Nebraska Law Review

Volume 80 | Issue 3 Article 3

2001

Palazzolo, Lucas, and *Penn Central*: The Need for Pragmatism, Symbolism, and Ad Hoc Balancing

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TABLE OF CONTENTS

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"For the Snark *was* a Boojum, you see."**

The constitutional right to compensation for a governmental taking of property[1] is relatively easy to apply in situations involving a straightforward, physical appropriation of land for a public use like a highway. However, difficulties arise when governmental action consists only of rules that limit an owner's *use* of land. In most situations, these limits are viewed as burdens an individual is properly subject to as a citizen and land owner.[2] From this

** LEWIS CARROLL, THE HUNTING OF THE SNARK: AN AGONY IN EIGHT FITS 83 (1876). Others have compared the Supreme Court's takings jurisprudence to a Snark hunt. For example, Gideon Kanner uses the analogy in criticizing the Supreme Court's failure to provide opinions that fulfill the managerial role. Gideon Kanner, *Hunting the Snark, Not the Quark: Has the U.S. Supreme Court Been Competent in its Effort to Formulate Coherent Regulatory Takings Law?*, 30 URB. LAW. 307, 312-320 (1998). Kanner, however, never considers the problems with devising such opinions. Nor does he address the problem that some Snarks are Boojums. *See infra* notes 283-85 and accompanying text.

1. U.S. CONST. amend. V ("[P]rivate property [shall not] be taken for public use, without just compensation."); *see also* JAMES W. ELY, JR., THE GUARDIAN OF EVERY OTHER RIGHT: A CONSTITUTIONAL HISTORY OF PROPERTY RIGHTS (2d ed. 1998) (offering a historical perspective on the Just Compensation Clause in terms of property rights in the United States). This mandate has been deemed incorporated into the Fourteenth Amendment and thus applies to state governments. *See* Chic., Burlington, & Quincy R.R. v. Chicago, 166 U.S. 226, 239 (1897). State constitutions generally contain equivalent protection. For example, the South Carolina Constitution provides that "private property shall not be taken . . . for public use without just compensation being first made therefor." S.C. CONST. art. I, § 13.

2. For example, *Keystone Bituminous Coal Ass'n v. DeBenedictis*, 480 U.S. 470 (1987) notes:

> Under our system of government, one of the State's primary ways of preserving the public weal is restricting the uses individuals can make of their property. While each of us is burdened somewhat by such restrictions, we, in turn, benefit greatly from the restrictions that are placed on others. These restrictions are "properly treated as part of the burden of common citizenship." Long ago it was recognized that "all property in this country is held under the implied obligation that the owner's use of it shall not be injurious to the community," and the Takings Clause did not transform that principle to one that requires compensation whenever the State asserts its power to enforce it.

Id. at 481-82 (citations omitted).

perspective, the exercise of the "police power" of the government, which has traditionally been used to prohibit public and private harms, does not usually involve a taking of property, even if the restriction involved results in a substantial loss in the economic value of the land.[3] For example, zoning restrictions on land generally do not constitute takings.[4] However, some restrictions on land use are unwarranted or too extensive and, therefore, constitute a "regulatory taking." Compensation is required in such cases, because the cost "should be borne by the public as a whole."[5] The problem is thus one of line-drawing: How does one distinguish mere regulation from a regulatory taking?

I. TWO PERSPECTIVES ON OPINIONS: SYMBOLIC AND MANAGERIAL

As with any area of law, the problem of identifying regulatory takings can be viewed from many perspectives, each of which is true to some extent.[6] This Article contrasts two perspectives on Supreme Court regulatory takings opinions.

First, these opinions can be viewed as serving the symbolic function of simultaneously endorsing two opposing sets of values, the values furthered by the individual right to use property and the values served by governmental regulation of the property.[7] From this per-

3. *See, e.g.*, Village of Euclid v. Ambler Realty Co., 272 U.S. 365, 384-97 (1926) (holding that alleged reductions in value as a result of a zoning ordinance from $10,000 per acre to $2,500 per acre and from $150 per front foot to $50 per front foot were not an unconstitutional taking); Hadacheck v. Sebastian, 239 U.S. 394, 404-14 (1915) (holding that the prohibition against brickyard operation that allegedly resulted in a reduction in value from $800,000 to $60,000 was lawful). As indicated in notes 259-60 and accompanying text, the Supreme Court recently held that a loss of 94% of value might not be a taking.

4. *See, e.g.*, *Village of Euclid*, 272 U.S. at 384-97 (holding that the zoning ordinance did not amount to a taking).

5. Penn Cent. Transp. Co. v. New York City, 438 U.S. 104, 123 (1978) (quoting Armstrong v. United States, 364 U.S. 40, 49 (1960)).

6. *See, e.g.*, Guido Calabresi & A. Douglas Melamed, *Property Rules, Liability Rules, and Inalienability: One View of the Cathedral*, 85 HARV. L. REV. 1089, 1089 n.2 (1972).

7. *See, e.g.*, James E. Krier, *The Takings-Puzzle Puzzle*, 38 WM. & MARY L. REV. 1143 (1997) (reviewing the importance and intractable nature of value disagreement underlying the takings doctrine); Frank Michelman, *Takings, 1987*, 88 COLUM. L. REV. 1600, 1628 (1988) ("[T]he claims of popular sovereignty and classical property cannot . . . be stably reconciled at a very high level of abstraction or generality."); Gregory Daniel Page, Lucas v. South Carolina Coastal Council *and Justice Scalia's Primer on Property Rights: Advancing New Democratic Traditions by Defending the Tradition of Property*, 24 WM. & MARY ENVTL. L. & POL'Y REV. 161 (2000) (contrasting conflicting but coexisting "statist" and "absolutist" conceptions of property). *Cf., e.g.*, Henry Paul Monaghan, Comment, *The Sovereign Immunity "Exception,"* 110 HARV. L. REV. 102, 121-22 (1996) (discussing the Supreme Court's role in a state's sovereign immunity); Glenn H. Reynolds &

spective, the concern is to recognize the importance of rights and of regulation and to avoid giving primacy to either. Clear guides for decisionmaking are avoided because clarity can result in a broad, strategic endorsement of one set of values as more important than the other. Though clarity is generally preferred in Supreme Court opinions, it may not be possible or desirable where there is no cultural agreement on the relative importance of competing values. Thus, a choice of vague rules over clear per se rules would reflect a pragmatic acceptance of the lack of cultural agreement on how to resolve the conflict between rights and regulation.[8] At a deeper level, this symbolic approach also avoids the need to acknowledge and address the more general and basic problem of the lack of a generally accepted objective guide to constitutional interpretation.[9]

The second perspective is more concerned with the substance of opinions and views the United States Supreme Court in terms of its managerial role at the apex of two parallel hierarchal judicial systems—the federal[10] and the state.[11] Because the likelihood of Su-

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Brannon P. Denning, *Lower Court Readings of* Lopez, *or What if the Supreme Court Held a Constitutional Revolution and Nobody Came?*, 2000 WIS. L. REV. 369 (2000) (discussing the prohibition of firearms close to schools). For a brief summary of the conflicting positions on rights vis-à-vis regulation, see F. Patrick Hubbard, *"Takings Reform" and the Process of State Legislative Change in the Context of a "National Movement,"* 50 S.C. L. REV. 93, 109-14 (1998).

8. *See, e.g.*, GUIDO CALABRESI, IDEALS, BELIEFS, ATTITUDES, AND THE LAW 87-114 (1985) (discussing the importance of giving recognition to conflicting values in the abortion debate).

9. For a sense of the diversity and complexity of the literature on constitutional interpretation, see Symposium, *Fidelity in Constitutional Theory, Editor's Foreword*, 65 FORDHAM L. REV. 1247 (1997). For further discussion of this point in terms of use of culture as an objective guide, see *infra* notes 119-130 and accompanying text.

10. The federal courts are divided into two systems. Where state and local governmental action is involved, the matter is litigated in federal district court and appealed to a federal circuit court. Where federal action is involved, the matter is litigated in the Court of Federal Claims and appealed to the Federal Circuit Court. *See, e.g.*, David F. Coursen, *The Takings Jurisprudence of the Court of Federal Claims and the Federal Circuit*, 29 ENVTL. L. 821, 822 (1999); Robert Meltz, *Takings Claims Against the Federal Government*, *in* COURSE MATERIALS ON INVERSE CONDEMNATION AND RELATED GOVERNMENT LIABILITY SE 18 ALI-ABA 475 (1999).

11. The state courts have an especially important role in the area of regulatory takings because ripeness and abstention doctrines limit the role of the federal courts in reviewing state land use planning schemes. *See, e.g.*, Williamson County Reg'l Planning Comm'n v. Hamilton Bank, 473 U.S. 172 (1985) (requiring the denial of compensation by the state system as a prerequisite to federal jurisdiction of takings claims); Sinclair Oil Corp. v. County of Santa Barbara, 96 F.3d 401, 409-10 (9th Cir. 1996) (abstaining in a land-use case based on doctrine set forth in RR Comm'n v. Pullman Co., 312 U.S. 496 (1941)); Arthur M. Pomponio v. Fauquier County Bd. of Supervisors, 21 F.3d 1319, 1324-28 (4th Cir. 1994) (abstaining in a zoning case based on Burford v. Sun Oil Co., 311 U.S. 315 (1943)); Michael M.

preme Court review of a decision from either system is extremely small,[12] the cases accepted for review must be used to maximum effect if the Supreme Court is to fulfill its managerial role of providing clear guidance to the lower courts, to the governmental officials involved in making the regulations at issue in a takings case, and to the owners of land subject to regulation.[13] In effect, the Supreme Court is like a corporate CEO who has very limited opportunities to issue memorandums on policy and procedures to guide branch offices all over the nation (and the customers of these branch offices) on how to do a complex task involving a wide range of circumstances.

This managerial analogy cannot be pushed too far. The Supreme Court is a multimember common law court, reacting to petitions for certiorari and assisted only by a small staff of novice law clerks. There are limits on the ability of such an institution to provide detailed management guidelines.[14] Nevertheless, many people argue that the concept of the "rule of law" necessitates that Supreme Court opinions play a substantively meaningful role in determining the precise results that are reached by the lower courts. Otherwise, lower court decisions will not be based on objective standards. As a result, the "rule of law" will be frustrated by the uncertainty, contradiction, and instability that will occur.[15] Moreover, the court occasionally

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Berger, *Supreme Bait & Switch: The Ripeness Ruse in Regulatory Takings*, 3 WASH. U. J.L. & POL'Y 99 (2000); Max Kidalov & Richard H. Seamon, *The Missing Pieces of the Debate over Federal Property Rights Legislation*, 27 HASTINGS CONST. L.Q. 1, 5-17 (1999) (ripeness).

12. In the October 2000 Term, for example, the Court granted review and acted upon about 1.75% of the cases that were on its docket (total of 7760 paid and informa pauperis cases; total of 136 cases available for review). *See Statistical Recap of Supreme Court's Workload During Last Three Terms*, 70 U.S.L.W. 3060 (2001); *see also* Yee v. City of Escondido, 503 U.S. 519, 536 (1992) ("Last Term alone we received over 5,000 petitions for certiorari, but we have the capacity to decide only a small fraction of these cases on the merits.").

13. Opinions also serve other managerial roles. For example, they can correct error in the case involved.

14. *See, e.g.*, CASS R. SUNSTEIN, ONE CASE AT A TIME: JUDICIAL MINIMALISM ON THE SUPREME COURT 3-5 (1999) (arguing that the Supreme Court should say "no more than necessary to [decide] an outcome, . . . leaving as much as possible undecided . . . *when the Court is dealing with a constitutional issue of high complexity about which many people feel deeply and on which the nation is divided (on moral or other grounds)*" (emphasis added)).

15. *See, e.g.*, Steven J. Eagle, *The 1997 Regulatory Takings Quartet: Retreating from the "Rule of Law,"* 42 N.Y.L. SCH. L. REV. 345 (1998) (looking at four New York Court of Appeals cases and whether they are "consistent with the United States Supreme Court precedent and the rule of law"); Kanner, *supra* note **, at 349 (discussing that the "field of regulatory inverse condemnation does not have a reliable underlying doctrine to guide" planners, lawyers, and judges). *Cf., e.g.*, LON L. FULLER, THE MORALITY OF LAW 38-39, 63-70 (rev. ed. 1969) (arguing that a decision-making process that is ad hoc, unclear, or contradictory is contrary to the achievement of a "moral" legal system); Paul M. Bator, *What is Wrong with the Supreme Court?*, 51 U. PITT. L. REV. 673, 685-86 (1990) (criticizing the Su-

adopts a clearly managerial perspective—for example, the adoption of a clear, easily applied rule to guide police in *Miranda v. Arizona*.[16]

Though Supreme Court opinions are not exclusively "symbolic" or "managerial," it is possible to categorize an opinion based on the degree to which it clearly prescribes the result in subsequent cases. An opinion can be viewed as symbolic to the extent that it endorses conflicting value schemes and avoids clear, per se rules that would clearly result in the "victory" of one of the competing schemes. In contrast, a managerial opinion clearly indicates value preferences and explicitly guides decision-making. Such explicitness is particularly important to the managerial role of the Supreme Court in an area like regulatory takings because there is no cultural consensus about the relative importance of the competing values. Given this lack of consensus, vague rules will provide little substantive guidance on the "right result" to lower courts.

Opinions that fulfill the symbolic function should not necessarily be regarded as unimportant or as bad judicial craftsmanship. Symbols, rhetoric, and narratives about power are important.[17] Controversies over burning the American flag or flying the confederate battle flag demonstrate the emotional depths involved with symbols. Views about property rights and about owners' legal responsibilities to the community also involve deeply held, emotion-stirring beliefs.[18] Consequently, a symbolic opinion is important to these beliefs, even if it simply affirms both values or uses language that appears to prefer one value over the other but avoids adopting a clear substantive standard

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preme Court for overuse of vague multipart tests, which result in poor quality of fulfilling the function of providing "reasonabl[e], intelligible and stable guidelines to other actors in the legal system"); Antonin Scalia, *The Rule of Law as the Law of Rules*, 56 U. CHI. L. REV. 1175 (1989) (discussing the use of broad applicable principles in the creation of new law). For the concept that a process can fulfill the rule of law, see *infra* note 48 and accompanying text.

16. 384 U.S. 436 (1966); *see also* Dickerson v. United States, 530 U.S. 428, 435 (2000) (providing that because the case-by-case-totality-of-circumstances test of voluntariness of confessions is not sufficient in the context of the coercive nature of modern custodial interrogation, *Miranda* "laid down 'concrete constitutional guidelines for law enforcement agencies and courts to follow.'" (quoting *Miranda*, 384 U.S. at 442)). *Atwater v. Lago Vista*, 532 U.S. 318 (2001), contains similar language concerning the importance of clear rules in the context of the Fourth Amendment.

17. *See, e.g.*, ROBERT L. HAYMAN, JR. & NANCY LEVIT, JURISPRUDENCE: CONTEMPORARY READINGS, PROBLEMS AND NARRATIVES 297-324 (1994) (discussing the importance of narratives and "storytelling"); RICHARD RORTY, CONTINGENCY, IRONY, AND SOLIDARITY 29 (1989) (emphasizing the role of narrative in view of "one's life, or the life of one's community"); NARRATIVE, VIOLENCE, AND THE LAW: THE ESSAYS OF ROBERT COVER 271 (Martha Minow et al. eds., 1992); Robert Cover, *Nomos and Narrative*, 97 HARV. L. REV. 4 (1983).

18. *See, e.g.*, Gregory S. Alexander, *Takings, Narratives, and Power*, 88 COLUM. L. REV. 1752 (1988); William W. Fisher III, *The Significance of Public Perceptions of the Takings Doctrine*, 88 COLUM. L. REV. 1774 (1988).

that would, in fact, adopt such preference. Moreover, where it is not possible to craft a clear definite rule, a vague symbolic standard may be the best that can be expected of judges.[19] In such cases, a vague, imprecise "rule" which provides a structure for addressing specific circumstances in the context of a fair process will be a better way to address a problem than a clear formal substantive rule that does not respect factual distinctions that are important to differing value schemes.[20]

II. *PENN CENTRAL* AND THE AD HOC BALANCING APPROACH: PRAGMATIC TRIUMPH OF SYMBOL

By the 1970s, the Supreme Court had openly abandoned the search for an explicit test or standard of when a regulatory taking occurs. *Penn Central Transportation Co. v. New York City*[21] summarized the lack of a substantive test for identifying a taking as follows:

> The question of what constitutes a "taking" for purposes of the Fifth Amendment has proved to be a problem of considerable difficulty. While this Court has recognized that 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," this Court, quite simply, has been unable to develop any "set formula" for determining when "justice and fairness" require that economic injuries caused by public action be compensated by the government, rather than remain disproportionately concentrated on a few persons. Indeed, we have frequently observed that whether a particular restriction will be rendered invalid by the government's failure to pay for any losses proximately caused by it depends largely "upon the particular circumstances [in that] case."[22]

In lieu of a test, *Penn Central* identifies several factors that are to be considered in an ad hoc balancing approach:

> 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.[23]

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19. *See, e.g.*, Scalia, *supra* note 15, at 1186-87 (noting that despite the value of clear general rules, there are times where they are not possible; therefore, "[w]e will have totality of the circumstances tests and balancing modes of analysis with us forever").

20. *See* Wibren Van der Burg, *The Expressive and Communicative Functions of Law, Especially with Regard to Moral Issues*, 20 LAW & PHIL. 31, 53-54 (2001). For further discussion of this point, see *infra* note 48 and accompanying text.

21. 438 U.S. 104 (1978).

22. *Id.* at 123-24 (citations omitted).

23. *Id.* at 124 (citations omitted).

Because of its adoption of an ad hoc balancing test rather than an explicit standard, *Penn Central* can be categorized as an opinion that adopts a symbolic perspective. More specifically, it explicitly recognizes the importance of both property rights and regulation while also refusing to adopt an explicit standard that would resolve the conflict in favor of one set of values at the expense of the other. Instead, the court simply identifies vague factors to be used in an ad hoc inquiry into "justice and fairness."

A. Reasons for Approach: Complexity and Lack of Independent Definition of Property

The recognition of the lack of a "set formula" and the adoption of the ad hoc balancing approach do not necessarily reflect a deliberate choice to prefer symbolism over management. Nor has the lack of a test resulted from a lack of effort[24] or intelligence[25] on the part of judges and scholars. Instead, the adoption of the *Penn Central* balancing test should be viewed as a pragmatic acceptance of the problems resulting from the complexity and diversity of the circumstances involving regulation and from the lack of an objective test or definition of property rights that is independent from the positive law.

The complexity of land use regulation is clear from a review of the types of issues that the Supreme Court has addressed in deciding whether a regulatory taking has occurred.[26] These claims involve not

24. "Thousands of square miles of our nation have been deforested to provide the paper to print the thousands—probably hundreds of thousands—of books, articles, notes, comments, seminar papers, newsletters, etc., dealing with *regulatory takings*." Julian Conrad Juergensmeyer, *Florida's Private Property Rights Protection Act: Does It Inordinately Burden the Public Interest?*, 48 FLA. L. REV. 695, 696 (1966); *see also* CAROL M. ROSE, PROPERTY AND PERSUASION 49 (1994) ("Scholars have joined judges in spilling a great deal of ink over takings . . . ."). The scale of the scholarly effort is reflected by the following: A WestLaw Keycite search in February 2001 for *Lucas v. South Caroling Coastal Council*, 505 U.S. 1003 (1992), indicates 2,397 citations, of which 658 were cases and 1,730 were secondary sources, mostly articles. For *Penn Central Transportation Co. v. New York City*, there were 3,140 citations, of which 1,216 were cases and 1,836 were secondary sources.

25. "The judges and scholars who have addressed the issue in the twentieth century are as intelligent a group as is likely to address it in the twenty-first. The takings issue is muddy because it is inherently hard to deal with, not because the people who have addressed it haven't been smart enough to see the light." WILLIAM A. FISCHEL, REGULATORY TAKINGS: LAW, ECONOMICS, AND POLITICS 325 (1995).

26. For a discussion of a random sample of regulatory takings cases that indicates the diversity of issues involved, see *infra* notes 209-16 and accompanying text.

only zoning[27] and environmental schemes,[28] but also concerns ranging from rent control and other restrictions on landlords[29] to prohibitions on business activities.[30] Moreover, within each category, there may be important doctrinal differences in addressing the different ways that regulations can affect land.[31] Despite such complexity, it might be possible to develop a set of clear rules if there were an agreed upon standard of property rights that could be used to determine when a land use by an owner is improperly limited by regulation.

One possible standard is state law because property rights are generally defined by the positive law of each state. However, although rights under state law may appear to be relatively objective and easily determined, this is not the case. These property rights have always been subject to limits because one owner's use of property may affect another. Thus, an owner's rights under state law are (and always have been) subject to a governmental exercise of the police power to determine whether any particular use of the property must be limited to prevent "harm" to the public good or to another person. Moreover, these limits have never been static because, in order to perform this preventive function, the state must be able to address changes in circumstances by imposing new limits or by using existing limits in new ways. These changes can have a negative impact on the value of the property subject to the new limit. In theory, the government could be required to compensate for this impact. However, the government could not use the police power effectively if it were required to compensate owners every time the value of their property is reduced in

27. *See, e.g.*, Penn Cent. Transp. Co. v. New York City, 438 U.S. 104 (1978) (upholding the application of a historic preservation ordinance); Nectow v. City of Cambridge, 277 U.S. 183 (1928) (striking down the application of a zoning ordinance); Village of Euclid v. Ambler Realty Co., 272 U.S. 365 (1926) (upholding a zoning scheme).

28. *See, e.g.*, Lucas v. S.C. Coastal Council, 505 U.S. 1003 (1992) (finding a possible taking).

29. *See, e.g.*, Yee v. City of Escondido, 503 U.S. 519 (1992) (holding that a rent control ordinance for mobile home parks was not a taking); Pennell v. City of San Jose, 485 U.S. 1 (1988) (holding that a taking claim was premature, but noting that rent control was not necessarily a taking); Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419 (1982) (holding that the requirement that landlords allow installation of cable by a cable television company was a taking).

30. *See, e.g.*, Mugler v. Kansas, 123 U.S. 623 (1887) (upholding the prohibition of manufacture or sale of alcohol).

31. For example, the Supreme Court has held that use restrictions in a zoning scheme are treated differently from "exactments." *See* Dolan v. City of Tigard, 512 U.S. 374 (1994); *see also* City of Monterey v. Del Monte Dunes at Monterey, Ltd., 526 U.S. 687, 702 (1999) ("[W]e have not extended the rough-proportionality test of *Dolan* beyond the special context of exactions—land-use decisions conditioning approval of development on the dedication of property to public use."). Exactments are discussed further in notes 66-68 and accompanying text.

value.[32] Therefore, compensation is not required in most cases of a change in state law. In short, property rights under state law are vague, and it is permissible to impose new limits without compensation.

There is a risk that the government's ability to exercise the police power without having to compensate will result in property rights becoming simply a matter of "positive law"—i.e., rights will be simply what the legislature or courts say they are.[33] Such a result is contrary to the notion that the Fifth Amendment's Takings Clause is designed to limit the government and thus protect property owners from government abuse of the owners' "rights." Given the Takings Clause, "the government does not have unlimited power to redefine property rights."[34] Thus, an independent, objective test for identifying rights is needed so that property rights can serve as a limit on governmental use of the police power to enact positive law. Unfortunately, there is no such objective standard.[35] More specifically, there is no agreement on a standard or theory of property rights that is sufficiently precise to serve as a test for identifying limits on government power.

The standards that have been agreed upon are so vague that they do not provide a test for distinguishing a regulatory taking from other regulatory action under the police power. For example, it is possible to get widespread agreement on the principle that liberty can be restricted in order to prevent harm to others.[36] The common law relied on this shared view about limiting harm in adopting the "rule" that the right to use land is subject to the maxim, *sic utere tuo ut alienum non lædas* ("[O]ne should use his own property in such a manner as not to injure that of another."[37]). In the takings context, the Supreme Court has noted:

> Long ago it was recognized that "all property in this country is held under the implied obligation that the owner's use of it shall not be injurious to the com-

32. *See, e.g.*, Pa. Coal Co. v. Mahon, 260 U.S. 393, 413 (1922) ("Government hardly could go on if to some extent values incident to property could not be diminished without paying for every such change in the general law. As long recognized, some values are enjoyed under an implied limitation and must yield to the police power.").

33. *See, e.g.*, *Lucas*, 505 U.S. at 1034 (Kennedy, J., concurring) ("There is an inherent tendency towards circularity . . . 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.").

34. Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419, 439 (1982).

35. For a critique of recent "objective" formulations by the Supreme Court, see *infra* notes 119-30 and accompanying text.

36. This agreement underlies the continued appeal of John Stewart Mills' classic essay, ON LIBERTY.

37. BLACK'S LAW DICTIONARY 1380 (6th ed. 1990).

munity," and the Takings Clause did not transform that principle to one that requires compensation whenever the State asserts its power to enforce it.[38]

Despite the long tradition of using such maxims concerning harm to others, they have been widely recognized as vague and question-begging because they do not provide guidance until one first answers the question: What is an injury?[39] For example, if Ramona Rocker likes to listen to loud music in her yard, and Gerald Green loves to listen to the birds in his yard, the *sic utere* maxim is useless until one first determines whether Rocker "injures" Green by playing music that is so loud Green cannot "enjoy" the singing of the birds.[40] Unless there is an objective way to answer such questions, *sic utere* cannot help us determine whether an owner has a "right" to a use that may be taken by a regulatory limit on that use.

The problem of identifying rights is further complicated in the regulatory takings context by the "denominator problem," which arises whenever one wants to determine the extent of the impact of a regulation on the owner's rights. For example, if a parcel is rezoned from commercial to residential, has the owner suffered a "total" loss of his right to use the land for commercial use or a "partial" loss of one among many possible uses of the land?[41] In terms of fractional analysis, the numerator in this example is the loss of commercial use, and the issue is whether the denominator is commercial use alone or all possible uses.

Three types of denominator problems arise. The first parallels the rezoning question above and involves the question of whether a particular use is a distinct legal interest that, because of this distinct status, must serve as the denominator by itself. Where this is an issue, the problem of circularity in terms of the positive law arises again. If positive law is used to determine whether an interest is distinct (and thus

38. Keystone Bituminous Coal Ass'n v. DeBenedictis, 480 U.S. 470, 491-92 (1987) (citations omitted); *see also* Fertilizing Co. v. Hyde Park, 97 U.S. 659, 667-68 (1878) (stating that the restraint of nuisances through the exercise of the police power "rests upon the fundamental principle that every one shall so use his own [property] as not to wrong and injure another. . . . 'Every right, from absolute ownership in property down to a mere easement, is purchased and holden subject to the restriction that it shall be so exercised as not to injure others.'" (quoting Coates v. Mayor of New York, 7 Cow. 585, 605 (N.Y. 1827))).

39. *See, e.g.*, Joseph L. Sax, *Takings and the Police Power*, 74 YALE L.J. 36, 48-50 (1964) (criticizing "noxious use" analysis on the ground that it is question-begging).

40. *See, e.g.*, F. Patrick Hubbard, *Taking Persons Seriously: A Jurisprudential Perspective on Social Disputes in a Changing Neighborhood*, 48 U. CIN. L. REV. 15, 19-21 (1979) (using a similar hypothetical in the context of discussing the difficulty of awarding entitlements to land use).

41. *See, e.g.*, *Lucas*, 505 U.S. at 1065-66 (Stevens, J., dissenting) (phrasing the denominator issue in terms of rezoning from multifamily residential to single-family residential). Such rezoning is not treated as a total loss. *See infra* note 151 and accompanying text.

is the denominator), there will be no independent source of rights to serve as a limit on governmental regulation.[42] The second type of denominator problem arises from the ability to subdivide land. If a wetlands regulation prohibits the filling of a bog that constitutes one acre of a five acre parcel, is the denominator one acre (the bog) or five acres (the total parcel)?[43] The third type of denominator is temporal. If a restriction is in effect for only a specific length of time—e.g., one year—is the denominator that year or some longer period—e.g., a "useful life of the investment"?[44] The Supreme Court summarized its inability to develop a test to resolve denominator problems as follows:

42. Because a state's positive law of property interests can be viewed as "distinct" from its positive law of regulatory limits, it is tempting to think that a state's law concerning "property interests" can provide an independent basis for identifying distinct property interests that will serve as the denominator. Thus, for example, rezoning from commercial to residential is generally treated as an "easy" example of the denominator problem because the positive law of the states does not treat the right to commercial use as a distinct interest. *See infra* note 151 and accompanying text. However, what if a state legislature, court, or agency disagrees with a federal court's characterization of the interest defined by state law? *See, e.g.*, Machipongo Land & Coal Co. v. Commonwealth, 719 A.2d 19, 29 n.24 (Pa. Commw. Ct. 1998) (suggesting that the Supreme Court may have been mistaken in *Keystone* about the law of Pennsylvania). Can the Supreme Court "reverse" a state supreme court if it disagrees with the state supreme court's interpretation of the state's law? *See* Phillips v. Wash. Legal Found., 524 U.S. 156, 167 (1998) ("[A] State may not sidestep the Takings Clause by disavowing traditional property interests long recognized under state law."); Stevens v. City of Cannon Beach, 510 U.S. 1207, 1211 (1994) (Scalia, J., dissenting from denial of certiorari) ("Our opinion in *Lucas* . . . would be a nullity if anything that a state court chooses to denominate 'background law'—regardless of whether it is really such—could eliminate property rights."); *Lucas*, 505 U.S. at 1032 n.18 ("We stress that an affirmative decree eliminating all economically beneficial uses may be defended only if an *objectively reasonable* application of *relevant* precedents would exclude those beneficial uses in the circumstances in which the land is presently found." (emphasis added)); McDonald, Sommer, & Frates v. Yolo County, 477 U.S. 340, 352 n.8 (1986) (noting that the Supreme Court "must respect" the decision of a state court "on matters of local law" but not indicating whether the Supreme Court could *respect*fully disagree with a state court); William W. Fisher III, *The Trouble with* Lucas, 45 STAN. L. REV. 1393, 1407 (1993) ("We can . . . expect to see the Supreme Court reexamining and sometimes overturning state courts' interpretations of their own states' common law."). Even if there is agreement between the state and the United States Supreme Court as to the prior law, can a state change its positive law about property interests? There is no "objective" standard to answer these questions. Thus, the positive law of each state provides only limited guidance. For further discussion of this point, see *infra* notes 149-50 and accompanying text.

43. *See, e.g., Lucas*, 505 U.S. at 1016 n.7 (recognizing the uncertainty about treatment of regulation requiring "a developer to leave 90% of a rural tract in its natural state"); John E. Fee, Comment, *Unearthing the Denominator in Regulatory Taking Claims*, 61 U. CHI. L. REV. 1535 (1994) (analyzing the "denominator" problem).

44. For further discussion of this point, see *infra* notes 153-64 and accompanying text.

"Unsurprisingly, this uncertainty regarding the composition of the denominator in our 'deprivation' fraction has produced inconsistent pronouncements by the Court."[45]

B. Effects of Approach: Delegation and Uncertainty

Penn Central concluded there was no independent test for identifying a taking and adopted an ad hoc balancing approach for identifying regulatory takings. Given the problems of devising a standard, this balancing scheme may be the best approach available. Nevertheless, it is important to note that the use of such an ad hoc balancing test has two important effects.

First, it results in a considerable delegation of substantive power to the lower courts. Only proper weighting can result in correct substantive decisions in a balancing scheme. Therefore, given the small number of cases that can be reviewed by the Supreme Court, the *Penn Central* approach will provide substantively "correct" answers only if the lower courts give the "proper" weight to each of these vague factors. As a result, this approach necessitates a reliance on the capability of the lower courts to make the value judgments necessary to determine the proper weight to assign to the competing factors. Moreover, because of the restrictions on bringing takings claims concerning state programs in the federal courts,[46] the ad hoc balancing test will generally be applied by state courts in such cases. As a result, state courts will be determining the content of the constitutional right under the takings clause because they will be responsible for assessing the relative values of property rights vis-à-vis regulation in the circumstances at issue in a particular case involving the state's regulatory program.

The evaluation of this impact depends partly upon one's views about the functions of the Supreme Court. If the view is that the Court should fulfill its managerial function by providing a scheme to produce "right answers" concerning a fundamental constitutional right, the delegation to such disparate lower courts can be criticized on the ground that it offends the rule of law[47] because of the risks of arbitrariness and a high rate of errors. However, if the function of opinions in this area is seen as affirming competing values and providing legitimacy for government regulation by utilizing a process for resolving the conflict that satisfies the rule of law because the litigants will accept it as "fair," then the delegation can be praised as an efficient use of scarce judicial resources.[48]

45. *Lucas*, 505 U.S. at 1016-17 n.7.
46. *See supra* note 11 and accompanying text.
47. *See supra* note 15 and accompanying text.
48. *See, e.g.*, Michelman, *supra* note 7, at 1629 ("[B]alancing—or, better, the judicial practice of situated judgment or practical reason—is not law's antithesis but a

The second effect of using the balancing approach is that owners and regulators will have considerable uncertainty about regulatory takings. This uncertainty is inevitable if the various lower courts do not agree on the relative weights of the competing values to be balanced. Moreover, even if the various lower courts were likely to reach the same result in applying the balancing test to a particular set of facts, the regulators and owners would have problems in predicting this result beforehand. The effects of this uncertainty can be severe because litigation in this area is both expensive and lengthy.[49] As with the effect of delegation, one's evaluation of uncertainty depends, in part, upon whether one is viewing the function of opinions in terms of management or symbol.

Not surprisingly, persons with strong views about the relative importance of the two competing value schemes may prefer a managerial scheme, but only so long as it favors their preferred scheme. For example, the defenders of a strong view of property rights have been particularly critical of the results of using the *Penn Central* test. One reason for this criticism is their view that courts utilizing the balancing test do not give property rights enough value in comparison to regulation.[50] Another reason for this criticism is that delegation and uncertainty can have a greater negative impact on owners than on regulators because it is often easier and cheaper for regulators to adopt new rules than it is for owners to fight them. Even if a lower court does determine that a taking has occurred, the government can reduce its losses by withdrawing the regulation and thus be liable, at most, for only a temporary taking. Moreover, ripeness rules can give regulators at least one "free shot" at the owner, who may be required to revise his plans several times before a court will consider a taking claim.[51] Finally, given these problems and given the costs and uncertainty of litigation, an owner may simply decide that it is not worth the fight. This decision not to fight is particularly likely where the stakes are relatively small or where time is important to profitability.

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part of law's essence."). *Cf., e.g.*, KENNETH CULP DAVIS, DISCRETIONARY JUSTICE: A PRELIMINARY INQUIRY (1969) (arguing that discretion that is confined, structured, and checked is the best approach to decision-making where rigid rules are inappropriate); H.L.A. HART, THE CONCEPT OF LAW 91-96, 120-32 (1961) (arguing that law is inherently open textured and that one type of law consists of rules empowering people to make decisions—for example, "rules of adjudication"); JOHN RAWLS, A THEORY OF JUSTICE 74-76 (rev. ed. 1999) (discussing the importance of procedural justice where there is no independent standard of substantive justice or no way to determine the answer based on an accepted independent standard).

49. *See* Hubbard, *supra* note 7, at 107-08.

50. *See, e.g.*, RICHARD A. EPSTEIN, TAKINGS: PRIVATE PROPERTY AND THE POWER OF EMINENT DOMAIN (1985); MARK L. POLLOT, GRAND THEFT AND PETIT LARCENY: PROPERTY RIGHTS IN AMERICA (1993).

51. *See supra* note 11 and accompanying text.

Because of these reasons, a test that is "correct" in the sense that it protects rights adequately and is sufficiently precise to enable the lower courts and regulators to identify regulatory takings correctly is viewed as extremely important to those who view the right to compensation for takings as essential to liberty and to efficiency.[52] In addition to a test that will draw the line correctly, defenders of a strong version of property rights also want the line to be defined with sufficient precision that it can be identified in a predictable manner that is both administratively simple and subject to minimal opportunities for administrative abuse. These concerns for clarity, predictability, and administrative efficiency and fairness have been major reasons, along with the concern for "correct" answers, given in support of the national "property rights" movement for influencing judicial decisions[53] and for adopting takings statutes that have clear, easily applied rules favoring the right to compensation.[54]

III. *LUCAS* AND THE CATEGORICAL TOTAL TAKING TEST: SYMBOL IN THE GUISE OF MANAGERIAL CATEGORIES

Though flexible enough to address the complexity of regulation and the lack of consensus on values, the ad hoc balancing approach has serious shortcomings as a managerial technique, particularly if one is concerned with providing a predictable scheme for getting the "right answer" in order to protect property rights from "excessive" regulation. Consequently, it is not surprising that, in other contexts, the Supreme Court has rejected the approach of using ad hoc balancing and has opted instead for categorical approaches to protect rights.[55] In

52. *See, e.g.*, Lynch v. Household Fin. Corp., 405 U.S. 538, 552 (1972) ("[T]he dichotomy between personal liberties and property rights is a false one. Property does not have rights. People have rights. The right to enjoy property without unlawful deprivation, no less than the right to speak or the right to travel, is in truth a 'personal' right . . . . [A] fundamental interdependence exists between the personal right to liberty and the personal right in property. Neither could have meaning without the other. That rights in property are basic civil rights has long been recognized."); Hubbard, *supra* note 7, at 110-13 (1998) (discussing the libertarian perspective on land rights).

53. *See, e.g.*, POLLOT, *supra* note 50, at 161-82 (setting forth litigation strategy); Douglas T. Kendall & Charles P. Lord, *The Takings Project: A Critical Analysis and Assessment of the Progress So Far*, 25 B.C. ENVTL. AFF. L. REV. 509 (1998).

54. *See, e.g.*, Hubbard, *supra* note 7, at 109-12 (discussing arguments for property rights reform).

55. For discussion of the need for a categorical test in assessing the voluntariness of confessions, see *supra* note 16 and accompanying text. The Supreme Court has also emphasized the problems with the ad hoc approach in applying the First Amendment to common law defamation rules:

> [T]he balance between the needs of the press and the individual's claim to compensation for wrongful injury might be struck on a case-by-case basis. . . . "[I]t might seem, purely as an abstract matter, that the most

1992, the Court attempted to provide more clarity and predictability in the takings area by identifying two limited per se categories of regulatory taking in *Lucas v. South Carolina Coastal Council*.[56] This approach could be useful from a managerial perspective because even limited categorical tests can help manage and control the lower courts in at least some cases.

However, this managerial effect will not happen unless the categories are clearly defined. If they are not, then *Lucas* is more properly viewed as a symbolic opinion. The following sections argue that, because of the difficulty of identifying regulatory takings and the limits on the ability of the Supreme Court to articulate clear per se tests in this area, *Lucas* is factually narrow and conceptually vague. Consequently, the case does not clearly guide and limit lower courts. Instead, *Lucas* performs the symbolic function of strongly endorsing the value of property rights and criticizing regulatory excess[57] while also allowing regulation to restrict the use of property in a wide range of circumstances.

A. *Lucas v. South Carolina Coastal Council*

Lucas notes that, in dealing with a challenge that a regulation results in a taking, the Supreme Court has generally eschewed any "'set formula' for determining how far is too far" and has, instead, preferred

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> utilitarian approach would be to scrutinize carefully every jury verdict in every libel case, in order to ascertain whether the final judgment leaves fully protected whatever First Amendment values transcend the legitimate state interest in protecting the particular plaintiff who prevailed." But this approach would lead to unpredictable results and uncertain expectations, and it could render our duty to supervise the lower courts unmanageable. Because an *ad hoc* resolution of the competing interests at stake in each particular case is not feasible, we must lay down broad rules of general application.

Gertz v. Robert Welch, Inc., 418 U.S. 323, 343-44 (1979) (quoting Rosenblum v. Metromedia, Inc., 403 U.S. 29, 63 (1971) (Harlan, J., dissenting)). For an argument that there are important reasons for differences in approach between speech and takings, see Page, *supra* note 7, at 199-204.

56. 505 U.S. 1003 (1992). Only five judges joined the majority opinion. Justice Kennedy concurred in the result, but disagreed as to the standard to be applied. *See infra* notes 109-12. Justice Souter was of the view that the writ of certiorari in *Lucas* should not have been granted. *See Lucas*, 505 U.S. at 1076-78 (statement of Souter, J.). Justices Blackmun and Stevens dissented on the merits. *See id.* at 1036-61 (Blackmun J., dissenting), 1061-76 (Stevens, J., dissenting).

57. *See, e.g.*, Fisher, *supra* note 42, at 1408-09 (noting the pattern of attacks by Scalia on regulators in *Lucas* and other opinions); Richard J. Lazarus, *Putting the Correct "Spin" on* Lucas, 45 STAN. L. REV. 1411, 1419-20 (1993) (arguing that the majority in *Lucas* felt that regulatory actions were resulting in "horrible" action and that therefore a "win" for a landowner was needed); *infra* notes 269-72 and accompanying text.

to "engag[e] in . . . essentially ad hoc, factual inquiries."[58] However, *Lucas* also asserts that, where real property is involved,[59] the Supreme Court has held:

> [There are] at least two discrete categories of regulatory action [that are] compensable without case-specific inquiry into the public interest advanced in support of the restraint. The first encompasses regulations that compel the property owner to suffer a physical "invasion" of his property. In general (at least with regard to permanent invasions), no matter how minute the intrusion, and no matter how weighty the public purpose behind it, we have required compensation. . . .
>
> The second situation in which we have found categorical treatment appropriate is where regulation denies all economically beneficial or productive use of land.[60]

The dispute in *Lucas* involved two lots on a coastal barrier island that could not be developed because of a statutory scheme designed to protect the shore by prohibiting new construction between the beach and an administratively determined erosion "baseline."[61] Lucas had purchased the lots before the enactment of the regulatory scheme, and the trial court held that the lots, which were largely located between the shoreline and the erosion baseline, had become "valueless" because of the development prohibition.[62] Given this total effect on the value of the land, the Supreme Court held that a taking existed under the second category of per se takings. The case was remanded to the South Carolina Supreme Court for a determination of whether preexisting background principles of nuisance and property law prohibited the construction of the house.[63] On remand, the South Carolina Su-

58. 505 U.S. at 1015 (quoting Penn Cent. Transp. Co. v. New York City, 438 U.S. 104, 124 (1978)).

59. *See Lucas*, 505 U.S. at 1027-28 (indicating greater protection for land vis-à-vis personal property, which can constitutionally suffer a total loss in value without compensation). For analyses of reasons for treating land differently, see, for example, Paul J. Boudreaux, *The Quintessential Best Case for "Takings" Compensation—A Pragmatic Approach to Identifying the Elements of Land-Use Regulations That Present the Best Case for Government Compensation*, 34 SAN DIEGO L. REV. 193, 214-23 (1997) (supporting difference); Jeffrey A. Frieden, *Towards a Political Economy of Takings*, 3 WASH. U. J.L. & POL'Y 137 (2000) (questioning reasons for difference).

60. *Lucas*, 505 U.S. at 1015. *Lucas* involved the second situation. As an example of the first type of per se taking, *Lucas* refers to *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982). The *Lucas* opinion asserts that *Loretto* holds the following: "New York's law requiring landlords to allow television cable companies to emplace cable facilities in their apartment buildings constituted a taking, . . . even though the facilities occupied at most only 1.5 cubic feet of the landlords' property . . . ." *Lucas*, 505 U.S. at 1015.

61. S.C. CODE ANN. § 48-39-290(A) (Law. Co-op. Supp. 2000); *Lucas*, 505 U.S. at 1006-09.

62. *See Lucas*, 505 U.S. at 1006-07.

63. *See id.* at 1031-32; *infra* notes 96-97 and accompanying text.

preme Court held that no common law prohibition applied to the proposed house and that a taking had occurred.[64]

B. Vagueness of the Test

Regardless of one's views as to whether a regulatory taking occurs in a fact situation like *Lucas*, neither of the per se categories identified by the majority opinion in *Lucas* provides a "set formula" for even a limited class of regulatory takings. Though this Article focuses on the problems with the total takings test, it should be noted that the first category—physical invasions—also fails to provide a formula because many physical invasions are *not* viewed as takings.[65] For example, "exactments" as a condition of development include a wide range of constitutionally permissible dedications of land.[66] *Dolan v. City of Tigard*[67] recognizes that, as a condition for permission to expand a retail store, a city may "exact" a dedication of land from a land owner so long as the city makes "some sort of individualized determination that the required dedication is related both in nature and extent to the impact of the proposed development."[68] Moreover, the physical invasion test is limited to the permanent "physical occupation of a portion of . . . [the property] by a third party."[69] Thus, this categorical limit on regulation has very little impact in terms of protecting private property rights because the limit does not address a wide range of rules that, for example: (1) permit nonpermanent invasions,[70] (2) effectively require an owner to dedicate land and resources to a public good (for example, building setbacks and landscaping requirements for parking lots),[71] or (3) require a landlord to install things like utility

64. Lucas v. S.C. Coastal Council, 424 S.E.2d 484 (S.C. 1992). The taking was viewed as a temporary, rather than permanent, taking because a variance scheme had been adopted during the litigation and this scheme could allow Lucas to build. *See id.* at 486; *Lucas*, 505 U.S. at 1010-14. Following the decision by the South Carolina Supreme Court, the state purchased the lots from Lucas and then sold them. *See infra* note 205. For a discussion of subsequent litigation concerning the lots, see *infra* note 205 and accompanying text.

65. *See* FISCHEL, *supra* note 25, at 320.

66. *See, e.g.*, DANIEL R. MANDELKER, LAND USE LAW §§ 9.11-9.23 (4th ed., Lexis Law Publ'g 1997) (describing on- and off-site improvements, impact fees, and other considerations that municipalities may "exact" from builders).

67. 512 U.S. 374 (1994).

68. *Id.* at 391.

69. Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419, 440 (1982).

70. *See id.* at 435 n.12 ("The permanence and absolute exclusivity of a physical occupation distinguish it from temporary limitations on the right to exclude. Not every physical *invasion* is a taking."), 441 ("We affirm the traditional rule that a *permanent* physical occupation of property is a taking." (emphasis added)). *Cf.* PruneYard Shopping Ctr. v. Robins, 447 U.S. 74, 88 (1980) (holding that a shopping center must accommodate a person exercising the right of free speech).

71. *See, e.g.*, Gorieb v. Fox, 274 U.S. 603 (1927) (upholding setback requirements challenged as a denial of due process and equal protection); Ehrlich v. City of

connections for tenants at his expense.[72] Thus, the physical invasion categorical limit is largely symbolic because it endorses private property rights without substantially limiting physical invasions.

1. *Recognition of Problems in* Lucas

The opinions in *Lucas* recognize that applying the categorical "total taking" test will require case-by-case adjudication and that there will be problems of vagueness in this application. One source of vagueness is the denominator problem discussed above.[73] The majority opinion concedes that the issue of whether a taking is "total" involves denominator problems and that the Court has not identified a test for addressing these problems.[74] The majority explicitly notes that, given this lack of a test, "the rhetorical force of our 'deprivation of all economically feasible use' rule is greater than its precision."[75] In addition, it was clear to the Court that, even if the denominator problems were resolved, there are problems with determining whether an owner had lost "all economically beneficial or productive use of land." Indeed, several justices question whether Lucas' land in fact

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Culver City, 911 P.2d 429, 450 (Cal. 1996) (landscaping); Parking Ass'n of Ga., Inc. v. City of Atlanta, 450 S.E.2d 200, 203 n.3 (Ga. 1994) (landscaping); Daley v. Blaine County, 701 P.2d 234, 237-38 (Idaho 1985) (holding no taking occurred). *Cf.* Dolan v. City of Tigard, 512 U.S. 374, 385 (1994) (distinguishing physical occupation resulting from "legislative" actions vis-à-vis "adjucative" actions). Justices Thomas and O'Connor dissented from the denial of certiorari in *Parking Ass'n of Georgia* noting that "[t]he lower courts should not have to struggle to make sense of this tension in our case law." *Parking Ass'n of Ga.*, 515 U.S. at 1118 (Thomas, J., dissenting).

72. *See Loretto*, 458 U.S. at 440. Ironically, the opinion in *Loretto* notes that, although the state was required to compensate landlords for the physical invasion resulting from a regulation requiring the installation of coaxial cable by the cable company in apartment buildings, it would be a "different question" if the landlord were required to install the cable for his tenants at his own expense. *Id.* at 440 n.19. The symbolic nature of *Loretto* is also reflected in the amount of compensation to be received by the landlords. *See id.* at 437 n.15 (noting that state commission had established a presumptive award of $1); Loretto v. Teleprompter Manhattan CATV Corp., 446 N.E.2d 428, 434 (N.Y. 1983) ("[The] amount receivable by any single property owner is small . . . ."); *see also* Loretto v. Group W. Cable, 522 N.Y.S.2d 543 (App. Div. 1987) (denying Loretto's claim for attorney fees under 42 U.S.C. §§ 1983 and 1988 on the grounds that Loretto had not applied for compensation and, therefore, had not been denied the constitutional right to compensation). *But see Loretto*, 458 U.S. at 437 n.15 (noting that arguments concerning value were "speculative").

73. *See supra* notes 41-45 and accompanying text.

74. *See Lucas*, 505 U.S. at 1016 n.7. In his dissent, Justice Blackmun recognized that there is no "objective" way to determine what the denominator should be. *Id.* at 1054 (Blackmun, J., dissenting). Justice Stevens criticized the lack of a definition for the property interest that will serve as the denominator. *Id.* at 1065-66 (Stevens, J., dissenting). For discussion of this problem in terms of the facts of *Lucas*, see *infra* note 17 and accompanying text.

75. *Lucas*, 505 U.S. at 1016 n.7.

lost all economic value.[76] Finally, a total loss of the economic value of the owner's land is not a taking under *Lucas* if the proscribed uses were never "a part of [the owner's] title to begin with."[77] Because of this limit, the "total loss" category of per se taking cannot be applied until after one has determined the uses that were permitted prior to the denial of development under the challenged regulation. As indicated below,[78] the courts have adopted several different approaches to make this determination. This diversity in approach was inevitable because *Lucas* does not provide a clear standard for making the determination.

2. *Treatment of Problems in* Lucas

a. *Summary*

The majority was able to sidestep these problems in *Lucas* by a superficial treatment of the facts and by a remand to the South Carolina Supreme Court. The problem of identification of the property interest involved was avoided by simply accepting the label used in Lucas' pleadings—the "fee simple interest"—rather than, for example, the right to build a house or a bulkhead—and adopting the view that a taking occurs if, as a result of the regulation, the fee simple interest is "left . . . without economic value."[79] Denominator problems were also avoided by ignoring the history of the development of Isle of Palms. Lucas was a "contractor, manager and part owner of the Wild Dune development on the Isle of Palms."[80] "In the late 1970s, Lucas and others began extensive residential development of the Isle of Palms"[81] and "[t]oward the close of the development cycle for one residential subdivision known as 'Beachwood East,' Lucas in 1986 purchased the two lots at issue in this litigation for his own account."[82] These two

76. *See infra* notes 85-88 and accompanying text.
77. *Lucas*, 505 U.S. at 1027.
78. *See infra* notes 172-93 and accompanying text. For additional critiques of this aspect of *Lucas*, see Fisher, *supra* note 42, at 1407 (arguing that nuisance law is too vague to clarify takings doctrine); William Funk, *Revolution or Restatement? Awaiting Answers to* Lucas' *Unanswered Questions*, 23 ENVTL. L. 891, 898 (1993) (arguing that reliance on state nuisance doctrines may lead to divergent applications of the takings doctrine in different states); John A. Humbach, *Evolving Thresholds of Nuisance and the Takings Clause*, 18 COLUM. J. ENVTL. L. 1, 13 (1993) (arguing that adoption of a common law nuisance standard provides few "objective parameters" for legislative conduct); John A. Humbach, *"Taking" the Imperial Judiciary Seriously: Segmenting Property Interests and Judicial Revision of Legislative Judgments*, 42 CATH. U. L. REV. 771, 815-16 (1993) (arguing that adoption of a nuisance standard usurps the proper legislative role of determining regulatory legitimacy).
79. *Lucas*, 505 U.S. at 1016 n.7.
80. *Id.* at 1038 (Blackmun, J., dissenting).
81. *Id.* at 1008.
82. *Id.*

lots were "two of the last four pieces of vacant property in the development."[83] Given Lucas' role in the total development, it is not clear why the Court simply accepted the two lots as the denominator rather than a larger tract. If a larger tract had been chosen, there may not have been a total taking.

The majority avoided the problem of determining whether all the value of the two lots was eliminated by accepting the trial court's questionable finding of fact that the land had been rendered valueless.[84] Justice Kennedy's concurring opinion notes that he accepts this finding, though he finds it "curious" and that he had "reservations" about accepting it.[85] Justice Blackmun's dissent notes that this finding is "implausible"[86] and "almost certainly erroneous."[87] Justice Souter notes that the finding is "highly questionable."[88] As with the unexplored development history, it seems likely that most defendants in a case involving a total taking claim will offer evidence of some value remaining in the land at issue regardless of how restrictive the regulation at issue.[89]

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83. *Id.* at 1038 (Blackmun, J., dissenting).

84. *See id.* at 1020 n.9. This approach to findings is not unprecedented in addressing the conflict between property rights and land use regulations. For example, *Nectow v. City of Cambridge*, 277 U.S. 183 (1928), relied on a master's express finding that inclusion of a parcel of property in one zoning district rather than another did not promote the health, safety, convenience, or welfare of the city and, therefore, struck down the inclusion as a denial of due process. This approach enabled the court to endorse property rights by the use of a "categorical" test applicable to cases where no public interest was served without substantially undermining the endorsement of zoning two years earlier in *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926).

85. *Lucas*, 505 U.S. at 1034 (Kennedy, J., concurring).

86. *Id.* at 1036 (Blackmun, J., dissenting).

87. *Id.* at 1044 (Blackmun, J., dissenting) (noting that Lucas still had the right to exclude and that he could "picnic, swim, camp in a tent, or live on the property in a movable trailer"). It should be noted that the record in *Lucas* did not indicate whether Lucas could use a tent or trailer. For a discussion of the lack of evidence on the effect of restrictive covenants on Lucas' use of the land, see *infra* note 89 and accompanying text.

88. *Id.* at 1076 (Souter, J., statement that writ of certiorari should have been dismissed as having been granted improvidently).

89. *See infra* notes 166-67 and accompanying text (discussing both pre- and post-*Lucas* use of recreational use in assessing the impact of regulation on the value of the land involved). The attorney for the state in *Lucas* stated at trial that he did not know what effect the restrictive covenants on Isle of Palms might have on what could be built on the site and offered no evidence as to other uses that might be economically valuable—for example, he offered no evidence of recreational value. Instead, the state relied exclusively on expert testimony concerning "salvage value," which the expert said was the basis for answering that the property had some value. This expert testimony was excluded because it was admittedly "speculative." *See* DAVID LUCAS, LUCAS V. THE GREEN MACHINE 107-09, 127-34 (1995) (containing selections from trial transcript).

Because of the trial court's finding, *Lucas* also avoided the problem of determining the proper approach where a regulation results in a very substantial, but less than total, reduction in value. The majority opinion often uses a term like "all" value or "total" loss to reflect this finding.[90] However, the opinion also uses descriptive terms like "economically beneficial,"[91] "economically valuable,"[92] and "economically viable"[93] to describe the uses that are totally lost. It is not clear whether these alternative terms indicate that a loss in value that is less than total, but approaches totality, falls within the per se test of *Lucas* rather than within the balancing test identified by *Penn Central*.[94] The majority opinion also suggests uncertainty on this issue: "[T]he landowner whose deprivation is one step short of complete . . . *might* not be able to claim the benefit of our categorical formulation."[95]

The problem of determining whether the right to build a residence on the lot was a part of Lucas' title prior to the prohibition was addressed by remanding the case to the South Carolina Supreme Court with this instruction:

> [A]s it would be required to do if it sought to restrain Lucas in a common-law action for public nuisance, South Carolina must identify background principles of nuisance and property law that prohibit the uses he now intends in the circumstances in which the property is presently found. Only on this showing can the State fairly claim that, in proscribing all such beneficial uses, the Beachfront Management Act is taking nothing.[96]

The issue was then resolved by the South Carolina Supreme Court, which ruled in Lucas' favor solely on the basis of this conclusory analysis:

> We have reviewed the record and heard arguments from the parties regarding whether Coastal Council possesses the ability under the common law to prohibit Lucas from constructing a habitable structure on his land. Coastal Council has not persuaded us that any common law basis exists by which it could restrain Lucas's desired use of his land; nor has our research uncovered any such common law principle.[97]

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90. *See Lucas*, 505 U.S. at 1015 ("all economically beneficial or productive use"), 1017 ("total deprivation of beneficial use"), 1018 ("all economically beneficial uses"), 1019 ("'all' economically beneficial uses"), 1020 ("valueless"), 1028 ("all economically valuable use").

91. *Id.* at 1015, 1017, 1019.

92. *Id.* at 1028.

93. *Id.* at 1016 (quoting Agins v. City of Tiburon, 447 U.S. 255, 260 (1980)), 1016 n.6 (quoting Keystone Bituminous Coal Ass'n v. DeBenedictis, 480 U.S. 470, 495 (1987)).

94. For cases denying a right to compensation even though the regulation at issue caused a substantial reduction in property value, see *supra* note 3.

95. *Lucas*, 505 U.S. at 1019 n.8 (emphasis added).

96. *Id.* at 1031-32.

97. Lucas v. S.C. Coastal Council, 424 S.E.2d 484, 486 (S.C. 1992).

b. Pre-existing Rights and Limits

Identifying pre-existing rights is an ad hoc process because there is no standard or test to determine whether a particular use was part of the owner's "title to begin with." As indicated above,[98] the common law of nuisance addressed this issue by relying extensively on the vague maxim, *sic utere tuo ut alienum no lædas*. The majority in *Lucas* rejected this approach as too question-begging and conclusory to provide an "objective, value-free basis" for decisionmaking.[99] For this reason, the Court held that in order to win a takings case, the state "must do more than proffer the legislature's declaration that the uses . . . [at issue] are inconsistent with the public interest, or the conclusory assertion that they violate a common-law maxim such as *sic utere tuo ut alienum non lædas*."[100]

As an alternative to legislative declarations and *sic utere*, Justice Scalia's opinion for the majority adopts a test based on tradition, which he asserts provides a standard that: (1) is independent of the statutes or judicial decisions of a state; and (2) provides a workable guide to rights of ownership in the context of regulatory takings. Justice Scalia argues that "our 'takings' jurisprudence . . . has traditionally been guided by the understandings of our citizens regarding the content of, and the State's power over, the 'bundle of rights' that they acquire when they obtain title to property."[101] To Scalia, this "constitutional culture"[102] provides a reasonable expectation standard: Some limits are reasonably expected by citizens and are therefore proper;[103] other limits are not reasonably expected and are therefore im-

98. *See supra* notes 37-40 and accompanying text.

99. *Lucas*, 505 U.S. at 1026. One of the puzzling aspects of Scalia's opinion is that, after rejecting the concept of harm as too vague and conclusory to provide an objective test of limits of property rights, the opinion then adopts common law nuisance principles, including their use of the concept of harm from a use of land, as the basis for an objective test. *Id.* at 1023-26, 1030-31. For criticisms of the vagueness of nuisance law in other opinions in *Lucas*, see *infra* notes 112-18.

100. *Id.* at 1031. "[N]oxious-use logic cannot serve as a touchstone to distinguish regulatory 'takings'—which require compensation—from regulatory deprivations that do not require compensation. A fortiori the legislature's recitation of a noxious-use justification cannot be the basis for departing from our categorical rule that total regulatory takings must be compensated." *Id.* at 1026.

101. *Id.* at 1027.

102. *Id.* at 1028.

103. *See id.* at 1027.

> It seems to us that the property owner necessarily expects the uses of his property to be restricted, from time to time, by various measures newly enacted by the State in legitimate exercise of its police powers; "[a]s long recognized, some values are enjoyed under an implied limitation and must yield to the police power."
>
> *Id.* (quoting Pa. Coal Co. v. Mahon, 260 U.S. 393, 413 (1922)).

proper.[104] As to the content of this cultural tradition, Justice Scalia refers to "relevant property and nuisance principles,"[105] to relevant "background principles,"[106] and to "common law principles."[107]

> [R]egulations that prohibit all economically beneficial use of land . . . cannot be newly legislated or decreed (without compensation), but must *inhere in the title itself*, in the restrictions that background principles of the State's law of property and nuisance already place upon land ownership. A law or decree with such an effect must, in other words, do no more than duplicate the result that could have been achieved in the courts-by adjacent landowners (or other uniquely affected persons) under the State's law of private nuisance, or by the State under its complementary power to abate nuisances that affect the public generally, or otherwise.[108]

In his concurring opinion in *Lucas*, Justice Kennedy also adopts a culturally based standard, which he expresses in terms of "reasonable, investment-backed expectations" to be used "[w]here a taking is alleged from regulations which deprive the property of all value."[109] This approach is necessary to avoid "an inherent tendency towards circularity . . .; 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."[110] The cultural expectation standard provides an independent test that makes it possible to avoid this circularity because "[t]he expectations protected by the Constitution are based on objective rules and customs that can be understood as reasonable by all parties involved."[111] However, Justice Kennedy disagrees with Justice Scalia's emphasis on the common law nuisance principles as the basis for reasonable expectations as to property rights.

> In my view, reasonable expectations must be understood in light of the whole of our legal tradition. The common law of nuisance is too narrow a confine for the exercise of regulatory power in a complex and interdependent society. The State should not be prevented from enacting new regulatory initiatives in response to changing conditions, and courts must consider all reasonable expectations whatever their source. The Takings Clause does not require a static body of state property law; it protects private expectations to ensure private investment.[112]

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104. *See id.* at 1030 ("When . . . a regulation that declares 'off-limits' all economically productive or beneficial uses of land goes beyond what the relevant background principles would dictate, compensation must be paid to sustain it.").

105. *Id.* Specifically, Justice Scalia refers to "background principles of the state's law of property and nuisance." *Id.* at 1029.

106. *Id.* at 1029-30.

107. *Id.* at 1031. Regulations may "duplicate the result that could have been achieved in the courts." *Id.* at 1029.

108. *Id.* at 1029 (emphasis added) (footnote omitted).

109. *Id.* at 1034 (Kennedy, J., concurring).

110. *Id.*

111. *Id.* at 1035.

112. *Id.* (citation omitted).

Nuisance law is also rejected as a test by Justice Blackmun,[113] Justice Stevens,[114] and Justice Souter,[115] all of whom argue that common law nuisance is too narrow, vague, and uncertain to provide a test for whether an owner had a preexisting right. For example, Justice Blackmun notes that nuisance law has been termed an "impenetrable jungle" in which the term nuisance "has meant all things to all people and has been applied indiscriminately,"[116] that "[t]he Court itself has noted that 'nuisance concepts' are 'often vague and indeterminate'",[117] and that it is not clear from the majority opinion "where our 'historical compact' or 'citizens' understanding' comes from."[118]

The majority in *Lucas* had to be aware that common law nuisance principles and cultural tradition do not provide a precise guide for lower courts, regulators, and owners. The problems with using nuisance doctrine as a guide were explicitly noted in the other opinions.[119] Even Justice Scalia criticized the use of the circularity of the *sic utere* test that underlies much of nuisance law.[120] The vagueness of "cultural tradition" was also noted by dissenting opinions.[121] Tradition cannot be used as a precise objective guide given the open-ended time span involved,[122] the wide variance in law among the states, and the scale and diversity of our pluralistic society. These vagueness problems are fundamental and pervasive. Consequently, the vague-

113. *See id.* at 1054-60 (Blackmun, J., dissenting). Justice Blackmun's dissent further argues:

> There simply is no reason to believe that new interpretations of the hoary common-law nuisance doctrine will be particularly "objective" or "value free." Once one abandons the level of generality of *sic utere tuo ut alienum non laedas*, one searches in vain, I think, for anything resembling a principle in the common law of nuisance.

Id. at 1055 (Blackmun, J., dissenting) (footnote omitted) (citation omitted).

114. *See id.* at 1067-71 (Stevens, J., dissenting). Justice Stevens argues that the reliance on a nuisance law will limit the courts to nineteenth century state of development and prevent legal charges based on changing circumstances and new knowledge. *Id.* at 1069-70 (Stevens, J., dissenting).

115. *Id.* at 1077-78 (Souter, J., statement of reasons to dismiss writ of certiorari).

116. *Id.* at 1055 n.19 (quoting W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS 616 (5th ed. 1984)).

117. *Id.* (quoting Milwaukee v. Illinois, 451 U.S. 304, 317 (1981)).

118. *Id.* at 1055-56.

119. *See supra* notes 112-18 and accompanying text.

120. *See supra* notes 99-100 and accompanying text.

121. *Lucas*, 505 U.S. at 1055-56 (Blackmun, J., dissenting); *see id.* at 1034-35 (Kennedy, J., concurring) (arguing that Justice Scalia's emphasis on common law as a basis of tradition is too narrow and that a broader, cultural expectation approach should be used).

122. The majority opinion never indicates what time framework is contemplated. Apparently, however, pre-constitutional traditions contrary to the court's interpretation of the takings clause do not count. *See id.* at 1028 n.15.

ness involved goes to the core of the test and is not limited to line-drawing problems at the margins.[123]

The fundamental vagueness of culture plays an important role in fulfilling the symbolic function in *Lucas*. As indicated above, American culture places a high value on individual rights and on protecting the community welfare. Because there is no cultural agreement on the resolution of conflicts between the two, particularly in the context of regulatory takings, using culture as a test of rights performs the symbolic function of affirming the conflicting values without explicitly favoring property rights or regulation.

Moreover, this use of culture also helps support another powerful symbol—the "rule of law." Many argue that under the rule of law, judges must decide cases based on "objective" standards. More specifically, judges should not simply adopt their subjective view of what the decision should be, particularly where they decide whether a governmental unit must pay compensation as the price for pursuing a legitimate government objective supported by the majority.[124] The assertion by the majority in *Lucas* that culture provides an objective, independent test for rights is, in effect, an assertion that the decision accords with this sense of the rule of law. However, culture is so diverse that it can justify almost any position on regulatory takings by reference to some selected parts of the various contradictory cultural views on rights. Limiting the analysis to "legal culture" does not significantly reduce the diversity; statutes and cases are too vague and contradictory to provide clear answers. Moreover, it is not clear what counts as "legal." Does legal culture include works like the Declaration of Independence,[125] John Stuart Mill's *On Liberty*, and Martin Luther King's *Letter from a Birmingham Jail*?[126] These are about rights and about law even though they are not decisions by officials. Thus, culture only *appears* to provide an objective basis to support a decision about background rights, and this appearance of objectivity is important to the symbolic affirmation of the rule of law.

123. *Cf., e.g., Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 435 n.12 (1982) (stating that the difficulty of distinguishing between permanent and temporary physical invasions is not a valid objection to the categorical rule that a permanent physical invasion is a taking because "this Court has not declined to apply a *per se* rule simply because a court must, *at the boundary of the rule*, apply the rule of reason and engage in a more complex balancing analysis." (second emphasis added)).

124. *See supra* notes 15, 47 and accompanying text. *Cf., e.g.*, Krier, *supra* note 7, 1150 (noting that the inherent uncertainty of the meaning of "taking" creates a problem because "[a]mbiguity and uncertainty . . . are likely to provoke unusual anxiety when we sense them at the heart of our political-economic system").

125. *See, e.g.*, PAULINE MAIER, AMERICAN SCRIPTURE: MAKING THE DECLARATION OF INDEPENDENCE (1997).

126. THE CRY FOR FREEDOM 354 (Frank W. Hale, Jr. ed., 1969).

However, this use of culture simply disguises the judges' use of their own preferences in deciding cases.[127] Even if a judge feels compelled to decide a particular way because of some view of the culture, this compulsion can only result because of some selection of the parts of the culture that count. Culture, therefore, functions in the opinions in the same manner as the curtain in front of the Wizard of Oz—i.e., culture enables judges to hide the facts (perhaps even from themselves) that there are no clear guides to decision-making and that they are merely making up law as they go along. Culture can play an important role in constructing theories of justice, but only if one accepts the limits of culture as a guide.[128] Because of these limits, culture cannot provide a standard that is objective in the sense that Justices Scalia and Kennedy claim.

Fulfilling these symbolic functions has a high cost in terms of the managerial role of the Supreme Court. *Lucas* achieves these symbolic goals by asserting that property rights have an objective independent basis in "culture" and that culture can, therefore, guide and limit courts (including the Supreme Court) and legislatures. This assertion "works" symbolically because it ignores the vagueness of culture as a standard.[129] However, from a managerial perspective, this vagueness cannot be ignored because the vagueness of culture has forced (or enabled) lower courts to develop their own interpretative applications of the test.[130] The subjectivity hidden by the vagueness of the test will become clearer if the Supreme Court explicitly rules that a state supreme court has erred in interpreting the state's own cultural background principles.[131] However, this will occur very rarely because so few lower court opinions are reviewed by the Supreme Court.

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127. It has also been argued that culture is used as a basis for decision because the rule of law is fostered by judicial decisions that are consistent with the views of the culture. *See, e.g.*, Fisher, *supra* note 42, at 1399 (discussing an unpublished paper by Frank Michelman). The assertion in the text above is radically different. The text asserts that there is *no* single guiding cultural view on the complexities of property rights; there are only conflicting views.

128. *See, e.g.*, F. Patrick Hubbard, *Justice, Creativity, and Popular Culture: The "Jurisprudence" of Mary Chapin Carpenter*, 27 PAC. L.J. 1139, 1140-52 (1996).

129. *Lucas* does not indicate *how* one determines the content of culture. *Lucas* explicitly states that content is *not* determined by reference to the culture at the time the Constitution was adopted because they "were out of accord with any plausible interpretation of the takings clause." 505 U.S. at 1028 n.15. However, there is virtually no guidance as to what *does* count.

130. For a discussion of the tests that have been adopted, see *infra* notes 172-93 and accompanying text. As indicated in notes 237-43 and accompanying text, the Supreme Court recently decided that two of these tests were "wrong."

131. *See supra* note 42.

C. Narrowness of the Test

In assessing the extent to which *Lucas* is managerial or symbolic, it is important to consider how often the use of the per se total takings category will require compensation. The majority notes that total taking situations are "extraordinary" and "relatively rare."[132] Justice Blackmun's dissent notes the "narrow scope" of the case and suggests that the majority has launched "a missile to kill a mouse."[133] None of the opinions addresses a more precisely focused issue: How many instances, if any, will exist where compensation would be required under the total takings test but not under the balancing test of *Penn Central*? There is, of course, no way to answer that question in a definitive manner. However, it seems plausible to assume that there will be many situations where the result would be the same under either test. For example, a federal district court held, prior to *Lucas*, that an owner in the exact position as Lucas had suffered a taking.[134] Justice Scalia seemed to think the results would be the same because his justification of the total takings rule refers to *Penn Central*.[135] In any event, to the extent that there are very few such instances, *Lucas* is a symbolic opinion that strongly endorses property rights but has very little impact on regulation. From a managerial perspective, the total taking test would, at best, provide some assistance in using the *Penn Central* test in a few cases.

D. Conclusion: Symbolic Nature of the Test

The authors of the various opinions in *Lucas* were aware of three facts. First, decisions by the Supreme Court in the regulatory takings area are very rare in comparison to the number of decisions made by regulators and lower courts. Second, the categorical test is extremely vague because of the uncertainties resulting from identifying a "total" loss, from the uncertainties in identifying the relevant denominator, and from the need to determine whether a use was a part of the owner's "title to begin with." Third, the total takings categorical test was likely to have little impact because instances of total takings are probably rare and the results under the *Penn Central* balancing test in such cases would likely be the same. Given the court's awareness of these three facts and given that all the opinions endorsed the values of both private property rights and public regulation of those rights, *Lucas* is properly viewed as a symbolic opinion rather than substantive and managerial. To the extent that *Lucas* fulfills a managerial role,

132. *Lucas*, 505 U.S. at 1017-18.
133. *Id.* at 1036 (Blackmun, J., dissenting).
134. *See* Chavous v. S.C. Coastal Council, 745 F. Supp. 1168 (D.S.C. 1990), *vacating as moot* Esposito v. S.C. Coastal Council, 939 F.2d 165 (4th Cir. 1991).
135. *See Lucas*, 505 U.S. at 1017.

the total takings test is, at best, only slightly less vague and open-ended than the ad hoc balancing test. Consequently, the problems of uncertainty and of delegation of power that result from the ad hoc balancing test also exist with the total takings test.

IV. IMPACT OF THE TOTAL TAKINGS TEST: MANAGERIAL FAILURE AS A RESULT OF UNCERTAINTY AND LIMITED EFFECT

In addition to comparing the symbolic versus managerial functions of the total takings test by a conceptual analysis of *Lucas*, it is also necessary to consider lower court decisions to determine whether it has provided managerial guidance. This Article analyzes several groups of cases to assess this effect: (1) a selection of cases illustrating how the issues raised by the total takings test have been addressed; (2) all the South Carolina cases applying *Lucas*; and (3) a random selection of cases citing *Lucas*. Assessing the effect of the total takings test is difficult because there is no objective way to determine what the results would have been if *Lucas* had not adopted the test. For example, because a total taking would have a substantial impact under the ad hoc balancing test of *Penn Central*, it is impossible to know whether a court which finds that a *Lucas* taking has occurred would have reached the same result under *Penn Central*. At another level, the symbolic language about per se categorical tests may have had the effect of causing regulators to be less restrictive of development in order to avoid possible liability for compensation under a test that was perceived as granting increased substantive protection to owners. Given these problems, the assessment of the effect of *Lucas* will, of necessity, be somewhat impressionistic. Nevertheless, the paucity of findings of a total taking and the lack of agreement in application of important parts of *Lucas* indicate that the total taking test has had very little impact in terms of providing managerial guidance.[136]

A. Cases Illustrating Treatment of Issues Raised by Test

The problems recognized, but avoided, in *Lucas* have presented difficulties in the lower courts. More specifically, the courts have addressed problems with defining the denominator, with identifying

136. Other reviews of the impact of *Lucas* also conclude that the case has had little impact. *See, e.g.*, Coursen, *supra* note 10; Robert L. Glicksman, *Making a Nuisance of Takings Law*, 3 WASH. U. J.L. & POL'Y 149 (2000); Ronald H. Rosenberg, *The Non-impact of the United States Regulatory Takings Cases on the State Courts: Does the Supreme Court Really Matter?*, 6 FORDHAM ENVTL. L.J. 523 (1995); Glenn P. Sugameli, Lucas v. South Carolina Coastal Council: *The Categorical and Other "Exceptions" to Liability for Fifth Amendment Takings of Private Property Far Outweigh the "Rule,"* 29 ENVTL. L. 939 (1999).

situations where the land has no value as a result of the regulation, and with determining preexisting rights.

1. Denominator Problems

Though all three types of denominator problems have presented difficulties, most of the cases have focused on the problem of whether the denominator is the limited parcel affected by the regulation or a larger parcel, which includes the regulated parcel. Where a parcel is *un*subdivided, the courts generally refuse to treat only the regulated portion of the parcel as the denominator. Instead, the entire parcel is used.[137]

Where the property has been subdivided and all of one of the subdivided parcels is affected, the courts have adopted various approaches to the issue of whether to use the larger undivided parcel or the smaller subdivided parcel as the denominator. One important factor is whether the subdivided parcel has been sold. Where the parcel has been subdivided and a single subdivided lot has been sold to a new owner, there is a tendency to use the new owner's subdivided portion as the denominator in any claim by the new owner.[138] Where the original owner retains the subdivided parcels, the courts sometimes adopt an ad hoc approach with very little reasoning, and the results can be hard to reconcile.[139] At least one court has adopted a per se test that uses the subdivided land subject to regulation as the parcel

137. *See, e.g.*, Concrete Pipe & Prods. v. Constr. Laborers Pension Trust, 508 U.S. 602, 642-44 (1993) ("[A] claimant's parcel . . . [cannot] be divided into what was taken and what was left for the purpose of demonstrating the taking of the former to be complete and hence compensable."); K&K Constr., Inc. v. Dep't of Natural Res., 575 N.W.2d 531, 536 (Mich. 1998) (providing that under "'nonsegmentation' principle . . . the effect of the taking must be viewed with respect to the parcel as a whole."); Quirk v. Town of New Boston, 663 A.2d 1328, 1332-33 (N.H. 1995); Zealy v. City of Waukesha, 548 N.W.2d 528, 532-34 (Wis. 1996). *Cf., e.g.*, Adams Outdoor Adver. v. City of East Lansing, 614 N.W.2d 634, 638-39 (Mich. 2000) (holding that the owner cannot create a smaller denominator by leasing narrow parcels of or interests in his property). These cases are consistent with pre-*Lucas* authorities. *See, e.g.*, Keystone Bituminous Coal Ass'n v. DeBenedictis, 480 U.S. 470, 497-98 (1987) (rejecting the division of parcel into segments); Penn Cent. Transp. Co. v. New York City, 438 U.S. 104, 130-31 (1978) ("'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. . . . [T]his court focuses . . . on . . . the parcel as a whole . . . ."). As indicated in note 71 and accompanying text, the entire parcel is used in evaluating the impact of setback and landscaping requirements.

138. *See, e.g.*, Bowles v. United States, 31 Fed. Cl. 37 (1994) (treating a single lot in a residential subdivision as denominator).

139. *Compare, e.g.*, FIC Homes of Blackstone, Inc. v. Conservation Comm'n of Blackstone, 673 N.E.2d 61 (Mass. App. Ct. 1996) (addressing a takings claim by a developer/subdivider by treating all of a subdivided thirty-eight-lot parcel as a single parcel), *with, e.g.*, Hunziker v. State, 519 N.W.2d 367 (Iowa 1994) (addressing a takings claim by a developer/subdivider by treating a single subdivided lot

so long as the subdivided parcel had a value "separate and apart from any contiguous land that was owned" by the owner involved.[140] Many courts have explicitly adopted a multifactor balancing approach to the problem of a subdivided parcel that is part of a larger parcel owned by a single owner. Under this approach, the court looks at a variety of factors, including unity of ownership of contiguous lots, "the degree of contiguity, the dates of acquisition, the extent to which the parcel has been treated as a single unit, [and] the extent to which the protected lands enhance the value of remaining lands."[141] Thus, most courts have adopted "a flexible approach, designed to account for factual nuances"[142] and "to identify the parcel as realistically and fairly as possible, given the entire factual and regulatory environment."[143]

It should also be noted that *Penn Central* indicates that, under the balancing test, it is proper to consider the rights given in exchange for the regulation imposed on a parcel, which allow the owner to more intensively develop parcels in the vicinity of the affected parcel.[144] It is not clear whether this approach would apply in determining whether there has been a total taking. Justice Scalia has explicitly criticized the *Penn Central* approach to development rights.[145] However, the Court arguably adopted the approach in *Suitum v. Tahoe Regional Planning Agency*[146] because the Court considered whether the government decisions concerning the development rights were final.

The cases addressing the property right aspect of the denominator problem have an ad hoc quality. One understandable approach is to

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as the parcel but finding that the total limitation on development inhered in the title itself).

140. Machipongo Land & Coal Co. v. Commonwealth, 719 A.2d 19, 28 (Pa. Commw. Ct. 1998).

141. *K&K Constr., Inc.*, 575 N.W.2d at 536 (quoting Ciampitti v. United States, 22 Fed. Cl. 310, 318-19 (1991)).

142. Loveladies Harbor, Inc. v. United States, 28 F.3d 1171, 1181 (Fed. Cir. 1994).

143. *K&K Constr. Inc.*, 575 N.W.2d at 536-37.

144. *See Penn Cent.*, 438 U.S. at 137 (Penn Central's air rights have been "made transferable to at least eight parcels in the vicinity of the Terminal, one or two of which have been found suitable for the construction of new office buildings. . . . [T]he rights afforded are valuable. While these rights may well not have constituted 'just compensation' if a 'taking' had occurred, the rights nevertheless undoubtedly mitigate whatever financial burdens the law has imposed on appellants and, for that reason, are to be taken into account in considering the impact of regulation.").

145. *See Lucas*, 505 U.S. at 1016 n.7 (criticizing the approach of *Penn Central* as "extreme" and "unsupportable"); *see also* Suitum v. Tahoe Reg'l Planning Agency, 520 U.S. 725, 750 (1997) (Scalia, J., concurring) (providing that the relevance of development rights "is limited to the compensation side of the takings analysis, and . . . taking them into account in determining whether a taking has occurred will render much of our takings jurisprudence a nullity").

146. 520 U.S. 725 (1997).

focus on the treatment of the interest under the applicable state law.[147] However, as indicated above,[148] there are problems with this use of state property law. At times, the cases exhibit a somewhat random quality in their approach to these problems. For example, two cases determine that the right to build a pier is not a separate interest, but adopt very different approaches in reaching the result. These two cases are in different states, and one involved a large pier to be built in the ocean[149] while the other involved a dock to be constructed along a river.[150] However, whatever the reasons for the difference in approach in these two cases, the fact remains that the interest at issue was determined on an ad hoc basis.

Despite these uncertainties concerning this type of denominator problem, there is considerable agreement that, where zoning is involved, there is no independent right to use land for any particular purpose. Consequently, so long as the owner has some reasonable return on the investment in the land, there is no taking simply because the owner has suffered a "total loss" of another zoning use classification that would generate a higher return.[151] Thus, the hypothetical problem raised above about rezoning of land from residential to commercial[152] would not be treated as a total taking of the right to commercial use.

An example of the third type of denominator problem was presented in *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency*,[153] in which the plaintiffs, noting that *Lucas* involved a temporary total taking, claimed a temporary total taking for the period of time a total moratorium on their development was in effect. The court refused to accept the owners' view that the denominator was "the temporary 'slice' of each fee that covers the time span during which" the moratorium was in effect.[154] Instead of such "con-

147. *See, e.g.*, Machipongo Land & Coal Co. v. Commonwealth, 719 A.2d 19, 28-29 (Pa. Commw. Ct. 1998) (recognizing that the "coal estate" is one of three distinct separate estates in land under Pennsylvania law, but holding that fact issues remained as to the impact of regulation on the owner's coal estate).

148. *See supra* note 42 and accompanying text.

149. *See* Cabins on the Ocean IV Homeowners Ass'n v. City of N. Myrtle Beach, 523 S.E.2d 193, 200 (S.C. Ct. App. 1999) (holding that the right to build a pier is not a separate right), *aff'd on other grounds*, 548 S.E.2d 595 (S.C. 2001) (finding no taking occurred because the owner claimed only a temporary taking and because the delay involved was a normal regulatory delay).

150. *See* Karam v. N.J. Dep't of Envtl. Prot., 705 A.2d 1221, 1225-28 (N.J. Super. Ct. App. Div. 1998) (holding that a "riparian grant" of right to build a pier is not a separate right).

151. *See, e.g.*, 1 EDWARD H. ZIEGLER, JR., RATHKOPF'S THE LAW OF ZONING AND PLANNING § 6.05 (rev. ed. 2001).

152. *See supra* note 41 and accompanying text.

153. 216 F.3d 764 (9th Cir. 2000), *cert. granted*, 121 S. Ct. 2589 (2001).

154. *Id.* at 774.

ceptual severance in the temporal dimension of property rights,"[155] the court concluded that the "'use' of the plaintiffs' property runs from the present to the future"[156] and that the moratorium "denied the plaintiffs only a small portion of this future stream."[157] This approach to the application of *Lucas* has, in effect, been used in a number of other cases involving fixed term moratoria.[158] Moreover, the Supreme Court has arguably approved temporary total takings that "would arise in the case of normal delays in obtaining building permits, changes in zoning ordinances, variances, and the like."[159]

Despite these authorities, moratoria on all development are arguably inconsistent with the Supreme Court's recognition of claims for temporary takings and its treatment of cases involving a loss for a specified time of interest on a monetary fund.[160] An alternative approach to the temporal denominator problem is indicated by the dissent to the denial of plaintiffs' petition for rehearing en banc in *Tahoe-Sierra Preservation Council*. The dissenters argued:

> [T]here is no clear-cut distinction between a permanent prohibition and a temporary one. Governmental policy is inherently temporary while land is timeless. Even a permanent prohibition can be rescinded and, in the fullness of time, almost certainly will be. The land may retain market value based on speculation that it will someday become usable because the regulation will be revoked.[161]

The dissent also noted that a series of "temporary" moratoria could have substantially the same effect as a permanent total taking.[162] Some courts have, in effect, adopted the view of this dissent because they have required compensation in situations where, in order to abate a public nuisance, an owner who is innocent of any wrongful

155. *Id.* at 775-76.

156. *Id.* at 782.

157. *Id.*

158. *See, e.g.*, Santa Fe Vill. Venture v. City of Albequerque, 914 F. Supp. 478, 483 (D.N.M. 1995); Williams v. City of Central, 907 P.2d 701, 704 (Colo. Ct. App. 1995); Woodbury Place Partners v. City of Woodbury, 492 N.W.2d 258 (Minn. Ct. App. 1992).

159. First English Evangelical Lutheran Church of Glendale v. County of Los Angeles, 482 U.S. 304, 321 (1987).

160. *See, e.g.*, Phillips v. Wash. Legal Found., Inc., 524 U.S. 156 (1998) (holding that the interest is private property for purposes of the takings clause); Webb's Fabulous Pharmacies, Inc. v. Beckwith, 449 U.S. 155 (1980) (finding a taking of interest on funds deposited in court).

161. Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency, 228 F.3d 998, 1001 n.1 (9th Cir. 2000) (Kozinski, J., dissenting). For opposing arguments concerning the distinction between permanent and temporary *physical* invasions, see *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 435 n.12 (defending distinction), 448-49 (1982) (Blackmun, J., dissenting) (criticizing distinction).

162. *Id.* at 1001-22.

conduct is totally denied the use of his property for a period of time.[163] The competing views concerning moratoria should be addressed next year because the Supreme Court has granted certiorari in *Tahoe-Sierra Preservation Council*.[164] As indicated in the Conclusion to this Article, the Supreme Court should resolve the issue on the basis of a candid pragmatic balancing test, not a formal categorical approach like that used in *Lucas*.

2. *Value of Permitted Uses*

The *Lucas* majority avoided the problem of determining the value of any permitted uses of the lots at issue by accepting the trial court's finding that there was no value remaining.[165] Many subsequent cases have been unable to avoid this problem, and these cases have often been generous to the government in determining value. For example, many courts have held that the recreational uses of a parcel had a market value and that this value was sufficient to avoid the categorical total takings rule.[166] This approach is consistent with pre-*Lucas*

163. *See, e.g.*, City of St. Petersburg v. Bowen, 675 So. 2d 626 (Fla. Dist. Ct. App. 1996) (holding that a total taking resulted from a year-long closing of an apartment building and noting that the order prohibited all use, not just the sale or use of drugs on the premises); State *ex rel.* Pizza v. Rezcallah, 702 N.E.2d 81, 88 (Ohio 1998) ("The fact that the order [of closure of the real property] is of limited duration does not change this conclusion [that the owner has suffered a *Lucas* loss of all economically beneficial use]."). *But cf., e.g.*, City of Minneapolis v. Fisher, 504 N.W.2d 520 (Minn. Ct. App. 1993) (holding that an abatement order closing the sauna for one year was not a taking because it was temporary and the owner did not suffer a total taking because residential units in the same building could be rented); State v. Ramey, No. 99CA0002, 1999 WL 957650 (Ohio Ct. App. Sept. 3, 1999) (upholding a year-long injunction because of evidence of negligent or knowing acquiescence by the owner of the public nuisance resulting from violations of liquor regulations at the tavern).

164. 121 S. Ct. 2589 (2001) (granting certiorari "limited to the following question: 'Whether the Court of Appeals properly determined that a temporary moratorium on land development does not constitute a taking of property requiring compensation under the Takings Clause of the United States Constitution?'").

165. *See supra* note 84 and accompanying text.

166. *See, e.g.*, State v. Burgess, 772 So. 2d 540, 543-44 (Fla. Dist. Ct. App. 2000) (recognizing the value of recreational use of land at issue and holding that *Lucas* did not reject "recreational use as an economically beneficial use"); Wyer v. Bd. of Envtl. Prot., 747 A.2d 192, 193 (Me. 2000) (holding that the trial court "properly considered the use of the property for parking, picnics, barbecues and other recreational uses as beneficial uses available to" the owner despite denial of the variance that would have allowed construction prohibited by the sand dune laws); Darack v. Mazrimas, 5 Mass. L. Rptr. 469 (Super. Ct. 1996) ("[A]pplication of flood plain zoning . . . does not constitute a de facto taking [under *Lucas*] even though the property owner is left with only exceedingly limited use of a parcel, such as agricultural, horticultural, or recreational uses."). It is interesting to note that the government does not always make this argument. *See, e.g.*, McQueen v. S.C. Coastal Council, 530 S.E.2d 628, 631 (S.C. 2000) (stating that it was "uncontested that permit denial . . . deprives respondent of all economically

decisions holding that recreational uses were sufficient to constitute a reasonable remaining use.[167] The United States Court of Federal Claims has occasionally been more generous to owners in addressing this issue. For example, one case refused to place any value on recreational use of waterfront property.[168] In addition, once the owner has established a prima facie case of a total taking, the Court of Claims explicitly shifts to the government the burden of producing evidence of some remaining value.[169]

Lucas also used the trial court's finding of total loss to avoid the problem of determining whether a taking that approached, but did not reach, 100% of the value of the parcel would be treated under the per se rule. Though lower courts have generally stated the rule as applying only to situations where there is a loss of all value,[170] very few decisions explicitly address the question of a loss that approaches 100% of value.[171]

3. *Pre-existing Rights and Limits*

a. *Approaches*

The courts have used three approaches, sometimes as alternative grounds, in addressing whether a particular use was part of the owner's "title to begin with." The first approach asks whether, under the State's background principles of property law, any owner in the chain of title had a right to the use at issue.[172] This approach focuses

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viable use of his property" along the manmade salt-water canal), *cert. granted and case remanded*, 121 S. Ct. 2581 (2001).

167. *See, e.g.*, *Lucas*, 505 U.S. at 1044 (Blackmun, J., dissenting) (citing cases where recreational remaining uses prevented the finding of a taking); First English Evangelical Lutheran Church of Glendale v. County of Los Angeles, 258 Cal. Rptr. 893, 904 (Ct. App. 1989) (finding that "agricultural and recreational uses" were reasonable remaining uses); ZIEGLER, *supra* note 151 at 7-98, n.17 (listing cases relying on modest economic uses as reasonable remaining uses).

168. *See, e.g.*, Bowles v. United States, 31 Fed. Cl. 37, 48 (1994) (treating the right to "set up a tent" on a lot along a canal in a subdivision as valueless).

169. *See id.* at 47-48.

170. *See, e.g.*, Cohen v. City of Hartford, 710 A.2d 746, 754-55 (Conn. 1998) (balancing test found applicable unless regulation results in "a practical confiscation"); Stevens v. City of Cannon Beach, 854 P.2d 449, 460 (Or. 1993) ("all economically viable use"); Palazzolo v. State *ex rel* Tavares, 746 A.2d 707, 715 (R.I. 2000) ("all beneficial use"), *aff'd on finding of no total taking but rev'd on other grounds*, 121 S. Ct. 2448 (2001); Bd. of Supervisors of Prince William County v. Omni Homes, Inc., 481 S.E.2d 460, 464 (Va. 1997) ("all economic use"); Guimont v. Clarke, 854 P.2d 1, 34 (Wash. 1993) ("all economically viable use").

171. *See, e.g.*, K&K Constr., Inc. v. Dep't of Natural Res., 575 N.W.2d 531, 539 n.13 (Mich. 1998) (holding that leaving the owner with only "a small fraction of the economic value" is not a categorical taking).

172. *See, e.g.*, State Dep't of Health v. Mill, 887 P.2d 993, 1002 (Colo. 1995) (holding, as an alternative ground to the owner being on notice that regulatory controls would be imposed, that "relevant Colorado common law principles would not per-

only on whether any owner would have had the right. It does not matter whether the owner challenging the regulation acquired title before or after the regulation was adopted. The second approach focuses on a chronological question: Was the limitation at issue adopted before or after the owner claiming a taking acquired title? If the owner acquired title after the limitation was adopted, the courts conclude that the use limited by the regulation was never part of his title.[173] Occasionally, a court will combine the first and second approaches as alternative grounds. The third approach adopts a two-step analysis which starts with the following question: Did the owner have a reasonable investment-backed expectation of using the land in the manner at issue? If the answer to this question is "no," then there is no taking. If the answer to this question is "yes," then (and only then), the court proceeds to determine whether a *Lucas* total taking is involved.

The basis for the second and third approaches is that there is *no* reasonable investment-backed expectation if the owner acquires property after the restriction is adopted or with notice that the restriction was likely to be adopted. This lack is viewed as fatal to any taking claim because, as stated in *Good v. United States*[174]: "Reasonable, investment-backed expectations are an element of *every* regulatory tak-

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mit a landowner to engage in activities that spread radioactive contamination"); Karam v. State Dep't of Envtl. Prot., 705 A.2d 1221, 1228-29 (N.J. 1998) (holding, under the public trust doctrine, the owner never had an "absolute right to construct a dock."). *See, e.g.*, Kim v. City of New York, 681 N.E.2d 312, 316-17 (N.Y. 1997) (relying, as an alternative ground, on preexisting common law obligations of owners, in addition to the view that the owners had no right to object to permanent physical invasion by the government because regulatory action was based on a preexisting ordinance). *Cf., e.g.*, Stevens v. City of Cannon Beach, 854 P.2d 449, 453 (Or. 1993) (holding that the owner was not denied all economic use and that this use was never a part of the owner's title); McQueen v. S.C. Coastal Council, 530 S.E.2d 628, 631 n.2 (S.C. 2000) (declining to address application of public trust doctrine to alleged taking because the taking issue was resolved against the owner on grounds of "notice").

173. *See, e.g.*, Hunziker v. State, 519 N.W.2d 367, 371 (Iowa 1994) (involving regulatory provision that "was in existence and therefore part of Iowa's property law some twelve years before the plaintiffs purchased the land in question"); *Karam*, 705 A.2d at 1229 (noting that there was never an "absolute right to construct a dock" and that more stringent environmental restriction "was a matter of public record long before plaintiffs purchased the property"); Palazzolo v. State *ex rel* Tavares, 746 A.2d 707, 715-16 (R.I. 2000) (discussed further in notes 217-61 and accompanying text); City of Virginia Beach v. Bell, 498 S.E.2d 414, 418 (Va. 1998) (stating that inquiry into "nuisance or property law preceding the Ordinance . . . is irrelevant and unnecessary since . . . [the owner] acquired property already burdened by regulatory restrictions."); *infra* notes 204-06 and accompanying text. *Cf., e.g.*, *Kim*, 681 N.E.2d at 315-16 (denying claim for permanent physical invasion by the government on the basis of a preexisting ordinance and noting that "in identifying the background rules of State property law that inhere in an owner's title, a court should look to the law in force, whatever its source, when the owner acquired the property").

174. 189 F.3d 1355 (Fed. Cir. 1999).

ings case. . . . The *Lucas* Court did not hold that the denial of all economically beneficial or productive use of land eliminates the requirement that the landowner have reasonable, investment-backed expectations of developing his land."[175] Frequently, these two approaches are phrased in terms of notice of a regulatory restriction. Under this conceptualization, if the regulation prohibiting a use had been adopted at the time the owner acquired title or foreseeably would be adopted before development, then the owner has notice of the restriction and could not, therefore, have a reasonable investment-backed expectation of using the land in the prohibited manner.[176]

The third approach is effectively the same as the second approach except for two distinctions. First, it is not necessary under the third approach that the regulatory prohibition actually be adopted before acquisition of title. If a person buys property subject to a highly regulated scheme, that person is on notice that a new, more restrictive regulation may be adopted after the purchase. In view of the regulatory climate and the resulting notice of restrictive change, a court could find that there was no reasonable expectation of no new restrictions and thus no taking, even if a subsequently adopted regulation denies all economic use.[177] Second, in cases where the regulation was adopted before the owner acquired title but the owner does not have actual notice of the regulation, then it must be shown that "constructive notice exists in the sense that a reasonable person would have known of the restriction at the time of acquisition of title."[178]

b. Discussion

If one relies solely on the opinion in *Lucas*, it is not clear which alternative or alternatives are correct. The second approach provides a clear categorical answer, and such certainty is consistent with the concern in *Lucas* for per se rules. However, both the second and the

175. *Id.* at 1361 (emphasis added).

176. *See, e.g.*, Daniel R. Mandelker, *Entitlement to Substantive Due Process: Old Versus New Property in Land Use Regulation*, 3 WASH. U. J.L. & POL'Y 61, 85-92 (2000).

177. *See Good*, 189 F.3d 1355; State Dep't of Envtl. Prot. v. Burgess, 772 So. 2d 540, 543-44 (Fla. Dist. Ct. App. 2000); *McQueen*, 530 S.E.2d 628 (S.C. 2000), *vacated and remanded sub nom.* McQueen v. S.C. Dep't of Health & Envtl. Control, 121 S. Ct. 2581 (2001) (mem.). *See, e.g.*, Palm Beach Isles Assocs. v. United States, 231 F.3d 1365, 1367-70 (Fed. Cir. 2000) (Gajarsa, J., dissenting from denial of petition for rehearing en banc); State v. Mill, 887 P.2d 993, 999-1001 (Colo. 1994) (holding that it was not reasonable to expect no increase in requirements designed to accomplish background goals); *Karam*, 705 A.2d at 1228-29 (finding that it was not reasonable to expect no changes in the law); Patricia A. Hageman, *Fifth Amendment Takings Issues Raised by Section 9 of the Endangered Species Act*, 9 J. LAND USE & ENVTL. L. 375, 387-92 (1994); Sugameli, *supra* note 136, at 972-84.

178. Bowles v. United States, 31 Fed. Cl. 37, 51 (1994).

third approaches appear contrary to the concern of *Lucas* to provide a limit on the ability of government to "take" property simply by changing the rules. If a regulation can avoid the effect of the per se total takings rule (and even avoid the need for applying the *Penn Central* balancing test) so long as the regulation is adopted prior to acquisition or is foreseeable at the time of acquisition, then property rights become what the regulations have said (or foreseeably will say). This result seems to be precisely the circularity that *Lucas*[179] and other cases[180] attempt to prevent. Moreover, the idea that rights disappear based on this chronological basis results in potentially difficult puzzles such as when did the rights "disappear" and who would have a claim.[181] Thus, it is not surprising that the second and third approaches have been criticized by commentators[182] and rejected by some courts. For example, *Palm Beach Isles Association v. United States*[183] rejected the third approach and stated that statements about the necessity of reasonable, investment-backed expectations in *Good v. United States*[184] were dictum. "[I]n accord with *Lucas*, and not inconsistent with any prior holdings of this court, when a regulatory taking, properly determined to be categorical, is found to have occurred, the property owner is entitled to a recovery without regard to consideration of investment-backed expectations."[185]

179. *See supra* notes 99-112 and accompanying text.

180. *See, e.g.*, Nollan v. Cal. Coastal Comm'n, 483 U.S. 825, 834 n.2 (1987), ("[The owners' rights are not] altered because they acquired the land well after the Commission had begun to implement its policy. So long as the Commission could not have deprived the prior owners of the easement without compensating them, the prior owners must be understood to have transferred their full property rights in conveying the lot."); Webb's Fabulous Pharmacies, Inc. v. Beckwith, 449 U.S. 155, 164 (1980) ("[A] State, by *ipse dixit*, may not transform private property into public property without compensation . . . .").

181. *See, e.g.*, Preseault v. United States, 100 F.3d 1525, 1537-38 (Fed. Cir. 1996). For arguments that the pre-regulation owner should have a takings claim, see, for example, Gregory M. Stein, *Who Gets the Takings Claim? Changes in Land Use Law, Pre-Enactment Owners, and Post-Enactment Buyers*, 61 OHIO ST. L.J. 89 (2000).

182. For arguments that these approaches are contrary to *Lucas*, see Eagle, *supra* note 15 at 381-90; R.S. Radford & J. David Breemer, *Great Expectations: Will* Palazzolo v. Rhode Island *Clarify the Murky Doctrine of Investment-Backed Expectations in Regulatory Takings Law?*, 9 N.Y.U. ENVTL. L.J. 449 (2001). For a more general criticism of this approach, see Stephen E. Abraham, *Windfalls or Windmills: The Right of a Property Owner to Challenge Land Use Regulations (A Call to Critically Reexamine the Meaning of* Lucas), 13 J. LAND USE & ENVTL. L. 161, 194 (1997). For articles that appear to assume that these approaches are consistent with *Lucas* and with general principles underlying the takings clause, see Mandelker, *supra* note 176; Page, *supra* note 7.

183. 208 F.3d 1374 (Fed. Cir. 2000), *order in response to petition for rehearing*, 231 F.3d 1354 (Fed. Cir. 2000).

184. 189 F.3d 1355 (Fed. Cir. 1999). For a discussion of these statements in *Good*, see *supra* note 174 and accompanying text.

185. Palm Beach Isles Assocs. v. United States, 231 F.3d 1354, 1364 (Fed. Cir. 2001).

On the other hand, Justice Kennedy's concurring opinion arguably supports the third approach because it states: "The finding of no value must be considered under the Takings Clause by reference to the owner's reasonable, investment-backed expectations . . . . Where a taking is alleged from regulations which deprive the property of all value, the test must be whether the deprivation is contrary to reasonable, investment-backed expectations."[186] Moreover, the temporal statements in the majority opinion are not sufficiently precise to bar the adoption of the second and third approaches. For example, the opinion states that limits on the title must inhere "in the restrictions that background principles of the State's law of property and nuisance *already* places upon land ownership."[187] Similarly, *Lucas* states that "[i]n the case of land, . . . the notion . . . that title is somehow held subject to the 'implied limitation' that the State may *subsequently* eliminate all economically valuable use is inconsistent with the historical compact recorded in the Takings Clause that has become part of our constitutional culture."[188] Thus, one *could* read the concern in *Lucas* for background principles to be applicable only where the regulation was adopted after the owner acquired title.

Although the first approach avoids these problems, it raises other problems. One problem is the vagueness involved in determining background principles. Given this vagueness, the problems of uncertainty and delegation resulting from the *Penn Central* test will remain. There will also be disputes over whether the state courts have improperly claimed that the law has always prohibited the uses at issue. For example, in *Stevens v. City of Cannon Beach,*[189] owners of beachfront lots claimed that a taking resulted from a regulation prohibiting sea walls in the "dry sand area" of the beach. The Oregon Supreme Court rejected the claim because, under the "doctrine of custom," the public had a right of access to the dry sand area and therefore "exclusive use of the dry sand areas was not a part of the 'bundle of rights'" the owners acquired. The Supreme Court denied certiorari. In his dissent to this denial, Justice Scalia argued that the Oregon Supreme Court's position was "unsupportable"[190] and that Supreme Court review was necessary. "Our opinion in *Lucas* . . . would be a nullity if anything that a state court chooses to denominate 'background law'—regardless of whether it is *really* such—could eliminate

186. Lucas v. S.C. Coastal Council, 505 U.S. 1003, 1034 (S.C. 1992).
187. *Id.* at 1029 (emphasis added).
188. *Id.* at 1028 (emphasis added).
189. 854 P.2d 449 (Or. 1993).
190. Stevens v. City of Cannon Beach, 510 U.S. 1207, 1211 n.3 (Scalia, J., dissenting from denial of certiorari). Part of Justice Scalia's objection was that, in an earlier case that was central to the decision in *Stevens*, "the Supreme Court of Oregon appears to have misread Blackstone in applying the law of custom." *Id.* at 1212 n.5.

property rights."[191] Given the possibility that this may be the case, "petitioners must be afforded an opportunity to make out their constitutional claim by demonstrating that the asserted custom is *pretextual*."[192]

Thus, it has been difficult, if not impossible, to determine in the years following *Lucas* which of the three approaches is correct or when an approach has been misused. *Lucas* does not provide clear guidance on this issue. This lack of guidance results partly from imprecise phrasings in the majority opinion and from Justice Kennedy's using the phrase "reasonable investment-backed expectations" without clarifying how the phrase would apply to subsequent cases. More fundamentally, this lack of a clear reading of *Lucas* is the result of a failure to confront the basic cultural conflict over the proper balance of rights and duties of landowners. Given this conflict, the culture cannot provide an independent test or basis for property rights.[193] For example, it is not possible to "prove" or "disprove" whether our culture has "adopted" the following proposition: Rules must change as circumstances change, and people who buy property with knowledge of a recently enacted limitation cannot complain because: (1) any hardship is the result of the choice to purchase with actual or constructive knowledge of the restriction; and (2) the purchase price must have reflected the limitation on land use and it would be a windfall to remove the restriction.

B. Case Study: South Carolina

Because *Lucas* arose in South Carolina, the South Carolina experience with *Lucas* provides a useful case study of the application of *Lucas*. South Carolina first addressed the application of *Lucas* in determining on remand whether there were "background principles of nuisance and property law that prohibit the uses [Lucas] now intends in the circumstances in which the priority is presently found."[194] As indicated above, the South Carolina Supreme Court concluded, with no analysis or discussion, that no "common law basis exists . . . [to] restrain Lucas's desired use of his land."[195]

In the years since this decision by the South Carolina Supreme Court, the South Carolina appellate courts have issued opinions in nine cases involving the application of *Lucas*.[196] None of these cases found that a regulatory taking occurred. Five of the cases found that

191. *Id.* at 1211 (emphasis added).
192. *Id.* at 1214 (emphasis added).
193. *See supra* notes 117-30 and accompanying text.
194. *Lucas*, 505 U.S. at 1031-32.
195. Lucas v. S.C. Coastal Council, 424 S.E.2d 484, 486 (S.C. 1992).
196. There is also a published federal district court opinion, *McMahan v. International Ass'n of Bridge, Structural, and Ornamental Iron Workers*, 858 F. Supp. 529

the total takings test was not applicable because the taking was not total,[197] and four cases (including a case involving a total loss of value)[198] held that there was no preexisting right to the use at issue.[199]

Most of the cases finding that there was no total taking do not explicitly address the denominator problem. Instead, they simply state that the property had some economic value despite the regulation at issue.[200] One case addressed the property interest aspect of the denominator problem and held that the right to build a pier was simply a "stick" in the "bundle of sticks," not "a property interest in itself,"[201] and that "[t]he pier is but one piece of the whole" parcel.[202]

Three of the cases finding that there was no preexisting right involved the Coastal Council.[203] Two of these cases apparently involved partial takings and relied on the approach that determines the existence of preexisting rights by focusing on when the owner acquired the property and held that, because the regulation at issue was enacted before the owner acquired title, there was no pre-existing right and thus there could be no taking.[204] It is interesting to note that, in an unreported lower court opinion, a trial court used a similar theory in holding that, because the purchase occurred after the regulation had been adopted, a subsequent purchaser of the property involved in *Lucas* had no preexisting right to build erosion control barriers to avoid

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(D.S.C. 1994). *McMahan* held that *Lucas* was not applicable to a takings challenge involving union funds. *See id.* at 542.

197. *See* Main v. Thomason, 535 S.E.2d 918 (S.C. 2000); Quality Towing, Inc. v. City of Myrtle Beach, 530 S.E.2d 369 (S.C. 2000); Sea Cabins on the Ocean IV Homeowners Ass'n, Inc. v. City of N. Myrtle Beach, 523 S.E.2d 193 (S.C. 1999); Staubes v. City of Folly Beach, 500 S.E.2d 160 (S.C. Ct. App. 1998), *aff'd on appeal of different issue*, 529 S.E.2d 543 (S.C. 2000); Long Cove Club Assocs. v. Town of Hilton Head Island, 458 S.E.2d 757 (S.C. 1995).

198. *See* McQueen v. S.C. Coastal Council, 530 S.E.2d 628 (S.C. 2000), *vacated and remanded sub nom.* McQueen v. S.C. Dep't of Health & Envtl. Control, 121 S. Ct. 2581 (2001) (mem.).

199. *See* Westside Quik Shop, Inc. v. Stewart, 534 S.E.2d 270 (S.C. 2000); *McQueen*, 530 S.E.2d 628; Wooten v. S.C. Coastal Council, 510 S.E.2d 716 (S.C. 1999); Grant v. S.C. Coastal Council, 461 S.E.2d 388 (S.C. 1995).

200. *See Main*, 535 S.E.2d at 922; *Quality Towing*, 530 S.E.2d at 373-74; *Staubes*, 500 S.E.2d at 165-66; *Long Cove Club Assocs.*, 458 S.E.2d at 758.

201. *Sea Cabins on the Ocean IV Homeowners Ass'n*, 523 S.E.2d at 200.

202. *Id.* at 203.

203. The fourth case, which involved video poker machines that became useless in South Carolina after the state enacted legislation prohibiting possession of the machines, relied upon the theory that persons in a highly regulated field have no reasonable, investment-backed expectation that such changes in the law will not occur. Westside Quik Shop, Inc. v. Stewart, 534 S.E.2d 270 (S.C. 2000). The Coastal Council functions are now performed by the South Carolina Department of Health and Environmental Control. *See McQueen*, 530 S.E.2d at 629 n.1.

204. *Wooten*, 510 S.E.2d 716; *Grant*, 461 S.E.2d 388. For a discussion of the use of this approach in other jurisdictions, see *supra* notes 173-78 and accompanying text.

the loss of the use of the land for a house.[205] The third Coastal Council case relied on the "notice" approach to hold that there was no taking, even though there was a total loss of economic value as a result of a regulation adopted *after* the owner acquired title, because there was no legitimate investment-backed expectation of being able to develop the land.[206]

C. Random Selection of Cases Citing *Lucas*

In order to reduce the subjectivity that occurs when cases are selected to address an issue or to illustrate a point, a random selection of cases citing *Lucas* was examined. The cases were selected by using the Westlaw Keycite feature to generate a list of the cases citing *Lucas*.[207] One hundred and ten cases (one-sixth of the 658 cases citing *Lucas*) were selected randomly and reviewed.[208] A copy of the review sheet used for this process is included as Appendix 1 to this Article. Appendix 2 contains a tabular summary of results. The table indicates, for example, that only three of the 110 cases surveyed found that a total taking was involved. None of these three cases involved traditional land use or other similar administrative actions. Two involved the abatement of a public nuisance in the form of houses where narcotics were used by nonowners.[209] The owners of the buildings were innocent of wrongdoing, and the abatement orders involved a total prohibition of any use of the building, not just some form of criminal use. The third case involved a dispute between the owner and the United States Forest Service over the title to a gravel pit.[210] The court found a taking because, instead of using the approaches a private party would use, the Forest Service had "utilized threats backed by its sovereign power to prevent plaintiff from operating in the pit."[211]

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205. *See* ROBERT C. ELLICKSON & VICKI L. BEEN, LAND USE CONTROLS: CASES AND MATERIALS 209-10 (2d ed. 2000). For accounts of the settlement proceedings between Lucas and the State and the Coastal Council's sale of the two lots, see LUCAS, *supra* note 89, at 249-52; Gideon Kanner, *Not with a Bang, but a Giggle: The Settlement of the* Lucas *Case*, *in* TAKINGS: LAND DEVELOPMENT CONDITIONS AND REGULATORY TAKINGS AFTER *DOLAN* AND *LUCAS* 308 (David L. Callies ed., 1996).

206. *McQueen*, 530 S.E.2d at 633-35. For a discussion of the use of this approach in other jurisdictions, see *supra* notes 174-178 and accompanying text.

207. The keycite list was generated on February 20, 2001.

208. The random selection was done by using a random number table to select a case from the first six cases on the list. Every sixth case on the rest of the list was then selected and reviewed.

209. *See* City of St. Petersburg v. Bowen, 675 So. 2d 626 (Fla. Dist. Ct. App. 1996); State *ex rel* Pizza v. Rezcallah, 702 N.E.2d 81 (Ohio 1998).

210. *See* Pettro v. United States, 47 Fed. Cl. 136 (2000).

211. *Id.* at 150.

The reasons for the cases' lack of a finding of a taking are informative. Many cases do not address the merits of the takings claim; instead *Lucas* is cited as a general proposition (32 cases) or the issue is determined not to be ripe or is otherwise not explicitly addressed (21 cases). Of the cases that address the merits, 27 cases conclude that *Lucas* does not apply because the taking is not total and 14 cases find that the use at issue was not part of the owner's property to begin with. The size of this last category is interesting when compared to the small number of cases finding a total taking. This difference in size suggests that the *Lucas* "test" of whether the owner never had the right at issue may have had an unexpectedly large negative impact on owners.

The survey also illustrates the diversity of situations involving takings claims. Though many of the cases citing *Lucas* involved environmental schemes, wetlands (13 cases) and coastal protection schemes (6 cases) were not as common as might be expected. There were more zoning cases (26) than cases involving these environmental categories. The largest single category of governmental program is "Other," which includes such diverse types of governmental action as taxation,[212] freezing of a foreign bank's assets by presidential order,[213] rent control,[214] navigable waters,[215] and utility hookup requirements.[216]

V. *PALAZZOLO V. RHODE ISLAND*: THE LIMITS OF CATEGORICAL TESTS AND ADVANTAGES OF AD HOC BALANCING

Palazollo v. Rhode Island,[217] the Supreme Court's most recent regulatory takings case, is another symbolic opinion with strong rhetoric about property rights but very limited substantive guidance. From a managerial point of view, *Palazzolo* could be viewed as one step sideways as it clarifies a point raised in part by *Lucas* itself, one step backwards because it introduces new uncertainty into the *Penn Central* balancing test, and not much else because it leaves other major issues unresolved.

212. *See* Van Zelst v. Comm'r, 100 F.3d 1259 (7th Cir. 1996); McMurray v. Comm'r, 985 F.2d 36, 41-42 (1st Cir. 1993).

213. *See* CONSARC Corp. v. Iraqi Ministry, 27 F.3d 695, 701 n.5 (D.C. Cir. 1994).

214. *See* Carson Harbor Vill. Ltd. v. City of Carson, 37 F.3d 468 (9th Cir. 1994), *overruled on other grounds by* WMX Technologies, Inc. v. Miller, 104 F.3d 1133 (9th Cir. 1997).

215. *See* United States v. 30.54 Acres of Land, 90 F.3d 790 (3d Cir. 1996).

216. *See* Stern v. Halligan, 158 F.3d 729 (3d Cir. 1998).

217. 121 S. Ct. 2448 (2001).

A. Facts and Procedural History

Anthony Palazzolo acquired title to property in Westerly, a coastal town in Rhode Island, in 1978.[218] The parcel consisted of a large wetlands area as well as some higher land. Palazzolo was denied a request to fill all the wetlands as well as a subsequent request to fill some of the wetlands. After the second denial, Palazzolo filed an inverse condemnation claim in state court, alleging that a total taking had occurred because "the Council's action deprived him of 'all economically beneficial use' of his property."[219] He sought "damages in the amount of $3,150,000, a figure derived from an appraiser's estimate as to the value of a 74-lot residential subdivision."[220] The trial court ruled against Palazzolo.[221]

The Rhode Island Supreme Court affirmed on three grounds.[222] First, the court held that the claim was not ripe because Palazzolo had never applied for a 74-lot subdivision or for any scheme that did not involve substantial filling.[223] Second, Palazzolo had not suffered a total taking under *Lucas* because the upland portion of the land had a value of $200,000 if developed.[224] Moreover, even if he had suffered a total taking, he did not acquire title until after "the regulations limiting his ability to fill the wetlands were already in place."[225] Consequently, the right to fill was not part of his title to begin with. Third, Palazzollo did not suffer a taking under the *Penn Central* balancing test because, at the time of the acquisition of the property, "there were already regulations in place limiting Palazzolo's ability to fill the wetlands for development."[226] Therefore, he had no investment-backed expectation of a right to fill. This lack was "dispositive in this case" and thus negated the need to "consider the other factors of the *Penn Central* test."[227]

B. Supreme Court Decision

The Supreme Court affirmed in part, reversed in part, and remanded the case for further proceedings. The majority held that the matter was ripe for review for three reasons. First, there was no doubt that Palazzolo would be denied a right to fill *any* wetlands, re-

218. The chain of ownership is complicated, but the Supreme Court concluded that Palazzolo did not acquire title until 1978. *See id.* at 2456.
219. *Id.*
220. *Id.*
221. *See id.* at 2456-57.
222. Palazzolo v. State *ex rel* Tavares, 746 A.2d 707 (R.I. 2000).
223. *See id.* at 714.
224. *See id.* at 715.
225. *Id.*
226. *Id.* at 717.
227. *Id.*

gardless of how grandiose or minimal his scheme might be.[228] Second, possible dispute as to the value of any wetlands development that would be permitted in light of other, unchallenged restrictions did not prevent the matter from being ripe as a takings issue.[229] Any dispute about the value of this development related to the determination of the fair market value of the wetlands, not to whether there was a final decision by the Council.[230] Third, the value of the uplands development was sufficiently settled for review because both Palazzolo and the state had accepted $200,000 as the value for upland development.[231]

As to the possible development of the upland portion of the parcel, Palazzolo did not challenge the finding that the upland parcel had a developmental value of $200,000. Instead, he argued that his situation satisfied *Lucas* because it was such a substantial loss that he was left with only "a few crumbs of value."[232] This argument was rejected on the ground that a regulation permitting a landowner to build a substantial residence on an 18-acre parcel does not leave the property "economically idle."[233] His argument that "the upland parcel is distinct from the wetlands portion"[234] was also rejected because the issue was not presented in the petition for certiorari.[235] However, the Court noted:

> This contention asks us to examine the difficult, persisting question of what is the proper denominator in the takings fraction. Some of our cases indicate that the extent of deprivation effected by a regulatory action is measured against the value of the parcel as a whole; but we have at times expressed discomfort with the logic of this rule, a sentiment echoed by some commentators.[236]

The Supreme Court rejected the Rhode Island Supreme Court's adoption of the chronological approach[237] to determine whether filling the wetlands was ever a part of Palazzolo's title and held that a takings "claim is not barred by the mere fact that title was acquired after the effective date of the state-imposed restriction."[238] Justice Kennedy's opinion for the majority characterized the chronological rule as

228. *See Palazzolo*, 121 S. Ct. at 2458-60. Justice Stevens joined the five member majority on this issue. *See id.* at 2468-72 (Stevens, J., concurring and dissenting).
229. *See id.* at 2461-62.
230. *See id.*
231. *See id.* at 2460-61, 2464. This treatment of the record in terms of the state's position was criticized. *See id.* at 2472-77 (Ginsburg, J., dissenting).
232. *Id.* at 2464.
233. *Id.* at 2465.
234. *Id.*
235. *See id.*
236. *Id.* (citations omitted).
237. For a discussion of this test and the similar "notice" test, see *supra* notes 172-93 and accompanying text.
238. *Palazzolo*, 121 S. Ct. at 2464.

a rule that "[a] purchaser or a successive title holder like petitioner is deemed to have notice of an earlier-enacted restriction and is barred from claiming that it effects a taking."[239] This rule could not be accepted because it would mean that "the postenactment transfer of title would absolve the State of its obligation to defend any action restricting land use, no matter how extreme or unreasonable" and would thus allow the state "to put an expiration date on the Takings Clause."[240] Given rules concerning ripeness in regulatory takings, the owner of the land at the time of enactment might have no claim. "It would be illogical, and unfair, to bar a regulatory takings claim because of the post-enactment transfer of ownership where the steps necessary to make the claim ripe were not taken, or could not have been taken, by a previous owner."[241] In addition to policy and logic, the Court also noted that *Nollan v. California Coastal Commission*[242] had rejected the sweeping effect of the chronological approach.[243]

Because of their adoption of the chronological approach to postenactment acquisition, the Rhode Island courts did not apply the *Penn Central* balancing test to Palazzolo's situation.[244] Therefore, the Supreme Court remanded the case to the Rhode Island Supreme Court so that the balancing test could be applied to the partial deprivation of economic use suffered by Palazzolo.

The majority opinion by Justice Kennedy provides no guidance on the application of the balancing test on remand. The opinion only states that a takings "claim is not barred by the *mere* fact that title was acquired after the effective date of the state-imposed restriction."[245] Justice Kennedy does not indicate whether the chronology of acquisition vis-à-vis enactment is relevant to determining if a taking has occurred. Justice Scalia's concurring opinion addresses this issue and asserts:

> [T]he fact that a restriction existed at the time the purchaser took title (other than a restriction forming part of the "background principles of the State's law of property and nuisance") . . . should have no bearing upon the determination of whether the restriction is so substantial as to constitute a taking. The "investment-backed expectations" that the law will take into account do not include the assumed validity of a restriction that in fact deprives property of so much of its value as to be unconstitutional. Which is to say that a *Penn Central* taking, . . . no less than a total taking, is not absolved by the transfer of title.[246]

239. *Id.* at 2462.
240. *Id.* at 2462-63.
241. *Id.* at 2463.
242. 483 U.S. 825.
243. *See Palazzolo*, 121 S. Ct. at 2463-64.
244. *See* Palazzolo v. State *ex rel* Tavares, 746 A.2d 707, 717 (R.I. 2000).
245. *Palazzolo*, 121 S. Ct. at 2464 (emphasis added).
246. *Id.* at 2468 (Scalia, J., concurring).

Justice Scalia's argument is rejected by five members of the Court.[247] Justices O'Connor and Breyer argue that the relationship between the time of the acquisition and the adoption of the regulation is relevant to the determination of the owner's reasonable investment-backed expectations under the *Penn Central* balancing test.[248] Justice Stevens argues that a party who acquires property after enactment is "simply the wrong party" to bring the takings claim.[249] Justice Ginsburg, in an opinion joined by Justices Breyer and Souter, dissents on the issue of ripeness but notes: "If Palazzolo's claim were ripe and the merits properly presented, I would, at a minimum, agree with Justice O'Connor, Justice Stevens, and Justice Breyer, that transfer of title can impair a takings claim."[250] Given this agreement of five justices, it is reasonable to conclude that whether an owner acquired property after the enactment of a restriction would be relevant under the *Penn Central* balancing test. It would also be logical to assume that "notice" of the likely adoption of a restrictive regulation would be relevant to the application of the *Penn Central* test in cases where the owner acquired title before enactment of the regulation.[251]

C. Impact

Palazzolo states one clear rule: Whether the use at issue was a part of the owner's title to begin with will *not be* addressed simply by determining whether the regulation at issue was adopted before the owner acquired title.[252] Thus, the per se rejection of a takings claim

247. *See generally Palazzolo*, 121 S. Ct. 2448 (Justices Kennedy, Rehnquist, and Thomas are silent on the issue.).

248. *See id.* at 2465-67 (O'Connor, J., concurring) (expanding on a portion of the majority opinion addressing chronology and arguing that "[c]ourts properly consider the effect of existing regulations under the rubric of investment-backed expectations in determining whether a compensable taking has occurred"); *id.* at 2477-78 (Breyer, J., dissenting) (arguing that the chronology of acquisition vis-à-vis regulation is relevant).

249. *Id.* at 2468-72 (Stevens, J., concurring in part and dissenting in part).

250. *Id.* at 2477 n.3 (Ginsburg, J., dissenting) (page references deleted).

251. *See, e.g.*, Daniel R. Mandelker, *Investment-Backed Expectations in Taking Law*, 27 URB. LAW. 215, 227-37 (1995). The effect of notice in a *Penn Central* balancing test would be different from the per se effect of notice of more restrictive regulations discussed in notes 173-178 and accompanying text. *Palazzolo* clearly rejects such a per se approach. *See supra* notes 237-43 and accompanying text.

252. The holding on ripeness was so fact specific that it did not establish a rule for future cases. *See, e.g., Palazzolo*, 121 S. Ct. at 2459 ("Council's decisions make plain that the agency interpreted its regulations to bar petitioner from engaging in any filling or development activity on the wetlands . . . ."), 2460 (holding that the state's assertion that the value of developable uplands is in doubt "comes too late in the day for purposes of litigation before this court"), 2462 ("Where the state agency charged with enforcing a challenged land use regulation entertains an application from an owner and its denial of the application makes clear the extent of development permitted, and neither the agency nor a reviewing state

under the second and third approaches that have been used by the lower courts are not valid.[253] In this regard, *Palazzolo* fulfills a useful managerial function. However, the case provides a clear substantive rule only in a negative sense—it clarifies a problem raised by *Lucas*[254] by clearly stating what is *not* the test of limits inherent in the title. *Palazzolo* provides no guidance on how to use the first approach, which relies solely on "background principles,"[255] in addressing this issue. Instead, as to the issue of background principles, the Court states: "We have no occasion to consider the precise circumstances when a *legislative* enactment can be deemed a background principle of state law or whether those circumstances are present here."[256] Thus, *Palazzolo* does not address whether Justice Kennedy's view or Justice Scalia's view in *Lucas* will prevail as to legislation versus common law.[257] Nor does it address how to handle other historical arguments about background rights.[258] Moreover, *Palazzolo* arguably makes takings analysis less clear because of the disagreement among the judges concerning the role of postenactment acquisition in applying the *Penn Central* test and by its gratuitous expression of "discomfort" with the "parcel as a whole" approach to the denominator issue.

Palazzolo makes it clear that *Lucas* only applies where a total loss of use is involved. More specifically, *Palazzolo* holds that a very substantial loss in value will not be treated as a per se taking on the basis of the total takings categorical rule. The loss to *Palazzolo* was substantial because, if one accepts his assertion of the value of development ($3,150,000),[259] he would suffer a loss of 94% of the land's value if left with a value of only $200,000.[260] However, this is a rule only in a negative sense because it simply indicates that *Lucas* had not implicitly overruled prior decisions of the Court holding that very substantial losses in value were not takings.[261]

Given the limited managerial guidance in *Palazzolo*, it is better to view the opinion in symbolic terms. This characterization is also supported by *Palazzolo*'s adoption of the *Penn Central* balancing test as

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court has cited non-compliance with reasonable state law exhaustion or pre-permit processes . . . federal ripeness rules do not require the submission of further and futile applications with other agencies.").

253. For a discussion of these tests, see *supra* notes 173-78 and accompanying text.
254. *See supra* notes 179-93 and accompanying text.
255. For a discussion of this test, see *supra* note 172 and accompanying text.
256. *Palazzolo*, 121 S. Ct. at 2464 (emphasis added).
257. For a discussion of these views, see *supra* notes 101-12 and accompanying text.
258. The state argued before the Supreme Court that Palazzolo's proposed use was barred by Rhode Island's background principles, including "[e]nactments dating to 1876" and understandings dating "from its earliest settlement." *See* Brief for Respondent at 11-12, *Palazzolo*, 121 S. Ct. 2448.
259. *See Palazzolo*, 121 S. Ct. at 2456.
260. *See id.* at 2460, 2464.
261. *See supra* note 3.

the appropriate standard to be used on remand. Indeed, the primary impact of the case is likely to be a revival of the symbolic approach of *Penn Central*.

VI. CONCLUSION

Lucas has had very little effect as a limit on judicial decisions addressing regulatory takings. In this respect, Justice Blackmun's dissenting opinion was prescient; the majority had launched "a missile to kill a mouse."[262] A review of the cases indicates how exceedingly rare it is for the courts to find this mouse. By itself, this rarity does not necessarily mean that the *Lucas* total taking test is not useful from a managerial perspective. It could be very useful if, in fact, it provided a clear test for at least some takings disputes. However, the *Lucas* approach is too vague to achieve this result. This vagueness was one reason why Justice Blackmun's concern was not to "save the targeted mouse, but . . . to limit the collateral damage."[263]

Given the strong rhetoric concerning property rights in *Lucas*, it is ironic that, to the extent that there has been collateral damage, owners may have been the casualties. On the one hand, that rhetoric may have intimidated regulators and caused them to be less restrictive of development. However, it is plausible to assume that the regulators have been watching the lower courts to see whether the rhetoric in *Lucas* was having an impact on decisions. To the extent that they have been watching, regulators have been learning that they need not be intimidated, because owners were receiving very little benefit in the courts from *Lucas*. Very few cases find that a total taking occurred. Moreover, *Lucas* hurt owners in cases like *Palazzolo*, which adopted an expanded version of the *Lucas* "exception" for pre-existing limits. In many lower court opinions, this version served a managerial function by becoming a per se rule of *no* taking, including cases involving permanent physical invasions by the government, so long as the owner had "notice" of the restriction.[264] As a result, the rule was clear under this expanded version: Owners with notice could not prevail. Thus, the *Lucas* concern for certainty was served, but in a manner that was contrary to the protection of owners' rights.

One important effect of the experience with *Lucas* has been to reinforce the importance and role of *Penn Central* as the basic test for all

262. Lucas v. S.C. Coastal Council, 505 U.S. 1003, 1036 (1992) (Blackmun, J., dissenting).

263. *Id.* at 1036-37 (Blackmun, J. dissenting).

264. *See, e.g.*, Kim v. City of New York, 681 N.E.2d 312, 315-16 (1997) (holding that because the obligation to provide lateral for public highways was in force when the owners acquired the property, the city's enforcement of the obligation did not constitute a taking). For a discussion of the "notice" approach, see *supra* notes 173-178 and accompanying text.

regulatory takings cases. In effect, situations involving a total loss of value or involving a physical invasion are special applications of the *Penn Central* balancing test. In these two situations, the balance always tips in favor of the owner's pre-existing rights. Indeed, *Penn Central* stated that if a land use "restriction makes property wholly useless 'the rights of property . . . prevail over the other public interest' and compensation is required."[265] Similarly, where there is no governmental purpose served by the restriction, the balance would always be in favor of the owner.[266] One reason for the continuing importance of *Penn Central* is its pragmatic rejection of per se rules in favor of a balancing process. Only such a flexible approach can address the complexity of takings decisions. There are problems with this approach, and the disagreement in *Palazzolo* concerning the role of post-enactment acquisitions in assessing investment-backed expectations illustrates these problems. However, the continued vitality of *Penn Central*, as evidenced by the remand for application of the test in *Palazzolo*, indicates the value of its approach despite these problems.

Lucas's per se categorical rules did not solve the problems inherent in the *Penn Central* approach. Per se rules can only work if the relevant facts can be easily categorized, but such categorization is almost never possible with takings cases. Moreover, *Lucas* is not simply another failed attempt to simplify takings law; the majority in *Lucas knew* that they were *not* really simplifying takings law. They were aware that total takings would be rare and that they were not providing a test for identifying total takings or for determining an owner's developmental rights.

Given this awareness, the *Lucas* opinion is more symbolic than managerial. The categories are too vague and limited to be meaningful tests. Instead, the categories serve as symbols that endorse property rights by apparently placing clear limits on regulation while simultaneously supporting regulation by using vague concepts that, at best, apply only to very limited circumstances. The categories are also symbolic in the sense that their apparent clarity affirms the "rule of law" by appearing to provide explicit rules that will prevent ad hoc, subjective decision-making by courts.

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265. Penn Cent. Transp. Co. v. New York City, 438 U.S. 104, 128 (1978) (quoting Hudson Water Co. v. McCarter, 209 U.S. 349, 355 (1908)).

266. *See, e.g.*, Nectow v. City of Cambridge, 277 U.S. 183 (1928) (enjoining the application of the zoning scheme to plaintiff because inclusion of his property in the district served no public purpose). *Cf., e.g.*, Dolan v. City of Tigard, 512 U.S. 374 (1994) (requiring a relationship between the impact of development and the purpose served by dedication of the land to public use); Nollan v. Cal. Coastal Comm'n, 483 U.S. 825 (1987) (same requirement as *Dolan*). *But see, e.g.*, John D. Echeverria, *Does a Regulation That Fails to Advance a Legitimate Governmental Interest Result in a Regulatory Taking*, 29 ENVTL. L. 853 (1999) (arguing that lack of purpose is not a test for takings).

Penn Central is also symbolic, but its pragmatic balancing approach to takings is better than the formalistic approach of *Lucas* for two reasons.[267] First, *Penn Central*'s balancing test is based on a candid admission that there is no standard. Instead, the best that can be achieved is to use a fair process that tries to fit evolving contradictory views about property rights to the circumstances of a regulatory limit. In contrast, *Lucas* uses formal categories that are hard to apply in the real world and explicitly introduces a troublesome new "natural rights" approach into takings jurisprudence. Under this approach, an owner has a natural right to at least some developmental use of land unless the government can show that all developmental use is restricted by the state's "background principles of law," which are "objectively" defined by shared cultural expectations, not by "recent" enactments. This culturally defined natural right has a disquieting similarity to substantive due process because, given the open-textured nature of cultural expectations, it provides virtually no limit on the court's ability to frustrate majoritarian decisions where a "total taking" exists. Moreover, this natural law approach is less useful in guiding decision-making than *Penn Central*'s concept of reasonable investment-backed expectations. Both are vague; however, expectations analysis has the advantage that it focuses on current concerns and values rather than on sterile scholastic debates about the meaning of a concept in Blackstone's Commentaries.[268]

Lucas and *Penn Central* also differ considerably in terms of tone. *Penn Central* is more neutral and demonizes neither regulators nor property owners. Instead, it respects both and thus provides a framework for the judicial process to balance the conflicting values at issue. In contrast, *Lucas* fits into a pattern of decisions that adopt a style that can be viewed as "bashing" of state courts and state legislatures.[269] For example, Justice Scalia's majority opinion adopts the view that government has a natural tendency to use the police power to eliminate private property[270] and engage in "plundering"[271] and that the harm principles would not be an effective limit unless the legislature had a "stupid staff."[272]

267. For a collection of articles arguing for and against formal categorical rules in takings jurisprudence, see Symposium, *The Jurisprudence of Takings*, 88 COLUM. L. REV. 1581, 1849 (1988).

268. *See, e.g.*, Stevens v. City of Cannon Beach, 510 U.S. 1207, 1212 n.5 (Scalia, J., dissenting from denial of certiorari) (arguing that "the Supreme Court of Oregon appears to have misread Blackstone").

269. *See supra* note 57 and accompanying text.

270. *See Lucas*, 505 U.S. at 1014 (quoting Pa. Coal Co. v. Mahon, 260 U.S. 393, 415 (1922)).

271. *Lucas*, 505 U.S. at 1027 n.14.

272. *Id.* at 1025 n.12.

Such views are clearly inappropriate for two reasons. First, they are vastly out of proportion to regulatory conduct in the United States, most of which is clearly proper. *Lucas* unleashes this rhetorical attack in the context of a total taking, even though such a taking would clearly be rare and was questionable under the facts in *Lucas*. The sample of cases citing *Lucas* indicates just how rare total regulatory takings are: None of the three total taking cases in the sample studied involved land use regulation like zoning or environmental restrictions. Thus, as a factual matter, there is little, if any, basis for *Lucas*'s one-sided view of the regulatory process. Second, the *Penn Central* balancing approach will be used in the vast majority of takings cases, and the legitimacy of this approach relies largely on the concept that the particularized fact-specific balancing is done in a procedurally fair manner.[273] "Bashing" state courts, legislatures, and regulatory agencies undermines the legitimacy of the *Penn Central* process.

There may be many reasons for this unwarranted negative tone, including the almost inevitable hubris of any court that is not subject to review by a higher tribunal. However, an important reason for the attacks may be the formalistic categorical approach underlying *Lucas*. If there are clear "objective, value free" standards for identifying rights, then only "bad" or "incompetent" legislators, administrators, and judges will deny rights. In addition, the widespread advocacy of balancing tests suggests to formalists that there is a widespread failure to appreciate not only the nature and value of property rights but also the threat that regulators, unrestrained by the rule of law, pose for these rights. As a result, strong language is viewed as necessary.

Palazzolo provides reason to hope that the court will reject the formalistic rhetorical approach of *Lucas* in favor of the more balanced pragmatic realism of *Penn Central*. The ad hoc balancing test has its own problems because it results in considerable uncertainty and in reliance on courts and officials to apply the process of balancing correctly. Moreover, the Court could obviously provide more guidance in structuring this process. *Palazzolo* is disappointing in this regard because it provides no clear additional guidance on how the balancing is to be addressed in terms of defining investment-backed expectations and in addressing the denominator problems. The gratuitous remark about "discomfort with the logic of . . . [the parcel as a whole] rule"[274] is so delphic and portentous that it could hinder analysis of this type of denominator problem. The lower courts have adopted a more posi-

273. *See supra* note 48 and accompanying text.

274. *See supra* note 236 and accompanying text.

tive and useful approach to this problem because they have identified factors relevant to structuring the search for fair solutions.[275]

Despite the problems with balancing, the *Penn Central* approach provides a pragmatic process for an open, public resolution of the conflict between rights and regulations within a specific factual context. A similar approach will be necessary to resolve the issues raised by the Court's grant of certiorari to review whether a taking resulted from the moratorium on development in *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency*.[276] There is merit to both sides concerning temporary moratoria. On the one hand, as indicated in the dissent to the petition for rehearing en banc by the Ninth Circuit, lengthy or repeated temporary moratoria can have substantially the same effect as more permanent prohibitions.[277] On the other hand, temporary moratoria serve a useful purpose because, by maintaining the status quo, they provide time for reflection and procedural fairness in the planning process. This time is particularly helpful in land regulation because, partly as a result of the tension between the values of planning and free market development, planning departments are established but understaffed and politicians tend to postpone hard decisions concerning land use planning in order to seek compromises and consensus. Thus, as with any regulatory takings issue, moratoria require balancing by the courts in order to resolve difficult line drawing issues. A symbolic scheme that recognizes the competing values and structures the balancing in a particular factual context is the best approach for this task. Because of the problems of vagueness and uncertainty that are inherent in this approach, it would be better if we could find clear objective, value free categorical rules about temporary moratoria. However, experience has shown that there are no such formal rules to address problems like regulatory takings, at least no such rules that are not subject to reasonable debate in the important hard cases.[278]

This formalistic categorical approach should be avoided. In a postmodern world where there are no "objective" truths, anyone searching for such objective rules is like the crew searching for the Snark in Lewis Carroll's *The Hunting of the Snark*.[279] Carroll never tells us what a Snark is; he simply lists the five very vague but "unmistakable marks by which you may know . . . the warranted genuine

275. For a discussion of the multifactor balancing test to be used in determining whether subdivided parcels will be treated as a whole, see *supra* notes 141-43 and accompanying text.

276. 216 F.3d 764 (9th Cir. 2000). This case is discussed above in notes 153-64 and accompanying text.

277. *See supra* notes 161-62 and accompanying text.

278. *See* Hubbard, *supra* note 128, at 1142-45.

279. CARROLL, *supra* note **.

snarks."[280] He also indicates that the captain of the ship used a map that was "a perfect and absolute blank"[281] and that the captain had "only one notion for crossing the ocean, And that was to tingle his bell."[282] However, searching for Snarks or objective values without a map or guide is only part of the problem. Actually finding a Snark can be worse because of an extremely unsettling fact:

> [A]lthough common Snarks do no manner of harm
> . . . Some are Boojums . . . .[283]
> If your Snark be a Boojum . . . .
> You will softly and suddenly vanish away
> And never be met with again.[284]

Eventually, one member of the crew finds a Snark. However,

> He had softly and suddenly vanished away -
> For the Snark *was* a Boojum, you see.[285]

280. *Id.* at 21-22.
281. *Id.* at 16.
282. *Id.* at 18.
283. *Id.* at 24.
284. *Id.* at 30.
285. *Id.* at 83.

APPENDIX 1 - REVIEW SHEET FOR SAMPLE OF CASES CITING *LUCAS V. SOUTH CAROLINA COASTAL COUNCIL*

Case Number: _____/_____ Review date_____/_____/01

I. Parties
   A. Affected party
      1. Nature
         a. individual person[s]
         b. business[es] (includes associations)
         c. could not tell
      2. Size
         a. small
         b. large (e.g., likely to involve more than 20 residential lots in size or more than twenty employees)
         c. could not tell
   B. Governmental unit
      1. Federal
      2. State
      3. Local/regional
   C. Other: _____
II. Court
   A. Federal
      1. Court
         a. Traditional (Claims against state or local government)
            (1) Court of Appeals (Circuits 1-11, D.C. Circuit)
            (2) District Court
         b. Claims against federal government
            (1) Claims Court
            (2) U.S. Court of Appeals for the Federal Circuit
         c. S. Ct.
         d. Other: _____
      2. *Lucas* **or other challenge** to property **regulation** at issue? (Compare IV below)
         a. Not at issue
         b. If at issue, did court address merits?
            (1) Yes, addressed merits
            (2) No, avoided merits. If so, basis
               (a) ripeness (exhaustion) (Same as IV-B-3 below)
               (b) abstention
               (c) other: _____
   B. State
III. Program
   A. Environment
      1. Wetlands/flood plain
      2. Coastal

3. Species (animal, plant) protection
4. Other

B. Zoning
C. Forfeiture/nuisance abatement
D. Other: _____
E. Not a taking case

IV. *Lucas* total taking addressed?
A. If so, code "yes" and address the following:
1. Was there a total taking?
a. Yes
b. No. If so, was it because:
(1) not total (compare B-3 below)
(2) not property to begin with (or "notice")
(3) other: _____
2. How long did it take to identify (Measured by last application date to date of decision)? [Note that decision not necessarily final; see V below. Note also that appellate decisions (e.g., F.3d) take longer than trial court (e.g., F. Supp 2d).]
a. not possible to tell
b. two years or less
c. three years
d. four years
e. more than four years

B. If not addressed, code "no" and address the following concerning the role of *Lucas* in the case:
1. Merely cited as a general proposition
2. Cited and used for a categorical *Loretta* taking
3. *Lucas* at issue but held not ripe (or not yet possible to tell if total or if not "property to begin with")
4. Other: _____

APPENDIX 2			Federal							State	Total
			Traditional		Claims against Fed. Gov.		S. Ct	Other	Total		
			Ct. App.	D. Ct.	Claims Ct.	US Ct. App. Fed					
Total Cases			14	20	10	5	3	3	55	55	110
Parties	Nature	Individual	9	10	6	3	1	0	29	30	59
		Business	6	9	4	2	2	3	26	25	51
		Uncertain	0	0	0	0	1	0	1	1	2
	Size	Small	5	8	0	0	0	3	16	23	39
		Large	5	4	6	4	1	0	20	18	38
		Uncertain	4	5	4	1	2	0	16	13	29
Governmental Unit		Federal	6	5	10	5	0	3	29	0	29
		State	0	4	1	0	1	0	6	16	22
		Local/Regional	8	9	1	0	2	0	20	39	59
Program	Environment	Wetlands/Flood plain	0	2	2	1	0	1	6	7	13
		Coastal	0	0	0	1	0	0	1	5	6
		Species protection	1	1	0	1	0	0	3	1	4
		Other	1	1	2	1	0	0	5	14	19
		Total Environmental Cases	2	4	4	4	0	1	15	27	42
	Zoning		3	3	0	1	1	0	8	19	27
	Forfeiture/Nuisance Abatement		2	1	2	0	0	0	5	1	6
	Other		6	10	5	4	1	2	28	10	38
	Not a Taking Case		0	2	0	0	0	0	2	0	2
Lucas Total Takng	Yes		0	0	1	0	0	0	1	2	3
	No—Addressed	Not Total	1	5	1	0	0	0	7	22	29
		Not Property to Begin With	3	2	2	1	0	0	8	6	14
		Other	0	1	0	1	0	0	2	5	7
	No—Not Addressed	Cited as General Proposition	5	7	4	1	1	3	21	12	33
		Cited for Loretta Taking	0	0	0	0	0	0	0	0	0
		Not Ripe or Not Possible to Tell	4	3	0	2	0	1	10	11	21
		Other	3	2	4	0	1	0	10	4	14
	Time to Identify	Not Possible to Tell	0	1	0	1	0	0	2	1	3
		Two Years or Less	0	3	2	0	0	0	5	5	10
		Three Years	0	2	0	1	0	0	3	8	11
		Four years	2	0	0	0	0	0	2	1	3
		More Than Four Years	2	2	2	1	0	0	7	15	22