The Use-Value Distinction in Regulatory Takings Law: Which Property Interest is Protected by the Constitution?

Brian F. Crossman

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The Use-Value Distinction in Regulatory Takings Law: Which Property Interest is Protected by the Constitution?

Brian F. Crossman[*]

One of the two threshold inquiries inherent to virtually all regulatory takings cases is a determination of what the private property owner is left with after the government's action. (This is the "numerator" of the diminution analysis. The second inquiry is what the plaintiff would have without the regulation — the "denominator" of the fraction.) While the weight that this determination is given in the takings analysis has fluctuated over the decades of Supreme Court takings decisions, it has always remained relevant to the question. Defining the nature and quantum of property rights that the Constitution requires to be left over after the application of police power regulations, however, has been an exceedingly difficult and erratic process. It was given great potential significance by the Supreme Court's 1992 decision in Lucas v. South Carolina Coastal Council,[1] and lately has received some important clarification from the Court.

Applying the classic formulation of regulatory validity developed in zoning cases, the Court, like many state courts, has often said that private property owners must be left with a reasonable remaining use for their property.[2] The word "use," however, was never clearly defined,[3] and many takings opinions implied that it is actually the remaining "value" of the parcel of private property with which courts should be concerned. Despite numerous decisions on the topic, a clear distinction between use and value has never been articulated. Until very recently, the Court had never even acknowledged that the words might have different meanings, much less expressed a preference for one over the other. The distinction, while often overlooked, could be important, depending upon what "use" is assumed to mean. In the *Lucas* setting it could be critical,[4] and in the more usual *Penn Central* setting it remains a significant consideration.[5] A use-focused standard implies some active development use, perhaps even a structural use, and would often tend to be defined

[*] Boston College Law School '05. I gratefully acknowledge the help and insight provided on this topic by Tim Dowling and John Echeverria. I also owe a debt of gratitude to Professor Zyg Plater, whose advice and willingness to read and critique drafts of this paper were invaluable.

1. 505 U.S. 1003 (1992).

2. *See, e.g.*, Tahoe-Sierra Pres. Council v. Tahoe Reg'l Planning Agency, 535 U.S. 302 (2002); Palazzolo v. Rhode Island, 533 U.S. 606; *Lucas*, 505 U.S. 1003; Agins v. City of Tiburon, 447 U.S. 255 (1980). The reasonable remaining use is often referred to by the Court as an "economically viable use."

3. Other elements that are not the subject of this present analysis have not been well defined either, such as: What is "reasonable"? In what context should takings claims be viewed — in terms just of the individual, or of the public as well? Must the use really be "remaining," or can past harvesting of investment-backed expectations suffice? The present analysis focuses only on the use-or-value definition.

4. The presence of a categorical taking, and ultimately whether a claim is evaluated under a *Lucas* or *Penn Central* analysis, is determined by whether the claimant is left with an "economically viable use." Therefore, the type of analysis in which a court must engage is dependant upon how "use" is defined. *See Lucas*, 505 U.S. at 1016.

5. What a claimant is left with after a government action is an important consideration for at least two of the three *Penn Central* factors, as discussed below.

by the propertyowner's intentions for the land. Such a requirement would make invalidations easier. Chief Justice Rehnquist, joined by Justices Scalia and Thomas, vehemently argued for defended such a use-focused standard in their *Tahoe* dissent, arguing:

> The Court reads *Lucas* as being fundamentally concerned with value…rather than with the…use of land. But *Lucas* repeatedly discusses its holding as applying where no productive or economically beneficial use of land is permitted.... The Court's position that value is the *sine qua non* of the *Lucas* rule proves too much.[6]

On the other hand, very few restrictions leave land "valueless." Even restrictions that leave a parcel of land with no active or structural use may still provide for "passive uses." For example, undevelopable land may still hold substantial monetary value as a buffer for adjacent landowners or as a nature preserve. Therefore a value-focused standard would usually be far less stringent.

Given that takings disputes so often pit business against government, and frequently incorporate environmental concerns, the significance of the use-value distinction to regulatory takings law is likely to receive continuing scrutiny from the environmental bar. The distinction has become even more important in light of the Court's "categorical" takings doctrine developed in *Lucas*, in which the Court declared that a categorical, or *per se*, taking is effected by a "total wipeout," but failed to clarify whether a total wipeout was defined by a deprivation of use or value.

It should be noted that while the word "value" has a fairly clear meaning in property law – typically a determination made by appraisal experts regarding a particular piece of property, stating the highest market price likely to be paid by a willing buyer to a willing seller[7] – the word "use" does not. (In traditional property terms, for instance, a use means a form of *trust*. In eminent domain law, "public use" has been generally re-defined to mean "a public *purpose*."[8]) As applied to land, "use" can in some cases refer to passive uses, as in the Chicago School's economic analyses,[9] in other cases it can refer to purely active uses. A use may not produce any market value for the propertyowner, or in other cases may produce only intangible values. In most cases however, we think of uses as activities on the land that have commercial utility, and hence, produce market value, not just personal value to the propertyowner. This definition process deserves attention, but for the

6. *See Tahoe*, 535 U.S. at 350-52 (Rehnquist, J., dissenting).
7. *See* PAULA K. KONIKOFF, PRACTICING LAW INST., REAL ESTATE LAW AND PRACTICE COURSE HANDBOOK SERIES: APPRAISALS, 815 (2001).
8. *See* Wendell E. Pritchett, *The "Public Menace" of Blight: Urban Renewal and the Private Uses of Eminent Domain*, 21 YALE L. & POL'Y REV. 1, 9-13; *see also* Note, *The Public Use Limitation on Eminent Domain: An Advance Requiem*, 58 YALE L. J. 599 (1949).
9. Although Justice Scalia comes from the Chicago School, he is not likely to adopt such a definition in a regulatory takings setting for obvious reasons.

purposes of this analysis it is sufficient to say that Court's takings jurisprudence has generally ignored the problem of defining what a "use" is.

The latent ambiguity in the "use"-or-"value" rubric is as old as the Court's regulatory takings doctrine. In Pennsylvania Coal Co. v. Mahon,[10] the case which first enforced the idea that regulations could effect a taking, Justice Holmes, writing for the majority, found a violation of the Takings Clause where a regulation, intended to prevent subsidence of the surface land, deprived the claimant of a right to mine coal. In Justice Holmes words, "what makes the right to mine coal valuable is that it can be exercised with profit. To make it commercially impracticable to mine certain coal has very nearly the same effect for constitutional purposes as appropriating or destroying it."[11] Justice Holmes's language in this paragraph focuses on the deprivation of profitable use as opposed to monetary value. Justice Holmes, however, also used language implying that it was the remaining *value* that was relevant:

> Government could hardly go on if to some extent *values* incident to property could not be diminished.... As long recognized, some *values*...yield to the police power.... One fact...in determining such limits is the *extent of the diminution*. When it reaches a certain *magnitude*, in most if not all cases there must be...compensation.[12]

This language does not seem to be focused on use, but rather on the monetary consequences of restricted use. Accordingly, Justice Brandeis in his dissent in the case assumed that Holmes was concerned with value, and not use.[13] State and federal takings cases following *Pennsylvania Coal* have been imprecise in distinguishing use and value, often using the terms interchangeably and offering little insight into which approach was preferred.[14] In any event, the Court's imprecision and reluctance to define these terms provided adequate support for subsequent arguments for either a use-focused or value-focused approach to regulatory takings.

In Penn Central Transportation Co. v. New York City,[15] Justice Brennan, writing for the Court, blurred the use-value distinction when he declared that the economic

10. 260 U.S. 393 (1922).
11. *Id.* at 414.
12. *Id.* at 413 (emphasis added).
13. *See id.* at 419 (Brandeis, J., dissenting); *see also* Goldblatt v. Town of Hempstead, 369 U.S. 590, 594 (1962) (interpreting Justice Holmes's diminution comment as calling for a comparison of *value*, pre and post-restriction).
14. *See Goldblatt*, 369 U.S. at 592. Despite interpreting *Pennsylvania Coal* to be concerned with diminution in value, in deciding the case, the Court considered whether the regulation deprived the land of its "beneficial use." Additionally, the Court's discussion in United States v. Causby assessed the market value of the property in question, though ultimately a taking was found because the government action inhibited the "owner's full enjoyment of the property and…limit[ed] his exploitation of it." 328 U.S. 256, 265 (1946). It should be noted that in the inverse condemnation cases such as *Causby*, the government action was physical, not regulatory.
15. 438 U.S. 104 (1978). The claimant in *Penn Central* alleged that New York City's Landmarks Preservation Law violated the Takings Clause by preventing Grand Central Station from erecting a 50-floor office building above the terminal.

impact of a government regulation and the propertyowner's investment-backed expectations were two of three significant factors which must be evaluated in analyzing a takings claim.[16] The former sounds like value and the latter seems to imply use.[17] Brennan was similarly imprecise with his language on the economic significance of the transfer of development rights (TDRs) retained by the claimant. According to the court, the value of the TDRs must be factored into a takings analysis, and at the very least, mitigates the financial burden or economic impact of the regulation in question. At one point in this discussion, however, Brennan made note of the fact that the Landmark Preservation Law in no way interfered with the claimant's present *use* of the property, which might indicate support for a use-focused approach. Generally though, it would appear that *Penn Central* interprets the Holmesian approach as a balancing based on remaining value.

As evidence of the flexibility that the Court's imprecision with language provides, just two years after *Penn Central* the Court, citing *Penn Central* as support, managed to shift the focus back to remaining use, or at least give use-focused advocates a strong foothold. In Agins v. City of Tiburon[18] (where the Court took the standard rule for weighing takings claims in zoning decisions and applied it as if it had been a standard test for takings generally) the majority said that a taking was effected if a regulation did not substantially advance a legitimate interest, "or denie[d] an owner *economically viable use* of his land."[19] In recent years, the more conservative justices have latched onto this use-focused language to suggest that elimination of profitable development rights constitutes an uncompensated taking.[20] While the use-value distinction had always been relevant to balancing regulatory takings issues, defining the distinction became imperative with the development of the categorical or *per se* takings doctrine as applied to a purported total wipeout case in *Lucas*.[21]

In *Lucas* the trial court had decided the case on the assumption that the land had been rendered "valueless." Operating under the same assumption, the Supreme Court found a categorical taking of the claimant's property, analogizing such a total

16. The third factor being the character of the government's action, which includes not only whether it is a physical or non-physical taking, but also considers the public purpose of the regulation, as Justice O'Connor made clear in her separate opinion in Palazzolo v. Rhode Island. *See* 533 U.S. 606, 634 (O'Connor, J., concurring).
17. Brennan did note that a diminution in value could not by itself effect a taking, citing as support, cases in which diminutions ranging from 75 to 87.5 percent did not effect a taking. *See Penn Central*, 438 U.S. at 131.
18. 447 U.S. 255 (1980).
19. *Id.* at 260 (citing *Penn Central*, 438 U.S. at 138 n.36 as support) (emphasis added).
20. *See* Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency, 535 U.S. 302, 350 (2002) (Rehnquist, J., dissenting); Lucas v. South Carolina Coastal Council, 505 U.S. 1003, 1016 (1992).
21. Under the Court's categorical taking doctrine, when a landowner has been deprived of all economically viable use of his or her land, i.e., a total wipeout, the court need not engage in any case-specific inquiry. Rather such a "total deprivation" implicitly effects an uncompensated taking, limited only by a state's background principles of property and nuisance law. The *Lucas* decision could also be considered to be limited by its applicability to land *only*, and not personal property. Given these limits, calling a *Lucas* taking "categorical" is a bit of a misnomer. *See Lucas*, 505 U.S. at 1015-1019; *see also* Douglas T. Kendall, *Defining the* Lucas *Box:* Palazzolo, Tahoe, *and the Use/Value Debate*, *in* TAKING SIDES ON TAKING ISSUES: PUBLIC AND PRIVATE PERSPECTIVES (Thomas E. Roberts ed., 2002).

wipeout to a physical invasion of property which always requires compensation.[22] The *Lucas* decision, like so many of the Court's takings cases, was plagued by imprecision, making the distinction between use and value, and therefore what constituted a total wipeout, even more difficult to define. Justice Scalia's majority opinion in *Lucas* confusingly used both use language and value language. Justice Scalia said that a categorical taking is effected when a propertyowner is denied all "economically viable use" of his or her land,[23] however, he frequently noted that a categorical taking had been triggered in *Lucas* because the coastal-zone construction ban "rendered [Mr. Lucas's property] *valueless*."[24] At another point, Justice Scalia claimed the government action constituted a total wipeout because it "wholly eliminated the *value* of the claimant's land."[25] Furthermore, Justice Scalia attempted to clarify the boundary for a total wipeout in terms of diminution of value rather than the type or degree of proscribed use, acknowledging that a "landowner whose property is diminished in value 95% recovers nothing [under a categorical takings analysis], while the landowner who suffers a *complete elimination of value* recovers the land's full value."[26]

The creation of the categorical takings doctrine, and its requirement of a total wipeout, made the use-value distinction relevant to any post-*Lucas* takings claim analysis. If it is a deprivation of use which creates a total wipeout, restrictions on development or a propertyowner's ability to profit from the land could effect a categorical taking, while a total wipeout based only on a parcel's monetary value would grant the government far greater latitude in regulating property. Justice Scalia's opinion seemed to imply that a court should be concerned with the use retained by propertyowners, however his inconsistency and tendency to focus on value as well as use reflected the basic ambiguity.[27] Regardless of what the Court intended to convey in *Lucas*, the opinion provided considerable support for both approaches,[28] and offered little insight into what was needed to avoid a total-wipeout *Lucas* analysis.

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22. *See Lucas*, 505. U.S. at 1017. While no specific justification for the categorical takings doctrine was given, the majority suggested that Justice Brennan's dissenting opinion in San Diego Gas & Electric Co. v. San Diego (450 U.S. 621, 652 (1981)(Brennan, J., dissenting)) which argued that from a landowner's perspective, a total deprivation is the equivalent of a physical appropriation, is an appropriate analogy to justify the Court's categorical taking; *see also Tahoe*, 535 U.S. at 348 (Rehnquist, J., dissenting) (noting that "[t]he *Lucas* rule is derived from the fact that a total deprivation of beneficial use is, from the landowner's point of view, the equivalent of a physical appropriation.").
23. *Lucas*, 505 U.S. at 1016.
24. *Id.* at 1020 (emphasis added).
25. *Id.* at 1026 (emphasis added).
26. *See id.* at 1019 n.8 (emphasis added).
27. *Compare* Douglas T. Kendall, *The Use/Value Debate and* Tahoe, *in* TAKING SIDES ON TAKING ISSUES: THE IMPACT OF *TAHOE-SIERRA* 95 (Thomas E. Roberts ed., 2003), *with* James S. Burling, *Use Versus Value in the Wake of* Tahoe-Sierra, *in* TAKING SIDES ON TAKING ISSUES: THE IMPACT OF *TAHOE-SIERRA* 99 (Thomas E. Roberts ed., 2003).
28. *See* Kendall, *supra* note 27, at 95 (suggesting that the dictum in the *Lucas* opinion can support both a use-focused, and value-focused definition of "total wipeout").

The Supreme Court's imprecise language in *Lucas* does not clarify the use-value distinction. In the years since *Lucas*, however, some decisions by the Court, as well as the lower courts, have shed considerably more light on the debate. In the years immediately following the *Lucas* decision, a number of lower courts picked up on Justice Scalia's invitation to scrutinize regulations for the categorical-test trigger, often using a use-focused standard to force compensation where development restrictions infringed on a propertyowner's particular desired use for a particular parcel of land.[29]

In recent years however, the Supreme Court has significantly narrowed the scope of the *Lucas* categorical taking, in part by favoring a value-focused standard for the diminution takings analysis.[30] In the wake of these Supreme Court decisions, the lower courts have for the most part followed suit,[31] contributing to what some have described as a "turning of the tide" in regulatory takings law.[32]

The value-focused standard used by the Court in both Palazzolo v. Rhode Island[33] and Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency[34] found support in Justice Scalia's majority opinion in *Lucas*. Specifically, support was found in *Lucas's* Footnote Eight, where Justice Scalia acknowledged that a regulation or restriction which diminished the value of a parcel of land by ninety-five percent would not effect a categorical taking under the *Lucas* analysis because the propertyowner had not suffered a "complete elimination of value" of his land.[35] Since a parcel of land in a ninety-five percent diminution case retained some value albeit minimal, a *Penn Central* analysis was more appropriate. The footnote made no mention of "use" as part of the trigger.

Drawing upon the fact that on the record Mr. Palazzolo's parcel retained value, the Court in *Palazzolo* did not find the restriction on development to be a total wipeout. According to the trial record, the propertyowner's land retained approximately $200,000 in development value. This would constitute a diminution of nearly ninety-four percent from the plaintiff's claimed market value of the property if totally

29. *See* J. David Breemer, *Of Nominal Value: The Impact of* Tahoe-Sierra *on* Lucas *and the Fundamental Right to Use Private Property*, 33 ENVTL. L. REP. 10331 n.74 (2003) (citing post-*Lucas* cases which, under a use-focused standard, found a categorical taking despite the fact that the land retained some value).
30. *See* Palazzolo v. Rhode Island, 533 U.S. 606 (2001); Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency, 535 U.S. 302 (2002).
31. *See, e.g.*, Cooley v. United States, 324 F.3d 1297 (Fed. Cir. 2003); Lost Tree Vill. Corp. v. City of Vero Beach. 838 So. 2d 561 (Fla. Dist. Ct. App. 2002); McPherson Landfill, Inc. v. Bd. of County Comm'rs of Shawnee County, 49 P.3d 522 (Kan. 2002).
32. *See* John D. Echeverria, *A Turning of the Tide: The* Tahoe-Sierra *Regulatory Takings Decision*, 32 ENVTL. L. REP. 11235, 11252 (2002).
33. 533 U.S. 606.
34. 535 U.S. 302.
35. *See Lucas*, 505 U.S. at 1019 n.8.

unregulated.[36] That the Court declined to find a categorical taking for an alleged ninety-four percent diminution in value should not be surprising in light of Justice Scalia's footnote comment that even ninety-five percent diminutions do not trigger categorical takings. In dicta the *Palazzolo* Court did suggest that the government could not avoid a categorical taking by leaving the propertyowner with merely a "token interest," which the Court expressed in terms of value, not use. The amount of $200,000 (or approximately six percent of the land's claimed maximum value) was more than a token interest according to the Court.[37] The *Palazzolo* majority declined to define exactly what constituted a total wipeout – leaving open the question of whether a diminution of value between ninety-five and 100 percent could effect a categorical taking – though the Court clearly focused the issue on remaining value, not use.

In *Tahoe*, ten months after the decision in *Palazzolo,* the Court offered an even stronger endorsement for the value-focused approach and further indicated that a total wipeout could only be effected by a complete elimination of value. In *Tahoe* the Court focused heavily on Justice Scalia's *Lucas* opinion, including Footnote Eight. As the *Tahoe* Court noted, *Lucas* required there be *no* economically viable use, a requirement that was reiterated in Justice Scalia's footnote where he implied that anything less than a "complete elimination of value," conceivably a 100 percent diminution, was not a total wipeout and thus could not effect a categorical taking. Therefore, the Court in *Tahoe*, determining that the land in question retained some value despite a temporary development moratorium, found that the appropriate analysis under which to evaluate the takings claim was *Penn Central* and not *Lucas*.[38] Surely, in joining the *Tahoe* dissent, Justice Scalia could not have been pleased about the majority's hijacking of his *Lucas* footnote so as to validate a land-use regulation by focusing on retained value rather than use.

Seemingly, any question left after *Lucas* or *Palazzolo* as to whether a total wipeout is defined by use or value was answered by *Tahoe*. The Court in *Tahoe* explained that "the categorical rule in *Lucas* was carved out for the extraordinary case in which a regulation permanently deprives property of all *value*,"[39] and should be applied only where there is a "permanent obliteration of *value* of fee simple estate."[40] *Tahoe* could hardly have been more clear that value is the issue. If a regulation has not

36. *See Palazzolo*, 533 U.S. at 631. The land in question, if allowed to be developed, would have been worth an estimated $3.15 million.
37. *Palazzolo*, 533 U.S. at 631. The "token interest" comment might seem at odds with the "complete elimination of value" requirement in *Tahoe*, however the conflict is likely not as great as it appears, especially when one considers that Justice Kennedy, the author of the *Palazzolo* decision, joined the Court's opinion in *Tahoe*. One possible explanation provided by David Kendall, is that the "token interest" comment is applicable only where the government appears to be attempting to circumvent a categorical taking by leaving a few "crumbs of value." Absent such strategic behavior, the token interest comment would not be applicable. *See* Kendall, *supra* note 27, at 97.
38. *See* 535 U.S. at 342.
39. *Id.* at 332 (emphasis added).
40. *Id.* at 330 (emphasis added).

caused a total wipeout of value, it is not a categorical taking. In such cases, courts must use the *Penn Central* factors to determine whether an uncompensated taking has occurred.

Following the Supreme Court's lead, the lower courts have also applied the value-focused approach, as well as strictly interpreting the "complete elimination" requirement, in determining whether a categorical taking has occurred. In Cooley v. United States[41] the Court of Appeals for the Federal Circuit evaluated a development restriction which resulted in a 98.8 percent diminution in the value of the claimant's land. Citing *Tahoe*, the court found that "[a]nything less than a complete elimination of value or a total loss…would require the kind of analysis applied in *Penn Central*," and not that which was applied in *Lucas*.[42] Therefore, since the propertyowner retained approximately 1.2 percent of the land's worth, there had been less than a complete elimination of value. In the absence of a total wipeout, *Lucas* did not apply. The court's analysis in *Cooley*, like that in *Tahoe*, and to a lesser degree, *Palazzolo*, focused not on what use the propertyowner had retained, but what value the land retained. Where the land retained any value, even if minimal as was the case in *Cooley*, a categorical taking had not been effected. Rather, the question of whether the propertyowner was due compensation would have to be determined by a fact-based inquiry in accordance with the *Penn Central* factors.

After *Tahoe*, it seems clear that the Court's concern is with remaining value, not use. The implications of this are particularly important to the *Lucas* total wipeout requirement since the presence of a categorical taking is indicated by what the propertyowner is left with. Post-*Tahoe*, a regulation which renders land undevelopable, or even unprofitable, does not effect a total wipeout as long as the land retains some financial value beyond a mere token. Therefore, a parcel of land, which after a particular government action is still of some value, perhaps as a buffer to neighbors or as a nature preserve (though no active use), would not be deemed a total wipeout.

Such a value-focused approach seems to not only be the correct approach under the current Supreme Court precedent, but the preferable approach as well. A value-focused approach eliminates much of the subjectivity inherent to a use-focused approach by evaluating a parcel's worth according to an objective economic market criterion rather than a subjective judgment of what the minimal constitutionally-appropriate use of land is, or what the individual propertyowner's intentions for exploitation of the land might be.

Applying a value-focused rubric does not pre-ordain the outcome of the takings inquiry, of course. In a *Lucas* wipeout setting there still is the balance of property and tort limitations on title (which is why calling the *Lucas* test a "categorical" rule is

41. 324 F.3d 1297 (Fed. Cir. 2003).
42. *Id.* at 1305.

not really appropriate[43]). In non-*Lucas* settings the government action would still need to be evaluated under the *Penn Central* factors to determine whether a taking has occurred at all.[44]

In light of the explicit recent Supreme Court applications (as well as the logical appropriateness) of a value-focused approach to establishing the diminution numerator in regulatory takings cases, this element of the takings puzzle at least should now be regarded as pretty well settled.

43. *See* Kendall, *supra* note 21, at n.3.

44. It is reasonable to believe (though relatively untested in the courts) that even if denied the benefit of a categorical takings analysis, a propertyowner who suffers a ninety-five percent diminution in the value of his or her land due to government action would still have a strong takings claim under the *Penn Central* factors, given the economic impact of the action and the adverse affect on the propertyowner's investment-backed expectations.