WHY IS THE MAGNITUDE OF A REGULATION RELEVANT TO DETERMINING WHETHER IT TAKES PROPERTY?

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I. INTRODUCTION

The Fifth Amendment of the U.S. Constitution requires the government to pay just compensation when it takes private property for public use.[1] When the government formally takes ownership of private property it clearly must pay compensation, regardless of how much property it takes.[2] The value of the property determines how much compensation is just, but not whether compensation is due in the first place. And the value of the property taken in relation to value of the private owner's property as a whole is irrelevant.

But when the government takes private property by regulating it rather than by formally taking ownership, the government may not have to pay compensation. Courts determine whether the regulation is a taking, requiring payment of compensation, by considering the magnitude and character of the regulatory burden and how it is distributed among property owners.[3] A regulation that deprives the owner of all economically viable use of the property as a whole is a compensable taking, unless the owner did not really have the right to use the property in a viable way under background principles of state law.[4] A regulation that deprives the owner of a high percentage of the whole property's value is more likely to be a compensable taking than a regulation that deprives the owner of a small percentage of that value.

This article considers why the government must pay compensation for even small parts of larger parcels of land when it formally takes ownership of the land, but does not have to pay compensation when regulation deprives the owner of a small part of the use and value of a parcel of land. In other words, it considers why the magnitude of the regulation's economic impact is relevant to the decision whether the regulation is a taking. In Part II, I describe four possible explanations that appear in the U.S. Supreme Court's opinions: (1) requiring compensation for all regulatory deprivations would simply prevent effective government; (2) the larger the economic impact, the more

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1. U.S. CONST. amend. V.

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

3. *See* Lingle v. Chevron U.S.A., Inc., 544 U.S. 528, 542 (2005); Penn Cent. Transp. Co. v. New York, 438 U.S. 104, 124 (1978).

4. Lucas v. South Carolina Coastal Council, 505 U.S. 1003, 1019, 1027 (1992).

disproportional and unfair the regulatory burden; (3) the larger the economic impact, the more the regulation is functionally equivalent to the exercise of eminent domain; and (4) unless its economic impact is too large, a police power regulation of land is merely the exercise of a reserved power that qualifies all private property ownership and therefore takes nothing that actually belonged to the private owner. In Part III, I compare the practical and theoretical strengths and weaknesses of these four explanations. In Part IV, I conclude that, even though the Supreme Court has most recently emphasized functional equivalence as a justification for magnitude considerations, the best explanation, practically and theoretically, is that regulations of smaller magnitude are exercises of a reserved power qualifying property titles and therefore take nothing from the owner.

II. FOUR EXPLANATIONS OF WHY MAGNITUDE IS RELEVANT

The Fifth Amendment simply says that private property shall not be "taken" for public use without just compensation.[5] This clause itself does not suggest a magnitude consideration. Regardless of how much property the government takes, it must pay just compensation for whatever it took, although the amount of compensation obviously will increase with the amount or value of the property taken.

Regulations can take property without an official declaration that the property belongs to the government. The prevailing understanding of "property" is that it signifies legal rights in relation to things, not the things themselves.[6] By requiring or prohibiting certain acts in relation to property, regulation may take property for the benefit of the public. Practically, regulations will never take all of a person's property. But just as the government must pay just compensation when it takes one acre of an owner's 10,000-acre ranch, one might reason that the government must pay compensation when it takes only some of an owner's pre-existing property rights.

But that is not today's law of regulatory takings. Instead, courts consider the magnitude of the regulatory burden: what rights were taken (and consequently how much property value was

5. U.S. CONST. amend. V.

6. *See, e.g.*, United States v. Gen. Motors Corp., 323 U.S. 373, 377-78 (1945) (describing as "more accurate" an understanding of "property" as "the group of rights inhering in the citizen's relation to the physical thing, as the right to possess, use and dispose of it").

taken) in relation to what rights the owner retained. The greater the relative extent of the deprivation, the more likely the regulation will be considered a compensable taking.[7]

A. The Practical Explanation: Requiring Compensation for All Regulatory Property Deprivations Would Be Too Expensive

One explanation the U.S. Supreme Court has suggested for considering magnitude is simply that government could not possibly afford to pay compensation for all takings of recognized property rights. In *Pennsylvania Coal Co. v. Mahon*,[8] the Court said that when an exercise of the police power "reaches a certain magnitude, in most if not in all cases there must be an exercise of eminent domain and compensation to sustain the act."[9] One of the Court's reasons for this conclusion was that "[g]overnment hardly could go on if to some extent values incident to property could not be diminished without paying for every such change in the general law."[10] The Supreme Court in *Lucas v. South Carolina Coastal Council* referred to this justification as "the *functional* basis for permitting the government, by regulation, to affect property values without compensation."[11] I will refer to it as the practical explanation of why magnitude is relevant.

B. The Distributional Explanation: The Larger the Regulatory Burden, the More Likely the Regulation Is Disproportional and Unfair

Another reason that the magnitude of the economic impact may matter is that it may help indicate when a regulatory burden is disproportional and unfair. I will refer to this explanation as the distributional explanation.

The Supreme Court has emphasized that the Just Compensation Clause is intended to avoid disproportional and unfair burdens on individual property owners. The Court has said many times that the purpose of the Just Compensation Clause is "to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should

7. *See, e.g.*, *Penn Central*, 438 U.S. at 130–31.
8. 260 U.S. 393 (1922).
9. *Id.* at 413.
10. *Id.*
11. 505 U.S. 1003, 1018 (1992).

be borne by the public as a whole."[12] In *Penn Central Transportation Co. v. City of New York*, the Court indicated that a regulatory taking occurs "when 'justice and fairness' require that economic injuries caused by public action be compensated by the government, rather than remain disproportionately concentrated on a few persons."[13] In its more recent opinion in *Lingle v. Chevron U.S.A.*, the Court tried to clarify the relevant considerations in regulatory takings, again quoting the previous statement and stressing that the relevant considerations are "the magnitude or character of the burden" and "how any regulatory burden is distributed among property owners."[14]

Although this principle has been expressed and understood in different ways, the common denominator is that a regulatory burden is considered a taking if it is unfair: unfair because the public should bear the burden, because it is disproportional, because the burdened owner is unfairly targeted, because the owner is burdened but receives no reciprocal or compensating benefit.[15]

To decide whether a regulatory burden is fairly distributed, one must consider who bears the burden, how much of a burden they bear, and why the burden is placed on them. The larger the burden, the more unusual. The more unusual the burden, the more likely it is to be unfair to require some individuals to bear the burden rather than for the public as a whole to bear it.[16] As the Court observed in *Lucas*, when the burden is so great that it denies any "productive or economically beneficial use of land," then "it is less realistic to indulge our usual assumption that the legislature is simply 'adjusting the benefits and burdens of

12. Armstrong v. United States, 364 U.S. 40, 49 (1960); *accord* Arkansas Game & Fish Comm'n v. United States, 133 S. Ct. 511, 518 (2012); Palazzolo v. Rhode Island, 533 U.S. 606, 617–18 (2001) ("These inquiries are informed by the purpose of the Takings Clause, which is to prevent the government from 'forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole.'"); *see also* Carlos A. Ball & Laurie Reynolds, *Exactions and Burden Distribution in Takings Law*, 47 WM. & MARY L. REV. 1513, 1534–35 (2006) ("[T]he Armstrong principle is one of the few concepts associated with takings law on which there seems to be a strong and ongoing agreement among members of the Court.").

13. *Penn Cent.*, 438 U.S. at 124.

14. 544 U.S. at 542.

15. *See* Stephen Durden, *Unprincipled Principles: The Takings Clause Exemplar*, 3 ALA. C. R. & C.L. L. REV. 25, 41–53 (2013) (discussing various expressions and applications of the *Armstrong* principle).

16. *See* Mark W. Cordes, *The Fairness Dimension in Takings Jurisprudence*, 20 KAN. J.L. PUB. POL'Y 1, 29 (2010) ("A focus on economic impact makes sense from the perspective of fairness. All else being equal, regulations that result in severe economic impacts on landowners will be viewed as less fair than those with modest impacts.").

economic life' in a manner that secures an 'average reciprocity of advantage' to everyone concerned."[17]

The smaller the regulatory burden, on the other hand, the more we may conclude that, even though the burdened owners suffer a loss, they suffer comparable gains in other ways that are just part of this process of adjusting the benefits and burdens of economic life.[18]

C. The Functional Equivalence Explanation: A Less Burdensome Regulation Is Not Sufficiently Like a Physical Seizure

Another explanation of the relevance of magnitude is that a regulation is a taking only if it is so burdensome that it is functionally equivalent to a physical seizure of the land. So I'll call this the functional equivalence explanation.

The text of the Fifth Amendment can be interpreted to suggest this view. "Property" in the Fifth Amendment may be read not in the lawyerly sense to mean legal rights in relation to things, but instead to mean the things themselves. If so, then the text of the Fifth Amendment says that the government has to pay compensation only when it takes a thing away from somebody and says nothing about paying compensation for merely taking away rights in relation to a thing. The Supreme Court has expressed this argument before:

> 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 reference to regulations that prohibit a property owner from making certain uses of her private property.[19]

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17. *Lucas*, 505 U.S. at 1017–18 (citations omitted).

18. *See* Cordes, *supra* note 16, at 29.

19. Tahoe-Sierra Pres. Council, Inc. 535 U.S. at 321–22 & n.17 (2002) ("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.' When the government condemns or physically appropriates the property, the fact of a taking is typically obvious and undisputed. When, however, the 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

When the government physically seizes land, of any size and any percentage of a whole parcel, the government clearly has taken a thing from another. The government must pay just compensation for such a seizure or physical invasion, which the Court has called the "paradigmatic taking."[20] But if "property" is understood to mean the thing and not rights in relation to it, then when the government merely restricts what the owner may do with the land, the government has not taken the thing away from the owner. The government has taken a right in relation to the thing, but not the thing itself. The owner still has control and use of it.

Regulations do not usually take things from people, just certain rights in relation to those things. But the more extensive a regulation, the more it approaches being a physical seizure – a taking away of the thing itself, not just certain rights in the thing. The Court has recognized this from very early on in the development of takings law. In the 1871 decision of *Pumpelly v. Green Bay*,[21] the 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.[22]

The Court has expressed and reaffirmed this reasoning a number of times since. In *Mahon*, the Court said, "[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."[23] Other cases have quoted and reaffirmed this reasoning from *Pumpelly* and *Mahon*.[24] In dissent, Justice

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taking is not self-evident, and the analysis is more complex."); *accord* Brown v. Legal Found. of Wash., 538 U.S. 216, 233 (2003).

20. *Lingle*, 544 U.S. at 537.

21. 80 U.S. 166 (1871).

22. *Id.* at 177-78.

23. Pa. Coal Co. v. Mahon, 260 U.S. 393, 414 (1922).

24. *See, e.g.*, Stop the Beach Renourishment, Inc. v. Florida Dep't of Envtl. Prot., 560 U.S. 702, 713 (2010) ("Moreover, though the classic taking is a transfer of property to the State or to another private party by eminent domain, the Takings Clause applies to other

Brennan said, "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."[25] The Court subsequently noted Justice Brennan's point as a possible justification for the rule that a "total deprivation of beneficial use" is a taking, because, "from the landowner's point of view, [it is] the equivalent of a physical appropriation."[26]

The Court's more recent decision in *Lingle v. Chevron* emphasizes this explanation for the relevance of magnitude in regulatory takings cases. The Court said that all of its tests for determining whether regulation effects a taking "share a common touchstone," 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."[27] Some have understood *Lingle* to require a regulation to be functionally equivalent to a physical seizure in order to be compensable.[28] From this perspective,

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state actions that achieve the same thing."); First English Evangelical Lutheran Church v. County of Los Angeles, 482 U.S. 304, 316–17 (1987); Kaiser Aetna v. United States, 444 U.S. 164, 174 n.8 (1979); United States v. Dickinson, 331 U.S. 745, 750 (1947).

25. San Diego Gas & Elec. Co. v. City of San Diego, 450 U.S. 621, 652 (1981) (Brennan, J., dissenting).

26. *Lucas*, 505 U.S. at 1017.

27. *Lingle*, 544 U.S. at 539.

28. *See, e.g.*, City of Coeur d'Alene v. Simpson, 136 P.3d 310, 318 n.5 (Idaho 2006) (reading the post-*Lingle* "character" test as encompassing only an inquiry into whether the regulation constitutes a physical invasion); Kafka v. Mont. Dep't of Fish, Wildlife & Parks, 201 P.3d 8, 27–28 (Mont. 2008) ("Regulatory takings, by contrast, turn more on the magnitude of the economic impact and 'the degree to which it interferes with legitimate property interests.' Thus, under the 'character of the governmental action' prong courts should inquire concerning the magnitude or character of the burden imposed by the regulation, and determine whether it is functionally comparable to government appropriation or invasion of private property." (citing *Lingle*, 544 U.S. at 540)); Mansaldo v. State of New Jersey, 898 A.2d 1018, 1024 (N.J. 2006) (concluding that *Lingle* had barred "considerations of 'legitimate state interests'" from takings claims); D. Benjamin Barros, *At Last, Some Clarity: The Potential Long-Term Impact of* Lingle v. Chevron *and the Separation of Takings and Substantive Due Process*, 69 ALB. L. REV. 343, 348 (2005) ("The regulatory takings inquiry, in other words, focuses on the regulation's effect on the private property at issue and asks whether that effect is functionally equivalent to a physical taking."); Nestor M. Davidson, *The Problem of Equality in Takings*, 102 NW. U. L. REV. 1, 34–35 (2008); Robert G. Dreher, *Lingle's Legacy: Untangling Substantive Due Process From Takings Doctrine*, 30 HARV. ENVTL. L. REV. 371, 401 (2006) ("Justice O'Connor's unifying vision of the basic foundation for regulatory takings—their functional equivalence to physical expropriations of property—necessarily directs the courts' inquiry to a single factor of paramount importance: 'the severity of the burden that the government imposes upon private property rights.' Moreover, the clear import from the functional equivalence notion is that the economic burden must be very substantial indeed, approaching if not equaling the total loss that physical expropriation would entail. There remain a multitude of nagging questions in regulatory takings law, but the Court's articulation in *Lingle* of a clear model for what constitutes a regulatory taking will go far to simplify the tangled jurisprudence in the field."); Mark Fenster, *The Stubborn Incoherence of Regulatory*

the magnitude of a regulatory burden is not just relevant to determining whether the regulation is a taking, it is the primary or even sole consideration.

D. The Implied Limitation Explanation: Less Burdensome Regulations Take Nothing Because Property Titles Are Implicitly Subject to Such Regulation

However, there is another explanation evident in the Court's decisions as well. Even if "property" in the Fifth Amendment does signify legal rights rather than the things themselves, the magnitude consideration may be part of determining whether a legal right has been taken from the owner in the first place. I will call this the implied limitation explanation.

A regulation that prohibits or restricts certain rights in relation to land takes nothing from landowners if their title to land did not include those rights in the first place. If a particular title is subject to an easement belonging to another, the title owner could not complain that the easement holder trespassed when using the easement. Likewise, if a particular title is subject to rights belonging to other landowners, or to the government, the title owner cannot complain that a regulation protecting or implementing those rights is a taking of her property rights.

In *Lucas*, the Supreme Court recognized the theoretical possibility that "background principles of the State's law of property" may already have prohibited use of the landowner's beachfront property.[29] If so, a recently-enacted state law restricting development of the property would have taken nothing from the owner even if the magnitude of the regulatory impact was so great that it prohibited "all economically beneficial use of the land."[30]

Takings, 28 STAN. ENVTL. L.J. 525, 572 (2009); Michael B. Kent, Jr., *Construing the Canon: An Exegesis of Regulatory Takings Jurisprudence After* Lingle v. Chevron, 16 N.Y.U. ENVTL. L.J. 63, 100–01 (2008); 2 (ANDERSON'S) AMERICAN LAW OF ZONING § 16.9 (5th ed. 2012) ("Pursuant to the Supreme Court's comments on regulatory takings doctrine in *Lingle*, it seems likely that the courts will tend to view a high degree of economic impact as necessary to establish that a regulation is the functional equivalent of the direct appropriation of or physical ouster from the property affected by the regulatory action.").

29. *Lucas*, 505 U.S. at 1029.

30. *Id.* Of course, this same reasoning would likewise apply if the regulation's impact was less severe: if the regulation only prohibited what was not a property right in the first place, then the regulation took nothing from the owner. *See* Michael C. Blumm, Lucas*'s Unlikely Legacy: The Rise of Background Principles as Categorical Takings Defenses*, 29 HARV. ENVTL. L. REV. 321, 326 & n.28 (2005) (citing cases).

Background principles qualifying property titles may include not just pre-existing limitations on property use such as those expressed in nuisance law, but also pre-existing authority to regulate property use in the future. When such authority is exercised, the regulator takes nothing from the property owner, because the owner's title was subject to such authority all along.[31] Until the regulator exercises that authority, of course, the property owner is free to use her property as she will, but she does so knowing at least constructively that the day may come when her freedom of use will be limited pursuant to that reserved authority. *Pennsylvania Coal Co. v. Mahon* suggested this theory as well:

> As long recognized, some values are enjoyed under an implied limitation and must yield to the police power. But obviously the implied limitation must have its limits or the contract and due process clauses are gone. One fact for consideration in determining such limits is the extent of the diminution. When it reaches a certain magnitude, in most if not in all cases there must be an exercise of eminent domain and compensation to sustain the act.[32]

This passage says that the reason for considering the magnitude of the regulatory burden is not to decide whether a regulation is functionally equivalent to a physical seizure, but to decide whether the regulation is pursuant to an "implied limitation" or whether it exceeds the limits to that implied limitation. But unlike the nuisance law discussed in *Lucas*, the implied limitation to which *Mahon* refers is not an existing rule of law, but rather a limitation that the police power may in the future further restrain property use to a certain extent.

Other earlier cases likewise expressed this same understanding that the police power is what *Lucas* called a "background principle" qualifying property titles.[33] In *Chicago,*

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31. *See generally* Cordes, *supra* note 16, at 24–26 ("American law has long recognized that private property rights are not absolute and are limited to a certain degree by the broader public interest. It is important to emphasize that this is an inherent limitation in the nature of private property rather than a deprivation of any preexisting rights."); John E. Fee, *The Takings Clause as a Comparative Right*, 76 S. CAL. L. REV. 1003, 1020-21 (2003) ("[A]n owner's title in private property is inherently qualified, from the outset, by the government's power to regulate what is in the public interest.").

32. Pa. Coal Co. v. Mahon, 260 U.S. 393, 413 (1922).

33. *See* Bradley C. Karkkainen, *The Police Power Revisited: Phantom Incorporation and the Roots of the Takings Muddle*, 90 MINN. L. REV. 826, 838–42 (2006) (describing the

B. & Q. R. Co. v. City of Chicago, the Court held that the government did not have to pay compensation for exercising the police power, because "all property . . . is held subject to the authority of the state to regulate its use in such manner as not to unnecessarily endanger the lives and the personal safety of the people," and any property that such regulations damage or injure "is not, within the meaning of the Constitution, taken for public use, nor is the owner deprived of it without due process of law."[34] In *Missouri Pacific Railway Co. v. Nebraska*, the Court held that a regulation exceeded the state's police power and therefore was an unconstitutional taking in violation of the Fourteenth Amendment, explaining that "States have power to modify and cut down property rights to a certain limited extent without compensation, for public purposes, as a necessary incident of government—the police power," but that "there are constitutional limits to what can be required . . . under either the police power or any other ostensible justification for taking such property away."[35] Similarly, the Court in *Block v. Hirsh* said that the police power allows "property rights [to] be cut down, and to that extent taken, without pay" but it is "open to debate . . . whether the statute goes too far. For just as there comes a point at which the police power ceases and leaves only that of eminent domain . . . regulations of the present sort [if] pressed to a certain height might amount to a taking without due process of law."[36]

Courts have recognized similar but narrower governmental powers that inherently limit property titles even though the power may not have been exercised until the landowner sought to use the land in a certain way. *Lucas* itself noted one such power, the federal government's navigational servitude, declaring that "we assuredly would permit the government to assert a permanent easement that was a pre-existing limitation upon the landowner's title."[37] Some courts have likewise held that the public trust

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police power as a background principle and discussing early cases treating police power that way). "History teaches that states have always claimed, as a 'background principle of the state's law of property,' the reserved police power to alter the law of property at the margins for purposes of protecting the public health, safety, morals, and general welfare; and further that under their law of property, all property is always held subject to this inherent limitation." *Id*. at 912.

34. 166 U.S. 226, 252 (1897).

35. 217 U.S. 196, 206 (1910).

36. 256 U.S. 135, 155–56 (1921).

37. *Lucas*, 505 U.S. at 1028–29 (1992) (citing cases); *see also* United States v. Rands, 389 U.S. 121, 123 (1967) ("The proper exercise of [the navigational servitude] is not an invasion of any private property rights in the stream or the lands underlying it, for the damage sustained does not result from taking property from riparian owners within the meaning of the Fifth Amendment but from the lawful exercise of a power to which the

doctrine qualifies property ownership, allowing owners to use their lands as they choose until the government asserts its pre-existing authority.[38]

Bradley Karkkainen has argued that, under the traditional view of the implied police power limitation on property rights, a valid state regulation could never be a compensable taking. If a state regulation was a valid exercise of the police power, that exercise was merely an application of the pre-existing qualification of property rights and therefore took nothing from the owner. If a state regulation was not a valid exercise of the police power, then it was simply void under the Due Process Clause.

Thus a legitimate exercise of the police power could never give rise to a compensable taking, but that did not mean that states had license to run roughshod over property rights. Some actions ostensibly taken pursuant to the police power might not be legitimate exercises of that power. Such actions might be deemed implied exercises of the state's complementary power of eminent domain, compensable under established due process principles; or they might lie beyond any legitimate power of the state, and be held invalid.[39]

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interests of riparian owners have always been subject."); Palm Beach Isles Assocs. v. United States, 208 F.3d 1374, 1384 (Fed. Cir. 2000) ("In light of our understanding of *Lucas* and the other cases we have considered, we hold that the navigational servitude may constitute part of the 'background principles' to which a property owner's rights are subject, and thus may provide the Government with a defense to a takings claim."); United States v. 30.54 Acres of Land, 90 F.3d 790, 795 (3d Cir. 1996) (holding that a ban on the development of a riverside coal loading facility was not a taking because it was an exercise of the federal government's navigational servitude); Donnell v. United States, 834 F. Supp. 19, 26 (D. Me. 1993) (holding that order to remove wharf did not take owner's property because it was subject to "the federal government's control for purposes of navigation and commerce"); Blumm, *supra* note 30, at 329 ("Consequently, most lower court decisions have recognized that background principles include the navigational servitude as well as other federal law limitations on property rights.").

38. *See, e.g.*, Esplanade Props., LLC v. City of Seattle, 307 F.3d 978, 985 (9th Cir. 2002) ("In this case, the 'restrictions that background principles' of Washington law place upon such ownership are found in the public trust doctrine."); McQueen v. South Carolina Coastal Council, 580 S.E.2d 116, 120 (S.C. 2003) ("The tidelands included on McQueen's lots are public trust property subject to control of the State. McQueen's ownership rights do not include the right to backfill or place bulkheads on public trust land and the State need not compensate him for the denial of permits to do what he cannot otherwise do."); Stevens v. City of Cannon Beach, 854 P.2d 449, 456–57 (Ore. 1993) ("We, therefore, hold that the doctrine of custom as applied to public use of Oregon's dry sand areas is one of 'the restrictions that background principles of the State's law of property . . . already place upon land ownership.'"); Orion Corp. v. State, 747 P.2d 1062, 1073 (Wash. 1987) (en banc) (holding that landowner never had the right to dredge and fill tidelands because of public trust doctrine); Blumm, *supra* note 30, at 341–44 (discussing cases holding that governmental actions were not takings because of the public trust).

39. Karkkainen, *supra* note 33, at 842 (footnotes omitted). "Throughout this period, the term "taking" was routinely invoked as a casual synonym for a prohibited "deprivation" of property without due process. But the substantive due process branch of "takings" law did not turn on judicial parsing of "take" or "taking." Instead, the analysis centered on the

Under modern substantive due process doctrine, which generally considers only rationality and not the extent of the regulatory burden, this reasoning would mean that a rational regulation would never be a taking regardless of how great the economic burden on the owner. But that's clearly not the law, not even in *Mahon*. Justice Holmes said that if a regulation goes too far it would require compensation to sustain it[40] – so he contemplated that some regulations would be permissible with compensation but impermissible without compensation. A regulation could be rational but require payment of compensation.

Therefore, the implied limitation cannot simply be that property titles are held subject to the full scope of potential rational police power actions.[41] Justice Holmes in *Mahon* suggested that constitutional protections limit the reserved police power to regulate property: "As long recognized, some values are enjoyed under an implied limitation and must yield to the police power. But obviously the implied limitation must have its limits or the contract and due process clauses are gone."[42] Perhaps people's reasonable expectations about private property and government regulation also qualify and limit the reserved police power.[43] Whatever the source of limitations, the Court's regulatory takings decisions reflect the conclusion that the government has not implicitly reserved the power to regulate property without compensation regardless of the circumstances or the financial impact on the owner. Rather, property titles are held subject to

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extent of the claimant's legitimate property entitlements in light of the state's reserved power to regulate. To delineate that boundary required careful, case-by-case scrutiny of the nature of, and justification for, the governmental action, and whether that action was fairly embraced within the police power." *Id.* at 898; *see also* City of Belleville v. St. Clair Co. Tpk. County, 84 N.E. 1049, 1053 (Ill. 1908) (stating that a use restriction to prevent harm or advance the general welfare is "a regulation and not a taking, an exercise of the police power and not of eminent domain" but "the moment the Legislature passes beyond mere regulation, and attempts to deprive the individual of his property, or of some substantial interest therein, under the pretense of regulation, then the act becomes one of eminent domain").

40. Pa. Coal Co. v. Mahon, 260 U.S. 393, 413 (1922) ("One fact for consideration in determining such limits is the extent of the diminution. When it reaches a certain magnitude, in most if not in all cases there must be an exercise of eminent domain and compensation to sustain the act.").

41. *See* Keystone Bituminous Coal Ass'n v. DeBenedictis, 480 U.S. 470, 491 n.20 (1987) ("The nuisance exception to the taking guarantee is not coterminous with the police power itself." (quoting Penn Central Transp. Co. v. New York, 438 U.S. 104, 145 (1978) (Rehnquist, J., dissenting))); Fee, *supra* note 31, at 1021 ("There is no regulation that could not, in principle, be described as an exercise of inherent sovereign power to protect the public interest.").

42. *Pa. Coal*, 260 U.S. at 413.

43. *See, e.g.*, Palazzolo v. Rhode Island, 533 U.S. 606, 630 (2001) (describing "background principles of law" as "those common, shared understandings of permissible limitations derived from a State's legal tradition").

potential future police power actions that do not go "too far," considering the magnitude of the regulatory burden, the character of the governmental action, and other relevant considerations.[44]

III. STRENGTHS AND WEAKNESSES OF THE FOUR EXPLANATIONS

As the previous section discusses, the Supreme Court's takings opinions express and support all four of these explanations for the magnitude consideration: the practical explanation, the distributional explanation, the functional equivalence explanation, and the implied limitation explanation. Litigants and courts may invoke all four of these explanations. But one reason why regulatory takings arguments and opinions can be so messy is that not only are the relevant considerations vague and imprecise, but the underlying principles are also unclear. One cannot persuasively argue that the economic impact of a particular regulation makes it compensable without some explanation of why.

The four explanations do not always lead to the same conclusion. Some may be more persuasive than others. This section considers how well each of the four explanations explains regulatory takings law and how well each fits with the underlying principle of the Takings Clause.

A. Consistency With the Constitutional Text

One criterion for evaluating and comparing the four explanations is whether they are consistent with the constitutional text. People can debate the relative importance of textual consistency, but regulatory takings doctrine is founded on the constitutional text. At least if all other things are equal, an explanation that is more consistent with the constitutional text would be better than an explanation that is less consistent with the text. The implied limitation explanation generally is more consistent with the constitutional text than the other explanations are.

The practical explanation, that the government simply can't afford to compensate property owners who suffer smaller regulatory takings, is especially unsatisfying theoretically. If

44. *See, e.g.*, *id.* at 627 ("The right to improve property, of course, is subject to the reasonable exercise of state authority . . . . The Takings Clause, however, in certain circumstances allows a landowner to assert that a particular exercise of the State's regulatory power is so unreasonable or onerous as to compel compensation.").

the Constitution requires payment of compensation, it doesn't seem right for courts to disregard that requirement simply because it costs too much. If nothing else, the Constitution should be changed. But perhaps what seems like a practical argument might be understood as an interpretive argument: the Takings Clause surely could not have been intended in a way that would require so much compensation that it would prevent the ordinary business of government from going on. So the Takings Clause can't mean that any time the government takes a discrete property right from an owner, it must pay compensation.

Even this version of the practical explanation is not very helpful, however. The Takings Clause does not include any language suggesting that more severe regulations are compensable but less severe regulations are not, so the most logical conclusion from this interpretive observation would be that regulations were never expected to be compensable takings at all, but only actual seizures of property were. That obviously is not the law today, so this argument does not help much to justify consideration of magnitude, with smaller burdens being non-compensable and larger burdens being compensable.

The distributional explanation, that magnitude is relevant because the larger the regulatory loss the more likely it is to be unfair, is based on the perceived principle of the Takings Clause rather than the text of the clause. The Takings Clause itself doesn't say that takings of property are compensable if and when they are unfairly distributed. It just says takings are compensable. The Supreme Court has discerned that principle from the text.[45] It's unfair to take a person's private property away for the public to use because the public rather than the individual property owner should pay for such a public benefit.

One problem with justifying the magnitude consideration on the basis of perceived principle rather than drawing it from the text is that the principle may be broader than the text.[46] Taking property without compensation may be an instance of unfairly distributing burdens, but that does not mean all unfairly distributed burdens are takings of property. Magnitude may be relevant to determining whether a burden is unfair but not relevant to determining whether a regulation takes property. The distributional explanation explains that magnitude is relevant to determining the distributional fairness of a burden; it doesn't explain how magnitude is relevant to determining whether the burden takes property.

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45. *See supra* part II.B.
46. *See* Durden, *supra,* note 15 at 60–61.

The functional equivalence explanation, unlike the practical and distributional explanations, originates more clearly from the text of the Takings Clause. The text says that the government can take private property for public use only if it gives the owner just compensation. Physical seizures of property for the public to use clearly require compensation. Regulations do not take ownership of property away from the owner and so the text could suggest that no compensation is required for property regulation. But if a regulation is sufficiently like a physical seizure, then it makes sense to treat it the same as a physical seizure and require compensation.

This is not an inevitable conclusion, however. One could also reason that if physical seizures are all that is made compensable by the Takings Clause, then that is all that should be compensated. If regulations are not in fact made compensable by the Takings Clause, but only physical seizures are, then courts should not make up an additional constitutional requirement even if it seems consistent with the principle of the express constitutional requirement.

Furthermore, this theory explains the relevance of magnitude only if the Fifth Amendment uses the word "property" to mean things rather than legal rights in relation to things. If "property" means legal rights in relation to things, then taking away a legal right to use land in a certain way is just as much a taking of property as physically seizing part of the land and it doesn't matter whether the regulation is large or small, like or unlike a physical seizure. But if "property" means the thing itself, then it makes sense that we must consider whether restrictions on a thing are so extensive that the restrictions are nearly like taking the thing away altogether. This is a weakness of this explanation because it is not how we usually think of "property."[47] The Supreme Court has acknowledged that "property" could be read to mean the thing, but doesn't seem to like the idea and has construed it to mean legal rights instead:

> It is conceivable that ["property"] was used in its vulgar and untechnical sense of the physical thing with respect to which the citizen exercises rights recognized by law. On the other hand, it may have been employed in a more accurate sense to denote the group of rights inhering in the citizen's relation to the physical thing, as the right

47. *See, e.g.*, Fee, *supra* note 31, at 1011–12 (citing authorities describing property as rights concerning things).

> to possess, use and dispose of it. In point of fact, the construction given the phrase has been the latter . . . . The constitutional provision is addressed to every sort of interest the citizen may possess.[48]

The implied limitation explanation also originates in the text of the Fifth Amendment but is more consistent with the usual understanding of "property." This explanation is that regulations do take property just as physical seizures do, because they take away legal rights in relation to things. This explanation thus embraces the natural and prevailing legal view of "property." From this perspective, ordinary property regulations aren't compensable not because they do not "take" but because what they take is not "property": property owners hold their titles subject to a reserved power to impose reasonable police power regulations on the use of property. This explanation thus is founded on the constitutional text but avoids interpreting "property" as the thing itself, which creates problems explaining why regulatory burdens are ever takings and which is inconsistent with the Supreme Court's understanding of what "property" means in the Takings Clause.

B. Explaining Differences Between Physical and Regulatory Takings

Because the magnitude consideration is relevant only to regulatory takings and not physical takings, the explanation for the magnitude consideration should also explain why magnitude is relevant to regulations but not physical seizures. If an explanation logically applies to regulatory and physical takings alike, it doesn't explain the actual state of takings law.

The distributional explanation is the weakest of the four explanations at explaining why magnitude matters for regulatory takings but not for physical seizures. The distributional explanation suggests that more extensive or injurious regulations are more likely to be unfair and disproportional and therefore are more likely to be the kind of property intrusions that the Takings Clause was intended to compensate. But physical seizures also could be larger or smaller, well distributed or concentrated on a few property owners. Yet physical seizures are always compensable even if widely distributed and imposed on all

48. United States v. General Motors, 323 U.S. 373, 377–78 (1945); *accord* PruneYard Shopping Ctr. v. Robins, 447 U.S. 74, 82 n.6 (1980).

property owners equally.[49] So this explanation does not explain why magnitude is relevant to regulations but not to physical seizures.

The other explanations, on the other hand, do explain in some way the difference between physical and regulatory takings. The practical explanation is that the Takings Clause cannot be meant to compensate for all regulatory takings of discrete property rights because the business of government could not go on if such compensation was required. That observation is unique to regulatory takings because the business of government involves all sorts of regulations that restrict property. The business of government, at least as we conceive and experience it, does not involve all sorts of uncompensated physical seizures of people's private property. So this explanation is consistent with the difference between regulatory takings and physical seizures.

The functional equivalence explanation also applies to regulatory takings but not physical takings. Under this reasoning, physical seizures are the expressly compensable action referred to by the Takings Clause. So the magnitude of such seizures does not matter. Regulations are not expressly referred to in the text, so the only reason to compensate for regulations is if they are functionally equivalent to physical seizures.[50] We consider the magnitude of such regulations to decide whether they are functionally equivalent.

Finally, the implied limitation explanation also is consistent with the difference between regulatory and physical takings. It begins with the premise that all takings of property rights are included in the Takings Clause. But because the government implicitly reserved a power to regulate property without compensation, most regulations don't take away property rights from owners. On the other hand, the government did not reserve a power to physically seize property without compensation. So the magnitude of a regulation helps determine whether the government acted within the scope of its reserved power when it regulated property, but the magnitude of a physical seizure

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49. *Cf.* Lucas v. South Carolina Coastal Council, 505 U.S. 1003, 1027 n.14 (1992) ("But a regulation specifically directed to land use no more acquires immunity by plundering landowners generally than does a law specifically directed at religious practice acquire immunity by prohibiting all religions.").

50. *See* Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency, 535 U.S. 302, 321–22 (2002) ("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 reference to regulations that prohibit a property owner from making certain uses of her private property.").

is irrelevant to the determination of whether a physical seizure is compensable.

None of these explanations solves what some might consider a problem, that small physical takings are compensable while much larger regulatory takings might not be. But the implied limitation explanation does explain that this is simply the result of the fact that the Fifth Amendment requires compensation for taken "property," not value. Government regulations may financially hurt people in all sorts of ways, but the clause clearly does not apply to other kinds of financial impacts.

Property may have more market value because the market does not foresee or expect that the government will impose many possible regulations that would be pursuant to the implied limitation. The market is predicting, as it does in other ways as well. But as a result, a regulation may take away a lot of market value that does not actually represent what the owner owned, but rather represents what the owner had been allowed to do and the market anticipated would be continued to allowed to do. Therefore, some regulations take away a lot of value without taking away legal property rights.[51]

C. Explaining Why Large But Not Complete Regulatory Deprivations Can Be Takings

While all but the distributional explanation explain why magnitude matters for regulatory takings but not physical takings, the best explanation of the magnitude consideration should also explain why a regulation can be a taking even if it is not a total deprivation of the property.

One of the theoretical weaknesses of the functional equivalence explanation is that it does not explain why an extensive but not complete deprivation could ever be a taking. Physical takings always are compensable because they completely deprive the owner of a thing in which the owner had property rights. If a regulation likewise completely deprives the owner of the thing, then the regulation is the same and should be compensable. But if the regulation does not completely deprive the owner of

51. *See, e.g.*, Andrus v. Allard, 444 U.S. 51, 66 (1979) ("[A] reduction in the value of property is not necessarily equated with a taking."); Penn Central Transp. Co. v. New York, 438 U.S. 104, 131 (1978) ("[T]he decisions sustaining other land-use regulations, which . . . are reasonably related to the promotion of the general welfare, uniformly reject the proposition that diminution in property value, standing alone, can establish a 'taking . . . .'"); Steven J. Eagle, *"Economic Impact" in Regulatory Takings Law*, 19 HASTINGS W.-N.W. J. ENVTL. L. & POL'Y 407, 434 (2013) ("It is axiomatic in property law that 'value' is not property.").

a thing, but merely impairs the value of the thing by regulating its use, then the owner still has something of value after application of the regulation and the regulation is not equivalent to a physical seizure of the thing. Yet such a regulation may still be a compensable taking even though it is not actually equivalent to the constitutionally compensable action.

One response may be that a regulation may impair the value of property so much that it makes the property practically unusable, and so practically take the property away from the owner even though it still has some value. Justice Holmes suggested this explanation in *Mahon* when he wrote that making it "commercially impracticable" to mine coal has "very nearly the same effect" as taking the coal away.[52]

Even if this gives the magnitude consideration a little bit of flexibility, the functional equivalence explanation unavoidably requires a very severe economic impact in order to logically conclude that the regulation is functionally equivalent to taking the property away from the owner.[53] But this does not sound the same as the *Penn Central* test, because the Court described the magnitude of economic impact as just one consideration in deciding whether justice and fairness require the public rather than the individual owner to bear the regulatory burden.[54] Even in *Lingle*, which seems to emphasize the functional equivalence explanation, the Court still says both "the magnitude or character of the burden" and "how any regulatory burden is distributed" are significant in determining whether a regulation is a taking.[55] To whatever extent that current takings law considers a regulation to be a taking because the regulatory burden is unfairly distributed even though the owner is not deprived of all practical value, the functional equivalence theory does not explain why.

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52. Pa. Coal v. Mahon, 260 U.S. 393, 414 (1922).

53. *See, e.g.*, *Tahoe-Sierra*, 535 U.S. at 322 n. 17 ("When the government condemns or physically appropriates the property, the fact of a taking is typically obvious and undisputed. When, however, the 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."); Rose Acre Farms, Inc. v. United States, 373 F.3d 1177, 1195 (Fed. Cir. 2004) ("[C]ourts have traditionally rejected takings claims in the absence of severe economic deprivation. This hesitation stems from the very nature of a regulatory takings claim."); Daniel L. Siegel, *Evaluating Economic Impact in Regulatory Takings Cases*, 19 HASTINGS W.-N.W. J. ENVTL. L. & POL'Y 373, 377 (2013) ("[F]or an economic impact to be so onerous that it is similar to eliminating a core property interest, the impact has to be huge.").

54. *See* Penn Central Transp. Co. v. New York, 438 U.S. 104, 123–24 (1978).

55. Lingle v. Chevron U.S.A. Inc., 544 U.S. 528, 542–43 (2005) ("A test that tells us nothing about the actual burden imposed on property rights, or how that burden is allocated, cannot tell us when justice might require that the burden be spread among taxpayers through the payment of compensation.").

One might think that the distributional explanation explains the relevance of distribution, and so these two explanations work together to account for the current state of takings law. But they do not really work together like that. The functional equivalence explanation alone can justify only the conclusion that a regulation is compensable if it makes property practically useless. It does not explain why the distribution is relevant or why it might make a regulation compensable even if the economic impact was not like a physical seizure. It adds nothing to the distributional explanation's ability to account for these aspects of regulatory takings law. The distributional explanation, on the other hand, also justifies finding complete regulatory deprivations to be compensable, because, as the Court suggested in *Lucas*, such complete deprivations are inevitably unfairly distributed.[56] The distributional explanation also justifies finding less severe regulations to be compensable because of their unfair distribution. So the functional equivalence explanation does not account for this aspect of regulatory takings law, but the distributional explanation does.

The other two explanations likewise explain why a regulation may be compensable even if it doesn't practically deprive the owner of all value. As the Court said in *Lucas*, the practical explanation suggests that the government cannot afford to compensate for more common, less severe regulations, but the government can afford to compensate for the "relatively rare situations" in which regulation deprives the owner of all value.[57]

The implied limitation explanation also explains why a lesser deprivation could still be a compensable taking. From this perspective, the magnitude of a regulation is just one of the considerations in deciding whether a particular regulation is an exercise of the implied reserved police power or whether it goes too far and takes property from the owner. So a less severe regulation may still exceed the scope of the reserved power if it is unfairly imposed on an owner.

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56. *See* Lucas v. South Carolina Coastal Council, 505 U.S. 1003, 1017–18 (1992) ("Surely, at least, in the extraordinary circumstance when no productive or economically beneficial use of land is permitted, it is less realistic to indulge our usual assumption that the legislature is simply 'adjusting the benefits and burdens of economic life' in a manner that secures an 'average reciprocity of advantage' to everyone concerned."). However, the Court noted that even if the burden were widespread, a complete deprivation of economically beneficial use would still be a taking. *See id.* at 1027 n.14 ("But a regulation specifically directed to land use no more acquires immunity by plundering landowners generally than does a law specifically directed at religious practice acquire immunity by prohibiting all religions.").

57. *See id.* at 1018.

D. Explaining Why the Duration of a Regulation Matters

Another distinction between physical seizures and regulatory takings is that a physical seizure of private property is a compensable taking regardless of how long it lasts, while even a regulation that denies all economically beneficial use may not be a taking if it is temporary. In *Tahoe-Sierra*, the Court reasoned that judging a regulation's magnitude requires considering both how much it restricts and how long it restricts the property.[58] The best explanation of the magnitude consideration in current regulatory takings law should also explain why the duration of the regulation matters.

The functional equivalence explanation does not explain why the duration of a regulation matters. In fact, the functional equivalence perspective suggests the opposite conclusion. From this perspective, a regulation should be compensable if it has the same effect as a physical seizure that clearly is compensable. A physical seizure is compensable regardless of how long it lasts; the duration only affects the measurement of just compensation.[59] A regulation that denies all economically viable use of the land for a time is functionally identical to a temporary physical seizure, and therefore should also be compensable. The duration would be relevant only to measuring just compensation. Of course, if the temporary denial of use is an exercise of a reserved power or background principle, it may not be compensable. But the functional equivalence doctrine itself doesn't explain why the duration of a regulation would generally be relevant to deciding whether a regulation is a compensable taking.

Chief Justice Rehnquist's dissent in *Tahoe-Sierra* recognized this implication of the functional equivalence explanation, arguing that just as a permanent deprivation of beneficial use is the functional equivalent of a physical appropriation, "a 'temporary' ban on all economic use is a forced leasehold."[60] But his argument lost. In disagreeing with his dissent, the majority opinion suggested that the functional equivalence explanation doesn't completely explain the law of regulatory takings. The Court acknowledged that "even a regulation that constitutes only a minor infringement on property may, from the landowner's

58. *See* Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency, 535 U.S. 302, 342 (2002) ("[T]he duration of the restriction is one of the important factors that a court must consider in the appraisal of a regulatory takings claim . . . .").

59. *See, e.g.*, First English Evangelical Lutheran Church v. County of Los Angeles, 482 U.S. 304, 318 (1987) (citing and discussing cases).

60. *See Tahoe-Sierra*, 535 U.S. at 348 (Rehnquist, J., dissenting).

perspective, be the functional equivalent of an appropriation."[61] But the Court said the dissent's reasoning "stretches *Lucas'* 'equivalence' language too far."[62] According to the Court, *Lucas* created a "narrow exception to the rules governing regulatory takings" which was "only partially justified based on the 'equivalence' theory."[63] The Court noted that *Lucas* also described the distributional explanation and the practical explanation in support of its rule; the Court then said those explanations suggest that a temporary moratorium should not be compensable.[64] Even though *Tahoe-Sierra* doesn't reject the functional equivalence explanation, it thus suggests that the functional equivalence explanation alone cannot explain all the rules of regulatory takings and that other perspectives are necessary for some aspects of regulatory takings law, including the relevance of duration.

As the Court in *Tahoe-Sierra* argued, the distributional explanation does suggest that the duration of a regulation may be relevant to determining whether a regulation is a taking.[65] A temporary prohibition on development, like the moratoria in that case, is less likely to impose unfair burdens on individual landowners "because it protects the interests of all affected landowners against immediate construction that might be inconsistent with the provisions of the plan that is ultimately adopted."[66] So although a moratorium imposes a burden on an affected landowner, it also provides a substantial benefit by imposing the burden on others and by preserving the land pending resolution of the regulatory issues.

The Court also indicated that the practical explanation suggests a reason why duration is relevant: governments could not afford to pay compensation to every restrained landowner every time they need to delay development temporarily while making regulatory decisions. The Court wrote that the likely result is that "the financial constraints of compensating property owners during a moratorium may force officials to rush through the planning process or to abandon the practice altogether."[67] The Court likewise noted that requiring compensation for other kinds of temporary restraints on property "would render routine

61. *Id.* at 324 n.19.
62. *Id.*
63. *Id.*
64. *Id.*
65. *Id.*
66. *Id.* at 341.
67. *Id.* at 339.

government processes prohibitively expensive or encourage hasty decisionmaking."[68]

Finally, the implied limitation explanation also is consistent with the consideration of duration. From this perspective, the question is whether the regulation is an exercise of a power reserved by the government or whether it takes away a private property right. The government's reserved power to regulate land use logically includes some power to prohibit land use while the government decides how to regulate the land. The Court in *Agins v. City of Tiburon* thus recognized that "[m]ere fluctuations in value during the process of governmental decision making, absent extraordinary delay, are 'incidents of ownership,'" not compensable takings.[69] In *First English Evangelical Lutheran Church v. County of Los Angeles*, the Court likewise seemed to recognize that the government has some implied reserved power to prohibit land use while making regulatory decisions, holding that "where the government's activities have already worked a taking of all use of property, no subsequent action by the government can relieve it of the duty to provide compensation for the period during which the taking was effective," but noting that the question would be "quite different . . . in the case of normal delays in obtaining building permits, changes in zoning ordinances, variances, and the like."[70]

The implied limitation explanation suggests that duration is relevant not because duration is part of the formula for determining the overall economic impact on the owner – the point that *Tahoe-Sierra* emphasizes – but because a normal delay to make regulatory decisions is part of the government's reserved power to which all private property is subject. From this perspective, courts should consider not just how long a regulatory restraint lasted, but the reason for the restraint. If it was a reasonable moratorium or a normal decision-making delay, then the court would hold that the government took nothing from the owner but merely exercised its reserved power.

E. Considerations of Fairness and Justice

The preceding subsections consider how well each of the four explanations fits with the text of the Fifth Amendment and with

68. *Id.* at 335.

69. 447 U.S. 255, 263 n.9 (1980) (quoting Danforth v. United States, 308 U.S. 271, 285 (1939)).

70. 482 U.S. 304, 321 (1987).

the characteristics of regulatory takings that distinguish them from physical seizures. The most useful and correct explanation for considering the magnitude of economic impact should also explain how the magnitude is relevant to the underlying principle of the Takings Clause.

The Supreme Court has long stressed that the Takings Clause "was designed to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole."[71] The Court in *Penn Central* began its statement of regulatory takings law by explaining that a court's objective is to determine when "'justice and fairness' require that economic injuries caused by public action be compensated by the government, rather than remain disproportionately concentrated on a few persons."[72] The "factors that have particular significance" that the Court proceeded to identify, including the economic impact of the regulation, are factors to help answer this basic question of justice and fairness.[73] In subsequent opinions, the Court further indicated that its ultimate objective is to determine from all the relevant facts whether fairness and justice require the public to bear the burden.[74] In *Lingle*, the Court reaffirmed both the principle and the factual considerations expressed in *Penn Central*, noting that "[w]hile scholars have offered various justifications for this regime, we have emphasized its role in 'bar[ring] 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.'"[75] This principle of fairness does not fully explain modern takings law, because it does not explain why physical seizures are always compensable but regulatory invasions may not be. A regulatory

71. Armstrong v. United States, 364 U.S. 40, 49 (1960); *see also* Andrus v. Allard, 444 U.S. 51, 65 (1979) ("The Takings Clause, therefore, preserves governmental power to regulate, subject only to the dictates of 'justice and fairness.'"); Monongahela Navigation Co. v. United States, 148 US. 312, 325 (1893) ("[The Takings Clause] prevents the public from loading upon one individual more than his just share of the burdens of government, and says that when he surrenders to the public something more and different from that which is exacted from other members of the public, a full and just equivalent shall be returned to him."); Durden, *supra* note 15, at 44–45 (citing cases and commentary affirming and defending the *Armstrong* principle); *supra* part II.B.

72. Penn Central Transp. Co. v. City of New York, 438 U.S. 104, 124 (1978).

73. *See id.*

74. *See, e.g.*, Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency, 535 U.S. 302, 334 (2002) ("[T]he ultimate constitutional question is whether the concepts of 'fairness and justice' that underlie the Takings Clause will be better served by one of these categorical rules or by a *Penn Central* inquiry into all of the relevant circumstances in particular cases."); Palazzolo v. Rhode Island, 533 U.S. 606, 617–18 (2001) ("These inquiries are informed by the purpose of the Takings Clause, which is to prevent the government from 'forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole.'").

75. Lingle v. Chevron U.S.A. Inc. , 544 U.S. 528, 537 (2005).

invasion could be more unfair in magnitude and distribution than a physical seizure, yet the physical seizure is always compensable while the regulation may not be.[76] Still, regulations generally are more widespread than physical seizures. To the extent fairness is consistency or equality of treatment, a regulation is more likely to be fair.[77] In any event, the Supreme Court has emphasized the fairness principle in regulatory takings law, regardless of whether it fully explains the law concerning just compensation for physical seizures.

As the Court suggested in *Penn Central*, the magnitude of the economic impact should somehow help determine whether it is fair to let a few people bear the burden or whether the public as a whole should bear the burden. That is the distributional explanation for the magnitude consideration—that the larger the regulatory burden, the more disproportional and therefore the more that fairness requires the public to bear the burden. This is the great theoretical strength of the distributional explanation: it focuses attention directly on how the magnitude of the regulatory burden relates to the primary principle of the Takings Clause, as expressed by the Supreme Court.[78] A court evaluating the magnitude of the regulatory burden from this perspective would not focus separately on magnitude and distribution as if they are two independent variables, but rather would consider the magnitude to help decide whether the burden is fundamentally fair.

This is also a practical strength of the distributional explanation. Compare this perspective to the functional equivalence explanation. The functional equivalence explanation is not incompatible with the fairness principle the Court has expressed, but rather than directly asking whether a regulation is so large that it is unfair, the functional equivalence explanation asks whether a regulation is so large that it is like a physical seizure, and the implication in the background is that a physical seizure or a regulation that is like a physical seizure is unfair if uncompensated. The result is that, logically at least, from the functional equivalence approach the magnitude of the economic impact must be so great that it makes the property practically useless, and the distribution of the burden is relatively

76. *See* Andrea L. Peterson, *The False Dichotomy Between Physical and Regulatory Takings Analysis: A Critique of Tahoe-Sierra's Distinction Between Physical and Regulatory Takings*, 34 ECOLOGY L.Q. 381, 393–94 (2007).

77. *See id.* at 401.

78. Of course, if the Supreme Court has erred in expressing the principle of the Takings Clause, this explanation of the magnitude consideration perpetuates the error. *See generally* Durden, *supra* note 15 (critiquing the *Armstrong* principle and its application).

insignificant: the regulation either is or is not tantamount to a physical seizure, whether a few or many people are made to suffer such a burden.

But as the Court has said, both the magnitude and the distribution are important to this determination. From a functional equivalence perspective, a court has no real benchmark against which to compare the magnitude of regulations that are not complete takings of value. All the court can say is that the regulation imposes a very large burden, and therefore it is more like a taking than a regulation that imposes a smaller burden. But how alike is enough? From the distributional fairness perspective, on the other hand, the court has a clearer principle to apply. The court tries to decide whether the burden, in light of both its size and its distribution, is unusual or unfair, or whether it is similar to other types of burdens that other landowners commonly bear, and therefore is simply part of adjusting the benefits and burdens of economic life. The standard is still imprecise, of course, but that is the nature of the standard, regardless of the explanation for it. At least from the distributional perspective, the court has some principle to help evaluate the significance of the magnitude when it is less than a total deprivation.

Like the functional equivalence explanation, the practical explanation doesn't directly consider whether the economic impact of a regulation is unfair; it considers whether the economic impact is too large to pay for. The government's practical ability to pay compensation depends both on the magnitude of the economic impact and how many people are affected. Total deprivations of value have the greatest magnitude but they are rare, so the government can afford to pay compensation when they occur. The Court offered this explanation in *Lucas*:

> [T]he *functional* basis for permitting the government, by regulation, to affect property values without compensation—that "Government hardly could go on if to some extent values incident to property could not be diminished without paying for every such change in the general law"—does not apply to the relatively rare situations where the government has deprived a landowner of all economically beneficial uses.[79]

79. Lucas v. South Carolina Coastal Council, 505 U.S. 1003, 1018 (1992) (citation omitted).

This practical explanation of the magnitude requirement therefore naturally involves consideration of the distribution of the burden as well as the magnitude of the burden, even though the explicit reason for considering the magnitude is not to evaluate the fairness of the burden but to consider the government's ability to pay.

The practical explanation may go too far in emphasizing distribution rather than magnitude. In fact, this explanation is not concerned so much with the fairness of the distribution as it is with simply the number of people who bear the regulatory burden, because the more people burdened, the greater the expense to compensate them. From this perspective, the regulation most likely to be compensable is a regulation that affects only a few people and also has a relatively small economic impact: that would be the cheapest for the government to compensate. And the least likely to be compensable is a regulation that has a very large economic impact and is very widespread, because that would cost the most. The explanation does not offer a consistent principle to differentiate compensable from non-compensable regulations, because if the very same onerous regulation affected only a few people the government could compensate, but if the regulation simply was expanded to burden many or most people, then it would become non-compensable under this reasoning, because the government simply could not afford it. There must be some other explanation that does not depend entirely on the government's own appetite for regulation.

Finally, the implied limitation explanation, like the distributional explanation, also explains how magnitude is relevant to the underlying principle of the Takings Clause. From the implied limitation perspective, both the magnitude and the distribution help determine whether a particular regulation is a reasonable exercise of the government's police power or whether it goes beyond that reserved power to take property away without compensation. This theory poses the relevant question directly: is the regulation the sort of limitation that property owners generally should be subject to as members of an ordered society, even though the burden is not universal, or has the government restrained private land use so much that it should pay compensation? The scope of the reserved police power, which itself may change over time, determines whether a regulation is compensable or not. As Bradley Karkkainen argued:

> [T]he solution must come from an inquiry into the nature and limits of private property rights in a

> democratic society, and the nature and limits of the states' concomitant power, on behalf of the demos, to define and adjust the legal boundaries determining the specific content of those rights. That discussion, predicated upon the understanding that the law of property—like any foundational social institution—must be dynamic and malleable to adapt to changing social needs, is one in which substantive-due-process-era courts and commentators constructively engaged through their discourse on the police power and its limits. It is a discourse that in the post-Penn Central era we have abandoned, to the impoverishment of property jurisprudence.[80]

IV. ADVANTAGES OF THE IMPLIED LIMITATION EXPLANATION

As Part III demonstrates, the implied limitation explanation best fits with today's regulatory takings law and the underlying principle of the Takings Clause. This explanation also has some other theoretical and practical advantages over the other explanations. This section discusses these advantages.

A. Consistency With Text, Principle, and Current Regulatory Takings Law

The greatest advantage of the implied limitation explanation is that it is most consistent with the text and principle of the Takings Clause and best explains the rules of regulatory takings.

As I discuss in part III.A, the text of the Takings Clause does not express either the practical explanation or the distributional explanation. The functional equivalence explanation is more consistent with the text, but only if "property" is read to refer to things themselves rather than legal rights in relation to things. Even then, the logic of the functional equivalence explanation necessarily means that the Takings Clause itself does not require compensation for regulations, but that courts require compensation because regulations may be sufficiently like the actions for which the text of the Takings Clause does require compensation. The implied limitation explanation is most consistent with the text. From this perspective, the Takings Clause expressly prohibits taking legal rights in relation to things, described as "property." But most land use regulations simply

80. Karkkainen, *supra* note 33, at 832.

do not take away any legal rights because the regulations are exercises of a pre-existing limitation on the property owner's title.

As I discuss in the rest of part III, the implied limitation explanation explains why the magnitude of the economic burden is relevant to regulatory takings but not physical seizures, why large but not complete regulatory deprivations may be compensable, why the duration of a regulation matters but the duration of a physical seizure does not matter, and how magnitude relates to the underlying principle of the Takings Clause, to avoid unfairly imposing burdens on individuals rather than the public as a whole. The other explanations, on the other hand, all have some weakness in explaining these aspects of regulatory takings law. The distributional explanation does not explain why the magnitude of the economic burden is relevant to regulatory takings but not physical seizures. Besides being theoretically weak and unconnected to the text of the Takings Clause, the practical explanation does not explain how the distribution of the burden is relevant to compensability, in fact suggesting the opposite, that the more widely distributed the burden, the less likely the government can afford to pay compensation. And the functional equivalence explanation over-emphasizes the magnitude of the economic burden because it does not explain the relevance of the distribution of the burden or why any regulation that does not completely deprive the owner of beneficial use should be compensable. It also does not explain why the duration of a regulation is relevant to the determination of whether the regulation is a taking; in fact, it suggests that the duration should not be relevant.

B. Completeness

The implied limitation explanation thus is unique in that it can fully and independently account for both positive and negative outcomes – decisions that regulations are compensable as well as decisions that regulations are not compensable. If a regulation is an exercise of the reserved power, it is not compensable. If a regulation is not an exercise of the reserved power, it is compensable.

That is not true for the other theories. If a regulation is functionally equivalent to a physical seizure, it is a taking. But even if it is not functionally equivalent, it may still be a taking because of the character of the action and the distribution of the burden. Similarly, if a regulation is unfairly distributed, it is a taking. But even if a regulation is fairly distributed, it may still be

a taking, such as when the regulation takes all economically beneficial use or involves a physical intrusion. The practical impossibility of compensating all regulatory takings may explain both positive and negative outcomes in a way – if we can afford it, we will compensate; if we cannot, we will not. But that's not much of a standard.

C. Clarity and Certainty

The implied limitation explanation may feel too vague and indefinite. How does a property owner know what the "implied limitations" are, when it is not an existing rule but rather the possibility of new future rules? In *Village of Euclid v. Ambler Realty Co.*, the Supreme Court acknowledged the indefiniteness of the scope of the police power: "The line which in this field separates the illegitimate assumption of power is not capable of precise delimitation. It varies with circumstances and conditions."[81]

This is a problem, but it is a problem regardless of the explanation for the relevance of magnitude. As *Mahon* suggests, the ad hoc regulatory taking factors are just as much guidance in deciding whether a regulation is pursuant to this implied limitation or whether it does actually go beyond that implied limitation to take something from the owner.

Despite the unavoidable uncertainty of what government actions are pursuant to the implied limitation, the implied limitation explanation at least eliminates some avoidable uncertainties. It eliminates the need to wrestle with whether a regulation is like a physical seizure. The functional equivalence explanation may cause courts to wrestle with categorization and magnitude issues when the problem is not really magnitude at all. From the implied limitation perspective, cases like *Loretto v. Teleprompter Manhattan CATV Corp.*[82] can more directly address the real issue – whether the regulation goes too far, beyond the implied limitation on property rights, rather than how much it is like a physical seizure.

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81. 272 U.S. 365, 387 (1926); s*ee also* Karkkainen, *supra* note 33, at 893–94 ("More worryingly, indeterminacy left legislatures and property owners with ex ante uncertainty as to the ultimate scope of property rights and the constitutionally permissible bounds of the state's reserved power to regulate. Legal uncertainty invited litigation, and left discretionary power in the hands of judges to determine—on a case-by-case basis, without the aid of clear rules or guiding principles—when a regulation 'went too far' and overstepped the bounds.").

82. 458 U.S. 419 (1982) (holding that law requiring landlord to permit installation of cables was a compensable taking because it was a permanent physical occupation of landlord's property).

The implied limitation explanation, as well as the distributional explanation, also helps counter a possible post-*Lingle* tendency to think just about the magnitude of the loss. The question isn't so much the extent of the market value loss but whether the regulation was a fair exercise of the police power pursuant to the implied limitation. That may help us remember, as *Penn Central* tried to indicate, that the character of the regulation is as important as the extent of the regulation.

D. Burden of Proof

Another practical implication of the implied limitation exception, which some might see as a strength and others as a weakness, is that the government bears the burden of proof, rather than the landowner. Under *Lucas*, background principles are an affirmative defense to takings liability.[83] The landowner need only prove that the government action took property. "This makes sense because it would be intellectually awkward, perhaps impossible, for the claimant to prove the absence of use-limiting background principles."[84] The government then may undertake to prove that the regulation actually took nothing from the owner because it was an exercise of a pre-existing limitation on the owner's title.

E. State Law Defines Property

Another advantage of the implied limitation explanation is that it relies on state law to determine what property is, as state law generally does in our legal system,[85] rather than being subject to loose federal judicial creations about how much of a regulatory burden is too much. As the Court said in *Board of Regents v. Roth*, "Property interests . . . are not created by the Constitution. Rather,

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83. *See* Lucas v. South Carolina Coastal Council, 505 U.S. 1003, 1031–32 (1992) ("We emphasize that to win its case South Carolina must do more than proffer the legislature's declaration that the uses Lucas desires are inconsistent with the public interest, or the conclusory assertion that they violate a common-law maxim . . . . Instead, . . . South Carolina must identify background principles of nuisance and property law that prohibit the uses he now intends in the circumstances in which the property is presently found.").

84. Blumm, *supra* note 30, at 326–27.

85. *See, e.g.*, Stop the Beach Renourishment, Inc. v. Florida Dep't of Envtl. Protection, 560 U.S. 702, 707 (2010) ("Generally speaking, state law defines property interests."); Stephanie Stern, *Protecting Property Through Politics: State Legislative Checks and Judicial Takings*, 97 MINN. L. REV. 2176, 2238 (2013) ("Property law varies significantly across the states based on differences in politics, natural resources, culture, fiscal conditions, and state-specific historical understandings of public versus private rights. Not only does state law create the baseline of property rights, it is also necessary to determine the degree of change from the baseline that is acceptable . . . .").

they are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law . . . ."[86] Yet, the prevailing takings approach does not rely on state law to determine whether property has been taken. State law may be consulted to determine whether a thing is property, but the decision whether it has been taken involves a federal law consideration of the magnitude of the loss. The implied limitation explanation instead considers state law in the magnitude determination as well. State law determines whether a regulation is pursuant to the reserved regulatory power. This approach is thus more faithful to the federalism principle that states may not just define property rights initially, but may continue to adjust such rights over time.[87]

F. Irrational Regulations Are Takings

Another noteworthy implication of the implied limitation perspective may also be viewed as a strength or a weakness. If some land use regulations are not takings only because they are exercises of a reserved police power that qualifies all land titles, then whenever a regulation is not an exercise of such a power, but nevertheless takes away a recognized property right, it will be a taking. An irrational or arbitrary regulation is not an exercise of the police power. So if a regulation is arbitrary or irrational, and yet is applied to property and deprives the owner of some property right she would otherwise have, then the regulation has taken her property and the government must compensate her.[88]

The Court in *Lucas* suggested this conclusion when it said that "*any* regulatory diminution in value" requires compensation unless it has a "police power justification."[89] That may sound inconsistent with *Lingle*, however, which held that a regulation is not a taking simply because it does not substantially advance a legitimate state

86. 408 U.S. 564, 577 (1972); *see also* Davies Warehouse Co. v. Bowles, 321 U.S. 144, 155 (1944) ("The great body of law in this country which controls acquisition, transmission, and transfer of property, and defines the rights of its owners in relation to the state or to private parties, is found in the statutes and decisions of the state.").

87. *See* Karkkainen, *supra* note 33, at 834 ("An owner's property rights thus ordinarily extend only as far as state property law says they do, and under federalism principles, states have considerable discretion not only to determine the primary rules of property in the first instance, but also to make necessary adjustments over time through legislative enactments and evolving judicial doctrines, just as they adjust their laws of tort or contract.").

88. I made this argument at greater length in an earlier article. *See* Alan Romero, *Ends and Means in Takings Law After* Lingle v. Chevron, 23 J. LAND USE & ENVTL. L. 333, 355-60 (2008).

89. Lucas v. South Carolina Coastal Council, 505 U.S. 1003, 1026 (1992).

interest. It does not directly conflict with the reasoning of *Lingle*, however. *Lingle* held that the substantial advancement test isn't a "freestanding takings test," perhaps even with its own different level of scrutiny.[90] The implied limitation argument is not that the Takings Clause itself requires compensation if a regulation doesn't substantially advance a legitimate state interest. Rather, the argument is still a substantive due process argument: if a regulation is irrational or arbitrary–if it does not rationally advance a legitimate state interest–then it is a violation of substantive due process and not a proper exercise of the police power. But the implied limitation argument points out that if a regulation is not a proper exercise of the police power, that means that it was not just implementing a pre-existing limitation on property titles, but it really did take away some of the owner's property rights without compensation.

Some would say this is a weakness, because it would have some of the same effects as the rejected independent takings test of substantial advancement. Others, including me, would say it is a strength, because if the Court in *Lingle* meant to go further than rejecting an independent takings test, it shouldn't have. The implied limitation argument resolves the Court's concerns that an independent takings test is inconsistent with takings doctrine and that practically it might invoke more extensive scrutiny of the rationality of regulations. The implied limitation explanation resolves those concerns because it does not suggest an independent test, but merely an implication of a regulation that violates substantive due process.

V. CONCLUSION

All four explanations are valid descriptively, in that the Supreme Court has expressed all four principles explaining or justifying regulatory takings analysis and decisions. Each of them may be a persuasive explanation in some situations. Certainly the advocate should consider all four explanations in making arguments about the magnitude of regulatory burdens.

Maybe that contributes to the perceived messiness or confusion of regulatory takings law.[91] Courts consider several different principles rather than just one principle in evaluating the relevant factual considerations. If so, regulatory takings law may be clearer by being more explicit about the influence of these perspectives. Courts can and should address how each of these perspectives may

90. Lingle v. Chevron U.S.A., 544 U.S. 528, 540 (2005).
91. *See, e.g.*, Durden, *supra* note 15, at 28.

influence the judgment about whether the regulation goes too far and should result in compensation. That would help clarify the court's reasoning and give more guidance to future litigants.

I think that courts should pay more attention to the implied reserved police power perspective, however. It is rarely considered except in evaluating whether background principles already prohibited the desired uses. Yet it gives the fullest and best account of why magnitude matters. The functional equivalence argument explains why a total or nearly total regulatory taking should be compensable, but does not explain why a regulation with less economic impact may still be a taking. The distributional fairness argument does not explain why a total or near total regulatory taking should be compensable even if it were widely and rationally distributed. The practical explanation does not explain why the distribution of the regulatory burden matters, if anything suggesting that the more widely distributed the burden, the less likely to be compensable because the government cannot afford to pay the bill. The implied limitation explanation, on the other hand, explains the relevance of both variables and integrates them in a single approach. Property titles are subject to ordinary, reasonable exercises of the police power regulating the property. The government can choose to exercise that power in some ways but not in other ways, resulting in unequal distribution of regulatory burdens. But property titles are not subject to extraordinary exercises of the power that are unusually large, unusually rare, or that would swallow up due process, contract, or takings protections of the Constitution.

If nothing else, the implied limitation explanation would better focus our attention on the ultimate and unavoidably difficult and complex question, whether ownership of property in our legal system should be qualified by such an exercise of public power or whether it goes too far and the public should bear the burden of accomplishing that regulatory purpose in that particular way.