May the Market Do What Taking Jurisprudence Does Not: Divide a Single Parcel into Discrete Segments?

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> Taking jurisprudence does not divide a single parcel into discrete segments and attempt to determine whether rights in a particular segment have been entirely abrogated.[1]

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1. This language was most recently used in *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency*, 535 U.S. 302, 327 (2002). Other instances where the Court has used this language include: *Dolan v. City of Tigard*, 512 U.S. 374, 400-01 (1994) (Stevens, J., dissenting); *Keystone Bituminous Coal Ass'n v. DeBenedictis*, 480 U.S. 470, 497 (1987); *Penn Central Transportation Co. v. New York City*, 438 U.S. 104, 130 (1978).

I. INTRODUCTION

Current takings doctrine distinguishes two kinds of takings, categorical and noncategorical, or takings per se and takings per accidens. A categorical, or per se, taking occurs when government destroys an essential property right,[2] either by physical occupation[3] or by regulating away all economically viable use.[4] A noncategorical, or per accidens, taking occurs when the government justification for its action is insufficiently weighty to justify the adverse impact on the affected property.[5] A *temporary* taking occurs when a government regulation, later rescinded, effects a categorical taking.[6] No taking occurs if government is regulating a common law nuisance, even if the regulation would otherwise effect a taking (of either kind).[7] This summary of

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2. The "essential property rights" are the rights to exclude, use, and dispose. *See* Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419, 433 (1982); 1 WILLIAM BLACKSTONE, COMMENTARIES *134.

3. *See Loretto*, 458 U.S. at 432.

4. *See* Lucas v. S.C. Coastal Council, 505 U.S. 1003, 1016 (1992). The "set formula" the Court usually uses for categorical takings comes from *Agins v. City of Tiburon*: A taking occurs "when land-use regulation does not substantially advance legitimate state interests or denies an owner economically viable use of his land." 447 U.S. 255, 260 (1980). The Court has recently recognized that this is an unfortunate way of stating the rule as it tends to confuse a deprivation of property without due process (failure to advance any legitimate state interest) with a true taking (destruction of an essential property right). *See* Lingle v. Chevron U.S.A., Inc., 125 S. Ct. 2074, 2082-83 (2005). Whether *Lingle* will at last cure the confusion between deprivations and takings seems unlikely, as the Court's taking jurisprudence has systematically confused them at least since *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393 (1922), a due process case, dicta in which is the source of much current takings doctrine. *See generally* Patrick Wiseman, *When the End Justifies the Means: Understanding Takings Jurisprudence in a Legal System with Integrity*, 63 ST. JOHN'S L. REV. 433 (1989). In noncategorical takings cases, the Court denies the existence of any set formula, engaging instead in "an essentially *ad hoc* factual" analysis. *Penn Cent.*, 438 U.S. at 124.

5. *See Penn Cent.*, 438 U.S. at 123-24. The test, from *Penn Central*, for a noncategorical or per accidens taking is a multifactor test, sometimes characterized as a balancing test, which looks at economic impact, interference with investment-backed expectations, character of the government action, whether the property owner enjoys a reciprocity of advantage, etc. *Id.* at 124-28. The Court has recently made clear that no factor is dispositive in this multifactor test. Palazzolo v. Rhode Island, 533 U.S. 606 (2001). Justice O'Connor, concurring in *Palazzolo*, expresses a very high degree of comfort with the ad hoc approach, which is perhaps not surprising, given her judicial style. *Id.* at 635-36. Although the factors appear to be about impact on the property *owner*, it is the adverse impact on the *property* that is at issue, as, after *Palazzolo*, a takings claim runs with the land. *See infra* text accompanying notes 67-73.

6. *See Tahoe-Sierra*, 535 U.S. at 321; First English Evangelical Lutheran Church v. County of L.A., 482 U.S. 304 (1987). According to *Tahoe-Sierra*, a regulation which temporarily denies all use is not a categorical taking, although it might be of sufficient duration to amount to a taking per accidens. 535 U.S. at 321. The decision in *Tahoe-Sierra* defies the logic, if not the dicta, of *First English*.

7. *See Lucas*, 505 U.S. at 1010. *Lucas* involved a categorical taking, the denial of all economically viable use (or so it was implausibly alleged). *Id.* at 1020. Had the South Carolina Coastal Commission been prohibiting a common law nuisance, Lucas would have had no takings

current takings doctrine, while it creates a comforting illusion of clarity, is unhelpful absent an answer to the threshold question: what "property" is at issue? This question, which has come to be called "the denominator question,"[8] asks whether the property at issue (the denominator) is a "single parcel," only a fraction of which is adversely affected by the government action, or a "discrete segment," all of which is adversely affected. Although the United States Supreme Court has recently reiterated, in *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency*, its preference for the former, the denominator question is hardly settled, the current Court being closely divided on the issue.[9]

In another recent case, *Palazzolo v. Rhode Island*, the Court has suggested that a buyer of land subject to regulation is not precluded from challenging the regulation's constitutionality, even if the buyer bought with notice of the regulation.[10] Hence the question asked by this Article: may the market do what taking jurisprudence does not, i.e., divide a single parcel into discrete segments? Before *Palazzolo*, it would have been presumed that someone who buys a piece of property subject to a regulation which renders it essentially worthless, and who pays the appropriately distressed price for the land, has no takings claim, as such a buyer has no reasonable investment-backed expectations, a presumptively critical factor in the *Penn Central Transportation Co. v. City of New York* multifactor test.[11] *Palazzolo*, however, holds that a takings claim runs with the land, so that a buyer of regulated property acquires the property, subject to regulation, together with the right to challenge the constitutionality of the regulation.[12] But what if a buyer buys only so much of the land as is adversely affected by the regulation,

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claim, even if his property was rendered valueless by the regulation. Had the case involved a noncategorical taking, Lucas would have lost simply because nuisance regulation always weighs heavier in the balance than harm to an individual property owner. *See infra* text accompanying notes 21-22.

8. A number of cases use this terminology. *See Tahoe-Sierra*, 535 U.S. at 303, 330 n.19; *Palazzolo*, 533 U.S. at 631 n.22; Concrete Pipe & Prods., Inc. v. Constr. Laborers Pension Trust for S. Cal., 508 U.S. 602, 643 n.29 (1993); *Lucas*, 505 U.S. at 1017 n.7, 1054, 1066; Keystone Bituminous Coal Ass'n v. DeBenedictis, 480 U.S. 470, 497 (1987).

9. *Tahoe-Sierra*, 535 U.S. at 327, 331. *Tahoe-Sierra* was itself a 5-4 decision. *Id.* at 302. The next majority might answer the denominator question differently. *Compare* Justice Stevens' majority opinion, 535 U.S. at 331 ("The starting point for the [lower] court's analysis should have been to ask whether there was a total taking of the entire parcel . . . ."), *with* Justice Thomas's dissent, 535 U.S. at 355 ("I had thought that *First English* put to rest the notion that the 'relevant denominator' is land's infinite life" and "The majority's decision to embrace the 'parcel as a whole' doctrine as *settled* is puzzling.").

10. 533 U.S. at 628.

11. 438 U.S. 104, 124-28 (1978). The *Penn Central* multifactor test is explained in more detail *supra* note 5.

12. *Palazzolo*, 533 U.S. at 628.

thus effectively *defining* the denominator? Does that buyer have a takings claim?

This Article addresses, only to reject, the "whole-parcel" rule of *Tahoe-Sierra*,[13] suggesting that a better answer to the denominator question lies in state-regulated property markets.[14] One obvious way in which state law defines "property" is in its nuisance doctrine, and so we start our analysis with an examination of the ill-named "nuisance exception" to the Takings Clause, and explore the relationship between that "exception" and the denominator question. We then turn to a discussion of why the "whole-parcel" rule of *Tahoe-Sierra* is unprincipled and review the Court's past deviations from this rule.[15] The Article next proposes and defends a reading of *Palazzolo*, which holds that the constitutionality of a land-use regulation turns more on the regulation's impact on the regulated land than it does on the impact on the owner of the regulated land.[16] The Article proposes that if a state's property market allows an owner to divide his property into discrete segments, then so too should an owner of *regulated* property be allowed to sever segments of his property (within the limits of a recognized property market) whenever regulation impairs or destroys an essential property right. We then reexamine *Penn Central Transportation Co. v. New York City*,[17] *Keystone Bituminous Coal Ass'n v. DeBenedictis*[18] and *Tahoe-Sierra*,[19] in light of this suggestion. Finally, the Article distinguishes market severance from conceptual severance and concludes that the market may indeed separate property into discrete, takable segments, but that this conclusion does not seriously impede the government's ability to regulate land use.

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13. *See Tahoe-Sierra*, 535 U.S. at 327.

14. This is by no means an original suggestion. Indeed, the Supreme Court has suggested as much itself. *See* Lucas v. S.C. Coastal Council, 505 U.S. 1003, 1017 n.7 (1992) ("The answer to this difficult question may lie in how the owner's reasonable expectations have been shaped by the State's law of property—*i.e.*, whether and to what degree the State's law has accorded legal recognition and protection to the particular interest in land with respect to which the takings claimant alleges a diminution in (or elimination of) value.").

15. *See Tahoe-Sierra*, 535 U.S. at 327.

16. *See Palazzolo*, 533 U.S. at 629-30.

17. 438 U.S. 104 (1978).

18. 480 U.S. 470 (1987).

19. 535 U.S. at 302.

II. THE EVOLUTION OF THE NUISANCE "EXCEPTION," OR, THERE IS NOT NOW, NOR HAS THERE EVER BEEN, A NUISANCE EXCEPTION TO THE TAKINGS CLAUSE

Classic takings analysis did not allow a true nuisance exception to the Takings Clause, although such an exception has been frequently invoked, with the same series of cases always being cited in support. In each of the cases cited in support of the proposition that government may regulate a nuisance with constitutional impunity, there was invariably some value left in the regulated property.[20] In other words, that government was regulating a nuisance would usually defeat a claim of a taking per accidens, but the rationale had never in fact been invoked to *excuse* a taking per se. That is, those nuisance cases were simply limiting cases of (what was later to become) *Penn Central*'s balancing test;[21] government prevailed because its interest in regulating a nuisance always outweighed the harm to the regulated owner, so long as some value remained in the property. The owner *always* enjoyed a "reciprocity of advantage," as everyone benefits from prohibition of nuisances.[22] And government could declare uses nuisances which had not been so declared before. But if the government regulation effected a categorical taking, that taking was not "excused" by appeal to a nuisance exception; when a regulation destroyed an essential property right, it effected a per se taking, regardless of the government purpose served.[23]

Under the new nuisance "exception," declared by *Lucas v. South Carolina Coastal Council*, if a government regulation destroys all

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20. *See* Goldblatt v. Hempstead, 369 U.S. 590, 591 (1962) (holding that law effectively prevented continued operation of quarry in residential area); Miller v. Schoene, 276 U.S. 272, 273 (1928) (ordering destruction of diseased cedar trees to prevent infection of nearby orchards); Hadacheck v. Sebastian, 239 U.S. 394, 394 (1915) (holding that law barred the operation of brick works in residential area). As the Court, per Justice Scalia, noted in *Lucas v. South Carolina Coastal Council*, "[n]one of [the cases] that employed the logic of 'harmful use' prevention to sustain a regulation involved an allegation that the regulation wholly eliminated the value of the claimant's land." 505 U.S. 1003, 1026 (1992). In other words, there has never been a nuisance "exception" to the Takings Clause.

21. *See* Penn Cent. Transp. Co. v. New York City, 438 U.S. 104, 124-28 (1978). The *Penn Central* balancing test is discussed in more detail *supra* note 5.

22. The phrase comes from Justice Holmes's dicta in *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 415 (1922), characterized as such by the Court in *Keystone Bituminous Coal Ass'n v. DeBenedictis*, 480 U.S. 470, 490-92 (1987).

23. *See* Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419, 434 (1982) (internal citation omitted) ("In short, when the 'character of the governmental action' is a permanent physical occupation of property, our cases uniformly have found a taking to the extent of the occupation, without regard to whether the action achieves an important public benefit or has only minimal economic impact on the owner."). Although *Loretto* is, in legal time, a relatively recent case, it is evident from the Court's opinion in *Loretto* that it was not announcing a new rule. *See id.* at 435.

economically viable use, it effects a (categorical) taking, unless government is regulating a common law nuisance, i.e., a use that is a nuisance under the background principles of the state's real property and nuisance law.[24] Insofar as a nuisance "exception" to the takings clause *excuses* what would otherwise be a taking, the *Lucas* "exception" is not, properly speaking, a nuisance exception at all; there is no taking in these circumstances, as the regulated owner had no right to put the property to the regulated use in the first place.[25] Thus, after *Lucas*, whether the owner is entitled to the regulated use is part of the threshold question, whether the owner has a property interest at stake at all.[26]

That the use, as the *Lucas* court puts it, was "not part of [the owner's] title to begin with" will come as a surprise to many owners engaged in newly prohibited uses.[27] A frequent situation in which a neighbor prevails in nuisance litigation, the Court's test for whether the use was prohibited under the state's background principles[28] occurs when a use, otherwise legal, *becomes* a nuisance because the character of surrounding use has changed.[29] The Court's "rationale" in *Lucas* ignores this reality.[30] The "classic" nuisance analysis better protects the interests of property owners than does the "modern" one.[31]

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24. 505 U.S. 1003, 1029 (1992). *Lucas* thus constitutionalizes state property law. What may be a nuisance, and so prohibitable with impunity, in one state may not be a nuisance in another state; so what may be an unconstitutional taking in one state may be a valid regulation of property use in another. While that may seem problematic, it is not unusual for the meaning of "property" to be a matter of state law. *See, e.g.*, Bd. of Regents of State Colls. v. Roth, 408 U.S. 564, 577 (1972) ("Property interests, of course, are not created by the Constitution. Rather, they are created and their dimensions are defined by existing rules and understandings that stem from an independent source such as state law."). Indeed, turning to state law for the definition of property may be the solution to our problem. *See infra* text accompanying notes 89-94.

25. As the Court puts it in *Lucas*, "[w]here the State seeks to sustain regulation that deprives land of all economically beneficial use, we think it may resist compensation only if the logically antecedent inquiry into the nature of the owner's estate shows that the proscribed use interests were not part of his title to begin with." 505 U.S. at 1027.

26. I am grateful to Sarah Tosone, a student in my Spring 2003 Property II class, for this insight, which, like all great insights, seems obvious in retrospect.

27. *See supra* text accompanying note 25.

28. *See Lucas*, 505 U.S. at 1029 ("A law or decree with such an effect [destruction of use] must . . . do no more than duplicate the result that could have been achieved in the courts—by adjacent landowners (or other uniquely affected persons) under the State's law of private nuisance, or by the State under its complementary power to abate nuisances that affect the public generally, or otherwise.").

29. *See* Spur Indus., Inc. v. Del E. Webb Dev. Co., 494 P.2d 700, 707-08 (Ariz. 1972). *Spur Industries* is now a classic example of this.

30. Further, it precludes a legislature from regulating uses it deems noxious, leaving such regulation entirely to the common law, at least when such regulation renders property worthless. This result is surely unintended. *See infra* text accompanying notes 82-84.

31. There is a certain irony to the fact that Justice Scalia, writing for the Court, has undermined property rights in the apparent belief that he's protecting them. He first did so in

Whether a use is a common law nuisance is, in any event, a rather more complex question than the *Lucas* court seems to acknowledge.[32] In a situation where the use has evolved into a nuisance because surrounding use has changed, it may well be that the government which, after this fact, prohibits the use, should be liable to compensate the owner whose use has been prohibited. This, indeed, may well be the result of a common law nuisance action, which the *Lucas* Court claimed was its measure of whether the use was a common law nuisance.[33] Government prohibition of a "noxious use," if that use is a common law nuisance, is akin to the injunction which a private plaintiff might secure if suing for a private nuisance. If the plaintiff "came to the nuisance," the injunction might be granted, but at the plaintiff's expense.[34] The analogous result, that government may prohibit the use, but only if willing to pay for it, should be available to a landowner under the *Lucas* analysis. In *Nollan v. California Coastal Commission*, the Court holds that "if [the California Coastal Commission] wants an easement across the Nollans' property, it must pay for it."[35] It is not obvious why, if government wants what is essentially an inverse nuisance easement on someone's property, it should not likewise have to pay for it (on the assumption that the nuisance-use is the only economically viable use of the property, an assumption which, as we have suggested, is rarely accurate).[36]

Nollan v. California Coastal Commission, 483 U.S. 825 (1987), in which the Court, in an opinion by Justice Scalia, effectively held that government could regulate irrationally so long as it was willing to pay for it; and he does so again in *Lucas*, 505 U.S. 1003, holding that a property owner engaged in a lawful use may be denied that use once it becomes a nuisance, and may be denied *all* use if it happens that there is no use which would not be a common law nuisance. In each case, the *particular* landowner prevails, but at the price of a rule which undermines property rights more generally.

32. *See Lucas*, 505 U.S. at 1035.

33. *See id.*

34. *See Spur Indus.*, 494 P.2d at 706-07.

35. *Nollan*, 483 U.S. at 842.

36. That the assumption is so rarely accurate renders *Lucas* a far less important decision than it appeared when decided. *See* 505 U.S. 1003. Only if a regulation destroys all economically viable use do we even ask the *Lucas* question, whether a common law nuisance is being regulated. Otherwise, we apply the *Penn Central* balancing test, for a taking per accidens, and government, more often than not, prevails. Penn Cent. Transp. Co. v. New York City, 438 U.S. 104, 124-28 (1978). In *Nollan*, government must pay for the easement because it has *destroyed*, not merely impaired, the right to exclude. 483 U.S. at 841-42. Again, it is a rare regulation which destroys the right to use. *See infra* note 51 and accompanying text.

III. THE INTERPLAY BETWEEN THE DENOMINATOR AND THE NUISANCE "EXCEPTION"

If the denominator is the whole parcel, then, under the old nuisance cases, government could regulate a "noxious" use, significantly impair the value of property, and yet avoid a takings claim. This, as suggested earlier,[37] is simply a limiting case of the ad hoc balancing test; where government is prohibiting a noxious use, its interest weighs most heavily in the balance.[38]

Under the new nuisance rule, if the use is a common law nuisance then it is not part of the denominator to begin with. But if the use is *not* a common law nuisance, however noxious, government may not (without compensation) prohibit the use if the effect of the prohibition is to render an owner's property essentially useless.

If, on the other hand, the denominator is a "discrete segment," namely, so much of the property as is adversely affected by the contested regulation, then the old nuisance cases must be understood, after all, to *excuse* a literal taking.[39] So, for example, if the denominator in *Miller v. Schoene* is the loss in value to the owner of the cedar trees, 100% of which has, by hypothesis, been lost, the regulation imposing the per se taking is excused, because cedar rust is a nuisance to apple orchards, which the state deems more important.[40] Again, under the new nuisance rule, the use, growing cedar trees within range of apple orchards, is simply excluded from the denominator.[41]

Whether the denominator is the "whole parcel" or that "discrete segment" adversely affected by regulation is, then, the threshold question.

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37. *See supra* text accompanying notes 20-23.

38. The government's interest may weigh fairly heavily in the balance when it is "securing a public benefit," too. The skepticism often expressed about the usefulness of the nuisance rule, which turns on the notion that one person's bad is another's good, is largely mooted when it is noticed that what is at issue is simply the weight of the government's interest and that that weight does not turn on whether government is pursuing a good or prohibiting a bad. *See, e.g.*, Frank I. Michelman, *Property, Utility, and Fairness: Comments on the Ethical Foundations of "Just Compensation" Law*, 80 HARV. L. REV. 1165, 1193 (1967).

39. *See Penn Cent.*, 438 U.S. at 150 (Rehnquist, J., dissenting).

40. *See* Miller v. Schoene, 276 U.S. 272, 273-74 (1928). This is, in fact, a bad reading of *Miller*, both in treating the loss in value as the denominator, and in ignoring the fact that even cut cedar has value. *See id.* But it is the reading required if the case is to be understood as creating or applying a nuisance *exception* to the takings clause. Presumably, the state's deeming apple orchards more important than cedar stands is, post-*Lucas*, a legitimate articulation of the state's background principles.

41. That growing cedars within range of orchards is a "nuisance" and so prohibitable with impunity shows the absurdity of the *Lucas* rationale.

IV. THE THRESHOLD QUESTION

From the United States Supreme Court's suggestion in *Pennsylvania Coal Co. v. Mahon* that "certain coal" had been taken by the Kohler Act,[42] to its insistence in *Penn Central* that the relevant property was the "city tax block,"[43] from its treatment of the space occupied by cable company equipment as the relevant property in *Loretto v. Teleprompter Manhattan CATV Corp.*,[44] to its reiteration in *Tahoe-Sierra* that the Court considers only "the whole parcel" when faced with a taking claim,[45] the Court has been woefully inconsistent in answering the denominator question.[46] As with many threshold questions in constitutional cases, the answer is more or less dispositive of the case: if the denominator is the whole parcel, only a fraction of which has been lost to regulation, the owner almost certainly loses; on the other hand, if the denominator is a discrete segment, so much of the property as has been adversely affected by regulation, then the owner almost certainly wins.[47] It is for this reason that the *Tahoe-Sierra* Court rejected the "circular" argument that the property at issue is precisely the extent to which property has been adversely affected by regulation, and insisted instead that the property at issue is "the whole parcel," in all its *four* dimensions.[48] Thus, in *Tahoe-Sierra*, the Court states:

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42. 260 U.S. 393, 414 (1922). That suggestion appears in what is perhaps the most influential *obiter dicta* in the Court's history. *See id.* at 415.

43. *Penn Cent.*, 438 U.S. at 130-31.

44. Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419, 435 (1982).

45. Tahoe-Sierra Pres. Council v. Tahoe Reg'l Planning Agency, 535 U.S. 302, 327 (2002).

46. *But see* Timothy J. Dowling, *On History, Takings Jurisprudence, and* Palazzolo*: A Reply to James Burling*, 30 B.C. ENVTL. AFF. L. REV. 65, 96 (2002) (asserting that "the parcel-as-a-whole rule is one of the few firmly entrenched, bright lines in takings jurisprudence").

47. Other "threshold questions" which tend to be dispositive include: what classification is in issue, in equal protection cases, and what right is asserted, in substantive due process cases. *See, e.g.*, Gen. Elec. Co. v. Gilbert, 429 U.S. 125, 135 (1976) (holding that, in the equal protection context, classification on the basis of pregnancy is not a classification on the basis of sex, and so gets only rational basis scrutiny which it ipso facto survives); Bowers v. Hardwick, 478 U.S. 186, 190 (1986) (stating, in the substantive due process context, that "[t]he issue presented is whether the Federal Constitution confers a fundamental right upon homosexuals to engage in sodomy"), *overruled by* Lawrence v. Texas, 539 U.S. 558, 578 (2003) ("Th[is] case . . . involves two adults who, with full and mutual consent from each other, engaged in sexual practices common to a homosexual lifestyle . . . . Their right to liberty under the Due Process Clause gives them the full right to engage in their conduct without intervention of the government.").

48. *See Tahoe-Sierra*, 535 U.S. at 331-32. The largest "whole parcel" in its four dimensions is the fee simple absolute. The Court's adoption of the common law estate as the "unit" of takable property suggests the Court's endorsement of a Blackstonian conception of property, where the rights to exclude, use, and dispose are the essential property rights, *see supra* text accompanying note 2, and real property is owned in "estates" of varying duration, the fee simple absolute being the "highest" estate known to the common law. Given the Court's

> An interest in real property is defined by the metes and bounds that describe its geographic dimensions and the term of years that describes the temporal aspect of the owner's interest. . . . Both dimensions must be considered if the interest is to be viewed in its entirety. Hence, a permanent deprivation of the owner's use of the entire area is a taking of "the parcel as a whole," whereas a temporary restriction that merely causes a diminution in value is not. Logically, a fee simple estate cannot be rendered valueless by a temporary prohibition on economic use, because the property will recover value as soon as the prohibition is lifted.[49]

The threshold question being more or less dispositive of any takings claim, it is essential, if takings law is to have any principled foundation, that it be possible to give a principled answer to the question. Unfortunately, the whole-parcel rule does not provide that principled foundation.

V. THE WHOLE-PARCEL RULE IS UNPRINCIPLED

There is a fundamental flaw in the whole-parcel rule. It treats similarly regulated property owners differently depending on the extent of their holdings. There is no principled way to determine the "size" of the "whole parcel." Imagine three property owners, each of whom owns ten acres of land subject to a regulation which renders that ten acres essentially useless: *A* owns 200 acres, of which the regulated ten is but 5%; *B* owns twenty acres, of which the regulated ten is 50%; *C* owns only ten acres, of which the regulated ten is 100%. *A* almost certainly has no takings claim, under the whole-parcel rule, as *A* has lost only 5% of value and the government's basis for regulation is almost certainly sufficient to justify so small an impact. *B* has a better takings claim, having lost 50% of value, but government will probably still prevail,

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inclination to defer to state law on the question of what counts as "property" for takings law purposes, this adoption of the Blackstonian conception for federal constitutional purposes would be problematic, but for the fact that it appears to be the general common law conception. Perhaps the Court thus completes the constitutionalization of the "liberal conception of property," a process which was only incomplete before. *See* Margaret J. Radin, *The Liberal Conception of Property: Crosscurrents in the Jurisprudence of Takings*, 88 COLUM. L. REV. 1667, 1668 (1988).

49. *Tahoe-Sierra*, 535 U.S. at 331-32. In other words, the owner's investment-backed expectations are *restored* when the moratorium ends. This, of course, is why *First English Evangelical Lutheran Church v. County of Los Angeles*, 482 U.S. 304 (1987), was wrongly decided. *See* Patrick Wiseman, First English*'s Regulatory Takings Analysis: Is Compensation for a Landowner's Temporary Frustration of Economic Expectation Justified?* 9 URB. L. & POL'Y 157, 160 (1988). The logic of *First English*, all the Court's protestations in *Tahoe-Sierra* to the contrary notwithstanding, really required the opposite result in *Tahoe-Sierra*. The Court should have had the courage to overrule *First English*, just as in *Keystone* it should have had the courage to overrule *Pennsylvania Coal*. The Court's lack of fortitude (or perhaps it's just a lack of votes) has made the law of takings increasingly incoherent, at least superficially.

especially if it is regulating a nuisance-like use. *C* has a categorical takings claim, having lost all economically viable use.

This differing treatment of identically regulated property makes no principled sense.[50] *A* and *B* should be permitted to treat their regulated 10 acres as the denominator of the takings fraction, just as *C* can. And, if the regulation indeed renders their regulated property useless, i.e., effectively appropriates it, then government should be required to exercise its power of eminent domain and buy the property. But it is an extremely rare regulation which literally renders property useless.[51] Other than government-authorized physical occupation, which destroys the rights to exclude, use, and dispose, categorical takings are rare indeed. Even when the denominator is that "discrete segment" adversely affected by regulation, then, more often than not the appropriate takings test will be the ad hoc balancing test, and the question will be whether the government purpose served by the regulation is sufficiently weighty to justify the impact on the regulated property. While this imposes on government a burden to demonstrate a substantial justification for its regulation, that burden is not insurmountable and does not seem too much to expect when government regulation has so great an impact on land use.

VI. DEVIATIONS FROM THE WHOLE-PARCEL RULE

Not only is the whole-parcel rule unprincipled, but the Court has not always been so scrupulous in its identification of the property at stake, or in its refusal to engage in "conceptual severance" of property interests, to treat one "stick" in the bundle of sticks that is property as takable.[52] In

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50. To the extent that a takings claim attaches to *land*, as suggested by *Palazzolo*, the whole-parcel rule makes even less sense. *See infra* text accompanying notes 67-73 (discussing Palazzolo v. Rhode Island, 533 U.S. 606 (2001)); Tyrone T. Bongard, *Does* Palazzolo v. Rhode Island*'s Upholding of the Transferability of Takings Claims Require a Rethinking of Takings Jurisprudence?*, 81 N.C. L. REV. 392, 411 (2002) ("The parcel-as-a-whole doctrine thus encourages landowners to engage in inefficient transactions, such as purchasing and holding land in smaller size lots . . . or putting smaller parcels in the name of a relative or friend. The parcel-as-a-whole doctrine also discriminates against those with larger landholdings and those who happen to concentrate those holdings in a particular area.").

51. An honest assessment of the regulation challenged in *Lucas v. South Carolina Coastal Council*, for example, would reveal that the finding of the lower courts that Lucas's property had no postregulation economically viable use was simply implausible. *See* 505 U.S. 1003, 1076 (1992). Justice Souter would have found certiorari improvidently granted because "[t]he petition for review was granted on the assumption that the State by regulation had deprived the owner of his entire economic interest in the subject property. . . . It is apparent now that . . . the trial court's conclusion is highly questionable." *Id.*

52. The notion of property as a "bundle" of rights, attributed variously to Justices Cardozo, Hart, and Honoré, or Hohfeld, continues to be useful. *See* WESLEY HOHFELD,

Loretto, for example, the Court seemed willing to treat the two and a half cubic feet occupied by the cable company's cables and equipment separately from the "whole parcel," speaking of Jean Loretto's rights to "exclude, use, and dispose of" the space occupied by the cable company's equipment as having been literally destroyed.[53] Had the Court focused on the "whole parcel," presumably Jean Loretto's apartment building,[54] it might, nonetheless, have found a destruction of the right to exclude, despite the likely increase in the value of her property,[55] and so found a taking.[56] But that was not the Court's emphasis. The *Loretto* Court seemed to treat the space occupied by cable company equipment as the denominator of the takings fraction.[57] Tellingly, the Court's most recent citations to *Loretto* treat it as being mostly about the right to exclude, which, if the denominator is to be the whole parcel, is the only way that *Loretto* makes sense.[58]

FUNDAMENTAL LEGAL CONCEPTIONS AS APPLIED IN JUDICIAL REASONING AND OTHER LEGAL ESSAYS (1923); Antony Honore, *Ownership*, *in* OXFORD ESSAYS IN JURISPRUDENCE: A COLLABORATIVE WORK 107 (Anthony Guest ed., 1961); Robert J. Goldstein, *Green Wood in the Bundle of Sticks: Fitting Environmental Ethics and Ecology into Real Property Law*, 25 B.C. ENVTL. AFF. L. REV. 347, 366-86 (1998) (tracing origin of "bundle of sticks" metaphor to Justice Cardozo or Wesley Hohfeld).

53. Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419, 435 (1982) ("Property rights in a particular thing have been described as the rights to 'possess, use and dispose of it.' To the extent that the government permanently occupies physical property, it effectively destroys *each* of these rights. . . ." (internal citation omitted)).

54. Had Jean Loretto owned two, adjacent apartment buildings, would they be her "whole parcel?" Sometimes, perhaps, it is fairly easy to identify the "whole parcel" at issue. Even so, two identically-regulated owners are treated differently under the whole-parcel rule, depending on the extent of their holdings.

55. An apartment building with cable is presumably more valuable than one without. That was not exactly Jean Loretto's choice, however. Her choice was between an apartment building with cable at *her* price and an apartment building with cable at *government's* price. *See Loretto*, 458 U.S. at 421. On the assumption that she would not have priced herself out of the market, she would have been better off setting her own price, and so the regulation cost her something.

56. This would, in my view, have been the right analysis. And it appears to be the Court's more recent understanding of *Loretto*. *See Lucas*, 505 U.S. at 1020 n.8 (citing *Loretto*, 458 U.S. at 436, as support for protecting an "interest in excluding strangers from one's land").

57. *See Loretto*, 458 U.S. at 436. Certainly, it was fair to say that Jean Loretto's right to *exclude* the cable company from so much of her roof as was occupied by its equipment was destroyed; and that her right to *use* so much of the space on her roof as was occupied by the equipment was likewise destroyed; and even that her right to *dispose* of that space was arguably destroyed. *See id.* Indeed, the latter was almost certainly Jean Loretto's real objection to the regulation; before its enactment, she could negotiate with the cable company a fee for occupation of her roof; postregulation, her compensation is predetermined. She had, quite literally, lost the right to dispose of that space at a negotiated price.

58. *See Lucas*, 505 U.S. at 1020 n.8. If the "whole parcel," i.e., Loretto's apartment building, is the denominator of the takings fraction, the decision does not make sense unless the right to exclude is deemed *destroyed* by the regulation; if it were merely *impaired*, then the *Penn Central* ad hoc factual analysis, *see* text accompanying *supra* note 5, would apply, and it is hard to

Loretto is not the only case in which the Court has indicated a willingness to divide a single parcel into discrete segments. In *First English Evangelical Lutheran Church v. County of Los Angeles*, although the Court denies it in *Tahoe-Sierra*,[59] the Court seemed willing to treat a temporal slice as a separate segment of property.[60] In *Andrus v. Allard*, the Court seems to treat the right to alienate as a takable stick.[61] In *Lucas*, "economically viable use" is treated as a discrete segment of property.[62]

But we have, so far, conflated two very different notions of "discrete segment." A discrete segment of property is either a physical subdivision of the property, one among the bundle of rights which constitutes property, or, most controversially, the extent to which property value is diminished by regulation.[63] Where real property is *physically* divisible,

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imagine that Jean Loretto would have prevailed, given that the value of her parcel was almost certainly *enhanced* by the regulation requiring that she accommodate the cable company.

59. Tahoe-Sierra Pres. Council v. Tahoe Reg'l Planning Agency, 535 U.S. 302, 328 (2002). In *Tahoe-Sierra*, the Court stated:

> It is important to recognize that we did not address in that case [*First English*] the quite different and logically prior question whether the temporary regulation at issue had in fact constituted a taking. In *First English* the Court unambiguously and repeatedly characterized the issue to be decided as a "compensation question" or a "remedial question."

Id.

60. First English Evangelical Lutheran Church v. County of L.A., 482 U.S. 304, 319 (1987). The *First English* Court stated:

> The value of a leasehold interest in property for a period of years may be substantial, and the burden on the property owner in extinguishing such an interest for a period of years may be great indeed. Where this burden results from governmental action that amounted to a taking, the Just Compensation Clause of the Fifth Amendment requires that the government pay the landowner for the value of the use of the land during this period.

Id. (internal citation omitted). The *First English* Court, of course, also treated the right to use as severable. *Id.* at 321 ("[T]he ordinance has denied appellant all use of its property for a considerable period of years, and we hold that invalidation of the ordinance without payment of fair value for the use of the property during this period of time would be a constitutionally insufficient remedy.").

61. Andrus v. Allard, 444 U.S. 51, 66 (1979). In *Andrus*, the Court upholds a regulation banning the *sale* of eagle feathers, but suggests that a regulation forbidding *any* alienation of particular property would be an unconstitutional taking. *Id.* ("In this case, it is crucial that appellees retain the rights to possess and transport their property, and to donate or devise the protected birds.").

62. *See* 505 U.S. 1003, 1016 (1992).

63. Even Justice Holmes, who arguably got us into this mess with his largely advisory opinion in *Pennsylvania Coal*, acknowledges that "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." Pa. Coal Co. v. Mahon, 260 U.S. 393, 413 (1922). Thus, the extent to which property value is lost to regulation is simply a nonstarter as an answer to the denominator question, as the *Tahoe-Sierra* Court correctly notes. *See Tahoe-Sierra*, 535 U.S. at 326. But the

there is no reason why the Court would not permit an owner to divide it.[64] If an owner can convey to a buyer a subdivided portion of property in fee simple absolute (i.e., a "whole parcel," just a whole parcel smaller than the owner's original), there seems no reason in principle not to permit such subdivision. Where matters become, perhaps, a little trickier is when the owner seeks to convey a "stick" from the bundle of sticks which constitutes the property; e.g., the owner may want to grant a right to use, an easement. The common law, of course, permits this all the time. And when the owner seeks *conceptually* to divide the property, as, for example, when the owner seeks to convey the right to collect rent on the property, matters become murkier still.

So where, for takings law purposes, can we draw a line? Should there be any limits placed on an owner's ability to divide property, physically or conceptually, and to market the divisions? If the result of division is to render a piece of property subject to regulation essentially worthless, should the owner (or buyer) be precluded from bringing a takings claim?

VII. MARKET SEVERANCE

Tahoe-Sierra reiterates the view, first articulated in *Penn Central*, that "'[t]aking' jurisprudence does not divide a single parcel into discrete segments and attempt to determine whether rights in a particular segment have been entirely abrogated."[65] Were it to do so, the categorical rules of *Loretto* (destruction of the right to exclude is a categorical taking) and *Lucas* (destruction of the right to use is a categorical taking) would seem to require that any "segment" of property destroyed by regulation be always held to be "taken" by that regulation, reasoning which the *Tahoe-Sierra* Court correctly rejects as circular.[66]

While taking jurisprudence does not divide property into discrete segments, what is to stop a seller from doing so? *Palazzolo* holds that a buyer of regulated property is not precluded from challenging the regulation under the Takings Clause.[67] The fact that the buyer took with

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Court goes too far in rejecting more plausible contenders, "discrete segments" of property such as the rights to exclude, use, or dispose, which have long been recognized by the common law. *See id.*

64. *But see infra* text accompanying notes 77-78.

65. *Tahoe-Sierra*, 535 U.S. at 327.

66. *See id.*

67. Palazzolo v. Rhode Island, 533 U.S. 606, 628 (2001). To the extent that *Palazzolo* can be read to make the essentially trivial point that an unripe takings claim survives transfer of title, it is uninteresting. *See* Gregory M. Stein, *Takings in the 21st Century: Reasonable Investment-Backed Expectations After* Palazzolo *and* Tahoe-Sierra, 69 TENN. L. REV. 891, 916-26 (2002). Far

notice of the regulation, and presumably paid a price that reflected the adverse effect of the regulation, does not foreclose an inverse condemnation action.[68] At the very least, this makes good economic sense.[69] A seller of land subject to an arguably unconstitutional regulation should not be prevented from selling the land, if at a reduced price; and a buyer, having paid the reduced price, should not be precluded from spending whatever it takes (presumably not more than the discounted difference between the value of the land unregulated and the value of the land regulated) to test the constitutionality of the regulation.[70] The buyer, in other words, buys the right to challenge the constitutionality of the regulation together with the risk of failure, a risk that the seller, presumably, was unwilling to take.[71] A regulatory takings

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more interesting is the suggestion that a takings claim runs with the land, at least so long as the statute of limitations has not run on the claim. I shall take this to be the "holding" of *Palazzolo* for purposes of my analysis; it is a holding I shall defend.

68. *Palazzolo*, 533 U.S. at 627, 629. It is, or should be, no objection to the proposition that a takings claim runs with the land that the law does not permit the sale of legal claims. *See* Stein, *supra* note 67, at 899. If you injure my *person*, I cannot sell someone else my cause of action for battery, because I cannot sell my person; but if you injure my *property*, the buyer of my property should not be precluded from recovering for the injury. Perhaps to the extent that your injury to my property injures me personally, I should not be able to sell my cause of action along with my property; but a takings claim, at least as treated by the legal system, is not of this sort.

69. That it makes good economic sense, of course, does not settle the question whether it is sound policy or just law.

70. Under conventional economic analysis, it would be an irrational buyer who would spend any more than the difference in value, discounted by the probability of success. That is, if success is guaranteed, a buyer should be willing to spend the entire difference in value to secure property of the unregulated value. If the chance of success is but fifty percent, then the buyer should be willing to risk that much less. But why does this buyer have no reasonable investment-backed expectations, and so lose under the *Penn Central* balancing test? *See* Penn Cent. Transp. Co. v. New York City, 438 U.S. 104, 123-24 (1978). For two reasons: (1) that element of the test is not dispositive (*Palazzolo*, 533 U.S. at 633); and, more to the point, (2) the buyer's investment-backed expectation is *precisely* that the buyer may spend to challenge the regulation. The buyer's investment, that is to say, is the minimal cost of the property plus the cost of the litigation to challenge the regulation which rendered the property so cheap.

71. The seller, of course, may have been unable to take the risk, lacking the resources to do so; but conventional economic analysis makes no distinction between those unwilling and those unable. *See, e.g.*, RICHARD A. POSNER, THE ECONOMICS OF JUSTICE 61 (1983) ("The individual who would like very much to have some good but is unwilling or unable to pay anything for it—perhaps because he is destitute—does not value the good in the sense in which I am using the term 'value.'").

claim,[72] that is to say, runs with the land, and is not personal to the owner who is in possession when the regulation is adopted.[73]

Mr. Palazzolo owned eighteen acres of developable land, a fact which (under the whole-parcel rule) defeated his claim that he had been denied all use and so was entitled to compensation under the categorical rule of *Lucas*.[74] While he asked the Court to treat his wetlands property as a discrete, "taken" segment, the Court declined the opportunity to settle the denominator question thereby offered, because Palazzolo had not raised the question below.[75] Had Palazzolo sold his wetlands property, would his buyer have had a takings claim? As just noted, *Palazzolo* essentially holds that takings claims run with the land, so that Palazzolo's buyer, who now, by hypothesis, owns property which is arguably useless,[76] bought as well the right to challenge the regulation which makes it so. Justice Breyer, dissenting in *Palazzolo*, in response to a suggestion from some amici that strategic buying and selling of regulated property would lead to invalidation of all regulation, opines that no "constitutional provision concerned with 'fairness and justice' could reward any such strategic behavior."[77] Perhaps not; but why should Palazzolo be precluded from subdividing his property and selling the wetland portion, for a presumably "distressed" price? What considerations of "fairness and justice" preclude his buyer from launching a constitutional challenge against the regulation which renders the property essentially useless, if indeed such is the effect of the

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72. *Palazzolo* distinguishes regulatory takings cases from eminent domain cases. *Palazzolo*, 533 U.S. at 628. Justice Kennedy, writing for the Court, opined that, in the latter cases, only the owner at the time of condemnation may recover. *Id.* This rule also makes economic sense; no rational buyer would spend the price of the property in order to recover the value of the property, and so come out even (but for the costs of the transaction), and without the property.

73. This should be so, even if the takings claim was ripe before the sale. There is language in *Palazzolo* to suggest that only unripe takings claims run with the land, but that would (1) make *Palazzolo* singularly uninteresting, and (2) contrary to the logic of *Palazzolo* itself, mean that transfer of title cuts short the statute of limitations on bringing a takings claim. *See Palazzolo*, 533 U.S. at 629-30. Justice Stevens, dissenting in *Palazzolo*, disagrees that a takings claim is not personal to the owner when the regulation takes effect, arguing that Palazzolo's predecessor in interest was the only one with a takings claim. *Id.* at 638 (Stevens, J., dissenting). That the takings claim is not personal to the owner in possession when the regulation was adopted does *not* mean that the takings claim need not have existed when the regulation was adopted. In other words, I am not endorsing the notion of a sale which *creates* a takings claim.

74. *Id.* at 631.

75. *Id.*

76. Property protected by wetlands regulation is not ipso facto useless. In other words, wetlands regulation, if the denominator of the takings fraction is the wetlands, does not automatically effect a categorical taking. Whether it effects a taking per accidens turns, as always, on the facts.

77. *Palazzolo*, 533 U.S. at 655 (Breyer, J., dissenting).

regulation?[78] On the one hand, denying Palazzolo the right to subdivide and sell would seem to be a literal taking of that segment of his property, as it effectively denies the right to alienate.[79] On the other hand, foreclosing his buyer from challenging the constitutionality, as applied, of a regulation which renders the property useless would seem to be a straightforward deprivation of property without due process. There is, after all, more to due process than notice; even if a buyer acquires property with notice that it is subject to a regulation which renders it worthless, the regulation may either deprive the owner of that property without (substantive) due process, insofar as the regulation serves no legitimate public purpose, or it may effect a taking. The constitutionality of the regulation is not saved by the fortuity of a sale.[80]

Assuming, then, that Palazzolo's buyer of the wetlands portion of his property is not precluded from bringing a takings claim (and assuming, arguendo, that land designated as a wetland lacks any economically viable use[81]), how would such a claim fare? *Lucas* appears to preclude a legislature from identifying new nuisances, and allows instead only that a use which is a nuisance under a state's "background principles of nuisance and property law" may be prohibited.[82] Therefore, whether Palazzolo's buyer's taking claim succeeds will turn on whether the regulation is an explication of background principles of state nuisance and property law. Although *Lucas* speaks of "common law nuisance,"[83] it must be the case that statutory law can become, in time, part of a state's background principles. Otherwise, the effect of *Lucas* is

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78. As noted above, such is an extremely rare regulation. *See* supra note 36 and accompanying text.

79. Perhaps he could give it away or devise it. But that just shifts the problem to his successor. Is a donee, devisee, or heir precluded from launching a takings challenge? *Palazzolo* itself suggests not. *See* 533 U.S. at 628. Perhaps such a successor has not engaged in the kind of strategic behavior which bothers the amici to whom Justice Breyer responds, and so would not be precluded from bringing a takings challenge. *See id.* at 655. But it does not seem entirely principled to treat a bona fide purchaser so differently from another successor in interest. Of course, it is the buyer's bona fides which the amici doubt, but why is it bad faith to buy the right, and associated risk, to challenge the constitutionality of a regulation?

80. This is, arguably, the whole point of *Palazzolo*, 533 U.S. 606.

81. *But see supra* text accompanying note 76.

82. *See* Lucas v. S.C. Coastal Council, 505 U.S. 1003, 1029-31 (1992). *Lucas* is arguably not so significant in its implications; a state is required to compensate an owner whose land, as a consequence of regulation, has no economically viable use, *unless* the prohibited use is a nuisance within the background principles of the state's property law. Thus, a state legislature *may* identify new nuisances, but it must compensate those owners whose land has *only* the prohibited use. Land which has only one economically viable use is surely rare indeed. *But see* POA Co. v. Findlay Township Zoning Hearing Bd., 713 A.2d 70, 76 (Pa. 1998) (holding that where land was suitable only for billboard use, the owner was entitled to use variance).

83. *Lucas*, 505 U.S. at 1031.

to ossify state law and to disable state legislatures from amending or updating the background principles of the state's nuisance and property law, surely an unintended effect.[84]

When, then, does a state statute fade into the background, so that a buyer who buys with (at least constructive) notice *is* precluded from bringing a takings claim? In other contexts, the passage of legally significant time is often marked by statutes of limitations; perhaps a state statute should be considered part of the background principles of the state's nuisance and property law when the statute of limitations on a takings claim has elapsed since its passage, thus making the state statute immune to a facial challenge on takings grounds.[85] Under this scenario, Palazzolo's buyer's takings claim probably comes too late. If the wetlands regulation has *not* become part of the state's background principles of nuisance and property law, and its effect really is to render the land designated as a wetland literally useless, the owner/buyer would have a categorical takings claim.

VIII. LIMITING THE MARKET SEVERABILITY OF DISCRETE SEGMENTS

While the law may not "separate a single parcel into discrete segments" for takings law purposes, should the market be prevented from doing so?[86] There are limits even to the market's ability to sever segments of property, but within those limits the law should recognize the legitimacy of a regulatory takings claim whenever regulation impairs or destroys an essential property right in properly severed, or even severable, property segments.[87]

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84. *See id.* at 1068-69 (Stevens, J., dissenting). In his dissent Justice Stevens stated:

> [T]he Court's holding today effectively freezes the State's common law, denying the legislature much of its traditional power to revise the law governing the rights and uses of property. . . . [In *Munn v. Illinois*] we recognized that "the great office of statutes is to remedy defects in the common law as they are developed, and to adapt it to the changes of time and circumstances."

Id.; *see also* Kim v. City of New York, 681 N.E.2d 312, 315-16 (N.Y. 1997) (holding that it would be illogical for courts to look exclusively to common law principles to identify the preexisting rules of state property law, as this would essentially elevate common law over statutory law).

85. It would, of course, remain subject to a takings challenge *as applied* to a particular piece of property, but the challenging owner would not have available a *Lucas* claim that the regulation, before application, was not in the "background" of state nuisance and property law, making the as-applied challenge unlikely to succeed.

86. *See* Tahoe-Sierra Pres. Council v. Tahoe Reg'l Planning Agency, 535 U.S. 302, 327 (2002).

87. Once severability of a "segment" is recognized, it would be inefficient (and serve no goal of justice) to *require* an owner physically to sever and sell that segment before it would be "takable." To put that another way, Palazzolo's sale of the regulated property would not *create* a

Are there any principled limits on what property segments may be severed in the market? *Lucas*, *Tahoe-Sierra*, and other cases suggest how such limits may be set—by state law.[88] If, *preregulation*, a property interest was treated as discrete under state law, it had exchange value under state law, and so was "severable" in the market.[89] In other words, if (and only if) there was a market for the allegedly taken property *before* the regulation allegedly took it, that property was takable, in the constitutional sense. This is consistent with the text of the Takings Clause,[90] and indeed brings the notion of a taking by regulation more in line with that text.[91] Before acting in pursuit of its presumptively legitimate goal,[92] government has a choice of means to achieve the goal: regulate land use, or buy property, i.e., either exercise its police power to regulate or exercise its eminent domain power to expropriate. Unless, ex ante, there is a market for the property, the latter option is not available to government.[93] On the other hand, if there was a market for the property ex ante the regulation, then the property is, to that extent, takable.

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takings claim; Palazzolo himself already had a takings claim with respect to the wetlands portion of his property.

88. *See, e.g.*, *Tahoe-Sierra*, 535 U.S. at 335; *Lucas*, 505 U.S. at 1016 n.7. The *Lucas* Court stated:

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

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

89. To have exchange value is to be "severable" in a market.

90. "[N]or shall private property be taken for public use without just compensation." U.S. CONST. amend. V.

91. The notion of a "regulatory taking," although it has been with us for some eighty years, is conceptually problematic. A "taking," in ordinary parlance, involves an expropriation, a transfer of title. *See, e.g.*, Pa. Coal Co. v. Mahon, 260 U.S. 393, 417 (1922) (Brandeis, J., dissenting) ("The restriction here in question is merely the prohibition of a noxious use. The property so restricted remains in the possession of its owner. The State does not appropriate it or make any use of it."). Brandeis, of course, lost that argument. But the notion that property is takable by regulation only if takable by transfer of title perhaps strikes a middle ground between Holmes' majority view and Justice Brandeis' dissent.

92. If the government's goal is illegitimate, it is acting in violation of substantive due process. The public use requirement of the Takings Clause is coextensive with the requirement of substantive due process that government act rationally in pursuit of legitimate ends. *See* Haw. Hous. Auth. v. Midkiff, 467 U.S. 229, 241-43 (1984). The principle of *Hawaii Housing Authority* was recently endorsed and reaffirmed by the Court in *Kelo v. City of New London*, 125 S. Ct. 2655, 2668 (2005).

93. There can be no regulatory taking unless government had the option to exercise its power of eminent domain ab initio. Furthermore, if government could achieve its goal by exercising its power of eminent domain but, by doing so, would acquire more property than it needs to achieve its goal, and the adverse impact on the property of the regulation is not in the

It follows from this observation that *Penn Central* was wrongly decided, at least to the extent that air rights were "discrete" and transferable under New York law.[94] It also follows that the *Keystone* Court was wrong in holding that the support estate, recognized as "discrete" under Pennsylvania law, was not "takable."[95] It perhaps puts in doubt the reluctance of the *Tahoe-Sierra* Court to consider a short-term denial of all use a categorical taking, as an owner can lease property for such a short term. We will examine each of these cases in turn, subjecting them to critique under our new insight that a regulation "takes" property only if government had the option of buying the property allegedly taken *before* it regulated.

A. Penn Central Transportation Co. v. New York City

Under New York law, at the time *Penn Central* was decided, air rights (i.e., the right to develop above one's property) were, under certain circumstances, transferable, i.e., there was a market for such development rights.[96] That being the case, when Grand Central Terminal was designated an historic landmark, New York City at least had the *option* of exercising its power of eminent domain to acquire Penn Central's air rights. But it is an option which would have utterly failed to achieve the purposes of the historic-landmark designation. Destruction of the air rights, if indeed such was the effect of the designation,[97] was simply a by-product of the designation, not its purpose. In other words, government *had* to act by regulating; exercising the power of eminent domain, unless it was to acquire Grand Central Terminal itself, would have fallen far short of achieving its purposes. And acquiring Grand Central Terminal, while it would have assured its preservation, would have cost far more than was necessary to achieve government's goals.

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market pre-regulation, there is necessarily value left in the property postregulation and the regulation is ipso facto not a categorical taking.

94. *See* Penn Central Transp. Co. v. New York City, 438 U.S. 104, 136-37 (1978). Thus, *Penn Central* was wrongly decided on the liability question. Whether Penn Central was entitled to any *remedy* would depend on the value of the air rights taken. It may be that their value under the Transferable Development Rights program would have been just and adequate compensation for the taking, a question the *Penn Central* Court itself avoided. *See* 438 U.S. at 122.

95. See Keystone Bituminous Coal Ass'n v. DeBenedictis, 480 U.S. 470, 501 (1987). The Court was right, however, that the support estate had not been taken; rather only those little bits of it beneath supported buildings were taken, and those "bits," as we'll see, should *not* be treated as discrete segments for takings law purposes.

96. 438 U.S. 104, 108-09 (1978).

97. It appears from the decision that Penn Central retained the right to *transfer* their development rights, and so they were not, in fact, destroyed by the designation. *Penn Cent.*, 438 U.S. at 113-14.

Had the designation rendered Grand Central Terminal literally worthless, government would have been required to rescind the regulation or to buy the terminal; but that, of course, as the decision in *Penn Central* makes abundantly clear, was not the effect of the designation.[98] Thus, even when government does have the preregulation option to regulate or condemn, it should be required to do the latter only if doing so is *necessary* to achieve government's purpose.

B. Keystone Bituminous Coal Ass'n v. DeBenedictis

In *Keystone* the Court found that the twenty-seven million tons of coal required to remain in place by the Subsidence Act were not "a separate segment of property" for takings law purposes.[99] And a sensible conclusion it was. The twenty-seven million tons of coal, standing in place under buildings required to be protected from subsidence, have no independent exchange value. It would be, to say the least, foolish of me to go to the affected coal companies and offer to buy, pillar by pillar, the 27 million tons of coal, so that I could claim that my "denominator" was 100% taken and so categorically compensable.[100] This is exactly the kind of strategic maneuvering of which the amici to whom Justice Breyer responds in his *Palazzolo* dissent are wary.[101] But those 27 million tons of coal had no discrete exchange value before the regulation required that they be left in place. Until the regulation was adopted, that coal was fungible. Only after the regulation was adopted did it become discretely identifiable.[102]

The support estate, on the other hand, is recognized under Pennsylvania law as an estate separate and distinct from the surface and mineral estates (although, as the *Keystone* Court observed, it is always

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98. *See id.* at 108-09.

99. Keystone Bituminous Coal Ass'n v. DeBenedictis, 480 U.S. 470, 498 (1987).

100. As 100% of my property has been arguably categorically taken, I do not have to worry that the court will apply the *Penn Central* test and find that I have no investment-backed expectations. The *Penn Central* factors are relevant only to noncategorical regulatory takings. *See Penn Cent.*, 438 U.S. at 123-24.

101. *See* Palazzolo v. Rhode Island, 533 U.S. 606, 655 (2001) (Breyer, J., dissenting).

102. There was no market for the 27 million tons of coal as such. There was, however, a market for coal in general, including the 27 million tons now required to be left in place. But it would not have been possible, until the law identified the coal required to be left in place, for government to exercise its power of eminent domain and buy it. Thus, government had no option but to regulate. Even postregulation, the coal required to be left in place is probably not precisely identifiable. The Subsidence Act simply imposes on coal companies a duty of subjacent support of some buildings; whether they satisfy that duty by leaving coal in place or by shoring up the surface after its removal is presumably their choice. PA. STAT. ANN. tit. 52, §§ 1406.1–1410(d) (Purdon 1994) (effective Apr. 27, 1966).

associated with one or the other).[103] If one owns the surface estate and the owner of the mineral estate owns the support estate, thus giving the latter the right literally to undermine one's home, wouldn't one be "in the market" for the support estate?[104] The coal companies thus have at least a plausible claim that their support estate is takable. Once again, though, only parts of it have been taken (the two-dimensional, planar parts at the top of each pillar of coal) and those "parts," just like the pillars of coal which they top, are *not* a preregulation, separately recognized segment of property under state law, but rather are fungible pre regulation.

C. Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency

Could government have exercised its power of eminent domain to purchase the "discrete segment" allegedly taken in *Tahoe-Sierra*?[105] Hardly. Although, after the fact, one can estimate the fair rental value of the property while under a moratorium, *before* the fact the length of the "lease" was unpredictable. Government had no choice but to regulate; exercising the power of eminent domain was not a preregulation option.[106] This is *not* to say that there can never be a successful temporary takings claim, but such claims can succeed only by a showing that government's purpose in imposing the moratorium was insufficiently weighty to justify the burden imposed on the private owner. In other words, as *Tahoe-Sierra* itself says, unless a taking is categorical, in which case it cannot be undone by rescinding the regulation which effects it, a temporary takings claim is like any other claim of a taking per accidens, and is subject to the ad hoc factual analysis to which all such claims are subject.[107]

IX. MARKET SEVERANCE IS NOT CONCEPTUAL SEVERANCE

Does market severance, as contemplated here, have the same problem as conceptual severance, that it effectively makes the adverse regulatory impact on property the denominator in the takings fraction, thus making it considerably more likely that a takings claim will

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103. *Keystone*, 480 U.S. at 500-01.

104. It would probably be a bilateral monopoly, as it is unlikely that anyone but the owners of the surface and mineral estates would have any interest in the support estate, but it is a market nonetheless.

105. *See* Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency, 535 U.S. 302, 327 (2002).

106. Government might, perhaps, have acquired a fee simple determinable, having possession "so long as the moratorium remains in effect."

107. *See Tahoe-Sierra*, 535 U.S. at 335-36.

succeed?[108] Allowing that the market may sever what the law will not does not lead inexorably to constitutionalizing a laissez-faire approach to that market.[109] While conceptual severance can hobble government regulation, if any adverse impact is treated as a taking to the extent of the impact, market severance only does so if "the extent of the impact" has preregulation exchange value under state law, and then only if government *must* exercise its power of eminent domain if it can.[110] An owner subject to rent control, for example, loses profit. A conceptual severer may well find that the lost profit has been "taken."[111] But the market cannot sever what is not there in the first place. Although the loss of profit would affect the market value of the rental property *as a whole*, it is not a separately alienable property interest.[112] An owner denied the right to develop air rights, on the other hand, loses those air rights; the market *may* sever the air rights, *but only in a legal context within which those rights are severable*; this is not a *laissez-faire* market place, it is a regulated market place.

X. CONCLUSION

The whole-parcel rule lacks any principled foundation. It treats similarly regulated owners differently simply because of the extent of their real property holdings. As *Palazzolo* makes clear, the focus of the takings inquiry should be on the regulated *property* and not on the effect of the regulation on its *owner*. The threshold question should thus be, was the allegedly taken property available to government in a preregulation market? In other words, did government have the *option* of exercising its power of eminent domain to acquire the property interest in pursuit of its goal? If not, then there can be no taking at all, and so no regulatory taking. If so, then there may be a regulatory taking, under the rules of current takings doctrine with which this Article opened.

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108. The term "conceptual severance" was coined by Margaret J. Radin, *supra* note 48, at 1676.

109. *See id.* at 1677-78.

110. There is no such rule. "Can" does not imply "ought," to invert the Kantian principle. Government, when it has the option to buy or to regulate, is only required to buy when the regulation would effect a taking.

111. *See* Pennell v. City of San Jose, 485 U.S. 1, 15 (1988) (Scalia, J., dissenting) (arguing that a rent control ordinance based on the hardship of the tenant constitutes a taking of private property without just compensation).

112. Even if an owner could *assign* profit to a third party, the *loss* in profit attributable to rent control is not, ex ante the regulation, assignable, i.e., there is no pre-regulation market for the lost profit, and so no possibility of a taking by eminent domain, and hence no possibility of a regulatory taking either.