

The False Dichotomy between Physical and Regulatory Takings Analysis: A Critique of *Tahoe-Sierra's* Distinction between Physical and Regulatory Takings

*Andrea L. Peterson**

This Article examines the line drawn by the U.S. Supreme Court in Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency between physical and regulatory takings. Justice Stevens, writing for the Court, asserted that the two types of takings are entirely distinct, that no analogies should be drawn between them, and that physical and regulatory takings claims should be analyzed in a completely different manner from one another. This Article challenges Stevens' approach, arguing that analogies have been and should be drawn between physical and regulatory takings, and that there is no basis for using different principles to analyze physical and regulatory takings claims. Moreover, this Article asserts that in resolving takings claims, courts should focus on why the government deprived the claimant of property, regardless of whether the alleged taking involved a physical invasion or a regulatory use restriction, since the fundamental issue is whether fairness requires the payment of compensation.

Copyright © 2007 by the Regents of the University of California.

* Professor of Law, Boalt Hall School of Law, University of California, Berkeley. AB 1974, Stanford University; JD 1978, Boalt Hall School of Law, University of California, Berkeley. I would like to thank Steve Bundy and Michael Rubin for their helpful comments, Tabitha Lundberg for her research assistance, and Jenna Musselman and Casey Roberts for their editorial suggestions.

Introduction	384
I. The Court in <i>Tahoe-Sierra</i> Distinguished between Physical and Regulatory Takings	387
II. <i>Tahoe-Sierra's</i> Distinction between Physical and Regulatory Takings Fails to Address the Fundamental Issue in Takings Cases.....	392
A. The Fundamental Issue Is Whether Fairness Requires the Payment of Compensation	392
B. Whether the Alleged Taking Is Physical or Regulatory, the Government's Justification for Its Action Must Be Considered in Determining Whether Fairness Requires the Payment of Compensation.....	393
III. Whether the Government Intentionally Deprives the Claimant of Property through a Physical Invasion or a Regulatory Use Restriction, No Compensation Is Due If the Government Is Merely Preventing or Punishing Wrongdoing	396
A. The Results in the Supreme Court's Takings Decisions Reflect Common-Sense Fairness Principles	397
B. The Court's Takings Doctrine Is Based on Analogies the Court Has Drawn among Takings That Occur through a Formal Exercise of the Power of Eminent Domain, through Physical Action, and through Regulation	399
C. Although Functional Equivalence Analysis May Show That a Deprivation of Property Occurred, That Alone Does Not Establish That a Taking Requiring the Payment of Just Compensation Occurred	401
D. The Government Cannot Defeat a Takings Claim Simply by Establishing That It Deprived the Claimant of Property to Promote the Common Good.....	402
E. The Government <i>Can</i> Defeat a Takings Claim by Establishing That It Deprived the Claimant of Property to Prevent or Punish Conduct That the Governmental Decision Makers Reasonably Believed the Public Would Consider Blameworthy	403
1. The Government Might Deprive the Claimant of Property through a Formal Exercise of the Power of Eminent Domain.....	403
2. The Government Might Deprive the Claimant of Property through Physical Action	404
3. The Government Might Deprive the Claimant of Property through Regulation	405

2007]

THE FALSE DICHOTOMY

383

a.	Regulation Might Authorize a Physical Invasion of the Claimant's Property.....	405
b.	Regulation Might Impose Restrictions without Authorizing a Physical Invasion of the Claimant's Property.....	410
IV.	In <i>Tahoe-Sierra</i> , Justice Stevens May Have Failed to Recognize the Similarities between Physical and Regulatory Takings Because He Unwittingly Contrasted Physical Invasion Cases in Which the Government Is Acting Merely to Promote the Common Good with Regulatory Non-Physical Invasion Cases in Which the Government Is Addressing Blameworthy Conduct.....	412
V.	How Have Courts Responded to <i>Tahoe-Sierra's</i> Flawed Distinction between Physical and Regulatory Takings?	416
A.	The Supreme Court in <i>Lingle v. Chevron U.S.A., Inc.</i> Departed from <i>Tahoe-Sierra's</i> Mode of Analysis without Acknowledging the Inconsistency	416
1.	The Supreme Court in <i>Lingle</i> Once Again Focused on the Functional Equivalence of Takings That Occur through a Formal Exercise of the Power of Eminent Domain, through Physical Action, and through Regulation.....	416
2.	The Court Emphasized in <i>Lingle</i> That the Key Issue in a Takings Case, Whether the Burden Imposed on the Claimant Was Fair, Is Not Resolved Simply by Showing That the Government's Action Promoted the Common Good.....	417
3.	The Supreme Court in <i>Lingle</i> Was Less Categorical Than the Court in <i>Tahoe-Sierra</i> about Physical Invasions Constituting Takings.....	418
B.	Lower Federal Court and State Court Decisions Illustrate the Problems Created by the Physical versus Regulatory Takings Distinction Articulated in <i>Tahoe-Sierra</i>	420
1.	Some Courts Appear to Place the Alleged Taking in Whichever <i>Tahoe-Sierra</i> Category Will Yield a Fair Result.....	420
a.	A Case May Involve a Physical Invasion and Yet the Court Concludes That No Physical Taking Was Involved	420
b.	A Case May Involve Regulation of Use and Yet the Court Concludes That a Physical Taking Occurred.....	424
2.	Some Courts Explicitly Modify the Rules Articulated in <i>Tahoe-Sierra</i>	426

a. A Court May Return to the <i>Loretto</i> Rule	427
b. A Court May Find That No Taking Occurred Because the Claimant Was at Fault or Because the <i>Lucas</i> Nuisance Exception Applied	429
3. Some Courts Are Understandably Confused about Whether to Analyze Takings Cases Involving Conditional Physical Invasions as Physical or Regulatory Takings Cases	436
Conclusion.....	440

INTRODUCTION

In *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency*,¹ the U.S. Supreme Court drew an analytical distinction between physical and regulatory takings. Justice Stevens, writing for the majority, announced that a physical invasion of private property by (or authorized by) the government requires the payment of just compensation, even if the invasion involves only a portion of the claimant's property or is only temporary. However, according to Stevens, regulatory takings should be analyzed completely differently, focusing on the property as a whole.

In this Article, I argue that Justice Stevens' different treatment of physical invasion cases and non-physical invasion cases is analytically unsound. Justice Stevens placed great weight on *how* the government deprived the claimant of property, whether through a physical invasion or a regulatory use restriction. That distinction fails to address the fundamental issue in takings cases, which is whether fairness requires that compensation be paid. Stevens should have focused on *why* the government acted, because the government's reason for depriving the claimant of his property is critically important in resolving whether fairness requires the payment of just compensation.

I begin the Article by explaining, in Part I, the analytical structure announced by Justice Stevens in *Tahoe-Sierra*. I also present the reasons Stevens offered for analyzing physical and regulatory takings claims differently.

In Part II, I consider whether Justice Stevens' distinction between physical and regulatory takings makes sense. I conclude that it does not, for whether the government deprived the claimant of property through a physical invasion or through a regulatory use restriction, one must consider the government's *justification* for depriving the claimant of his property to assess the fairness of the government's action.

1. 535 U.S. 302 (2002).

In Part III, I explore what types of justification establish that fairness does not require the government to pay compensation even though it intentionally deprived the claimant of property. I contend that the results in the Supreme Court's takings cases can best be summarized in the following manner: even if the government intentionally forces the claimant to give up his property, no taking occurs so long as the government is merely seeking to prevent or punish conduct that the governmental decision makers reasonably believe the public would consider wrong or blameworthy. These principles apply whether the government intentionally deprives the claimant of property through a formal exercise of its eminent domain power, through physical action, or through regulation, regardless of whether or not the regulation authorizes a physical invasion of the claimant's property.

In Part IV, I consider how Justice Stevens might have made the mistake of treating physical and regulatory takings as completely different from one another. I suggest that Stevens may have done so because he focused solely on physical invasion cases in which the government was not addressing blameworthy behavior. Stevens unwittingly contrasted that limited group of physical invasion cases with regulatory non-physical invasion cases, in which the government generally is addressing blameworthy conduct. After contrasting physical invasion cases in which there is *no* plausible judgment of blame with regulatory cases in which there generally *is* a plausible judgment of blame, Stevens concluded that "physical" and "regulatory" takings cases are entirely different, when in fact, the critical difference between the two groups of cases is whether the government is addressing blameworthy conduct.

Finally, in Part V, I discuss several cases decided after *Tahoe-Sierra* to illustrate the flaws in Justice Stevens' approach. First, I discuss *Lingle v. Chevron U.S.A., Inc.*,² decided three years after *Tahoe-Sierra*, in which the Supreme Court emphasized the *similarity* of takings that occur through eminent domain, through physical action, and through regulation. The Court appeared to be retreating from the categorical line it had drawn in *Tahoe-Sierra* between physical invasion cases and non-physical invasion cases. Moreover, the Court appropriately emphasized that the key issue in a takings case is the fairness of the burden imposed on the claimant.

Next, I look at lower federal court and state court decisions that purport to apply the rules announced in *Tahoe-Sierra*. These cases illustrate the shortcomings of the *Tahoe-Sierra* rules in a number of ways. For example, in some cases, a physical invasion of the claimant's property unquestionably had occurred, and the government either had committed

2. 544 U.S. 528 (2005).

or authorized the physical invasion. Thus, a taking should have been found under the *Tahoe-Sierra* rules. However, the government had authorized the physical invasion to prevent blameworthy conduct. In such circumstances, courts understandably have been reluctant to require the government to pay. Some courts have responded to physical invasion cases in which the government sought to prevent blameworthy conduct by finding no taking, while purporting to apply the *Tahoe-Sierra* rules, stating that no physical invasion was involved (even though that is plainly inaccurate). Other courts have modified the *Tahoe-Sierra* rules, saying that the physical invasion must be permanent to count as a physical taking. One court avoided finding a taking by applying the nuisance exception articulated in the regulatory takings case of *Lucas v. South Carolina Coastal Council*.³ This enabled the court to conclude that despite the *Tahoe-Sierra* rules, no taking occurred because the government's physical invasion was designed to address a nuisance.

In the context of discussing the post-*Tahoe-Sierra* cases, I address the *Lucas* exception and compare it to my view that no taking occurs when the government is acting to prevent or punish wrongdoing. I argue that the nuisance exception articulated in *Lucas* is both too static and too narrow in scope, and that the Supreme Court could have addressed the undue rigidity and narrowness of the *Lucas* nuisance exception in *Tahoe-Sierra*. Instead, Justice Stevens arrived at his desired result by another route—by creating an unjustified distinction between physical invasion and non-physical invasion takings cases.

Finally, I illustrate the flaws in the *Tahoe-Sierra* approach by considering how conditional physical invasions should be analyzed under those rules. Under *Tahoe-Sierra*, the court must first determine whether the case involves a physical or a regulatory takings issue. However, which of those categories should be used if the government gives the claimant a *choice* between suffering a physical invasion or a regulatory use restriction? The Court did not consider this question in *Tahoe-Sierra*, and quite understandably, some courts have been confused about how to analyze conditional physical invasion cases. That confusion provides yet another illustration of the analytical difficulties created by *Tahoe-Sierra*'s physical versus regulatory dichotomy. Under my view of takings cases, the same principles would apply regardless of whether the claimant was required to suffer a physical invasion or a regulatory use restriction or was given a choice between suffering *either* a physical invasion *or* a regulatory use restriction.

I conclude that Justice Stevens' instincts told him that the government should pay compensation when it physically takes a claimant's tangible property to promote the common good, but that

3. 505 U.S. 1003 (1992).

governmental regulation of owners' use of their property usually is fair and should not be considered a taking. I agree with those propositions. However, they do not support the analytical distinction that Justice Stevens drew between physical and regulatory takings. Rather, they support an approach that focuses on *why* the government deprived the claimant of property, whether the deprivation occurred through a physical invasion or a regulatory use restriction.

I. THE COURT IN *TAHOE-SIERRA* DISTINGUISHED BETWEEN PHYSICAL AND REGULATORY TAKINGS

In *Tahoe-Sierra*, Justice Stevens asserted that physical and regulatory takings claims are properly governed by markedly different rules.⁴ He distinguished between two types of takings claims. He described as "physical" takings claims those based on the government physically invading the claimant's property (or authorizing others to do so), and he described as "regulatory" takings claims those based on the government regulating the claimant's use of his property without authorizing a physical invasion.⁵

According to Justice Stevens, in the case of a physical invasion, compensation must be paid even if the physical invasion does not encompass the claimant's entire property: "When the government physically takes possession of an interest in property for some public purpose, it has a categorical duty to compensate the former owner, regardless of whether the interest that is taken constitutes an entire parcel or *merely a part* thereof."⁶ Stevens provided two examples of such partial physical takings. First, he explained that a temporary physical invasion requires the payment of compensation, even though the government takes only a portion of the claimant's property in a *temporal* sense: "Thus, compensation is mandated when a leasehold is taken and the government occupies the property for its own purposes, *even though that use is temporary*."⁷ Second, a physical invasion of just *a portion of the physical space* owned by the claimant requires the payment of compensation: "Similarly, when the government appropriates part of a rooftop in order to provide cable TV access for apartment tenants, or when its planes use private airspace to approach a government airport, it is required to pay for that share *no matter how small*."⁸

Justice Stevens then asserted that regulatory takings must be analyzed in a completely different fashion than physical takings: "[W]e do not apply our precedent from the physical takings context to regulatory

4. See *infra* text accompanying notes 9–12.

5. See *infra* text accompanying notes 6–12 & 27–30.

6. *Tahoe-Sierra*, 535 U.S. at 322 (emphasis added) (citation omitted).

7. *Id.* (emphasis added).

8. *Id.* (emphasis added) (citations omitted).

takings claims.”⁹ According to Stevens, while physical takings require compensation even if only a portion of the physical space owned by the claimant is invaded or if the physical invasion is only temporary, a regulatory taking must be analyzed by looking at the effect of the regulation on *the property as a whole, both geographically and temporally*:

[I]n regulatory takings cases we must focus on “the parcel as a whole.” . . . An interest in real property is defined by the metes and bounds that describe its *geographic dimensions* and the term of years that describes the *temporal aspect* of the owner’s interest. . . . *Both dimensions must be considered if the interest is to be viewed in its entirety*.¹⁰

Applying this principle, Stevens concluded: “Hence, a *permanent* deprivation of the owner’s use of the *entire area* is a taking of ‘the parcel as a whole,’ whereas a temporary restriction that merely causes a diminution in value is not.”¹¹

Why should regulatory and physical takings be analyzed so differently? One reason Justice Stevens offered was pragmatic. He expressed concern that if the rules applied to physical takings were applied to regulatory takings, land use regulations would often be found to effect takings, and regulators would be required to pay compensation in far too many cases. “Land-use regulations are ubiquitous and most of them impact property values in some tangential way—often in completely unanticipated ways. Treating them all as *per se* takings would transform government regulation into a luxury few governments could afford.”¹² Stevens also argued that physical takings “usually represent a greater affront to individual property rights.”¹³ In a footnote, he elaborated by explaining that a regulatory taking “does not give the government any right to use the property, nor does it dispossess the owner or affect her right to exclude others.”¹⁴ Stevens thus viewed a physical invasion as a particular “affront” to a property owner, whether the government itself was committing the physical invasion, for example by “us[ing] the property,” or whether the government was authorizing third parties to enter the property, “affect[ing] [the owner’s] right to exclude others.” The final rationale Stevens offered for applying different rules to physical and regulatory takings was that “[t]he text of the Fifth Amendment itself provides a basis for drawing a distinction between physical takings and

9. *Id.* at 323–24.

10. *Id.* at 331–32 (emphasis added).

11. *Id.* at 332 (emphasis added).

12. *Id.* at 324.

13. *Id.*

14. *Id.* at 324 n.19.

regulatory takings.”¹⁵ The Takings Clause provides: “[N]or shall private property be taken for public use, without just compensation.”¹⁶ Stevens asserted that this “plain language requires the payment of compensation whenever the government acquires private property for a public purpose, whether the acquisition is the result of a condemnation proceeding or a physical appropriation.”¹⁷ However, in a footnote, Stevens acknowledged that the key issue is actually what the word “taken” in the Takings Clause means: “In determining whether government action affecting property is an unconstitutional deprivation of ownership rights under the Just Compensation Clause, a court must interpret the word ‘taken.’”¹⁸ Then, rather than arguing that the Takings Clause *explicitly* treats all physical invasions as takings, he asserted that “[w]hen the government condemns or physically appropriates the property, the fact of a taking is *typically obvious and undisputed*.”¹⁹ By contrast, when “[a property] owner contends a taking has occurred because a law or regulation imposes restrictions so severe that they are tantamount to a condemnation or appropriation, *the predicate of a taking is not self-evident*, and the analysis is more complex.”²⁰ Thus, Stevens asserted that physical invasions are obviously takings, whereas a regulation may effect a taking, but a taking is not “self-evident.”

In prior cases, the Court had stressed the functional equivalence of the government taking property through a formal exercise of its eminent domain power, through physical action, and through regulation.²¹ However, Justice Stevens in *Tahoe-Sierra* rejected that line of analysis. He refused to draw analogies between physical and regulatory takings, and he rejected the dissent’s emphasis on functional equivalence analysis. Stevens remarked that “even a regulation that constitutes only a minor infringement on property may, from the landowner’s perspective, be the functional equivalent of an appropriation.”²² Thus, Stevens made clear his concern that too many regulations would be found to effect takings if the Court merely focused on functional equivalence.²³

15. *Id.* at 321.

16. U.S. CONST. amend. V.

17. *Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg’l Planning Agency*, 535 U.S. 302, 321 (2002).

18. *Id.* at 322 n.17.

19. *Id.* (emphasis added).

20. *Id.* (emphasis added).

21. *See, e.g.*, *First English Evangelical Lutheran Church v. County of L.A.*, 482 U.S. 304 (1987); *Lucas v. S.C. Coastal Council*, 505 U.S. 1003 (1992). *See* Section III.B.

22. *Tahoe-Sierra*, 535 U.S. at 324 n.19.

23. *Tahoe-Sierra*’s rejection of functional equivalence analysis and the Court’s refusal to analyze physical and regulatory takings in a similar manner have provoked quite different responses from commentators. For example, Professor Richard Lazarus celebrated *Tahoe-Sierra*’s rejection of functional equivalence reasoning:

The implications of equating physical and regulatory takings plainly troubled Justice Stevens. He took it as a given that a physical invasion of private property authorized by the government would be a taking, even if

[I]n *Tahoe-Sierra*, the Court stepped away from [functional equivalence] analysis and characterized physical and regulatory takings as completely distinct and therefore subject to different kinds of constitutional analyses. . . . The majority opinion could hardly have been any clearer in this respect: “[W]e do not apply our precedent from the physical takings context to regulatory takings.” . . .

The Court’s opinion in this respect is no incidental matter. The threshold notion that physical and regulatory takings are constitutionally equivalent under the Takings Clause served as a fundamental premise of Professor Richard Epstein’s original manifesto urging the courts to reinvigorate the Clause. His legal theories have long provided academic fuel to property rights advocates. In the aftermath of the Court’s ruling in *Tahoe-Sierra*, however, it is now clear that six Justices on the Court . . . reject Epstein’s fundamental premise. Several lower courts have since relied on the *Tahoe-Sierra* Court’s distinction between physical and regulatory takings in rejecting takings claims.

Richard J. Lazarus, *Celebrating Tahoe-Sierra*, 33 ENVTL. L. 1, 9–10 (2003) (footnotes omitted). Professor Richard Epstein, on the other hand, continued to assert that physical and regulatory takings are properly viewed as analogous. Responding to *Tahoe-Sierra*, he stated that “what is needed is the rejection of any categorical distinction between physical and regulatory takings.” Richard A. Epstein, *The Ebbs and Flows in Takings Law: Reflections on the Lake Tahoe Case*, 2002 CATO SUP. CT. REV. 5, 29 (2002).

A number of commentators have noted that the *Tahoe-Sierra* Court did not fully justify its distinction between physical invasions and use restrictions. For example, Professor John Echeverria stated that the Court in *Tahoe-Sierra* had clearly taken the position that “a physical appropriation, whether temporary or not, is qualitatively different from a use restriction,” and he then characterized the Court’s sharp distinction between physical invasions and use restrictions as “problematic,” commenting that “[i]t is hardly obvious that physical appropriations . . . actually represent a greater intrusion on private property rights than many landmark use restrictions.” John D. Echeverria, *A Turning of the Tide: The Tahoe-Sierra Regulatory Takings Decision*, 32 ENVTL. L. REP. (ENVTL. LAW INST.) 11,235, 11,242, 11,244 (2002). The *Tahoe-Sierra* Court, he noted, had “explained the distinction largely in practical terms.” *Id.* at 11,243.

Professor Andrew Gold commented even more pointedly that “probably the true motivation for drawing its distinction” between physical and regulatory takings was the *Tahoe-Sierra* Court’s concern that otherwise many land use regulations might be found to be takings. Andrew S. Gold, *The Diminishing Equivalence Between Regulatory Takings and Physical Takings*, 107 DICK. L. REV. 571, 589 (2003). Given the Court’s long history of functional equivalence reasoning, Professor Gold viewed the *Tahoe-Sierra* Court’s “reluctance to equate regulatory and physical governmental acts” as “ensur[ing] continued uncertainty in takings jurisprudence.” *Id.* at 571–72.

Finally, Professor Steven J. Eagle remarked, “[T]o say that physical invasions usually are more severe than regulations . . . hardly gives rise to confidence in an arbitrary rule stating that physical and regulatory takings claims are to be evaluated by different doctrines.” Steven J. Eagle, *Planning Moratoria and Regulatory Takings: The Supreme Court’s Fairness Mandate Benefits Landowners*, 31 FLA. ST. U. L. REV. 429, 455 (2004). Moreover, Eagle asserted that although “Justice Stevens might be correct in asserting that physical seizures ‘represent a greater affront to individual property rights’ than regulatory seizures,” this “is not certain . . . since pride in ownership might be offset by outrage that the owner’s only practical indicium of ownership would be the periodic receipt of a real estate tax bill.” Steven J. Eagle, *Some Permanent Problems with the Supreme Court’s Temporary Regulatory Takings Jurisprudence*, 25 U. HAW. L. REV. 325, 343 (2003).

the physical invasion were limited in its geographic or temporal scope. For example, he noted that in *Loretto v. Teleprompter Manhattan CATV Corp.*,²⁴ the Court had held that a state law requiring landlords to permit the installation of cable television facilities on their buildings effected a taking, even though the cable installation on the claimant's rooftop occupied just a small area.²⁵ Moreover, he stated that even temporary physical invasions require compensation.

Stevens did not contend that permanent physical invasions should be analyzed differently than temporary physical invasions. He cited *Loretto* as support for the proposition that *physical invasion* cases are different than *non-physical invasion* cases, without acknowledging that the Court in *Loretto* had formulated a per se rule only for "permanent" physical invasions, while describing physical invasions in general as "property restrictions of an unusually serious character for purposes of the Takings Clause."²⁶

In *Tahoe-Sierra*, Justice Stevens accepted that the government would have to pay compensation if it physically took someone's property, even if it took that property only temporarily or took only a part of the property. However, he asserted that if the government merely *regulated the claimant's own use* of his property for a limited period of time or as to a portion of the physical space involved, a taking would not necessarily occur. This reasoning was important in *Tahoe-Sierra*, where the claimants argued that they had suffered a taking under the per se rule established in *Lucas v. South Carolina Coastal Council*²⁷ when they were deprived of all economically beneficial use of their land for thirty-two months by a moratorium on development. That moratorium had been imposed while the government was devising a plan to save the clarity of the water of Lake Tahoe.²⁸ Justice Stevens characterized the moratorium as mere

24. 458 U.S. 419 (1982).

25. *Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency*, 535 U.S. 302, 322 (2002).

26. The Court stated in *Loretto*:

[W]e have long considered a physical intrusion by government to be a property restriction of an unusually serious character for purposes of the Takings Clause. Our cases further establish that when the physical intrusion reaches the extreme form of a permanent physical occupation, a taking has occurred. In such a case, "the character of the government action" not only is an important factor in resolving whether the action works a taking but also is determinative.

Loretto, 458 U.S. at 426.

27. 505 U.S. 1003 (1992).

28. In *Lucas*, the Court held that a taking occurs when "the owner of real property has been called upon to sacrifice *all* economically beneficial uses in the name of the common good," *id.* at 1019, *unless* "inquiry into the nature of the owner's estate shows that the proscribed use interests were not part of his title to begin with," *id.* at 1027, given the restrictions that "background principles of the State's law of property and nuisance already place upon land

regulation of the claimants' own use of their property. Therefore, according to Stevens, the takings claim had to be analyzed under regulatory takings principles, not physical takings principles, and consequently, the Court was required to focus on the claimants' "whole property," both geographically *and temporally*. Stevens then concluded that no taking had occurred under the *Lucas* per se rule, since the government had not deprived the claimants of all use of their land forever.²⁹

Justice Stevens plainly sought to arrive at what he considered a just outcome in the *Tahoe-Sierra* case when he formulated the proper method of analyzing physical versus regulatory takings claims. However, he also was concerned about the impact the rules he announced would have on the resolution of a wide range of other takings cases involving governmental regulation. Although Stevens accepted that any physical taking, even if limited temporally or geographically, requires compensation, he made it clear that regulations that limit one's use of one's property generally should not be deemed takings. Stevens expressed pragmatic concern about the ability of regulators to pay compensation. He also suggested that in many cases, regulatory restrictions on use do not place unfair burdens on property owners and thus should not be deemed takings.³⁰ That point is a valid one.

II. *TAHOE-SIERRA'S* DISTINCTION BETWEEN PHYSICAL AND REGULATORY TAKINGS FAILS TO ADDRESS THE FUNDAMENTAL ISSUE IN TAKINGS CASES

A. *The Fundamental Issue Is Whether Fairness Requires the Payment of Compensation*

The fundamental issue in a takings case is whether fairness requires that compensation be paid. In assessing whether a compensable "taking" has occurred, the Supreme Court seeks to determine "when 'justice and fairness' require that economic injuries caused by public action be

ownership," *id.* at 1029. The "nuisance exception" to the *Lucas* per se rule is discussed more fully at Section V.B.2.b.

29. Justice Stevens stated that the *Lucas* per se rule would only apply in the rare case where "a regulation *permanently* deprives property of all value." *Tahoe-Sierra*, 535 U.S. at 332 (emphasis added). This disposed of the takings issue, since no takings claim based on the three-factor test set out in *Penn Central Transportation Co. v. City of New York*, 438 U.S. 104 (1978), was before the Court in *Tahoe-Sierra*. Justice Stevens remarked that "if [the claimants] had challenged the application of the moratoria to their individual parcels, instead of making a facial challenge, some of them might have prevailed under a *Penn Central* analysis." *Tahoe-Sierra*, 535 U.S. at 334.

30. For example, Stevens asserted that fairness would not require the payment of compensation for "numerous practices that have long been considered permissible exercises of the police power," including "orders temporarily prohibiting access to crime scenes, businesses that violate health codes, [and] fire-damaged buildings." *Tahoe-Sierra*, 535 U.S. at 334–35.

compensated by the government.”³¹ As the Court has often explained, the role of the Takings Clause is to “bar[] Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole.”³² Thus, Justice Stevens was justifiably concerned about formulating a takings doctrine under which regulations that do not impose unfair burdens are not considered takings. However, this legitimate concern should not have led him to create an analytical distinction between physical and regulatory takings. Before creating such a distinction, Justice Stevens should have considered: how does the nature of the taking as either a physical invasion or a regulation relate to the fundamental issue of fairness?

Tahoe-Sierra did not adequately address that key issue. Rather, Justice Stevens simply asserted that in the case of a physical invasion, “the fact of a taking is typically obvious and undisputed”³³ and that physical invasions “usually represent a greater affront to individual property rights” than regulations do, since physical invasions interfere with the property owner’s right to exclude.³⁴ One important question, then, is whether physical invasions authorized by government are necessarily *unfair* intrusions on property owners’ rights.

B. Whether the Alleged Taking Is Physical or Regulatory, the Government’s Justification for Its Action Must Be Considered in Determining Whether Fairness Requires the Payment of Compensation

Justice Stevens used the term “physical takings” to encompass a wide range of situations in which governmental action produces a physical invasion of private property. He referred to cases in which the government itself committed a physical intrusion, as in *United States v. Causby*,³⁵ where the government made frequent low flights over the claimants’ land, preventing the claimants from using their land as a chicken farm. He also referred to cases in which the government authorized a third party to enter the claimant’s property, as in *Loretto*.³⁶ In addition, Stevens cited cases in which the physical invasion was temporary, as in *Causby*,³⁷ as well as cases in which the physical invasion

31. *Penn Cent. Transp. Co. v. City of New York*, 438 U.S. 104, 124 (1978).

32. *Lingle v. Chevron U.S.A., Inc.*, 544 U.S. 528, 537 (2005) (quoting *Armstrong v. United States*, 364 U.S. 40, 49 (1960)).

33. *Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg’l Planning Agency*, 535 U.S. 302, 322 n.17 (2002).

34. *Id.* at 324.

35. 328 U.S. 256 (1946).

36. *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982).

37. The Supreme Court held that a taking occurred in *Causby* and remanded for a determination of whether the “easement” taken by the government’s flights was temporary or permanent. *Causby*, 328 U.S. at 267–68. On remand, the court held that the easement was temporary, since the flights had stopped. *Causby v. United States*, 109 Ct. Cl. 768, 771–72 (1948).

was deemed permanent, as in *Loretto*. Finally, Stevens discussed cases in which a regulation specifically authorized a physical invasion of the claimant's property, as in *Loretto*, as well as cases in which the claimant did not challenge a regulation that governed him, but rather complained about physical action by the government, such as the flights over the Causbys' chicken farm.

Bearing in mind the broad range of situations in which the government might engage in a "physical taking," as Stevens used that term, would every one of those physical invasions be unfair? Suppose, for example, that a law authorized a governmental official to inspect a workplace for health and safety reasons. Would that physical invasion authorized by government be unfair? Suppose the government authorized the seizure and destruction of animals that bore a serious communicable disease that threatened human health. Would fairness require the payment of compensation for those animals? Suppose the government required someone to forfeit a weapon he had used in the commission of a crime. Would fairness require the government to compensate the criminal for his weapon? Surely we must look to the government's justification for committing the physical taking. To prove unfairness, it cannot be enough simply to establish that through physical action or through a regulation authorizing a physical invasion the government has produced a physical invasion of the claimant's private property. It must matter *why* the government took the action.

Justice Stevens himself has often focused on the significance of the government's justification for depriving the claimant of his property. Writing for the Court in *Keystone Bituminous Coal Ass'n v. DeBenedictis*,³⁸ Justice Stevens stated:

Many cases . . . have recognized that the nature of the State's action is critical in takings analysis. In *Mugler v. Kansas*, 123 U.S. 623 (1887), for example, . . . Justice Harlan explained that a "prohibition simply upon the use of property for purposes that are declared, by valid legislation, to be *injurious to the health, morals, or safety of the community*, cannot, in any just sense, be deemed a taking or appropriation of property."³⁹

Similarly, in *First English Evangelical Lutheran Church v. County of Los Angeles*,⁴⁰ Justice Stevens explained that the challenged ordinance prohibiting construction in a floodplain surely had not effected a taking, since it had been adopted for health and safety reasons. He commented that "[i]n light of the tragic flood and the loss of life that precipitated the

38. 480 U.S. 470 (1987).

39. *Id.* at 488-89 (emphasis added).

40. 482 U.S. 304 (1987).

safety regulations here, it is hard to understand how [the claimant] ever expected to rebuild on Lutherglen.”⁴¹ More broadly, he stated:

[I]n order to protect the health and safety of the community, government may condemn unsafe structures, may close unlawful business operations, may destroy infected trees, and surely may restrict access to hazardous areas—for example, . . . land in the path of a potentially life-threatening flood. When a governmental entity imposes these types of health and safety regulations, it may not be “burdened with the condition that [it] must compensate such individual owners for pecuniary losses they may sustain, by reason of their not being permitted, by a noxious use of their property, to inflict injury upon the community.”⁴²

In a similar vein, in *Tahoe-Sierra*, Stevens rejected the claimants’ proposed rule that any regulation that led to the deprivation of all economic use of private property, however brief, should be deemed a taking. He pointed out that such a rule would require compensation even in cases in which governmental officials had issued “orders temporarily prohibiting access to crime scenes, businesses that violate health codes, [or] fire-damaged buildings,”⁴³ which would not accord with “the concepts of ‘fairness and justice’ that underlie the Takings Clause.”⁴⁴ Thus, in *Tahoe-Sierra*, Stevens acknowledged the relevance of the government’s justification for its action in *regulatory* takings cases.

Yet, in *Tahoe-Sierra*, Stevens did not acknowledge that the government’s justification for its action could also establish that a *physical invasion* was not a taking. This omission is surprising. Consider the examples Stevens offered to show that the government’s justification for restricting a property owner’s use of his land may establish that no taking occurred. Stevens referred to instances in which governmental officials temporarily prohibit access to crime scenes, businesses that violate health codes, and fire-damaged buildings. Surely governmental officials would not just restrict the owner’s access to his property in such cases, but would also enter the property themselves to investigate the crime scene, the health code violations, or the damage done by the fire. Although these entries by governmental officials would constitute physical invasions, fairness would not require the payment of compensation, just as fairness would not require the payment of compensation for restricting the owner’s access. In each case, the government’s justification for its action is critical.

41. *Id.* at 327–28 (Stevens, J., dissenting).

42. *Id.* at 325–26 (quoting *Mugler v. Kansas*, 123 U.S. 623, 668–69 (1887)).

43. *Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg’l Planning Agency*, 535 U.S. 302, 335 (2002).

44. *Id.*

In earlier cases, Justice Stevens *had* recognized that the government's justification for its action could establish that no taking occurred in a physical invasion case, as well as in a regulatory case. For example, in *Keystone*,⁴⁵ Stevens described the case of *Miller v. Schoene*,⁴⁶ which involved physical destruction of the claimant's infected trees, as one in which "it was clear that the State's exercise of its police power to prevent the impending danger [from the infected trees] was *justified*" and thus no compensation was due.⁴⁷ In *First English*, Stevens again referred to the government "destroy[ing] infected trees" in *Miller v. Schoene* as an example of a case in which no compensation was due because the government was "protect[ing] the health and safety of the community."⁴⁸ Yet, in *Tahoe-Sierra*, Stevens did not even consider the relevance of the government's justification for its action in the context of physical invasions. Stevens was so intent on distinguishing physical invasions from regulatory use restrictions that he failed to notice the similarities between physical and regulatory takings cases.

III. WHETHER THE GOVERNMENT INTENTIONALLY DEPRIVES THE CLAIMANT OF PROPERTY THROUGH A PHYSICAL INVASION OR A REGULATORY USE RESTRICTION, NO COMPENSATION IS DUE IF THE GOVERNMENT IS MERELY PREVENTING OR PUNISHING WRONGDOING

Justice Stevens evidently believes that in a wide range of cases, governmental regulation is not only desirable but also fair, and thus should not be considered a taking. I agree. However, this does not justify articulating entirely different rules for analyzing physical and regulatory takings claims.

My view is that Justice Stevens focused on the wrong issue when he distinguished between physical and regulatory takings. To address the fairness issue that lies at the heart of every takings case, Stevens should have focused on the government's *justification* for depriving the claimant of his property, not the *means* by which the government accomplished that deprivation. Although takings decisions often do not state this explicitly, the government's justification is critical in determining the outcome of a takings case, whether the government is depriving the claimant of property through a physical invasion or through a regulatory use restriction.

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

46. 276 U.S. 272 (1928).

47. *Keystone*, 480 U.S. at 489 (emphasis added).

48. *First English Evangelical Lutheran Church v. County of L.A.*, 482 U.S. 304, 325-26 (1987) (Stevens, J., dissenting).

A. *The Results in the Supreme Court's Takings Decisions Reflect Common-Sense Fairness Principles*

As I explained more fully in an earlier article,⁴⁹ the Supreme Court's takings decisions reflect the Justices' instinctive efforts to achieve fair outcomes. The outcomes of the Court's takings decisions can best be summarized in the following manner: a taking occurs if the government intentionally forces the claimant to give up his property, *unless* the governmental decision makers are seeking to prevent or punish action (or inaction) by the claimant that they reasonably believe the public would consider wrong or blameworthy. To put it more simply, if the government is stopping you from doing something wrong, it does not have to pay you. If the government is punishing you for doing something wrong, it does not have to pay you. However, if the government's only justification for taking your property is that doing so will promote the common good, then the government must pay you. Thus, no taking occurs if the government prevents you from polluting the air. Nor does a taking occur if the government requires you to forfeit a weapon you used to commit a crime. However, a taking does occur if the government zones your land for public park use to benefit the public.

This judgment of blame or wrongdoing does not have to be a judgment of strong condemnation, as in the case of a serious crime.⁵⁰ It could be a much weaker judgment of condemnation, as where the owner's conduct is viewed as "nuisance-like" in the sense that the owner is acting in a manner that imposes unreasonable burdens on others. Moreover, the governmental decision makers' judgment of blame need only be plausible, since the court reviews that judgment deferentially.⁵¹

49. See Andrea L. Peterson, *The Takings Clause: In Search of Underlying Principles, Part II—Takings as Intentional Deprivations of Property Without Moral Justification*, 78 CAL. L. REV. 53 (1990).

50. I use the terms "judgment of blame" and "judgment of wrongdoing" interchangeably.

51. As I explained in my earlier article, a court would rarely find a taking under the principles I articulated:

This is true for a number of reasons. First, the term "wrongdoing" is used to describe quite weak judgments of condemnation, as in a nuisance case. Second, the reviewing court would not make an independent judgment of whether the public would consider A's conduct to be blameworthy. Rather, the court would consider whether the lawmakers (or other authorized governmental decisionmakers) reasonably believed that the public would consider A's conduct to be blameworthy. Indeed, the reviewing court would give such great deference to the lawmakers' judgment that one might say that no taking will be found so long as the lawmakers made a plausible determination that the public would consider A's conduct to be blameworthy. Moreover, the reviewing court would assume that a judgment of wrongdoing had been made if such a judgment could plausibly have been made, unless the evidence showed that in fact no judgment of wrongdoing had been made. To find a taking, then, the reviewing court would either have to conclude that no judgment of wrongdoing could plausibly have been made, or that in fact no judgment of wrongdoing had been made.

Nevertheless, it must be a judgment of blame or wrongdoing, not simply a judgment that if the claimant were to give up his property this would promote the common good.

These underlying fairness principles apply whether the government intentionally deprives the claimant of his property through a formal exercise of eminent domain, through physical action, or through regulation.⁵² Unlike Justice Stevens, I do not believe it makes sense to analyze physical takings completely differently than regulatory takings. Moreover, unlike Justice Stevens, I do not resist acknowledging that deprivations of property that occur through physical invasions and through regulatory action can be described as “functionally equivalent.” However, functional equivalence alone should not be regarded as sufficient to establish that a compensable taking has occurred. In order to consider whether the deprivation of property was *unfair*, we must also consider *why* the government acted.

Peterson, *supra* note 49, at 92–93 (footnotes omitted).

52. I explained in my earlier article that a takings claimant must establish that the government *forced* him to give up his property, since no taking would occur if a claimant gave up his property voluntarily. The government could force someone to give up property in three different ways:

First, the government may use an eminent domain proceeding to force A to transfer her claim to an economically valuable resource, such as a parcel of land, to the government. . . . Second, the government may adopt a law that expressly requires A to give up something of economic value. . . . Finally, physical action by the government may force A to give up something of economic value, even though no law requires A to do so.

Id. at 76–77 (footnotes omitted).

Moreover, to commit a taking, the government must *intentionally* deprive the claimant of property. Usually, this requirement is easily met:

In most takings cases, the government clearly intended to deprive the claimant of her property. When the government formally exercises its eminent domain power, for example, it plainly intends to force A to give up her property. Similarly, when the government enacts a law that expressly requires A to give up her property, no issue of intent arises. The intent issue is most likely to arise when the government engages in physical action that has the effect of forcing A to give up her property. . . .

. . .

. . . [T]he Court’s takings decisions can best be explained by saying that . . . the intent requirement is met if the government made a deliberate decision to act in a manner that would be substantially certain to force A to give up her property, even if that impact on A was not affirmatively desired.

Id. at 80–83 (footnotes omitted).

Once the claimant establishes that the government intentionally deprived him of property, the critical issue is *why* the government did so. If the government was merely preventing or punishing wrongdoing, no taking occurred.

B. The Court's Takings Doctrine Is Based on Analogies the Court Has Drawn among Takings That Occur through a Formal Exercise of the Power of Eminent Domain, through Physical Action, and through Regulation

Fundamentally, the Court's takings jurisprudence is based on analogies the Court has drawn among takings that occur through a formal exercise of the power of eminent domain, through physical action, and through regulation. As the Court explained in *First English*,⁵³ "While the typical taking occurs when the government acts to condemn property in the exercise of its power of eminent domain, *the entire doctrine of inverse condemnation* is predicated on the proposition that a taking may occur without such formal proceedings."⁵⁴

Early on, the Court drew an analogy between a formal taking of property through an eminent domain proceeding and an effective deprivation of property through physical action by the government:

In *Pumpelly v. Green Bay*, this Court said: "It would be a very curious and unsatisfactory result, if . . . it shall be held that if the government refrains from the absolute conversion of real property to the uses of the public it can destroy its value entirely, can inflict irreparable and permanent injury to any extent, can, in effect, subject it to total destruction without making any compensation, because, in the narrowest sense of that word, it is not *taken* for the public use."⁵⁵

The Court explained in *First English* that later Supreme Court cases "unhesitatingly applied this principle."⁵⁶

In time, the Court recognized that regulation could also effectively deprive a property owner of his property. In *Pennsylvania Coal Co. v. Mahon*,⁵⁷ the Court reasoned that "[t]o make it commercially impracticable to mine certain coal *has very nearly the same effect for constitutional purposes as appropriating it or destroying it*,"⁵⁸ and concluded that if regulation goes "too far" it requires the payment of just compensation.

53. *First English Evangelical Lutheran Church v. County of L.A.*, 482 U.S. 304 (1987).

54. *Id.* at 316 (emphasis added). The Court explained in *United States v. Clarke*, 445 U.S. 253 (1980), that "[i]nverse condemnation is a *cause of action against a governmental defendant* to recover the value of property which has been taken in fact by the governmental defendant, even though no formal exercise of the power of eminent domain has been attempted by the taking agency." *Id.* at 257 (citations omitted) (internal quotation marks omitted).

55. *Id.* at 316–17 (quoting *Pumpelly v. Green Bay*, 80 U.S. 166, 177–78 (1871)).

56. *Id.* at 317.

57. 260 U.S. 393 (1922).

58. *Id.* at 414 (emphasis added).

In his influential dissenting opinion in *San Diego Gas & Electric Co. v. City of San Diego*,⁵⁹ Justice Brennan summarized the functional equivalence of these three methods of depriving owners of their property:

Police power regulations such as zoning ordinances and other land-use restrictions can destroy the use and enjoyment of property in order to promote the public good just as effectively as formal condemnation or physical invasion of property. From the property owner's point of view, it may matter little whether his land is condemned or flooded, or whether it is restricted by regulation to use in its natural state, if the effect in both cases is to deprive him of all beneficial use of it.⁶⁰

Echoing that reasoning, the Court in *First English*⁶¹ emphasized the parallel nature of three methods by which the government might effect a temporary taking: the government might acquire a property interest of limited duration, such as a leasehold interest, through a formal exercise of eminent domain; it might take property for a limited period of time through physical action, as in *Causby*; or it might take property for a limited period of time through regulation.⁶² In *Lucas v. South Carolina Coastal Council*,⁶³ the Court once again drew analogies between physical and regulatory deprivations of use, citing with approval Justice Brennan's suggestion that "total deprivation of beneficial use is, from the landowner's point of view, the equivalent of a physical appropriation."⁶⁴

Despite this long-standing recognition by the Court of the functional equivalence of deprivations of property that occur through eminent domain, physical action, and regulatory action, Justice Stevens refused to acknowledge their similarity in *Tahoe-Sierra*. He refused to draw

59. 450 U.S. 621, 636 (1981) (Brennan, J., dissenting). The majority in *San Diego* dismissed the appeal for lack of a final judgment. Justice Brennan, however, addressed the substantive issue presented in the case, arguing that just compensation must be paid for temporary regulatory takings. Justice Brennan's dissent was joined by three other Justices. In addition, Justice Rehnquist wrote in a concurrence: "If I were satisfied that this appeal was from a 'final judgment or decree' . . . I would have little difficulty in agreeing with much of what is said in the dissenting opinion of Justice Brennan." *Id.* at 633 (Rehnquist, J., concurring). Six years later, Chief Justice Rehnquist wrote the majority opinion in *First English Evangelical Lutheran Church v. County of Los Angeles*, 482 U.S. 304 (1987), adhering to the substantive position set out in Justice Brennan's *San Diego* dissent.

60. *San Diego Gas & Elec. Co.*, 450 U.S. at 652 (footnote omitted).

61. *First English*, 482 U.S. 304.

62. As examples of "temporary takings," the Court cited cases in which the government acquired a leasehold interest through a formal exercise of the eminent domain power and cases in which the government committed a taking through physical action, as in *Causby*. *Id.* at 316-19. The Court concluded that just as compensation must be paid for those temporary takings, so must compensation be paid if a taking occurs through regulation, even if the taking is temporary. *Id.* at 318-22.

63. 505 U.S. 1003 (1992).

64. *Id.* at 1017 (citing *San Diego Gas & Elec. Co.*, 450 U.S. at 652 (Brennan, J., dissenting)).

analogies between physical and regulatory takings, and he rejected the dissent's emphasis on functional equivalence analysis.⁶⁵

C. Although Functional Equivalence Analysis May Show That a Deprivation of Property Occurred, That Alone Does Not Establish That a Taking Requiring the Payment of Just Compensation Occurred

Why was Justice Stevens so troubled by functional equivalence analysis? Justice Stevens expressed the concern that “even a regulation that constitutes only a minor infringement on property may, from the landowner’s perspective, be the functional equivalent of an appropriation.”⁶⁶ Thus, a regulation that prohibited a particular use of a plot of land might be considered “functionally equivalent” to governmental acquisition or “appropriation” of a servitude.

In my view, Stevens was overly concerned about the dangers of acknowledging the functional equivalence of depriving private property owners of their property through eminent domain, through physical invasion, and through regulation. Justice Stevens was concerned that functional equivalence analysis would be dispositive. However, although functional equivalence analysis may show that a deprivation of property occurred, that alone should not be regarded as sufficient to establish that a compensable taking occurred, since the deprivation of property was not necessarily *unfair*. We must also consider *why* the government acted.

The Court has often recognized that even if the government has effectively deprived the claimant of his property, the government’s justification for its action must still be considered to determine whether a taking occurred. In *Pennsylvania Coal*,⁶⁷ for example, the Court viewed the challenged regulation as effectively depriving the claimant of its coal, since “mak[ing] it commercially impracticable to mine [the] coal has very nearly the same effect . . . as appropriating it or destroying it.”⁶⁸ However, the Court acknowledged that the same regulation would not constitute a taking if it were designed to protect the safety of miners.⁶⁹ Years later, in *Keystone*,⁷⁰ the Court held that a statute very similar to the one challenged in *Pennsylvania Coal* did not effect a taking, emphasizing the government’s health and safety rationale for requiring the claimant to

65. *Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency*, 535 U.S. 302, 323–24, 324 n.19 (2002).

66. *Id.* at 324 n.19.

67. *Penn. Coal Co. v. Mahon*, 260 U.S. 393 (1922).

68. *Id.* at 414.

69. *Id.* at 415 (“It is true that in *Plymouth Coal Co. v. Pennsylvania*, 232 U. S. 531 [(1914)] it was held competent for the legislature to require a pillar of coal to the left along the line of adjoining property, . . . [b]ut that was a requirement for the safety of employees invited into the mine.”).

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

leave certain coal in place and explaining that “no individual has a right to use his property so as to create a nuisance or otherwise harm others.”⁷¹ In *Lucas*, the Court emphasized the functional equivalence of a taking through eminent domain and a taking through a regulation prohibiting all use of a parcel of land, yet the Court ultimately did not consider dispositive a finding of functional equivalence. Rather, the Court concluded that even if a regulation effectively deprived a landowner of all economically beneficial use of his land, no compensation would be due if the prohibited use would have been considered a nuisance.⁷² Justice Kennedy concurred in the judgment, agreeing with the general principle that prohibiting landowners from unreasonably harming others does not constitute a taking, but arguing that the nuisance exception as expressed in the majority opinion had been formulated far too narrowly.⁷³

Thus, the functional equivalence argument is not as worrisome as Stevens seems to think. Establishing that the government effectively deprived someone of his property cannot be enough to establish that a taking requiring the payment of just compensation occurred. Another key issue must be: what sort of justification did the government have for its action?

D. The Government Cannot Defeat a Takings Claim Simply by Establishing That It Deprived the Claimant of Property to Promote the Common Good

If the government deprived a claimant of property, whether through a formal exercise of the power of eminent domain, through physical invasion, or through regulation, the government cannot defeat a takings claim simply by establishing that it acted to promote the common good. The claimant who alleges that a taking occurred essentially argues: “It isn’t fair to make me give up my property without paying me for it.” The government cannot adequately respond to that fairness issue simply by saying: “We plan to put your property to good use.”

The Court has made this point repeatedly in its takings decisions. In *Pennsylvania Coal*,⁷⁴ for example, the Court emphasized that “[t]he protection of private property in the Fifth Amendment presupposes that it is wanted for public use, but provides that it shall not be taken for such use without compensation.”⁷⁵ The Court also remarked that the government may not justly refuse to pay for property that it has

71. *Id.* at 492 n.20.

72. *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1029 (1992).

73. The undue narrowness of the *Lucas* nuisance exception is discussed more fully in Section V.B.2.b.

74. *Penn. Coal Co. v. Mahon*, 260 U.S. 393 (1922).

75. *Id.* at 415.

effectively taken simply “because the public wanted it very much.”⁷⁶ In *Nollan v. California Coastal Commission*,⁷⁷ the Court held that the California Coastal Commission had effected a taking when it forced the Nollans, owners of beachfront land, to give up an easement to provide public access along the beach if the Nollans wished to build a home on their land. In response to the Coastal Commission’s argument that “the public interest [would] be served by a continuous strip of publicly accessible beach,” the Court remarked that California was “free to advance its ‘comprehensive program’ [of providing lateral public beach access] . . . by using its power of eminent domain for this ‘public purpose’; but if it wants an easement across the Nollans’ property, it must pay for it.”⁷⁸

E. The Government Can Defeat a Takings Claim by Establishing That It Deprived the Claimant of Property to Prevent or Punish Conduct That the Governmental Decision Makers Reasonably Believed the Public Would Consider Blameworthy

I have argued that the results in the Court’s takings decisions can best be captured by stating that even if the government intentionally forced the claimant to give up his property, no taking occurred if the government merely sought to prevent or punish conduct that the governmental decision makers reasonably believed the public would consider wrong or blameworthy. As shown below, in some contexts the government commits a taking when it physically invades the claimant’s property or authorizes a third party to do so. However, in other instances, although the government commits or authorizes a physical invasion of private property, no taking occurs.

1. The Government Might Deprive the Claimant of Property through a Formal Exercise of the Power of Eminent Domain

In the case of a formal exercise of the government’s eminent domain power, the paradigm case of a taking, the government offers no judgment of wrongdoing. The government’s justification for forcing a private property owner to give up his property in an eminent domain proceeding is that it will promote the common good. For example, if the government condemns land to build a highway, the government asserts that the land

76. *Id.*

77. 483 U.S. 825 (1987). As discussed in Section V.A.2, the Court emphasized in *Lingle v. Chevron U.S.A., Inc.*, 544 U.S. 528 (2005), that in determining whether a taking occurred, the Court is not asking whether the government’s action promoted the common good.

78. *Nollan*, 483 U.S. at 841–42 (citation omitted).

will be used in a manner that will benefit the public.⁷⁹ Thus, as everyone agrees, a compensable taking occurs when the government formally exercises its power of eminent domain to acquire private property.

2. *The Government Might Deprive the Claimant of Property through Physical Action*

In other cases, the government deprives the claimant of property by means of physical action. For example, the government might build a dam that floods the claimant's land, as in *Pumpelly*,⁸⁰ or it might make frequent, low flights over the claimants' land, preventing them from using it for a chicken farm, as in *Causby*.⁸¹ In these cases, the government does not purport to address any blameworthy conduct by the property owner. When the government builds a new dam to benefit the public, knowing that the dam will result in the permanent flooding of certain privately owned land, the government effectively deprives the landowners of property. However, the government does not make a judgment that the property owners' use of their land was wrongful. It simply seeks to promote the common good. Similarly, in *Causby*, the government did not make a judgment that the Causbys' use of their land for a chicken farm was wrongful. Indeed, it was the government's action that was nuisance-like, not the Causbys'.

In some "physical invasion" cases, then, the government has effectively deprived the claimant of property, but it has made no judgment of wrongdoing by the claimant. Thus, I would expect the Court to find that a taking occurred, as it did in both *Pumpelly* and *Causby*. In each case a physical invasion occurred; however, the critical point is that the government did not act to prevent or punish blameworthy conduct by the claimants.

79. In some cases, perhaps for political reasons, the government might *choose* to acquire property through a formal exercise of its eminent domain power, even though it could have achieved the same result through enactment of a law that would not have been considered a taking. For example, the government might choose to pay for diseased plants or animals and then destroy them, rather than requiring the owners to destroy their diseased plants or animals without receiving compensation. If the government chooses to proceed through a formal exercise of its eminent domain power, then the government is simply asserting, "You must transfer your property to us to promote the common good," and the government must pay just compensation for the property it acquires.

80. *Pumpelly v. Green Bay*, 80 U.S. 166 (1871). In *Pumpelly*, the Court found that a taking occurred when the government built a dam that resulted in the permanent flooding of the claimant's land. The Court stated that "where real estate is actually invaded by superinduced additions of water, earth, sand, or other material, or by having any artificial structure placed on it, so as to effectually destroy or impair its usefulness, it is a taking." *Id.* at 181.

81. *United States v. Causby*, 328 U.S. 256 (1946).

3. *The Government Might Deprive the Claimant of Property through Regulation*

In many takings cases, the claimant argues that regulatory action by the government effectively deprived him of something of economic value and that the government thereby “took” his property. In some instances, the challenged regulation expressly authorizes a physical invasion of the claimant’s land or other tangible property, while in others the challenged regulation prohibits the claimant from using his land or some other economically valuable resource for certain purposes. In each case, the critical issue is whether the government forced the claimant to give up his property pursuant to a plausible judgment of wrongdoing, not whether the government deprived the claimant of his property through a physical invasion.

a. *Regulation Might Authorize a Physical Invasion of the Claimant’s Property*

As a general matter, in the United States we do not consider it wrong of a property owner to exclude others from his land or other tangible property. The Supreme Court has called this “right to exclude” an “essential stick” in the bundle of rights one obtains as a property owner.⁸² The Court in *Tahoe-Sierra* referred to a physical invasion as an “affront” to a property owner.⁸³

Could one argue that whenever the government requires a property owner to suffer a physical invasion, the government has no basis for faulting the property owner, who is simply rightfully seeking to exclude others from his property? If so, Justice Stevens’ view (that any physical invasion authorized by government constitutes a taking) would yield the same outcome in a physical invasion case as my view (that the Court finds a taking when the government intentionally forces the claimant to give up his property and is not seeking to prevent or punish blameworthy conduct).

However, it would be too broad a generalization to state that the government has no basis for blaming any property owner who excludes others from his land or other tangible property. Judgments of blame, or wrongdoing, depend on the circumstances.⁸⁴ Although in general, we do not consider it wrong of a property owner to prevent others from physically invading his land or other tangible property, there are

82. See, e.g., *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1044 (1992); *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 433 (1982); *Kaiser Aetna v. United States*, 444 U.S. 164, 176 (1979).

83. *Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg’l Planning Agency*, 535 U.S. 302, 324 (2002).

84. See Peterson, *supra* note 49, at 98–115 (discussing judgments of wrongdoing).

circumstances in which we would blame a property owner for preventing a physical invasion.

Consider, for example, a case in which the government authorized a physical entry to address a health or safety risk created by a property owner, as in the case of a regulation that authorized governmental officials to make workplace health and safety inspections. Such a regulation would authorize a physical invasion, yet surely it would not effect a compensable taking.

Health and safety inspections involve only temporary physical invasions. However, there are also circumstances in which a property owner is fairly required to permit a *permanent* physical taking of his property. Suppose, for example, a property owner raised livestock, and the government determined that his livestock bore a communicable disease that threatened human health, and therefore seized the livestock and slaughtered them. Although the government would have permanently deprived the property owner of his livestock, fairness would not require the payment of compensation.⁸⁵ Even if the property owner could not be blamed for the livestock harboring the disease in the first place, he could be blamed for continuing to own livestock that presented a risk to human health.

Sometimes the government physically seizes property to *punish* blameworthy conduct by the property owner, rather than to *prevent* blameworthy conduct by the property owner. Suppose, for example, that a law authorized governmental officials to require an individual who had used a weapon in the commission of a crime to forfeit that weapon. The government would be punishing the owner of the weapon for wrongdoing, and fairness would not require the payment of compensation even if the government permanently deprived the owner of his weapon.⁸⁶

85. See, e.g., *Lawton v. Steele*, 152 U.S. 133, 136 (1894) (“It is universally conceded [that the police power] justifi[es] the destruction or abatement . . . of whatever may be regarded as a public nuisance. Under this power it has been held that the State may order . . . the slaughter of diseased cattle.”); *Johansson v. Bd. of Animal Health*, 601 F. Supp. 1018 (D. Minn. 1985) (state statute requiring hog farmers to quarantine or sell for slaughter hogs found to carry an infectious disease did not effect a taking); *Loftus v. Dep’t of Agric.*, 232 N.W. 412, 420 (Iowa 1930) (“The right to compensation for diseased animals is not absolute. They, being nuisances, may be destroyed without compensation.”).

86. The Court at times has relied on the fiction that the thing itself is guilty of wrongdoing and must give itself up. See, e.g., *Bennis v. Michigan*, 516 U.S. 442 (1996). However, in my view, the Court should focus on whether the property owner can be considered culpable. In an earlier case, *Calero-Toledo v. Pearson Yacht Leasing Co.*, 416 U.S. 663, 690 (1974), the Court was not satisfied with justifying forfeiture by relying on the fiction that the thing itself is the wrongdoer. Toward the end of the opinion, the Court in effect said that the case would have been different if the claimant had not been at fault—that is, if there had been no basis for blaming him for the illegal use of his forfeited yacht.

Note that each of these physical invasions is authorized only in certain circumstances. If you run a factory, you must submit to health and safety inspections. If you raise cattle, you will be held responsible for the health risks they pose and may even have to give up diseased cattle. Similarly, if you wish to develop your land, you may have to suffer a physical invasion to mitigate the harm your proposed development would otherwise create.

Development exactions involving physical invasions are another example of the principle that if the government intentionally forces the claimant to give up his property, the critical issue in determining whether a taking has occurred is whether the government was merely seeking to prevent or punish conduct by the claimant that the governmental decision makers reasonably believed the public would regard as blameworthy. For example, developers of single-family residential subdivisions are often required to give up land for streets or parks to remedy the problems their proposed subdivisions would otherwise create. They lose their right to exclude the public from that land, yet no taking occurs. Justice Scalia, author of *Nollan*,⁸⁷ a key Supreme Court case on development exactions, explained the rationale for this approach in his separate opinion in *Pennell v. City of San Jose*.⁸⁸

[In the case of] [t]raditional land-use regulation . . . there is a cause-and-effect relationship between the property use restricted by the regulation and the social evil that the regulation seeks to remedy. Since the owner's use of the property is (or, but for the regulation, would be) the source of the social problem, it cannot be said that he has been singled out unfairly. Thus, the common zoning regulations requiring subdividers . . . to dedicate certain areas to public streets, are in accord with our constitutional traditions because the proposed property use would otherwise be the cause of excessive congestion.⁸⁹

Thus, a development exaction, even one that requires a developer to grant public access to his land, may be justified on the ground that the government is simply asking the developer to mitigate the harm he would otherwise be causing.

Thus far, I have focused on cases in which a governmental regulation authorizes a physical invasion of private property pursuant to a plausible judgment of blame. In some cases, however, although the government purports to be preventing blameworthy behavior, the judgment of blameworthiness is so implausible that the Court rejects it. Consider the development exaction at issue in *Nollan*.⁹⁰ The government argued that

87. *Nollan v. Cal. Coastal Comm'n*, 483 U.S. 825 (1987).

88. 485 U.S. 1, 15 (1988) (Scalia, J., concurring in part and dissenting in part). The majority in *Pennell* did not reach the takings issue.

89. *Id.* at 20.

90. *Nollan*, 483 U.S. 825.

the Nollans would harm the public if they built a single-family dwelling on their beachfront lot without permitting public access along the beach. The government's theory was that the Nollans' home would interfere with the public's view of the beach from the road, thereby reducing the public's desire to use the beach. According to the government, it had merely required the Nollans to mitigate this harm to the public by requiring them to give up an easement, providing public access to their land. The Court found it "impossible to understand"⁹¹ how providing lateral beach access would remedy any problems created by building the Nollans' home, and suggested that in fact the government had attempted to extract a public benefit without paying just compensation. According to the Court, this was not regulation, but "extortion."⁹² Thus, the Court rejected the government's argument that the Nollans would be wrongfully harming the public if they built their home without providing public access.

The government could also effect a taking pursuant to a regulation that authorizes a physical invasion of private property without offering any judgment of wrongdoing at all. For example, suppose a local government enacted a law providing that the public could use a parcel of undeveloped privately owned land for recreational purposes because this would benefit the public.⁹³ Rather than taking title to the property through an eminent domain proceeding, the government chose to authorize public use of the land through the enactment of a law. In such a case, fairness would require the payment of compensation. Here, the government would be effectively depriving the claimant of his property solely to promote the common good, just as it does in the paradigmatic takings case, an eminent domain proceeding.

Loretto provides an example of a state legislature authorizing a physical invasion of private property by third parties without making a judgment that it would be wrong of the property owners to exclude those third parties.⁹⁴ The state law challenged in *Loretto* required landlords to permit cable companies to install cable facilities on their buildings to enable people living in *other* buildings to receive cable television ("crossover installations"). It also required them to permit the installation of cables to enable their own tenants to receive cable

91. *Id.* at 838.

92. *Id.* at 837.

93. *Cf.* *Fred F. French Investing Co. v. City of New York*, 350 N.E.2d 381 (N.Y. 1976) (ordinance rezoning two private parks for public park use held to be a violation of substantive due process, on the theory that regulation that goes "too far," as in *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393 (1922), should be regarded as a violation of substantive due process, rather than a taking); *City of Plainfield v. Borough of Middlesex*, 173 A.2d 785 (N.J. Super. Ct. Law Div. 1961) (zoning ordinance that limited use of plaintiffs' land to either a school or a public park or playground, held to effect a taking).

94. *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982).

television (“noncrossover installations”). According to the New York Court of Appeals, the state legislature required landlords to permit crossover installations “[to] promote the rapid development of the [cable television] industry,” which would benefit the public.⁹⁵ This does not sound like a judgment that it would be wrong of landlords to exclude the cable companies from their buildings. Rather, it apparently was simply a judgment that the common good would be promoted if cable television companies could install their facilities on landlords’ buildings. The U.S. Supreme Court concluded in *Loretto* that this statutory access requirement constituted a taking, stressing that it involved a “permanent” physical invasion.⁹⁶ In my view, however, the critical point regarding the *crossover* installations is that the state legislature evidently authorized this physical invasion simply to benefit the public.⁹⁷ With respect to the *noncrossover* installations, by contrast, the lawmakers may well have concluded that it would be wrong of landlords to preclude their tenants from receiving cable television. According to the dissenters in *Loretto*, the state legislature decided that “[a] landlord should not be able to preclude a tenant from obtaining [cable television] service . . . any more than he could preclude a tenant from receiving mail or telegrams directed to him.”⁹⁸ However, the U.S. Supreme Court majority evidently saw cable television service as a luxury, not a necessity that a landlord could not rightfully preclude a third party from installing for the benefit of his tenants. The majority drew an analogy between receiving cable television service and having a swimming pool available on the leased premises, arguing that just as a landlord could not be required to permit a third party to install a swimming pool on the rooftop “for the convenience of [his] tenants” without receiving just compensation, a landlord also could not be required to permit a third party to install cable television facilities on the rooftop for his tenants’ convenience without receiving just compensation.⁹⁹ This suggests that the majority did not see this as a case in which it would be wrong of the landlord to exclude the cable television company. Thus, fairness would require the payment of just compensation,

95. *Loretto v. Teleprompter Manhattan CATV Corp.*, 423 N.E.2d 320, 328 (N.Y. 1981), *rev’d*, 458 U.S. 419.

96. The Court concluded that the cable facilities should be considered “permanent,” even though under the statute, the cable facilities could legally be removed if the building were no longer rented. *Loretto*, 458 U.S. at 439 n.17.

97. Justice Blackmun, dissenting in *Loretto*, acknowledged that the crossover installations might effect a taking, but then argued that the taking could be ignored as “*de minimis*”: “[A]ssuming, *arguendo*, that the crossover extension in this case works a taking, I would be prepared to hold that [it] is a *de minimis* deprivation entitled to no compensation.” *Id.* at 448 n.6 (Blackmun, J., dissenting).

98. *Id.* at 444 n.3.

99. The majority considered it uncontroversial that “if the State required landlords to permit third parties to install swimming pools on the landlords’ rooftops for the convenience of the tenants, the requirement would be a taking.” *Id.* at 436 (majority opinion).

although the compensation might be so minimal that the case would not be worth litigating.

b. Regulation Might Impose Restrictions without Authorizing a Physical Invasion of the Claimant's Property

Let us turn now to those takings cases in which the claimant alleges that the government effectively deprived him of his property by means of a regulation that did *not* authorize a physical invasion of his land or other tangible property. In *Tahoe-Sierra*, Justice Stevens labeled such cases “regulatory” takings cases and argued that they are properly analyzed under an entirely different set of principles than “physical” takings cases. Justice Stevens used the term “physical takings” to include cases in which a physical invasion occurs through physical action by the government, such as the flooding in *Pumpelly* or the overflights in *Causby*, as well as cases in which a regulation expressly authorizes a physical invasion of the claimant’s property by the government or a third party, as in *Loretto*.

In my view, the same principles apply whether a taking occurs through a formal exercise of the power of eminent domain, through physical action, or through regulation, regardless of whether the regulation authorizes a physical invasion or not. If the government intentionally forces the claimant to give up his property, the question is whether the government is merely seeking to prevent or punish conduct by the claimant that the governmental decision makers reasonably believe the public would regard as blameworthy.

In most cases, when a law is enacted prohibiting certain uses of land or some other economically valuable resource, the lawmakers have made a plausible judgment that the public would consider the prohibited conduct blameworthy. Thus, under my approach, a regulatory restriction on property use usually would not effect a taking. This is plainly the result that Justice Stevens feels is correct, although he sought to arrive at that result in *Tahoe-Sierra* through a very different approach—by adopting a distinction between physical and regulatory takings analysis.

Focusing on cases that Justice Stevens described as presenting “regulatory” takings claims, in what sorts of situations might we blame a property owner for using his land or other tangible property in a certain manner? We readily blame a property owner whom we consider responsible for posing an undue risk to human health or safety. Thus, it is not surprising that in *Tahoe-Sierra*, Justice Stevens provided examples of the government acting to protect the public health or safety when he asserted that “the concepts of ‘fairness and justice’ that underlie the

Takings Clause”¹⁰⁰ would not require the payment of compensation if governmental officials issued “orders temporarily prohibiting access to crime scenes, businesses that violate health codes, [or] fire-damaged buildings,” even though the landowner in each case would temporarily have been prohibited from using his land.¹⁰¹ Similarly, the Court in *Lucas* stated that no taking would occur if “the corporate owner of a nuclear generating plant [were] directed to remove all improvements from its land upon discovery that the plant sits astride an earthquake fault [even if] [s]uch regulatory action [had] the effect of eliminating the land’s only economically productive use.”¹⁰²

Another clear example of a prohibition on use based on a judgment of blame is *Mugler v. Kansas*,¹⁰³ where the state legislature prohibited the manufacture and sale of alcoholic beverages “to guard the community against the evils attending the excessive use of such liquors.”¹⁰⁴ Although the Court recognized that the “buildings and machinery constituting [the claimant’s] breweries [were] of little value” because of this prohibition,¹⁰⁵ the contemporaneous moral judgment of the people of Kansas that manufacturing and selling alcoholic beverages was wrong was sufficient to defeat the brewery owner’s takings claim. One hundred years later, Justice Stevens, writing for the Court in *Keystone*, reaffirmed the continuing validity of the Court’s statement in *Mugler* that a “prohibition simply upon the use of property for purposes that are declared, by valid legislation, to be *injurious to the health, morals, or safety of the community*, cannot, in any just sense, be deemed a taking or appropriation of property.”¹⁰⁶

In other cases, the challenged regulation does not prohibit conduct that is regarded as evil and does not address a serious health or safety problem, but it still rests on a plausible judgment of blame. For example, a land use regulation might require a developer to solve a problem that he otherwise would create through his proposed development. In his separate opinion in *Pennell*,¹⁰⁷ Justice Scalia explained that such land use regulations are not unfair because the landowner would otherwise be “the source of [a] social problem.”¹⁰⁸ Scalia did not distinguish between

100. *Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg’l Planning Agency*, 535 U.S. 302, 334 (2002).

101. *Id.* at 335.

102. *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1029 (1992).

103. 123 U.S. 623 (1887).

104. *Id.* at 662.

105. *Id.* at 657.

106. *Keystone Bituminous Coal Ass’n v. DeBenedictis*, 480 U.S. 470, 489 (1987) (quoting *Mugler*, 123 U.S. at 668–69) (emphasis added).

107. *Pennell v. City of San Jose*, 485 U.S. 1, 15 (1988) (Scalia, J., concurring in part and dissenting in part).

108. *Id.* at 20.

regulations that prohibit the landowner from using his property in certain ways and regulations that authorize physical invasions. Rather, he referred both to “zoning regulations requiring subdividers to observe lot-size and set-back restrictions”¹⁰⁹ and to “regulations requiring subdividers . . . to dedicate certain areas to public streets.”¹¹⁰ In each case, Scalia concluded that the regulations do not effect takings “because the proposed property use would otherwise be the cause of excessive congestion.”¹¹¹ I would say that in each case, no taking occurs because the regulators plausibly determined that the public would consider it blameworthy of the landowner to develop his land without addressing the problems that his development would cause.

Finally, imagine a case in which the government enacts a regulation that restricts a property owner’s use of his land or other economically valuable resource solely for the purpose of promoting the common good, without making a judgment that the prohibited conduct is blameworthy. For example, suppose all the landowners in a new small town built homes on their indistinguishable half-acre plots except for one landowner, whose plot remained undeveloped. One month after the neighbors had completed their homes, they decided they would prefer to have this undeveloped land remain in open space, solely because they wanted the pleasure of looking at it. Rather than asking the local government formally to exercise its eminent domain power either to acquire the land in fee simple as a public park or to acquire a servitude to restrict the land to open space, the neighbors persuaded the city council to zone it for open space only. Under the terms of the new zoning ordinance, the landowner could still enter his land and could still exclude others from his land, but he could not build on it. In this example, one landowner was singled out to promote the common good, and no argument was even offered that building on his land would have been wrongful in any sense. Here, fairness would require that compensation be paid.

IV. IN *TAHOE-SIERRA*, JUSTICE STEVENS MAY HAVE FAILED TO RECOGNIZE THE SIMILARITIES BETWEEN PHYSICAL AND REGULATORY TAKINGS BECAUSE HE UNWITTINGLY CONTRASTED PHYSICAL INVASION CASES IN WHICH THE GOVERNMENT IS ACTING MERELY TO PROMOTE THE COMMON GOOD WITH REGULATORY NON-PHYSICAL INVASION CASES IN WHICH THE GOVERNMENT IS ADDRESSING BLAMEWORTHY CONDUCT

In *Tahoe-Sierra*, Justice Stevens repeatedly contrasted physical takings with regulatory takings, using the term “regulatory takings” to describe cases in which the government regulated the claimant’s use of his land or other economically valuable resource without authorizing a

109. *Id.*

110. *Id.*

111. *Id.*

physical invasion of that resource.¹¹² I have focused on whether Stevens' distinction between physical and regulatory takings makes sense and have argued that it does not.

Perhaps, however, Justice Stevens was convinced that physical takings are entirely different than regulatory takings because he mentally drew a different line. Perhaps when Stevens imagined physical takings cases, he envisioned cases in which the government acted merely for public advantage, *not* to prevent or punish blameworthy conduct by the claimant, whereas when Stevens imagined "regulatory" non-physical invasion cases, he envisioned cases in which the government generally had regulated to prevent blameworthy conduct. If so, Stevens naturally would have come to the conclusion that fairness requires the payment of just compensation in the first category of cases, but generally does not require payment in the second category of cases.

I raise this possibility because of the examples of physical takings that Stevens used in *Tahoe-Sierra*. Stevens never discussed cases in which the government deprived the claimant of a tangible resource to punish or prevent blameworthy conduct. For example, he did not consider cases in which the government required the forfeiture of a weapon used in the commission of a crime, or cases in which the government destroyed the claimant's product to prevent a health hazard. Rather, Stevens focused on cases in which the government or a third party used the claimant's tangible resource for public advantage.

In support of his point that a physical invasion by the government, even a temporary one, requires the payment of just compensation, Stevens cited cases in which the government had formally used its eminent domain power to condemn a leasehold interest, using these cases to show that "compensation is mandated when a leasehold is taken and the government occupies the property for its own purposes, even though that use is temporary."¹¹³ Cases in which the government formally exercises its eminent domain power are the paradigmatic takings cases, in which everyone agrees that compensation must be paid. In these cases, the government acts merely for public advantage, not to prevent or punish blameworthy conduct by the claimant. Stevens also cited a case in which the government physically took over a business for public purposes, pursuant to an executive order, without a formal transfer of title, to show that "[w]hen the government physically takes possession of an interest in property *for some public purpose*, it has a categorical duty to compensate the former owner . . . regardless of whether the interest

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

113. *Id.* at 322 (citing *United States v. Gen. Motors Corp.*, 323 U.S. 373 (1945) and *United States v. Petty Motor Co.*, 327 U.S. 372 (1946)).

that is taken constitutes an entire parcel or merely a part thereof.”¹¹⁴ Again, the physical invasion at issue was designed to promote the common good, much like a taking through eminent domain.¹¹⁵

Next, to establish that a physical invasion requires compensation even if only a small space is invaded, Stevens cited *Causby* and *Loretto*. Recall that in *Causby* the government effectively prevented the Causbys from using their land for a chicken farm, although no determination had been made that a chicken farm would be blameworthy in that location. In *Loretto*, the majority evidently viewed the case as one in which landlords were unfairly being asked to suffer a physical invasion by a third party simply to provide a “convenience” to their tenants and to facilitate the spread of cable television. Stevens described both *Causby* and *Loretto* as cases in which the government had physically “appropriated” space for public purposes. He explained that just as compensation is mandated when the government “occupies property for its own purposes,” even temporarily, compensation is also mandated when the government “uses private airspace,” as in *Causby*, or “appropriates part of a rooftop,” as in *Loretto*, “no matter how small” the area that is appropriated.¹¹⁶

Thus, in *Tahoe-Sierra*, Stevens focused on physical invasion cases in which he perceived the government as simply taking a private resource to promote the common good. In that context, he stressed that even if the resource is taken briefly or even if just a small thing is taken, fairness requires the payment of just compensation.

Stevens contrasted this select group of physical invasion cases with regulatory cases in which no physical invasion is authorized. He plainly thought that in most of these cases, fairness would not require the payment of just compensation. Stevens suggested that the critical point is that in these regulatory cases, the government simply prohibits the property owner from using his resource for certain purposes, rather than requiring him to suffer a physical invasion. However, Stevens did not focus solely on the absence of a physical invasion in these cases. Rather, he offered a number of examples of regulatory cases in which the government had a health or safety justification for prohibiting the claimant’s use of his property. He used cases in which governmental officials had issued “orders temporarily prohibiting access to crime scenes, businesses that violate health codes, [or] fire-damaged

114. *Id.* (emphasis added) (citing *United States v. Pewee Coal Co.*, 341 U.S. 114, 115 (1951)).

115. In *Pewee Coal*, the Court explained that the seizure of the mines “ma[de] the mines governmental facilities ‘in as complete a sense as if the Government held full title and ownership.’ . . . [Thus,] the Government here ‘took’ Pewee’s property and became engaged in the mining business.” *Pewee Coal*, 341 U.S. at 116–17 (quoting *United States v. United Mine Workers*, 330 U.S. 258, 284–85 (1947)).

116. *Tahoe-Sierra*, 535 U.S. at 322.

buildings”¹¹⁷ to show that in these situations, “the concepts of ‘fairness and justice’ that underlie the Takings Clause”¹¹⁸ do not require the payment of compensation. In other words, Stevens offered examples of regulatory action by the government where the government had prohibited the property owner from using his property in a manner that could plausibly be viewed as blameworthy, since the property owner otherwise would have been interfering with public health or safety.

Imagine a two-by-two matrix in which the two columns are “physical invasion” and “no physical invasion” and the two rows are “pursuant to a plausible judgment of blame” and “not pursuant to a plausible judgment of blame,” as shown in Figure 1. In the “physical invasion” column, it seems that Stevens unwittingly focused only on physical invasions that are *not* pursuant to a plausible judgment of blame and entirely missed the category of physical invasions that *are* pursuant to a plausible judgment of blame. Moreover, in the “no physical invasion” column, Stevens focused on cases in which the government acted pursuant to a plausible judgment of blame, emphasizing that in such cases, fairness would not require the payment of just compensation. Because Stevens contrasted physical invasion cases in which there was *no* plausible judgment of blame with regulatory cases in which there generally *is* a plausible judgment of blame, he became convinced that physical and regulatory takings cases are entirely different. Perhaps he would have seen the analytical similarities more clearly if he had considered all four cells in the matrix.

	Physical Invasion	No Physical Invasion
Pursuant to a Plausible Judgment of Blame		Stevens focused on regulatory non-physical invasion cases in which the government acted pursuant to a plausible judgment of blame
Not Pursuant to a Plausible Judgment of Blame	Stevens focused on physical invasion cases in which the government did not act pursuant to a plausible judgment of blame	

Figure 1

117. *Id.* at 335.

118. *Id.* at 334.

V. HOW HAVE COURTS RESPONDED TO *TAHOE-SIERRA*'S FLAWED DISTINCTION BETWEEN PHYSICAL AND REGULATORY TAKINGS?

When Justice Stevens insisted in *Tahoe-Sierra* that physical takings and regulatory takings should be analyzed completely differently and that no analogies should be drawn between these two types of takings, his reasoning struck me as unpersuasive and at odds with the basic principles underlying the Court's takings cases. Thus, I have watched with interest in the years since the *Tahoe-Sierra* decision to see how the Supreme Court and other courts would respond to *Tahoe-Sierra*'s analysis of takings issues. I was particularly interested in how courts would respond to physical invasion cases in which the government sought to prevent blameworthy conduct, since it seemed to me that Stevens had entirely overlooked that category of cases. I was also curious to see whether courts would return to drawing analogies among the different types of takings. I expected that they would, since such reasoning had formed the basis of the Court's inverse condemnation jurisprudence.

A. *The Supreme Court in Lingle v. Chevron U.S.A., Inc. Departed from Tahoe-Sierra's Mode of Analysis without Acknowledging the Inconsistency*

1. *The Supreme Court in Lingle Once Again Focused on the Functional Equivalence of Takings That Occur through a Formal Exercise of the Power of Eminent Domain, through Physical Action, and through Regulation*

Three years after the *Tahoe-Sierra* decision, the Court again stressed the functional equivalence of different types of takings in *Lingle v. Chevron U.S.A., Inc.*¹¹⁹ Returning to the basic analogies that underlay its takings decisions, the Court emphasized the similarity of takings that occur through a formal exercise of the power of eminent domain, through physical action, and through regulation:

The paradigmatic taking requiring just compensation is a direct government appropriation or physical invasion of private property. Indeed, until the Court's watershed decision in *Pennsylvania Coal Co. v. Mahon*, "it was generally thought that the Takings Clause reached *only* a 'direct appropriation' of property, or the *functional equivalent* of a 'practical ouster of [the owner's] possession.'" *Lucas v. South Carolina Coastal Council*.

Beginning with *Mahon*, however, the Court recognized that government regulation of private property may, in some instances, be so onerous that its effect is *tantamount to a direct appropriation or*

119. 544 U.S. 528 (2005).

ouster—and that such “regulatory takings” may be compensable under the Fifth Amendment.¹²⁰

Next, the Court discussed its various tests for determining whether *regulation* effects a taking, including within the category of “regulation” those regulations that authorize a physical invasion of property, as in *Loretto*. The Court explained that all of its tests for determining whether regulation effects a taking “share a common touchstone,”¹²¹ as “[e]ach aims to identify regulatory actions that are *functionally equivalent* to the classic taking in which government directly appropriates private property or ousts the owner from his domain.”¹²²

Thus, unlike *Tahoe-Sierra*, the Court in *Lingle* did not argue that takings cases involving physical invasions and takings cases that do not involve physical invasions have nothing to do with one another analytically. Rather, the Court drew parallels between takings that occur through a formal exercise of the eminent domain power, through physical action and through regulatory action, and within the category of regulatory action, the Court drew parallels between regulations that authorize physical invasions and regulations that do not authorize physical invasions. The Court did not acknowledge, or perhaps even recognize, the inconsistency with its opinion in *Tahoe-Sierra*.

2. *The Court Emphasized in Lingle That the Key Issue in a Takings Case, Whether the Burden Imposed on the Claimant Was Fair, Is Not Resolved Simply by Showing That the Government’s Action Promoted the Common Good*

The Court reiterated in *Lingle* that the key issue in takings cases is fairness. It spoke not only of the nature of the burden imposed by the government’s action but also of how that burden had been distributed, stressing that the Takings Clause serves to “bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole.”¹²³

The Court made abundantly clear in *Lingle* that in determining whether a taking occurred, it does *not* ask whether the government’s action promoted the common good by serving a valid public purpose.¹²⁴ As the Court expressed it, “such an inquiry is logically prior to and distinct from the question whether a regulation effects a taking, for the

120. *Id.* at 537 (second and third emphasis added) (alteration in original) (citations omitted).

121. *Id.* at 539.

122. *Id.* (emphasis added).

123. *Id.* at 542–43 (quoting *Armstrong v. United States*, 364 U.S. 40, 49 (1960)).

124. In *Lingle*, the Court held that inquiring whether regulation of private property “substantially advances” a legitimate governmental interest is *not* an appropriate test for determining whether regulation effects a taking. *Id.* at 548.

Takings Clause presupposes that the government has acted in pursuit of a valid public purpose.”¹²⁵ After all, if the government were *not* acting to promote the common good, the governmental action would not meet the threshold public use test and could be enjoined.¹²⁶

In *Lingle*, the Court underscored that the issue in two prior takings cases involving development exactions, *Nollan v. California Coastal Commission*¹²⁷ and *Dolan v. City of Tigard*,¹²⁸ had *not* been whether the challenged governmental action would produce some public benefit. Rather, the Court explained that it had analyzed the government’s justification for imposing the exaction in relation to the problems the claimant’s proposed development would cause, considering whether the burden imposed by the exaction was “‘rough[ly] proportiona[l]’ . . . both in nature and extent to *the impact of the proposed development*.”¹²⁹

3. *The Supreme Court in Lingle Was Less Categorical Than the Court in Tahoe-Sierra about Physical Invasions Constituting Takings*

In *Tahoe-Sierra*, Stevens considered the critical analytical distinction to be whether or not the government had physically invaded the claimant’s property. The next year, in *Brown v. Legal Foundation of Washington*,¹³⁰ the Court adhered to this *physical* versus *nonphysical* distinction. Quoting liberally from *Tahoe-Sierra*, Justice Stevens, again writing for the Court, reiterated his view that physical takings and regulatory takings are entirely different:

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

125. *Id.* at 543.

126. The Takings Clause merely states: “[N]or shall private property be taken for public use, without just compensation.” U.S. CONST. amend. V. However, it has been interpreted as prohibiting the government from taking private property if the taking is not for a “public use.” *See, e.g., Kelo v. City of New London*, 545 U.S. 469 (2005). As the Court explained in *Lingle*, the Takings Clause “presupposes that the government has acted in pursuit of a valid public purpose.” *Lingle v. Chevron U.S.A., Inc.*, 544 U.S. 528, 543 (2005). If the government’s action does not meet that requirement, “that is the end of the inquiry. No amount of compensation can authorize such action.” *Id.*

127. 483 U.S. 825 (1987).

128. 512 U.S. 374 (1994).

129. *Lingle*, 544 U.S. at 547 (quoting *Dolan*, 512 U.S. at 391) (emphasis added) (alteration in original).

130. 538 U.S. 216 (2003).

reference to regulations that prohibit a property owner from making certain uses of her private property.¹³¹

Stevens again stated that in the case of physical takings, the courts apply a “clear rule,” while regulatory takings require a more complex assessment.¹³² He then announced that a Washington Supreme Court rule that deprived private parties of interest paid on their money held in lawyers’ trust accounts constituted a physical taking of the interest. According to Stevens, “the transfer of the interest to the [Legal Foundation of Washington] seems more akin to the occupation of a small amount of rooftop space in [*Loretto*], which was a physical taking subject to *per se* rules.”¹³³ As in *Tahoe-Sierra*, Stevens distinguished between physical and nonphysical takings cases, and did not distinguish between permanent and temporary physical invasions. Consequently, he did not even consider whether the result might differ, depending on whether one viewed the taking of the interest as a temporary use of the principal or as a permanent taking of the interest.¹³⁴

However, just two years later, in *Lingle*, the Court was far less categorical about the proper treatment of physical invasions. Rather than stating that *any* physical invasion authorized by government is a taking, even if its geographic or temporal scope is limited, the Court returned to the *Loretto* formulation that a “permanent” physical invasion authorized by the government constitutes a *per se* taking. The Court stated: “Our precedents stake out two categories of regulatory action that generally will be deemed *per se* takings for Fifth Amendment purposes. First, where government requires an owner to suffer a permanent physical invasion of her property—however minor—it must provide just compensation.”¹³⁵ As for “temporary” physical invasions, the Court explained, as it had prior to *Tahoe-Sierra*, that under the *Penn Central* test, “the ‘character of the governmental action’—for instance whether it amounts to a physical invasion . . . may be relevant in discerning whether a taking has occurred.”¹³⁶ Thus, the Court seemed to back away from the notion that all physical invasions should be categorized as physical takings and treated as *per se* takings. Indeed, the Court in *Lingle*, unlike the Court in *Tahoe-Sierra*, seemed to use the term “physical takings” to refer *only* to permanent physical invasions covered by the *Loretto per se*

131. *Id.* at 233 (quoting *Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg’l Planning Agency*, 535 U.S. 302, 321–22 (2002)) (quotation marks omitted).

132. *Id.* (quoting *Tahoe-Sierra*, 535 U.S. at 323).

133. *Id.* at 217–18.

134. Although Stevens labeled this a “physical” taking, he concluded that no compensation was due because the claimants had suffered no net economic loss. *Id.* at 240.

135. *Lingle v. Chevron U.S.A., Inc.*, 544 U.S. 528, 538 (2005) (citing *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982)).

136. *Id.* at 539 (quoting *Penn Cent. Transp. Co. v. New York City*, 438 U.S. 104, 124 (1978)).

rule. The Court stated: “[This] Court has held that *physical takings* require compensation because of the unique burden they impose: A *permanent physical invasion*, however minimal the economic cost it entails, eviscerates the owner’s right to exclude others from entering and using her property—perhaps the most fundamental of all property interests.”¹³⁷ Again, the Court did not acknowledge any inconsistency with its reasoning in *Tahoe-Sierra*, leaving state courts and lower federal courts in the unenviable position of working within the inconsistent formulations of the Supreme Court’s ever-changing takings doctrine.

B. Lower Federal Court and State Court Decisions Illustrate the Problems Created by the Physical versus Regulatory Takings Distinction Articulated in Tahoe-Sierra

Ever since the *Tahoe-Sierra* decision, lower federal courts and state courts have recited the physical versus regulatory takings distinction articulated by the Court in *Tahoe-Sierra*.¹³⁸ Judges generally purport to follow the analytical structure established in *Tahoe-Sierra*. However, at times, judges appear to place the alleged taking in the *Tahoe-Sierra* category they believe will yield a fair result, rather than the category that seems most accurate. In some instances, judges explicitly modify the rules articulated in *Tahoe-Sierra*. In the case of conditional physical invasions, judges may understandably be confused about whether to analyze the case as a physical or a regulatory taking. In my view, these difficulties underscore the inadequacy of the *Tahoe-Sierra* analytical approach.

1. Some Courts Appear to Place the Alleged Taking in Whichever Tahoe-Sierra Category Will Yield a Fair Result

a. A Case May Involve a Physical Invasion and Yet the Court Concludes That No Physical Taking Was Involved

A major problem with the *Tahoe-Sierra* rules is that Justice Stevens viewed all physical takings as compensable, but his category of “physical takings” encompassed cases in which fairness does not require the payment of just compensation. As discussed above, perhaps Stevens only

137. *Id.* (emphasis added).

138. See, e.g., *Philip Morris, Inc. v. Reilly*, 312 F.3d 24, 33 (1st Cir. 2002); *Dakota, Minn. & E. R.R. Corp. v. South Dakota*, 236 F. Supp. 2d 989, 1026 (D.S.D. 2002), *aff’d in part, vacated in part, and remanded by* 362 F.3d 512 (8th Cir. 2004); *John R. Sand & Gravel Co. v. United States*, 60 Fed. Cl. 230, 237 (2004) (pre-trial ruling), 62 Fed. Cl. 556 (2006) (post-trial ruling), *vacated and remanded by* 457 F.3d 1345 (Fed. Cir. 2006), *cert. granted*, 75 U.S.L.W. 3636 (U.S. May 29, 2007) (No. 06-1164) (grant of certiorari limited to statute of limitations issue); *McCarran Int’l Airport v. Sisolak*, 137 P.3d 1110, 1122–23 (Nev. 2006), *cert. denied*, 127 S. Ct. 1260 (U.S. Feb. 20, 2007).

had in mind physical invasion cases in which the government took a private resource merely to promote the common good, and did not consider cases in which the government physically invaded or seized private property pursuant to a plausible judgment of blame.

One illustration of this type of case is *Rose Acre Farms, Inc. v. United States*.¹³⁹ The claimant, Rose Acre Farms, was a major egg producer. One of its claims was that the government had effected a taking by seizing and killing thousands of its hens. Rose Acre argued that this was a physical taking and thus compensable under the principles articulated in *Tahoe-Sierra*, where the Court had unequivocally stated that “[w]hen the government physically takes possession of an interest in property for some public purpose, it has a categorical duty to compensate the former owner.”¹⁴⁰ The government conceded that it had seized and killed Rose Acre’s hens. Under the principles articulated in *Tahoe-Sierra*, this would be a compensable physical taking. Even if one were to apply the more restrictive per se rule articulated earlier in *Loretto* that a “permanent” physical invasion authorized by the government constitutes a taking, Rose Acre would be entitled to compensation, since the government had permanently taken and killed Rose Acre’s hens.

The government, however, had seized the hens to prevent Rose Acre from posing an undue risk to human health. It had acted pursuant to U.S. Department of Agriculture (USDA) regulations designed to “protect[] the public against exposure to a potentially serious, even fatal, food-borne illness”¹⁴¹ caused by salmonella. After salmonella illness outbreaks were traced back to various hen flocks owned by Rose Acre, USDA employees tested the blood of Rose Acre hens, and then killed thousands of hens whose blood had tested positive so that the hens’ organs could be tested for salmonella.

Although Rose Acre claimed that it was entitled to compensation because its hens had been “physically taken,” I would expect a court to rule against Rose Acre, because it was not unfair for the government to require a food producer to address potential health hazards presented by its food. Indeed, the Federal Circuit Court of Appeals did not find a taking. The court did not try to argue with the Supreme Court’s pronouncements in *Tahoe-Sierra*. Rather, the court just avoided calling the seizure and killing of the chickens a physical taking. The court acknowledged that under the Supreme Court’s precedents, a physical taking of personal property could occur, as evidenced by the Supreme

139. 373 F.3d 1177 (Fed. Cir. 2004).

140. Brief of Plaintiff-Appellee Rose Acre Farms, Inc. at 48, *Rose Acre Farms*, 373 F.3d 1177 (No. 03-5103), 2003 WL 24305574, at *48 (quoting *Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg’l Planning Agency*, 535 U.S. 302, 322 (2002)).

141. *Rose Acre Farms*, 373 F.3d at 1195.

Court's opinion in *Brown*.¹⁴² However, the court treated Rose Acre's claim as a regulatory takings claim, as if Rose Acre were complaining of a regulation governing its own use of its hens. Pursuing that line of analysis, the court reasoned that if "the regulations [had] required Rose Acre itself to kill and test the hens, no per se taking could be found" under *Lucas*,¹⁴³ because the government would only have deprived Rose Acre of "a portion of its relevant personal property,"¹⁴⁴ not the *whole property*, which the court determined to be three of Rose Acre's farms, treated as a single entity.¹⁴⁵ The court then announced that "*the mere fact that government officials carried out the testing (and the prerequisite seizure and destruction of the hens)*" was not enough to take the case out of regulatory takings analysis under *Penn Central*.¹⁴⁶ Thus, the court struggled mightily to avoid finding a physical taking, even though government employees unquestionably had physically seized and killed Rose Acre's hens.

In its petition for rehearing, Rose Acre argued forcefully that the seizure and killing of its hens was a physical taking and thus compensable under *Tahoe-Sierra*:

The Panel's [analysis] . . . is squarely at odds with controlling Supreme Court authority. These authorities recognize that the Government's seizure, occupation or invasion of private property constitutes a categorical taking, requiring the payment of just compensation. "When the government physically takes possession of an interest in property for some public purpose, it has a categorical duty to compensate the former owner, *regardless of whether the interest that is taken constitutes an entire parcel or merely a part thereof.*"¹⁴⁷

Rose Acre accused the court of ignoring the "clear jurisprudential line" drawn by the Court in *Tahoe-Sierra* between physical and nonphysical takings by "fail[ing] to acknowledge the fundamental distinction between a *confiscation, occupation or invasion* of property, on the one hand, and a mere *restriction on the use* of property, on the other."¹⁴⁸

The problem the Federal Circuit faced in *Rose Acre*, which led it to avoid applying the *Tahoe-Sierra* rule for physical takings, is that the rule

142. *Brown v. Legal Found. of Wash.*, 538 U.S. 216 (2003).

143. See *supra* note 28 (describing the *Lucas* rule).

144. *Rose Acre Farms*, 373 F.3d at 1198 (emphasis added).

145. Earlier, the court had concluded that for regulatory takings analysis, three separate Rose Acre farms infected with salmonella should be combined and treated as a whole. *Id.* at 1190.

146. *Id.* at 1197 (emphasis added).

147. Rose Acre's Combined Petition for Panel Rehearing and Rehearing En Banc Brief at 12, *Rose Acre Farms*, 373 F.3d 1177 (No. 03-5103), 2004 WL 3769761, at *12 (quoting *Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency*, 535 U.S. 302, 322 (2002) (citing *Brown v. Legal Found. of Wash.*, 538 U.S. 216, 233-34 (2003))).

148. *Id.* at 13.

announced in *Tahoe-Sierra* does not enable a court to consider the government's *justification* for a physical invasion. The Federal Circuit plainly felt that the government's justification for its action in *Rose Acre* was critical. It remanded to the trial court for analysis of the takings claims under *Penn Central*, emphasizing that the trial court had erred in thinking that the "character of the governmental action" factor favored *Rose Acre*. Instead, that factor favored the government, for as the trial court itself had recognized, "[s]almonella may be considered a nuisance," and "the public has a strong interest in eating safe food."¹⁴⁹ Moreover, the regulatory means chosen by the government were reasonable and consistent with the knowledge it had possessed at the time and advanced "the substantial public purpose underlying the regulation—protecting the public against exposure to a potentially serious, even fatal, food-borne illness."¹⁵⁰ Thus, the court first avoided finding a taking under the *Tahoe-Sierra* rules by unpersuasively labeling this a regulatory rather than a physical takings claim, and then strongly suggested that no taking should be found on remand because of the government's justification for the physical invasion.

*Seiber v. United States*¹⁵¹ provides another example of a case in which the court refused to find that a physical taking occurred under *Tahoe-Sierra*, even though the government had deprived the claimants of their "right to exclude." The Seibers claimed that a physical taking occurred when the government, under the Endangered Species Act, prohibited them from excluding spotted owls from their land, which provided a nesting site for the owls.¹⁵² They argued that this was a physical taking under *Tahoe-Sierra* and *Brown*, because the government had authorized the physical occupation of their land by the owls. The court of appeals did not deny that the Seibers were prohibited from excluding the owls, but it nevertheless characterized this as a "regulatory" case and asserted that "governmental protection of owls . . . is not comparable to a government authorization to third parties to utilize property."¹⁵³

The court in *Seiber* avoided labeling this a physical taking and thus avoided having to order the payment of compensation under the *Tahoe-Sierra* rules.¹⁵⁴ The court explained that governmental "protection of

149. *Rose Acre Farms, Inc. v. United States*, 373 F.3d 1177, 1192 (Fed. Cir. 2004) (quoting *Rose Acre Farms, Inc. v. United States*, 55 Fed. Cl. 643, 660 (2003)) (alteration in original).

150. *Id.* at 1195.

151. 364 F.3d 1356 (Fed. Cir. 2004).

152. *Id.* at 1366.

153. *Id.* at 1367.

154. The court also cited with approval its earlier decision in *Boise Cascade Corp. v. United States*, 296 F.3d 1339 (Fed. Cir. 2002), where the court had stated that "occupation by wild owls" is distinguishable from a "forced government intrusion" like that in *Loretto*, since "[t]he government has no control over where the spotted owls nest, and it did not force the owls to

owls” from habitat disruption is not equivalent to simply authorizing third parties to “utilize” private property, but that distinction does not pertain to whether the property owner has been denied the right to exclude. Rather, it pertains to the nature of the government’s *justification* for denying the property owner the right to exclude. When the government acts to prevent harm to threatened species under the Endangered Species Act, as it does when it “protects” owls from habitat disruption, one could say that the government is acting to prevent blameworthy behavior. A judgment of blame may not be as widely accepted in this context as it would be if the government were acting to prevent conduct that posed a serious threat to human health. However, a judgment of blame is at least plausible. By contrast, if the government simply authorizes third parties to “utilize” someone else’s private property, no judgment of blame would appear to be involved. The court in *Seiber* may have sensed this distinction. However, it failed to articulate clearly the relevant difference between the two situations when it simply asserted that protecting owls is different than permitting third parties to use other people’s property.¹⁵⁵

b. A Case May Involve Regulation of Use and Yet the Court Concludes That a Physical Taking Occurred

After the Supreme Court decided *Tahoe-Sierra*, I expected to see cases in which courts were unwilling to find that physical invasions designed to address blameworthy conduct effected takings. In such a case, a court might seek to avoid *Tahoe-Sierra*’s rules, perhaps even by finding that the case did not involve a physical taking.¹⁵⁶ The converse reaction seemed far less likely—that a court would characterize a regulatory takings claim as a physical taking to find that a taking *did* occur. After all, if the challenged regulation were so unfair that a taking should be found, the court should be able to arrive at that result under the *Penn Central* three-factor analysis,¹⁵⁷ which is quite open-ended. However, since *Tahoe-Sierra*, at least one court has characterized a regulation of the claimant’s own use of his land as a physical taking in order to find that a taking occurred.

In *McCarran International Airport v. Sisolak*,¹⁵⁸ an owner of land near the Las Vegas airport claimed that the county had effected a taking

occupy Boise’s land.” *Id.* at 1354–55. However, the government did not force the cable company to occupy Loretto’s rooftop, either. It merely authorized the physical occupation and denied Loretto the right to exclude.

155. See *Seiber*, 364 F.3d at 1367.

156. See, e.g., *Rose Acre Farms, Inc. v. United States*, 373 F.3d 1177 (Fed. Cir. 2004); *Seiber v. United States*, 364 F.3d 1356 (Fed. Cir. 2004).

157. See *Penn Cent. Transp. Co. v. New York City*, 438 U.S. 104, 124–25 (1978).

158. 137 P.3d 1110 (Nev. 2006), *cert. denied*, 127 S. Ct. 1260 (U.S. Feb. 20, 2007).

by enacting ordinances restricting the height of buildings on his land. The ordinances were enacted for the stated purpose of preventing structures from being built too close to the flight path of aircraft using the airport. Absent a variance, the ordinances prohibited the claimant from building any structure higher than three to ten feet on his land, depending on the location of the structure in relation to the projected flight path.¹⁵⁹ Although the ordinances simply set height limits and did not explicitly authorize aircraft to make low flights over Sisolak's land, the Nevada Supreme Court construed the ordinances as "authoriz[ing] the permanent physical invasion of [Sisolak's] airspace."¹⁶⁰ The court stated that "Nevadans hold a property right in the useable airspace above their property up to 500 feet,"¹⁶¹ and that the challenged height restrictions were designed to facilitate flights within this airspace.¹⁶² The court plainly regarded the height restrictions as an unfair burden on the claimant, describing the ordinances as "permit[ting] airplanes to permanently invade Sisolak's property and *appropriate it for public use* without just compensation."¹⁶³ Thus, the court characterized this as a case in which the government forced the claimant to give up property rights without just compensation to promote the common good.

McCarran may seem analogous to *Causby*, where the government through low overflights deprived landowners of certain uses of their land. However, in *McCarran*, unlike *Causby*, the government offered a justification that purported to assign blame to the claimant—asserting that there was a "safety" justification for the height restrictions, since aircraft might otherwise fly into buildings.¹⁶⁴ Of course, establishing that a safety issue exists does not tell us who is to blame for the problem, and the court did not see the safety issue as one that Sisolak should be held responsible for solving:

The fact that the County enacted the Ordinances to ensure the safety of those arriving at or departing from McCarran Airport does not change the conclusion that a . . . taking occurred. As the Supreme Court reasoned in *Griggs [v. Allegheny County]*, 'an adequate approach way is as necessary a part of an airport as is the ground on which the airstrip, itself, is constructed.' However, in designing the airport, a local government has to acquire enough private property in

159. *See id.* at 1115.

160. *Id.* at 1124. The court also emphasized that such overflights were actually occurring.

161. *Id.* at 1120.

162. The height restrictions were explicitly based on the slope of the projected flight path over Sisolak's land, and the court remarked that "[land] [a]cross the street from Sisolak's property [did] not fall within the critical departure zone [and thus was] subject to less strict height restrictions than Sisolak's property." *Id.* at 1118 n.13.

163. *Id.* at 1125 (emphasis added).

164. *Id.* at 1126.

order to avoid a future taking of adjacent private property for public use without just compensation.¹⁶⁵

In the court's view, the government was not justified in simply imposing strict height restrictions to solve the safety issue, rather than using its eminent domain power to acquire easements through Sisolak's airspace.

The court in *McCarran* insisted on characterizing the case as a physical takings case, emphasizing that the "essential purpose" of the height restrictions was "to facilitate flights through private property."¹⁶⁶ However, under Justice Stevens' approach, the court should have characterized the county's height restrictions as regulatory and should have analyzed the case under *Penn Central*. The court appears to have been so convinced that the height restrictions were an unfair means of facilitating a physical invasion of the claimant's airspace that it placed the governmental action in the physical takings category, which established that a taking had occurred under *Tahoe-Sierra's* rules.¹⁶⁷ By characterizing the ordinance as effecting a physical taking, the court avoided analyzing the effect of the government's action on the "parcel as a whole," as *Tahoe-Sierra* requires in a regulatory takings case, and it avoided applying the *Penn Central* test.¹⁶⁸

In some takings cases, then, a court avoids finding a physical taking even though a physical invasion plainly occurred, as in *Rose Acre*. In *McCarran*, by contrast, the court treated a regulation that did *not* explicitly authorize a physical invasion as effecting a physical taking, because the ultimate purpose of the regulation was to facilitate a physical invasion. In each case, the court apparently chose the *Tahoe-Sierra* category that it believed would produce a fair outcome, even though the categorization in each case was inaccurate.

2. *Some Courts Explicitly Modify the Rules Articulated in Tahoe-Sierra*

While some courts have avoided the implications of the *Tahoe-Sierra* rules through inaccurate labeling of the category of taking involved,

165. *Id.* (quoting *Griggs v. Allegheny County*, 369 U.S. 84, 90 (1962)) (footnote omitted).

166. *Id.* at 1124.

167. The court repeatedly cited *Tahoe-Sierra*. *Id.* at 1122–24, 1128. The court also asserted that a taking had occurred under *Loretto*. *Id.* at 1130. According to the court, the challenged regulation required the owner to suffer a permanent physical invasion of his property. The court described the case as a "regulatory per se taking" case, like *Loretto*, contrasting it with a regulatory takings case in which the challenged regulation does *not* authorize a physical invasion of the claimant's property. *Id.* at 1122. The court also referred to the case as involving a "per se taking by physical invasion." *Id.*

168. Two justices dissented, arguing that the takings claim should have been analyzed under *Penn Central*. *See id.* at 1131 (Becker, J., dissenting in part and concurring in part); *see also id.* at 1134 (Maupin, J., dissenting).

whether physical or regulatory, other courts have explicitly *modified* the rules to achieve results the judges considered fair.

a. *A Court May Return to the Loretto Rule*

The most common modification is to depart from the *Tahoe-Sierra* rule that a physical invasion by the government (or authorized by the government) necessarily effects a taking, and to return to the narrower *Loretto* rule that only a “permanent” physical invasion by the government (or authorized by the government) necessarily effects a taking.¹⁶⁹ Using this approach, a court faced with a takings challenge to a physical invasion that does *not* seem unfair can hold that no per se taking occurred, since the invasion was merely “temporary.” In *Seiber v. United States*,¹⁷⁰ for example, the U.S. Court of Federal Claims considered the Seibers’ claim that a physical taking had occurred when the government, acting pursuant to the Endangered Species Act, denied them “the right to exclude the northern spotted owl” from their land, because it was a nesting site for this threatened species.¹⁷¹ Responding to the Seibers’ claim, the Court of Federal Claims acknowledged that the Supreme Court in *Tahoe-Sierra* had distinguished physical takings from regulatory takings and had stated that the two categories of takings are to be analyzed quite differently. However, the court asserted in a footnote that the *Tahoe-Sierra* distinction between physical takings and regulatory takings should not be viewed as replacing the *Loretto* distinction between “permanent physical occupations” and other physical invasions. Under the *Loretto* rule, only “permanent physical occupations” are per se takings. Thus, the court reinstated a distinction that the Supreme Court in *Tahoe-Sierra* had not recognized in its statement of the governing rules. Relying on that distinction, the court rejected the Seibers’ physical takings claim, stating that they had not suffered a “permanent” physical invasion. The Court in *Loretto* had characterized a “permanent” physical occupation of property as “forever den[ying] the owner any power to control the use of the property,”¹⁷² and the Court of Federal Claims emphasized that the Seibers had not alleged that the government had “forever” denied them control over the land occupied by the spotted owls.¹⁷³

169. See, e.g., *Seiber v. United States*, 53 Fed. Cl. 570 (2002), *aff’d*, 364 F.3d 1356 (Fed. Cir. 2004); *McCarran Int’l Airport v. Sisolak*, 137 P.3d 1110 (Nev. 2006), *cert. denied*, 127 S. Ct. 1260 (U.S. Feb. 20, 2007).

170. 53 Fed. Cl. 570.

171. *Id.* at 576.

172. *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 436 (1982) (emphasis added).

173. As discussed at *supra* text accompanying notes 150–53, the Federal Circuit Court of Appeals also rejected the physical takings claim in *Seiber*, although it characterized this as a

It is understandable that after the *Tahoe-Sierra* decision, courts seeking to work within the Supreme Court's takings doctrine would be inclined to revert to the *Loretto* rule. After all, the Court in *Tahoe-Sierra* had not even acknowledged that it was departing from its former case law in announcing a general rule that physical invasions are takings, even if they are temporary. Three years after *Tahoe-Sierra*, the Supreme Court in *Lingle* itself reverted to *Loretto*'s distinction between permanent and temporary physical invasions in its summary of takings doctrine. After *Lingle*, lower courts are likely to distinguish between permanent and temporary physical invasions when faced with physical takings claims, and thus, as a practical matter, litigators should be prepared to work with that distinction. The Supreme Court has yet to resolve the *analytical* confusion, however.

Recall that the Court's analysis in *Tahoe-Sierra* hinged on the distinction between *physical invasion* cases and *non-physical invasion* ("regulatory") cases. The Court stated that a temporary regulatory restriction, such as the development moratorium challenged in *Tahoe-Sierra*, is not analogous to a temporary physical restriction, which would be compensable. The line the Court drew in *Tahoe-Sierra* between physical invasion cases and non-physical invasion cases is quite different than the line it had previously drawn in *Loretto*. There, the Court had distinguished permanent physical invasions from other types of governmental action, including both temporary physical invasions and regulations restricting the claimant's own use of his property.

The Supreme Court needs to explain which analytical line is significant and why. Is the relevant distinction between physical and nonphysical governmental action, or is the relevant distinction between permanent physical invasions and other types of governmental action? If permanent and temporary physical invasions should be treated differently, what does the Court mean by "permanent"? For example, in *Loretto*, the Court characterized an "easement of passage" as a *temporary* physical invasion.¹⁷⁴ In *Nollan*, by contrast, the Court characterized a similar easement as a *permanent* physical occupation.¹⁷⁵

In my view, the temporary or permanent nature of the governmental action is not the critical issue, regardless of whether the government's action is a physical invasion. In each context, one must consider *why* the government deprived the claimant of his property: was the government merely seeking to prevent or punish blameworthy conduct by the claimant?

"regulatory" case and asserted that "governmental protection of owls . . . is not comparable to a government authorization to third parties to utilize property." *Seiber v. United States*, 364 F.3d 1356, 1367 (Fed. Cir. 2004).

174. *Loretto*, 458 U.S. at 433.

175. *Nollan v. Cal. Coastal Comm'n*, 483 U.S. 825, 831-32 (1987).

b. A Court May Find That No Taking Occurred Because the Claimant Was at Fault or Because the Lucas Nuisance Exception Applied

In at least one post-*Tahoe-Sierra* case, *John R. Sand & Gravel Co. v. United States*,¹⁷⁶ the court focused on the blameworthiness of the claimant's conduct in concluding that a physical invasion by the government was not a taking, despite the rules articulated in *Tahoe-Sierra*. The claimant, John R. Sand & Gravel, alleged that the Environmental Protection Agency (EPA) and its agents had committed a physical taking of part of a 158-acre parcel of land that John R. Sand & Gravel had leased in 1969 for fifty years for the purpose of mining sand and gravel.¹⁷⁷ Although the terms of the lease entitled John R. Sand & Gravel to "exclusive use" of the property,¹⁷⁸ John R. Sand & Gravel had permitted the lessor to continue to operate a landfill on the northern portion of the property from 1969 until 1980.¹⁷⁹ During its years of operation, the landfill "illegally accepted solid and liquid industrial waste in 55-gallon drums," with the result that "[t]ens of thousands of such drums are currently buried on the site."¹⁸⁰ The EPA determined that remedial action was necessary, "includ[ing] installing a landfill cap system to prevent further contamination of the aquifers by the wastes dumped in Metamora Landfill and a fence around the landfill to restrict access to the site,"¹⁸¹ and it prohibited John R. Sand & Gravel from mining within the restricted area. John R. Sand & Gravel filed suit, alleging that the EPA's physical intrusion onto the leased premises constituted a physical taking of its property.

Relying on the nuisance exception articulated in *Lucas*, the government argued that no taking had occurred, because the EPA was abating nuisance-like conduct. John R. Sand & Gravel responded that *Lucas* was not on point, since that was a regulatory takings case, and under *Tahoe-Sierra*, "precedents from regulatory takings are not applicable to physical takings and vice versa."¹⁸² The Court of Federal

176. *John R. Sand & Gravel Co. v. United States*, 60 Fed. Cl. 230, 237 (2004) (pre-trial ruling), 62 Fed. Cl. 556 (2006) (post-trial ruling), *vacated and remanded by* 457 F.3d 1345 (Fed. Cir. 2006), *cert. granted*, 75 U.S.L.W. 3626 (U.S. May 29, 2007) (No. 06-1164) (grant of certiorari limited to statute of limitations issue). See *infra* note 190 for a discussion of the court of appeals' decision.

177. *John R. Sand & Gravel*, 62 Fed. Cl. at 557-58.

178. *Id.* at 564.

179. *Id.* at 559-60.

180. *John R. Sand & Gravel*, 457 F.3d at 1347 (restating facts set forth in Court of Federal Claims decision).

181. *Id.* at 1348.

182. *John R. Sand & Gravel Co. v. United States*, 60 Fed. Cl. 230, 237 (2004) (pre-trial ruling), 62 Fed. Cl. 556 (2006) (post-trial ruling), *vacated and remanded by* 457 F.3d 1345 (Fed. Cir. 2006), *cert. granted*, 75 U.S.L.W. 3626 (U.S. May 29, 2007) (No. 06-1164) (grant of certiorari limited to statute of limitations issue).

Claims acknowledged that the Supreme Court in *Tahoe-Sierra* had declared it “inappropriate to treat cases involving physical takings as controlling precedents for the evaluation of a claim that there has been a ‘regulatory taking,’ and vice versa.”¹⁸³ Nonetheless, the Court of Federal Claims concluded that it was permissible to use the reasoning of *Lucas*, a regulatory takings case, to analyze a physical takings claim, because *Lucas*’ reasoning addressed the nature of the claimant’s property interest:

[T]he *Lucas* articulation of the background principles [of nuisance and property law] exception can apply to physical takings. In both physical and regulatory takings cases, just compensation will not be due if the exercise of a “property right” asserted by the owner was prohibited by state property law and could have been abated by a private party under the state’s private nuisance law or by the government under its power to abate public nuisances. When the government “takes” property, it can only take what the owner possesses. If the state property law can effect the abatement that is the basis for his takings claim, then the property owner cannot recover because nothing in his “bundle of rights that are commonly characterized as property” has been taken.¹⁸⁴

The court reasoned that this threshold inquiry regarding the nature of the claimant’s property logically was relevant in a physical takings case as well as in a regulatory takings case. Thus, even though the government admittedly had physically invaded the claimant’s land, the court concluded that because of the *Lucas* exception, a taking had not necessarily occurred.

In a subsequent opinion, the Court of Federal Claims held that indeed no taking had occurred.¹⁸⁵ Wholly independent of the *Lucas* exception, the court based its ruling on the conclusion that fairness did not require the payment of compensation, because the claimant had helped to create the problem that the government sought to remedy through its physical entry onto the leased premises. The court stated:

John R. Sand’s own actions (allowing the Landfill operation to continue on its property and cooperating with the Landfill operation) contributed to the problem (a landfill encompassing a hazardous waste site) that the government sought to solve by remediating the site and, in the process of remediation, excluding plaintiff from a portion of its leasehold.¹⁸⁶

183. *Id.* (quoting *Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg’l Planning Agency*, 535 U.S. 302, 323–24 (2002)).

184. *Id.* at 239 (citation omitted).

185. *John R. Sand & Gravel Co. v. United States*, 62 Fed. Cl. 556 (2006) (post-trial ruling), *vacated and remanded by* 457 F.3d 1345 (Fed. Cir. 2006), *cert. granted*, 75 U.S.L.W. 3626 (U.S. May 29, 2007) (No. 06-1164) (grant of certiorari limited to statute of limitations issue).

186. *Id.* at 571.

Distinguishing cases cited by the claimant, the court concluded that John R. Sand & Gravel's "participation in the Landfill operation and acquiescence in its presence on its leasehold preclude a finding that plaintiff is an *innocent* landowner."¹⁸⁷ Consequently, "[j]ustice and fairness do not require that the community at large bear the burden of plaintiff's inability to mine a portion of its leasehold when plaintiff contributed to the circumstances causing the loss of the right to mine."¹⁸⁸ Thus, despite the rules announced in *Tahoe-Sierra*, the court decided that a physical invasion designed to address blameworthy conduct by the claimant was not a taking.¹⁸⁹

As an alternative ground for decision, the court found that no taking occurred because of the *Lucas* exception. The court determined that at the time the physical invasion occurred, John R. Sand & Gravel could have been found guilty of violating certain Michigan environmental statutes and of committing a nuisance, and that under state law, the government could have addressed these violations through a physical entry. Thus, no taking occurred, because at the time of the alleged taking, the claimant's property rights under state law did not include the right to use the land in the manner sought by the claimant.¹⁹⁰

In applying the *Lucas* exception, the court emphasized that John R. Sand & Gravel controlled the leased property and contributed to creating the serious problem the EPA was attempting to solve. In many respects, the court seemed to be repeating its judgment that the company's conduct was blameworthy, although the court's alternate approach emphasized that under both Michigan nuisance law and Michigan environmental statutes the company's conduct was considered blameworthy. However, the court's focus on the blameworthiness of the claimant's conduct is not entirely consistent with the Supreme Court's analysis in *Lucas*.

The *Lucas* nuisance exception is premised on the notion that the bundle of sticks the claimant obtained when he acquired his interest in the property never contained the stick the claimant says the government "took" from his bundle. The Supreme Court in *Lucas* spoke of "the 'bundle of rights' that [landowners] acquire *when they obtain title* to

187. *Id.* at 572 (emphasis added). The court emphasized that "John R. Sand permitted the Landfill to exist on its own leasehold, coordinated landfilling activities with the Landfill operators, and observed barrels containing hazardous materials being dumped on the leasehold property." *Id.* at 571-72.

188. *Id.* at 572.

189. The court emphasized that the plaintiff's lack of innocence "defeat[ed] plaintiff's claim in its entirety." *Id.*

190. On appeal, the Court of Appeals for the Federal Circuit did not reach either basis for the district court's decision on the merits. Rather, the divided panel concluded that the takings claim was barred by the statute of limitations. See *John R. Sand & Gravel*, 457 F.3d 1345.

property.”¹⁹¹ In formulating the *Lucas* exception, the Court stated: “Where the State seeks to sustain regulation that deprives land of all economically beneficial use, we think it may resist compensation only if the logically antecedent inquiry into the nature of the owner’s estate shows that the proscribed use interests were *not part of his title to begin with*.”¹⁹² Thus, the Court apparently was focusing on whether it could be shown that *at the time the claimant acquired his property interest*, state law already precluded him from using his land in the now-proscribed manner. It appeared that the issue was one of timing: what rights did the claimant acquire under state law at the time he acquired his interest in the property? However, the *Lucas* Court also spoke of whether the proscribed use was “*always unlawful*,”¹⁹³ as if restrictions that fall within the *Lucas* exception must have existed from time immemorial—or at least must have existed long before the claimant acquired his interest in the property. Frankly, it is difficult to determine exactly what the Court had in mind in *Lucas*. It is clear, however, that the Court was not just focusing on the provisions of state law *at the time of the alleged taking*. The Court in *Lucas* explicitly distinguished “pre-existing” limitations on the landowner’s title (those in place when he acquired the property) from “newly legislated or decreed” restrictions.¹⁹⁴

In *Palazzolo v. Rhode Island*,¹⁹⁵ the Supreme Court again considered the scope of the *Lucas* exception. The Court stated that it had used the term “background principle of the State’s law of property and nuisance” in *Lucas* to describe “common, shared understandings of permissible limitations derived from a State’s legal tradition.”¹⁹⁶ This plainly would at least include common law nuisance doctrine. However, the Court stated that in the case before it, it had no occasion “to consider the precise circumstances when a *legislative* enactment can be deemed a background principle of state law,”¹⁹⁷ except to say that “a regulation that otherwise would be unconstitutional absent compensation is not transformed into a background principle of the State’s law by mere virtue of the passage of title.”¹⁹⁸ Prior to *Palazzolo*, it seemed that in constructing the *Lucas* exception, the Court was focusing on the provisions of state law at the time the claimant acquired the property. The *Lucas* exception seemed to be based on the argument: “You did not suffer a taking when you lost that stick, because you actually did not acquire that stick when you

191. *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1027 (1992) (emphasis added).

192. *Id.* (emphasis added).

193. *Id.* at 1030.

194. *Id.* at 1028–29.

195. 533 U.S. 606 (2001).

196. *Id.* at 630.

197. *Id.* at 629 (emphasis added).

198. *Id.* at 630.

acquired your interest in the property.” In *Palazzolo*, however, the Court decided that under the *Lucas* exception, the government cannot defend against a takings claim by saying to the claimant, “You never had that stick in your bundle,” if the missing stick was unfairly “taken” from the bundle without compensation *before* the claimant acquired the property. Of course, this takes us back to the original question of when removing a stick from the bundle *is* a “taking.” Thus, the logic of the *Lucas* exception is difficult to follow.

Although the substance of the *Lucas* exception is not entirely clear, it does seem that the Court of Federal Claims in *John R. Sand & Gravel* applied the *Lucas* exception incorrectly. The court focused on Michigan law *at the time the government physically entered the leased property*, rather than seeking to ascertain background principles that either had “always” existed in Michigan, or at least had existed at the time John R. Sand & Gravel acquired its “bundle of sticks” back in 1969. The court did not simply rely on long-standing common law nuisance principles in Michigan. It also cited Michigan environmental statutes that may not have existed at the time John R. Sand & Gravel signed the lease in 1969, and certainly did not “always” exist in Michigan.

The Court of Federal Claims used the *Lucas* exception to return to issues of blame as it discussed John R. Sand & Gravel’s violation of both common law nuisance principles and Michigan environmental statutes. However, the Court in *Lucas* had sought to *avoid* issues of blame, since it sought a takings test that would be “objective” and “value free.”¹⁹⁹ The Court preferred to focus on whether the claimant had ever had the stick he claimed to have lost, rather than asking whether the government was seeking to prevent blameworthy conduct.

In my view, considering whether the government deprived the claimant of his property to prevent or punish blameworthy conduct better captures the fairness inquiry at the core of takings cases than the Court’s approach in *Lucas* does. Admittedly, focusing on blameworthiness is not a “value free” approach, but it is hard to imagine how the issue of fairness could be resolved in a “value free” manner. Moreover, focusing on blameworthiness enables us to better understand the outcomes in a broad range of takings cases.

Consider a case in which a newly enacted state environmental statute deprives a landowner of the right to use his land in a manner that had previously been permissible. If the state legislature enacted the law reasonably believing the people of that state considered the prohibited conduct to be wrong, why would fairness require the payment of

199. *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1026 (1992).

compensation? Under *Lucas*, a taking might occur here.²⁰⁰ In *Mugler*, however, the Supreme Court reasoned that moral judgments change over time, and that fairness does not require the payment of compensation to property owners who are prohibited from acting in a manner that is considered wrongful at the time of the prohibition, even if, as in *Mugler*, the proscribed conduct was legal at the time the claimant acquired its property. The Court explained that lawmakers must be free to enact laws that reflect changing moral judgments without the requirement of compensation:

The power which the states have of prohibiting such use by individuals of their property, as will be prejudicial to the health, the morals, or the safety of the public, is not, and, consistently with the existence and safety of organized society, cannot be, burdened with the condition that the state must compensate such individual owners for pecuniary losses they may sustain, by reason of their not being permitted, by a noxious use of their property, to inflict injury upon the community. . . . It is true, when the defendants in these cases purchased or erected their breweries, the laws of the state did not forbid the manufacture of intoxicating liquors. But *the state did not thereby give any assurance, or come under an obligation, that its legislation upon that subject would remain unchanged.*²⁰¹

The Court in *Mugler* relied on the “fundamental principle that every one shall so use his own [property] as not to *wrong* and injure another,”²⁰² contrasting cases of wrongdoing with cases in which “unoffending property is taken away from an *innocent owner*.”²⁰³

Although the Court in *Lucas* sought to avoid issues of blame, the *Lucas* exception incorporates judgments of blame to some degree. It provides, at a minimum, that no taking occurs if the proscribed conduct would “always” have been considered a common law nuisance, and judgments of blame are made in common law nuisance cases. However, they certainly are not limited to that context. Justice Blackmun, dissenting in *Lucas*, pointed out that “[t]he brewery closed in *Mugler* itself was not a common-law nuisance” and that in prior cases, the Court “explicitly had *rejected* the contention that the government’s power to act without paying compensation turns on whether the prohibited activity

200. If the law deprived the landowner of all economically viable use of his land and the newly enacted environmental law prohibited conduct that did not violate common law nuisance doctrine or other “background principles,” then a taking would occur, even if the state legislature was proscribing conduct that it reasonably believed the people of that state considered wrongful.

201. *Mugler v. Kansas*, 123 U.S. 623, 669 (1887) (emphasis added).

202. *Id.* at 667 (emphasis added) (quoting *Fertilizing Co. v. Hyde Park*, 97 U.S. 659, 667 (1878)).

203. *Id.* at 669 (emphasis added).

is a common-law nuisance.”²⁰⁴ Similarly, Justice Kennedy, concurring in the judgment in *Lucas*, wrote that “[t]he common law of nuisance is *too narrow* a confine for the exercise of regulatory power in a complex and interdependent society” and that “[t]he Takings Clause does not require a *static* body of state property law.”²⁰⁵ Justice Stevens, dissenting in *Lucas*, also focused on changing public values. He recognized that property rights may be redefined as moral judgments change. “Thus, when the Nation came to understand that slavery was morally wrong and mandated the emancipation of all slaves, it, in effect, redefined ‘property.’”²⁰⁶ On a lesser scale, he argued, newly enacted environmental laws, such as those protecting endangered species from harm, reflect evolving public values.²⁰⁷

Justice Stevens might have taken this analysis one step further in *Tahoe-Sierra* by using the concept of evolving judgments of blame to explain why a moratorium on development designed to save Lake Tahoe was not a taking.²⁰⁸ Just as many people today would blame a landowner who deliberately harms an endangered species, many would also blame a landowner who insists on acting in a manner that will damage a treasured national resource, such as Lake Tahoe. The claimants in *Tahoe-Sierra* argued that the government had acted unfairly in delaying their development plans for thirty-two months while it devised a plan to save the clarity of Lake Tahoe. However, the government was seeking to solve a problem caused by landowners building around the lake.²⁰⁹ Thus, the claimants were not wholly “innocent” landowners, even if their proposed conduct would not have been labeled a “nuisance” under the common law.²¹⁰ Nevertheless, the district court found a taking under *Lucas*, since

204. *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1052 (1992) (Blackmun, J., dissenting) (emphasis added).

205. *Id.* at 1035 (Kennedy, J., concurring in the judgment) (citation omitted) (emphasis added).

206. *Id.* at 1069 (Stevens, J., dissenting).

207. *Id.*

208. As I explained in an earlier article, judgments of blame change over time and vary geographically, and the Court’s takings decisions take into account that variation. Peterson, *supra* note 49, at 110–15. For example, the Court found that no taking occurred in *Mugler* because “the challenged law represented the judgment ‘of the people [of Kansas] as expressed by their chosen representatives’ that the manufacture of alcoholic beverages should be prohibited ‘to guard the community against the evils attending the excessive use of such liquors,’ . . . even though that judgment of blame was not in line with national values at the time.” *Id.* at 113 (quoting *Mugler v. Kansas*, 123 U.S. 623, 662 (1887) (alteration in original)).

209. Moreover, the district court found that the government acted reasonably and in good faith in its planning efforts. *See Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg’l Planning Agency*, 34 F. Supp. 2d 1226, 1248 (D. Nev. 1999), *rev’d in part and remanded in part by* 216 F.3d 764 (9th Cir. 2000), *aff’d*, 535 U.S. 302 (2002).

210. It is true that some landowners may have bought land adjoining Lake Tahoe, intending to build on that land, at a time when the harm to the lake caused by building was not evident. Their intentions at that time could fairly be characterized as “innocent.” Yet when new

the claimants had been deprived of all economically viable use of their land during the moratorium and the government's action did not fall within the *Lucas* nuisance exception.²¹¹

The Supreme Court could have addressed the problems created by the undue narrowness of the *Lucas* exception in *Tahoe-Sierra*. Instead, Justice Stevens avoided finding a taking by an entirely different route. He announced that physical and regulatory takings claims must be analyzed completely differently, and that although a physical taking of even a portion of the claimant's property requires compensation, a regulatory takings claim must be analyzed with respect to the "parcel as a whole," both geographically and *temporally*. Thus, he was able to conclude that no taking had occurred under *Lucas* because the government had not deprived the landowners of all economically viable use of their parcels of land *forever*.²¹²

Justice Stevens sought to achieve a fair result in *Tahoe-Sierra*. He may also have sought to reduce greatly the range of cases in which a taking could be found under the poorly conceived *Lucas* per se rule. However, he arrived at the result he sought in an analytically unsound manner—by creating an unjustified analytical divide between physical and regulatory takings.

3. *Some Courts Are Understandably Confused about Whether to Analyze Takings Cases Involving Conditional Physical Invasions as Physical or Regulatory Takings Cases*

As discussed above, in some cases, judges have purported to apply the *Tahoe-Sierra* rules, yet have labeled the governmental action as either regulatory or physical in an inaccurate manner, apparently in order to arrive at results they considered fair. In other cases, courts explicitly have modified the rules articulated in *Tahoe-Sierra*. Finally, in a number

information established the harm to the lake caused by building and the landowners nevertheless insisted on building without giving the government time to arrive at a solution to the problem, those landowners could reasonably be blamed.

Similarly, suppose a manufacturer invested in a product that originally was not considered unhealthy. Later, new scientific information revealed that the product posed a substantial health risk, and the product was banned. Professor Sax refers to such a case as one involving an "innocent" victim of change. See Joseph L. Sax, *Reflections on Western Water Law*, 34 *ECOLOGY L.Q.* 299, 303 (2007). Yet, even if the manufacturer was innocent in producing the product originally, the manufacturer could reasonably be blamed for *continuing* to produce the product once its health risks became known.

211. *Tahoe-Sierra*, 34 F. Supp. 2d at 1245, 1248.

212. The Court stated that the *Lucas* rule applies only to a regulation that "*permanently* deprives property of all value" and that "[l]ogically, a fee simple estate cannot be rendered valueless by a *temporary* prohibition on economic use, because the property will recover value as soon as the prohibition is lifted." *Tahoe-Sierra*, 535 U.S. at 332 (emphasis added).

of post-*Tahoe-Sierra* cases, courts have expressed genuine confusion over whether to categorize the alleged taking as regulatory or physical.²¹³

Dakota, Minnesota & Eastern Railroad Corp. v. South Dakota,²¹⁴ provides an example of such confusion. In *Dakota*, a federal district court considered a takings challenge to a South Dakota statute that altered the eminent domain powers historically delegated to railroads. The statute required railroads to provide *free* easements to electric utilities, public utilities, telecommunication companies, and rural water systems on land they acquired through eminent domain. The claimant railroad argued that a compelled grant of a free easement would effect a taking. The court began its analysis of the railroad's claim by reviewing *Tahoe-Sierra's* physical versus regulatory dichotomy:

As the United States Supreme Court recently made clear, there are two veins of constitutional analysis in the area of takings law. In *Tahoe-Sierra* . . . the Court recognized the “longstanding distinction between acquisitions of property for public use, on the one hand, and regulations prohibiting private uses on the other.” The Court explained that it is inappropriate to use the “regulatory takings” analysis for cases involving physical takings, and vice versa.²¹⁵

The court remarked that given the different treatment of the two categories, it was not surprising that the railroad argued that this was a physical takings case, while the government claimed it was a regulatory takings case.²¹⁶ The court acknowledged that if the government forced the railroad to grant an easement, this would create a “permanent physical occupation of its property by the easement holder.”²¹⁷ On the other hand, the government would not force the railroad to grant an easement “outright.” Rather, it would force the railroad to grant an easement “*condition*” of the railroad exercising the power of eminent domain. Therefore, the court concluded that the case was “more akin to the regulatory takings cases.”²¹⁸

The court decided to classify the case as a regulatory takings case because it seemed analogous to the Supreme Court's development

213. See, e.g., *Philip Morris, Inc. v. Reilly*, 312 F.3d 24 (1st Cir. 2002) (considering whether an alleged taking of trade secrets should be analyzed as a physical or a regulatory takings claim and, more particularly, how to analyze a takings case in which the challenged regulation would deprive the claimant of the right to exclude others from its intellectual property only as a *condition* of selling its products in the state); *Dakota, Minn. & E. R.R. Corp. v. South Dakota*, 236 F. Supp. 2d 989 (D.S.D. 2002), *aff'd in part, vacated in part, and remanded by* 362 F.3d 512 (8th Cir. 2004).

214. 236 F. Supp. 2d 989.

215. *Id.* at 1026 (quoting *Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency*, 535 U.S. 302, 323 (2005)).

216. *Id.*

217. *Id.*

218. *Id.*

exaction cases, *Nollan* and *Dolan*.²¹⁹ In *Nollan*, the Court did not simply find that the forced dedication of an easement was a physical taking. Rather, the Court focused on the rationale for the exaction, inquiring whether the government had exacted the easement to mitigate harm that the Nollans' proposed development otherwise would have created. Similarly, in *Dolan*, the Court focused on whether the exaction was "related both in nature and extent to the impact of the proposed development."²²⁰ The district court in *Dakota* characterized this approach as "regulatory takings analysis." The court decided that the governmental action at issue was similarly "regulatory" in nature, although the government was "not regulating the use of land, but rather its acquisition."²²¹ The court then considered the government's *justification* for forcing the railroads to grant free easements and concluded that it did not meet the standards set out in *Nollan* and *Dolan*. Although the South Dakota legislature had expressed concern over railroads charging excessive fees to utilities for easements, this did not justify forcing railroads to provide easements for free.

The district court apparently was not entirely sure that the court of appeals would accept its labeling of the case as regulatory, as it also provided an "alternative holding," stating that "the outcome would be the same under the analysis for physical takings cases."²²² Since the statute required "the permanent physical occupation by way of a free easement of land acquired by the railroad," the court concluded that a taking could also be found under *Loretto*.²²³

On appeal, the Eighth Circuit Court of Appeals questioned whether the state legislature actually had meant to require the provision of *free* easements, but said that if it had, then "the end result appears to be a *permanent physical taking* of a property interest."²²⁴ Thus, the court of appeals apparently regarded this as a physical takings case, not a regulatory takings case.

This case highlights an important analytical problem with the *Tahoe-Sierra* dichotomy between physical and regulatory takings. Consider a case like *Nollan*. The government, in effect, said to the Nollans: "Either you can't build a single-family home on your land *or* you must give up a free easement of access to the public." Thus, the Nollans had to *either* accept a *regulatory restriction* on their own use of their land *or* permit a

219. *Id.* at 1026–29 (citing *Nollan v. Cal. Coastal Comm'n*, 483 U.S. 825 (1987) and *Dolan v. City of Tigard*, 512 U.S. 374 (1994)).

220. *Dolan*, 512 U.S. at 391.

221. *Dakota, Minn. & E. R.R. Corp. v. South Dakota*, 236 F. Supp. 2d 989, 1026 (D.S.D. 2002), *aff'd in part, vacated in part, and remanded by* 362 F.3d 512 (8th Cir. 2004).

222. *Id.* at 1029.

223. *Id.*

224. *Dakota*, 362 F.3d at 521 (emphasis added).

physical invasion of their land. Is that a regulatory takings case or a physical takings case under the *Tahoe-Sierra* rules?

In *Tahoe-Sierra*, Justice Stevens did not consider how to categorize a takings challenge to a law that requires the claimant to submit to a physical invasion *or* a restriction on the use of his property. He simply treated physical and regulatory claims as readily distinguishable. Perhaps Stevens would say that the access exaction in *Nollan* should not be considered a physical taking because the government gave the Nollans a choice: they could choose not to build on their land and thus avoid giving up an easement. However, one could make the same argument in *Loretto*. If Loretto had chosen to stop renting her building, she would no longer have been obligated to have the cable facilities remain on her building. In *Loretto*, the Court concluded that the claimant's ability to avoid the physical invasion did not matter; but in *Nollan*, the Court said that it did matter.²²⁵ Thus, the Court has not been consistent in deciding whether to characterize a conditional physical invasion as a physical taking.

The issue of how a conditional physical invasion should be analyzed is important. It logically would arise in a broad range of settings because the government generally requires a private property owner to submit to a physical invasion of his land or other tangible resource only *in certain circumstances*. For example, *if* you run a factory, you must submit to health and safety inspections. *If* you want to build a large residential subdivision, you may have to provide land for parks to meet the new residents' needs.

Under my view of takings cases, this does not present analytical difficulties. There is no need to categorize a claim as a physical or a regulatory takings claim, since the same principles apply in all cases. On the facts of *Dakota*, I would ask whether the state legislature had a plausible basis for blaming railroads for not giving up free easements to utilities on land the railroads acquired through eminent domain. While the state legislature blamed railroads for charging *excessive fees* for such easements, that does not explain why the railroads should be required to provide *free* easements. Indeed, the legislature later addressed the logical disconnect between the terms of the statute and its rationale by amending

225. In *Loretto*, the Court found a per se taking, even though the landlord could avoid the physical occupation, stating that "a landlord's ability to rent his property may not be conditioned on his forfeiting the right to compensation for a physical occupation." *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 439 n.17 (1982). Similarly, the Court might have responded in *Nollan* that "a [landowner]'s ability to [build on] his property may not be conditioned on his forfeiting the right to compensation for a physical occupation." Instead, however, the Court stated that the *Loretto* per se rule would have applied if the government had simply required the Nollans to dedicate an easement, but since the Nollans only had to dedicate an easement *if* they wished to build, the *Loretto* per se rule did not apply. *Nollan v. Cal. Coastal Comm'n*, 483 U.S. 825, 831-37 (1987).

the statute to provide that the railroads could only charge “a reasonable fee” for easements.²²⁶

Under the *Tahoe-Sierra* rules, unlike my approach, a strict dichotomy exists between physical and regulatory cases, and the mode of analysis differs depending on the nature of the taking. Before announcing that physical and regulatory takings must be analyzed differently, Justice Stevens should have considered how a court, applying his approach, should categorize a case in which the claimant has a *choice* of abiding by a regulatory restriction on the use of his property or submitting to a physical invasion.

Those familiar with the Supreme Court’s takings cases will undoubtedly respond that cases in which the claimant must make such a choice are exaction cases, governed by *Nollan* and *Dolan*. Indeed, in *Lingle*, after reciting the physical versus regulatory dichotomy from *Tahoe-Sierra*,²²⁷ the Court described the *Nollan* and *Dolan* tests as applying to the “special context” of land use exactions. But, what is the principled basis for recognizing this “special” category of takings cases? And what cases should we view as falling within this special category? For example, should *Dakota* be analyzed under *Nollan* and *Dolan* even though it did not involve a *land use* exaction? Did *Loretto* essentially involve an exaction imposed on landlords? If all conditional physical invasions should be analyzed in the same manner, how broad will the category of “conditional physical invasions” be? Why would that category not include the case of the factory owner who must submit to physical invasions by governmental officials making health and safety inspections *if* he wants to run a factory?

Cases involving conditional physical invasions highlight a fundamental problem with the *Tahoe-Sierra* mode of analysis. It divides all takings claims into physical and regulatory cases, yet it is difficult to find a principled basis for treating the two types of cases in an entirely different manner.

CONCLUSION

Justice Stevens, author of *Tahoe-Sierra*, had the right instincts. He felt that fairness would require compensation if the government took even part of someone’s tangible property to promote the common good. However, he thought that governmental regulation of owners’ use of their own property usually is fair and should not require the payment of compensation. Responding to that insight, Stevens formulated a rule that drew an analytical distinction between physical takings (requiring

226. *Dakota, Minn. & E. R.R. Corp. v. Rounds*, 422 F. Supp. 2d 1073, 1074 (D.S.D. 2006).

227. As discussed above, the Court in *Lingle* seemed to be reinterpreting “physical” to mean “permanent physical invasion.” See *supra* text accompanying notes 135–37.

2007]

THE FALSE DICHOTOMY

441

compensation even if the government took just part of someone's thing) and regulatory takings (requiring analysis of the government's effect on the whole thing). That distinction, however, does not make sense, and cases trying to apply it illustrate some of the problems with Justice Stevens' approach.

In future takings decisions, the Supreme Court should focus more directly on the government's *justification* for depriving the claimant of his property, whether the government takes just a little bit or the whole thing. Even when the government has physically taken the claimant's property, the government's justification for its action may establish that fairness does not require the payment of compensation. Moreover, even when the government has merely regulated the claimant's use of his own property, fairness may require that compensation be paid.

