

THE *PENN CENTRAL* TEST AND TENSIONS IN LIBERAL PROPERTY THEORY

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This Article uses background theories of property and government to provide a partial explanation of the Supreme Court's precedent on regulatory takings. The author advances two theses. First, the Penn Central test is not as ad hoc and case-specific as is often assumed: although the three factors in this test can each vary sharply in application, the different factors are regularly construed together to advance one of two theories of government—a "classical" theory, reflecting commitments of classical liberalism, and a "modern" theory, reflecting the commitments associated with a centralized regulatory state. Second, the Court's most moderate Justices have used one or the other of these two theories depending on factors including: whether the right allegedly taken is essential to the species of property to which it is attached; whether legal precedent has historically treated that right as essential to the species of property in question; and how compelling the reasons to regulate potential abuses of that property right are. While these insights by no means explain regulatory takings doctrine completely, they are two significant contributing factors in any comprehensive explanation.

INTRODUCTION

This Article aims to clear up some of the "muddle"¹ that confuses contemporary federal regulatory-takings law. In its decision in *Penn Central Transportation Co. v. City of New York*, the Supreme Court confessed that its regulatory-takings doctrine is "ad hoc."² As most practitioners appreciate, however, this confession is not entirely accurate. Most of the Court's regulatory-takings decisions lean toward one of two theoretical extremes. In one, the Court sounds formalistic, libertarian, and insistent that compensation be made though the heavens may fall. In the other, the Court seems realistic and greatly concerned that takings law not stymie government action. As two commentators have observed, the Court "has shown a pronounced tendency to talk tough about property rights" in some cases, but then "beat a hasty retreat" in other cases involving "complex regulatory schemes generating pools of winners and losers."³

This Article is primarily explanatory. It tries to clear up some of the *Penn Central* muddle by advancing two theses. One thesis focuses on *how*

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¹ See Carol A. Rose, Mahon *Reconstructed: Why the Takings Issue Is Still a Muddle*, 57 S. CAL. L. REV. 561 (1984).

² 438 U.S. 104, 124 (1978).

³ William J. Baumol & Thomas W. Merrill, *Does the Constitution Require That We Kill the Competitive Goose? Pricing Local Phone Services to Rivals*, 73 N.Y.U. L. REV. 1122, 1129 n.34 (1998).

different Justices exploit the *Penn Central* balancing test. Supreme Court Justices and lower-court judges systematically interpret *Penn Central*'s factors regularly toward one of two competing theories of property regulation—called here the “modern” and the “classical” approaches. The modern approach reconciles at a high level of generality constitutional “private property” and “regulatory” powers, so as to make both compatible with twentieth-century regulatory schemes including zoning, rent control, environmental preservation, anti-discrimination laws, and so forth. The classical approach, by contrast, refers to the classical-liberal understanding that prevailed in eighteenth- and nineteenth-century American and English legal thought.⁴ This view holds that the overriding object of property “regulation” is to secure to property owners a zone of free choice proportionate to the property they own. The modern approach explains how the Court has construed the *Penn Central* test in *Penn Central* itself and in most regulatory-takings cases since. The classical approach explains, at least partially, the handful of cases in which the Court has applied the *Penn Central* test in a more libertarian spirit. Even if the classical approach does not explain these cases completely, it still provides important insight into how the Court glosses the *Penn Central* factors to declare regulatory takings.

More tentatively, the second thesis of this Article explores *who* on the U.S. Supreme Court veers erratically between the classical and modern renditions of *Penn Central*, and *why*. Over the Burger and Rehnquist Courts, enough Justices alternated between the classical and modern renditions of the *Penn Central* test that the law seemed to combine tough talk and hasty retreats. This Article assumes that a plurality group of three or four Justices has consistently favored the modern rendition of *Penn Central* in any regulatory-taking challenge that does not completely oust an owner from her fee. (That track record more or less describes Justices Stevens, Souter, Ginsburg, and Breyer on the Court now.) The Article also assumes that the Burger and Rehnquist Courts' most conservative Justices (Rehnquist, Scalia, and Thomas) have consistently presumed that any change in regulations that does not execute preexisting background regulations inflicts a regulatory taking. This Article focuses on the crucial swing votes—on the Rehnquist Court, Justices O'Connor and Kennedy, and before them Justices Stewart, Burger, Powell, and infrequently some of the Burger Court's more liberal Justices. These swing Justices typically apply the modern rendition of *Penn Central*, but occasionally they embrace the classical approach instead. Although it is hard to predict with precision exactly when they switch from the modern approach to the classical approach, they are more likely to do so when they are convinced that the property interest in question is crucial to the species of property at issue, that history and case

⁴ See Eric R. Claeys, *Takings, Regulations, and Natural Property Rights*, 88 CORNELL L. REV. 1549 (2003).

law have treated the interest as crucial to that species of property, and that the challenged regulation is especially lacking in justification. Admittedly, the first and third of these factors border on being circular and non-falsifiable. Nevertheless, many constitutional doctrines use circular tests.⁵ Moreover, in practice, some regulations may seem so threatening to the substantive interests property covers that different legal treatment seems warranted—even under a vague test.

This Article offers two contributions. Primarily, it should help theorists and practicing lawyers better appreciate how the Court exploits the three-part *Penn Central* test in practice. Separately, this Article has a modest normative lesson. Many readers probably find indefensible the Court's tendency to mark off limits on government regulations, especially in "per se" cases like *Lucas v. South Carolina Coastal Council*,⁶ which presumes that a land-use regulation inflicts a taking if it restrains all economically viable land uses. My own view is the opposite, that the Court does not give owners the same "property" in their use and disposition rights as it does for their control rights.⁷ The swing Justices' approach will not satisfy either camp. But perhaps there is room for a "second-best" compromise when more consistent theoretical alternatives are impossible to reconcile. The swing Justices have, in a muddled sort of way, tried to reconcile the Takings Clause to most interventionist property regulation while still marking off some extreme-case limits on government power. In isolation, the individual cases seem contradictory. But perhaps the whole is less muddled than the sum of its parts.

I. THE *PENN CENTRAL* MUDDLE

Federal regulatory-takings law balances three separate factors. While the Court first spoke of these factors as a group in *Penn Central*,⁸ they were referred to as three separate factors in *Kaiser Aetna Inc. v. United States*.⁹ At some point in the decade after *Kaiser Aetna* the Court came to assume that these factors set forth the main framework for considering general takings challenges.¹⁰ These factors include (1) the extent to which the government action inflicts economic losses on the owner, (2) the extent to which the action interferes with the owner's reasonable investment-

⁵ See, e.g., Gary Lawson, *Delegation and Original Meaning*, 88 VA. L. REV. 327, 377–78, 395 (2002) (listing the Appointments Clause and the Fourth Amendment Searches and Seizures Clause as examples).

⁶ 505 U.S. 1003 (1992).

⁷ See Eric R. Claeys, *Takings and Private Property on the Rehnquist Court*, 99 NW. U. L. REV. 187 (2004).

⁸ See *Penn Cent. Transp. Co. v. City of New York*, 438 U.S. 104 (1978).

⁹ 444 U.S. 164, 175 (1979).

¹⁰ See Gary Lawson et al., "Oh Lord, Please Don't Let Me Be Misunderstood!": *Rediscovering the Mathews v. Eldridge and Penn Central Frameworks*, 81 NOTRE DAME L. REV. 1, 42–44 (2005).

backed expectations, and (3) the character of the government action.¹¹ Although these factors are often referred to as “the *Penn Central* test,” this shorthand can be misleading. As will become clear below, *Penn Central* was significant not only for announcing this three-part test but also for construing these factors consistent with a particular theory of government. The Court sometimes, indeed usually, follows this theory of government, but not always. To avoid confusing the elements with the theory of government, I will refer to this test merely as “the three-part test” except when context requires otherwise.

The three-part test has come under considerable criticism, which can be distinguished roughly into two separate categories. The dominant criticism holds that the test is incomprehensible or, in other words, that it fails to generate predictable outcomes that lawyers associate with doctrine and the rule of law. Andrea Peterson described the typical complaint:

In recent takings decisions, the Court has defined “property” in different and conflicting ways without even acknowledging the inconsistencies in its definition, much less trying to resolve them. The Court also has announced at least four different tests for determining when a “taking” occurs, without explaining why its inquiry should differ from one takings case to the next or providing clear guidelines as to when each takings test should be applied.¹²

Separately, and in contrast, other scholars have criticized the three-part test for being too predictable—in particular, for being too regularly oriented toward the wrong kind of result. In previous scholarship, I have assumed (critically) that the test was written to undercompensate, by applying “to regulatory takings doctrine the main lessons from the realist and utilitarian tendencies of twentieth-century property scholarship.”¹³ Other scholars have criticized the test for generating doctrinal pressures likely to overcompensate.¹⁴

Over the last two years, however, several developments have forced observers to reconsider both sets of criticisms. In particular, these devel-

¹¹ See *Penn Cent.*, 438 U.S. at 124. As Gary Lawson, Katharine Ferguson, and Guillermo A. Montero have pointed out, in many respects it is more helpful to understand these factors as two and not three: In many cases the Court views the owner’s interests and expectations not separately but together, so that the crucial question is how much economic value the owner has lost beyond the losses she should reasonably have expected in light of controlling background property regulation. See Lawson et al., *supra* note 10, at 46–48. I agree with this criticism, but I prefer not to go against the conventional understanding of *Penn Central* any more than necessary to advance this Article’s claims.

¹² 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, 1304 (1989).

¹³ Claeys, *Takings and Private Property on the Rehnquist Court*, *supra* note 7, at 192.

¹⁴ See, e.g., William Michael Treanor, *The Armstrong Principle, the Narratives of Takings, and Compensation Statutes*, 38 WM. & MARY L. REV. 1151, 1151–53 (1997).

opments have raised the question of whether the three-part test ought to be read as an *outcome-determining* test or, more modestly, as an *argument-framing* device. To begin with, David Carpenter, Justice Brennan's lead clerk on *Penn Central*, has explained that *Penn Central* was meant to be written in the narrower argument-framing fashion. On a 2003 retrospective panel on *Penn Central*, he said he "thought Justice Brennan was making some modest efforts to bring a little content to an area of law that was . . . then quite formalist and in disarray," that he was trying "not [to] say very much before [he] started work on the draft and [that] in fact after it was circulated, Justice Stewart's clerk read it and said he was pretty sure it [wouldn't] say anything at all."¹⁵

Separately, Gary Lawson, Katharine Ferguson, and Guillermo Montero have canvassed much of the Court's regulatory-takings precedent and concluded that regulatory-takings doctrine is emphatically *not* meant to serve as "doctrine," if doctrine is understood as a "decision making algorithm," or as a "tool[] for making or predicting judicial decisions."¹⁶ They have contributed to scholarship on the *Penn Central* case by interpreting it in light of the Supreme Court's pre-1978 case law. In light of that background, they conclude, the three-part test "had the more modest, but nonetheless important, ambition of providing a *framework or structure for discussion* of the issues arising in takings . . . law."¹⁷

I have been slowly coming around to this understanding of *Penn Central* in my own scholarship,¹⁸ and I am convinced by Carpenter's observations and by Lawson and his co-authors' interpretations of the dominant cases. Therefore, I assume for the remainder of this Article that *Penn Central*'s three-part test was originally meant and is now understood by the Court to serve a modest, argument-framing function. Namely, the factors act more or less as placeholders, which help lawyers and judges focus their arguments on a few considerations that everyone can understand.

However, this understanding raises a new question, explored here in this Article: If the three-part test was meant to focus arguments rather than settle them, does it focus the arguments in any regular way? The problem is fairly obvious: Lawyers and judges could easily read the three factors to reflect unique and untranslatable *gestalt* judgments about property regulation. Understood this way, the test would not facilitate productive argument—rather, it would undermine such argument. To illustrate, as John Echeverria has recounted, on one occasion or another the Court has used nine different legal sub-factors to draw conclusions about the character of

¹⁵ *Looking Back on Penn Central: A Panel Discussion with the Supreme Court Litigators*, 15 *FORDHAM ENVTL. L.J.* 287, 307–08 (2004).

¹⁶ Lawson et al., *supra* note 10, at 4–5.

¹⁷ *Id.* at 5.

¹⁸ See Eric R. Claeys, *The Telecommunications Act of 1996, the Takings Clause, and Tensions in Property Theory*, 22 *YALE J. ON REG.* 205, 215–23, 225–27 (2005).

a challenged government action.¹⁹ If those sub-factors have no logical connection to one another, the “government action” prong is too open-ended to serve even the argument-framing function suggested by Lawson and his co-authors.

In reality, however, each factor can be and is usually interpreted in one of two regular but diametrically opposed ways. In addition, these pairs of opposites are related. As practicing inverse-condemnation lawyers are well aware, many cases are decided more on the basis of comprehensive substantive theory than on facts particular to a specific case. On the one hand, an owner knows it will not be her day if the court’s opinion leans heavily on *Penn Central*’s observations 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,” and that “[l]egislation designed to promote the general welfare commonly burdens some more than others.”²⁰ With an introduction like this, the three-part test is bound to favor the government.

On the other hand, a government lawyer knows it will not be *his* day if the court’s opinion insists (from *United States v. General Motors Corp.*) that constitutional “private property” covers not only the “vulgar and untechnical sense of the physical thing,” but also “the right to possess, use and dispose of it,”²¹ and (from *Armstrong v. United States*) that takings law aims “to bar Government from forcing some people alone to bear public burdens which . . . should be borne by the public as a whole.”²² These passages are tip-offs that the three-part test will heavily favor the owner. Without getting too much into the details of particular doctrinal elements, each set of statements draws upon strikingly different presuppositions about what ought to count as “property” and when it may be redistributed without compensation.

Especially among land-use lawyers, conventional wisdom holds that the passages from *Penn Central* capture the Supreme Court’s mood more often than the passages from *General Motors* and *Armstrong*. That wisdom is largely right. The Court has recently described *Penn Central* as the “polestar” of its regulatory-takings case law, especially because its principles help prevent challenges to “numerous practices that have long been considered permissible exercises of the police power.”²³ Nevertheless, in a significant number of cases, the Court has applied an owner-friendly interpretation. In *Loretto v. Teleprompter Manhattan CATV Corp.*, the

¹⁹ See John D. Echeverria, *The “Character” Factor in Regulatory Takings*, WETLANDS LAW AND REGULATION, SK081 ALI-ABA 143, 146–55 (2005).

²⁰ *Penn Cent. Transp. Co. v. City of New York*, 438 U.S. 104, 130, 133 (1987).

²¹ 323 U.S. 373, 377–78 (1945).

²² 364 U.S. 40, 49 (1960).

²³ *Tahoe-Sierra Pres. Council v. Tahoe Reg’l Planning Agency*, 535 U.S. 302, 326 n.23 (2002) (quoting *Palazzolo v. Rhode Island*, 533 U.S. 606, 633 (2001) (O’Connor, J., concurring)); *id.* at 335.

Court used the three-part test to lay down a per se rule deeming regulations to be takings when they occupied land permanently.²⁴ In *Ruckelshaus v. Monsanto Corp.*, the Court held that Congress inflicted regulatory takings on pesticide makers when it authorized the disclosure of confidential trade secrets without prior notice or consent from the makers.²⁵ In *Hodel v. Irving*,²⁶ and then again in *Babbitt v. Youpee*,²⁷ the Court held that Congress inflicted regulatory takings on the holders of small interests in land by forcing their interests to escheat to the Indian tribes of which the holders were members. Most controversially, in *Lucas v. South Carolina Coastal Council*, the Court held that states inflict regulatory takings when they restrain an owner's use of her land to the point that the owner cannot make any economically productive use of the land.²⁸

These variations are fairly systematic and prompt three questions: Why are these conceptual moves so regular? How do moves in one prong relate to the others? And what motivates a court to opt for the pro-owner pairing or the pro-government pairing?

II. SWING JUSTICES, JUDICIAL MINIMALISM, AND A TWO-DIMENSIONAL VIEW OF PROPERTY

Of course, this Article cannot answer these questions comprehensively. A truly comprehensive account would need to consider many facts idiosyncratic to particular Justices in different cases, and these kinds of idiosyncrasies make generalization difficult. My aim is to add at least a small measure of explanatory clarity into the motivations of the "swing Justices"—the Justices who followed the pro-government rendition of the three-part test in some cases and the pro-owner rendition in others, without worrying that these renditions are substantially inconsistent with each other. Justices Powell, Kennedy, and especially O'Connor have all been swing Justices. On a few occasions, this camp has included Justices Brennan and Stevens, and on at least one occasion each Justice Blackmun (who authored *Monsanto*) and Justice Marshall (who authored *Loretto*).

By focusing on the swing Justices, this Article abstracts out of focus both the most conservative Justices over the Burger and Rehnquist Courts—Rehnquist, Scalia, and Thomas—and the more liberal Justices—Blackmun, Brennan, Marshall (again, with each of them straying from his usual tendencies once), and the current quartet of Stevens, Souter, Ginsburg, and Breyer. The liberals have more or less consistently followed the

²⁴ 458 U.S. 419 (1982).

²⁵ 467 U.S. 986 (1984).

²⁶ 481 U.S. 704 (1987).

²⁷ 519 U.S. 234 (1997).

²⁸ 505 U.S. 1003 (1992). The Court's holding excepted regulations that enforced substantive limitations on owners' use rights inherent in the owners' titles through background principles of nuisance and property law. *Id.* at 1067–68.

pro-government rendition of the three-part test, largely because they subscribe to an interventionist understanding of government regulation, to be described in Part III.B. The conservatives have consistently tried to make regulatory-takings law more pro-property and rule-bound—the former probably for a mixture of substantive and originalist reasons, and the latter out of a concern that courts, when they can, should convert all-the-circumstances balancing tests, into more regular and predictable legal rules. I have examined these blocs' motivations in previous scholarship,²⁹ and I will focus here on the Justices who veer between these two blocs.

Let us consider here some of the normative ideas that might explain the swing Justices' behavior. Some relate to constitutional interpretation. The Justices in question might be motivated by a philosophy to which I will refer here as "Thayerian minimalism." Thayerian minimalism acts like a "clear and convincing evidence" standard in constitutional law: under it, judges should not use a constitutional provision to invalidate a government action unless they are confident that the provision's text clearly proscribes the action.³⁰ Thayerian minimalism tries to straddle a problem. On one hand, Justices who follow it respect text and original meaning as important sources of interpretive information. In the context of the Takings Clause, therefore, such Justices insist on protecting private property when they are strongly confident that there is constitutionally protected "private property," and that it has been "taken." On the other hand, originalism often strains when the cases shift from core cases to peripheral cases. In takings law, that shift occurs when cases stretch from permanent occupations of land to zoning restrictions on use rights. An originalist *could* rely on the property theory of Locke and Blackstone (both of whom were in vogue at the founding) to develop a sophisticated theoretical distinction between "takings" and "regulations" of use and disposition rights in "private property." Richard Epstein deserves pride of place for having done that.³¹ But such a theory seems far-fetched to a Thayerian minimalist, who prefers not to interfere with the actions of legislatures and executives without clear constitutional text. In takings law, a Thayerian minimalist would be put off by the fact that the founders regulated land use in ways inconsistent with the general principles of property regulation sketched

²⁹ See Claey's, *Takings and Private Property on the Rehnquist Court*, *supra* note 7, at 216–19, 220–29.

³⁰ For the reference to Thayer, consider James B. Thayer, *The Origin and Scope of the American Doctrine of Constitutional Law*, 7 HARV. L. REV. 129, 140 (1893). ("[A]n Act of the legislature is not to be declared void unless the volition of the constitution is so manifest as to leave no room for reasonable doubt." (quoting Commonwealth ex rel. O'Hara v. Smith, 4 Binn. 117, 123 (Pa. 1811))). Thomas Merrill has given a similarly minimalist rendition of recent separation of powers doctrine in Thomas W. Merrill, *The Constitutional Principle of Separation of Powers*, 1991 SUP. CT. REV. 225, 255–59.

³¹ See RICHARD A. EPSTEIN, TAKINGS: PRIVATE PROPERTY AND THE POWER OF EMINENT DOMAIN 22–24, 63–145 (1985).

broadly by Locke and Blackstone.³² But on the proverbial third hand, a Thayerian minimalist would then need to worry that deference in the peripheral cases might undermine the legal principles governing the core cases. If legislators and regulators know that courts will take a hands-off approach in cases involving use rights (e.g., zoning) or disposition rights (e.g., rent controls), they could be encouraged to use their power over use and disposition rights to pressure owners to relinquish their core-protected control rights. Concerns like this help explain why the Court extended the doctrine of unconstitutional conditions to eminent-domain law in the exactions cases *Nollan* and *Dolan*.³³ As I have explained elsewhere, the Court's deference to zoning and conservation encourages local governments to use the permit process to pressure owners to dedicate land they prefer to keep; *Nollan* and *Dolan* even the scales by subjecting exactions to non-deferential means-ends analysis.³⁴ That tension could easily spring up elsewhere. Swing Justices might want to keep the pro-owner rendition of the three-part test handy in case legislators or regulators abuse the deference they usually receive from minimalist courts.

These interpretive concerns are complemented by substantive concerns about the policies furthered by property ownership. Although many of the swing Justices (especially O'Connor and Kennedy) have been sympathetic to originalism, they have been much less interested originalists than Scalia or Thomas. The swing Justices have considered text and original meaning as only two of several other factors, including precedent, practicability, and more overt policy considerations. But as often happens in individual-rights constitutional law, the policy issues that need to be considered in takings cases are disjointed. "Property" as an institution protects policy goals that are diffuse, general to society, and slow to come to fruition. Property creates wealth by guaranteeing owners that they will reap what they sow, but it takes decades for secure ownership to create wealth. Similar things can be said about property's tendencies to secure individual liberty, decentralize political power, and encourage social experimentation.³⁵ On the other hand, when public legislation centralizes and redistributes a few particular use or disposition rights, it usually does so to promote objectives that seem concrete, immediate, and urgent to the needs of a specific legislative majority—a suburban majority's desire for the communal, aesthetic, and financial goods that come from single-family

³² See, e.g., John F. Hart, *Colonial Land Use Law and Its Significance for Modern Takings Doctrine*, 109 HARV. L. REV. 1252, 1289–93 (1996); William Michael Treanor, *The Original Understanding of the Takings Clause and the Political Process*, 95 COLUM. L. REV. 782, 815–18 (1995).

³³ See *Nollan v. California Coastal Comm'n*, 483 U.S. 825 (1987); *Dolan v. City of Tigard*, 512 U.S. 374 (1994).

³⁴ See Claeys, *Takings and Private Property on the Rehnquist Court*, *supra* note 7, at 199–203.

³⁵ All of the policy values discussed here, except labor, come from Emily Sherwin, *Two- and Three-Dimensional Property Rights*, 29 ARIZ. ST. L.J. 1075, 1081–83 (1997).

homeownership, or renters' desire for equal bargaining power with their landlords.

Because these different policy goals operate at different levels, they put a Justice who takes policy seriously in an awkward position, and especially so in a constitutional case. In a run-of-the-mill land-use challenge, a legislature has spoken and claimed that the voters it represents want more single-family residences, less rent-gouging, or other specific legislative goals. To invalidate such proposals, policy-oriented judges must rely, in substantial part, on an argument that runs along the following lines: trust us, you cannot achieve the short-term gains you think you are getting without undermining broader societal goals that are more important. For most judges, that claim is difficult to make with confidence—not only to decide the merits, but also to declare invalid an act by a sovereign government.

Policy-oriented judges can respond to this problem in one of two ways. One is to de-constitutionalize the topic and let legislative majorities and experts draw these policy balances. This is the approach that the liberals prefer in cases in which the government is not ousting owners from their land.³⁶ But there is another alternative: rank different incidents of ownership by, on the one hand, how much they tend to promote property's general wealth-creating, liberty-protecting, and democracy-reinforcing functions and, on the other, how much majorities need to redistribute them to achieve specific policy goals. A policy-oriented judge could then carve off a few incidents that seem absolutely central to property's general functions and peripheral to specific redistributive goals, and signal that these few rights are off-limits.

To make the same point in different words, consider Emily Sherwin's taxonomy of the three dimensions of property: what count as proper objects of property, what are the conditions that entitle a person to claim ownership of that property, and what use and disposition rights come with ownership.³⁷ Sherwin posits that American law lurches uneasily between "two-" and "three-dimensional" conceptions of property. That is, all serious theories of property identify objects that can be owned and lay down rules for establishing ownership. The fights break out, for particular uses of property, over whether the owner or the government ought to choose which uses and benefits come with the property.³⁸ Sherwin suggests that the Court might draw the line between use regulations and regulatory touchings (the line between *Penn Central* and *Loretto*) because regulatory touchings trench on the two fundamental dimensions

³⁶ See, e.g., *Tahoe-Sierra Pres. Council v. Tahoe Reg'l Planning Agency*, 535 U.S. 302, 321–22, 326–27 (2002) (encouraging federal courts to apply the deferential and ad hoc *Penn Central* approach unless the acquisition is the result of a condemnation proceeding or a physical appropriation).

³⁷ Sherwin, *supra* note 35, at 1076.

³⁸ See *id.* at 1092–1101.

of property, while use regulations focus on the problematic third.³⁹ I agree, but I would suggest that the swing Justices employ a “two-plus” conception of property. Some restraints on use or disposal rights can appear so severe that they seem tantamount to a seizure or destruction of the property in question—a *de facto* seizure along one of the first two dimensions.

To be sure, there are limits to how helpful these sorts of policy arguments are in predicting where, when, and how swing Justices might flip from one view of the merits to another. Both the originalist and the policy arguments prescribe a fairly circular and open-ended inquiry: courts should defer to property regulations unless the regulations encroach on a right so important to the species of property at issue that constitutional “private property” is meaningless without the right. At the same time, in particular cases, this inquiry might be clearer in practice than it is in theory. Many Realists, for example, acknowledged that property has to protect the right to exclude.⁴⁰ Precedent can help in this inquiry, too. The longer and more clearly that background property law has protected a certain incident of ownership, the more confident a swing Justice might be that the right is one that cannot be teased out of the proverbial bundle without disrupting deep social expectations and threatening serious policy damage.

III. TENSIONS IN LIBERAL PROPERTY THEORY

Takings law then leaves these Justices with a dilemma: there is no consistent language or line of precedent to accord with their middle-road sentiments. Worse, the case law has two fairly well-articulated and respectable understandings of property and takings. In extremely telescoped form, the classical understanding conceives of “private property” as the widest zone of free use and control over an asset by an owner consistent with the like rights of others and the core needs of the public. In equally telescoped form, the modern understanding conceives of “property” as, on one hand, a few core expectations by an owner over uses that she has been conducting at considerable time and expense, and, on the other hand, a collection of other legal rights that may be reassigned by regulators as public policy requires. This Part does not pass judgment on either approach, and it does not purport to be comprehensive. This Part suggests only (1) that each approach has a tolerably well-developed legal vocabulary, (2) that each vocabulary explains important broad normative assumptions the Court makes in particular takings decisions, and (3) that the three factors of the *Penn Central* test can be construed to accomplish the policy ends of either approach.⁴¹

³⁹ See *id.* at 1094–95.

⁴⁰ See, e.g., Felix S. Cohen, *Dialogue on Private Property*, 9 RUTGERS L. REV. 357 (1954).

⁴¹ The portraits in this Section are adapted and derived from Claeys, *The Telecommunications Act*, *supra* note 18, at 215–23, where they were called the “Libertarian” and “Re-

A. The Classical Approach

The classical approach presumes that property's overriding function is to encourage inherent human tendencies to work, produce, and acquire for one's own chosen ends. Chancellor James Kent, a New York state judge and author of a leading nineteenth-century legal treatise influenced heavily by natural-rights ideas, described "the sense of property [as] graciously implanted in the human breast, for the purpose of rousing us from sloth, and stimulating us to action."⁴² Jeremy Bentham made basically the same claim within a utilitarian framework: "If I despair of enjoying the fruits of my labour, I shall only think of living from day to day: I shall not undertake labours which will only benefit my enemies."⁴³

The classical approach accepts that claim as true, at least politically—if not accurate in every case, then at least accurate enough to rely upon when establishing government institutions. Descriptively, the owners of assets generally have better information than the government or other individuals about how to use their assets. As Friedrich Hayek claimed,

There would be no difficulty about efficient control or planning were conditions so simple that a single person or board could effectively survey all the relevant facts. It is only as the factors which have to be taken into account become so numerous that it is impossible to gain a view of them that decentralization becomes imperative.⁴⁴

Prescriptively, one of the overriding objects of government then becomes to establish laws that recognize, take advantage of, and encourage these linkages between human initiative and external assets. As John Locke put it, the proper object of property regulation is "by established laws of liberty to secure protection and encouragement to the honest industry of Mankind."⁴⁵ In one sense, when the laws promote what Locke called "honest industry," private property becomes the overriding object of government. But in another sense, the protection and encouragement of property is simply a different way of saying that the law should, to the extent that it can, transfer control and use decisions from legislative majorities and public officials to individual owners. Such law presumes that individual owners

alist" approaches. These portraits also have been informed generally by THOMAS SOWELL, *A CONFLICT OF VISIONS* (2002). In important respects, the "classical" and "modern" understandings track Sowell's distinction between (respectively) "constrained" and "unconstrained" views of knowledge and social control. *See id.* at 35–65.

⁴² JAMES KENT, 1 *COMMENTARIES ON AMERICAN LAW* 257 (1st ed. 1827).

⁴³ Jeremy Bentham, *Principles of the Civil Code*, in 1 *THE WORKS OF JEREMY BENTHAM* 297, 310 (John Bowring ed., Edinburgh, William Tait 1843).

⁴⁴ FRIEDRICH HAYEK, *THE ROAD TO SERFDOM* 48–49 (1994).

⁴⁵ JOHN LOCKE, *SECOND TREATISE ON GOVERNMENT* § 42 (1698) (Peter Laslett ed. 1988).

can use what is closest to them to fit their own needs more effectively than a legislative majority can with a large class of commercial assets.

In takings law, these overarching claims give “private property” a broad construction. Because property ordinarily encourages tendencies that are generally productive, as a starting presumption owners should be left with the fullest range of use rights consistent with the rights of others. Adam Mossoff has described this approach as an “integrated” approach to property.⁴⁶ This background explains why the Supreme Court claimed in the *General Motors* case that “private property” normally covers “every sort of interest the citizen may possess”—not only the “vulgar and untechnical sense of the physical thing,” but also “the group of rights inhering in the citizen’s relation to the physical thing, as the right to possess, use and dispose of it.”⁴⁷

One important corollary of this claim is that classical property theory tends to resist conceiving of property solely in terms of owners’ expectations or future plans. Property protects not any one concrete set of expectations but a freedom to make choices. Classical theory usually presumes that economic life is characterized by change more than by stasis, that owners’ interests differ more than they resemble one another, and that owners are better-positioned than neighbors, rivals, or planners to know how best to use their own assets.

If these generalizations describe economic life tolerably accurately, it follows that the law should protect not only owners’ current plans but also their rights to change their minds. The law may take account of owners’ expectations, but expectations play a largely secondary role. Expectations help assess owners’ just compensation when they lose property rights, because strong expectations suggest that the rights taken are quite valuable to the owner. But classical theory seeks to protect initiative in many situations in which an owner has not yet acquired hard expectations, particularly the freedoms to change and adapt.⁴⁸ This claim follows, as Thomas Merrill and Henry Smith explain, from a “deep design principle” by which owners are entitled to control “the future use and enjoyment of particular resources . . . that holds against all the world.”⁴⁹

Second, classical property theory presumes that, in the absence of some compelling justification, government ought to preserve security in property by paying just compensation whenever it restrains the free exercise of property rights. This presumption informs *Armstrong’s* assertion that the Takings Clause’s overriding purpose is “to bar Government from

⁴⁶ Adam Mossoff, *What Is Property? Putting the Pieces Back Together*, 45 ARIZ. L. REV. 371, 386 (2003).

⁴⁷ *United States v. General Motors Corp.*, 323 U.S. 373, 377–78 (1945).

⁴⁸ See Claeys, *Takings, Regulations, and Natural Property Rights*, *supra* note 4, at 1607–15.

⁴⁹ Thomas W. Merrill & Henry E. Smith, *What Happened to Property in Law and Economics?*, 111 YALE L.J. 357, 359, 361 (2001).

forcing some people alone to bear burdens which, in all fairness and justice, should be borne by the public as a whole.”⁵⁰ If society makes a strong commitment to protecting and encouraging property rights, the common good ought to be understood not as the wishes of a legislative majority but as the aggregation of the rights of all citizens. That relation entitles the government to act for the common good by taking property for public uses, but at the same time it requires the government to spread private losses across the entire public. Over the long run, that guarantee encourages many unforeseeable and productive forms of investment and commerce that would not otherwise be fostered.

Third, the classical approach presumes that it is conceptually possible and substantively necessary to enforce a relatively fixed conception of the power to “regulate.” That conception provides the main justification for taking property without compensation. Laws that “regulate” may restrain property without triggering just-compensation requirements. “Regulations” are primarily laws that “make property rights regular”—laws that define the zone of free use, control, and transfer rights that are fairly proportional to any asset; laws that define and enforce abuses of those rights; and laws that facilitate the orderly use and transfer of property.⁵¹ This definition sets a baseline determining whether an owner is suffering a “burden” to her property rights or merely being limited to her equal rights.

Let us consider how a fully articulated classical approach would inform the *Penn Central* factors. As will become clear in the next Part, few if any of the leading cases follow this approach perfectly. Even so, it helps to sketch the ideal better to appreciate the tendencies in the pro-takings cases. In the classical ideal, the Court starts not with the government’s interests but rather with the owner’s. It emphasizes the fact that, under controlling law—read, controlling background expectations—the owner did have a clear legal right to own, use, or alienate the property in a manner affected by the law under challenge. Now, the classical approach presumes that the government is inflicting a taking whenever it interferes with owners’ property rights as defined by that background controlling law. Swing Justices probably apply this approach only to core rights and apply the modern approach to peripheral use and disposition rights. Even so, when a use or disposition right seems especially important, precedent exists to suggest that owners have “property” in the right to use or dispose of property in manners not barred by background law.

In either case, the classical approach then examines seriously the character of the government action. It shifts away from the reasons or purposes the government puts forward to justify its actions, and it certainly

⁵⁰ *Armstrong v. United States*, 364 U.S. 40, 49 (1960).

⁵¹ See Claeys, *Takings, Regulations, and Natural Property Rights*, *supra* note 4, at 1553–55; Richard A. Epstein, *The “Necessary” History of Property and Liberty*, 6 *CHAP. L. REV.* 1, 2–3 (2003).

does not speak in rational-basis terms. Instead, the classical approach does one of two things. First, it may ask whether the regulation approximates the substance of a more confined understanding of “regulation.” Here, it will consider harm-control and reciprocity-of-advantage justifications for the law, but it construes these justifications narrowly and non-deferentially. Secondly, the Court may ask whether the specific government regulation reinforces the substance of limitations inherent in the owner’s property title by virtue of background property and harm-control regulations. If the law survives one or both of these defenses, it is a *bona fide* regulation. Otherwise, the court awards a taking.

As a final point, note that, in the classical approach, the owner’s economic losses are close to irrelevant at the takings stage. The losses become relevant only when determining the owner’s just compensation.

B. The Modern Approach

The modern approach breaks with the classical-liberal approach on a wide range of fronts. Most fundamentally, it questions the account of human nature that grounds the classical-liberal approach. For instance, Margaret Jane Radin has challenged the classical-liberal conception of property because she questions its underlying “Hobbesian model of human nature,” within which “[n]othing will get produced unless people are guaranteed the permanent internalization of the benefits of their labor.”⁵² By calling that claim into question, the modern approach expands the realm of the possible for the state. If selfish, industrious, productive, and acquisitive passions do not limit state action meaningfully, the state has more reason to assume it can and should achieve a wider range of democratically chosen goals. Frank Michelman has attributed the “denaturalization and positivization” of property to “[c]hanged and intensified modes of social interaction” and the turn to “the economically active and regulatory state with its licenses, franchises, and the like.”⁵³ He then concludes that “the claims of popular sovereignty and classical property cannot, in truth, be stably reconciled at a very high level of abstraction or generality.”⁵⁴ These claims only make sense if the selfish and productive passions associated with property do not limit social changes or the effectiveness of the regulatory state.

The character of property then changes to keep pace with the expanding horizons of possible political action. First, if property is “integrated” within the classical-liberal approach, it is “disintegrated” in the modern-

⁵² Margaret Jane Radin, *The Liberal Conception of Property: Cross Currents in the Law of Takings*, 88 COLUM. L. REV. 1667, 1683–84 (1988). For the challenge to “the classical-liberal conception of property,” see *id.* at 1667.

⁵³ Frank I. Michelman, *Takings*, 1987, 88 COLUM. L. REV. 1600, 1627 (1988).

⁵⁴ *Id.* at 1628.

liberal approach.⁵⁵ That is why, for instance, Legal Realists Walton Hamilton and Irene Till defined “property” in the 1937 edition of the *Encyclopedia of the Social Sciences* as “a euphonious collocation of letters which serves as a general term for the miscellany of equities that persons hold in the commonwealth.”⁵⁶ That claim, typical of Hamilton and other Legal Realists, explains *Penn Central*’s famous claim 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.”⁵⁷ To borrow Bruce Ackerman’s description of “property,” the Realist/*Penn Central* approach treats constitutional “private property” not as “a thing, but [as] a set of legal relations between persons governing the use of things.”⁵⁸

This “list of uses” understanding of property creates a slight presumption, which is rebuttable but no less perceptible, against recognizing particular use rights as “property.” Since government policymakers decide which rights count on the acceptable list of uses, the understanding subtly transfers policy choices from the owner to government policymakers. If property consists of a list of particularized use rights, government can and should consider each piecemeal right claim depending on whether owner control of a particular use right advances state interests. From this starting perspective it follows that owners ought not to be entitled to constitutional property in specific control, use, or transfer rights unless and until they can show that such rights contribute to the general welfare. In individual cases, owners may be able to make this showing. But where the classical approach presumes that particular rights are useful and part of “property” until specifically shown to be harmful, the modern approach presumes that particular rights are not useful until specifically shown to redound to the general welfare.

To be sure, property may still mean more than the right to use one’s own property consistent with the state’s conception of what contributes to the general welfare. But to determine whether owners have special attachments to any stick in the proverbial bundle of rights, “private property” tends to focus on owners’ expectations. Frank Michelman contributed to this view when he argued that, for takings purposes, “private property” ought to be conceived of largely in reference to an owner’s “investment-backed expectations.”⁵⁹ The U.S. Supreme Court embraced Michelman’s argument by making “investment-backed expectations” a crucial element

⁵⁵ Thomas C. Grey, *The Disintegration of Property*, in NOMOS XXII: PROPERTY 69 (J. Roland Pennock & John. W. Chapman eds., 1980).

⁵⁶ Walton H. Hamilton & Irene Till, *Property*, in 12 ENCYCLOPAEDIA OF THE SOCIAL SCIENCES 528, 528 (Edward R. A. Seligman & Alvin Johnson eds., 1937).

⁵⁷ *Penn Cent. Transp. Co. v. City of New York*, 438 U.S. 104, 130 (1978).

⁵⁸ BRUCE ACKERMAN, PRIVATE PROPERTY AND THE CONSTITUTION 27 (1977).

⁵⁹ See Frank I. Michelman, *Property, Utility, and Fairness: Comments on the Ethical Foundations of “Just” Compensation*, 80 HARV. L. REV. 1165, 1211–13 (1967).

of regulatory-takings law in *Penn Central*.⁶⁰ This focus, however, subtly builds in a presumption that owners are not entitled to claim property rights in development potential, or more generally in the right to put existing property to new and different uses. In other words, property owners should reasonably expect that government will regulate most property interests *except* for those few incidents that are absolutely essential to the species of property or those in which the owner has sunk deep investments.

This understanding also has deep roots in a New Deal government theory. As James Landis explained in *The Administrative Process*, American administrative governance was driven mainly by a “recognition by the governing classes of our civilization of their growing dependence upon the promotion of the welfare of the governed. Concessions to rectify social maladjustments thus had to be made.”⁶¹ This expansion of government responsibility created a need for more government power. In Landis’s words, “demands for positive solutions increased and . . . *laissez faire*—the simple belief that only good could come by giving economic forces free play—came to an end.”⁶² It thus followed that the business of government was to run business: “[t]he dominant theme in the administrative structure is thus determined not primarily by political conceptualism but rather by concern for an industry whose economic health has become a responsibility of government.”⁶³ Although Landis focused here on how separation of powers constrains manufacturing regulation, his argument applies with equal force to property rights as they constrain the regulation of land, pension plans, health care, telecommunications, and so on. In each case, it is “intelligent realism” to make government follow “the industrial rather than the political analogue.”⁶⁴

Separately, because the modern approach presumes that many different social policies may be desirable in different circumstances and for different people, it tends to doubt that the law can draw clear distinctions between government actions that “regulate” and “take.” This tendency comes out most often in law and scholarship about the concepts of “harm” and “benefits.” In *Lucas v. South Carolina Coastal Council*, Justice Scalia explained, “The transition from [the Court’s] early focus on control of ‘noxious’ uses to [its] contemporary understanding of the broad realm within which government may regulate without compensation was an easy one, since the distinction between ‘harm-preventing’ and ‘benefit-conferring’ regulation is often in the eye of the beholder.”⁶⁵ Frank Michelman lent a great deal of respectability to this view in his 1967 article *Property, Utility, and Fairness*, which concluded that “there is no basis for a gen-

⁶⁰ See *Penn Cent.*, 438 U.S. at 124.

⁶¹ JAMES LANDIS, *THE ADMINISTRATIVE PROCESS* 7–8 (1938).

⁶² *Id.* at 8.

⁶³ *Id.* at 12.

⁶⁴ *Id.* at 11–12.

⁶⁵ 505 U.S. 1003, 1024 (1989).

eral rule dispensing with compensation in respect of all regulations apparently of the 'nuisance-prevention' type."⁶⁶ If one subscribes to such sentiments, one is skeptical that the law can maintain clear distinctions between "regulations" and "takings"—in nuisance law, in common-carrier law, or anywhere else.

Consider how the modern approach informs the *Penn Central* three-part test. First, the modern approach begins not with the owner's interests, but with the government's—the character of the government action. The Court may profess not to be able to understand, let alone judge, the distributive consequences of the transfers, or it may worry that it would be socially costly to tie government's hands by forcing it to pay for every act of regulation. Here, the Court draws on the pro-action tendencies of New Deal administrative theory. In this positioning, the Court prefers not to use the character prong to ask whether the regulation redistributes economic wealth; rather, it focuses on the government's stated purpose and defers to that purpose.

When the Court turns to the owner's property interests, it frames them narrowly. The "denominator" game uses Realist "bundle of rights" theory to contextualize and therefore to diminish an owner's economic losses. Expectation-based property theory helps to narrow the owner's expectations to the primary expectation of making some reasonable return off of the asset. New Deal administrative theory helps to explain why the owner ought to be on constructive notice that she should expect that the right in question is regulated quite often. Having thus construed the government action broadly and the owner's interests narrowly, the Court will conclude the regulation is a *bona fide* regulation deserving of no compensation.

IV. RIVALRY IN REGULATORY-TAKINGS CASE LAW

Of course, these approaches describe attitudes that operate at a level of generality substantially higher than in any one case, and each is only one factor in a broader synthetic account of how swing Justices approach particular cases. Even so, these approaches seem to inform the Court's work in regulatory takings since *Penn Central*. Let us consider the pro-government decisions first and the pro-owner decisions second.

A. *Cases in the Modern Spirit*

Penn Central itself provides the best illustration for the modern interpretation of its three-part test. This ambiguity explains much of the confusion about how the *Penn Central* case is now understood (including my own). Even if the Court did not mean *Penn Central's* restatement to be the only acceptable approach to solving regulatory-takings cases, the

⁶⁶ Michelman, *Property, Utility, and Fairness*, *supra* note 59, at 1197.

case did apply the three-part test in a manner particularly solicitous of government interests. Subsequent cases and authorities have, quite reasonably, cited *Penn Central* as authoritative not only for the three-part test but also for the way in which the Court applied the test to the historic-preservation law under challenge.⁶⁷

Penn Central presented a challenge to a New York City landmark designation; the Penn Central company claimed that the City inflicted a taking of its development rights by denying it permission to build the office building of its choice over Grand Central Station. To dismiss this claim, the Court construed the character of the government action deferentially.⁶⁸ The Court analyzed that character not by focusing on the invasiveness of the regulation but by taking at face value the purposes for which the government professed to act, including historic preservation, aesthetics, and education. In addition, the Court considered those purposes in terms close to rational-basis deference—by inquiring whether the landmark law under challenge was “reasonably related to the promotion of the general welfare.”⁶⁹ Finally, the Court declined to consider distributional implications when it considered the character of the government action. The Penn Central company had a serious argument that the landmark law significantly restrained the freedom it had previously enjoyed at common law and under prevailing law to build high-rise buildings; the Court declined to give that argument weight in large part because it believed that “[l]egislation designed to promote the general welfare commonly burdens some more than others.”⁷⁰

By the same token, the *Penn Central* Court also construed the two owner factors relatively narrowly. When it considered the economic impact of the landmark law, it focused on the effect not on society but specifically “on the claimant.”⁷¹ It used Realist “bundle of rights” theory to isolate the development rights the Penn Central Transportation Company was losing from the control and use rights it retained, explaining: “‘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 [Rather] this Court focuses on the nature and extent of the interference with rights in the parcel as a whole.”⁷² Similarly, the Court professed skepticism that the company could claim a general expectation in developing its property. The Court framed the company’s “primary expectation[s]” as being “to profit from the Terminal”

⁶⁷ See, e.g., *Tahoe-Sierra Pres. Council v. Tahoe Reg’l Planning Agency*, 535 U.S. 302 (2002); *Keystone Bituminous Coal Ass’n v. DeBenedictis*, 480 U.S. 470 (1987).

⁶⁸ The following analysis draws on Claeys, *Takings and Private Property on the Rehnquist Court*, *supra* note 7, at 196–97.

⁶⁹ *Penn Cent. Transp. Co. v. City of New York*, 438 U.S. 104, 131 (1987).

⁷⁰ *Id.* at 133.

⁷¹ *Id.* at 124.

⁷² *Id.* at 130–31.

and “also to obtain a ‘reasonable return’ on its investment.”⁷³ By speaking of a “primary expectation” of making a reasonable return, the Court tacitly excluded more general expectations of making a second use of the property, of changing uses, or of making as much money from the property as the market would bear. When the Court suggested that legislation burdens some more than others, it tacitly suggested that owners ought to expect reasonably that peripheral property interests may be redistributed by general legislation.

If *Penn Central* showed how the Court can diminish an owner’s takings claim over a use right, other cases confirm that the Court can make the same conceptual moves for alienation rights. The same tendencies prevail in many areas of rent- and price-control regulation. Here, there is some doctrinal confusion; rent and price regulations can get treatment under the three-part test, under standard common-carrier ratemaking principles,⁷⁴ or under due process principles.⁷⁵ Nevertheless, a few generalizations can be made. On the government’s side of the balance, courts do not scrutinize the character of the government action in light of background principles of harm-prevention and reciprocity of advantage; instead, courts defer to government claims that they are fighting actual or nascent monopoly conditions. As the Court explained in *Pennell v. City of San Jose*, “we have long recognized that a legitimate and rational goal of price regulation is the protection of consumer welfare.”⁷⁶ In the owner’s balance, courts construe owners’ expectations as narrowly as *Penn Central* did when it required owners to show that their expectation is “primary.” Separately, regardless of which doctrinal framework governs, owners may not claim the expectation to set whatever price a free market will bear; instead, they operate under a narrower expectation that rates will be only minimally “reasonable” and not “confiscatory.”⁷⁷ Simply by adopting a ratemaking framework, a court tacitly presumes that the government will have substantial input into pricing decisions. It therefore tacitly narrows the owner’s right to charge any price of its choosing in cases short of intentional monopoly.

⁷³ *Id.* at 136.

⁷⁴ *See, e.g.*, *FCC v. Florida Power Corp.*, 480 U.S. 245 (1987).

⁷⁵ *See, e.g.*, *Pennell v. City of San Jose*, 485 U.S. 1 (1988).

⁷⁶ *Id.* at 13. *Pennell* issued this language to foreclose Due Process and Equal Protection challenges to a rent-control scheme; the Court avoided the merits of the petitioners’ takings challenges on the ground that they were not yet ripe. *Id.* at 15. However, the Court made the same point far earlier in *Block v. Hirsh* when it deferred to the government’s claim that apartments were “necessarily monopolized in comparatively few hands” during World War I. 256 U.S. 135, 156 (1921). State courts have picked up on the same theme. *See, e.g.*, *Fisher v. City of Berkeley*, 693 P.2d 261, 289–91 (Cal. 1984) (holding that rent-control regulations are reviewed only to determine whether rents provide a “fair return” and avoid “confiscatory results”).

⁷⁷ *Florida Power*, 480 U.S. at 253. *See also* *Duquesne Light Co. v. Barasch*, 488 U.S. 299, 301 (1989).

Andrus v. Allard illustrates similar tendencies in a case focusing on the right to alienate independent of price controls.⁷⁸ In *Andrus*, the Court considered whether Congress inflicted a regulatory taking when it barred owners from selling feathers and other body parts of bald eagles and migratory birds.⁷⁹ The Court declined to examine the character of the government action skeptically, for it believed that “government regulation—by definition—involves the adjustment of rights for the public good,” and that “this adjustment curtails some potential for the use of or economic exploitation of private property.”⁸⁰ On the other side of the balance, the Court discounted any injury to owners’ alienation rights by contextualizing them: “[A] significant restriction has been imposed *on one means* of disposing of the artifacts,” and “the denial of one traditional property right does not always amount to a taking. At least where an owner possesses a full ‘bundle’ of property rights, the destruction of one ‘strand’ of the bundle is not a taking, because the aggregation must be viewed in its entirety.”⁸¹

B. Cases in the Classical Spirit

While the Court follows the modern approach most of the time, and especially in the cases of *Penn Central*’s magnitude, it does not do so always. The classical approach lingers on in contemporary regulatory-takings cases, in a diluted or corrupted form. The classical approach has receded for a variety of reasons. Because modern ideas about regulation have prevailed since the early twentieth century, federal, state and local governments all intervene and redistribute property interests far more frequently than their counterparts did a century ago.⁸² For understandable political reasons, federal courts have been reluctant to apply forceful property-rights doctrines resembling pre-New Deal substantive due process. Separately, because most contemporary academic theory sympathizes heavily with the modern approach, judges are less familiar and comfortable with the classical approach than their predecessors were a century ago. While they may appeal to the classical approach from time to time, when they do so they expose themselves to charges of obtuseness, arid formalism,⁸³ attachment to “primitive lay notions regarding ownership,” and lack of familiarity with the “scientific” rigor reflected in the modern approach.⁸⁴ All the same, in at least some “sport” cases since *Penn Central*, the Court has rigged the three-part test so that an affected owner can win,

⁷⁸ 444 U.S. 51 (1979).

⁷⁹ *See id.* at 53–54, 53 n.1 (citing 16 U.S.C. § 668(a) and executory regulations).

⁸⁰ *Id.* at 65.

⁸¹ *Id.* at 65–66 (emphasis added).

⁸² *See, e.g.*, STEPHEN SKOWRONEK, BUILDING A NEW AMERICAN STATE: THE EXPANSION OF NATIONAL ADMINISTRATIVE CAPACITIES, 1877–1920 (1982).

⁸³ *See, e.g.*, Michelman, *Takings*, *supra* note 53, at 1628.

⁸⁴ *See, e.g.*, ACKERMAN, *supra* note 58, at 26–29.

even at the risk of the political retaliation and academic derision just suggested.

The swing Justices follow the modern approach most often, but they also reserve the right to strike down regulations that seem to them extremely unfair or excessive. To an extent, they want to know how importantly the right has been treated in background law and how typical the regulation is. In doing so, they use classical ideas about regulation as a standard, for many more longstanding background patterns of land-use regulation follow the classical design than the modern. Separately, however, these Justices ask themselves whether a regulation under challenge is normatively sound. They appeal to some mixture of common sense and dominant theories of property regulation to ask whether the property right at issue seems so crucial that the entire bundle of rights would unravel without it. They also ask whether the government regulation seems to have any sensible normative justification. As a result, in rare cases, if the swing Justices think a right to be a core one and a regulation utterly lacking in justification, their approach tips quite suddenly.

The best-known view to follow this tendency is *Loretto v. Teleprompter Manhattan CATV Corp.*,⁸⁵ which established a per se rule protecting owners against unconsented permanent physical occupations of their property. In *Loretto*, New York City apartment owners challenged a law that required landlords to allow cable television companies to install television cables on their apartments.⁸⁶ The Court applied the three-part test in a spirit quite different from *Penn Central* to hold that the apartment owners suffered takings. In particular, when the *Loretto* Court analyzed the character of the government action, it was much more solicitous of property than the *Penn Central* Court had been. To begin with, the Court warned that “the [takings] inquiry is not standardless.”⁸⁷ It noted that the cable television law at issue required apartment owners to allow outsiders to make a “permanent physical occupation.”⁸⁸ Because such an invasion was “extreme,” the Court concluded, “the character of the government action’ not only is an important factor in resolving whether the action works a taking but also is determinative.”⁸⁹ Later in its opinion, the Court pointedly refused to use the government’s professed motivations to save the law; it rendered its decision “without regard to whether the action achieves an

⁸⁵ 458 U.S. 419 (1982). The interpretation that follows also explains then-Justice Rehnquist’s Court opinion in *Kaiser Aetna Co. v. United States*, 444 U.S. 164 (1979), which found that the U.S. Army Corps of Engineers inflicted a regulatory taking when it required a developer to open a previously closed lagoon to public navigation, after previously telling the developer it could open the lagoon without triggering such requirements. We focus on *Loretto*, nevertheless, because its reasoning is more comprehensive and its consequences more far-reaching.

⁸⁶ *Loretto*, 458 U.S. at 421.

⁸⁷ *Id.* at 426.

⁸⁸ *Id.* at 427, 438.

⁸⁹ *Id.* at 426.

important public benefit or has only minimal economic impact on the owner.”⁹⁰

Justice Marshall’s opinion for the Court reversed orientation from *Penn Central* for both of the reasons suggested above: the history cut against New York City’s regulations, and so did the Justice’s assessment of the regulation’s merits. On one hand, the Court reviewed a century’s worth of its own precedent to make clear that owners had always enjoyed an expectation that government would not use the power to regulate to occupy their property permanently without proceeding through eminent domain.⁹¹ On the other hand, the Court also suggested that this “historical rule” was also the right rule. Since “[p]roperty rights in a physical thing have been described as the rights to ‘possess, use and dispose of’” the thing,⁹² the Court reasoned, with a permanent physical occupation, “the government does not simply take a single ‘strand’ from the ‘bundle’ of property rights: it chops through the bundle, taking a slice of every strand.”⁹³ Furthermore, the Court drew on psychological theory to insist that a contrary rule would “literally add[] insult to injury.”⁹⁴

Loretto also construed the owners’ interests much more broadly than *Penn Central* had. There were good reasons to treat the owners’ interests quite narrowly in *Loretto*. As Justice Blackmun pointed out in dissent, “what was ‘taken’ in this case” consisted only of “36 feet of cable one-half inch in diameter and two 4” x 4” x 4” metal boxes,” which all told “occup[ied] only about one-eighth of a cubic foot of space.”⁹⁵ The apartment owners kept title, there was at most a “minor physical intrusion,” and the statute “did not interfere with appellant’s reasonable”—*Penn Central* would have said its “primary”—“investment-backed expectations.”⁹⁶ This intrusion might not seem so serious in light of statements from previous cases suggesting that “where an owner possesses a full ‘bundle’ of property rights, the destruction of one ‘strand’ of the bundle is not a taking.”⁹⁷ One also could have argued that New York City rent controls, cable regulation, or other laws should have put *Loretto* “on notice” that the city might commandeer land for junction boxes and wires. Nevertheless, the *Loretto* Court rejected such modern arguments and reverted to classical assumptions about property and its regulation. It insisted that “constitutional protection for the rights of private property cannot be made to depend on the size of the area permanently occupied.”⁹⁸ Additionally, the Court insisted that the trinity of possession, use, and disposition are much

⁹⁰ *Id.* at 434–35.

⁹¹ *See id.* at 427–35.

⁹² *Id.* at 435 (quoting *United States v. General Motors Corp.*, 323 U.S. 373, 378 (1945)).

⁹³ *Id.*

⁹⁴ *Id.* at 436.

⁹⁵ *Id.* at 443 (Blackmun, J., dissenting).

⁹⁶ *Id.* at 445.

⁹⁷ *Andrus v. Allard*, 444 U.S. 52, 65–66 (1979).

⁹⁸ *Loretto*, 458 U.S. at 436.

more integrated than cases such as *Penn Central* suggest: “even though the owner may retain the bare legal right to dispose of the occupied space by a transfer or sale, the permanent occupation of that space by a stranger will ordinarily empty the right of any value.”⁹⁹

The Court from time to time still uses logic similar to Marshall’s to give owners “one-off” takings awards. The Court has illustrated that tendency in two lesser-known cases about inheritance rights, *Hodel v. Irving*¹⁰⁰ and *Babbitt v. Youpee*.¹⁰¹ In both cases, the Court reviewed challenges to federal “escheat-to-tribe” laws, which provided that certain designated fractional future interests in Indian property would escheat to the tribe that originally owned the land.¹⁰² In neither case did the Court suggest it was handing down a per se rule governing future interests. Nevertheless, in both cases, the Court recast the three-part test in a classical direction. When the Court follows the modern approach, it prefers to put the economic impact of the law in a broader context, looking at the “impact of the statute upon the value of the whole bundle of property rights”¹⁰³ By contrast, in *Irving* the Court focused on the interests at issue, in isolation from all other rights of the owner and the heirs-in-waiting, and insisted flatly that some of the money values involved “[were] not trivial sums.”¹⁰⁴

In *Irving*, to be sure, the Court cast the owners’ expectations narrowly. It searched for specific investment-backed expectations that the property owners could pass on their future interests at will and found such claims “dubious.”¹⁰⁵ That fact contradicts the interpretation presented here. Nevertheless, in both *Irving* and *Youpee*, the Court recast the character of the government action in a light favorable to the owners. That recasting makes a certain amount of sense. In most cases, the swing Justices are inclined to give regulations the benefit of the doubt. They are not inclined to parse zoning regulations to determine whether they are justified or confiscatory, and they are inclined to accept that states must be heavily involved in the regulation and structuring of inheritance law. But the Court still concluded that the laws in *Irving* and *Youpee* were extreme. While they promoted the “average reciprocity of advantage” of owners indirectly as members of the tribes, they still truncated these members’

⁹⁹ *Id.* at 436.

¹⁰⁰ 481 U.S. 704 (1987).

¹⁰¹ *Youpee*, 519 U.S. 234 (1996), discussed *supra* note 27, was written by Justice Ruth Bader Ginsburg and joined by everyone on the Court except Justice Stevens. The result probably would have been different but for the fact that the Court had decided *Irving* a decade earlier.

¹⁰² *See id.* at 238–39.

¹⁰³ JESSE DUKEMINIER ET AL., WILLS, TRUSTS, AND ESTATES 8 (7th ed. 2005) (criticizing *Irving*).

¹⁰⁴ 481 U.S. at 714. The Court’s focus was particularly striking because it was using the financial interests of the grantees to analyze the property rights of the grantors. *See* DUKEMINIER ET AL., *supra* note 103, at 8.

¹⁰⁵ *See Irving*, 481 U.S. at 715.

inheritance rights.¹⁰⁶ For good measure, the *Youpee* Court cast further doubt on the character of the government action by using a means-ends analysis it does not usually use: the Court pointed out on the facts that the litigants in question were doing just as much to further the government's purpose—to unify title to the lands—as the act's forced-escheat provision would have done.¹⁰⁷

All in all, the swing Justices were probably influenced substantially by a concern that the escheat laws in question took a major chunk out of the right to alienate the land in question. While the power to devise property is only one slice of the right to alienate, it is a time-honored and important method of alienation. Moreover, Congress's laws threatened incorporeal interests that were themselves property. Different Justices appealed to these substantive and historical intuitions in both cases to justify the Court's conclusions. In *Irving*, Justice O'Connor suggested that, for an incorporeal future interest, the right to alienate was "one of the most essential sticks in the bundle of rights that are commonly characterized as property," of importance comparable to the right to exclude in the case of land.¹⁰⁸ In *Youpee*, Justice Ginsburg followed *Irving* closely and concluded that because the regulation was tantamount "to the 'virtual abrogation of the right to pass on a certain type of property,'" the "[k]ey to the decision in *Irving* lay in the 'extraordinary' character of the Government regulation."¹⁰⁹

The classical approach also helps explain the trade-secret case, *Ruckelshaus v. Monsanto Co.*¹¹⁰ *Monsanto* involved a challenge to an EPA pesticide registration program. To register new pesticides with EPA, pesticide makers needed to submit research and test data. Monsanto protected this data as trade secrets and maintained that its competitors regarded the data as commercially valuable for developing new products. In 1972, federal law guaranteed that pesticide makers could designate information they submitted as confidential trade secrets.¹¹¹ In 1978, however, Congress amended the relevant laws to allow EPA to disclose most of that previously confidential data to qualified requesters.¹¹²

When Monsanto challenged the disclosure of its data as a taking, the Court agreed, appealing to classical principles. *Monsanto* achieved this result not through the "government action" prong, as *Irving* and *Youpee* had, but through the investment-backed expectations prong. Justice Blackmun, writing for the Court, held that "the force of [the expectations] fac-

¹⁰⁶ See *id.* at 715–16. *Accord* *Babbitt v. Youpee*, 519 U.S. at 244.

¹⁰⁷ See *Babbitt v. Youpee*, 519 U.S. 234, 244–45 (1997).

¹⁰⁸ *Irving*, 481 U.S. at 716 (quoting *Kaiser Aetna Co. v. United States*, 444 U.S. 164, 176 (1979)).

¹⁰⁹ *Youpee*, 519 U.S. at 239–40 (quoting *Irving*, 481 U.S. at 716).

¹¹⁰ 467 U.S. 986 (1984).

¹¹¹ *Id.* at 992.

¹¹² *Id.* at 995–96.

tor is so overwhelming, at least with respect to certain of the data submitted by Monsanto to EPA, that it disposes of the taking question regarding those data."¹¹³ Even so, the expectations factor weighed heavily in *Monsanto* for the same reasons that the "government action" prong weighed heavily in *Loretto* and later in *Irving* and *Youpee*. The pesticide regulations under challenge extinguished trade secret owners' right to exclude competitors from using their data; Justice Blackmun insisted, as the Court had in *Loretto*, that "[t]he right to exclude others is generally 'one of the most essential sticks in the bundle of rights that are commonly characterized as property.'"¹¹⁴ Because a trade secret is intellectual property, its "value . . . lies in the competitive advantage it gives its owner over competitors," and "the right to exclude others is central to the very definition of the property interest. Once the data that constitute a trade secret are disclosed to others, or others are allowed to use those data, the holder of the trade secret has lost his property interest in the data."¹¹⁵ As in *Loretto*, *Irving*, and *Youpee*, the Court's analysis was driven by a substantive intuition that the right allegedly taken was crucial to the species of property at issue.

As important as what the Court said in *Monsanto* is what it did not say. In *Penn Central* and rent-control cases, the Court has tended to discount the severity of economic losses by dividing those losses over a "denominator" of all possible uses of the affected property.¹¹⁶ In *Monsanto*, by contrast, much if not most of the focus was on the owners' expectations. In the former cases, the Court has presumed that owners could reasonably expect to make some return, but one limited by broad land-use regulations. In *Monsanto*, the Court precluded that argument:

That the data retain usefulness for Monsanto even after they are disclosed . . . is irrelevant to the determination of the economic impact . . . on Monsanto's property right. The economic value of that property right lies in the competitive advantage over others that Monsanto enjoys by virtue of its exclusive access to the data, and disclosure or use by others of the data would destroy that competitive edge.¹¹⁷

To be sure, the Court did not follow the classical approach with total consistency in *Monsanto*. The Court found that Monsanto suffered takings of trade secrets submitted when the Federal Insecticide, Fungicide and Rodenticide Act ("FIFRA") clearly guaranteed confidential treatment,

¹¹³ *Id.* at 1005.

¹¹⁴ *Id.* at 1011 (quoting *Kaiser Aetna*, 444 U.S. at 176).

¹¹⁵ *Id.* at 1011, 1011 n.15.

¹¹⁶ See Marc R. Lisker, *Regulatory Takings and the Denominatory Problem*, 27 RUTGERS L.J. 663 (1996).

¹¹⁷ *Monsanto*, 467 U.S. at 1012.

but not of trade secrets submitted when background federal law provided no clear guarantee one way or the other.¹¹⁸ In doing so, the Court suggested, inconsistently with other parts of the opinion, that Monsanto had expectations determined not by state trade-secret law, but rather in whatever few and specific rights the most relevant federal laws clearly reserved for it. To follow the classical approach with perfect consistency, the Court would have needed to presume that Monsanto had a general expectation in controlling its trade secrets consistently with the state law that created a property interest in those trade secrets; it should then have used unconstitutional-conditions principles to determine whether the government could have satisfied its health-and-safety interests without requiring Monsanto to disclose all of its trade secrets.¹¹⁹ Here the swing Justices probably gave Congress characteristically modern deference out of respect for FIFRA's obvious health and safety goals.¹²⁰ Such deference confirms that the classical approach is not the only or dominant influence in takings law. All the same, something is needed to explain why the Court did not decide that the trade secrets were protected across the board. In that explanation, one substantial factor must include the historical and substantive value of trade secret holders' right to exclude competitors.

The last case to explain is *Lucas v. South Carolina Coastal Council*.¹²¹ In *Lucas*, the Court carved out a per se rule to protect owners when a land-use regulation "denies an owner economically viable use of his land."¹²² However, the Court also limited this per se rule from applying when state legislatures or courts enforce restrictions that "inhere in the title itself, in the restrictions that background principles of the State's law of property and nuisance already place upon land ownership."¹²³

Some aspects of *Lucas* are extreme, especially for the swing Justices. The swing Justices are functionalists, and they are not comfortable following a rule of law that requires them to declare property regulations to be confiscatory with so little examination into the justifications for the regulations. That fact helps explain why Justice Kennedy concurred separately, warning that "[t]he State should not be prevented from enacting new regulatory initiatives in response to changing conditions," and that "[t]he Takings Clause does not require a static body of state property law."¹²⁴

¹¹⁸ See *id.* at 1009–11.

¹¹⁹ See Richard A. Epstein, *The Constitutional Protection of Trade Secrets under the Takings Clause*, 71 U. CHI. L. REV. 57, 64–68 (2004).

¹²⁰ See, e.g., *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365, 388–89 (1926) (upholding building-height, construction, open-space, and pollution regulations and approving of the "inclusion of a reasonable margin, to insure effective enforcement" of use districts).

¹²¹ 505 U.S. 1003 (1992).

¹²² *Id.* at 1016 (emphasis removed) (quoting *Agins v. City of Tiburon*, 447 U.S. 255, 260 (1980)).

¹²³ *Id.* at 1029.

¹²⁴ *Id.* at 1035.

At the same time, substantively, the regulation at issue in *Lucas* had unusually extreme effect, forcing Lucas basically to leave his property undeveloped. That consequence had two implications. On one hand, it narrowed the reach of any compensation requirements. While state and local governments prefer never to pay just compensation, *Lucas*'s rule requires them to pay compensation only to the few landowners who are totally barred from new development. On the other hand, it focused these compensation requirements on the owners hardest hit. That latter implication easily could have impressed O'Connor and Kennedy: as Justice Scalia put it in his opinion for the Court, while an owner "necessarily expects the uses of his property to be restricted, from time to time, by various measures newly enacted by the State," the notion that "title is somehow held subject to the 'implied limitation' that the State may subsequently eliminate *all* economically valuable use" could well be inconsistent with even a minimalist conception of the Takings Clause.¹²⁵

That conclusion helps explain considerable parts of *Lucas*'s structure. Of course, the economic-loss prong by definition cuts in the owner's favor in a *Lucas* case. But *Lucas* bootstrapped this factor to recharacterize the other two *Penn Central* factors. As explained above, the Court insisted that owners have an expectation of getting one productive use out of land. Separately, the Court downgraded the character of the government action—in part because "total deprivation of beneficial use is, from the landowner's point of view, the equivalent of a physical appropriation," and in part because the confiscatory nature of such losses convinced it to suspend its "usual assumption that the legislature is simply 'adjusting the benefits and burdens of economic life.'"¹²⁶

V. WHITHER TAKINGS?

This interpretation helps identify the areas where takings doctrine still has room to develop and the areas where it has peaked. In land-use and environmental law, most of the major issues have been settled. *Loretto* concluded that the right to exclude is largely off-limits for land. Lower courts have carved out exceptions in cases in which governments enforce limitations inherent in owners' titles. As Michael Blumm and Lucas Ritchie have shown, governments have regulated the right to exclude to protect public navigational servitudes and customary gathering rights, and to protect private property from impending destruction.¹²⁷ By and large, however, these limitations are not controversial in precedent or in policy.

¹²⁵ *Id.* at 1027–28 (emphasis added).

¹²⁶ *Id.* at 1017 (quoting *Penn Cent. Transp. Co. v. City of New York*, 438 U.S. 104, 124 (1987)).

¹²⁷ See Michael C. Blumm & Lucas Ritchie, *Lucas's Unlikely Legacy: The Rise of Background Principles as Categorized Takings Defenses*, 29 HARV. ENVTL. L. REV. 321, 346–50, 361–62 (2005).

Similarly, *Tahoe-Sierra Preservation Council v. Tahoe Regional Planning Agency* more or less settled the lines in cases over land-use rights.¹²⁸ *Lucas* used a weak form of classical logic in the extreme case when a regulation permanently eliminates all economically viable use of a piece of land (without enforcing a limitation inherent in the title). In any lesser case, most courts will use modern principles, construe the three factors as they were construed in *Penn Central* itself, and uphold the act. *Tahoe-Sierra* was such a case: it presented a challenge to a series of land-use moratoria issued while an interstate governmental authority considered how to clean up Lake Tahoe. The moratoria lasted somewhere between thirty-two months and six years, depending on whether one believed the Court's opinion or Chief Justice Rehnquist's dissent.¹²⁹ While there was a plausible argument that the moratoria came within *Lucas* because they "totally" restrained use and development while in effect, Justice Stevens, writing for the Court, limited *Lucas* to apply only in "the extraordinary circumstance when no productive or economically beneficial use of land is permitted. . . . Anything less than a 'complete elimination of value,' or a 'total loss' . . . would require the kind of analysis applied in *Penn Central*."¹³⁰

Tahoe Sierra also deserves respect because it draws on modern intuitions about government regulating. To read *Penn Central* broadly and *Lucas* narrowly, Justice Stevens appealed to a practical consideration, namely that broad-based application of *Lucas* "would undoubtedly require changes in numerous practices that have long been considered permissible exercises of the police power" and "would render routine government processes prohibitively expensive."¹³¹ Since Stevens was writing not only for the liberals but also for O'Connor and Kennedy, *Tahoe-Sierra* confirms that the swing Justices and liberals accentuate the errors from charging too much compensation and eliminate the errors from over-regulation.

As a result, it is fair to guess that *Lucas* has been narrowed virtually to its facts for the foreseeable future. *Penn Central* remains the "polestar" of federal regulatory-takings law not only for the doctrinal framework it establishes but also for the policy mood in which it follows that framework.¹³² Since *Tahoe-Sierra* was decided 6-3, *Penn Central* should remain good law even assuming new Chief Justice John Roberts and Associate Justice Samuel Alito decide to side with those conservatives still on the Court. That latter assumption may be wrong, however, given that John Roberts litigated *Tahoe-Sierra* for the interstate agency protecting Lake Tahoe.¹³³

¹²⁸ See 535 U.S. 302 (2002).

¹²⁹ See *id.* at 306; *id.* at 343 (Rehnquist, C.J., dissenting).

¹³⁰ *Id.* at 330 (quoting *Lucas*, 505 U.S. at 1019–20, 1019 n.8).

¹³¹ *Id.* at 335.

¹³² *Id.* at 327 n.23 (quoting *Palazzolo v. Rhode Island*, 533 U.S. 606, 633 (2001) (O'Connor, J., concurring)).

¹³³ *Id.* at 305 (listing John Roberts as counsel for respondents).

The right to alienate land is the only substantial area left in land-use law where uncertainty remains. In land-use law, the main alienation cases uphold challenges to rent-control regulations: *Block v. Hirsh* originally,¹³⁴ and *FCC v. Florida Power Corp.*¹³⁵ and *Yee v. City of Escondido*¹³⁶ more recently.

Lingle v. Chevron U.S.A. Inc., decided in the 2004-05 Term, also suggests that no one on the Court has any enthusiasm for reviving per se principles in rent-control cases.¹³⁷ Doctrinally, *Lingle* presented the question of whether a regulation could trigger just compensation requirements if it failed substantially to advance a legitimate government interest.¹³⁸ (The Court held that the “substantially advances” test was not a takings test and overruled dicta suggesting otherwise.¹³⁹) However, this question arose out of a challenge to a rent-control scheme, a state law regulating the rent that oil refiners could charge local retailer-lessees selling their gas.¹⁴⁰ The Court accepted the state’s characterization of the law: among other things, when it recited the facts, it accepted unquestioningly that the local gasoline market was “highly concentrated” even though there were eight producing refineries or gas wholesalers competing.¹⁴¹ Separately, the Court took note that the district court had needed “to choose between the views of two opposing economists as to whether [the challenged] rent control statute would help to prevent concentration and supracompetitive prices in the State’s retail gasoline market.”¹⁴² This behavior concerned this Court, which preferred that federal courts not “substitute their predictive judgments for those of elected legislatures and expert agencies.”¹⁴³ These passages suggest that all wings on the current Court agree that regulatory-takings principles apply weakly if at all to rent-control regulations.

Even so, consider a law that extinguishes the right to sell land, which does to the lot what the law in *Andrus v. Allard* did to eagle feathers.¹⁴⁴ In that situation, it is more than likely that the Court would retreat from *Andrus* and the rent-control cases and decide a case using some sort of per se rule—perhaps relying in part on *Loretto* (to survey historical land-use

¹³⁴ 256 U.S. 135 (1921). *See also* *Brown v. Feldman*, 256 U.S. 170 (1921) (upholding a D.C. rent-control scheme against constitutional challenge).

¹³⁵ 480 U.S. 245 (1987) (upholding against takings challenge a law regulating the rates that utility companies may charge cable companies to carry cable lines).

¹³⁶ 503 U.S. 519 (1992) (upholding a New York rent-control scheme against constitutional challenge).

¹³⁷ 125 S. Ct. 2074 (2005) (upholding against takings challenge a rent-control scheme for mobile-home trailer parks). *Cf.* *Pennell v. City of San Jose*, 485 U.S. 1, 14 (1986) (Scalia, J., concurring and dissenting) (arguing, without success, for a theory to treat rent-control regulations as takings).

¹³⁸ *See* 125 S. Ct. at 2078.

¹³⁹ *See id.*

¹⁴⁰ *See id.*

¹⁴¹ *Id.*

¹⁴² *Id.* at 2008.

¹⁴³ *Id.*

¹⁴⁴ *See supra* text accompanying notes 78–81 and accompanying text.

regulation), in part on *Irving* and *Youpee* (to establish that the right to alienate is essential), and in part on *Buchanan v. Warley*¹⁴⁵ and other precedents striking down a state restraint on the sale of land. Although such a case is extremely unlikely to arise it is probably the last imaginable situation in which the Court might unexpectedly establish a per se rule.

CONCLUSION

The *Penn Central* three-factor test is best understood not as a rule-bound test but rather as a way to bracket disagreement about particular takings disputes in a constructive way. The *Penn Central* test is not totally indeterminate, however, because it is limited by the political theory that lawyers and judges bring to the test. In general, the Supreme Court has appealed to two different theories of property regulation to explain how to conceive of “private property” and its proper “regulation” or “taking” in particular cases. One, the classical view, is the fully articulated version of a theory holding that when society regulates property, it ought to aim primarily at preserving and protecting owners’ free action to use their own for their own individual purposes. In substantially diluted or corrupted form, this view helps swing Justices in those few cases when a regulation seems to restrain property rights in an extreme or unjust way. The other, the modern view, is the fully articulated version of a theory holding that property regulation is appropriate to remedy the social inequalities and social problems left unaddressed by a fairly unregulated market. This view informs most regulatory-takings opinions.

While this taxonomy does not provide an exclusive explanation of regulatory-takings law, it identifies several factors that make takings law easier to follow after *Penn Central*. At a minimum, this taxonomy explains why and how Justices manage to interpret each of the three *Penn Central* factors consistently in the same ways to generate pro- or anti-takings decisions. Separately, this view helps lawyers identify concerns that help to influence the dispositive swing Justices—now, more than anyone else, Justice Kennedy. Close regulatory-takings cases turn on three factors—the owner’s specific legal expectations as defined by background law and historical tradition, normative intuitions about whether the property right being regulated is absolutely necessary for the species of property at issue to have meaningful value, and normative intuitions about whether a regulation is justifiable.

¹⁴⁵ 245 U.S. 60 (1917).

