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Takings and Transitions

Holly Doremus
University of California, Davis

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Cover Page Footnote

Thanks to Donna Christie, Josh Eagle, Richard Epstein, David Markell, J.B. Ruhl, Mark Seidenfeld, Buzz Thompson, and other attendees at those presentations for their thoughtful criticisms, comments and suggestions. Matt Bullock and Julie Ogilvie provided invaluable research assistance.

TAKINGS AND TRANSITIONS

HOLLY DOREMUS*

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I. INTRODUCTION

“He who rejects change is the architect of decay. The only human institution which rejects progress is the cemetery.”

Harold Wilson

“Progress might have been all right once but it has gone on too long.”

Ogden Nash

Regulatory takings doctrine, which determines whether the government is constitutionally required to compensate property owners for regulations that reduce the value of their property, is famously incoherent.¹ The Supreme Court concedes that it has

* Professor of Law and Chancellor's Fellow, University of California, Davis. B.Sc. Trinity College (CT), Ph.D. Cornell University, J.D. U.C. Berkeley (Boalt Hall). Earlier versions of this paper were presented at the 2002 Distinguished Lecture in Environmental Law at The Florida State University College of Law and at the Environmental Law Workshop at Stanford Law School. Thanks to Donna Christie, Josh Eagle, Richard Epstein, David Markell, J.B. Ruhl, Mark Seidenfeld, Buzz Thompson, and other attendees at those presentations for their thoughtful criticisms, comments and suggestions. Matt Bullock and Julie Ogilvie provided invaluable research assistance.

1. See, e.g., Jed Rubenfeld, *Usings*, 102 YALE L.J. 1077, 1078 n.2 (1993) (compiling from the literature descriptions of the doctrine's incoherence).

never been able to articulate a generally applicable test for regulatory takings with any kind of detailed content.² In fact, the Court has announced at least two different tests that it applies haphazardly and with little explanation. Moreover, the Court has allowed cases that appear inconsistent with one another to stand, and even continues to cite them from time to time. Perhaps takings doctrine must inevitably remain subtle, nuanced, and vague,³ but property owners, governments, and society in general would seem to be entitled to a clearer explanation of the principles underlying decisions.

The introduction in the last few decades of “categorical” or “*per se*” takings, tests that make one factor determinative of an obligation to compensate, might have been expected (and intended) to clear up some of this confusion, but it has not.⁴ Indeed, the Court’s two most recent land use takings cases, *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency*,⁵ and *Palazzolo v. Rhode Island*,⁶ step back from categorical tests, returning to the notion that most regulatory takings claims must be evaluated on an *ad hoc*, case-by-case basis. Yet these recent cases perpetuate the Court’s pronounced lack of guidance on how that evaluation should be conducted.

The persistence of incoherence, instability and incomplete explanations in this area of the law suggests that the Court itself is dissatisfied with the tests it has developed, yet is unable to produce a more satisfying jurisprudence. It is generally agreed that the original understanding of the Takings Clause reached only physical occupation or acquisition of property by the government.⁷ Because it has no basis in constitutional history, some thoughtful commentators have argued that the entire doctrine of regulatory takings is fundamentally misguided.⁸ But it is unlikely to

2. See, e.g., *Palazzolo v. Rhode Island*, 533 U.S. 606, 617 (2001) (“Since *Mahon*, we have given some, but not too specific, guidance to courts confronted with deciding whether a particular government action goes too far and effects a regulatory taking.”).

3. See Marc R. Poirier, *The Virtue of Vagueness in Takings Doctrine*, 24 CARDOZO L. REV. 93 (2002).

4. Professor Thompson suggests that the Court’s categorical tests, by analogizing to physical confiscation of property, the extreme case widely agreed upon as requiring compensation, attempt to finesse the need for the Court to come to agreement on a rationale for takings decisions. He notes, however, that the lack of principles makes the categorical tests themselves impossible to defend. Barton H. Thompson, Jr., *The Allure of Consequential Fit*, 51 ALA. L. REV. 1261, 1270 (2000).

5. 535 U.S. 302 (2002).

6. 533 U.S. 606 (2001).

7. See William Michael Treanor, *The Original Understanding of the Takings Clause and the Political Process*, 95 COLUM. L. REV. 782, 785-97 (1995).

8. See, e.g., John F. Hart, *Land Use Law in the Early Republic and the Original Meaning of the Takings Clause*, 94 NW. U. L. REV. 1099 (2000); J. Peter Byrne, *Ten Arguments for the*

disappear. The doctrine responds to some widely held intuitions, and the Court shows no sign of renouncing it. It therefore seems more realistic, and more useful, to seek incremental improvement. I suggest that one key problem with current regulatory takings doctrine, and therefore an opportunity for improvement, is the Court's failure to focus directly on the key feature of those claims.

Regulatory takings claims are fundamentally conflicts over legal transitions.⁹ They arise when the rules change, those changes are costly (in economic or other terms), and the people bearing the costs believe that they are being unfairly singled out. The problem is not the content of the new rules in the abstract, but simply that the rules are different than they once were. A viable regulatory takings claim assumes that the government has acted to prohibit some activity that once was allowed, or at least had not been explicitly prohibited. That is true even in the most extreme case, when regulation denies all viable use of land. In *Lucas v. South Carolina Coastal Council*,¹⁰ which announced the rule that complete regulatory wipeouts ordinarily require compensation, the core of the problem was not that Lucas could not build what he wanted to on his lots. Rather, it was that when he bought the lots, Lucas expected that he could build luxury homes on them, and later changes in the rules precluded him from doing so.¹¹ The Court explicitly recognized the importance of change in *Lucas*, noting that compensation is not required when "background principles of State's law" render land unusable, only when newly declared rules have that effect.¹²

In most instances, takings claims also involve another kind of change: the effect of legal changes typically falls on property owners seeking to change the physical status quo. Governments rarely seek to regulate away established uses. So these claims nearly always arise when property owners seek to develop their property for a new use or to otherwise alter its physical condition, and find that the current regulations in force will not permit that change.

The quotations that opened this article illustrate the two faces of change: change is inevitable and necessary, often promising new opportunities and improvements. It represents evolution and progress, touchstones of the American ideal. But it is also stressful, disruptive and costly. It undermines and unsettles. Both the

Abolition of the Regulatory Takings Doctrine, 22 ECOL. L. Q. 89 (1995).

9. Cf. Carol M. Rose, *Property and Expropriation: Themes and Variations in American Law*, 2000 UTAH L. REV. 1, 18 (2000) (describing the underlying problem of the controversial regulatory taking cases as one of the transitions).

10. 505 U.S. 1003 (1992).

11. *Id.* at 1008-09.

12. *Id.* at 1029.

positive and the negative aspects of change are highlighted in the context of legal rules. Abrupt alteration of those rules can greatly reduce the expected return on investments made in reliance on a stable regulatory regime, and discourage future investment. Even without economic costs, people tend to fear and resist change. Change in the governing rules may threaten deeply ingrained ways of life or denigrate strongly held values, casting people emotionally adrift. Yet the ability to revise and update rules is essential to the public welfare, allowing society to respond to changed circumstances, changed understandings, and changed goals that render the old regime unsuitable for addressing the future.

Unfortunately, the dynamic aspect of takings law has been little developed by the Court. It was acknowledged in a backhanded fashion in *Penn Central Transportation Co. v. City of New York*,¹³ by the inclusion of "distinct investment-backed expectations" as one factor to consider in determining whether a regulatory taking has occurred,¹⁴ and again in *Lucas*, when the Court agreed that limitations that inhere in the title to property do not raise regulatory takings concerns.¹⁵ It also implicitly informs *Hodel v. Irving*¹⁶ and *Babbitt v. Youpee*,¹⁷ cases in which the extent to which abrupt departure from a long-established property rule led the Court to find a taking. But the Court has never made a serious direct attempt to grapple with the fundamental question about transitions: under what circumstances is it fair (the Court's ultimate touchstone for takings claims¹⁸) to impose the economic costs of a change in the rules governing property upon owners who seek to change the physical condition of their land?

Careful examination of that question is overdue. *Tahoe-Sierra* and *Palazzolo* make it clear that the current Court is disinclined to extend its narrow bright line rules. It is therefore well past time to give greater content to the *ad hoc* balancing test that will decide most regulatory takings cases. Focusing more directly on law as a dynamic phenomenon, on the benefits and costs of transitions, and on other factors that may encourage or impede transitions might

13. 438 U.S. 104 (1978).

14. *Id.* at 124.

15. 505 U.S. at 1027.

16. 481 U.S. 704 (1987).

17. 519 U.S. 234 (1997).

18. The most often quoted statement in the Court's modern takings jurisprudence describes the Takings Clause as "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." *Armstrong v. United States*, 364 U.S. 40, 49 (1960). Indeed, as Professor Thompson puts it, "[t]he 'parroting' of this sentence from *Armstrong* has become almost a joke." Thompson, *supra* note 4, at 1286.

bring some coherence to this famously incoherent area of the law, providing a clearer explanation for some of the Court's results and giving reason to question others.

That is not to say that focusing on transitions will make takings cases easy. Law has long had difficulty dealing with change. Because change is understood to be legitimate and necessary in a variety of circumstances, it is essentially never foreclosed. But when change occurs, the law has struggled with who should be subject to the new rules and on what terms. Several of the most consistently daunting areas of law deal with transitions from one regulatory regime to another, including the limits of retroactivity,¹⁹ the appropriate role of *stare decisis*,²⁰ and when and to what extent land use rights become vested.²¹ We should not expect takings doctrine to be clearer or more predictable than these other doctrines of change. But we can expect that focusing on the right questions will help illuminate principles that will make the decisions seem less ad hoc.

My aim here is not to develop an algorithm that will provide absolute predictability for takings claims. I agree with Marc Poirier that clear rules for regulatory takings claims are unlikely to materialize, and indeed are not desirable.²² But it is one thing to employ clear principles whose application to any particular set of facts may be contested. It is another to be entirely vague about the principles that govern the decision. In my view, the Court's current takings jurisprudence goes too far in both the direction of certainty

19. See *E. Enter. v. Apfel*, 524 U.S. 498 (1998); *United States v. Winstar Corp.*, 518 U.S. 839 (1996). For commentary on retroactivity, see generally Symposium, *When Does Retroactivity Cross the Line? Winstar, Eastern Enterprises and Beyond*, 51 ALA. L. REV. 933 (2000); Jill E. Fisch, *Retroactivity and Legal Change: An Equilibrium Approach*, 110 HARV. L. REV. 1055 (1997).

20. See, e.g., Thomas Healy, *Stare Decisis as a Constitutional Requirement*, 104 W. VA. L. REV. 43 (2001); Caleb Nelson, *Stare Decisis and Demonstrably Erroneous Precedents*, 87 VA. L. REV. 1 (2001); Richard H. Fallon, Jr., *Stare Decisis and the Constitution: An Essay on Constitutional Methodology*, 76 N.Y.U. L. REV. 570 (2001); Thomas R. Lee, *Stare Decisis in Economic Perspective: An Economic Analysis of the Supreme Court's Doctrine of Precedent*, 78 N. C. L. REV. 643 (2000); Rafael Gely, *Of Sinking and Escalating: A (Somewhat) New Look at Stare Decisis*, 60 U. PITT. L. REV. 89 (1998); Thomas R. Lee, *Stare Decisis in Historical Perspective: From the Founding Era to the Rehnquist Court*, 52 VAND. L. REV. 647 (1999); Henry Paul Monaghan, *Stare Decisis and Constitutional Adjudication*, 88 COLUM. L. REV. 723 (1988).

21. See, e.g., Laura S. Underkuffler, *On Property: An Essay*, 100 YALE L. J. 127, 130-31 (1990); Andrea L. Peterson, *The Takings Clause: In Search of Underlying Principles Part I—A Critique of Current Takings Clause Doctrine*, 77 CAL. L. REV. 1301, 1313-16 (1989); Grayson P. Hanes & J. Randall Minchew, *On Vested Rights to Land Use and Development*, 46 WASH. & LEE L. REV. 373 (1989); CHARLES L. SIEMON ET AL., *VESTED RIGHTS: BALANCING PUBLIC AND PRIVATE DEVELOPMENT EXPECTATIONS* (1982).

22. See Poirier, *supra* note 3 (arguing that vagueness in regulatory takings doctrine may be inevitable and may promote social discussions that reinforce sense of community).

and ambiguity, because the Court has failed to find a comfortable middle. On one side, the Court has grasped at clear categorical rules, even when the results those rules produce seem silly. On the other side, beyond the extreme cases to which those categorical rules apply, the Court has been unable to articulate any standard clearer than unadorned "fairness".²³ I believe we can and should aspire to a more principled takings jurisprudence, and that focusing on the pressures for and against regulatory change can help us develop one.

Regulatory takings jurisprudence should take into account the fact that resistance to legal change is already high, and should not impose additional barriers to necessary change. The Court should, however, seek principles that will help sort justified from unjustified change and protect against majoritarian political oppression. Two relatively simple steps would tie regulatory takings claims much more closely to the element of change. First, the Court should require that a regulatory takings claimant identify a change in applicable legal principles. Second, the Court should reconsider and refine its *ad hoc* takings test, focusing more directly on the transition problem. The key factors to consider in allocating the costs of rule transitions between property owners and the government are the justification for the transition, its foreseeability, its abruptness, and its generality.

II. THE TANGLED TAKINGS KNOT

The foundation of regulatory takings doctrine is *Pennsylvania Coal Co. v. Mahon*,²⁴ the 1922 case in which the Court held that the government was required to compensate a coal mining company for the effects of a statute prohibiting the mining of anthracite coal in such a way as to cause subsidence of the surface. That prohibition effectively forced the mining company to leave some coal in place in order to support the surface, even where it had sold the surface with the express reservation of the right to withdraw support.²⁵

In the course of its decision, the Court said that "if regulation goes too far it will be recognized as a taking,"²⁶ suggesting that the magnitude and effect of the regulation alone, regardless of other factors, may create an obligation to compensate. At the same time, it noted that most run-of-the-mill regulations would not require

23. *Armstrong*, 364 U.S. at 49.

24. 260 U.S. 393 (1922).

25. *Id.* at 412-13.

26. *Id.* at 415.

compensation because “[g]overnment hardly could go on” if it had to pay for every change in the law that diminishes property values.²⁷

Ever since *Pennsylvania Coal*, the Court has struggled to find a principled means of identifying regulations that cross that boundary. In *Armstrong v. United States*,²⁸ the Court articulated a general description it has repeated frequently in recent cases: the Takings Clause exists to prevent the government from “forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole.”²⁹ But that description seemed to bring the Court no closer to a general test distinguishing ordinary regulations, whose costs would fall where they might, from those that went too far, for which the government must bear the costs.

Finally, in *Penn Central Transportation Co. v. City of New York*,³⁰ upholding the city’s historic landmark law against a takings challenge, the Court provided something approaching a general test for regulatory takings. It listed two factors as having “particular significance”³¹ to regulatory takings claims: 1) the economic impact of the regulation, especially the extent to which it interfered with “distinct investment-backed expectations;”³² and 2) the “character of the governmental action,” with regulations that approach physical invasions receiving more scrutiny than those that merely adjust the benefits and burdens of economic life.³³ Subsequent cases have separated the first factor into two distinct elements: economic impact and interference with investment-backed expectations.³⁴

Because it actually formulated a test for regulatory takings, *Penn Central* has been called “the most important regulatory takings opinion.”³⁵ But it can hardly be said to have brought clarity to the doctrine. The Court has many times repeated the list of *Penn Central* factors, but has never refined the meaning of those factors, or explained how they should be weighted. Its decisions since *Penn Central* have sown nothing but confusion. The lack of investment-backed expectations, for example, has been decisive in some cases³⁶

27. *Id.* at 413.

28. 364 U.S. 40 (1960).

29. *Id.* at 49.

30. 438 U.S. 104 (1978).

31. *Id.* at 124.

32. *Id.*

33. *Id.*

34. *See, e.g.*, *Brown v. Legal Found. of Wash.*, 123 S. Ct. 1406, 1409 (2003); *Palazzolo v. Rhode Island*, 533 U.S. 606, 617 (2001); *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1071 (1992).

35. ROBERT MELTZ ET AL., *THE TAKINGS ISSUE: CONSTITUTIONAL LIMITS ON LAND USE CONTROL AND ENVIRONMENTAL REGULATION* 130 (1999).

36. *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986 (1984).

and irrelevant in others.³⁷ Litigants would be hard-pressed to distill from the cases any principles that explain the distinctions.

To make matters worse, two years after *Penn Central*, in *Agins v. City of Tiburon*,³⁸ the Court articulated a different, due-process based, standard that bears some similarities to the *Penn Central* factors,³⁹ but with an important difference. According to *Agins*, a regulation affecting property interests is a taking if it either does not substantially advance a legitimate state interest (a somewhat more intrusive standard than the ordinary test for whether regulation is within the government's power) or denies all economically viable use of property.⁴⁰ As if this were not enough confusion, in 1987 the Court upheld a statute virtually identical to the one in *Pennsylvania Coal* against a takings challenge, with little explanation and without overruling or even questioning *Pennsylvania Coal*.⁴¹ Faced with the Court's obscure pronouncements on regulatory takings, lower courts could surely be forgiven for throwing up their hands in despair.

In 1982, and again in 1992, the Court added another layer to takings analysis by introducing categorical rules that should, in principle, have simplified the analysis. First, in *Loretto v. Teleprompter Manhattan CATV Corp.*,⁴² the Court held that "permanent physical occupation,"⁴³ no matter how small or economically insignificant, always requires compensation. Then in *Lucas v. South Carolina Coastal Council*,⁴⁴ it held that compensation is always required if a regulation denies all economically viable use, with the important exception of regulations that merely make clear existing "background principles" of state law. But rather than provide clarity, these *per se* takings rules have simply encouraged unproductive arguments about what constitutes physical "occupation"⁴⁵ and what "denominator" the plaintiff's loss should be measured against.⁴⁶

37. *Hodel v. Irving*, 481 U.S. 704 (1987).

38. 447 U.S. 255 (1980).

39. The *Agins* test was foreshadowed in *Penn Central* by the Court's reference to regulations promoting the public welfare. *Penn Cent. Transp. v. City of New York*, 438 U.S. 104, 109 (1978).

40. *Agins v. City of Tiburon*, 447 U.S. 255, 260 (1980).

41. *Keystone Bituminous Coal Ass'n v. DeBenedictis*, 480 U.S. 470 (1987). The distinction between *Keystone* and *Pennsylvania Coal* is discussed *infra* in Part V(B)(3).

42. 458 U.S. 419 (1982).

43. *Id.* at 427.

44. 505 U.S. 1003 (1992).

45. *See Yee v. City of Escondido*, 503 U.S. 519 (1992).

46. *See, e.g., Lucas*, 505 U.S. at 1016 n.7; *Dist. Intown Props, Ltd. v. Dist. of Columbia*, 198 F.3d 874, 879 (D.C. Cir. 1999); Benjamin Allee, *Drawing the Line in Regulatory Takings Law: How a Benefits Fraction Supports the Fee Simple Approach to the Denominator Problem*, 70 *FORDHAM L. REV.* 1957 (2002); Frank I. Michelman, *Property, Utility, and Fairness: Comments*

The Court's two most recent land-use regulation takings cases retreat from the quixotic search for *per se* rules, reemphasizing the *ad hoc* test developed in *Penn Central*.⁴⁷ In *Palazzolo v. Rhode Island*, the Court responded to a wave of cases from the lower courts on the importance of notice in the takings context. Palazzolo became the legal owner of some undeveloped coastal wetlands in 1978, when the company of which he was the sole shareholder had its corporate charter revoked for failure to pay income taxes.⁴⁸ By that time, Rhode Island had in place both legislation and implementing regulations sharply limiting allowable development on coastal wetlands.⁴⁹ When he was denied the right to develop, Palazzolo brought a takings claim.⁵⁰ The Rhode Island Supreme Court rejected that claim on the ground that Palazzolo, because he acquired the parcel after the state's wetland regulations went into effect, could not have had any investment-backed expectation that the property could be developed free of those regulations.⁵¹ Essentially it held, as many other courts had done,⁵² that those who acquire property after regulations are put in place are never entitled to compensation.

The U.S. Supreme Court rejected that conclusion, ruling that "[t]he State may not put so potent a Hobbesian stick into the Lockean bundle."⁵³ Justice Kennedy wrote for the majority that while some prospective new rules may limit the value of land without requiring compensation, "other enactments are unreasonable and do not become less so by passage of time."⁵⁴ Without providing any more guidance, the Court remanded with directions to conduct a *Penn Central* analysis.⁵⁵ That was a rather odd step, since presumably the Rhode Island court felt that it had already gone through the *Penn Central* factors. Because Palazzolo had no reasonable investment-backed expectations, the state court implicitly concluded that the economic impact of the regulation on him was not unfair. Since the regulation in no way authorized physical occupation of Palazzolo's property, *Penn Central* seems to call for precisely the result the state court came to, although that

on the Ethical Foundations of "Just Compensation" Law, 80 HARV. L. REV. 1165, 1193-94 (1967).

47. *Tahoe*, 535 U.S. at 302.

48. *Id.* at 606-07.

49. *Id.*

50. *Id.* at 606.

51. *Palazzolo v. State ex rel. Tavares*, 746 A.2d 707 (R.I. 2000).

52. See *infra* note 192.

53. *Palazzolo v. Rhode Island*, 533 U.S. 606, 627 (2001).

54. *Id.*

55. *Id.* at 632.

court could have been more explicit about its consideration of factors other than investment-backed expectations.

In the Supreme Court, the multitude of separate opinions in *Palazzolo* evidenced considerable disagreement about the application of the *Penn Central* test. Justice Scalia described notice of the regulation as simply irrelevant to the takings analysis,⁵⁶ while Justice Stevens would have agreed with the state court that notice precludes a takings claim.⁵⁷ Justices O'Connor and Breyer (each writing separately) argued that notice was a relevant but not determinative factor that must, in some unspecified fashion, be taken into account in the specific context of each dispute.⁵⁸

A year later, the Court issued another regulatory takings decision, *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency*.⁵⁹ At issue in *Tahoe-Sierra* was a development moratorium that essentially prohibited any development on the plaintiffs' property for a period of nearly three years.⁶⁰ The moratorium was imposed to give the local planning agency time to plan for the rational distribution of the Lake Tahoe basin's limited capacity to absorb additional development.⁶¹ The District Court decided the moratorium was not a taking under the *Penn Central* test, but that it was a taking under the categorical *Lucas* test because it denied all economic use of the property, if only for a limited time.⁶² The property owners declined to appeal the *Penn Central* holding, but the Tahoe Regional Planning Agency appealed the *Lucas* ruling.⁶³ The Ninth Circuit reversed that ruling, holding that the moratorium was not a categorical taking,⁶⁴ and the Supreme Court affirmed.⁶⁵ As it had in *Palazzolo*, a majority of the Court emphasized the need for individual analysis of each case, and the limited applicability of the Court's *per se* takings rules.⁶⁶

Palazzolo and *Tahoe-Sierra* emphasize the continued importance of the *ad hoc Penn Central* test, but provide no more guidance about the application of that test than the Court's earlier decisions. We are left with the clear statement that in the most extreme cases

56. *Id.* at 636-37 (Scalia, J., concurring).

57. *Id.* at 637 (Stevens, J., dissenting).

58. *Id.* at 633 (O'Connor, J., concurring); *id.* at 654-55 (Breyer, J., dissenting).

59. 535 U.S. 302 (2002).

60. *Id.* at 306. Rehnquist, dissenting, interpreted the moratorium as being in effect for considerably longer than three years. *See id.* at 344-45 (Rehnquist, J., dissenting).

61. *Id.* at 310.

62. *Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency*, 992 F. Supp. 1218 (D. Nev. 1998).

63. *Id.*

64. *Id.*

65. *Tahoe-Sierra*, 535 U.S. at 302.

66. *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1015 (1992).

(permanent physical occupation and newly-declared rules denying all economic use) compensation is automatically required, but the vast majority of the cases must be evaluated individually to see if the burdens of regulation are fairly distributed. We have very little clue how the Court intends that analysis to be conducted.

III. CHANGE IS CENTRAL TO REGULATORY TAKINGS CLAIMS

Although the Court has implicitly recognized the importance of change to regulatory takings claims, its explicit discussion of those claims is quite static. In *Penn Central*, for example, the Court said that whether the regulation goes too far, requiring compensation, “may be narrowed to the question of the severity of the impact of the law on appellants’ parcel.”⁶⁷ Perhaps implicit in that characterization is the notion that the impact must be judged by comparing the world before and after the regulation, but the focus is more on the cost to the landowner than on the notion of change. Focusing more directly on the dynamic nature of regulatory takings claims, and indeed of regulation in general, should help develop a more principled regulatory takings jurisprudence.

Regulatory takings claims are all about change. They are obviously about distribution of the costs of regulatory transitions between landowners and society. At a more subtle level, they are also about both the practical ease and the moral acceptability of such transitions. Requiring compensation increases the barriers to change in two ways. First, it superimposes a budgetary check on existing political hurdles. Second, it suggests that property owners hold entitlements to act that government should not infringe. By reframing the debate, judicial declaration that compensation is required is likely to raise political, as well as budgetary, barriers to regulation.

Like all legal rules, property rules *must* be dynamic to some extent. Indeed, the rules governing real property must be more open to change than others. Land is the ultimate durable good; it cannot be created by human action,⁶⁸ and it is not destroyed by human action or the passage of time. But at the same time that land’s durability increases the need for flexibility in the governing rules, it complicates transitions. In other contexts, transitions may be eased by applying new rules prospectively. But new property rules can never be wholly forward-looking. Although they can be

67. 438 U.S. 104, 136 (1978).

68. Land’s features can be greatly altered, but it cannot be newly created. Filling wetlands, for example, puts solid ground where it was not previously found, but it does not create new land. There already is land under wetlands, streams, and the oceans; it is simply covered with water.

applied only to new activities, they can never be limited to new land. It is always possible for a landowner to complain that new rules conflict with her long-standing plans for the land.

The Court should begin its analysis of regulatory takings claims with the premise that a particular type of change is absolutely essential to a viable claim.⁶⁹ For a regulatory taking to occur, there must be a change, brought about by the government, in the rules governing property. "Rules" in this context mean the principles of decision, not the factual circumstances that determine how those principles apply to a particular parcel of land.

The Supreme Court has long recognized the importance of change in regulatory takings cases, but only in a glancing, offhand kind of way. In *Pennsylvania Coal*, for example, it noted that government could hardly go on if compensation were required for every change in the general law, and described the issue for decision as "upon whom the loss of the changes desired should fall."⁷⁰ In *Lucas*, it made change an element of a "total taking" claim, noting that the government can, without paying compensation, assert a pre-existing limitation on property use that inheres in the owner's title through background principles of state law even if the effect is "confiscatory."⁷¹ That makes strong logical, as well as pragmatic, sense. The term "taking" implies the loss of something once held, which means a change in one's property rights. There can be no taking without change.

But the converse is not true; a change does not automatically imply a taking. Only certain types of change implicate the concerns that motivate regulatory takings doctrine. The problem to which the doctrine of regulatory takings responds is the unique power of the government to make and modify the rules under which property is held. Only when *regulatory change* goes too far should a regulatory taking be found. That means that the rate and extent of change, rather than the absolute level of regulatory intrusion, are determinative. Even Justice Scalia, who comes closest of the members of the current Court to proclaiming that land ownership implies some minimum level of development rights, implicitly recognized the importance of regulatory change in his *Lucas* opinion by providing an exemption from compensation where a regulation

69. The Court has never held, and I am not persuaded, that some minimum level of recognition of property is guaranteed by the federal Constitution. In any case, that point is not important to my discussion here. As a matter of fact, government in the United States has recognized property rights to an extent surely sufficient to meet any minimum requirement. The issue now is whether and to what extent property rights previously recognized, implicitly or explicitly, can be constricted free of the obligation to compensate.

70. 260 U.S. 393, 416 (1922).

71. 505 U.S. at 1028-29.

merely makes explicit “background principles” of law.⁷² Law has always shaped property rights. That is not inherently problematic. What is problematic is a regulatory transition too drastic or abrupt to permit any response, or imposition of the costs of transition on only a subset of similarly situated landowners.

Only a change in applicable legal principles should support a regulatory taking claim. Mere application of existing principles, even vague ones such as the rules of nuisance, to new circumstances should not be enough. Broad principles serve an important change-facilitating function, allowing the law to make small adjustments to respond to new circumstances. By providing some notice of the potential for future application, such principles can encourage foresight and adaptability. The great virtue of notoriously vague nuisance law, for example, is its ability to respond to the new land use conflicts that have followed new technological developments since the industrial revolution.

A change in factual circumstances can bring serious economic loss, but generally will not invoke concerns about government oppression. Indeed, in most circumstances we want to encourage people to anticipate the changes in factual circumstances that will inevitably occur, so that society can respond nimbly to those changes. There is one conspicuous exception to this rule, tied to our special solicitousness for physical invasions. The legal principle of sovereign immunity, taken to the extreme, could allow the government to trespass with impunity. If the Takings Clause is to have any application to the forced expropriations it most clearly seeks to remedy, it cannot require a change in legal rules in that context. Where the government physically invades or expropriates property, therefore, it should be required to compensate where the facts permitting that invasion are peculiarly within its control.⁷³ In the regulatory taking context, however, a change in the facts should never be sufficient to require compensation. Since regulatory takings claims rest on abuse by the government of its regulatory power, a change in the legal rules under which property is held should be essential to making out such a claim.⁷⁴

72. In *Lucas*, Scalia seemed to want to declare that some building must be permitted on all land, but felt constrained to acknowledge that background principles must be consulted. See *id.* at 1031 (“It seems unlikely that common-law principles would have prevented the erection of any habitable or productive improvements on petitioner’s land; they rarely support prohibition of the “essential use” of land.”).

73. For a discussion of how this requirement would apply in practice, see *infra* text accompanying notes 133-52.

74. Physical takings may be viewed as different in this respect. If the background legal rules include sovereign immunity, limiting takings claims to changes in the legal rules could potentially allow the government to trespass with impunity. Given the historic evidence that

IV. CALIBRATING REGULATORY CHANGE

Because compensation rules will inevitably affect the ease of legal transitions, regulatory takings doctrine should, to the extent possible, be calculated to encourage adaptive change at a tolerable pace. In practice, because society is far more likely to be overly change-averse than overly change-seeking, a narrow interpretation of compensation requirements for regulations will almost certainly be more adaptive than a broad one.

A. *Impulsiveness, Inertia, and Plasticity*

In a study of corporate management behavior,⁷⁵ David Hirshleifer and Ivo Welch provide a very useful taxonomy of openness to change. They call excessive resistance to change *inertia*, excessive willingness to change *impulsiveness*, and the happy medium of readiness to change as appropriate in response to new information or circumstances *plasticity*. In the regulatory context, both inertia and impulsiveness have significant costs. The doctrine of takings should therefore be calibrated, to the extent practicable, to push governments away from the extremes and toward adaptive plasticity.

1. *The Problem of Impulsiveness*

The perils of impulsiveness include unfairness, inefficiency, the imposition of unnecessary transition costs, and the psychological costs of disturbing settled expectations. Changing the rules after people have adjusted their conduct on the basis of those rules often seems unfair, because we generally think that people are entitled to, and indeed should, govern their behavior according to the existing rules. Transitions can seem especially unfair where the choices made in reliance on the old regulatory regime cannot be readily undone or modified, as in the case of retroactive criminal liability, or of extensive physical modification of land. Regulatory change also can raise concerns about opportunities for oppression of political minorities. Some commentators argue that there are structural reasons to expect such oppression in the land use context, because development decisions often give voter/residents the opportunity to transfer wealth to themselves at the expense of

the Takings Clause was intended to address actual physical invasions or seizures of property, we should not go that far. In the physical invasion context, a factual change, invasion of the property by the government, can be the trigger for a takings claim. In that context, the Takings Clause ensures a tort-type remedy against the government.

75. David Hirshleifer and Ivo Welch, *An Economic Approach to the Psychology of Change: Amnesia, Inertia, and Impulsiveness*, 11 J. ECON. & MGMT. STRATEGY 379 (2002).

absentee landowners.⁷⁶ A related concern is that early developers, by blocking later development by others, may increase the scarcity value and accordingly the profitability of their own development.

Economic efficiency, as generally understood to mean the sum of preference satisfaction or welfare across society, can also be implicated by impulsiveness. One concern is that of “fiscal illusion”:⁷⁷ that government will not take into account the societal costs of rule changes if those costs do not come out of its budget. Budgetary signals, of course, are not the only, or even the most powerful, signals to which political actors respond.⁷⁸ Some commentators believe that fiscal illusion, though, might indirectly reduce the political strength of opposition to regulation. According to Saul Levmore, the public choice model of political decision-making suggests that the prospect of increasing taxes to support new regulation will arouse political opposition that might not otherwise materialize.⁷⁹ Daniel Farber, however, interprets the public choice consequences differently, and to my mind more plausibly. Noting that a key insight of public choice theory is that “small groups with high stakes have a disproportionately great influence on the political process,”⁸⁰ he suggests it is unlikely that the diffuse mass of taxpayers will mobilize more effectively against a government project than those who stand to lose their property without compensation.⁸¹ On this view, the opposition incited by the

76. See, e.g., WILLIAM A. FISCHER, *REGULATORY TAKINGS: LAW, ECONOMICS, AND POLITICS* 132-40 (1995).

77. “Fiscal illusion” is the term generally used to describe underweighting by regulators of costs they do not have to bear. See Lawrence Blume & Daniel L. Rubinfeld, *Compensation for Takings: An Economic Analysis*, 72 CAL. L. REV. 569, 620-22 (1984).

78. Louis Kaplow describes the fiscal illusion argument as “deeply flawed” because neither the costs nor the benefits of government action are borne directly by regulators. Louis Kaplow, *An Economic Analysis of Legal Transitions*, 99 HARV. L. REV. 509, 568, 606 (1986). It is also worth noting that compensation creates its own economic inefficiencies. The government may face short-term budgetary constraints that prevent it from paying for regulations which would, in the long run, provide substantial net positive benefits. Glynn S. Lunney, Jr., *Takings, Efficiency, and Distributive Justice: A Response to Professor Dagan*, 99 MICH. L. REV. 157, 167 (2000). Raising tax money to pay compensation also leads to dead weight losses that increase the net costs of regulation to society. Barton H. Thompson, Jr., *People or Prairie Chickens: The Uncertain Search for Optimal Biodiversity*, 51 STAN. L. REV. 1127, 1181-82 (1999).

79. Saul Levmore, *Changes, Anticipations, and Reparations*, 99 COLUM. L. REV. 1657, 1673 (1999). See also *Pennell v. City of San Jose*, 485 U.S. 1, 22 (Scalia, J., concurring) (“The politically attractive feature of regulation is not that it permits wealth transfers to be achieved that could not be achieved otherwise; but rather, that it permits them to be achieved ‘off budget,’ with relative invisibility and thus relative immunity from normal democratic processes.”).

80. Daniel A. Farber, *Public Choice and Just Compensation*, 9 CONST. COMMENT. 279, 289 (1992).

81. See also Marc R. Poirier, *Takings and Natural Hazards Policy: Public Choice on the Beachfront*, 46 RUTGERS L. REV. 243, 247 (1993) (concluding that uncompensated prohibitions

direct impact of an uncompensated regulation will typically be far more important to the political calculus than the marginal political consequences of imposing the economic costs of regulation on taxpayers.

Another efficiency concern is the worry that an unstable regulatory climate will inhibit investment, particularly investment that takes a long period of time to mature.⁸² Instability may also encourage the wrong kind of investment, or investment at the wrong time. If property rights can be securely vested through development, for example, regulatory instability will tend to encourage inefficiently early development.⁸³ Of course, investors could account for predictable changes in the legal rules just as they factor in the predictable threat of natural disasters. It may be that regulatory change is less predictable, at least less formally or mathematically predictable, than earthquakes or hurricanes, although there appears to be little empirical support for this view.⁸⁴

Beyond these uncertainty concerns, as Michael Van Alstine points out, regulatory change by its very nature imposes some other costs on society.⁸⁵ These "transition costs," as Van Alstine terms them, include the costs of learning to understand the new rule, including the work individuals and organizations put into understanding it, the increased costs of professional advice as the professionals must continually update their expertise, and the efforts of courts and legal scholars to flesh out the new rule's content.⁸⁶ In addition, there is always a risk that the new rule will

on beachfront construction "protect the public from predictable, long-term interest group subsidies that cannot otherwise be prevented.").

82. See, e.g., Michelman, *supra* note 46, at 1216-17 (arguing that predictability allows confidence in investment in capital projects); John O. McGinnis & Michael B. Rappaport, *Symmetric Entrenchment: A Constitutional and Normative Theory*, 89 VA. L. REV. 385, 432-33 (2003) ("The threat of a future taking would deter individuals from making the long-term investments that productive economic activity, especially in the modern world, requires.").

83. David A. Dana, *Natural Preservation and the Race to Develop*, 143 U. PA. L. REV. 655 (1995).

84. In fact, there is a market in prediction of regulatory risks. The PRS Group, a consulting firm which claims to supply information to more than 80% of the world's largest companies, produces an International Country Risk Guide providing "financial, political, and economic risk ratings for 140 countries." The PRS Group, International Country Risk Guide, available at <http://www.prsgroup.com/icrg/icrg.html>, (last visited July 16, 2003). The Guide includes such indicators as "Risk of Expropriation," "Risk of Repudiation of Contracts by Governments," and "Corruption in Government." Philip Keefer & Stephen Knack, *Boondoggles and Expropriation: Rent-seeking and Policy Distortion When Property Rights are Insecure*, 14-15 (Oct. 11, 2002), available at http://econ.worldbank.org/files/20746_wps2910.pdf (last visited July 16, 2003). Cf. Kaplow, *supra* note 79, at 605 (concluding that arguments for takings compensation based on investment incentives "are highly suspect").

85. Michael P. Van Alstine, *The Costs of Legal Change*, 49 UCLA L. REV. 789 (2002).

86. *Id.* at 816-45.

not in fact be an improvement on the old, and that society will eventually want to change back. That sort of “policy whiplash”⁸⁷ is surely both wasteful and disconcerting.⁸⁸

Finally, it has been argued that regulatory transitions carry special psychological costs. In his influential 1967 article, Frank Michelman contended that uncompensated regulatory changes impose “demoralization costs” in excess of natural disasters causing an equivalent loss, both because they are less predictable and because they appear purposive.⁸⁹ He argued that such transitions can demoralize not only the individuals or entities directly affected, but also others who empathize with those losses.⁹⁰ He suggested that demoralization costs must be taken into account in any efficiency calculation of the consequences of an uncompensated government taking of property.⁹¹ Others have questioned Michelman’s inclusion of demoralization costs only on the property owner’s side of the ledger. They point out that failure to regulate, or imposition of regulatory costs on taxpayers, may demoralize those whose expectations are violated by unregulated use of property, particularly where that use affects common resources.⁹²

As explained below,⁹³ there does indeed seem to be a special psychological cost associated with the loss of an entitlement. That does not solve the symmetry problem, however, because entitlements are frequently uncertain or contested. Society may believe it is entitled to the continued existence of an endangered species, for example, at the same time that an owner of land within the species’ habitat believes she is entitled to develop her property, even at the expense of the species. But there may be another way to view “demoralization” that is asymmetric in the way that Michelman posits. As Carol Rose points out, regulatory transitions whose costs fall especially hard on a small class of persons can convey a message that those persons are not full members of

87. Bryan G. Norton, *Which Morals Matter? Freeing Moral Reasoning from Ideology* (forthcoming 2003).

88. How much drag correction of policy errors is likely to impose on society, of course, is very hard to determine or even estimate. People are likely to have very different views about that *a priori*, depending upon their level of optimism about new law. There is a great deal of literature focused on why law might be made badly, but Levmore suggests there are also plausible reasons to suppose that most new law improves on the old. See Levmore, *supra* note 81, at 1662. My own intuition is that truly adaptive, “good”, law is not likely to be changed often, given the barriers to change detailed below. While a particular policy experiment may not work well, it may nonetheless provide information that will make the next attempt more likely to succeed.

89. Michelman, *supra* note 46, at 1214-17.

90. *Id.* at 1214.

91. *Id.* at 1214-15.

92. Poirier, *supra* note 3, at 182-83.

93. See *infra* Part IV(B).

society.⁹⁴ That apparent exclusion no doubt brings with it a demoralization that the advocates of a new regulation, who are by definition the winners of a social battle, are not likely to experience whether or not the losers are compensated.

2. *The Hazards of Inertia*

Just as there are reasons to be concerned about impulsiveness, there are problems associated with inertia, which implies that the legal regime does not keep up with demands. A variety of factors, including new information, new technology, new circumstances, and new social mores may call for changes in regulation.⁹⁵ Because land is both peculiarly persistent and fundamentally limited, not being within human power to produce, the rules governing land ownership and use will inevitably need to change in response to such triggers. Inertia, which delays or prevents those changes, means that the law will not accurately reflect societal goals. That in turn will surely make achievement of those goals more elusive.

New information may reveal that activities once believed to be socially neutral or even beneficial have a harmful aspect. Wetlands destruction is an example. Throughout the early history of the country, wetlands filling was actively encouraged as a means of putting "waste" areas to beneficial agricultural use.⁹⁶ Within the last half-century, however, ecologists have taught us that wetlands provide a variety of valuable ecosystem services, including water filtration and flood control.⁹⁷

New technology can create the need for new regulations by greatly reducing the costs of activities that were once impractical, by creating new impacts on resources, or by creating new demands on resources.⁹⁸ Wetlands destruction once again illustrates the first

94. Rose, *supra* note 9, at 27-29, 37.

95. See Poirier, *supra* note 3, at 179 ("Technological shifts, shifts in mores or tastes, new socioeconomic situations, and new scientific information can all prompt regulatory readjustment of property rights.")

96. NATIONAL RESEARCH COUNCIL, *WETLANDS: CHARACTERISTICS AND BOUNDARIES* 16 (1995).

97. Fred P. Bosselman, *Limitations Inherent in the Title to Wetlands at Common Law*, 15 *STAN. ENVTL. L.J.*, June 1996, at 247, 258-59 (1996); Katherine C. Ewel, *Water Quality Improvenent by Wetlands*, in *NATURE'S SERVICES: SOCIETAL DEPENDENCE ON NATURAL ECOSYSTEMS* 329, 329-31 (Gretchen C. Daily, ed., 1997).

98. Price and Duffy contend that technological change (and presumably any other shift that makes a change in law plausible) can also provide an excuse or front for judges, and perhaps legislatures, to push a pre-existing agenda. Monroe E. Price & John F. Duffy, *Technological Change and Doctrinal Persistence: Telecommunications Reform in Congress and the Court*, 97 *COLUM. L. REV.* 976 (1997). I do not doubt that claim, although I am skeptical of the long-term success of such "hidden agendas." I argue here only that there is a reasonably large class of cases in which changed circumstances of some kind actually do alter the effectiveness or appropriateness of existing legal rules.

possibility. For many years, the only practical means of making most wetlands dry enough to support construction were the addition of fill material to above the water table or the digging of drainage ditches. The equipment used to drain wetlands inevitably, albeit not intentionally, dumped substantial amounts of soil well away from the ditch. Under the circumstances, regulating the placement of fill in wetlands was sufficient to effectively prevent most wetland conversion. But the regulation of filling created economic pressure for the development of new technologies that would escape its coverage. In some places where land values are high, it is now apparently economically possible to create and use tightly sealed earth-moving equipment capable of digging drainage channels while minimizing the redeposit of dredged soil in the wetland.⁹⁹ That new technology may undermine the effectiveness of wetland protection unless its use is limited by the adoption of new regulations.

New impacts on resources are often a consequence of new technology, and eventually a motivation for new regulations. The development of chlorofluorocarbons (CFCs) as refrigerants, for example, led unexpectedly to destruction of the tropospheric ozone that shields the earth against ultraviolet radiation. Once that impact was recognized, CFC use was regulated.¹⁰⁰ Internal combustion engines and fossil-fuel-fired electricity plants have provided undoubted societal benefits, but have also drastically accelerated the anthropogenic production of carbon dioxide, leading to global warming.¹⁰¹ Although the federal government has not yet responded, a number of states are beginning to impose restrictions on carbon dioxide production as the undesirable effects of global warming become more apparent.¹⁰²

The new demands technology can create for resources that did not previously seem valuable are most clearly illustrated by the development of air flight. When people were tethered to the ground,

99. See Clean Water Act Regulatory Programs, 58 Fed. Reg. 45,008, 45,016 (Aug. 25, 1993) (describing developer's use of sophisticated machinery and techniques to drain hundreds of acres of ecologically valuable pocosin wetlands while evading the regulatory jurisdiction of the Corps of Engineers).

100. T. Nicolaus Tideman, *Takings, Moral Evolution, and Justice*, 88 COLUM. L. REV. 1714, 1720-21 (1988).

101. INTERGOVERNMENTAL PANEL ON CLIMATE CHANGE, CLIMATE CHANGE 2001: THE SCIENTIFIC BASIS (2001); NATIONAL RESEARCH COUNCIL, CLIMATE CHANGE SCIENCE: AN ANALYSIS OF SOME KEY QUESTIONS (2001).

102. See, e.g., John Dernbach et al., *Moving the Climate Change Debate from Models to Proposed Legislation: Lessons from State Experience*, 30 ENVTL. L. REP. 10933 (2000); BARRY G. RABE, GREENHOUSE & STATEHOUSE: THE EVOLVING STATE GOVERNMENT ROLE IN CLIMATE CHANGE (2002), (available at <http://www.pewclimate.org>); CAL. HEALTH & SAFETY CODE § 43018.5 (2003)(requiring state Air Resources Board to develop regulations to achieve the maximum feasible reduction of greenhouse gas emissions from passenger cars and light-duty trucks).

the sky was not a valuable resource. Not surprisingly, the common law routinely described land ownership as extending from the center of the earth to the sky.¹⁰³ That vivid depiction emphasized the security of ownership, and carried little cost. It served well as mining technology developed, providing a convenient means of distributing mineral rights. But once airplanes were invented, the sky became an important corridor for commerce, tied to the surface only at the points of take-off and landing, and requiring passage in between over any number of individual parcels. The rights of landowners to control that corridor were promptly reconsidered.¹⁰⁴

New circumstances, too, can alter the marginal costs and benefits of activities that society has not previously thought required regulation. Resource congestion, to use the economists' term, can cause a sharp increase in the costs of environmental modification, particularly where there are thresholds of irreversibility.¹⁰⁵ Destruction of a whooping crane roosting site in the course of land development, for example, would have been no great loss when the birds were plentiful. But by 1993, when the population in the wild was down to 160 birds,¹⁰⁶ a single lost roost could tip the species toward extinction. Similarly, the first few homes built along the shores of Lake Tahoe caused little impact on the lake, but as the amount of impervious surface surrounding the lake has increased, the marginal effects of additional homes on the lake's water quality have risen sharply. Accordingly, although it is often argued that it is unfair to deny latecomers the opportunity to build on the easy regulatory terms that were available to early developers,¹⁰⁷ in fact tighter regulation of later development may be

103. See *United States v. Causby*, 328 U.S. 256, 260-61 (1946) ("It is ancient doctrine that at common law ownership of the land extended to the periphery of the universe — *Cujus est solum ejus est usque ad coelum.*").

104.

But that doctrine has no place in the modern world. The air is a public highway, as Congress has declared. Were that not true, every transcontinental flight would subject the operator to countless trespass suits. Common sense revolts at the idea. To recognize such private claims to the airspace would clog these highways, seriously interfere with their control and development in the public interest, and transfer into private ownership that to which only the public has a just claim.

Id. at 261.

105. Rose, *supra* note 9, at 16-18, notes that resource congestion can justify new regulation. Levmore discusses congestion in a more literal sense, noting that speed limits may have to be adjusted as the number of cars using a roadway increases. Levmore, *supra* note 79, at 1664.

106. United States Fish & Wildlife Serv., Region 2, *Whooping Crane Recovery Plan iv* (1994), available at http://ecos.fws.gov/docs/recovery_plans/1994/940211.pdf.

107. See, e.g., Richard A. Epstein, *The Ebbs and Flows in Takings Law: Reflections on the Lake Tahoe Case*, ALI-ABA Course of Study, Sept. 26-28, 2002, Inverse Condemnation and Related Government Liability (available on Westlaw as SH025 ALI-ABA 247, 268-69) ("[T]he

justified by the higher marginal costs that development imposes on the resource.¹⁰⁸

Changes in moral understanding can also affect society's view of the need for regulation. In the property context, the most striking example is the elimination of slavery.¹⁰⁹ In the environmental context, commentators beginning with Aldo Leopold have argued for a new moral understanding of our relationship with the land.¹¹⁰ At the moment, environmental ethics are at best contested, but if society ever did reach a consensus recognizing an obligation to preserve land health or ecological integrity, that consensus might well counsel additional regulation of land use.

Delay in transitions made necessary by changed understanding, goals, or circumstances, will be costly even if it is later corrected. Delay will permit investment that in the long run turns out to be socially undesirable. Requiring compensation for the value lost in that sort of investment when a transition occurs will exacerbate the problem, encouraging overinvestment in reliance on stable legal rules.¹¹¹

B. Status Quo Bias and the Dominance of Regulatory Inertia

In the real world, policy inertia is likely to dominate policy impulsiveness, and adaptive plasticity is likely to prove elusive. Experience suggests that it is extraordinarily difficult to change the law. Law and policy choices often seem to hang on long after their

law must insist on a consistent interpretation of the law of tort for early and latecomers alike . . . the same regime has to be applied going forward to early and latecomers.”)

108.

Aside from securing owners' expectations, one fairness reason for this 'grandfathering' is that the early private uses may well not have damaged public resources, such as air, water, or wildlife, as much as the later uses of the same sort. In economic terms, the marginal costs of early uses may still be low — unlike latecomers' added uses, which have increasing marginal costs.

Carol M. Rose, *A Dozen Propositions on Private Property, Public Rights, and the New Takings Legislation*, 53 WASH. & LEE L. REV. 265, 285-86 n.78 (1996).

109. Tideman, *supra* note 100, at 1720 (“Only 125 years ago, our laws incorporated the idea that it was possible for one human being to own another.”).

110. See ALDO LEOPOLD, *A SAND COUNTY ALMANAC AND SKETCHES HERE AND THERE* 224-25 (1949) (“A thing is right when it tends to preserve the integrity, stability, and beauty of the biotic community. It is wrong when it tends otherwise.”). Eric Freyfogle is a leader among more recent writers who have taken on the task of articulating how a Leopoldian ethic would alter societal understanding of the terms of landownership. See, e.g., Eric T. Freyfogle, *Owning the Land: Four Contemporary Narratives*, 13 J. LAND USE & ENVTL. L. 279, 298-300 (1998); Eric T. Freyfogle, *The Construction of Ownership*, 1996 U. ILL. L. REV. 173; Eric T. Freyfogle, *The Owning and Taking of Sensitive Lands*, 43 UCLA L. REV. 77 (1995); Eric T. Freyfogle, *The Land Ethic and Pilgrim Leopold*, 61 U. COLO. L. REV. 217 (1990).

111. This is the familiar problem of moral hazard, explained in Blume & Rubinfeld, *supra* note 77, at 593.

original purpose has evaporated. Subsidies for crop production, agricultural water use and the like, for example, persist generations after agriculture has fallen from its status as an important national social institution or economic mainstay.¹¹² A perceived crisis or special alignment of the political stars is typically needed to overcome the barriers to legislative, or even regulatory, change.¹¹³

The apparent dominance of inertia should inform judicial interpretation of the Takings Clause, and indeed legislative treatment of compensation requests. We should worry more that the imposition of broad compensation obligations might stand as an additional barrier to adaptive change, than that narrow compensation requirements would make regulatory change too attractive.

Both cognitive psychology and political theory offer explanations for the resistance of law to change. Cognitive psychology tells us that, as a rule, people seek to limit change. Considerable evidence supports the existence of an "endowment effect" or "status quo bias." People prefer what they understand to be the status quo. So the traditional welfare economics assumption that people will be indifferent to whether they are buying or selling when they assign a value to a particular good or entitlement turns out not to be true

112. The widely recognized barriers to legal reform explain why the failure to repeal or amend a statute is generally not taken to mean that the statute continues to enjoy broad political support:

Equating an absence of congressional repeal with an affirmative delegation ignores the fact that any repealing legislation must overcome procedural hurdles in Congress as well as a potential presidential veto. Thus, even though a majority of Congress may disagree with a broad interpretation of the Antiquities Act, they may not be able to amend the Act.

James R. Rasband, *Utah's Grand Staircase: The Right Path to Wilderness Preservation?* 70 U. COLO. L. REV. 483, 554 n. 311 (1999).

The complicated check on legislation erected by our Constitution creates an inertia that makes it impossible to assert with any degree of assurance that congressional failure to act represents (1) approval of the status quo, as opposed to (2) inability to agree upon how to alter the status quo, (3) unawareness of the status quo, (4) indifference to the status quo, or even (5) political cowardice. (internal quotations and citation omitted).

Johnson v. Transp. Agency, 480 U.S. 616, 671-72 (1987) (Scalia, J., dissenting)

113. See, e.g., Cary Coglianese, *Social Movements, Law, and Society: The Institutionalization of the Environmental Movement*, 150 U. PA. L. REV. 85, 91 (2001) (attributing the politically powerful environmental movement of the late 1960s and 1970s to the grassroots response to perceived ecological disasters); David J. Hayes, *Federal-State Decisionmaking on Water: Applying Lessons Learned*, 32 ENVTL. L. REP. 11253 (2002) (contending that "a strong triggering event," i.e. a crisis, is one of the required elements for resolving water policy conflicts); J.B. Ruhl, *The Fitness of Law: Using Complexity Theory to Describe the Evolution of Law and Society and Its Practical Meaning for Democracy*, 49 VAND. L. REV. 1407, 1460-61 (1996) (describing the convergence of circumstances in the 1970s that produced environmental law's "statutory moment").

in many situations. In a classic experiment, half of a class of students were given university-logo coffee mugs available at the bookstore for \$6.¹¹⁴ When a market was set up, the median price demanded by students with mugs was \$5.25, while the median offer from those without mugs was no more than \$2.75.¹¹⁵ As that experiment suggests, the endowment effect can be remarkably strong; according to Chris Guthrie, the empirical evidence suggests that “losses generally loom at least twice as large as equivalent gains.”¹¹⁶ The effect is not limited to goods, which is why it might be more accurately described as status quo bias. The preference expressed by electric utility customers for reliable service, for example, depends heavily on the reliability of their current service.¹¹⁷

The endowment effect is context-dependent, and the factors that affect it are not all well understood,¹¹⁸ but some generalizations are possible. The effect is strongest when it is difficult to compare the items being exchanged, such as when there is no market for the item or no apparent substitute for it.¹¹⁹ It is also enhanced when the owner thinks of the item as something held for use, not something she plans to exchange in a market.¹²⁰ A sense of entitlement, or of having earned the status quo, also increases the endowment effect.¹²¹ The effect does not seem to attach to expectations. The right to collect a commodity does not give as strong an effect as even brief possession of the commodity itself,¹²² and forgone gains are not the same as losses.¹²³

It seems reasonable to assume that these individual cognitive biases will affect public decisions. Although Guthrie reports that experimental evidence is mixed on whether groups show status quo

114. Daniel Kahneman et al., *The Endowment Effect, Loss Aversion, and Status Quo Bias*, 5 J. ECON. PERSP. 193, 195-96 (1991).

115. *Id.*

116. Chris Guthrie, *Prospect Theory, Risk Preference, and the Law*, 97 NW. U. L. REV. 1115, 1119 (2003).

117. Kahneman et al., *supra* note 114, at 198.

118. Russell Korobkin, *The Endowment Effect and Legal Analysis*, 97 NW. U. L. REV. 1227, 1236 (2003). Of course, we must interpret the experimental data that supports the endowment effect in light of the important caveat that behavior in experiments may or may not actually predict behavior in the real world. Tanina Rostain, *Educating Homo Economicus: Cautionary Notes on the New Behavioral Law and Economics Movement*, 34 LAW & SOC'Y REV. 973, 985 (2000).

119. Korobkin, *supra* note 118, at 1237-38.

120. *Id.* at 1239.

121. Jeffrey J. Rachlinski & Forest Jourden, *Remedies and the Psychology of Ownership*, 51 VAND. L. REV. 1541, 1557 (1998).

122. *Id.* at 1558.

123. David A. Dana, *A Behavioral Economic Defense of the Precautionary Principle*, 97 NW. U. L. REV. 1315, 1340-41 (2003).

bias,¹²⁴ political decisions are in many respects aggregated individual decisions rather than group decisions. Dana points out that individual cognitive biases will affect popular opinion and the intensity of interest group involvement, both of which are likely to have some influence on political outcomes.¹²⁵ Russell Korobkin argues that the endowment effect impedes policy change because those who benefit from the status quo will value it more, and therefore will fight harder to protect it, than those who would benefit from a change.¹²⁶

Through its framing effect, a judicial determination that the government must compensate for a regulatory transition is likely to exacerbate the already strong tendency of landowners to cling to what they see as the status quo. Such a determination amounts to confirmation that the landowner, not the public, holds the contested entitlement.¹²⁷

Political theory also suggests that the regulatory status quo will be difficult to change. The public choice literature suggests that focused groups who stand to gain substantially will have an advantage in the political process over larger, more diffuse groups who each stand to gain only a small amount.¹²⁸ Because it is institutionally easier to block change than to obtain it,¹²⁹ this advantage will be particularly powerful when that identifiable minority benefits from the status quo.¹³⁰

V. DEVELOPING A DYNAMIC REGULATORY TAKINGS DOCTRINE

Requiring compensation for the economic impacts of new regulation does not, of course, preclude new regulation.¹³¹ Demands

124. Guthrie, *supra* note 116, at 1118.

125. Dana, *supra* note 123, at 1330-31.

126. Korobkin, *supra* note 118, at 1266.

127. Cf. Russell Korobkin, *The Status Quo Bias and Contract Default Rules*, 83 CORNELL L. REV. 608 (1998) (demonstrating that the choice of contract default rules can affect application of the endowment effect); Jeffrey J. Rachlinski, *Gains, Losses, and the Psychology of Litigation*, 70 S. CAL. L. REV. 113 (1996) (noting framing effects on litigation behavior); Barton H. Thompson, Jr., *Tragically Difficult: The Obstacles to Governing the Commons*, 30 ENVTL. L. 241, 256-57 (2000) (explaining how framing effects complicate commons problems).

128. MANCUR OLSON, *THE LOGIC OF COLLECTIVE ACTION: PUBLIC GOODS AND THE THEORY OF GROUPS* (1965); Farber, *supra* note 80, at 289. This effect might either result from or exacerbate the status quo bias described above.

129. Elizabeth Garrett, *Is the Party Over? Courts and the Political Process*, 2002 SUP. CT. REV. 95, 136 ("Legislative procedures favor the status quo.").

130. KAY LEHMAN SCHLOZMAN & JOHN T. TIERNEY, *ORGANIZED INTERESTS AND AMERICAN DEMOCRACY* 395-96 (1986).

131. Although the Court has been less than clear about the distinction between takings and substantive due process, see Ronald J. Krotoszynski, Jr., *Expropriatory Intent: Defining the Proper Boundaries of Substantive Due Process and the Takings Clause*, 80 N. CAR. L. REV. 713 (2002), landowners have been uniformly unsuccessful in seeking injunctions, rather than

for compensation, however, are often thinly disguised efforts to prevent legal transitions. In evaluating those claims, courts should be aware of the possibility that compensation requirements may impede change, both as a result of budget constraints and because the implication that government has “gone too far” is itself likely to prove a political impediment.

Courts should also focus on those factors that will most strongly indicate whether imposition of the costs of legal transitions on landowners is justified. Those factors include the reasons for legal change, the extent to which change could have been anticipated, the time frame over which it has been implemented, and the generality of its application.

A. Require Claimants to Prove a Change in the Principles of Decision

As explained earlier, a change in the legal principles governing property ownership or use ought to be the *sine qua non* of a regulatory takings claim.¹³² The starting point for judicial analysis of any such claim should be clear identification of a legal transition. At least one of the Court’s well-known takings decisions, *Kaiser Aetna v. United States*,¹³³ must be criticized on that ground. *Kaiser Aetna* involved a dispute about access to Kuapa Pond in Hawaii. The pond was physically separated from open coastal waters, but subject to tidal influence.¹³⁴ Kaiser Aetna developed the area of the pond with a marina and residences. In order to provide access to the marina, Kaiser Aetna then sought and obtained permission from the U.S. Army Corps of Engineers to dredge a boat channel connecting the pond to the Pacific Ocean.¹³⁵ Subsequently, a dispute arose over whether Kaiser Aetna could prevent public access to the pond, which the Corps asserted had become a navigable water of the United States subject to the federal navigation servitude.¹³⁶ The Court held, over the dissent of three justices, that although the pond was now subject to federal regulatory authority, it did not follow that Kaiser Aetna must open the pond to public access without compensation.¹³⁷

It does not appear that the legal rules applicable to the pond had changed. At a minimum, the majority failed to make a sound case

compensation, for regulations alleged to amount to unconstitutional takings.

132. See *supra* text accompanying notes 72-74.

133. 444 U.S. 164 (1979).

134. *Id.* at 166.

135. *Id.* at 167.

136. *Id.* at 168.

137. *Id.* at 172-73.

for the occurrence of such change. Justice Rehnquist's opinion for the majority can be read to hold that Kuapa Pond was not subject to the federal navigation servitude because it was not navigable in its natural state.¹³⁸ The Court notes that the navigation servitude need not be considered coextensive with federal regulatory power,¹³⁹ which plainly extends to at least some artificial waterways.¹⁴⁰ Although Kuapa Pond in its current state is clearly within Congress' regulatory authority,¹⁴¹ "it does not follow that the pond is also subject to a public right of access."¹⁴² Buried in another paragraph is the suggestion that the navigation servitude applies only to waters that are navigable in fact in their natural condition.¹⁴³ Finally, among the factors described as contributing to the result is the non-navigable state of Kuapa Pond prior to Kaiser-Aetna's development:

It is clear that prior to its improvement, Kuapa Pond was incapable of being used as a continuous highway for the purpose of navigation in interstate commerce. Its maximum depth at high tide was a mere two feet, it was separated from the adjacent bay and ocean by a natural barrier beach, and its principal commercial value was limited to fishing.¹⁴⁴

138. The dissent so reads the majority opinion:

A more serious parting of the ways attends the question whether the navigational servitude extends to all 'navigable waterways of the United States,' however the latter may be established. The Court holds that it does not, at least where navigability is in whole or in part the work of private hands.

Id. at 184 (Blackmun, J., dissenting).

139. It must be recognized that the concept of navigability [in past decisions relied upon by the United States] was used for purposes other than to delimit the boundaries of the navigational servitude: for example, to define the scope of Congress' regulatory authority under the Interstate Commerce Clause, to determine the extent of the authority of the Corps of Engineers under the Rivers and Harbors Appropriation Act of 1899, and to establish the limits of the jurisdiction of federal courts conferred by Art. III, § 2 of the United States Constitution over admiralty and maritime cases. (citations and footnotes omitted). *Id.* at 171-72.

140. *See id.* at 172 n.7.

141. *Id.* at 172.

142. *Id.* at 173.

143. *Id.* at 175 ("The navigational servitude is an expression of the notion that the determination whether a taking has occurred must take into consideration the important public interest in the flow of interstate waters *that in their natural condition are in fact capable of supporting public navigation.*") (emphasis added).

144. *Id.* at 178. *See also id.* n.10 ("Kuapa Pond clearly was not navigable in fact in its natural state.")

But the opinion never explicitly denied that the navigation servitude applied, nor did it discuss the historic scope of the navigation servitude, or identify any limits on the extent to which that servitude encompasses a right of free public passage.

If the decision fundamentally rested on the conclusion that the navigation servitude does not apply to, or does not require public access to, waters navigable only as a result of human intervention, one would expect some discussion of the historic underpinnings of a principled basis for that conclusion. That discussion is nowhere to be found, nor is any citation to a distinction between naturally navigable waters and waters artificially connected to navigable waters.¹⁴⁵ Instead, the opinion focused on the relationship between the navigation servitude and the Takings Clause. Distinguishing this dispute from a line of cases holding that the government need not compensate for the value of water access when it condemns fast land,¹⁴⁶ the Court emphasized Kaiser Aetna's investment of "substantial amounts of money" in its improvements,¹⁴⁷ the distant connection between navigation improvement and the public access right demanded,¹⁴⁸ and the fact that residents of the marina development were paying a fee to Kaiser Aetna for use of the pond.¹⁴⁹

In any case, the majority's undefended conclusion that the pond could not be subject to the navigation servitude because it was not, in its natural condition, navigable puts too much emphasis on a static view of property rights. The Court does not cite any prior decision limiting the reach of the servitude to naturally navigable waters. It is not at all clear, in other words, that the rules of decision, as opposed to the facts to which those rules were applied, had changed. The United States contended that its demand for access did not purport to alter the extent of the navigation servitude; it simply asserted that servitude once Kaiser Aetna had made its marina navigable. According to the Corps' view of the case, only the facts had changed, and at the request of the landowner, so no regulatory taking claim should have been possible.

145. See Eric T. Freyfogle, *Regulatory Takings, Methodically*, 31 ENVTL. L. REP. 10313, 10319 (2001) (describing whether the navigation servitude attaches to waters made navigable through human agency "was an issue of first impression, deserving of more careful thought").

146. See *United States v. Rands*, 389 U.S. 121 (1967); *United States v. Virginia Elec. & Power Co.*, 365 U.S. 624 (1961); *United States v. Twin City Power Co.*, 350 U.S. 222 (1956); *United States v. Willow River Co.*, 324 U.S. 499 (1945).

147. 444 U.S. 164, 176 (1979).

148. *Id.* at 178.

149. *Id.* at 180.

The fact that *Kaiser Aetna* may be described as a physical, rather than a regulatory, takings case¹⁵⁰ does not alter this conclusion. The United States did not dredge an opening to the Bay, nor did it demand that Kaiser Aetna do so. It simply permitted Kaiser Aetna to dredge. The changed facts that led to the claimed right of public access, therefore, were entirely within the control of the property owner rather than of the government. It may seem unfair that the United States did not warn Kaiser Aetna that dredging would lead to a public access easement,¹⁵¹ but it is standard law that the landowner bears responsibility for researching the legal rules affecting his property.¹⁵²

The distinction between changing facts and changing legal principles supports the outcome in *Hadacheck v. Sebastian*,¹⁵³ a 1915 case upholding the uncompensated prohibition of the operation of a brickyard in an area of Los Angeles which had become residential. The brickyard owner had acquired the land in 1902, when it was outside the city,¹⁵⁴ and argued that at the time he did not expect the land to be annexed.¹⁵⁵ One might well be skeptical of that claim. Even in 1902 it was apparent that cities were growing, and a brickmaker who relied on that growth for business would be expected to be acutely aware of it. But the Supreme Court did not need to evaluate the subjective truth of the brickmaker's claimed expectation. The Court correctly held that the expectation, even assuming it was sincerely held, was not entitled to protection.¹⁵⁶ Landowners simply are not entitled to assume that social, economic, and physical conditions will not change around them, or that those changes will not put them on the wrong side of applicable legal principles. When *Hadacheck* acquired his land, the city held the legal power to prohibit noxious uses. His use produced external impacts, such as air pollution, from the outset. That he was allowed to maintain it while limited use of the surrounding lands kept the

150. *See id.* at 180 ("Imposition of the navigational servitude in this context will result in an actual physical invasion of the privately owned marina.")

151. *See id.* at 167 (noting the Corps made no comment when it permitted Kaiser Aetna to dredge, other than that deepening the channel might cause erosion to the beach).

152. *See, e.g., Hill v. Town of Chester*, 771 A.2d 559, 561 (N.H. 2001) ("[L]andowners are deemed to have constructive notice of the zoning restrictions applicable to their property."); *Town of Lauderdale-by-the-Sea v. Meretsky*, 773 So. 2d 1245 (Fla. 4th DCA 2000) (observing that because landowner was on constructive notice of ordinance requirement, town's ultra vires approval of construction of wall encroaching on public right-of-way does not estop town from requiring removal of wall).

153. 239 U.S. 394 (1915).

154. *Id.* at 408.

155. *Id.* at 405.

156. *Id.* at 410 ("A vested interest cannot be asserted against [exercise of the police power] because of conditions once obtaining. To so hold would preclude development and fix a city forever in its primitive conditions.") (citation omitted).

costs of those externalities low did not give him a right either to continue it when intensified surrounding uses increased those costs or to insist that surrounding uses could not be allowed to intensify.¹⁵⁷

The need for a change in the governing legal principles also exposes the flaw in a recent federal district court opinion holding that adverse possession by the government could support a takings claim. The issue in *Pascoag Reservoir & Dam, L.L.C. v. State of Rhode Island*¹⁵⁸ was whether the state had acquired title to portions of a reservoir through its construction, and maintenance for the prescriptive period, of a boat ramp. After the state Supreme Court held that the state had met the requirements for adverse possession of the lake bottom beneath the boat ramp and acquisition of a prescriptive easement for lake access on behalf of the public,¹⁵⁹ the federal district court held that the reservoir owner had stated a claim for compensation under either *Loretto* or *Lucas*.¹⁶⁰

That holding is wrong because the legal rules remained stable throughout the reservoir dispute, and the changed facts that transferred title to the government were within the company's control. Anyone could have adversely possessed the property through precisely the actions the government took. The company was on notice that the law would deprive it of its property if it allowed another to dispossess it for a sufficient time. The company, therefore, lost nothing through government action; it never had the right to ignore its property yet retain its full property rights. The company's property rights did change, but only because of a change in the facts that can be wholly laid at the company's door. The company could have ended the government's occupation (or been entitled to compensation if the government refused to surrender possession) at any time before the prescriptive period expired. Its failure to do so cannot give rise to a regulatory takings claim.

An important doctrinal point follows from the recognition that a change in the legal rules is an essential element of a regulatory takings claim. It should be the plaintiff's burden to establish that

157. See *Rose*, *supra* note 108, at 282-83 (noting that *Hadacheck* "confirmed a commonplace from nineteenth-century property law: A private owner could commit what would otherwise be a public nuisance so long as the surrounding areas were lightly populated and relatively undisturbed, but public authorities could bar the use when the area became more heavily populated and when the public was actually inconvenienced by such private encroachments on public rights.").

158. 217 F. Supp. 206 (D. R.I. 2002).

159. *Reitsma v. Pascoag Reservoir & Dam, L.L.C.*, 774 A.2d 826 (R.I. 2001).

160. 217 F. Supp. at 221-22. Nonetheless, the court dismissed the claim for compensation on the grounds that the plaintiff had not brought suit within two years after the state had gained title by adverse possession. *Id.* at 226-28. The court also held the claim barred by laches. *Id.* at 228-29.

element, particularly since government actions are generally entitled to a presumption of validity,¹⁶¹ and regulatory takings are understood to be the rare exception.¹⁶² Placement of the burden of demonstrating change can determine the outcome where it is unclear whether the challenged regulation simply makes explicit existing background principles of state law. Consider, for example, *Tulare Lake Basin Water Storage District v. United States*.¹⁶³ In that case, the Court of Claims ruled that the United States had taken irrigators' water rights by ordering reduction of water deliveries from a state water project in order to protect endangered fish. The United States sought to interpose as a defense that the public trust doctrine, a background principle of state law, already required that water be withheld from irrigators if necessary to support the aquatic ecosystem.¹⁶⁴ But the court rejected that defense because the United States could not point to a judicial or administrative decision declaring that the public trust doctrine required the reduction of deliveries that was imposed in this situation.¹⁶⁵

Essentially, the court put the burden on the government to prove that the challenged regulation did not change state law, instead of requiring that the plaintiffs prove that it did. Indeed, the court apparently would not even consider any arguments on state law other than a determinative ruling by a state court or administrative agency. That stance puts the federal government in an untenable position in circumstances like those of *Tulare Lake*, because it may not have grounds for invoking the jurisdiction of a state court or agency, much less time to do so before imposing regulations to prevent environmental harm. It also creates undesirable incentives

161. *William v. Zbaraz*, 442 U.S. 1309, 1312 (1979); *Goldblatt v. Hempstead*, 369 U.S. 590, 596 (1962); *Davies Warehouse Co. v. Bowles*, 321 U.S. 144, 153 (1944).

162. See, e.g., *Tahoe-Sierra*, 535 U.S. at 324 ("Land-use regulations are ubiquitous and most of them impact property values in some tangential way — often in completely unanticipated ways. Treating them all as *per se* takings would transform government regulation into a luxury few governments could afford. By contrast, physical appropriations are relatively rare, easily identified, and usually represent a greater affront to individual property rights."); *Pennsylvania Coal*, 260 U.S. at 413 ("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."); *Penn Central*, 438 U.S. at 124 ("[T]his court has accordingly recognized, in a wide variety of contexts, that government may execute laws or programs that adversely affect recognized economic values."). Justice Rehnquist, dissenting in *Tahoe-Sierra*, sought to reverse the presumption that most regulations will not require compensation. *Tahoe-Sierra*, 535 U.S. at 354 (Rehnquist, J., dissenting) ("[A]s is the case with most governmental action that furthers the public interest, the Constitution requires that the costs and burdens be borne by the public at large, not by a few targeted citizens.").

163. 49 Fed. Cl. 313 (Ct. Claims, 2001).

164. *Id.* at 321.

165. *Id.* at 322.

for the state government, at least where the federal government has an obligation under the Endangered Species Act to limit actions harmful to listed species. The state may find itself in a position to gain the benefits of federal regulation (protection of species) while shifting the costs of regulation from its citizens to the federal government simply by refusing to affirmatively declare that state background law supports the regulation.¹⁶⁶

B. Alternative Set of Factors for the Court to Consider

I believe the *Penn Central* test has failed to bring coherence to the Court's regulatory takings jurisprudence because it does not capture the elements that control the fairness of imposing the costs of a regulatory transition on landowners. I suggest a test that more directly tracks the transition issue. That test would encompass four factors: 1) the justification for regulatory change; 2) the extent to which change was foreseeable in advance, and the ability of the landowner to adapt to that change; 3) the abruptness of the change; and 4) the generality of its application.

1. Justifications for change

The Court's cases show an enduring intuition that the legitimacy of the regulation is important to the resolution of takings cases.¹⁶⁷ That intuition has been a source of considerable confusion because it has led the court to awkwardly intermingle the questions of whether compensation is required (the takings issue) and whether the challenged regulation is valid (the substantive due process issue).¹⁶⁸ The intuition endures, however, because it has powerful

166. *Cf. Loveladies Harbor, Inc. v. United States*, 28 F.3d 1171, 1182 (concluding that because state regulatory agency had issued a permit allowing development of wetlands to resolve a lawsuit, federal government could not argue that background principles of state law precluded takings liability).

167. *See, e.g., Hodel v. Irving*, 481 U.S. 704, 716 (1987) (finding that statute limiting the ability to pass property to one's heirs constituted a taking requiring compensation in part because it applied even in circumstances where preventing transfer would not serve the government's asserted goal of consolidating property interests); *Agins*, 447 U.S. at 261 (finding no taking because the challenged ordinances "substantially advance legitimate governmental goals" and do not deny all economic use); *Penn Central*, 438 U.S. at 138 (upholding historic preservation law against takings challenge because "[t]he restrictions imposed are substantially related to the promotion of the general welfare" and permit reasonable use of the site).

168. Eric Freyfogle has fallen into the same conceptual trap. He argues that an important factor in whether or not compensation should be required is whether a new regulation represents "a legitimate shift in ownership norms." Freyfogle, *supra* note 145, at 10314. I agree. I part company from Professor Freyfogle, however, with respect to the test he suggests for the legitimacy of a transition. He would ask the substantive due process question of whether the rule is "reasonably calculated to promote the public health, safety, or general

roots. It is linked to the fear of political oppression, as well as to the desire to fairly distribute societal burdens. A new regulation that appears irrational is more likely to have been enacted with improper motives, and it always seems unfair to impose substantial costs on an individual or group through regulations that produce little or no countervailing benefit for society.

I believe these concerns can be more effectively addressed by maintaining a clear separation between the takings and substantive due process doctrines. If a new regulation is truly irrational, it is simply invalid as a matter of due process. The Takings Clause should be reserved for concerns about distribution of the costs of change. For that purpose, the relevant question is whether the government can defend the *change* in legal principles, rather than the new regulation itself. Because transitions carry both economic and psychological costs, a showing that the new regulation falls within the government's power does not necessarily justify the transition. Courts can, and should, demand a rational explanation for the departure from prior law. If the government can show a rational connection between the change and new information about externalized harms, new technology that has made possible new activities or produced new impacts, or cumulative impacts that have increased the marginal costs of development, the transition should not require compensation. If, on the other hand, the government cannot provide an explanation for the change other than a desire to redistribute wealth, or if the government concedes that it is correcting a problem of its own making,¹⁶⁹ compensation will generally be appropriate.

Requiring that the government show a reason for the change or compensate affected landowners will not discourage adaptive regulation. It will provide an additional counterweight against impulsive, unnecessary legal change, but since there are already ample barriers to frivolous change it is unlikely that compensation will frequently be required on this basis.

welfare." *Id.* When the question is whether compensation is required or not, rather than whether government has the authority to impose the rule at all, the focus should instead be on the justification for change.

169. An example is *Hodel*, 481 U.S. at 704, requiring compensation for the effects of the Indian Land Consolidation Act of 1983. The Act mandated the escheat to the tribe of small fractional interests in land on the death of tribal members. It was an attempt to solve the problem of extraordinarily fractionated interests in Indian lands, which had its origin in the federal policy of holding Indian lands in trust, preventing their alienation.

2. Foreseeability and the Ability to Adapt to Change

The Court was right to invoke expectations as an important factor in *Penn Central*, but should consider the reasons for protecting expectations, and the limits of that logic, more carefully. Expectations matter because they are what make change wrenching. The stronger and the more specific the expectations, the greater the psychological hurt when they are not fulfilled. Sometimes, too, expectations are the foundation for substantial investment, and change can cause the loss of that investment. But we should be leery of protecting expectations too strongly because people frequently, but mistakenly, expect the world to remain static. Excessive protection of expectations undermines development of the resilience and flexibility needed to accommodate and adapt to change.¹⁷⁰

The foreseeability of regulatory change at the time of investment is highly relevant to whether or not expectations merit protection. Requiring that property owners look ahead to potential changes, and take whatever steps are available to make their use of the property adaptable to future changes addresses the moral hazard problem. Foreseeability is to some extent captured in the Court's repeated description of those expectations that will be protected as "reasonable."¹⁷¹ Investment-backed expectations are not reasonable, and consequently should not be protected, if at the time of investment the property owner could have foreseen the future regulatory conflict or if the challenged regulation leaves sufficient opportunity to respond.

Regulations will sometimes be foreseeable because their arrival is preceded by a period of political ferment over the issue. In *Mugler v. Kansas*,¹⁷² the Court refused to require compensation when Kansas prohibited the manufacture and sale of alcoholic liquor, substantially diminishing the value of plaintiffs' breweries.¹⁷³ According to the facts recited by the Court, Mugler had constructed the brewery "several years" before the state went dry.¹⁷⁴ Because it resolved the case on other grounds, the Court did not delve more deeply into Mugler's expectations at the time he acquired the

170. See Kaplow, *supra* note 78, at 615; Joseph L. Sax, *Property Rights and the Economy of Nature: Understanding Lucas v. South Carolina Coastal Council*, 45 STAN. L. REV. 1433, 1449-50 (1993).

171. See, e.g., *Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency*, 535 U.S. 302, 315 n.10 (listing as one of the *Penn Central* factors interference with "reasonable investment-backed expectations").

172. 123 U.S. 623 (1887).

173. *Id.* at 664.

174. *Id.* at 657.

property or constructed the brewery. If the brewery was only built a few years before the state prohibited liquor manufacture, at a time when there was an active prohibition campaign in the state, Mugler would have no complaint.¹⁷⁵

It may also be foreseeable that an existing principle, whether of common law or of statutory law, will be extended to cover new circumstances. *Lucas* amply illustrates this point. Lucas bought two shorefront lots on a South Carolina barrier island in 1986.¹⁷⁶ South Carolina had imposed limitations on beachfront construction in 1977, prohibiting the construction of homes in "critical areas."¹⁷⁷ That statute established the principle that residential construction would not be allowed on sensitive coastal areas. Although Lucas' lots were not formally included within the restricted zone until after his purchase, the area was "notoriously unstable,"¹⁷⁸ suggesting that Lucas could readily have foreseen extension of the building restriction to his lots.

A related consideration is the extent to which prior government action specifically contributed to the claimant's expectations. New regulations that reverse a prior explicit authorization of activity should be subject to greater scrutiny than those that simply fill gaps (or plug loopholes) in existing regulation. No compensation should be given when existing principles, even very broad ones, are determined in light of changed circumstances or conditions to encompass new activities.

The investment-backed expectations test as originally applied in *Penn Central* was well suited to distinguishing between expectations that deserve and do not deserve protection, although it was not much explained or analyzed in that case. The *Penn Central* opinion focused on the existing use of the property as a railroad terminal with offices, which the challenged regulation allowed to continue.¹⁷⁹ The Court emphasized the importance of the fact that Penn Central could obtain a reasonable return on its investment in the terminal.¹⁸⁰ It makes sense, both from the

175. The Court in *Mugler* did not rely on foreseeability, instead holding that a simple prohibition on use of property for purposes declared to be injurious to public health, morals, or safety could not be deemed a taking. That statement may be too broad, but in most cases prohibition of a specific use, such as alcohol production, will leave the property owner a fair amount of room to respond to the regulation. Although Mugler alleged that his buildings would be of no value if they could not be used for brewing, skepticism of that claim is warranted. The machinery might have no other use, but it is highly unlikely that the buildings and land could not be put to any other use.

176. *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1038 (1992) (Blackmun, J., dissenting).

177. *Id.* at 1037.

178. *Id.* at 1038.

179. 438 U.S. 104, 136 (1978).

180. *Id.*

psychological perspective and from the point of view of providing a stable environment conducive to productive investment, to protect sunk costs expended in reasonable reliance on existing legal rules and not adaptable to other uses. When it prohibits an existing use, therefore, the government should bear a stronger responsibility for justifying both the change and the placement of costs of the transition on the landowner.

Not all expectations merit protection through compensation. The government should not, for example, become a guarantor of expectations dependent upon the persistence of a particular state of facts. Circumstances of all kinds change frequently. Investors should be encouraged to foresee and respond to changed circumstances, lest the law exacerbate our very human tendency to shrink from change.¹⁸¹

Property owners' expectations that they will be allowed to change the development status quo in the future also merit little protection. Those who buy and sell undeveloped real estate are typically speculating that the value of that land will change with time. They are gambling on their ability to predict, better than others, future demand for and acceptability of development. But the government need not be solicitous of that speculation or the investment it brings about. Speculative markets are apparently not inhibited by regulations that currently prohibit development,¹⁸² perhaps because land speculators believe they have the political strength to bring about regulatory change or that social changes will inevitably lead to the relaxation of restrictions. Participants in these markets are (or should be) aware of the risks, and able to take them into account. They will get the benefits of changes in the facts or regulatory climate that enhance the value of their land, and they can be expected to take the loss if they are wrong in their predictions. The cognitive psychology work that suggests that expectations do not have the same psychological power as possession¹⁸³ also supports refusal to compensate for speculative investments.

Perhaps the strongest argument against compensation based on investment in the land itself, however, rather than in improvements, is made by Nicolaus Tideman. He points out that "[f]rom an economic perspective, the purchase of land or natural

181. See *supra* text accompanying notes 152-57.

182. See *Florida Rock Indus., Inc., v. United States*, 18 F.3d 1560, 1566 (Fed. Cir. 1994) (noting that the "active though speculative" investment market in land subject to wetlands regulations suggests that "long term market trends in real estate values are not necessarily correlated to Government controls").

183. See *supra* text accompanying notes 122-23.

resources does not qualify as investment.”¹⁸⁴ What he means by that is that land and other natural resources are not produced by human agency. We do not, therefore, need to encourage investment in land and natural resources in order to ensure their production.¹⁸⁵

3. *Abruptness*

In *Palazzolo*, Justice Kennedy wrote for the majority that some regulations “are unreasonable, and do not become less so with the passage of time.”¹⁸⁶ That seems inarguable for substantive due process purposes. If there never was a rational reason for enacting a regulation, the passage of time may well never bring one. But for takings claims, which depend on the fairness of imposing transition costs on landowners, the passage of time should always work in favor of the government. As more time elapses between the enactment of a new regulation and the attempt to engage in the prohibited conduct, regulated entities will have had greater opportunities to adjust their expectations and plans for the land in order to respond to the new regulatory regime. They will also have had more opportunity to get a reasonable return on their investment. Finally, the psychological demoralizing effect of the regulation should also diminish; demoralization is likely to be strongly tied to the abruptness and unexpectedness of a government about-face. Enforcement of a regulation that is decades old may disappoint but it cannot shock.

The passage of time provides a principled explanation for the very different outcomes in *Keystone* and *Pennsylvania Coal*. On their face, the two cases are difficult to reconcile. *Pennsylvania Coal* required compensation for a Pennsylvania statute adopted in 1921 which forbade the mining of anthracite coal in such a way as to cause the subsidence of a home.¹⁸⁷ *Keystone*, by contrast, upheld a 1966 Pennsylvania law also prohibiting mining that caused subsidence damage to residences or certain other buildings.¹⁸⁸ In both cases, the companies had acquired or retained mineral estates

184. Tideman, *supra* note 100, at 1726.

185. I acknowledge that lack of compensation may induce premature development. Dana, *supra* note 83. I am not aware of, and Professor Dana does not cite, much data on the extent to which lack of compensation may drive early development. In many contexts existing institutional and practical barriers, such as requirements for installation of costly infrastructure will adequately discourage development. Where such barriers do not exist or prove inadequate, it may be desirable to provide financial incentives for conservation, even if it is not constitutionally required.

186. 533 U.S. 606, 627 (2001).

187. 260 U.S. 393, 412-13 (1922).

188. 480 U.S. 470, 506 (1987).

separate from surface estates, and obtained waivers of damage claims resulting from mineral removal.

Despite these similarities, timing provides a key distinction.¹⁸⁹ The *Keystone* statute was adopted more than forty years after the earlier law had provided notice that the legislature regarded subsidence as an important problem. *Keystone* did not challenge the law until 1982; apparently it was able to mine economically for a number of years in compliance with the statute.¹⁹⁰ The surface estates had been severed from 90% of the coal the company expected to mine by 1920.¹⁹¹ The law in *Pennsylvania Coal* came as more of a surprise. It was challenged immediately upon its passage, and shortly after the company had obtained waivers of surface damage claims. Clearly, *Keystone* had more opportunity to adapt to the challenged regulation than did *Pennsylvania Coal*. While sudden transitions may well warrant compensation, a transition accomplished over a period of more than half a century is unlikely to merit payment.

Passage of title is also relevant to the takings question. Prior to *Palazzolo*, courts had leaned heavily toward the view that acquisition of property after imposition of the challenged regulation precluded a takings claim.¹⁹² The Supreme Court had waffled on the question, describing notice of the challenged regulation as determinative against the claimant in *Ruckelshaus*¹⁹³ but as irrelevant in *Nollan*.¹⁹⁴

With respect to voluntary passage of title, I think the lower courts had it close to right. Voluntary acquisition in the face of the challenged rule should weigh strongly against a regulatory takings claimant, because the buyer has the opportunity to decide whether

189. The *Keystone* Court rather unconvincingly determined that the later statute, but not the former, addressed a significant threat to the public welfare and emphasized that *Keystone*, unlike *Pennsylvania Coal*, had not shown that the challenged statute would make their business unprofitable. *Id.* at 485.

190. *See id.* at 478.

191. *Id.*

192. *See* 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, 91 n.12 (2000) (collecting state cases). Lower federal courts had also leaned in this direction. *See, e.g.,* *Good v. United States*, 189 F.3d 1355, 1360-61 (Fed. Cir. 1999) (“[T]he requirement of investment-backed expectations limits recovery to owners who can demonstrate that they bought their property in reliance on the non-existence of the challenged regulation . . . it is common sense that one who buys with knowledge of a restraint assumes the risk of economic loss.”). Not all courts had adopted the notice rule. *See Palm Beach Isle Assoc. v. United States*, 231 F.3d 1354, 1364 (Fed. Cir. 2000) (“The existence of a regulatory regime does not *per se* preclude all investment-backed expectations for development.”); James Burling, *The Latest Take on Background Principles and the States’ Law of Property After Lucas and Palazzolo*, 24 U. HAW. L. REV. 497, 524-25 (2002).

193. 467 U.S. 986 (1984).

194. *Nollan v. California Coastal Comm’n*, 483 U.S. 825 (1987).

or not it can adapt to the regulation before taking over the property. The main argument made against using post-regulation acquisition to limit claims is that such a rule would prevent the pre-regulation property owner from transferring a property interest.¹⁹⁵ But that is simply wrong. Once a valid regulation is in place the property owner no longer has a property right to engage in the prohibited activity. If the regulation worked a taking, the property owner would have a legal claim for compensation, but not an interest in real property. There is no obvious reason why such claims must necessarily be transferable. Indeed, well-established practice in the condemnation context takes precisely the opposite approach, reserving the compensation claim to the seller when the property is transferred after the taking.¹⁹⁶

A stronger argument in favor of allowing transfer of regulatory takings claims is that those claims can be expensive and time-consuming to ripen, since the property owner may have to submit multiple development proposals.¹⁹⁷ But those barriers do not justify a blanket rule that takings claims must always transfer with the property. Involuntary transfers, by which I mean those which occur due to circumstances beyond the control of the new owner, such as the death of a prior owner, should not affect the availability of a takings claim.¹⁹⁸ The new owner should stand in the shoes of the old. But takings claims should only survive voluntary transfers in limited situations, where the prior owner has taken at least some steps to ripen the claim and the claim is explicitly made a part of the transaction. Even that level of protection may not be needed; prospective new owners may be able to enter into option transactions, analogous to those commonly used when a zoning change is needed to permit development, under which they obtain the option to purchase at a specific price and the opportunity to pursue the takings claim on behalf of the seller prior to actual transfer.

195. See *Nollan*, 483 U.S. at 834 n.2 ("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."); *Palazzolo v. R.I.*, 533 U.S. 606, 627 (2001) ("The State's rule would work a critical alteration to the nature of property, as the newly regulated landowner is stripped of the ability to transfer the interest which was possessed prior to the regulation.")

196. See Stein, *supra* note 192, at 105 and n.51.

197. *Palazzolo*, 533 U.S. at 627-28.

198. I would not put *Palazzolo* in this class. Prior to 1978, the parcel was owned by a company of which Palazzolo was the sole shareholder. Palazzolo became the owner by operation of law when the company's charter was revoked for failure to pay its taxes. *Id.* at 614. As the sole shareholder, Palazzolo plainly could have prevented the transfer by seeing to it that the corporation paid its taxes.

Without these sorts of limitations, allowing takings claims to transfer with land could encourage both sharp practices and unnecessary litigation. A long-time rancher who has never wanted to do anything else with her property, for example, might be perfectly willing to accept a new regulation that prohibits residential development. She might even welcome that regulation, which could hold down her property taxes and help keep a viable ranching community in the area. When she subsequently sells the ranch, perhaps to be nearer to her grown children, she is likely to assume that the land will continue in ranching, and price it with that in mind. Allowing the buyer to bring a takings claim against the limits on residential development would give that buyer a windfall, and force the government to defend a regulation that was victimless when enacted. Denying the buyer a takings claim, on the other hand, would encourage transfer of the property to a buyer willing to use it as a ranch, at a price fair to both buyer and seller. In other words, a windfall would be avoided and transfer to persons willing and able to adapt the land use to current societal preferences would be encouraged. It is difficult to see that as a bad thing. If someone is willing to ranch on the land, society will not suffer. And if ranching is truly untenable, the political process almost certainly will eventually allow the property to be put to other uses.

4. *Generality*

Where there are opportunities for, and especially where there is evidence of, a political majority deliberately taking advantage of a helpless minority, courts should be especially solicitous of takings claims.¹⁹⁹ In my view those cases are likely to be the very rare exception. Political “outsiders”, those who own land in a jurisdiction but do not vote there, look at first glance like easy targets.²⁰⁰ In some communities, under some circumstances, they may indeed be. But outsiders often are not powerless. Property ownership is strongly correlated with wealth, which in turn is correlated with political success. Although they cannot vote, outsiders typically can contribute money to campaigns. Furthermore, in many local jurisdictions funding is heavily dependent on property tax revenues, making potential development locally attractive even if the property owners are outsiders.

199. Cf. William Michael Treanor, *The Original Understanding of the Takings Clause and the Political Process*, 95 COLUM. L. REV. 782, 784 (1995) (arguing that courts should require compensation for government regulations “only in those classes of cases in which process failure is particularly likely”).

200. See FISCHER, *supra* note 76.

Since I believe that oppression of outsiders (or other groups of property owners) is not likely to be common, I would require some showing of at least the opportunity for oppression in any individual case before invoking increased judicial scrutiny.²⁰¹ The most important indicator of political dysfunction in a particular case is one the Court already considers in takings cases, although it has never made it an explicit element of the regulatory takings analysis: the generality (or lack thereof) of the new regulation.²⁰² If all similarly situated properties are treated alike, there will generally be little reason to worry about political oppression.

That may not always be the case, however, particularly if the class of similarly situated properties is small. In that context, courts should be willing to consider how accurately the specific winners and losers from a particular transition could be predicted at the time of regulatory enactment. More searching review is appropriate where only a minority will bear the regulatory burden²⁰³ and there is a significant departure from Rawlsian unpredictability about where costs will fall at the time a regulation is adopted. The Endangered Species Act (ESA),²⁰⁴ one of two federal environmental laws that have given rise to the loudest property rights complaints,²⁰⁵ fares surprisingly well on this test. When the ESA was adopted, it would have been very difficult to predict precisely who it would affect, when, and to what extent. It was unclear, for example, how often or under what circumstances restrictions on habitat modification would be required to protect species.²⁰⁶ A number of species were already listed as endangered under earlier, largely non-regulatory federal legislation,²⁰⁷ but it was unclear what species might be listed in the future. Probably it was predictable, if anyone had thought about it, that endangered species would be

201. Empirical data showing that outside landowners (or other identifiable groups of property owners) in fact typically are subjected to local discrimination might justify a different assignment of the burden of proof.

202. See, e.g., *Penn Cent. Transp. Co. v. City of New York*, 438 U.S. 104, 132 (1978) (noting that although historic preservation ordinance by its very nature applies only to selected parcels, it embodied a comprehensive plan to preserve historic structures wherever found).

203. When the burden is spread widely, as by general tax legislation, there is no reason to fear majoritarian oppression. Cf. Thompson, *supra* note 4, at 1288-89 (noting that standard tax legislation does not raise political discrimination concerns).

204. 16 U.S.C. §§ 1531-1544 (2003).

205. The other is section 404 of the Clean Water Act, 33 U.S.C. §§ 1344 (2003).

206. See Holly Doremus, *Delisting Endangered Species: An Aspirational Goal, Not a Realistic Expectation*, 30 ENVTL. L. REP. 10434, 10442-43 (2000) (describing legislative history as characterized by two very different strands, one focusing on the need for habitat protection, the other on what could be done by controlling hunting).

207. That legislation included the Endangered Species Preservation Act of 1966, Pub. L. No. 89-669, 80 Stat. 926 (1966), and the Endangered Species Conservation Act, Pub. L. No. 91-135, 83 Stat. 275 (1969).

concentrated in regions with high biodiversity, such as California, Florida, and Hawaii,²⁰⁸ but it is unlikely that in 1973 anyone would have foreseen the endangered species problems that now face major urban areas such as San Diego²⁰⁹ and Seattle.²¹⁰ Today, the impacts of the ESA spread far beyond the public lands and undeveloped private lands that probably seemed the most likely targets of regulation in 1973, affecting such things as water supplies for farmers²¹¹ and cities,²¹² and the construction of infrastructure in urban areas.²¹³ The effects of the ESA are sufficiently widespread, and were sufficiently difficult to predict in 1973, that its enactment cannot be viewed as an act of majoritarian oppression.²¹⁴ Although only a minority of parcels turns out to be affected by the presence of a listed species, the identity of those parcels seems, at least to the extent that it depends simply on the presence or absence of a listed species, far more a function of nature's lottery than of political choice.

Before wholeheartedly endorsing the ESA, however, we need to consider a different type of concern. When a new regulation is actually implemented, there may be significant opportunities for discretionary choice among a number of potential "victims". This in part explains the heightened concern in physical taking cases. Paradigmatic physical takings cases occur when public improvements, such as roads or reservoirs, are needed. In many cases there are multiple possible sites for improvements, and a

208. The distribution of listed species across the United States is far from uniform, but by 1995 some 2858 counties, ranging from coast to coast and including all the major metropolitan areas, were within the range of at least one endangered species. A.P. Dobson et al., *Geographic Distribution of Endangered Species in the United States*, 275 SCIENCE 550, 550-51 (1997).

209. See Bradley C. Karkkainen, *Adaptive Ecosystem Management and Regulatory Penalty Defaults: Toward a Bounded Pragmatism*, 87 MINN. L. REV. 943, 973-74 (2003) (describing San Diego's gnatcatcher problem as the catalyst for increased use of the ESA's incidental take permit provision); Robert L. Fischman & Jaelith Hall-Rivera, *A Lesson for Conservation from Pollution Control Law: Cooperative Federalism for Recovery Under the Endangered Species Act*, 27 COLUM. J. ENVTL. L. 45, 94-109 (2002) (describing the efforts of San Diego County and other Southern California jurisdictions to protect the California gnatcatcher and other dwindling species).

210. See Holly Doremus, *Water, Population Growth, and Endangered Species in the West*, 72 U. COLO. L. REV. 361 (2001); Fischman and Hall-Rivera, *supra* note 209, at 109-31 (detailing efforts to protect listed salmon in Puget Sound).

211. See generally Holly Doremus & A. Dan Tarlock, *Fish, Farms, and the Clash of Cultures in the Klamath Basin*, 30 ECOL. L. Q. 279 (2003).

212. See generally Doremus, *supra* note 210.

213. See Fischman & Hall-Rivera, *supra* note 209, at 125-31.

214. Perhaps we should expect that kind of ambiguity to be typical of legislation that imposes substantial regulatory burdens. It should be easier to pass legislation if its benefits are clear, allowing political support to build, but who will bear its burdens is unclear, defusing potential opposition. I do not find that kind of ambiguity troubling. In my view, it helps make needed change possible while at the same time reducing the dangers of majoritarian faction.

limited need. The selection of one particular site greatly reduces the possibility that others will be selected, now or in the future. Under those circumstances, if the selection process were genuinely random, people might agree in advance to take the risk that their property, or some of it, would be selected in order to gain the potential advantages of the improvements and the substantial chance that those improvements might come entirely at the expense of others. But of course the selection process is never random. It is political, and people are quite likely to fear that their property may be selected if they, for example, oppose a particular political candidate, take a public stand on a controversial issue, do not reside in the jurisdiction, are not wealthy, or are a member of a minority group. The requirement of compensation can, at least in theory, help provide assurances that selection decisions are made as dispassionately as possible.²¹⁵

Similar opportunities to select a small class of landowners to bear a large proportion of the burdens sometimes exist in the regulatory takings context. For example, in *Hunziker v. State*,²¹⁶ landowners sought compensation for regulations that precluded building on a lot that was found to contain a Native American burial mound. That in itself fits well with the lottery analysis above; it should be difficult to predict in advance which lands harbor ancient remains, so adoption of a prohibition on construction that would disturb burial mounds is unlikely to result from any form of political discrimination. The problem is that the state had not imposed an absolute prohibition. Instead, state law gave the state archaeologist authority to preclude development upon a determination that the remains in question had "state and national significance from an historical or scientific standpoint."²¹⁷ Because the landowners did not challenge the state archaeologist's conclusion that the remains found on their land had such significance,²¹⁸ the court rejected their takings claim without any inquiry into that process. If the question were raised, the state should have been required to show that both the finding and the process used to reach it were not arbitrary. For example, written guidelines for evaluating significance, or a showing that all remains of a certain age had in practice been deemed significant, should be sufficient to satisfy a reviewing court.²¹⁹

215. Of course, requiring compensation can also increase the importance of wealth in these choices, as governments seek the least valuable land to site their improvements.

216. 519 N.W.2d 367 (Iowa 1994).

217. *Id.* at 370 (quoting Iowa Code section 263B.9).

218. *Id.*

219. *Cf.* *Penn Cent. Trans. Co. v. City of New York*, 438 U.S. 104, 132 (1978) (noting that New York City's historic preservation law "embodie[d] a comprehensive plan to preserve

There are many other situations in which implementation of regulations which are not facially problematic provides the opportunity to create winners and losers among the class of potentially affected landowners. Conspicuous examples include situations in which a limited amount of development is permitted, selected from a larger area. This is where the ESA becomes more problematic. As originally enacted, the ESA precluded any "taking", a term defined very broadly, of endangered species. That soon came to seem both unnecessary and unfair in light of the more generous provision applied to federal actions.²²⁰ Accordingly, in 1982 Congress added a provision that allows the Department of Interior to authorize incidental taking so long as it does not threaten the survival and recovery of the species.²²¹ In order to obtain a permit, applicants must produce a Habitat Conservation Plan (HCP) detailing the impacts of the taking and showing that those impacts will be minimized or mitigated to the maximum extent practicable.²²² The Department of Interior encourages permit applicants to develop regional HCPs covering large areas.²²³ Typically such HCPs allow development of some part of the planning area, while other parts are preserved as habitat for the protected species. As a practical matter, preserve lands typically are purchased, using funds raised through assessment of mitigation fees on developed lands, so the takings issue has not been litigated in this context. Compensation may well be constitutionally required, even if preserve lands retain some economic value, because of the unfairness of singling out a small fraction of the undeveloped land in the area for preservation.²²⁴

To avoid a duty to compensate in a selection situation, the government should be required to show that selection was made on

structures of historic or aesthetic interest wherever they might be found in the city," and that Penn Central had not suggested that identification of its building as a landmark was arbitrary or unprincipled).

220. Endangered Species Act § 7, 16 U.S.C. § 1536 (2003), requires federal agencies to ensure that their actions do not jeopardize the continued existence of the species or destroy or adversely modify critical habitat, a standard that allows some taking as long as it does not significantly reduce the likelihood of survival and recovery of the species. See 50 C.F.R. 402.02 (2003) (defining "jeopardize the continued existence of" and "destruction or adverse modification" of critical habitat).

221. Endangered Species Act § 10(a)(2), 16 U.S.C. § 1539(a)(2).

222. 16 U.S.C. § 1539(a)(2)(B)(ii).

223. See U.S. Fish & Wildlife Serv. & National Marine Fisheries Serv., *Habitat Conservation Handbook i* (1995).

224. Most HCPs call for preserve assembly through voluntary transactions. That is politically attractive because there is often considerable local resistance to the use of eminent domain. But where some lands have unique habitat value it may leave the landowner in a position to hold up the purchaser, or to prevent assembly of a viable preserve. It may therefore sometimes be necessary to employ eminent domain.

the basis of neutral criteria applied in a manner that provides protection against political pressures. In the HCP context, for example, a committee of scientists might be enlisted to identify the best habitat in the area for the listed species. At Lake Tahoe, the allowable increment of development is allocated among property owners by a numerical scoring system intended to reflect suitability for development.²²⁵ If the government cannot persuade a court that it had a legitimate neutral basis for singling out burdened properties, it should be required to pay compensation.

One recurring complaint about dissimilar treatment has to do with the use of grandfathering, that is, imposing a new land use restriction only prospectively.²²⁶ Grandfathering allows some landowners to maintain a use that others cannot begin. So, for example, in the HCP context, those who developed their land before 1973 were able to do so free of the restrictions of the ESA. Yet, their development may have directly killed members of a species that is now listed, as well as contributing to the cumulative habitat destruction that often leads to listing.

Consideration of the temporal dimensions of regulation can help us understand why grandfathering is not inherently problematic. Recall that regulatory transitions are justified by changes in circumstances or changes in information. Changed circumstances may mean that the marginal social costs of later development greatly exceed those of earlier development. That difference can amply justify tighter restrictions on later development.²²⁷ New information may mean that we now understand the impacts of development that seemed benign in the past. Recognition today that past development had costs that were not recognized at the time does not necessarily justify demanding reversal of that development. Developed and undeveloped properties are never similarly situated; the costs, both financial and psychological, of being required to end an established use greatly exceed those of not being allowed to undertake a new use. Furthermore, it may as a practical matter be impossible to reverse the physical and biological effects of development; removing structures does not automatically

225. See Tahoe Regional Planning Agency, Individual Parcel Evaluation System, available at <http://www.trpa.org/ipes/howitworks.html> (describing the point system and its application); Jordan C. Kahn, *Lake Tahoe Clarity and Takings Jurisprudence: The Supreme Court Advances Planning in Tahoe-Sierra*, 26 ENVIRONS 33, 38-39 (2002). TRPA expects that the lowest scoring (most sensitive) lands will gradually be purchased through various government-funded programs, allowing development of less sensitive lands.

226. See, e.g., *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1031 (1992) (arguing that the fact that other landowners are permitted to continue a use will undermine the claim that the use was proscribed by background principles).

227. See Rose, *supra* note 108 and accompanying text.

restore habitat. Grandfathering, therefore, does not necessarily raise suspicions of political oppression of latecomers by early developers. So long as modification that would impose new impacts, or reconstruction after a natural disaster, are not exempted, grandfathering is not a factor that should call for compensation of regulated landowners or even heightened judicial scrutiny.²²⁸

V. CONCLUSION

Regulatory takings doctrine need not be as incoherent or unprincipled as it currently appears. Bringing the focus of takings jurisprudence more clearly onto the key element of regulatory change distinguishes takings from due process, highlights the basis for some powerful, but heretofore largely unexplained, intuitions implicit in the Court's takings jurisprudence, and explains some of the current anomalies. Adopting that focus could lead the Court to a more principled, durable takings test, one that would better separate the situations in which landowners should be expected to anticipate and respond to change without government help from those in which it would be unfair to impose the costs of change entirely on landowners.

Regulatory transitions are inevitable over the long run, and often represent socially adaptive responses to changed circumstances or increased information. They are difficult to achieve, however, because substantial psychological and political barriers stand in the way. Compensation requirements should be narrowly drawn to avoid over deterrence of regulatory change. Courts should require takings claimants to prove that they have been the victims of a change in the principles governing use or ownership of their property, to avoid playing into the human tendencies to resist change and to read vague legal principles as inapplicable to one's own activities. Finally, when a change in the legal rules does occur, the decision as to whether or not compensation is required should take into account the justifications for the change; the extent to which it could have been foreseen; the ability of the landowner to take action, before or after the change, to reduce its impacts or respond to it; the pace of the change; and the extent to which its costs have been spread to all similarly situated landowners. These factors provide a better picture of the

228. The statute limiting coastal development in *Lucas*, therefore, did not warrant increased judicial scrutiny. Although it did allow existing residences to remain in unstable areas where new ones could not be built, those existing homes could not be rebuilt if they were destroyed by a storm, nor could erosion control measures be repaired or extended, and at least some owners of developed land were required to nourish the beach to counteract the effects of their structures. *Lucas*, 505 U.S. at 1074 (Stevens, J., dissenting).

fairness of imposing transition costs on landowners than the *Penn Central* factors the Court currently applies.

I do not claim that the changes I have recommended will make takings decisions easy or formulaic, nor is that my goal. There clearly are tensions in our view of change; it has both positive and negative aspects, and striking the balance will always pose a challenge. But acknowledging that fair distribution of the costs of regulatory transitions is the fundamental problem of regulatory takings cases should inject greater discipline, and greater transparency, into what currently often appears to be unprincipled decision-making.