THE FOUR-FACTOR *PENN CENTRAL* REGULATORY TAKINGS TEST

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George Mason University Law and Economics Research Paper Series

13-67
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By Steven J. Eagle*

Abstract

The Article examines the ad hoc, multifactor, regulatory takings doctrine derived from Penn Central Transportation Co. v. City of New York. It analyzes the conventional three-factor characterization of the Penn Central tests, and concludes that a four-factor approach better captures the dynamics of Penn Central analysis. “Parcel as a whole,” conceptually regarded as delimiting the relevant parcel for the Penn Central inquiry, in fact interacts with the “economic impact,” “investment-backed expectations,” and “character of the regulation” tests.

While the four-factor analysis advocated here is conceptually better and enhances understanding of how Penn Central operates, the doctrine remains under-theorized, subjective, with its factors mutually referential, and unable to provide a reliable guide to courts or litigants.

Since Penn Central Transportation Co. v. City of New York1 was handed down thirty-five years ago, judges, litigants, municipal officials, and developers have tried to make sense of its various tests and use them to predict case outcomes.

It is possible, as I discuss elsewhere,2 that Penn Central never was intended as a set of tests with objective content. Instead, it might have been meant to provide some protection to landowners deemed unfairly harmed by changes in land use regulations.

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2 For analysis of the Penn Central doctrine primarily as an aspirational guideline akin to substantive due process, see Steven J. Eagle, Penn Central and its Reluctant Muftis, 66:1 BAYLOR L. REV. ____ (2014) (forthcoming).
This Article analyzes the principal factors generally thought of as comprising the *Penn Central* doctrine. Its main contribution is to add to the list of three *Penn Central* factors a fourth, which is described in a separate part of *Penn Central* as “parcel as a whole.” The Article is not intended to critique the level of protection that the *Penn Central* accords property owners. Rather, it explains how the doctrine has become a collection of moving parts that are neither individually coherent nor work well together.

The Supreme Court pronounced the *Penn Central* line of cases\(^3\) as the “polestar”\(^4\) of its regulatory takings jurisprudence.\(^4\) This Article asserts that a more accurate astronomical analogy to *Penn Central* and its progeny is Ptolemy’s geocentric cosmology. To our eye, the planets display retrograde motions that are inconsistent with a simple theory of their revolution around the Earth. Ptolemy noticed these, too, and accounted for them

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by superimposing small circles, called “epicycles,” on the larger orbits of the heavenly spheres.5

The reasoning by which Ptolemy justified his geocentric universe was literally convoluted. “Over time, the epicycles had constantly to be redrawn to account for new and divergent data, but there was an enduring belief that the refinements represented a progressive approach to reality.”6 Likewise, in the 35 years since Penn Central was decided, courts have patched its flaws with increasingly complex tests.7

Lacking a firm grounding in property law or due process, the Penn Central doctrine and its branches can be seen as series of cycles. The Penn Central doctrine has progressed through the Court offering heuristics responsive to particular cases before it. Lower courts, uncomfortable with unbounded discretion, transmuted those heuristics into what were described as objective rules. Subsequently, the Court rejected those rules as too rigid, sometimes offering new heuristics in their place.

One result is the creation of feedback loops that conflate ostensibly objective law with ostensibly subjective expectations about law. Even as he resisted the imposition of a bright-line test in Lucas v. South Carolina Coastal Council,8 Justice Kennedy observed, “There is an inherent tendency towards circularity in this synthesis, of course; for if the owner’s reasonable expectations are shaped by what courts allow as a proper exercise of governmental authority, property tends to become what courts say it is.”9 The result, as noted by District of Columbia Circuit Judge Stephen Williams, is that all except the most

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7 See Lloyd L. Weinreb, The Exclusionary Rule Redux-Again, 37 FORDHAM URB. L.J. 873, 873 (2010) (observing “[o]ne would have thought that there has been more than enough time for the Supreme Court to have clarified what the [Fourth Amendment exclusionary] rule is about,” instead of “freight[ing it] with innumerable epicycles, and epicycles on epicycles.”).
9 Id. at 1034 (Kennedy, J., concurring in judgment).
abrupt changes in regulations would commensurately affect expectations, so that “regulation begets regulation.” ¹⁰

But quite beyond the basic circularity to which Kennedy and Williams referred, each of the principal elements of Penn Central itself depends on the others for content and meaning.¹¹ Furthermore, the complex and ad hoc approach that is at the heart of Penn Central has been sharply criticized by scholars as “mask[ing] intellectual bankruptcy,”¹² and as a “strategy of insecurity.”¹³ As the Court itself noted, regulation without standards gives officials unchecked discretion.¹⁴

In the most general terms, the Penn Central doctrine purports to provide a jurisprudence of takings, but instead provides a jurisprudence of property deprivations that is built neither upon property rights nor upon substantive due process. Instead, it trades in what purports to be owners’ expectations regarding their property, together with intrinsically subjective notions of fairness.¹⁵

The Article starts by reviewing the Penn Central case and basic elements of the Penn Central doctrine: economic impact, investment-backed expectations, character of the regulation, and “parcel as a whole.”¹⁶ It then considers problems with the Penn Central model, including attempts to clarify how its moving parts are affected by the plasticity of “parcel as a whole,”¹⁷ especially as it pertains to temporary takings,¹⁸ and the unset-

¹¹ See infra Part II.
¹² See c.g., Thomas W. Merrill, The Economics of Public Use, 72 CORNELL L. REV. 61, 93 (1986) (noting that “a ‘totality of the circumstances’ test masks intellectual bankruptcy”).
¹³ ANTHONY T. KRONMAN, THE LOST LAWYER: FAILING IDEALS OF THE LEGAL PROFESSION 349 (1993) (“Like the use of complex multipart tests and similar analytic schemes, to which it is in fact a perfect complement, the rhetoric of balancing is thus a strategy of insecurity.”).
¹⁵ See infra Part I.B.1.
¹⁶ See infra Part I.
¹⁷ See infra Part I.D.6.
¹⁸ See infra Part II.D.
tled distinction between “physical” and “regulatory takings” that, itself, is grounded in a misunderstanding of the nature of property.

This Article stresses doctrinal problems, but notes as well that Penn Central and its progeny fail to meet the most basic practical requirement for a legal rule. The Penn Central doctrine does not impart knowledge of the legal rights and obligations of either property owners or public officials, resulting in protracted litigation and arbitrary outcomes.

I. From the Penn Central Case to the Penn Central Doctrine

A. The Penn Central Case

1. A Cause Célèbre and a Legal Provocation

As Justice Brennan’s opinion noted, Grand Central Terminal “is one of New York City’s most famous buildings. Opened in 1913, it is regarded not only as providing an ingenious engineering solution to the problems presented by urban railroad stations, but also as a magnificent example of the French beaux-arts style.” The New York City Landmarks Preservation Commission designated it a “landmark,” which would require Commission permission for alterations of its exterior architectural features or construc-

19 See infra Part I.D.6.
20 See infra Part II.D.2
21 See, e.g., Gideon Kanner, Making Laws and Sausages: A Quarter-Century Retrospective on Penn Central Transportation Co. v. City of New York, 13 WM. & MARY BILL RTS. J. 679 (2005). “Penn Central lacks doctrinal clarity because of its outright refusal to formulate the elements of a regulatory taking cause of action, and because of its intellectual romp through the law of eminent domain that paid scant attention to preexisting legal doctrine. Its aftermath has become an economic paradise for specialized lawyers, a burden on the judiciary, as well as an indirect impediment to would-be home builders, and an economic disaster for would-be home buyers and for society at large.” Id. at 681.
22 Id. at 682-683 (quoting Arvo Van Alstyne, Taking or Damaging Police Power: The Search for Inverse Condemnation Criteria, 44 S. CAL. L. REV. 1, 2 (1970)).
23 See e.g., William Wade, Penn Central’s Ad Hocery Yields Inconsistent Takings Decisions, 42 URB. LAW. 549 (2010)
tion of exterior improvements on the terminal site. In 1968, in order to augment its income, Penn Central entered into an agreement for long-term lease for the construction of a 55-story office building above the terminal. It was undisputed that the building would meet all zoning and building requirements not related to historic preservation. However, the Commission rejected Penn Central’s application for the required certificate of “appropriateness” on the grounds that the project would be “an aesthetic joke.”

The New York trial court’s unpublished order found that the Commission’s rulings constituted a compensable taking, enjoined enforcement, and set for a future date a hearing on Penn Central’s request for damages. After the City’s corporation counsel recommended that it accept the railroad’s offer to waive damages if the City agreed not to appeal, the Municipal Art Society, a prestigious local organization, started a spectacularly successful public relations campaign that induced the City to fight, and that culminated in numerous celebrities taking a whistlestop train to Washington just before the Supreme Court heard oral argument.

According to later recollections of Penn Central’s attorney, Daniel Gribbon, the railroad sought certiorari because Chief Judge Charles Breitel’s opinion below for the New York Court of Appeals “broke new ground.”

He had come up with a theory that in a matter of a taking you are entitled only to the value that you privately had added to the piece of property and are not entitled to the value that the public had added either by location or taxing or something of that sort. And, in addition, he had concluded that in the takings area the landmark designation program was so socially and culturally beneficial to the public that instead of being entitled to just compensation you

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25 Id. at 115-18.
26 Id. at 117-18.
were entitled only to any compensation that was necessary if you were unable
to make a profit from the property that you had left. That seemed to us to be
wrong in both respects and it was for that reason that we filed a petition for a
writ.  

Mr. Gribbon’s description is accurate. According to Judge Breitel’s opinion, in
examining the reasonable rate of return that property owners are due, courts must subtract
“that ingredient of property value created not so much by the efforts of the property ow-
er, but instead by the accumulated indirect social and direct governmental investment in
the physical property, its functions, and its surroundings.”  

This Georgist view of prop-
erty rights was a remarkable assertion that government was “entitled to appropriate to
itself all of the advantages of civilization.”  

2. No New Law?

David Carpenter, who was Justice Brennan’s clerk when Penn Central was hand-
ed down, later related that “other clerks had told me that the opinion better not say very
much before I started work on the draft and in fact after it was circulated, Justice Stew-
art’s clerk read it and said he was pretty sure it doesn’t say anything at all. [Laughter].”  

Of course, the lack of immediate notoriety is not definitive. For instance, at the time Carolene Products was decided, it “attracted virtually no public attention.”  

Later, Justice

31 Id. at 288-89.

32 Penn Central, 366 N.E.2d at 1272-73.


34 Transcript, supra note 30, at 307-08 (remarks of David Carpenter, Esq.).


Frankfurter disparagingly noted that “[a] footnote hardly seems to be an appropriate way of announcing a new constitutional doctrine . . .”  

Perhaps Buzz Thompson, now a law professor at Stanford and then a law clerk to then-Justice Rehnquist, had a more discerning take on *Penn Central*:

> The question, again, is whether I am surprised by the lasting impact of the dissent, right? [Laughter] No, I’m not surprised that the majority opinion has had lasting significance. I actually think that it’s an amazingly well crafted majority opinion, and its staying power is the result of two things. The first is that it does say something. It could have been an opinion that was five pages long, cited a couple of cases in support, and said we rule in favor of New York City. But it didn’t. It went on to lay out a balancing test and to try to give some sense of what goes into that balancing test. And yet at the same time, because it was written to try to hold together a majority, it sets out a test which is appealing to a large number of judges. And so it’s not at all surprising that as courts have wrestled with takings issues and found them as difficult as they are, they frequently find themselves coming back to *Penn Central* which appears to offer a refuge for virtually everyone - and in the process maybe doesn’t say anything at all.  

3. Counter-Factual Ironies

Given that *Penn Central* emphasized the need for fact-specific analysis, it is interesting to note that important parts of the opinion are based on incorrect factual assumptions that resulted from tactical decisions by counsel or, perhaps, from bad lawyering.

First, as the case mentioned in passing, there certainly were investment-backed expectations in the construction of an office tower on top of Grand Central Terminal, proved by the fact that “[t]he Terminal’s present foundation includes columns, which were built into it for the express purpose of supporting the proposed 20-story tower.”

Unfortunately for the railroad, it ran afoul of what the Court subsequently elaborated were the “final decision” and “use of available state procedures” prongs of *Williamson*

38 Transcript, *supra* note 30, at 288 (remarks of Professor Barton H. “Buzz” Thompson, Jr.) (emphasis added).
County by not “avail[ing] themselves of the opportunity to develop and submit other plans,” and by not seeking judicial review of the Commission’s denial of the 55-story development applications. Instead, “Appellants sought a declaratory judgment, injunctive relief barring the city from using the Landmarks Law to impede the construction of any structure that might others lawfully be constructed on the Terminal site.”

Also, Penn Central did not own the relevant part of what the Court termed its “parcel as a whole,” having entered into a long-term lease of the air rights above the terminal in 1968 to UGP Properties, Inc., which was to construct the office building. It might have boded better for success had suit respecting only its air rights been brought by UGP, instead of suit regarding all of the terminal tax block by Penn Central. The railroad’s attorney, Daniel Gribbon, later stated that he thought he made a “mistake . . . in not arguing the notions that air rights are a very important and discrete part of a property interest.” He added that while today air rights are “well established,” 25 years earlier they were “sort of mysterious” and the New York Court of Appeals said “they really didn’t amount to very much.” “Had I been able to persuade the lawyers on the Court that these air rights were just as important a part of property as an acre of ground or a wing of a building the decision could possibly have been different.”

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40 Williamson County Reg’l Plan. Comm’n v. Hamilton Bank, 473 U.S. 172 (1985) (takings claims against state or local governments not “ripe” for federal court adjudication without (1) final decision regarding type and intensity of development permitted and (2) use of available state procedures for compensation exhausted).

41 Penn Central, 438 U.S. at 118-19.

42 Id. at 118.

43 Id. at 119.

44 Id. at 116.

45 Transcript, supra note 30, at 306.

46 Id.

47 Id.
Another problem was Penn Central’s failure to challenge the New York courts’
determination that “Penn Central could earn a ‘reasonable return’ on its investment in the
Terminal.” As economist William Wade noted:

The decision overlooks diminished investors’ expectations about the growth
of the whole business in relation to expectations about the income from the
fifty-five-story building development above the terminal. The relative im-
portance of this new income compared to the declining income of the rails
business was the single-most salient stick to evaluate. This stick, doubtless,
would have become the tree trunk for the future Penn Central enterprise . . .
Penn Central rail stock was taken over by the federal government in 1975-76
to operate as Conrail. The terminal operation was taken over by New York
City’s Metropolitan Transit Authority in 1983 in a state of disarray. The his-
toric facts demonstrate that the plaintiffs faced a fatal hardship that was un-
recognized by the New York Appellate and Supreme Courts, which ultimate-
ly resulted in slow decay and confiscation that can be dated back ab initio.

4. Was the Judgment in *Penn Central* Correct?

It is possible to examine the correctness of the *Penn Central* judgment upholding
the New York City historic preservation ordinance apart from the case’s doctrinal analy-
sis. Even supporters of stringent government regulation of property who find *Penn Cen-
tral’s* tests problematic might support its result. Professor John Echeverria would consign
the *Penn Central* doctrine to “history’s dustbin,” since it lacked clarity and never pro-
duced a landowner victory except for “some special factor” such as deprivation of all
value or physical occupation. Nevertheless, Professor Echeverria made clear that while


50 John D. Echeverria, *Is the *Penn Central* Three-Factor Test Ready for History's Dustbin?*, 52
LAND USE LAW AND ZONING DIGEST No. 1 p. 3 (Jan. 2000).

51 *Id. at 4* (citing, inter alia, *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1993) (depr-
ervation of all economic use), *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419
(1982) (physical occupation)). For one recent case to the contrary, see City of Sherman v. Wayne,
266 S.W.3d 34 (Tex. App. 2008) (upholding trial court’s finding of Lucas taking based on zoning
ordinance’s deprivation of all economically viable use and jury’s condemnation award, and order-
ing land to be deeded to city).
“toss[ing] out the *Penn Central* bath water,” he would “preserve the *Penn Central* baby.”\(^\text{52}\)

Echeverria’s affirmative views were derived from *Penn Central*’s recognition that measuring the impact of a regulation on “the claimant’s entire parcel of property” is important, that diminutions in value, alone, cannot constitute a taking, that transferable development rights (TDRs) can “help offset the burden” of a regulation, and that land use restrictions might affirmatively add to owners’ property values.\(^\text{53}\)

A brief response would stress that these four points do not permit us to depart from his acknowledged infirmity of the *Penn Central* test as much as Echeverria might think. His invocation of “parcel as a whole” expressed in terms of an “entire parcel of property” highlights the incorrect conflation of “property” with physical parameters and the right of exclusion.\(^\text{54}\) It is correct, speaking loosely, that a diminution in value alone cannot constitute a taking, but such an equation conflates “value” with “property.”\(^\text{55}\)

*Penn Central* stated that TDRs “undoubtedly mitigate whatever financial burdens the law has imposed on appellants,” thus reducing the possibility that the regulation would be deemed a taking, and thus avoiding the conclusion that they otherwise could constitute inadequate compensation.\(^\text{56}\) Therefore, the grant of a TDR benefits the recipient, but at the cost of depriving other landowners of rights. If increased development in the neighborhood in which TDRs may be used should be permitted, it should redound to

\(^{52}\) *Id.* at 3.

\(^{53}\) *Id.* at 3-4.

\(^{54}\) *See infra* Part I.B.6.

\(^{55}\) If an owner’s “value” were derived from the advantage gained from dumping cyanide into the stream behind it, a regulatory prohibition would be based on the fact that under the common law no right to engage in that activity “inhere[d] in the title itself, in the restrictions that background principles of the State’s law of property and nuisance already place upon land ownership.” *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1029 (1992). Thus, the regulation would be viewed through the lens of the police power. *See Mugler v. Kansas*, 123 U.S. 623 (1887) (upholding prohibition rendering brewery useless).

the benefit of the existing landowners in that neighborhood, who had been deprived of value by regulation that turns out to be overly restrictive.\textsuperscript{57}

Also, restrictions indeed can add to property values where there is true reciprocity of advantage.\textsuperscript{58} However, \textit{Penn Central} is an archetypical case where that concept was abused, both by the arrogation of the benefit of diffused social interactions to government by the New York Court of Appeals, and by the lopsided view of “reciprocity” adopted by the Supreme Court majority, and described in then-Justice Rehnquist’s dissent.\textsuperscript{59}

It is entirely possible that a contemporary state court would hold \textit{Penn Central} unripe for adjudication by borrowing the federal \textit{Williamson County} “final decision” rule.\textsuperscript{60} The New York Court of Appeals has thus held that a regulatory takings claim is not ripe for judicial review until “the governmental entity charged with implementing the regulations has rendered a final decision regarding the application of the regulations to the property,” and “alternative uses of the property have been considered and rejected.”\textsuperscript{61} As noted earlier, an application for an office tower smaller than 55 stories never was made, so that, even if the air rights were deemed the relevant parcel, it never was established how much development of those rights was allowed.

The Supreme Court subsequently reduced the scope and importance of \textit{Penn Central} by adopting two bright-line rules. In 1982, it held that a permanent physical occupation would constitute a per se taking in \textit{Loretto v. Teleprompter Manhattan CATV Corp.}\textsuperscript{62} Similarly, in 1992, it held a deprivation of “all economically viable use” to constitute a

\textsuperscript{57} See Barancik v. County of Marin, 653 F.2d 364 (9th Cir. 1981) (holding enhanced development rights should be shared by owners in the targeted area).

\textsuperscript{58} See, \textit{e.g.}, City of New Orleans v. Dukes, 427 U.S. 297 (1976) (upholding French Quarter preservation ordinance).

\textsuperscript{59} Penn Cent. Transp. Co. v. City of New York, 438 U.S. 104, 138 (Rehnquist, J., dissenting) (“Of the over one million buildings and structures in the city of New York, appellees have singled out 400 for designation as official landmarks.”).


\textsuperscript{61} Town of Orangetown v. Magee, 665 N.E.2d 1061, 1066 (N.Y. 1996) (citing Southview Associates, Ltd. v. Bongartz, 980 F.2d 84, 96 (2d Cir. 1992)).

\textsuperscript{62} 458 U.S. 419 (1982).
per se taking in *Lucas v. South Carolina Coastal Council*. While bright-line rules appeal to both conservatives and liberals, subsequent cases relegated *Loretto* and *Lucas* to their archetypical facts.

**B. The Four Penn Central Factors**

This Part analyzes the *Penn Central* tests to include the three traditional *Penn Central* factors, plus the *Penn Central* “parcel as a whole” rule. “Parcel as a whole” has a much greater role than merely specifying the physical boundaries of a deeded parcel of land as an arena in which the three factors play out. It is, rather, a fourth factor that helps shape the meaning of each of the other three. This is perhaps most clear in the temporary takings context, where the temporary taking might be defined out of existence.

The principle of fairness is pervasive in the *Penn Central* doctrine. Rather than being an empty rhetorical trope, fairness has substantive effects on takings factors. For this reason, it is discussed prior to the four factors.

1. **The “Armstrong Principle” of Fairness**

   In *Penn Central*, Justice Brennan quoted *Armstrong v. United States*, which declared the “Fifth Amendment’s guarantee . . . [is] designed to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be

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64 See, e.g., John D. Echeverria, *Making Sense of Penn Central*, 39 ENVTL. L. REP. 10471, 10471-72 (2009) (noting that such an approach might lead “reliably to findings of takings liability, albeit in narrowly defined circumstances,” appealing to property rights advocates, and might “identify[] actions that would be safely immune from takings liability,” appealing to those favoring regulation).
66 See *infra* Part II.C.
67 See Guggenheim v. City of Goleta, 638 F.3d 1111 (9th Cir. 2010) (en banc), *cert. denied*, 131 S. Ct. 2455 (2011) (combining the expectations factor with basic considerations of fairness to deny compensation).
borne by the public as a whole.” Brennan added that the Court “has been unable to develop any ‘set formula’ for determining when ‘justice and fairness’ require that economic injuries caused by public action he compensated by the government, rather than remain disproportionately concentrated on a few persons.” In *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency*, the Court for the first time referred to the “Armstrong principle.” Three years later, the Court’s summation of its takings jurisprudence in *Lingle v. Chevron U.S.A., Inc.* reiterated its preference for *Armstrong* without indicating a rationale.

While the salutary nature of the *Armstrong* principle seems self-evident, *Penn Central* and *Lingle* might have referred as well to fundamental values that underlay the compensation requirement with more particularity. These include the roles of just compensation in preventing wasteful and excessive government, by ensuring that property taken is worth more to the government than it is in the marketplace, and in protecting individual liberty, by placing a check on a government’s ability to squelch opposition by taking the land of political opponents.

The requirement for just compensation (together with the Public Use Clause) also imposes some restraint on a correlative device, crony capitalism, where officials use the

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70 *Id.* at 321.


72 *Id.* at 537 (quoting *Armstrong*, 364 U.S. at 49) (“While scholars have offered various justification for [the Takings Clause], we have emphasized its role in ‘bar[ring] Government from forcing some people along to bear public burdens which, in all fairness and justice, should be borne by the public as a whole.”

73 Such abuse is not a recent innovation. See, e.g., Iian D. Jablon, *Civil Forfeiture: A Modern Perspective on Roman Custom*, 72 S. CAL. L. REV. 247, 255 (1998) (discussing the systematic use of forfeiture in Rome, starting in 80 B.C., whereby General (later dictator) Lucius Cornelius Sulla “made ‘proscription’ lists of political opponents with substantial resources and confiscated their estates through summary proceedings”).
promise of re-conveying appropriated lands to reward their friends. Most generally, the ownership of property gives individuals security in their residences and businesses that provides the sense of independence necessary for free citizens in a democratic polity.

While the decline of substantive due process led courts away from vigorous enforcement of property rights, courts are sometimes uncomfortable with the outer limits of legislative and regulatory deference. Limiting scrutiny to arbitrary or capricious regulations under a deferential view of the due process clause seems odd when constitutional guarantees explicitly incorporate protections of property and contract.

Moreover, the Takings Clause insulates property with an extra-layer of protection since, as a constitutional restriction on government, it is self-executing in nature, and not reliant of waiver of sovereign immunity, as would, for instance, tort claims. The Takings Clause thus presents a useful judicial vehicle to curtail abuses of governmental power.

However, a jurisprudence of inverse condemnation based on open-ended assessments of regulation under the rubric of “fairness,” instead of property rights, encourages courts to view individual holdings not as aspects of the objective rights of independent citizens, but as adjuncts of relationships within society, and as inextricably treating the legal rights of individuals as colored by their status. Indeed, the status of “speculator”

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74 See, e.g., Eagle, supra note 33 at 1080-81 (discussing cronyism in condemnation for urban revitalization).
76 See United States v. Clarke, 445 U.S. 253, 257 (1980) (holding that a landowner is entitled to bring an action for inverse condemnation “as a result of the self-executing character of the constitutional provision with respect to compensation…” (quoting 6 P. NICHOLS, EMINENT DOMAIN § 25.41 (3d rev. ed. 1972))).
77 See, e.g., Unites States v. Orleans, 425 U.S. 807, 813 (1976) (noting that the Federal Tort Claims Act is a “limited waiver of sovereign immunity”).
78 This was the problem with Chief Judge Breitel’s opinion in Penn Central Transportation Co. v. City of New York, 366 N.E.2d 1271 (N.Y. 1977), aff’d, 438 U.S. 104 (1978). See supra notes 30-33 and accompanying text.
79 Contra HENRY SUMNER MAINE, ANCIENT LAW: ITS CONNECTION WITH THE EARLY HISTORY OF SOCIETY AND ITS RELATION TO MODERN IDEAS 174 (Frederick Pollock ed., John Murray
played an important role in Professor Michelman’s seminal takings article, and in \textit{Penn Central} itself.\footnote{See Daniel R. Mandelker, \textit{Investment-Backed Expectations in Takings Law}, 27 \textit{Urb. Law}, 215, 244 n.117 (referring to “Professor Michelman’s speculator exception to the investment-backed expectations taking factor”).}

The Court’s emphasis on “fairness,” “public burdens,” and “disproportionality” lead to ends-means analyses, which are emblematic of substantive due process.\footnote{See supra notes 109-110, and accompanying text.} This is quite different in tenor from the language of the Takings Clause, which emphasizes that “nor shall private property be taken . . . without just compensation.”\footnote{U.S. Const. amend. V.} There, the emphasis is all on the “property,” and none on the owner.

\textbf{2. \textit{Penn Central}'s Three-Factor Inquiry}

In a few sentences, the Court in \textit{Penn Central} sketched what conventionally became known as its three-factor test:

In engaging in these essentially ad hoc, factual inquiries, the Court’s decisions have identified several factors that have particular significance. The economic impact of the regulation on the claimant and, particularly, the extent to which the regulation has interfered with distinct investment-backed expectations are, of course, relevant considerations. So, too, is the character of the governmental action. A “taking” may more readily be found when the interference with property can be characterized as a physical invasion by government, than when interference arises from some public program adjusting the benefits and burdens of economic life to promote the common good.\footnote{Penn Cent. Transp. Co. v. City of New York, 438 U.S. 104, 124 (1978) (internal citations omitted).}
Of course, there is nothing magical about this three-factor inquiry. In fact, “it is far from obvious that [the case] actually intended this enumeration of ‘significant’ factors to define a determinative, free-standing test for a regulatory taking.”85

[T]o the extent that the Court in *Penn Central* identified discrete factors for consideration, it identified two, rather than three, such factors: (1) the impact of the challenged regulation on the claimant, viewed in light of the claimant’s investment-backed expectations and (2) the character of the governmental action, viewed in light of the principle that actions that closely resemble direct exercises of eminent domain are more likely to be compensable takings than are garden-variety land use regulations. Someone who knew nothing of modern takings law would be, to say the least, hard pressed to distill a discrete three-factor analysis from the opinion in *Penn Central*.86

The Supreme Court of California enumerated the three *Penn Central* factors and an additional ten in *Kavanau v. Santa Monica Rent Control Board*.87 It further stated:

This list is *not a comprehensive enumeration* of all the factors that might be relevant to a takings claim, and we *do not propose a single analytical method* for these claims. Rather, we simply note factors the high court has found relevant in particular cases. Thus, instead of applying these factors mechanically,


87 941 P.2d 851 (Cal. 1997). “Subsequent cases, as well as a close reading of *Penn Central*, indicate other relevant factors: (1) whether the regulation “interfere[s] with interests that [are] sufficiently bound up with the reasonable expectations of the claimant to constitute ‘property’ for Fifth Amendment purposes; (2) whether the regulation affects the existing or traditional use of the property and thus interferes with the property owner’s “primary expectation; (3) “the nature of the State’s interest in the regulation” and, particularly, whether the regulation is “reasonably necessary to the effectuation of a substantial public purpose”; (4) whether the property owner’s holding is limited to the specific interest the regulation abrogates or is broader; (5) whether the government is acquiring “resources to permit or facilitate uniquely public functions” such as government’s “entrepreneurial operations”; (6) whether the regulation “permit [s the property owner] ... to profit [and] ... to obtain a ‘reasonable return’ on ... investment”; (7) whether the regulation provides the property owner benefits or rights that “mitigate whatever financial burdens the law has imposed”; (8) whether the regulation “prevent[s] the best use of [the] land”; (9) whether the regulation “extinguish[es] a fundamental attribute of ownership”; and (10) whether the government is demanding the property as a condition for the granting of a permit.” Id. at 860 (internal citations omitted).
checking them off as it proceeds, a court should apply them as appropriate to the facts of the case it is considering.88

Finally, the Court’s assertion that *Penn Central* is about making “essentially ad hoc, factual inquiries” itself strongly augurs against the notion that the Court would be imposing a rigid set of factors that would be determinative, relating to the underlying factual and legal background, and to each other, in some undisclosed fashion. Nevertheless, the Supreme Court’s post-*Penn Central* cases made ample mention of the “three-factor” test,89 as have many lower court opinions.90

3. **Economic Impact**

The Supreme Court stated in *Penn Central* that “the economic impact of the regulation, and in particular, the extent to which the regulation has interfered with distinct investment-backed expectations” “have particular significance” in the takings determination.91 While “investment-backed expectations” might logically be considered a subset of “economic impact,” the Court subsequently added that they were to be considered separate *Penn Central* factors.92

“Value” and “property” are very different constructs. “Property” is something susceptible of ownership, and “value” is a measure of how much a person is willing to exchange for that ownership. The Fifth Amendment protects “private property,” not “economic value.”93 Yet, takings of property resulting in losses of purely personal sub-

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88 *Id.* at 860 (emphasis added).


90 *See, e.g.,* Schooner Harbor Ventures, Inc. v. United States, 569 F.3d 1359, 1362 (Fed. Cir. 2009) (“*Penn Central* considered and balanced three factors”).


93 U.S. Const. amend V. (“nor shall private property be taken without just compensation”).
jective value are not compensated. Based on the Supreme Court’s explicitly utilitarian analysis, other takings are compensated only to the extent that “a willing buyer would pay in cash to a willing seller.”

While the extent of the pecuniary loss occasioned by the taking of property determines the amount of just compensation, the size of the loss should not determine if there is a taking. Since landowners do not have a property right in maintaining a nuisance or other condition inimical to the public health, safety, or welfare, even a large loss resulting from termination of such activity is not compensable.

Given the foregoing, why did Penn Central integrate into a takings test economic considerations and, in particular, the economic impact of a regulation? The answer apparently is that an economic effects test is helpful in assessing whether regulatory burdens, in fairness, require just compensation. However, it is unclear what burdens can be considered under the economic impact factor. Justice Brennan in Penn Central focused on whether Penn Central was allowed a “reasonable return” on its investment. Subsequently, in Keystone Bituminous Coal Ass’n v. DeBenedictis, the court discussed the regulatory impact of state legislation on a coal company under the rubric of profitability. While the “reasonable return” displays the interaction between economic impact and investment-backed expectations, there is no consensus on how this interaction should affect

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94 See Brown v. Legal Foundation of Wash., 538 U.S. 216 (2003) (commandeering of money belonging to law clients for deposit in “Interest on Lawyers Trust Accounts” not a taking, since clients could not have realized economic gain otherwise).

95 United States v. 564. 54 Acres of Land, 441 U.S. 506, 511 (1979). “Because of serious practical difficulties in assessing the worth an individual places on particular property at a given time, we have recognized the need for a relatively objective working rule. ... The Court therefore has employed the concept of fair market value to determine the condemnee’s loss. Under this standard, the owner is entitled to receive ‘what a willing buyer would pay in cash to a willing seller’ at the time of the taking.” Id. at 511 (quoting United States v. Miller, 317 U.S. 369, 374 (1943)).

96 See, e.g., Lucas v. South Carolina Coastal Council, 505 U.S. 1003, 1064 (1992) (declaring “[w]e have frequently ... held that, in some circumstances, a law that renders property valueless may nonetheless not constitute a taking,” and citing cases).

97 Penn Central, 438 U.S. at 129 n.26.


99 Keystone, 480 U.S. at 496.
the valuations of regulatory burdens in practice. With little guidance from the Supreme Court, courts have struggled when considering losses of income producing property in temporary takings.\textsuperscript{100}

Recently, the Supreme Court has stated that the “common touchstone” of its regulatory takings tests, is that they “aim to identify” regulatory actions that are “functionally equivalent” to a government appropriation and ouster.\textsuperscript{101} An economic impact test advances this inquiry by providing a rough measure of harm. Because the analogy between a regulation depriving a property owner of use, exclusion, or transfer rights, and a formal condemnation of a property interest is not straightforward, an “economic impact” test is useful as a coarse screen for distinguishing many clear-cut takings. Since “economic impact” is also measured with respect to the relevant parcel, these concepts are inextricably intertwined in important takings questions, such as the extent to which losses regarding temporary investments constitute takings.\textsuperscript{102}

Dean William Treanor argued that, from a historical standpoint, the Takings Clause did not originally encompass regulatory interferences with the value of property rights, but applied only to those situations in which the taking resulted in an actual ouster by the government.\textsuperscript{103} But “economic impact” is not justified by its long-standing history (the same holds true for the Penn Central doctrine as a whole) but rather by its practicality, since an approach equating “ouster” with “appropriation” fails to explain why an appropriation could not occur without physical ouster.\textsuperscript{104} In addition, the growing im-

\textsuperscript{100} See e.g., Walcek v. United States, 49 Fed. Cl. 248 (2001), aff’d, 303 F.3d 1349 (Fed Cir. 2002) (rejecting the government’s claim that economic impact is limited to diminution in value tests and holding that “the comparative value of the property is not the sole indicia of the economic impact of the regulation”). See generally Steven J. Eagle, “Economic Impact” in Regulatory Takings Law, 19 WEST NORTHWEST J. ENVTL. L. & POL’Y 407, 416-435 (2013).

\textsuperscript{101} See infra Part II.D. (quoting Lingle v. Chevron, 544 U.S. 528, 539 (2005)).

\textsuperscript{102} See infra Part II.B.2.

\textsuperscript{103} William Michael Treanor, The Original Understanding of the Takings Clause and the Political Process, 95 Colum. L. Rev. 782, 807 (1995) (“Prior to Justice Holmes’ exposition in Pennsylvania Coal v. Mahon . . . it was generally thought that the Takings Clause reached only a “direct appropriation” of property, Legal Tender Cases, . . . or the functional equivalent of a “practical ouster of [the owner’s] possession.” (quoting Lucas, 505 U.S. at 1014)).

\textsuperscript{104} See infra Part II.A.1 for discussion.
portance of non-possessory interests has mooted a jurisprudence of takings based on notions of appropriation.105

4. Investment-Backed Expectations

*Penn Central* stated that the “economic impact” of a regulation on a claimant, and “particularly, the extent to which the regulation has interfered with distinct investment-backed expectations,” is relevant to the takings inquiry.106 Justice Brennan cited *Pennsylvania Coal v. Mahon*107 as “the leading case for the proposition that a state statute that substantially furthers important public policies may so frustrate distinct investment-backed expectations as to amount to a ‘taking.’”108 He also cited Professor Frank Michelman’s classic article, in which the phrase originated,109 and from which Justice Brennan apparently borrowed it.110

In placing emphasis on expectations, Professor Michelman was concerned with fairness and reliance.111 However, insistence on a “sharply crystallized, investment-backed expectation”112 belies the fact that many speculators or developers buy land near the path of urban development, deferring the exact form of its commercial development

105 *See* WILLIAM B. STOEBUCK, NONTRESSPASSORY TAKINGS IN EMINENT DOMAIN 17-18 (1977) (“As with the concept ‘property,’ courts have increasingly moved from a physical toward a non-physical notion of ‘taking.’”).


107 260 U.S. 393 (1922).

108 *Id.* at 414.

109 438 U.S. at 128 (citing Frank I. Michelman, *Property, Utility, and Fairness: Comments on the Ethical Foundation of “Just Compensation” Law*, 80 HARV. L. REV. 1165, 1229-34 (1967) (asking whether a given regulation “can easily be seen to have practically deprived the claimant of some distinctly perceived, sharply crystallized, investment-backed expectation-.”)).

110 Justice Brennan’s judicial clerk who worked on *Penn Central* much later observed that “[t]he concept of ‘investment-backed expectations’ definitely came from Michelman’s article.” Transcript, *supra* note 30 at 309 (comment by David Carpenter, Esq.).

111 Michelman, *supra* note 109, at 1234 (“The zoned-out apartment house owner no longer has the apartment investment he depended on, whereas the nearby land speculator who is unable to show that he has yet formed any specific plans for his vacant land still has a package of possibilities with its value, though lessened, still unspecified—which is what he had before.”).

112 Michelman, *id.* at 1233.
for a more propitious moment. Furthermore, it is not clear why, under Michelman’s reasoning, unexpected inheritances that unquestionably are windfalls cannot be taken by the State without compensation.113

It is not clear whether Justice Brennan intended the “investment-backed” phrase to have precedential value, or whether the phrase was adopted as a rhetorical device to adorn the “economic impact” factor.114 As noted earlier, a natural reading of the relevant text could fairly discern only two factors.115 Moreover, just three years after Penn Central, Justice Brennan’s dissenting opinion in San Diego Gas & Electric Co. v. City of San Diego mentioned “the economic impact” and “character of the regulation” as the Penn Central factors, notably omitting any discussion of “expectations.”116

In any event, the intimate association of the subjective reliance of individual owners and their sharp pang of loss that seems the focus of Michelman and Brennan seemed diffused shortly thereafter, in Kaiser Aetna v. United States.117 There, without any explanation, then-Justice Rehnquist referred to “reasonable investment-backed expectations,”118 an objective formulation apparently based on the state of the law at the time the expectations were formed. If it is unclear that Kaiser Aetna meant to change the expectations test from subjective to objective, it is doubly unclear that Justice Rehnquist meant to change it from subjective to subjective and objective. In any event, both subjective and objective expectations appear instantiated in current law.

113 One type of windfall, punitive damage awards, often is appropriated through taxation. There, however, punitive damages have not, ab initio, been viewed as a property right. See, e.g., Evans v. State, 56 P.3d 1046 (Alaska 2002) (upholding statute as limiting punitive damages before vesting); Cheatham v. Pohle, 789 N.E.2d 467 (Ind. 2003) (holding no common law property right in damages in excess of those awarded to make plaintiff whole).

114 Kanner, supra note 21, at 767-780 (2005).


118 Id. at 175 (emphasis added).
Moreover, in Good v. United States, where the owner acquired wetlands at a time when development was legally permissible, the U.S. Court of Appeals for the Federal Circuit held: “In view of the regulatory climate that existed when Appellant acquired the subject property, Appellant could not have had a reasonable expectation that he would obtain [development] approval.”

Thus, claimants must show that their “expectations” in light of the law and perhaps even legal trends are both subjectively held and objectively reasonable. Thirty-five years after Penn Central, there has been no satisfactory rejoinder to Professor Richard Epstein’s conclusion: “Neither [Justice Brennan] nor anyone else offers any telling explanation of why this tantalizing notion of expectations is preferable to the words ‘private property . . . .’” It is possible for courts to devise property-based rules that eliminate the need for “expectations” analysis, and also deal with the “relevant parcel” problem, at least in the form of safe-harbor rules that might set objective standards for defining the parcel in many cases.

5. Character of the Regulation

One of the factors that Penn Central found of “particular significance” was “the character of the governmental action. A ‘taking’ may more readily be found when the interference with property can be characterized as a physical invasion by government, than when interference arises from some public program adjusting the benefits and burdens of economic life to promote the common good.”

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119 189 F.3d 1355 (Fed. Cir. 1999).
120 Id. at 1361-62 (emphasis added).
122 See John E. Fee, Comment, Unearthing the Denominator in Regulatory Takings Claims, 61 U. CHI. L. REV. 1535 (1994) (advocating a horizontal parcel of “independent economic viability”); STEVEN J. EAGLE, REGULATORY TAKINGS, § 7-7(e)(5) (5th ed. 2012) (advocating “commercial unit” test, borrowing term from U.C.C. § 2-608(1)).
Four years later, the Court removed permanent physical invasions from *Penn Central*’s purview when it held in *Loretto v. Teleprompter Manhattan CATV Corp.*\(^\text{124}\) that such occupations were per se takings. This raises the issue of what “character” would augur for a regulation being considered a taking.

Regulations that are arbitrary or capricious would be struck down as violative of due process.\(^\text{125}\) On the other hand, regulations emphatically serving the common good might nevertheless require compensation, since, as Justice Kennedy noted, the Takings Clause “operates as a conditional limitation, permitting the government to do what it wants so long as it pays the charge. The Clause presupposes what the government intends to do is otherwise constitutional.”\(^\text{126}\)

The “character of the regulation” prong may be revived, as courts review cases in which regulations apparently target specific property for negative treatment, or where non-transient government physical interference is not a “permanent occupation” under *Loretto.*\(^\text{127}\)

### 6. Parcel as a Whole

“Parcel as a whole” has not conventionally been treated as a *Penn Central* factor, but should be one, because of its intrinsic importance in applying the three-factor test. *Penn Central* observed:

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

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\(^{124}\) 458 U.S. 419 (1982)

\(^{125}\) Lingle v. Chevron U.S.A. Inc., 544 U.S. 528 543 (2005) (“[I]f a government action is found to be impermissible—for instance because it . . . is so arbitrary as to violate due process—that is the end of the inquiry. No amount of compensation can authorize such action.”).


\(^{127}\) *See supra* Eagle, note 2, for further discussion.
“Parcel as a whole” is a fetching concept, but is exceeding difficult and complex to administer in practice. As Chief Justice Rehnquist noted, “[t]he need to consider the effect of regulation on some identifiable segment of property makes all important the admittedly difficult task of defining the relevant parcel.” In that regard, the relevant parcel problem often is referred to as the denominator problem since, in comparing the value that has been taken from the property by the imposition with the value that remains in the property, “one of the critical questions is determining how to define the unit of property whose value is to furnish the denominator of the fraction.”

The task is made more difficult by the fact that takings claimants and the government both have strong incentives to manipulate it. The government asserts, in the coinage of Professor Margaret Radin, that claimants engage in “conceptual severance” by trying to make the relevant parcel, which is the denominator of the takings fraction, appear as small as possible. On the other hand, “[t]he effect of a taking can obviously be disguised if the property at issue is too broadly defined,” which the current author has referred to as “conceptual agglomeration.”

In determining the relevant parcel, the Federal Circuit has taken “a flexible approach, designed to account for factual nuances.” The Court of Federal Claims recently

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131 Palm Beach Isles Assocs. v. United States, 208 F.3d 1374, 1380 n.4 (Fed. Cir. 2000), aff’d on reh’g, 231 F.3d 1354 (Fed. Cir. 2000) (quoting Keystone, 480 U.S. at 497).
134 See EAGLE, supra note 122, at § 7-7(b)(2).
135 Loveladies Harbor, Inc. v. United States, 28 F.3d 1171, 1181 (Fed. Cir. 1994).
presented a useful guide to the relevant parcel inquiry in *Lost Tree Village Corp. v. United States*.136

Important problems pertaining to “parcel as a whole” include applying the doctrine to temporary investments,137 and unproven assertions by government officials that separately deeded parcels are under unified ownership.138 When reviewing these problems, it should become clear that the phrase “parcel as whole” has taken a life of its own. Its role in takings is not merely definitional of the boundaries of the property subject to the takings inquiry, but rather substantive so that, for instance, there is circularity between investment-backed expectations of the owner of “the” property, and expectations regarding the real estate to be included in the owner’s relevant parcel139 and non-deeded ownership of the property.140 Thus, “parcel as whole” interacts with the other *Penn Central* factors to deny compensation in temporary takings. For these reasons, “parcel as a whole” should be considered an additional *Penn Central* factor.

**C. The Recapitulation and Expansion of *Penn Central’s Domain***

The Supreme Court’s recapitulation of its regulatory takings analysis in *Lingle v. Chevron U.S.A. Inc.*141 reiterated its *Penn Central* doctrine, albeit acknowledging that its elements do not comprise an integral whole:

> Although our regulatory takings jurisprudence cannot be characterized as unified, these three inquiries (reflected in *Loretto*, *Lucas*, and *Penn Central*) share a common touchstone. Each aims to identify regulatory actions that are

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136 100 Fed. Cl. 412, 427-30 (2011), *rev’d*, 707 F.3d 1286 (Fed. Cir. 2013) (finding scattered landholdings should not have been included in relevant parcel).

137 See *infra* Part II.B.2.

138 See *infra* Part II.B.3.

139 See, e.g., Dist. Intown Props. Ltd. P’ship v. District of Columbia, 198 F.3d 874, 880 (D.C. Cir. 1999) (denial of building permit for separately deeded parcel on grounds owner’s expectation was that it would be used with another parcel).

140 See generally, Eagle, *supra* note 129, at 579-600 (discussing attempts of California Coastal Commission to assert doctrine of “unity of ownership,” whereby informal coordination of owners of separately deeded parcels with no overlap of legal ownership would be deemed one parcel for land use regulation purposes).

functionally equivalent to the classic taking in which government directly appropriates private property or ousts the owner from his domain. Accordingly, each of these tests focuses directly upon the severity of the burden that government imposes upon private property rights. The Court has held that physical takings require compensation because of the unique burden they impose: A permanent physical invasion, however minimal the economic cost it entails, eviscerates the owner’s right to exclude others from entering and using her property—perhaps the most fundamental of all property interests. In the *Lucas* context, of course, the complete elimination of a property’s value is the determinative factor. . . . And the *Penn Central* inquiry turns in large part, albeit not exclusively, upon the magnitude of a regulation’s economic impact and the degree to which it interferes with legitimate property interests.¹⁴²

_Lucas_ itself referred to “the extraordinary circumstance when no productive or economically beneficial use of land is permitted.”¹⁴³ However, without explanation, the Court has alternated between the concepts of “deprivation of use” and “deprivation of value.” Indeed, the summation in the preceding paragraph says that “the complete elimination of a property’s value is the determinative factor,” based on a quotation from _Lucas_ referring to a “deprivation of beneficial use.” But “value” might be based on the educated guess that a regulation currently prohibiting all “beneficial use” might be abrogated.¹⁴⁴ Furthermore, the _Lingle_ summary refers to “exclud[ing] others from entering and using her property—perhaps the most fundamental of all property interests.”¹⁴⁵ It seems ironic that the Court would thus give credence to the fundamental nature of use as well as exclusion, but only in the back-handed manner of describing rights another might take, as opposed to rights the owner possessed.


¹⁴³ _Lucas_, 505 U.S. at 1017.

¹⁴⁴ See, e.g., _Florida Rock Indus., Inc. v. United States_, 791 F.2d 893, 903 (Fed. Cir. 1986) (noting that “serious informed bidders” might have been “speculators” who believed they might “mitigate[] the severity of the regulatory action”).

¹⁴⁵ _Lingle, _544 U.S. at 539.
Given that the categorical rule of *Lucas* permits no remaining viable use,\(^{146}\) and the categorical rule of *Loretto* requires a permanent physical occupation,\(^{147}\) almost all property owners who might claim a regulatory taking would have to do so under the *Penn Central* standard.

In the *Penn Central* analysis as summarized in *Lingle*, “economic impact and the degree to which it interferes with legitimate property interests” seem to trump all.\(^{148}\) “Character” is not even mentioned in *Lingle*, other than as part of the rote *Penn Central* formula. “Legitimate” property interests refer, not to assets that might legally be possessed and which belong to the claimant under real property law, but rather to rights that are reasonable “expectations” under what ostensibly is a test of subjective intent.\(^{149}\) While *Lingle* is a useful summary of the heuristics available to courts when reviewing takings claims, it did little to clarify or address the cracks in the *Penn Central* model reviewed in the next section.\(^{150}\)

II. Cracks in the Ptolemaic Model

This Part of the Article moves from a review of the elements of *Penn Central*\(^{151}\) to an analysis of the problems that they, and their interactions, create in contemporary regulatory takings law.

\(^{146}\) *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1016 (1992) (“categorical treatment appropriate is where regulation denies all economically beneficial or productive use of land” (emphasis added)).

\(^{147}\) *Loretto v. Teleprompter Manhattan CATV Corp*, 458 U.S. 419, 426 (1982) (“a permanent physical occupation authorized by government is a taking without regard to the public interests that it may serve”).


\(^{150}\) *See infra* Part II.

A. “Physical” versus “Regulatory” Takings

1. An Artificial Distinction

In its summary of takings jurisprudence in *Lingle v. Chevron U.S.A., Inc.*, the Supreme Court stated: “The paradigmatic taking requiring just compensation is a direct government appropriate or physical invasion of private property.”

The text of the Fifth Amendment itself provides a basis for drawing a distinction between physical takings and regulatory takings. Its plain language requires the payment of compensation whenever the government acquires private property for a public purpose, whether the acquisition is the result of a condemnation proceeding or a physical appropriation. But the Constitution contains no comparable reference to regulations that prohibit a property owner from making certain uses of her private property.

*Lingle* thus makes plain that the Court regards “property” as a direct or inverse “physical appropriation,” which it distinguishes from prohibitions on use. According to *Lucas v. South Carolina Coastal Council*, there are several possible purposes for the distinction. One is that “total deprivation of beneficial use is, from the landowner’s point of view, the equivalent of a physical appropriation.” The Court quoted Lord Cook as writing “[F]or what is the land but the profits thereof[?]” Another, “functional,” basis is that governance inherently affects property to some extent and could not function if this required payment, but that this basis “does not apply to the relatively rare situations where the government has deprived a landowner of all economically beneficial uses.”

However, *Lucas* concluded, where no productive use of land is permitted, “it is less realistic to indulge our usual assumption that the legislature is simply ‘adjusting the

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153 *Lingle*, 544 U.S. at 537.
156 *Lucas*, 505 U.S. at 1017 (quoting San Diego Gas & Electric Co. v. City of San Diego, 540 U.S. 621, 652 (Brennan, J., dissenting)).
157 *Id.* (quoting 1 E. COKE, INSTITUTES, ch. 1, § 1 (1st Am. ed. 1812)) (changes in original).
158 *Id.*
benefits and burdens of economic life."\textsuperscript{159} Also, rules “requiring land to be left substantially in its natural state—carry with them a heightened risk that private property is being pressed into some form of public service under the guise of mitigating serious public harm.”\textsuperscript{160}

All of these observations are sensible heuristics, but they are only heuristics. The distinction adds up to the generality that depriving an owner of possession is apt to be a serious deprivation, so is always a taking, whereas depriving an owner of use is hardly ever that serious, so the owner is left to the \textit{Penn Central} ad hoc test.

While the Supreme Court holds that government permanent physical occupation of private property is a taking per se,\textsuperscript{161} its view of deprivation of the right to exclude has been more ambivalent. In \textit{Kaiser Aetna v. United States},\textsuperscript{162} the Court rejected the government’s contention that the conversion of a private pond into a marina, and connecting it to a bay, meant that “the owner has somehow lost one of the most essential sticks in the bundle of rights that are commonly characterized as property—the right to exclude others.”\textsuperscript{163} However, while the right to exclude might be “one of the most essential sticks,” the Court has not regarded its deprivation as a per se taking. In \textit{PruneYard Shopping Center v. Robins},\textsuperscript{164} the Court invoked \textit{Armstrong}, and \textit{Penn Central}, to see the facts in quite another way.

It is true that one of the essential sticks in the bundle of property rights is the right to exclude others. And here there has literally been a “taking” of that right to the extent that the California Supreme Court has interpreted the State Constitution to entitle its citizens to exercise free expression and petition rights on shopping center property. But it is well established that “not every

\textsuperscript{160} Id.
\textsuperscript{161} Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419 (1982).
\textsuperscript{162} 444 U.S. 164 (1979).
\textsuperscript{163} Id. at 176.
\textsuperscript{164} 447 U.S. 74 (1980).
destruction or injury to property by governmental action has been held to be a ‘taking’ in the constitutional sense.”165

PruneYard went on to apply the three Penn Central factors and find that “[t]here is nothing to suggest that preventing appellants from prohibiting [free expression by mall visitors and petition signature gathering] will unreasonably impair the value or use of their property as a shopping center.”166

Kaiser Aetna, Loretto, PruneYard, and Lucas together, according to Lingle, strongly suggest the primacy of the right to exclude, while using the “bundle of sticks” approach and keeping the ultimate determination within the ad hoc Penn Central framework.

Some theorists, including Professor Adam Mossoff, have challenged the emphasis on the right of exclusion, preferring instead the owner’s right to use his or her property.167 Mossoff advocates an “integrated theory of property.” This theory rejects the fragmentation of property rights inherent in the “bundle of sticks” approach, and “maintains that the right to exclude is essential to the concept of property, but it is not the only characteristic, nor is it the most fundamental. Other elements of property—acquisition, use, and disposal—are necessary for a sufficient description of this concept.”168

Professor Mossoff also has concluded that conceptualizing “property” as a “bundle of sticks” suited the purposes of Progressives “because it made it possible for the modern administrative state to control and restrict various property uses without implicating the constitutional protections of the Takings or Due Process Clauses.”169

165 Id. at 82 (citing Kaiser Aetna, 444 U.S. at 179-180, and quoting Armstrong v. United States, 364 U.S. 40, 48 (1960)).
166 Id. at 83.
168 Id. at 376.
2. Applying the Distinction in Borderline Cases

While the Supreme Court states in *Lingle* that regulatory and physical takings are to be analyzed using different standards,\(^{170}\) discerning which takings are “regulatory” and which are “physical” involves subtle determinations of the nature of the property involved. Two important recent cases highlighting this issue are *Casitas Municipal Water District v. United States*,\(^{171}\) and *Arkansas Game and Fish Commission v. United States*.\(^{172}\)

Casitas operated a water project for the government (“Project”) that included a dam, a water storage facility, and related canals. Its agreement with the government required that Casitas pay for the Project’s construction, and that it “shall have the perpetual right to use all water that becomes available through the construction and operation of the Project.”\(^{173}\) Subsequently the government listed the Steelhead Trout as an endangered species, and ordered water diverted from the Project for use by the trout downstream. Casitas claimed that the diversion of water constituted a physical taking.\(^{174}\) For purposes of summary judgment, the government accepted that the water was Casitas’s property, and challenged only its contention that the diversion was a physical taking. The Court of Federal Claims subsequently held that “the alleged taking was regulatory because it involved the government’s restraint on Casitas’s use of its property rather than the government’s takeover of the property (either by physical invasion or by directing the property’s use to its own needs).”\(^{175}\)


\(^{171}\) 708 F.3d 1340 (Fed. Cir. 2013).

\(^{172}\) 133 S.Ct. 511 (2012).

\(^{173}\) 708 F.3d at 1343.

\(^{174}\) Id. at 1344-45.

\(^{175}\) Id at 1346 (citing Casitas Mun. Water Dist. v. United States (*Casitas II*), 76 Fed. Cl. 100, 105-106 (2007)).
In 2008, the Federal Circuit reversed the dismissal of the physical takings claim and remanded.\textsuperscript{176} It noted that the government did not block the water at issue from leaving the river to enter the Project, “but instead actively caused the physical diversion of water” from a canal within the Project back to the river, requiring Casitas to build a fish ladder for this purpose, “thus reducing Casitas’s water supply.”\textsuperscript{177} The Federal Circuit held that “[t]he government requirement that Casitas build the fish ladder and divert water to it should be analyzed under the physical takings rubric.”\textsuperscript{178} It remanded for consideration of other issues, including whether there was a right to divert water from the river under state law, and whether Casitas was in fact deprived of water it actually could use. On remand, the Court of Federal Claims found that California law did not include a property right in diversion, and that Casitas did not demonstrate any loss of actual beneficial use, so that its claim was not ripe.\textsuperscript{179}

In its subsequent 2013 decision on appeal, the Federal Circuit rejected Casitas’s assertion that the Court of Federal Claims’ analysis neglected the Federal Circuit’s 2008 finding that there had been a physical taking. The Federal Circuit stated that its earlier ruling was based on the government’s temporary concessions for summary judgment purposes and that, “on remand, the Court of Federal Claims was correct to perform a full physical takings analysis, beginning with an assessment of the scope of Casitas’s right to the diverted water.”\textsuperscript{180} On the merits, the opinion continued, Casitas did not have a property interest in the diversion under state law, and “the Court of Federal Claims properly found that the diversion of water down the fish ladder to date has not impinged on Casitas’s compensable property interest—the right to beneficial use.”\textsuperscript{181}

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\textsuperscript{176} \textit{Id.} (citing Casitas Mun. Water Dist. v. United States (\textit{Casitas III}), 543 F.3d 1276 (Fed. Cir. 2008)).
\textsuperscript{177} \textit{Id.} (citing \textit{Casitas III}, 543 F.3d at 1291–92).
\textsuperscript{178} \textit{Id.} (citing \textit{Casitas III}, 543 F.3d at 1296).
\textsuperscript{179} \textit{Id.} at 1347-48 (citing Casitas Mun. Water Dist. v. United States (\textit{Casitas IV}), 102 Fed. Cl. 443, 471-72 (2011)).
\textsuperscript{180} \textit{Id.} at 1353.
\textsuperscript{181} \textit{Id.} at 1360.
\end{flushleft}
Water is a physical substance, but ownership of water not yet impounded typically is expressed in gallons or acre-feet of an implicitly fungible substance. However, the fact that water is not desired for continued possession should not preclude a physical takings claim, since the value of water, like coal, inheres not in the right to exclude others, but in the resource’s use. Also, dicta in *Arkansas Game and Fish Commission v. United States*\(^{182}\) noted the issues of physical versus regulatory takings, and also temporary incursion resulting in permanent damages, suggesting that these issues were amenable to analysis within the *Penn Central* framework.\(^{183}\)

The Court noted that it has “drawn some bright lines, notably, the rule that a permanent physical occupation of property authorized by government is a taking,” but added that most takings claims turn on situation-specific factual inquiries.\(^{184}\) It then turned to whether temporary flooding can ever give rise to a takings claim.\(^{185}\)

The Court stated that “temporary limitations are subject to a more complex balancing process to determine whether they are a taking,” and that this included “flood cases.”\(^{186}\) Its discussion noted that the significance of Arkansas water rights law had not been briefed, but that the Federal Circuit might consider it on remand.\(^{187}\) Also mentioned by the Court were the duration of the flooding, whether it was intended or foreseeable, and “the character of the land at issue and the owner’s ‘reasonable investment-backed expectations’ regarding the land’s use.”\(^{188}\)

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\(^{182}\) 133 S. Ct. 511 (2012) (holding government-induced flooding not barred from constituting compensable taking merely because not permanent or inevitably recurring).

\(^{183}\) *Id.* at 518.


\(^{185}\) *Id.*

\(^{186}\) *Id.* at 521 (quoting Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419, 435 n.12 (1982)).

\(^{187}\) *Id.* at 522.

\(^{188}\) *Id.* (citing Palazzolo v. Rhode Island, 533 U.S. 606, 618 (2001)).
The expansive dicta in *Arkansas Game and Fish* did not specify whether the repeated incursions of water released by a government dam resulted in a regulatory act that harmed the Commission’s property, the impressment on the property of a temporary flowage easement, or, indeed a temporary physical taking of the land. Whichever of these might be the case, there seems a substantial possibility that the Court will approach the issues using the lens of the *Penn Central* ad hoc tests.

If so, the *Loretto* per se test would be limited to permanent physical occupations, just as the *Lucas* test has been limited to the deprivation of all economically viable use. Lesser intrusions would be adjudicated under the *Penn Central* standard.

**B. The “Relevant Parcel” Problem**

The “parcel as a whole” doctrine[^189] is another example of *Penn Central* being at war with itself. On one hand, by its emphasis on “investment-backed expectations,” the doctrine strives for a realistic understanding of what ownership meant to the claimant. On the other hand, the artificial distinction between physical and regulatory takings, coupled with the Court’s stilted interpretation of temporary takings, augurs against such realism.

“Parcel as a whole” has great breadth, since regulatory takings law measures the claimant’s loss with respect to the relevant parcel, for which there is “no bright-line rule,” and which courts determine using “a flexible approach, designed to account for factual nuances.”[^190] *Penn Central*’s ideal paradigm for “parcel as a whole” is one deeded parcel with one owner. A court would examine whether a claimant simply had severed some of the physical area of the parcel and claim it as the unit of property against which the economic impact of a regulation is to be measured. However, the relevant parcel might be determined to include (or exclude) lands bought at different times or sold at different times, or, in effect, impressed with an equitable servitude in favor of other parcels owned

[^189]: See *supra* Part I.B.6 for earlier discussion.

by the claimant.\textsuperscript{191} Since the claimant’s activity and purpose help shape the relevant parcel against which those factors are to be measured, it is difficult to conceptualize economic impact and expectations as separate factors.

Even cases in which “parcel as a whole” is not an explicit element often are decided on that basis. For instance, the Supreme Court has defended the forced renewal of leases pursuant to rent control as not involving occupation of premises by the government’s designee, but rather as regulation of the terms of the landlord’s agreement with the tenant whose term had expired.\textsuperscript{192} Through the alchemy of implicit use of the freehold as the relevant parcel instead of the leasehold, which is bounded by duration, the Court thus avoids the conflict between its holdings that the government’s physical occupation of a leasehold is compensable,\textsuperscript{193} whereas the deprivation of all economically viable use for a similar time period is not.\textsuperscript{194}

The difficulty with the “parcel as whole” rule harkens back to the basic problem raised by this Article. The \textit{Penn Central} factors are not only internally vague, but each factor derives its meaning and content in its interaction with other factors. “Parcel as a whole” is no different, and for this reason, it should be considered as an additional factor in \textit{Penn Central} analysis. The incoherence resulting from this newly minted four-factor test can be analogized to that of a soccer field that changes in size according to the strategy of the players, and which referees apply flexible rules that contract or expand the field, depending on the factual nuances of the latest play.

\textsuperscript{191} \textit{See generally} Merriam, \textit{supra} note 129, \textit{Lost Tree Vill. v. United States}, 100 Fed. Cl. 412, 427-30 (2011), \textit{rev’d}, 707 F.3d 1286 (Fed. Cir. 2013) (holding scattered holdings should not have been included in relevant parcel).

\textsuperscript{192} \textit{See}, \textit{e.g.}, \textit{Yee v. City of Escondido}, 503 U.S. 519, 529-31 (1992).

\textsuperscript{193} \textit{E.g.}, \textit{Kimball Laundry Co. v. United States}, 338 U.S. 1 (1949); \textit{United States v. General Motors Corp.}, 323 U.S. 373 (1945).

1. Identifying the Property Interest

Even apart from efforts by the takings claimant to reduce the relevant parcel and the government to expand it, there are basic problems in determining the specific property interest for which the claimant seeks to recover.

For instance, in *Horne v. Department of Agriculture*, the underlying substantive questions involved whether the relevant property is the cash demanded as fines for not turning over raisins to a marketing board pursuant to the USDA’s “Raisin Marketing Order,” the raisins themselves, comprising approximately half of the claimant’s total crop, or the total crop itself. The Supreme Court ultimately held that the Hornes could raise an equitable takings defense against the assessment of fines. However, given the administrative judge’s finding that “handlers no longer have a property right that permits them to market their crop free of regulatory control,” it is uncertain how the relevant property interest will be characterized on remand.

Complicating matters, the purpose of the Raisin Marketing Order, which is administered by a committee of raisin growers, is to raise the price of raisins above the free market price that growers would obtain if unlimited raisins could be sold. If the aggregate revenue obtained from the restricted crop is greater than the revenue that would be obtained for the unrestricted crop, might individual restricted growers obtain implicit compensation through reciprocity of advantage?

2. The Temporary Investment

While the Supreme Court’s *Penn Central* doctrine has a substantial focus on a property owner’s investment-backed expectations, those who make investments of

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195 133 S. Ct. 2053 (2013) (holding that a defendant may raise the Takings Clause as a defense to a “direct transfer of funds mandated by the Government” and that the Ninth Circuit had jurisdiction over petitioner’s takings claim).
196 133 S. Ct. at 2061.
197 *Id.* at 2059.
198 *See, e.g.*, Pennsylvania Coal Co. v. Mahon, 260 U.S. 393, 415 (1922) (noting that competitors bound by the same restriction can enjoy an “average reciprocity of advantage”).
limited duration may find that the doctrine has morphed to their substantial detriment under the Court’s incantations to use the “parcel as a whole.”

In *Lucas v. South Carolina Coastal Council*, the Court held that a deprivation of “all economically viable use” would constitute a per se taking. In several earlier cases, it held that the U.S. government’s commandeering of private facilities for its own use during World War II would constitute takings of leasehold interests. Putting these concepts together, a regulation resulting in deprivation of “all economically viable use” for a substantial period of time would logically be analogous to the condemnation of a leasehold interest.

The Supreme Court rejected that view in *Tahoe-Sierra Preservation Council v. Tahoe Regional Planning Agency*. Justice Stevens, writing for the majority, applied the “parcel as whole” test to find that a purportedly complete deprivation for a period of time could not be a per se taking. Since the moratoria effectively prohibiting use were temporary, he reasoned, there would remain residual value in the fee simple. The temporary interest should not be “sliced” away from it.

But, the ubiquitous leasehold has for centuries been carved from the fee simple interest. As Chief Justice Rehnquist noticed in dissent, the majority in *Tahoe-Sierra* disregarded “the practical ‘equivalence’ between respondent’s deprivation and the deprivation resulting from a leasehold.” Justice Stevens fended off the notion of regulatory leaseholds by citing what he termed the “longstanding distinction between acquisitions of

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203 Tahoe-Sierra, 535 U.S. 302, 331-332 (asserting that “[l]ogically, a fee simple estate cannot be rendered valueless by a temporary prohibition on economic use, because the property will recover value as soon as the prohibition is lifted”).
204 Tahoe-Sierra, 535 U.S. 302, 319 (discussing the holding of the Court of Appeals; 216 F.3d at 774 (9th Cir. 2000)).
205 Id. at 331 (2002).
206 Id. at 349, (Rehnquist, C.J., dissenting).
property for public use, on the one hand, and regulations prohibiting private uses, on the other,” which “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.”’’

The impact of this reasoning has been to make it almost impossible for claimants to recover for even very heavy losses regarding temporary investment property. A vivid example of this is *CCA Associates v. United States*,208 where the Federal Circuit acknowledged its earlier repudiation of its previous “return on equity” approach,209 and measured the diminution in the return resulting from federal statutes not over the additional time that the claimant was forced to maintain its investment in low-income housing, but rather over the much longer life of the building in which the investment was made.210

CCA had entered into an agreement with the federal government to construct multifamily housing and was obligated to rent to low- and moderate-income tenants for 20 years, after which it could leave the program and relet the apartments to market-rate tenants. When the 20 years were up, new federal Housing Preservation Acts required that CCA accept below-market rents for an additional five years.211

Using the return-on-equity approach that the Federal Circuit adopted in 2003, in *Cienega VIII*,212 there would be an 81% diminution in returns, which augured for a *Penn Central* taking. Using the Federal Circuit’s replacement 2007 *Cienega X* approach,213 the economic impact was reduced to a non-consequential 18%. In *Cienega VIII*, the Federal

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207 Tahoe-Sierra, 535 U.S. at 323.
208 667 F.3d 1239 (Fed. Cir. 2011).
209 Cienega Gardens v. United States (*Cienega X*), 503 F.3d 1266 (Fed. Cir. 2007).
210 For a detailed discussion, see Eagle, supra note 100, at 425-435.
212 Cienega Gardens v. United States (*Cienega VIII*), 331 F.3d 1319, 1344 (Fed. Cir. 2003).
213 Cienega Gardens v. United States (*Cienega X*), 503 F.3d 1266 (Fed. Cir. 2007).
Circuit focused on the “total and immediate” impact of the Preservation Statutes,” whereas in *Cienega X*, which *CCA Associates* was bound to apply, it ignored the distinction between a categorical *Lucas* taking and a partial *Penn Central* taking, stating that, in “*Tahoe-Sierra*, the necessity of considering the overall value of the property was explicitly confirmed in the temporary regulatory takings context.”

Thus, while not formally repudiating the theory that there can be a temporary regulatory taking under the *Penn Central* ad hoc balancing tests, the practical effect is to conflate the requirements of a temporary regulatory taking with those of a permanent regulatory taking.

The failure of the Federal Circuit to ensure that property owners receive a reasonable return on investment is reminiscent of the fate of the California *Birkenfeld* doctrine. In *Birkenfeld v. City of Berkeley*, the California Supreme Court declared that the rent limitation provisions of the Berkeley ordinance would be “within the police power if they are reasonably calculated to eliminate excessive rents and *at the same time provide landlords with a just and reasonable return on their property*.” It proceeded to invalidate the ordinance on the grounds that it did not, on its face, guarantee the landlord a reasonable return.

However, the two crucial elements in determining a “fair rate of return,” income and capital, are defined in terms of the other. The market value of rental property is a function of income that the property is expected to generate, but what is a “reasonable” return to capital depends on market value. Also, a reasonable return depends on the market price of the building and mortgage interest rates at the time the landlord purchased it.

The California Supreme Court’s response to these imperatives, in *Fisher v. City of Berke-

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214 *Cienega VIII*, 331 F.3d at 1344.
215 *Cienega X*, 503 F.3d at 1281.
217 *Id.* at 1027 (emphasis added).
ley,\textsuperscript{218} was to state that neither the state nor federal constitution required that “reasonable” return be set with regard to any “specific standard.”\textsuperscript{219}

By conflating temporary and permanent regulatory takings in \textit{Cienega X} and \textit{CCA Associates}, and by affirming the dismantlement of any objective standard for a reasonable return on investment in \textit{Fisher}, the Supreme Court has further departed from protection of both traditional property rights, and retreated from its articulated goal of furthering owner’s investment-backed expectations in \textit{Penn Central}.

3. On Proving Non-Ownership

For purposes of determining the “parcel as a whole” for takings purposes, “most courts entertain at least a strong presumption that all contiguous land held by a single owner is to be treated as a single parcel.”\textsuperscript{220} Where parcels have different legal owners, the attribution of ownership to other entities depends on a showing of “clear and convincing proof.”\textsuperscript{221} While different owners could appropriate their property to a joint business venture, this, too, must be established by proof.\textsuperscript{222}

In an effort to circumvent the need for proof of joint ownership where there is some indication of coordination of development and joint infrastructure among neighboring owners, the California Coastal Commission has developed a theory of “unity of ownership.”\textsuperscript{223} As discussed in detail elsewhere,\textsuperscript{224} judicial approval of the theory would

\textsuperscript{218} 693 P.2d 261 (Cal. 1984), aff’d, 475 U.S. 260 (1986).
\textsuperscript{219} 693 P.2d at 261.
\textsuperscript{220} John E. Fee, \textit{The Takings Clause As a Comparative Right}, 76 S. CAL. L. REV. 1003, 1031 (2003) (citing, e.g., Dist. Intown Props. Ltd. P’ship v. District of Columbia, 198 F.3d 874, 880 (D.C. Cir. 1999); Forest Props., Inc. v. United States, 177 F.3d 1360, 1365 (Fed. Cir. 1994)).
\textsuperscript{221} See, e.g., \textit{CAL. EVID. CODE} § 666 (West 2012) (“The owner of the legal title to property is presumed to be the owner of the full beneficial title. This presumption may be rebutted only by clear and convincing proof.”).
\textsuperscript{224} Eagle, \textit{supra} note 129, at 579-600.
permit the Commission to treat separately deeded residential parcels as one parcel, although the individual parcels’ owners of record tried to achieve architectural harmony, shared expenses of infrastructure development, are social friends, and have employed the same counsel, and where the Commission believes it has inferential evidence that they are venturers in a common development scheme.

In pending cases, the Commission asserts that five large residential lots overlooking the Pacific Ocean in Malibu should be treated as one, with the construction of only one house to be permitted in total. Only one published decision even suggests the viability of this interpretation.

California law provides that the owner of “legal title” is presumed to be the owner of full “beneficial title” unless there is “clear and convincing evidence” to the contrary. However, while that provision is applicable to judicial determinations, it is not applicable to administrative determinations. Courts afford a strong presumption of correctness concerning administrative findings, and discern whether they are supported by “substantial evidence.” A bill was introduced in the California legislature to apply the “clear and convincing evidence” standard to administrative determinations, but it was defeated in committee. The Coastal Commission successfully opposed the legislation, asserting that “the new, higher standard would have a chilling effect on the state’s ability to effectively carry out statutory land use planning activities.”

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226 City of Coeur d’Alene v. Simpson, 136 P.3d 310 (Idaho 2006). The court noted that it was “not pure fantasy” to imagine a surreptitious ownership agreement. Id. at 314.

227 CAL. EVID. CODE § 666 (West 2012).

228 Fukuda v. City of Angels, 85 Cal.Rptr.2d 696 (Cal. 1999).


231 See AB 2226 SENATE JUD. COMM. REPORT at 5.
The result is that owners challenging adverse administrative determinations would have the burden of proof that their legally separate parcels are not one “parcel as a whole.”232

C. “Permanent” and “Temporary” Regulatory Takings

The relationship between “permanent” physical takings and “temporary” physical takings largely is clear, although a “permanent” taking is not necessarily really permanent,233 and a “temporary” taking might instead be classified as a de minimis or tortious incursion.234

In his dissent in Tahoe-Sierra,235 Chief Justice Rehnquist noted that in First English the Court “reject[ed] any distinction between temporary and permanent takings when a landowner is deprived of all economically beneficial use of his land.”236 He added:

[F]undamentally, even if a practical distinction between temporary and permanent deprivations were plausible, to treat the two differently in terms of takings law would be at odds with the justification for the Lucas rule. The Lucas rule is derived from the fact that a “total deprivation of beneficial use is, from the landowner’s point of view, the equivalent of a physical appropriation.” The regulation in Lucas was the “practical equivalence” of a long-term physical appropriation, i.e., a condemnation, so the Fifth Amendment required compensation. The “practical equivalence,” from the landowner’s

232 See, e.g., Fukuda v. City of Angels, 977 P.2d 693 (Cal. 1999). “In exercising its independent judgment, a trial court must afford a strong presumption of correctness concerning the administrative findings, and the party challenging the administrative decision bears the burden of convincing the court that the administrative findings are contrary to the weight of the evidence.” Id. at 700.

233 See Hendler v. United States, 952 F.2d 1364, 1376 (Fed. Cir. 1991) (“‘[P]ermanent’ does not necessarily mean forever, or anything like it.”).

234 Id. at 1377.


236 Id. at 347 (Rehnquist, C.J., dissenting) (quoting First English Evangelical Lutheran Church of Glendale v. County of Los Angeles, 482 U.S. 304, 318 (1987)).
point of view, of a “temporary” ban on all economic use is a forced leasehold.237

However, the majority held that the “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.”238 Unlike “relatively rare” physical takings, which “usually represent a greater affront to individual property rights,” regulations of land use are both “ubiquitous” and often “tangential” to value, and, if payment for them always was required, government land use regulation would be a “luxury.”239

These heuristics might be correct in the general run of cases. They do not, however, get to the essence of Chief Justice Rehnquist’s point, which is that if physical takings cause such severe loss as to be compensable even if they are temporary, so should regulatory losses that are so severe as to be deemed the “practical equivalence” of physical takings should be compensable even if they are temporary.

1. Might a “Permanent” Taking be Temporary?

An important consideration in the Tahoe-Sierra majority’s response to Chief Justice Rehnquist is that the Court’s seminal temporary regulatory takings case, First English Evangelical Lutheran Church of Glendale v. County of Los Angeles,240 was not about a regulation intended to be temporary at all.

When the Court in First English “turn[ed] to the question of whether the Just Compensation Clause requires the government to pay for ‘temporary’ regulatory takings,”241 we should note that the Court placed the word “temporary” in quotes. The regu-

237 Id. at 348 (Rehnquist, C.J., dissenting) (quoting Lucas v. South Carolina Coastal Council, 505 U.S. 1003, 1017 (1992)).
238 Id. at 323 (explanatory footnote omitted).
239 Id. at 323-24.
241 Id. at 313.
lations at issue were intended as permanent regulations, and their status changed only after the determination that they would constitute takings. “Once a court determines that a taking has occurred,” _First English_ added, “the government retains the whole range of options already available—amendment of the regulation, _withdrawal of the invalidated regulation_, or exercise of eminent domain.” 242 The Court “merely” held that there was an obligation to pay just compensation “for the period during which the taking was effective.” 243

The phrase “withdrawal of the invalidated regulation” seems both illogical and presumptuous. It is illogical because a government mandate that subsequently is determined to require just compensation does not thereby “violate” the Takings Clause. It is expected that government acts intended to further the public good might require just compensation,244 and any ensuing violation of the constitutional right would result not from the regulation, but from a refusal to pay.

The analysis is presumptuous because it assumes that a subsequent legislative “withdrawal” is effective from the time of the repeal, albeit, under _First English_, not from the date of the initial enactment that constituted the taking. If the government had condemned a house for use of the land in a highway project, and several years later had decided to abandon the project, could it then force the buyer to reassume ownership? If the answer is “no,” would the same answer not be required where the regulation worked a “total deprivation of beneficial use” that made it the “practical equivalence” of a physical taking? The author has suggested elsewhere that a government inchoate right to “withdraw” that worked the _Lucas_-type taking would be the equivalent of its having taken a

242 _Id._ at 321.

243 _Id._

separate “put option” that would force the claimant to reassume ownership under the status quo ante.245

2. Evaluating the Temporary Taking as Permanent

In Tahoe-Sierra, the Supreme Court held that it was “inappropriate” to treat physical takings cases as “controlling precedents” for regulatory takings, and vice-versa.246 Justice Stevens noted that Penn Central made “clear that even though multiple factors are relevant in the analysis of regulatory takings claims, in such cases we must focus on ‘the parcel as a whole’.”247 He described an interest in real estate as having geographic dimensions, and a term of years describing the “temporal aspect of the owner’s interest.”248

Both dimensions must be considered if the interest is to be viewed in its entirety. Hence, a permanent deprivation of the owner’s use of the entire area is a taking of “the parcel as a whole,” whereas a temporary restriction that merely causes a diminution in value is not. Logically, a fee simple estate cannot be rendered valueless by a temporary prohibition on economic use, because the property will recover value as soon as the prohibition is lifted.249

This analysis is economically uninformed, since property does not “recover value” when a restriction is removed. Taken literally, an asset might have the same nominal value at some point in the future as it had in the past. However, it does not have the same actual value, since the sum in the past would have generated earnings during the period of the restriction. A true comparison of the value of two assets would have to be made at the same point in time. The usual way this is done is through present value analysis, whereby all items of income and expenditure are taken into account, each item discounted by an

248 Id. at 331-32.
249 Id. at 331.
appropriate discount rate that takes into account the earnings potential of the sum if invested.\(^{250}\)

Justice Stevens is correct to the extent that if government restricts the commencement of economically viable use to the future, the asset has some value now. That value is the smaller sum that hypothetically could have been invested now at an anticipated rate of return, so that the present sum, together with compounded earnings, would equal the market value of the assets when its viable economic use begins. A good way to measure the economic impact of the temporary restriction would be to determine the fair market value of the unrestricted asset now, less the fair market value now of the asset subject to the restriction.\(^{251}\)

The effect of this conflation is to vitiate the concept of a “temporary” regulatory taking, in the sense that the extremely sharp or total deprivation that the owner must endure at present and in the near future is treated as if it were averaged over a much longer time frame. The result is that temporary regulatory deprivations are treated as if they were much milder permanent deprivations.

In the case where the owner’s investment model is based only on use of the asset for a limited period of time, the loss can be profound.\(^{252}\) Where a takings claimant plans long-term ownership, his or her loss likely will be sufficiently attenuated so that the *Penn Central* “economic impact” factor does not augur for a regulatory taking.

In *Arkansas Game and Fish Commission v. United States*,\(^{253}\) for example, the Supreme Court held only that government-induced flooding was not barred from constituting a compensable taking merely because it was not permanent or inevitably recurring.\(^{254}\) However, it left for remand possible consideration of issues of permanent and temporary


\(^{251}\) See generally Eagle, supra note 100.

\(^{252}\) See supra Part II.B.2.

\(^{253}\) 133 S. Ct. 511 (2012).

\(^{254}\) See supra Part I.A.2 for discussion.
takings, discussed here, and physical and regulatory takings, discussed elsewhere in the Article.\(^{255}\)

*Arkansas Game and Fish* noted that, in *Loretto v. Teleprompter Manhattan CATV Corp.*,\(^{256}\) the Court “distinguished permanent physical occupations from temporary invasions of property, expressly including flooding cases, and said that ‘temporary limitations are subject to a more complex balancing process to determine whether they are a taking.’”\(^{257}\)

The Court of Federal Claims stated in *Arkansas Game and Fish* that it would “assess the government’s acquisition of the flowage easement as a predicate closely attendant to the Commission’s property interest in timber. *In effect, the temporary taking of a flowage easement resulted in a permanent taking of timber* and thus timber value serves best as the measure of monetary relief to which the Commission is entitled.”\(^{258}\)

Presumably, the words “in effect” negate any implication that the timber itself had been taken. An assertion to the contrary would raise both problems under the “parcel as a whole” requirement,\(^{259}\) and also because in no sense did the government appropriate the timber to meet its needs, as it might be said to appropriate the flowage easement to effectuate a release for the surplus water behind its dam.

That said, the categorical exception from application of the *Penn Central* multi-factor test promulgated in *Loretto* did not explicitly encompass government incursions beyond “permanent physical occupations.”\(^{260}\) Were the Court to treat losses such as those in *Arkansas Fish and Game* as resulting from a temporary physical incursion, then the government might successfully assert that the temporary flowage easement itself would

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\(^{255}\) See *supra* Part II.A.2 for discussion.

\(^{256}\) 458 U.S. 419 (1982).

\(^{257}\) *AGFC*, 133 S. Ct. at 521 (quoting *Loretto*, 458 U.S. at 435).


\(^{260}\) *Loretto*, 458 U.S. at 435.
have to be evaluated under *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency.* As a consequence, the damage to the Commission’s Management Area would have to be evaluated with relation to value that would be generated during the Area’s indefinite lifetime. This would indicate that the takings fraction would be small indeed, and that the chances for success under a *Penn Central* claim would be correspondingly unlikely.

### III. Conclusion

In her concurring opinion in *Tahoe-Sierra,* Justice O’Connor cautioned that the Court “resist[s] 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.” She added that “[t]he Takings Clause requires careful examination and weighing of all the relevant circumstances in this context.” This indicates that the Court’s ad hoc *Penn Central* test includes “a number of factors,” perhaps not limited to the three enumerated as being of “particular significance,” and all of the circumstances that are relevant with respect to all of the factors.

While it would be unreasonable to expect that such an unbounded array of factors and myriad of circumstances could lend themselves to a mathematical formula both “simple” and “precise,” Justice O’Connor severely understates the problem. The Court has not even provided general guidance on how to weigh the various factors, either. The problem is that “the Court has done little to clarify its ad hoc, multifactor approach since

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264 *Tahoe–Sierra,* 535 U.S. at 326 n.23 (quoting *Palazzolo,* 533 U.S. at 636 (O’Connor, J., concurring)).
Penn Central,"266 and certainly has not furnished judges, litigants, or scholars with guides to application that are neither mechanical formulae nor unhelpful generalities.

Although the Penn Central doctrine’s economic impact and expectations tests refer to the claimant, they are unresponsive to the practical concerns of property owners. They disregard that owners of undeveloped property both sharpen and change expectations about eventual development over time, and that economically “viable” use depends on the purchase price and mortgage servicing obligations that the owner incurred, as well as the fact that some have structured their investments on short-term ownership of long-lived assets.267

Judicial subordination of owners’ use rights in favor of rights of exclusion268 leads to inordinate emphasis on whether a regulatory taking approaches the “equivalent of a physical appropriation.”269 Similarly, the parcel as whole factor overly emphasizes strategic gamesmanship on behalf of claimants and government actors, raising the stakes for theories based on conceptual severance and agglomeration. Instead of relying on traditional rules of partnership and ownership, the parcel as a whole flexible approach incorporates Penn Central’s other factors, layering the doctrine in complexity, redundancy, and incoherence.

One element of the Penn Central doctrine that warrants substantial stress is the aspect of the “character of the regulation” test that stresses whether the owner is targeted for disadvantageous treatment. This approach was raised by the Court of Federal Claims in American Pelagic Fishing Co. v. United States,270 and by the Federal Circuit CCA As-

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267 See supra Part II.B.2 for discussion of regulatory takings and temporary investments.

268 See supra notes 167-169 and accompanying text.

269 Lucas, 505 U.S. at 1017 (quoting San Diego Gas & Electric Co. v. City of San Diego, 540 U.S. 621, 652 (Brennan, J., dissenting)).

This inquiry has the merit of most closely resembling the concern in *Armstrong v. United States* that Justice Brennan professed motivated *Penn Central*: The “Fifth Amendment’s guarantee . . . [is] designed to bar 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.”

In both its temporal and spatial dimensions, the interaction of the Supreme Court’s “parcel as a whole” rule with the other *Penn Central* factors has exacerbated the incoherence of the Court’s regulatory takings doctrine.

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271 667 F.3d 1239 (Fed. Cir. 2011).