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Is Land Special - The Unjustified Preference for Landownership in Regulatory Takings Law

Eduardo Moises Penalver

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Is Land Special?

The Unjustified Preference for Landownership in Regulatory Takings Law

Eduardo Moisés Peñalver*

This article critiques the Court's attempt to cabin the Lucas "per se" takings rule by limiting it to real property. It argues that the distinction between real and personal property cannot be justified by history or the differing expectations of property owners. It then applies five theoretical frameworks (libertarian, personhood, utilitarian, public choice, and Thomistic-Aristotelian natural law) and finds that none of them supports the jurisprudential distinction between real and personal property. As a result, the article argues that "because the distinction between personal and real property is an unprincipled one, it cannot save the Court from the unpalatable implications of its Lucas holding for broader economic legislation." While acknowledging the rationale for the Court's attempt to create a bright line rule in the area of regulatory takings, Peñalver concludes that this is an area of law that is "unsuitable for such inflexible standards."

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INTRODUCTION

Scholars have widely condemned the Supreme Court’s approach to regulatory takings as a massive (and growing) swamp of muddled contradictions.¹ Some critics of the Court’s regulatory takings jurisprudence blame the confusion on shifting coalitions within the Court,

which have yielded a series of deeply divided decisions pointing in different (and at times, irreconcilable) directions. But criticism has also centered on the Court’s frequent reiteration, epitomized by its decision in *Penn Central Transportation Co. v. New York City,* of an ad hoc approach in this area. Bruce Ackerman has called the repeated invocation of this ad hoc standard a “parody of stare decisis.” And Susan Rose-Ackerman has argued that any bright line would be preferable to the Court’s tendency toward “ad hocery” in regulatory takings. “[T]his is one legal area,” she claims, “in which almost any consistent, publicly articulated approach is better than none. Clear statement, even if not backed by clear thinking, will do much to preserve the investment-backed expectations the Court talks so much about.”

Commentators usually cite the Court’s decision in *Lucas v. South Carolina Coastal Council* as a prime example of the Court’s efforts to create clarity out of murkiness. In that case, the Court held that—with certain crucial exceptions—a regulation “takes” an owner’s land when it renders that land valueless. The fairness of bright line rules in the regulatory takings context, however, has been questioned. Moreover, as

2. See Haar & Wolf, supra note 1, at 2169-72.
4. As the Court has often put it, its “regulatory takings jurisprudence . . . is characterized by essentially ad hoc, factual inquiries, designed to allow careful examination and weighing of all the relevant circumstances.” Tahoe-Sierra Pres.Council, Inc. v. Tahoe Reg’l Planning Agency, 535 U.S. 302, 322 (2002) (internal quotation marks omitted).
7. Id.
10. See *Lucas*, 505 U.S. at 1015, 1027 (regulation that deprives an owner of “all economically beneficial or productive use” of land is per se a taking).
11. See id. at 1064 (Stevens, J., dissenting) (noting the unfairness of creating a per se rule for people who lose one hundred percent of the value of their property when such people are, for all practical purposes, similarly situated to many people—for example, those whose property loses only slightly less than one hundred percent of its value—who will not fall within the scope of the rule); *Loretto*, 458 U.S. at 442-43 (Blackmun, J., dissenting) (“If the Court’s decisions
numerous scholars have observed, the predictability created by *Lucas* is debatable, at least in part because of the exceptions the *Lucas* Court wrote into its per se rule.\(^{12}\)

Most of the discussion about those exceptions has focused on the Court's statement that a regulation is not a "taking," even when it deprives an owner of "all economically beneficial use," if the regulation simply prohibits the owner from doing something forbidden by "background principles of the State's law of property and nuisance."\(^{13}\) While scholars have discussed this "background principles" exception at length, *Lucas* created another, even more sweeping, exception that has attracted far less scholarly attention. Citing *Andrus v. Allard*,\(^{14}\) the *Lucas* Court indicated in dicta that it understood its new per se rule to apply only to property in land, effectively carving out an exception for "personal property" whose value has been completely destroyed by regulation:

> [I]n the case of personal property, by reason of the State's traditionally high degree of control over commercial dealings, [the owner] ought to be aware of the possibility that new regulation might even render his property economically worthless (at least if the property's only economically productive use is sale or manufacture for sale). See *Andrus v. Allard*, 444 U.S. 51, 66-67 (1979 (prohibition on sale of eagle feathers). In the case of land, however, we think the notion pressed by the [South Carolina Coastal] Council that title is somehow held subject to the 'implied limitation' that the State may subsequently eliminate all economically valuable use is inconsistent with the historical compact recorded in the Takings Clause that has become part of our constitutional culture.\(^{15}\)

This strong distinction in *Lucas* between land and other forms of property made explicit a general favoritism toward land that had been latent in the Court's modern expansion of the regulatory takings construing the Takings Clause state anything clearly, it is that '[there] is no set formula to determine where regulation ends and taking begins.'" (quoting Goldblatt v. Town of Hempstead, 369 U.S. 590, 594 (1962)).


13. *Lucas*, 505 U.S. at 1029; see, e.g., Hubbard, supra note 9, at 499–507 (discussing the scope of the "background principles" exception in *Lucas*); Rubenfeld, supra note 1, at 1091–94 ("*Lucas* begins by telling judges why traditional nuisance reasoning is unworkable in takings law, and it ends by telling them that they must apply only traditional nuisance reasoning when they decide total-loss takings cases."); Lazarus, supra note 12, at 1426–27 (calling the Court's resort to the "background principles" exception a "shell game" that had the potential to drain the Court's holding of any force); Sugameli, supra note 12, at 957–77 (discussing the complexities of the "background principles" exception).


15. 505 U.S. at 1027–28.
Commentators have long noted this implicit preference. As Molly McUsic has observed, although the Supreme Court has not limited its regulatory takings doctrine to land, its regulatory takings decisions as a whole have "greatly favored that notion of property." J. Peter Byrne agrees, arguing that "the Supreme Court has shown absolutely no interest in applying the regulatory takings doctrine to assets other than land." The Court has never held, and this Article does not assert, that the regulatory takings doctrine never applies to personal property. But it is almost beyond dispute that, during its revival of the regulatory takings doctrine over the past two decades, the Court has focused overwhelmingly on regulations affecting land and that landowners bringing regulatory takings claims stand a greater chance of prevailing in the Supreme Court than the owners of other sorts of property.

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16. See infra notes 78–79 and accompanying text.
18. McUsic, supra note 17, at 653 ("[T]he Court gives little consideration under the Takings Clause to purely economic regulations that do not affect land, even when large amounts of wealth are at stake.").
20. See id.; see also McUsic, supra note 17, at 653. Indeed, the vast majority of regulatory takings cases in which plaintiffs have prevailed in the Supreme Court have involved suits by landowners. See, e.g., Palazzolo v. Rhode Island, 533 U.S. 606, 611 (2001) (land-based claim prevailing in the Supreme Court); City of Monterey v. Del Monte Dunes at Monterey, Ltd., 526 U.S. 687, 693–94 (1999) (same); Suitum v. Tahoe Reg'l Planning Agency, 520 U.S. 725, 730–31 (1997) (same); Babbitt v. Youpee, 519 U.S. 234 (1997) (same); Dolan v. City of Tigard, 512 U.S. 374, 377 (1994) (same); Lucas, 505 U.S. at 1006–07 (same); Nollan v. Cal. Coastal Comm'n, 483 U.S. 825, 827 (1987) (same); First English Evangelical Church of Glendale v. County of Los Angeles, 482 U.S. 304, 306–07 (1987) (same); Hodel v. Irving, 481 U.S. 704, 709–10 (1987) (same); Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419, 421–22 (1982) (same); Kaiser Aetna v. United States, 444 U.S. 164, 179–89 (1979) (same). In contrast, only a handful of plaintiffs asserting takings arguments related to property other than land have been identified in those arguments prevail in the Supreme Court. See Ruckelshaus v. Monsanto Co., 467 U.S. 986, 990, 997 (1984) (owner of trade secrets); Phillips v. Wash. Legal Found., 524 U.S. 156, 162–63 (1998) (plaintiff asserting taking of interest in bank accounts); Webb's Fabulous Pharmacies, Inc. v. Beckwith, 449 U.S. 155, 156–57 (1980) (same). Indeed, it is debatable whether Phillips and Webb's Fabulous Pharmacies even qualify as "regulatory takings" cases. In both cases, the Court confronted state actions directly appropriating interest earned on bank accounts. See Phillips, 524 U.S. at 167, 171 (describing Webb's Fabulous Pharmacies as involving "confiscatory regulations" and suggesting that the statute at issue in Phillips "confiscat[ed]" the plaintiff's "interest income"). But see Webb's Fabulous Pharmacies, 449 U.S. at 159 (characterizing the statute at issue as a "appropriation" of the power of the account's principal to earn interest for a period of time). If the state actions in those cases were viewed as "confiscations" of the interest (as opposed to regulation of the principal), the cases would more properly be categorized as involving direct, as opposed to regulatory, takings. Similarly, in Monsanto, the Court considered a claim brought by a trade-secret owner alleging that the government's use or disclosure of the information covered by that trade secret would deprive it of property. In holding in favor of the property-owner, the Court noted that

[with respect to a trade secret, the right to exclude others is central to the very definition of the property interest. Once the data that constitute a trade secret are]
At first glance, such favoritism towards property in land seems to resonate with widely-shared intuitions about the importance of landownership, particularly in light of land's apparently central role in the achievement of the "American Dream" of homeownership. Nevertheless, scholars who have discussed the Court's favoritism towards landownership in the context of regulatory takings have often dismissed its cogency out of hand. In his treatise on regulatory takings, for example, Steven Eagle argues that the "implication that 'personal property' should have less protection than land under regulatory takings doctrine flies in the face of long precedent that both tangible and intangible personality are as subject to condemnation as realty." Most other commentators to consider the issue—though not all—have concurred in this assessment. The judicial response to the Lucas distinction between personal property and land has been more mixed. While several lower courts have embraced the Supreme Court's distinction, others have rejected it, and instead applied the Lucas diminution-in-value test to claims asserting takings of personal property. Despite the discussion and application of the preference, no court or commentator has fully explored the

disclosed to others, or others are allowed to use those data, the holder of the trade secret has lost his property interest in the data.

Monsanto, 467 U.S. at 1012. Thus, Monsanto is a case in which the government conduct in question was the functional equivalent of a direct appropriation of the entire piece of property, as opposed to a mere regulation of that property. Finally, in Eastern Enterprises v. Apfel, 524 U.S. 498 (1998), a case involving pension benefits, the Court, though ultimately ruling in favor of the plaintiff asserting that its money was "taken" by the regulations in question, was unable to muster a majority in support of the plaintiff's Takings Clause arguments. See infra note 309.

23. Michael Allan Wolf defends a distinction between land and personal property within regulatory takings by focusing largely on money. See Michael Allan Wolf, Taking Regulatory Takings Personally: The Perils of (Mis)Reasoning by Analogy, 51 ALA. L. REV. 1355, 1361-62 (2000). Takings of money, however, raise their own set of complications. Specifically, it is not clear how to distinguish such "takings" from clearly permissible government interference with property rights, such as taxes. This Article does not discuss the broader question whether it makes sense for the Court to grant more (or less) scrutiny under the Takings Clause to certain narrow categories of property.
25. See infra Part I.C.
26. Compare Philip Morris, Inc. v. Reilly, 312 F.3d 24, 35 (1st Cir. 2002) (refusing to apply Lucas to personal property), with Maritrans, Inc. v. United States, 342 F.3d 1344, 1352 (Fed. Cir. 2003) (rejecting the government's argument that "the concept of a categorical taking cannot be extended to regulations that restrict the use of personal property").
distinction as a conceptual or normative matter. In light of the persistent and deeply rooted nature of the preference for land in the Court's modern takings revival, a thorough analysis of the preferred status of land within regulatory takings doctrine is overdue.

This Article undertakes such an exploration. Part I discusses the law of regulatory takings as it touches on the preferred status of land. Part II explores whether, as the Lucas Court claimed, the distinction between land and personal property can be justified on the basis of history or the differing expectations of owners of land and personal property. This Article ultimately concludes that neither of these factors can carry the weight the Court wants to place on them.

Given the failure of the Court's proffered explanations, Part III discusses a variety of alternative grounds for the Court's distinction, assessing it from the point of view of five theories within the scholarship of property and takings: libertarian theory; personhood theory; utilitarian theory, particularly that set forth in Michelman's classic article on regulatory takings; public choice theory; and Thomistic-Aristotelian natural law theory. Importantly, none of these normative frameworks justifies categorically favoring landownership over ownership of personal property in the regulatory takings context. Any intuitions that landownership is somehow more fundamental than ownership of other forms of property thus appear to rest on unreflective assumptions about the importance of land, assumptions that, even if once true, are no longer justified in our modern, post-industrial society.

Based on the analysis in Part III, Part IV concludes that, because the Court's favoritism toward land is an unprincipled one, it cannot save the Court from the unpalatable implications of its Lucas holding for broader economic legislation. Instead, the Court's apparent discomfort with those implications is reason to question the wisdom of the Lucas approach to regulatory takings. Indeed, to the extent that the modern Court's entire regulatory takings project has been made more palatable by its relatively narrow focus on land, the dubious basis of the distinction calls into question the soundness of that project as a whole.

27. In his interesting article on the Lucas Court's distinction, Bosselman approaches the issue from a largely historical perspective. See Bosselman, supra note 24.


I. THE DISTINCTION BETWEEN PERSONAL PROPERTY AND LAND WITHIN THE SUPREME COURT’S RECENT REGULATORY TAKINGS REVIVAL

A. The Implicit Distinction between Personal Property and Land Before Lucas

The Court’s statement in Lucas that personal property is entitled to less protection under the Takings Clause than land simply made explicit a longstanding tendency of the modern Court to give more credence to claims asserting regulatory takings of land than claims involving personal property. The different outcomes reached in Hodel v. Irving and Andrus v. Allard present an example of this tendency. Without relying on some sort of distinction between the protections afforded to land and to personal property, it is very difficult to reconcile the two cases.

In Andrus v. Allard, the Court upheld, against a Takings Clause challenge, environmental regulations that prohibited the sale of eagle parts. Owners of Native American artifacts containing eagle parts, who, as a consequence of the regulations, could no longer sell them, alleged that the regulations constituted a taking of their property without compensation. The Court rejected their claims. It observed that the challenged regulations “do not compel the surrender of the artifacts, and there is no physical invasion or restraint upon them.” Although it acknowledged that the regulations “prevent[] the most profitable use” of the artifacts, the Court argued that “the loss of future profits—unaccompanied by any physical restriction—provides a slender reed upon which to rest a takings claim.” The Court emphasized that the plaintiffs could still use the artifacts for purposes other than sale. Citing several prohibition era cases, the Court noted that “[r]egulations that bar trade in certain goods have been upheld against claims of unconstitutional taking.” It therefore held that no regulatory taking of property had occurred.

Eight years after its decision in Andrus, the Court confronted in Irving a statute that prevented Native American owners of highly fractionated interests in land from passing those fractional shares upon

30. See supra note 15 and accompanying text.
31. See supra note 17.
34. Id. at 55.
35. Id. at 55-68.
36. Id. at 65.
37. Id. at 66.
38. Id.
39. Id. at 67. For a more detailed discussion of the prohibition cases upon which the Court relied in Andrus, see infra notes 82-86 and accompanying text.
40. Andrus, 444 U.S. at 67-68.
their deaths. In the late nineteenth century, as part of a policy to force Native Americans to "abandon their nomadic ways" and to speed their assimilation, Congress enacted a series of statutes that allotted communal reservation land to individual Native Americans.41 The United States held allotted lands in trust so as to prevent the "improvident disposition" of the land to white settlers.42 As original owners died, the allotments passed by descent and devise to their heirs.43 Over time, the allotted parcels split among an increasing number of descendents.44 In some cases, hundreds of individuals owned one small parcel.45 The cost of administering such miniscule fractional shares often exceeded the income the property could generate (or even the value of the fractional share itself).46

To resolve this growing problem, Congress enacted the Indian Land Consolidation Act in 1983.47 Section 207 of that statute included an "escheat" provision that prohibited the descent or devise of any interest that represented less than two percent of the total tract in question.48 Although the owner of such fractional shares would enjoy income from the property until death, upon her death the property would pass automatically back to the tribe.49 The statute allowed fractional owners to transfer their shares (either by sale or gift) before death, but if they died while holding such small shares of property, the shares would escheat to the tribe.50

Several Native Americans filed suit, alleging that the statute took their property without compensation. Asserting the fundamental nature of the right to pass on one's property through descent or devise, the Court ruled in favor of the property owners.51 "In one form or another," the Court reasoned, "the right to pass on property—to one's family in particular—has been part of the Anglo-American legal system since feudal times."52 As a consequence, the Court concluded, the Takings Clause prohibited Congress from abrogating that right without compensating affected property-owners.53

42. See id. at 707.
43. See id.
44. See id.
45. See id. at 708, 713.
46. See id. at 713. The Court discussed one fractional share of land that was so small that it generated only one cent of income for its owner every 177 years. Id. The entire tract was worth only $8,000.00, but generated $17,560 in administrative costs each year. See id.
48. Id. § 207, codified at 25 U.S.C. § 2206 (2004); see also Irving, 481 U.S. at 709.
49. See id.
50. See id. at 715.
51. Id. at 716.
52. Id.
53. See id. at 716-17
It is difficult to square the Court's reasoning in Irving with the more nuanced approach it took, and with the result it reached, in Andrus. In Irving, the Court focused narrowly on the essential nature of the abrogated property right, whereas in Andrus, it took a broader view, emphasizing the nature of the rights that remained in the hands of the owners of eagle parts. There can be little doubt, however, that the interests left to the landowners in Irving were far more valuable, at least in economic terms, than those remaining to the plaintiffs in Andrus. After all, the owners in Irving were entitled to earn income from the property until their death; they also retained the full right to sell, give away, or trade their property, as long as they did so before they died. But even adopting the Irving Court's narrow focus on the abrogated interest, it is difficult to argue that the right to sell property lawfully in one's possession is less deeply rooted in the "Anglo-American legal system" than the right to pass property upon death.55

Indeed, the Court in Irving acknowledged the tension between its decision and the reasoning in Andrus by citing Andrus as adverse precedent, though it offered no basis on which to distinguish the case.56 Furthermore, Justice Scalia, in an opinion joined by two other justices from the Irving majority, observed that "the balance between rights taken and rights left untouched" in Irving was "indistinguishable" from that in Andrus.57

Although unmentioned in any of the Irving opinions, one possible distinction between the two cases is the type of property at issue. Irving involved property in land, whereas Andrus, and several of the cases on which it relied, involved personal property. The notion that the different outcomes in Irving and Andrus reflected an unstated distinction between personal property and land is reinforced by the observation that virtually all of the successful takings claims in the Supreme Court over the past two decades have been made by landowners.58 And the Court itself has subsequently endorsed the idea that it found no taking in Andrus precisely because that case involved the regulation of personal property and not land.59

54. Id. at 716.
55. See, e.g., Magoun v. Ill. Trust & Sav. Bank, 170 U.S. 283, 288 (1898) (noting that the "right to take property by devise or descent is a creature of the law, and not a natural right—a privilege, and therefore the authority which confers it may impose conditions upon it").
56. See Irving, 481 U.S. at 717.
57. See id. at 719 (Scalia, J., concurring).
58. See supra note 20 and accompanying text.
B. Lucas' Explicit Distinction Between Personal Property and Land

The Court has traditionally evaluated regulatory takings claims under a balancing test set forth in its opinion in *Penn Central*. In that case, the Court analyzed the plaintiff's regulatory takings claim by weighing three "essentially ad hoc" factors: (1) the diminution in value of property attributable to the challenged regulation; (2) the extent to which the regulation interfered with the owner's "investment-backed expectations;" and (3) the character of the government action.\(^{60}\)

Between *Penn Central* and *Lucas*, the most significant departure from this ad hoc approach came in *Loretto v. Teleprompter Manhattan CATV Corp.*,\(^{61}\) a case in which a landlord alleged that a government regulation requiring her to allow the local cable franchise to install equipment on her property constituted a taking.\(^{62}\) There, the Court held that regulations resulting in the permanent physical occupation of one's property always constitute a taking.\(^{63}\) In *Lucas*, the Supreme Court crafted another per se rule for regulatory takings, this time covering situations when property is stripped of all economic value. More importantly for the purposes of this Article, the *Lucas* Court for the first time explicitly raised the notion of a categorical distinction between personal property and land within regulatory takings law.

The facts of *Lucas* are well known. In the late 1970s, David Lucas, a South Carolina developer, was involved in the development of the Isle of Palms, "a barrier island situated eastward of the city of Charleston."\(^{64}\) In the mid-1980s, after Lucas and his partners had sold most of the other property in the area "at rapidly escalating prices,"\(^{65}\) Lucas purchased two lots in one of the Isle of Palms subdivisions for his own use.\(^{66}\) Although the land he had purchased was "notoriously unstable" and had even been submerged for several years,\(^{67}\) Lucas planned to build homes on each lot.\(^{68}\) In 1988, however, the South Carolina legislature enacted a statute prohibiting construction beyond the line of beach erosion, an area that included Lucas's land.\(^{69}\) As a result, Lucas was completely barred from building habitable structures on his two lots.\(^{70}\)

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63. *Id.* at 441.
65. *See id.* at 1038 & n.3 (Blackmun, J., dissenting).
66. *See id.* at 1008.
68. *See id.* at 1008.
69. *See id.*
70. *See id.*
Lucas filed suit in South Carolina state court, arguing that the statute took his land by completely extinguishing its economic value. In a finding of fact that was almost certainly incorrect, the trial court agreed that the statute deprived Lucas of the entire value of his land. It concluded that, as a result of that deprivation, the State had taken Lucas's property without compensation in violation of the Fifth Amendment. The South Carolina Supreme Court reversed the trial court's judgment, concluding that the statute was justified by the legislature's power to "prevent serious public harm."

In an opinion by Justice Scalia, the U.S. Supreme Court reversed the South Carolina Supreme Court, announcing its new "per se" rule. The Court held that when a landowner is deprived of all economically beneficial use of a piece of land, that is, when a landowner's property has been rendered "valueless," his property has been "taken" within the meaning of the Fifth Amendment and the landowner must be compensated. The Court qualified its holding, however, by observing that compensation would not be due when the regulation depriving the owner of all value in his land does no more than "duplicate the result that could have been achieved by the courts" under the state's common law of nuisance.

In his dissent, Justice Stevens pointed out several troubling implications of the Court's new rule: "[u]nder the Court's opinion today... , if a State should decide to prohibit the manufacture of asbestos, cigarettes, or concealable firearms, for example, it must be prepared to pay for the adverse economic consequences of its decision." Such regulations, Justice Stevens properly suggested, would likely deprive manufacturers and merchants of all economically beneficial uses in existing stocks of such materials, and in the equipment used to produce them. Because such a prohibition would not merely duplicate results

71. See Tahoe-Sierra, 535 U.S. at 350 (Rehnquist, C.J., dissenting) ("Surely, the land at issue in Lucas retained some market value based on the contingency, which soon came to fruition, that the development ban would be amended." (citation omitted)).
72. See Lucas, 505 U.S. at 1009.
73. See id.
75. See Lucas, 505 U.S. at 1016. Although Justice Scalia often speaks in terms of a regulation's deprivation of all "economically beneficial use" of property, see id. at 1027, as opposed to a deprivation of "value," it appears that he viewed the two concepts (total deprivation of economic value and total deprivation of economic uses) as amounting to the same thing. See, e.g., id. at 1020 (grounding the application of the per se rule on the trial court's finding that Lucas's property had been rendered "valueless"); see also Tahoe-Sierra, 535 U.S. at 330.
76. See id. at 1029. Other commentators have thoroughly exposed the enormous ambiguities introduced by this exception into the Lucas Court's seemingly crystalline analysis. See supra note 12.
77. See Lucas, 505 U.S. at 1068 (Stevens, J., dissenting).
78. As a general matter, however, mere prohibition of the sale of a category of personal property will not destroy the property's economic value because the product can usually be
that could be achieved through the common law of nuisance, the Lucas Court’s per se rule would require compensation for government regulation where, but for Lucas, almost no one would have thought it to be required.

Perhaps in response to Justice Stevens’s parade of horribles, all of which involved items of personal property, the Court indicated that it intended its per se rule to apply only to property in land. Throughout his opinion, Justice Scalia studiously avoided generic references to regulation of “property,” and instead repeatedly and narrowly referred to “land-use regulations” that deprive a “land owner” of all economically beneficial uses of “land.” Lest the significance of his careful word-choice be lost on moved to a jurisdiction where its sale is permitted. But the value of such property will be destroyed, at least as to merchants and manufacturers, when the prohibition on its sale is conjoined with restrictions on its transportation or export outside of the regulated jurisdiction, as occurred both with alcohol during prohibition, see U.S. CONST. amend. XVIII; Everard’s Breweries v. Day, 265 U.S. 545, 556-58 (1924) (prohibition on the sale and transportation of alcohol deprived manufacturers and vendors of alcoholic beverages of all economic value in their production facilities and stock on hand), and with eagle feathers in Andrus v. Allard, 444 U.S. 51, 53 n.1 (1979) (“Migratory birds, their parts, nests, or eggs, lawfully acquired prior to the effective date of Federal protection under the Migratory Bird Treaty Act ... may be possessed or transported without a Federal permit, but may not be imported, exported, purchased, sold, bartered, or offered for purchase, sale, trade, or barter.”) (quoting 50 C.F.R. § 21.2(a) (1978)). Additionally, the owner of personal property designed specifically for use in a particular industry can be deprived of its economic value when onerous regulations are imposed on that industry. For example, many west coast fishermen have suffered enormous declines in the values of their fishing boats as a result of government-imposed restrictions on fishing activities. Given the limited utility of these boats for anything other than fishing, and the prohibitive expense of, or legal restrictions on, moving them to more profitable fishing grounds, see Am. Pelagic Fishing Co. v. United States, 49 Fed. Cl. 36, 44 (2001) (discussing the legal restrictions on moving a fishing vessel into foreign waters), the boats have become virtually impossible to sell. The consequences for individual fishermen have been personally devastating. See William Booth, West Coast Fishermen Sense End of the Line, WASH. POST, Oct. 6, 2002, at A3; American Pelagic Fishing Co., 49 Fed. Cl. at 50 (noting that, once the plaintiff lost his fishing license, the value of his boat was virtually eliminated).

79. See Lucas, 505 U.S. at 1015 (“The second situation in which we have found categorical treatment appropriate is where regulation denies all economically and beneficial or productive use of land.”) (emphasis added); id. at 1016 (“As we have said on numerous occasions, the Fifth Amendment is violated when land-use regulation ‘does not substantially advance legitimate state interests or denies an owner economically viable use of his land.’”) (emphasis added); id. at 1017 (“Perhaps ... total deprivation of beneficial use is, from the landowner’s point of view, the equivalent of a physical appropriation.”) (emphasis added)); id. (“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.”) (emphasis added); id. at 1018 (“[T]he functional basis for permitting the government ... to affect property values without compensation ... does not apply to the relatively rare situation where the government has deprived a landowner of all economically beneficial uses.”) (emphasis added); id. (“regulations that leave the owner of land without economically beneficial or productive options for its use ... carry with them a heightened risk that private property is being pressed into some form of public service”) (emphasis added); id. at 1019 (“We think, in short, that there are good reasons for our frequently expressed belief that when the owner of real property has been called upon to sacrifice all economically beneficial uses in the name of the common good ... he has suffered a
the reader, however, Justice Scalia spelled out in express terms the nature and basis of the Court's distinction between land and other forms of property:

And in the case of personal property, by reason of the State's traditionally high degree of control over commercial dealings, [an owner] ought to be aware of the possibility that new regulation might even render his property economically worthless (at least if the property's only economically productive use is sale or manufacture for sale). See Andrus v. Allard, 444 U.S. 51, 66-67 (1979) (prohibition on sale of eagle feathers). In the case of land, however, we think the notion pressed by the [South Carolina Coastal] Council that title is somehow held subject to the 'implied limitation' that the State may subsequently eliminate all economically valuable use is inconsistent with the historical compact recorded in the Takings Clause that has become part of our constitutional culture.80

In other words, because of (1) their expectation that they will be subjected to greater regulation and (2) the historically favored status of land, owners of personal property are entitled to less regulatory takings protection than are owners of land. Consequently, they cannot take advantage of the Court's per se Lucas rule.81

In addition to blunting the force of Justice Stevens's hypotheticals, the Court's careful distinction between land and personal property allowed it to assert the consistency of the rule it was announcing in Lucas with a line of cases that, though largely undiscussed in Justice Scalia's opinion, loomed ominously in the background. Those cases rejected out taking."

80. Id. at 1027-28.

81. The recent apparent narrowing of the Lucas rule in Tahoe Sierra does little to diminish the significance of Lucas's treatment of personal property. Tahoe Sierra clarifies that the diminution in value suffered by a property-owner must be permanent in order to constitute a per se taking and seems to substantially narrow the number of instances in which Lucas takings of land might occur. But the case does very little to diminish the number of Lucas takings of personal property that would arise, were such claims permitted, because most such claims would involve permanent deprivations of value. See, e.g., supra note 78 (discussing scenarios in which owners of personal property might suffer a total deprivation of value). Thus, even if Lucas is virtually a dead-letter with respect to regulations affecting land, it would still be a potent tool for limiting the state's power to regulate if its distinction between land and other forms of property were disregarded, as has occurred in some lower courts. See infra Part I.C. Because the Court's favoritism towards land extends beyond the scope of the Lucas rule to the entire area of regulatory takings (as opposed to direct takings and their functional equivalents), see supra note 20, it is important to explore the cogency of that favoritism as a normative matter.
of hand takings claims brought by the owners of personal property that had been stripped of all economic value.

The earliest of these cases arose during the prohibition era, when plaintiffs brought takings claims alleging that various federal laws deprived them of property in stocks of alcohol on hand at the time the laws were enacted. In *Ruppert v. Caffey*[^82] and *Everard's Breweries v. Day*,[^83] the Court rejected such claims, even though the challenged laws surely deprived the dealers of all economically beneficial uses of their alcohol. In *Everard's Breweries*, for example, the Court noted that the plaintiff could do nothing with the large stock of alcohol in his possession except "dispose [of it], after de-alcoholization, at a heavy loss."[^85] The Court nonetheless found no "appropriation of private property, but merely a lessening of value due to a permissible restriction imposed upon its use."[^86]

Many years later, citing *Caffey* and *Everard's Breweries*, the Court in *Andrus* rejected the claims of the dealers in Native American artifacts. Although the Court suggested that the plaintiffs retained some economically beneficial uses of their property (for example, the Court somewhat implausibly suggested that they could display their artifacts for a charge),[^87] it is clear that the *Andrus* plaintiffs' property declined in value at least as much as Lucas's. Indeed, the entire purpose of the regulations at issue in *Andrus* was to destroy the economic value of eagle parts in order to eliminate any financial incentive for poachers to kill eagles.[^88] The *Lucas* Court's categorical distinction between personal

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[^82]: 251 U.S. 264 (1920).
[^83]: 265 U.S. 545 (1924).
[^84]: The Court's rejection of the plaintiff's takings claim did not rely on any argument that the Eighteenth Amendment had implicitly amended the Fifth Amendment to allow such deprivations in the case of alcohol. See *Andrus*, 444 U.S. at 67 n.23.
[^85]: See *Everard's Breweries*, 265 U.S. at 556.
[^86]: See *Everard's Breweries*, 265 U.S. at 563. *Everard's Breweries* presented a particular problem for the *Lucas* majority, since it was decided after the Court's decision in *Pennsylvania Coal v. Mahon*, 260 U.S. 393 (1922), the case identified by the *Lucas* majority as the principal authority for the regulatory takings doctrine. See *Lucas*, 505 U.S. at 1014 (“Prior to Justice Holmes's exposition in [Mahon]... it was generally thought that the Takings Clause reached only a 'direct appropriation' of property”). Indeed, the Court's decision in *Everard's Breweries* was joined by Justice Holmes, *Mahon*'s author. The outcome of these cases cannot be cleanly explained as falling within the *Lucas* Court’s “nuisance” exception. Courts reached widely varying conclusions about the status of alcohol under nuisance law. See Eric R. Claeys, *Takings, Regulations, and Natural Property Rights*, 88 CORNELL L. REV. 1549, 1582-83 (2003). Indeed, the confusion surrounding the status of alcohol under nuisance law hints at the deep uncertainties hidden within the *Lucas* nuisance exception.
[^88]: See supra notes 36-40 and accompanying text.
property and land allowed it to sweep this troublesome set of cases to the side.  

In addition to helping it to distinguish the prohibition cases, the Court's narrow focus on land in Lucas helped it to reconcile its decision with another inconvenient line of cases, in which the Court had repeatedly denied claims by business owners who suffered ruinous financial losses as a result of regulations prohibiting the operation of their existing enterprises. In Mugler v. Kansas, for example, the plaintiff was forced to shut down his brewery because of a Kansas prohibition on the production of alcohol. In Hadacheck v. Sebastian, the owner of a brick factory had to close his business after it became subject to a Los Angeles prohibition on the manufacture of bricks within city limits. Finally, in Reinman v. Little Rock, the plaintiffs had to close the livery stable business they had conducted "for many years" after a newly-enacted city ordinance prohibited such businesses within a specified geographic area. The Lucas Court distinguished these cases by focusing on the fact that, even if the regulations rendered the plaintiffs' businesses valueless, the plaintiffs were free to put their land to other, economically beneficial, uses. As a result, the Court reasoned, they were not wholly deprived of the value of their land. By focusing narrowly on the remaining economically beneficial uses of the land on which the Mugler, Hadacheck, and Reinman plaintiffs' businesses were located, the Lucas Court could distinguish those cases in which the Court had looked with indifference on situations in which regulations had eliminated the value of other types of property (the brewery, the brick factory, the livery stable, and the specialized equipment contained within those structures). In short, the Court's distinction in Lucas between land and other forms of property allowed it to claim consistency with the letter (if not the spirit) of earlier cases, while avoiding the most troubling implications of its newly created rule for general economic regulation.

89. See Lucas, 505 U.S. 1003, 1028 (1992) (citing Andrus, 444 U.S. 51). Although the Court did not cite the prohibition era cases directly, its citation of Andrus, which discussed them at some length suggests that it was aware of them.
90. 123 U.S. 623 (1887).
91. 239 U.S. 394 (1915).
93. See Lucas, 505 U.S. at 1026 & n.13 (distinguishing Mugler, Hadacheck, and Reinman by focusing on the remaining permitted uses of the underlying land, but ignoring the effects of the regulations at issue in the cases on plaintiff's non-land property).
94. See Hadacheck, 239 U.S. at 405 (noting plaintiff's allegation that his property had been specially adapted for use as a brickyard); Reinman, 237 U.S. at 623 (noting plaintiff's observation that its livery buildings were "useful for no other purpose"); Mugler, 123 U.S. at 274 (noting that plaintiff's building had been "specially constructed and adapted for the manufacture of . . . malt liquor").
C. Application of the Lucas Distinction in the Lower Courts

The response in the lower courts to the Lucas distinction between personal property and land has been mixed. Some have treated the Court's distinction as an affirmation of a general preference for landownership in regulatory takings law. Other courts have applied the distinction literally, holding simply that personal property is not covered by the Lucas diminution-of-value rule and that a regulatory taking of such property must be established, if at all, under Penn Central's ad hoc balancing approach. Finally, at least one court of appeals has rejected the distinction altogether.

The First Circuit appears to have followed the Lucas majority in distinguishing land from other forms of property. In Philip Morris, Inc. v. Reilly, the First Circuit, sitting en banc, held unconstitutional a Massachusetts statute requiring tobacco companies to disclose ingredient lists to the state, which could then publish the lists under certain circumstances. The tobacco companies challenged the statute, arguing that it took their property, in the form of trade secrets, in violation of the Takings Clause. Reversing the three-judge panel, the en banc court agreed. Although the en banc panel was unable to produce a single opinion for the court, a majority of the en banc judges agreed that the Supreme Court's per se Lucas rule applied only to land and that the proper framework for assessing regulatory takings with respect to other forms of property was the Supreme Court's ad hoc approach in Penn Central, even when the regulation at issue completely eliminated the value of the property.

Other courts of appeals have similarly relied upon the Supreme Court's Lucas distinction. In Unity Real Estate Co. v. Hudson, the Third Circuit rejected a claim by a coal company that it had suffered a categorical taking when the government retroactively imposed liability

95. See, e.g., Branch v. United States, 69 F.3d 1571, 1576 (Fed. Cir. 1996) ("Because of 'the State's traditionally high degree of control of commercial dealings,' the principles of takings law that apply to real property do not apply in the same manner to statutes imposing monetary liability." (citation omitted) (quoting Lucas, 505 U.S. at 1027-28)).
96. See Philip Morris, Inc. v. Reilly, 312 F.3d 24, 28-29 (1st Cir. 2002) (Torruella, J.).
97. See id. at 29-30, 46.
98. See id. at 35, 41 (applying the Penn Central balancing test even though the plaintiff's trade secrets would "lose all value" under the statute); see id. at 52-53 (Lopez, J., dissenting) (agreeing with Judge Torruella's analysis but disagreeing with the outcome of his application of the Penn Central test); see also Philip Morris, Inc. v. Reilly, Nos. 00-2425, 00-2449, 2001 WL 1215365, at *7 (1st Cir. Oct. 16, 2001) ("While a complete seizure of personal property may amount to a categorical taking, we cannot conclude, under the reasoning of Lucas, that the regulation of personal property which may be destructive of the value of trade secret information can be regarded as such a [per se] taking.") (opinion withdrawn for rehearing en banc).
for miners' benefits. In reaching its conclusion, the court relied in part on the Supreme Court's distinction between personal property and land.  

"[T]he 'total destruction' language of cases concerning real property," it said, should not be "mechanically applied" to cases concerning other types of property. The Ninth Circuit likewise relied on the Lucas distinction between land and personal property in declining to apply a per se takings analysis to a challenge to Washington State's Interest On Lawyers' Trust Accounts (IOLTA) program. The court observed repeatedly that "[s]uch an analysis has almost exclusively been employed in situations involving real property." Applying instead the Penn Central balancing test, the Ninth Circuit rejected the plaintiffs' takings claim.

Finally, in line with Lucas, the Court of Claims applied the Supreme Court's Penn Central test to a case involving personal property stripped of all value. In American Pelagic Fishing Co. v. United States, the plaintiff alleged that his highly specialized fishing boat had been rendered valueless when competing fishermen, who feared the impact of the plaintiff's larger boat on their profitability, used their influence in Congress to have the plaintiff's fishing licenses revoked. The Court of Claims, which ultimately found that a taking had occurred, reasoned that, in the context of takings claims involving "both tangible and intangible personalty, . . . [t]he relevant test for a regulatory taking . . . is the now-traditional Penn Central three part analysis."

Other courts, however, have rejected the Lucas distinction between personal property and property in land. In Maritrans Inc. v. United

100. See id. at 674–75.
101. Id.
102. See Wash. Legal Found. v. Legal Found. of Wash., 271 F.3d 835, 856 (9th Cir. 2001) (en banc).
103. See id. at 854–57. The Ninth Circuit's decision in Washington Legal Foundation did not implicate the precise distinction drawn by the Supreme Court in Lucas because the taking alleged by the plaintiffs in the Ninth Circuit involved a direct confiscation, or physical taking, of property rather than a mere reduction in value. Accordingly, the per se rule that would have applied was not the Lucas diminution-in-value test but rather the physical occupation test discussed by the Court in Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419, 427 (1982). See also supra note 9; Washington Legal Foundation, 271 F.3d at 854; Brown v. Legal Found. of Wash., 538 U.S. 216, 235 (2003) (stating in dicta that a per se approach under Loretto seemed consistent with the Court's prior analysis of IOLTA programs).
104. See Washington Legal Foundation, 271 F.3d at 856–62.
106. Id. at 38–44.
107. Id. at 46. See also Wilson v. City of Louisville, 957 F. Supp. 948, 955 (W.D. Ky. 1997) (noting the Lucas Court's distinction between land and personal property and stating that "even if the Ordinance rendered all of [plaintiff's] signs worthless, it is questionable whether it would constitute a taking."); Raynor v. Md. Dep't of Health & Mental Hygiene, 110 Md. App. 165, 189 (1996) ("[I]n Lucas, the Supreme Court, therefore, recognized that, unlike its dealings with real property, government may deprive an owner of personal property of all of that property's economic value through regulation without owing compensation.").
States, the Federal Circuit considered a takings claim brought on behalf of Maritrans Inc., the owner of a fleet of tank barges used to transport oil. Maritrans challenged the Oil Pollution Act of 1990, which required, among other things, that vessels used to transport oil in U.S. territorial waters have double hulls. The statute further required owners of single-hulled vessels to retrofit them with a second hull in order to continue operating in U.S. territorial waters after January 1, 1995. As a consequence of the statute, Maritrans was forced to retrofit, scrap, or sell several single-hulled vessels. Maritrans filed suit against the United States, arguing that the statute constituted, per se, a taking of its property under *Lucas*.

The government argued that "the concept of a categorical taking cannot be extended to regulations that restrict the use of personal property." The Federal Circuit rejected the government's argument and applied the *Lucas* diminution-in-value test to the plaintiff's claim. Although it ultimately found no categorical taking to have occurred, the Federal Circuit made clear its belief that a categorical taking of personal property occurs whenever a government regulation deprives an owner of "all economically viable use, i.e., all economic value has been taken by the regulatory imposition," whether the affected property is land or chattels.

Like the Federal Circuit, other courts have declined to apply a blanket rule in favor of landownership. The South Carolina Supreme Court has stated without elaboration that the *Lucas* per se rule applies with full force to personal property. And the Colorado Supreme Court has taken Justice Scalia's language in the opposite direction concluding that, in the context of a heavily regulated industry, land (like personal property) is not subject to *Lucas*’s per se takings analysis. Thus, despite

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108. 342 F.3d 1344 (Fed. Cir. 2003).
110. See id.
111. See Maritrans, 342 F.3d at 1350.
112. Id. at 1352.
113. See id. at 1352-55.
114. See id. at 1353.
115. See Long Cove Club Assocs. v. Hilton Head Island, 319 S.C. 30, 32 (1995) ("Long Cove does not cite, nor has our research uncovered, any authority for the proposition that the *Lucas* analysis does not apply to an alleged regulatory taking of personal, as opposed to real, property."). Similarly, in his dissenting opinion in *Philip Morris*, Judge Selya strongly rejected the First Circuit's refusal to apply the *Lucas* per se analysis to property other than land, accusing the majority of "adopt[ing] an overly literal view." See *Philip Morris*, Inc. v. Reilly, Nos. 00-2425, 00-2449, 2001 WL 1215365, at *22–23 (1st Cir. Oct. 16, 2001) (Selya, J., dissenting) ("I believe that in limiting *Lucas* and its progeny to land use cases, the majority has adopted an overly literal view.").
116. See State v. The Mill, 887 P.2d 993, 1000 n.4 (Colo. 1995) (finding the distinction between personal property and land inappropriate in the context of land that was traditionally subject to heavy regulation); *see also id.* at 1011 (Scott, J., dissenting) (noting that the trial court
the Supreme Court's clear intention in *Lucas* to apply a lower regulatory takings standard to personal property, the status of such property within regulatory takings law remains a source of some confusion.

II. EVALUATING THE SUPREME COURT'S EXPLANATIONS FOR THE DISTINCTION BETWEEN PERSONAL PROPERTY AND LAND IN THE REGULATORY TAKINGS CONTEXT

In light of the potentially significant consequences of the Court's favoritism toward land in the regulatory takings context, it is worth asking whether there is some principled basis for such disparate treatment of property owners. This question is particularly salient because the Court's distinction between land and personal property is so puzzling. To begin with, the distinction finds no support in the plain text of the Constitution. The Fifth Amendment protects "private property," but does not distinguish between personal property and land.\footnote{\textit{U.S. Const.} amend. V; see also \textit{Lazarus, supra} note 12, at 1423; \textit{Thompson on Real Property} § 14.03, at 184 (David A. Thomas ed., Supp. 1999) ("The term 'property,' when used in its most comprehensive sense, will include both real and personal property, unless restricted in its meaning by the context.").} And in cases involving direct government seizures of property, the Court has treated personal and real property the same.\footnote{\textit{See Eagle, supra} note 22, at 88.}

One obvious starting point in attempting to explain the Court's distinction is to consider the two justifications offered by the Court in *Lucas* itself: the historical treatment of land in our legal tradition and the expectations of property-owners. As it turns out, neither of these two explanations justifies the Court's categorical favoritism towards landownership.

A. The Inadequacy of the Court's Historical Explanation for the Distinction between Personal Property and Land

In *Lucas*, the Court suggested that a preference within regulatory takings law for property in land was required by an "historical compact" with landowners that "has become part of our constitutional culture."\footnote{\textit{See Lucas, supra} note 22, at 88.} The Court did not elaborate on the nature of this compact. This section considers four possible historical arguments to support the Court's distinction: first, the history of the distinction between personal property and land; second, the early practices of English eminent domain law; third, the apparent motives of the framers in adding the Takings Clause to the Bill of Rights; and, fourth, the connection between landownership and political participation in the early republic. As I will demonstrate,
none of these considerations supports the Court's position that land is more entitled to regulatory takings protection than other forms of property.

1. History of the Distinction Between Personal Property and Land

The practice of categorizing property as either personal or real has deep roots within the common law tradition.\textsuperscript{120} The most widely accepted explanation for the distinction traces its origins to the rise of the feudal system in England.\textsuperscript{121} After the Norman Conquest, land became subject to the law of feudal tenure, which did not apply to movable things, known as "chattels" or "goods."\textsuperscript{122} Under the system of feudal tenure, all land belonged ultimately to the Crown and thus, no subject could be the absolute owner of land. Consequently, all land was held "of the king or some mesne lord" and was subject to pervasive restrictions on alienation.\textsuperscript{123} Moreover, under feudal principles, land could not automatically pass to one's heirs, but reverted to the crown upon the death of a vassal.\textsuperscript{124} In contrast, chattels remained the objects of direct and absolute ownership, particular to an owner, "of which he could dispose at will."\textsuperscript{125}

If anything, because land was traditionally subject to greater state restriction on individual ownership rights, feudal history suggests that personal property rights are more absolute and therefore justify greater expectations on the part of the owner. In any event, the distinction, which is rooted in circumstances that never existed in the United States, has not resonated as strongly in American property law.\textsuperscript{126}


\textsuperscript{121} See, e.g., THOMPSON, supra note 117, § 14.03, at 181-82 (Supp. 1999); JOSHUA WILLIAMS, PRINCIPLES ON THE LAW OF PERSONAL PROPERTY 1, 6-8 (18th ed. 1926).

\textsuperscript{122} WILLIAMS, supra note 121, at 8-10.

\textsuperscript{123} See id. at 7 & n.(p).

\textsuperscript{124} See Daniel W. Bromley, Rousseau's Revenge: The Demise of the Freehold Estate, in WHO OWNS AMERICA? SOCIAL CONFLICT OVER PROPERTY RIGHTS 19, 21-23 (Harvey M. Jacobs ed. 1998).

\textsuperscript{125} WILLIAMS, supra note 121, at 13-14. Similarly, Blackstone viewed personal property as, in some sense, the more natural subject of ownership than property in land. See 2 WILLIAM BLACKSTONE, COMMENTARIES *2-11 (1766) ("And there can be no doubt, but that movables of every kind became sooner appropriated than the permanent substantial soil: . . . because few of them could be fit for use, till improved and ameliorated by the bodily labor of the occupant, which bodily labor, bestowed upon any subject which before lay in common to all men, is universally allowed to give the fairest and most reasonable title to an exclusive property therein.").

\textsuperscript{126} THOMPSON, supra note 117, § 14.03, at 182 (Supp. 1999) ("It is important . . . to keep in mind that [the distinction between land and personal property is] traceable to conditions no longer existing in England, and which never had any existence in this country.").
The argument might be made that landownership conferred special status in feudal society, a status that accompanies landownership to this day, and that deprivation of property in land consequently works a special kind of harm. But such considerations would only justify a differential rule in the context of direct confiscation. The status-conferring power of property is unaffected by the mere regulation of land, no matter how intrusive, because regulation, by definition, does not affect title ownership of the regulated property. Thus, the special status associated with landownership, can not justify heightened protection against regulatory takings.

Moreover, whatever special significance landownership once had in feudal societies, increasing commodification of land has steadily eroded that significance. In the modern economy, land is just another form of property. As Charles Geisler has observed: "[a]s service-sector employment grows at the expense of manufacturing and more basic extractive livelihoods, the domestic importance of land-based occupations fades along with the declining significance of land as a factor of production, social status, and basis of wealth." Thus, the history of the distinction between personal property and land fails adequately to explain the Lucas distinction.

2. Early Practices of Eminent Domain Law

Likewise, the early English history of eminent domain law offers no support for the Court's distinction, and arguably even cuts the other way. The first references in English law to the requirement that the sovereign compensate his subjects for confiscated property dealt with personal property requisitioned by the king for use by the royal household. While the king sometimes had the right to make use of private land without compensation, he could never take a subject's personal property without paying for it. The Magna Charta specified that the king could take corn and other provisions from his subjects against their will, but he

127. See Bosselman, supra note 24.
128. Charles Geisler, Ownership: An Overview, 58 RURAL SOC. 532, 542 (1993); see also WILLIAM B. SCOTT, IN PURSUIT OF HAPPINESS: AMERICAN CONCEPTIONS OF PROPERTY FROM THE SEVENTEENTH TO THE TWENTIETH CENTURY 201–02 (1977) (noting that, as American society shifted from an agrarian to an industrial society over the course of the nineteenth century, the social and political importance of landownership declined).
130. See id. While the king could use a subject's land for the purposes of national defense (for example, to build fortifications or to extract the raw materials for gunpowder) without compensation, he could not take possessory interest in land. See id. Only Parliament could do so; and, whenever Parliament did, it paid compensation. See id.
had to make immediate cash payment. The Magna Charta was silent, however, on the subject of compensation for takings of land.

3. Original Understanding of the Takings Clause

Nor can the Court find support for its position in the original understanding of the Takings Clause. Although the history of the Takings Clause itself provides little evidence of its original meaning and purpose, scholars have suggested that it was intended to combat uncompensated takings of both land and personal property. Based on his review of the limited contemporary commentary, Rubenfeld cites "the appropriation of private [presumably personal] property to supply the army during the Revolutionary War" as among the "paradigm case[s]" of government behavior that the Takings Clause was intended to remedy. In light of such a motive, it seems unlikely that the uncompensated taking of personal property was somehow less offensive to the Framers than the uncompensated taking of land.

William Treanor's analysis buttresses the notion that the original understanding of the Takings Clause deemed it to apply equally to both land and personal property. Citing James Madison's personal

131. See id.
132. See id.
135. See Rubenfeld, supra note 1, at 1122-23 ("[The Takings Clause] was probably intended to restrain the arbitrary and oppressive mode of obtaining supplies for the army, and other public uses, by impressments, as was too frequently practiced during the revolutionary war, without any compensation whatever." (quoting 1 HENRY ST. GEORGE TUCKER, BLACKSTONE'S COMMENTARIES at 305-06 (Philadelphia Birch & Small 1803)).
136. See NEDELSKY, supra note 134, at 150-51. Carol Rose has noted that Thomas Jefferson favored agricultural property over other forms of property as a guarantor of republican virtue. See ROSE, supra note 120, at 61-62. But Jefferson's distinction is as much a distinction among types of land as it is a distinction between land and personal property as such. That is, Jefferson favored agricultural over urban industrial property. See id. Compare Stanley N. Katz, Thomas Jefferson and the Right to Property in Revolutionary America, 466 J.L. & ECON. 467, 473-74 (1976) ("Cultivators of the earth are the most valuable citizens. They are the most vigorous, the most independent, the most virtuous, and they are tied to their country and wedded to its liberty and interests by the most lasting bands." (internal quotation marks omitted) (quoting Letter from Thomas Jefferson to John Jay, Aug. 23, 1785, in 8 THE PAPERS OF THOMAS JEFFERSON 426-28 (Julian P. Boyd ed. 1953)), with Katz, supra, at 474 ("The mobs of great cities add just so much to the support of pure government, as sores do to the strength of the human body." (internal quotation marks omitted) (quoting THOMAS JEFFERSON, NOTES ON THE STATE OF VIRGINIA 165 (William Peden ed. 1955)). Both of Jefferson's categories, however, included land. Moreover, as discussed below, the category of agricultural property necessarily includes at least some personal property. See infra Part III.A. Furthermore, that category of property has steadily diminished in importance as fewer and fewer Americans make a living from agriculture. See infra notes 181-183 and accompanying text.
correspondence, Treanor argues that Madison, the likely author of the Takings Clause, assumed that it required compensation for slaves, who were considered personal property. In an 1819 letter to Robert Evans, Madison said that “[the non-slave owning part of the nation] are too just to wish that a partial sacrifice should be made for the general good; and too well aware that whatever may be the intrinsic character of that description of property [i.e., slaves], it is one known to the constitution, and, as such could not be constitutionally taken away without just compensation.” Thus, the original understanding of the Takings Clause offers no support for a distinction between personal property and land in takings law.

4. Landownership and Voting Rights

Finally, it might be argued that, notwithstanding this likely original understanding of the scope of the Takings Clause, the relationship between landownership and voting rights in the early republic made uncompensated takings of land particularly troubling. Unlike takings of personal property, takings of land could deprive landowners of substantial political rights. Whatever the merits of such an argument in the context of a political system that employs landownership as a condition for full political participation, the argument loses its force once such conditions have been dropped, as they were in the United States by the mid-nineteenth century. Moreover, as already discussed in relation to the importance of property within feudal society, such status-based explanations have no force in the particular context of regulatory takings (as opposed to direct confiscations) because regulatory takings do not affect title ownership. Thus, none of these potential historical explanations supports the Court's distinction between land and personal property in regulatory takings.

B. The Failure of the Court's "Reasonable Expectations" Justification

Besides referring to a vague "historical compact," the Court in Lucas attempted to ground its distinction between personal property and land in the expectations of property owners, suggesting that “in the case of

137. See Treanor, supra note 133, at 839.
140. See Wilentz, supra note 139, at 32-39.
141. See id. at 32 (noting that most property qualifications in the early republic were based on ownership of "title" in land).
personal property, [an owner] ought to be aware of the possibility that new regulation might even render his property economically worthless (at least if the property's only economically productive use is sale or manufacture).”

This attempt to ground the distinction on owners' differing reasonable expectations, however, fails to withstand close scrutiny.

There are two ways to read the *Lucas* Court's statement. First, one could understand it to mean that, because of the Court's own favoritism toward land in its recent takings jurisprudence, a reasonable owner of personal property, unlike a landowner, does not expect to receive compensation when regulation reduces the value of that property to zero. On this reading, however, the Court's explanation is somewhat circular because it would justify the Court's decision not to compensate on the basis of expectations generated in large part by the Court's own decisions not to compensate. Grounding entitlement to compensation in expectations formed in large part by the Court's recent favoritism towards land provides only weak support for the Court's distinction.

Alternatively, the Court could be understood as asserting that owners of personal property, particularly property for "sale or manufacture," have a greater expectation that the government will heavily regulate their personal property, even to the point where the property could lose all value. Such a reading eliminates (or at least widens) the circle by grounding the property owners' expectations not in the Court's favoritism toward land, but instead in differences in owners' general expectations about the traditional pervasiveness of state regulation of personal property. Although this alternative reading of the Court's explanation ameliorates the logical problem inherent in basing the distinction between personal property and land directly on expectations created by the modern Court's own favoritism toward land, it does so at the expense of factual accuracy.

As a descriptive matter, the Court's claim that the regulation of land is less pervasive than regulation of personal property is unpersuasive.

Richard Lazarus has observed that, "[a]lthough there was a time when

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143. As Rubenfeld has observed, "a judicial holding that rescission of a particular right is uncompensable would supply conclusive authority in any future case that an owner of that particular right had no legitimate expectation that the right existed at anything other than the state's sufferance." Rubenfeld, *supra* note 1, at 1110.

144. This alternative reading does not completely eliminate the circularity in basing compensation decisions on owners' expectations because such expectations will always be shaped to a certain extent by the Court's own compensation decisions. See *Lucas*, 505 U.S. at 1034-35 (Kennedy, J., concurring). But it has the virtue of expanding the circularity beyond the confines of the Court's recent, land-based expansion of regulatory takings doctrine.

such a distinction could have validly been made, for the past twenty-five years (long before most current property owners received their titles), regulation of state and local land use has rivaled that of personal property."¹⁴⁶ Can the Court really believe, in this post-Euclid¹⁴⁷ world of pervasive zoning and environmental land-use regulation, that land is any less regulated than other items in commerce?

Indeed, in limiting his observation to the past twenty-five years, Lazarus is too generous. As John Hart has demonstrated, pervasive land-use regulation is not (as is often assumed) a recent phenomenon.¹⁴⁸ Instead, it stretches back to colonial times.¹⁴⁹ "Contrary to the conventional image of minimal land use regulation," Hart argues, "government in the colonial period often exerted extensive authority over private land for purposes unrelated to avoiding nuisance."¹⁵⁰ Historian William Cronon's observations about colonial land-use regulation in New England reinforce Hart's assertions:

[Property rights in colonial New England] were never absolute, since both town and colony retained sovereignty and could impose a variety of restrictions on how land could be used. Burning might be prohibited during certain seasons of the year. A grant might be contingent on the land being used for a specific purpose—such as the building of a mill—and there was initially a requirement in Massachusetts that all land be improved within three years or its owner would forfeit rights to it. Regulations might forbid land from being sold without the town's permission.¹⁵¹

It might be argued that the Court's position in Lucas is not based upon a factual assertion that the regulation of personal property is actually more pervasive than the regulation of land. Instead, the argument might go, the Court's statement about property-owners' expectations rests on the belief that, as a conceptual matter, it is intrinsically easy for regulations to deprive the owner of personal property (particularly personal property for manufacture or sale) of all economic value whereas it takes a particularly onerous sort of regulation to deprive a landowner of all economically beneficial use of his land. Because, to the manufacturer or merchant, personal property has but one

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¹⁴⁶. Lazarus, supra note 12, at 1424.
¹⁴⁷. See Village of Euclid v. Ambler Realty Co., 272 U.S. 365 (1926) (upholding a zoning ordinance over a landowner's claim that the regulation worked a 75% reduction in the value of his property).
¹⁵⁰. See Hart, supra note 148, at 1257.
¹⁵¹. CRONON, supra note 149, at 73.
use (sale), to deprive that owner of all value, the regulation need only prohibit its sale. In contrast, because land has a greater diversity of possible uses, it takes a more intrusive sort of regulation to squeeze all the economic value out of it. The argument would conclude that it is precisely such exceptionally onerous regulations that the regulatory takings doctrine is intended to weed out.

The Court's own rulings, however, cast doubt on the notion that even regulations eliminating the economic value of land are exceptionally difficult to produce. After all, the only use prohibited in *Lucas* was the "construction of occupiable improvements." It seems difficult to argue that restricting residential construction on land is intrinsically more onerous than prohibiting a category of personal property from being sold or transported to a locale where its sale is permitted.

In short, the text and history of the Takings Clause provide no immediate support for the Court's categorical distinction between personal property and land. Nor can owners' reasonable expectations, however conceived, bear the weight the Court would place upon them. The next step, then, is to evaluate whether the distinction holds up under any of the various normative theories proposed by takings scholars.

### III. CAN NORMATIVE THEORIES OF PROPERTY LAW SUPPORT THE LUCAS DISTINCTION?

My discussion of the implications of various normative theories of property for the distinction between personal property and land includes a broad cross-section of property theories: (1) the idea that private property must be protected from government intrusion because private ownership is essential to liberty, a view that has deep roots in American property thinking; (2) Radin's position, based upon her Hegelian theory of property for personhood, that nonfungible property should be subject to heightened takings protection; (3) the belief that government


153. It might be argued (though the Court did not say this in *Lucas*) that favoring real over personal property is consistent with the Court's traditional concern within regulatory takings law to "protect[] individual property owners from bearing public burdens." *See Tahoe-Sierra*, 535 U.S. at 332 (describing one of the principal goals of the regulatory takings doctrine as "protecting individual property owners from bearing public burdens, which in all fairness and justice, should be borne by the public as a whole" (internal quotation marks omitted)); see also Michael H. Schill, *Intergovernmental Taking and Just Compensation: A Question of Federalism*, 137 U. Pa. L. Rev. 829 (1989) (discussing the equal treatment theory of takings). This "equal protection" component of takings law could be understood to refer to situations in which a property owner is literally singled out for differential treatment. On such an understanding, it might make sense to treat land and personal property differently, because every parcel of land is in some sense unique. One could argue that it is more likely that a regulated landowner has been intentionally singled out. Such an argument would more properly be employed to support a rule that all nonfungible property (and not just land) should be entitled to heightened takings protection.
interference with property holdings will generate disutility, a notion at the heart of the theory of takings set forth in Michelman’s classic 1967 article; (4) the view, based upon the insights of public choice theory, that takings scrutiny should be at its highest under circumstances in which the political process is likely to break down; and, (5) the social theory of property that emerges from the Thomistic-Aristotelian natural law tradition. These theories cover a wide range of philosophical approaches. Most takings theories, even those not expressly included in this discussion, will find themselves closely aligned with at least one of the theories discussed.154

A. Takings and Liberty

One of the most persistent theories of private property is the libertarian position that posits an essential link between private ownership and individual liberty.155 Indeed, this liberal-libertarian vision of property was central to the worldview of the drafters of the Constitution.156 Such a vision roots the moral imperative for private property in the nature of the individual and in the need to guarantee a sphere of autonomy within which the individual can operate. This view would consider uncompensated takings, whether through regulation or eminent domain, an affront to the natural rights of the individual and a grave threat to individual liberty.

A variety of theories might be understood as advocating a liberty-based justification for private property. For example, both Epstein’s conservative theory of property and Radin’s more progressive, Hegelian personhood-based theory of property, could be characterized as positing a link between private property and individual autonomy.157 In this discussion, however, I will treat Radin’s Hegelian theory and the libertarian theories, like Epstein’s, as belonging to separate species, examining libertarian theories in this Section and Radin’s theory in the

154. Though each of the theories has its own particular strengths and weaknesses, the goal of this Article is not to present comprehensive arguments for or against any of them. Nor does this Article present a thorough philosophical analysis of every implication of each of the theories. The aim instead is to explore their implications for, and to assess their claims about, the distinction between land and personal property in the regulatory takings context.

155. See generally MILTON FRIEDMAN, CAPITALISM AND FREEDOM (1962).

156. See NEDELSKY, supra note 134, at 170–78 (noting the dominant role of liberalism in the creation of the American Constitution and observing that, for Madison, “[p]roperty derived much of its value from its relation to freedom”). Of course, the liberal tradition is not the only one within American property law. Republican strains of thought, rooted in pre-modern traditions that tend to emphasize the relationship between property and virtue, have remained vital within the American discussion of property. See id. (noting the republican influences on the Constitution); see also GREGORY ALEXANDER, COMMODITY AND PROPRIETY: COMPETING VISIONS OF PROPERTY IN AMERICAN LEGAL THOUGHT, 1776–1970, at 1–7 (1999); Rose, supra note 1, at 587–94.

next. I distinguish between these two theories based on a conceptual difference in the way the theories understand the notion of "freedom." The crucial difference lies in the time-worn, though still meaningful, distinction between liberty conceived of in the "positive" sense as the "freedom to" do certain things, and liberty in the "negative" sense as "freedom from" outside intrusion. When Hegelians talk about freedom and liberty, they appear to mean freedom to engage in activities necessary for the full realization of a human being's free will. Such a positive conception of human freedom generates a redistributive impulse within Hegelian property thought. In contrast to this positive conception of human freedom is the more negative libertarian understanding of freedom as freedom from outside, particularly governmental, interference. This negative approach emphasizes the right to be left alone and is generally comfortable with existing property distributions. Indeed, it views attempts to forcibly redistribute, except under certain narrow circumstances, as grave threats to personal liberty.

This discussion evaluates three strands of libertarian argument for the special status of land. First, this Section assesses Robert Ellickson's argument that land is somehow uniquely necessary for the preservation of individual liberty. Second, it explores the related notion that landownership is inextricably bound up with the American Dream of homeownership. Finally, the section discusses the connection between landownership and sovereignty.

1. Ellickson's Arguments For the Primacy of Land

The negative liberal-libertarian conception of liberty appears to offer a particularly strong basis for protecting land more vigorously than personal property from government regulation. Robert Ellickson, for

158. See ALEXANDER, supra note 156, at 2-3.
159. See GEORG W. F. HEGEL, PHILOSOPHY OF RIGHT §§ 44-45 (T. Knox trans. 1942); WALDRON, supra note 157, at 353 (observing that Hegel thought that "individuals need private property in order to sustain and develop the abilities and self-conceptions definitive of their status as persons"); Peter G. Stillman, Property, Freedom and Individuality in Hegel and Marx's Political Thought, in NOMOS XXII: PROPERTY, at 130, 132 (J. Roland Pennock & John W. Chapman, eds., 1980) ("[P]roperty for Hegel is essential for men if they are to lead a full life of reason.").
160. Hegel himself did not fully appreciate the redistributive impulses generated by his theory of property. See WALDRON, supra note 157, at 378-80. Nonetheless, his theory lends itself to strongly redistributive arguments. See id. at 381-86.
161. See NEDELSKY, supra note 134, at 172-73 (discussing Lance Banning, Jeffersonian Ideology, 43 WM. & MARY Q. 3, 18 (1986)).
162. See NOZICK, supra note 28, at 149-64.
163. See Robert C. Ellickson, Property in Land, 102 YALE L.J. 1315, 1344 (1993) ("Classical liberals, for example, regard private property in land as an essential instrument for promoting political freedom, privacy, and self-determination.").
example, has made the following three-part argument regarding the primacy of land in securing individual liberty:

Compared to other resources, land remains a particularly potent safeguard of individual liberty. Like no other resource, land can provide a physical haven to which a beleaguered individual can retreat. A land sanctuary directly serves a variety of so-called 'negative' liberties. First, when a society confers self-ownership of labor, as most do, private land-ownership helps to ensure economic independence. In the United States, more than 75% of wealth takes the form of human capital—entitlement to work for oneself or to sell one's labor. Whenever a landowner can credibly threaten to withdraw into self-employment on his own land, private property in land helps to protect a worker from overreaching by employers or state officials. This realization may have underlain Jefferson's wish for a polity of farmers. Today, back-to-nature agriculturalists, cottage artisans, and hermits are among those who use land as a refuge.

Second, some social scientists assert that human beings have an innate desire to control their own environment, and may even be innately territorial. To the extent that these traits exist—an issue that is highly contested—private property in land best serves them.

Third, and finally, an individual landowner's right to exclude directly enhances rights of privacy.164

Ellickson sets forth three distinct arguments for the unique importance of land within a liberty theory of property: (1) landownership as both a necessary and (when combined with self-ownership of labor) sufficient condition for individual self-sufficiency; (2) landownership as satisfying a possible innate territorial urge within human nature; and (3) landownership, including the right to exclude, as enhancing the right to privacy. Taken as arguments for the primacy of landownership over other forms of property, the second and third points are most easily dispatched. I will therefore address those two points first, before moving on to Ellickson's first, and most persuasive, argument.

The notion that landownership satisfies an innate territorial instinct could only justify a preference for property in land if the territorial instinct to which Ellickson refers is somehow more important or fundamental than the other instincts whose satisfaction depends upon other forms of property. For example, private enjoyment of food is

164. Id. at 1353.

165. In fairness to Ellickson, it appears from the context of this passage within his larger article on the ownership of land that this discussion is primarily oriented towards establishing the importance of private ownership of land over other forms of land tenure. That is, it is not principally intended to establish that the ownership of land is more important to liberty than the ownership of personal property. It appears, however, that Ellickson did intend to make the latter point as well as the former. See id. ("Compared to other resources, land remains a particularly potent safeguard of individual liberty.").
necessary to the satisfaction of a human instinct for self-preservation. Moreover, Hegelians view private property as satisfying a basic human need to develop a rational and autonomous will. Without an argument as to why Ellickson’s territorial instinct is somehow more fundamental than these (and other) instincts that are best (or only) satisfied by personal property, the mere existence of such a territorial instinct cannot serve as the basis for prioritizing land over personal property.

Ellickson’s argument that landownership is uniquely important to the preservation of liberty because it enhances a person’s enjoyment of the right to privacy is also unpersuasive. To begin with, at least with respect to the government (the entity with which proponents of “negative” liberty are chiefly concerned), it is unclear what calling land “property” adds to a person’s enjoyment of privacy. Requiring the government to respect individual privacy would seem sufficient to guarantee the enjoyment of that right as against the state, irrespective of the formal status of the piece of earth on which that right is enjoyed.

More broadly, however, there is a latent circularity in Ellickson’s reasoning. On Ellickson’s view, private ownership of land is constituted in substantial part by the right to exclude. Conversely, the privacy right Ellickson says is enhanced by private ownership is merely the right to be left alone by excluding others from a particular physical space. Ellickson asserts that private ownership of land is important because it enhances the individual’s right to privacy. In other words, Ellickson says that granting people the right to exclude is important because it enhances their enjoyment of the right to exclude. To make his argument more normatively compelling, Ellickson must explain what significance private ownership of land (as opposed to other resources) has for some independent account of human well-being more broadly and why landownership bears more of a connection to the realization of that well-being than ownership of other forms of property.

Ellickson appears to make just such a move with his argument that ownership of land is uniquely important to liberty because it provides the owner with an exit option from a life among the hurly burly of society. In

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166. See infra notes 220–221 and accompanying text.
167. There are reasons for doubting that such an innate need for individual landownership actually exists or, if it does, that it is only satisfied by private ownership of land. After all, landownership is a fairly recent phenomenon in the history of the human species. See, e.g., THOMPSON, supra note 117, § 14.03, at 181 (Supp. 1999) (noting that “[p]rimitive people recognized property rights in weapons, tools, pottery, clothing and livestock long before they contemplated realty as an object of ownership.”).
168. See Bromley, supra note 124, at 25.
169. Cf. ALEXANDER, supra note 156, at 377 (suggesting that the concept of property, by itself, does little to secure individual rights).
170. See Ellickson, supra note 163, at 1324, 1363.
171. See id. at 1353–54.
full possession of his labor, which, Ellickson asserts, constitutes the bulk of his net worth, the lone property owner can retreat to his land and provide for himself. Land thus serves both as a refuge from others and as a conceptual check on abuse by third parties, public and private. This is an argument that historically has resonated deeply with the libertarian tradition in American property thought.172

Though this argument may accomplish many things, it cannot establish the primacy of property in land over other forms of property for protecting individual liberty. Assuming that a person could retreat to his land to make a living on the basis of his "human capital,"173 Ellickson's argument would, at best, establish that land is a necessary condition for such liberty. Land could not, however, be a sufficient condition because it would be impossible for the reclusive self-employed to put his human capital to use without the benefit of personal property. The lawyer must have her books (or computer), the farmer his implements, and the artisan her tools. And we must all have food and clothing. Even the shelters in which landowners live and work were personal property before they were affixed to the land.174 Thus, were the private ownership of personal property not secure, private ownership of land would provide little of the independence Ellickson values.

Ellickson's self-sufficient landowners recall the image of the yeoman farmer, in whom Jefferson put such faith.175 Very few such farmers still exist.176 Furthermore, even the small farmers who remain are not self-reliant survivalists living off the land. They buy and sell their inputs and produce (both of which are personal property) on the open market and often receive substantial private and government assistance.177 Moreover,
even for Ellickson's "back-to-nature agriculturalists, cottage artisans, and hermits." ownership of a small farm would be worthless without secure ownership of the personal property necessary to work that farm. Finally, at least some of their productive endeavors are likely to be aimed toward the acquisition of personal property (food, clothing, building materials, toys, savings, etc.) for which human beings strive and by which we (at least those of us living in modern Western societies) in large part measure our material wellbeing. While it is eminently reasonable to think that the institution of private property is related to liberty, the private property conducive to liberty necessarily includes both land and personal property.  

In addition to the conceptual arguments against the notion that land is uniquely connected to liberty, historical arguments demonstrate the declining significance of landownership in a modern capitalist economy. As numerous scholars have observed, the modern economy is characterized by the increasing importance of non-land wealth, particularly intangible property, such as intellectual property and government largess. The small farmer is a dying breed in the United States. According to census data, less than one percent of the U.S. population is engaged in farming as a primary occupation. Even in rural


178. Ellickson, supra note 163, at 1353.

179. See Charles A. Reisch, The New Property, 73 YALE L.J. 733, 771-72, 787 (1964) (arguing that private property "draws a circle around the activities of each private individual and organization" inside of which the owner is granted "a greater degree of freedom" and suggesting that the space inside the circle must include more than just land). This Article's argument is unrelated to Reisch's point about the need for property-like protections of government largess in the modern welfare state. At all times, personal property is necessary to a person's enjoyment of the benefits, however characterized, of private ownership of land. Thus, to the extent that such enjoyment generates, or is constitutive of, liberty, private ownership of personal property enjoys equal credit with private ownership of land.

180. See ACKERMAN, supra note 5, at 166 ("Unlike our ancestors, we no longer count our wealth by looking first to our social property of land, farms, buildings. Instead, our principal means of support consist of legal property: stocks, bonds, pensions, an assortment of rights granted by the activist welfare state."); ALEXANDER, supra note 156, at 259 (observing that with the urbanization of America, land has "increasingly lost its role as the socially and economically dominant form of property"); Bosselman, supra note 24; WILLIAM A. FISCHER, REGUALTORY TAKINGS: LAW, ECONOMICS, AND POLITICS 278-79 (1995); Geisler, supra note 128, at 542; Reisch, supra note 179; Bernard Rudden, Things as Things and Things as Wealth, 14 OXFORD J. LEGAL STUD. 81, 82 (1994); SCOTT, supra note 128, at 75-93, 133-35, 201-02.

181. Geisler, supra note 128, at 533 ("The battle waged a century ago by the Populists to preserve an agrarian democracy built on broad distribution of private ownership among small holders seems to have been lost.").

areas, only 7.6 percent of employment is in agriculture.\textsuperscript{183} Were the fate of liberty dependent on the survival of such a lifestyle, these would indeed be frightening statistics. Although the prevalence of small farmers in the early republic may well have made it plausible for men like Thomas Jefferson to see an essential connection between such forms of landownership and liberty,\textsuperscript{184} the apparent survival of our liberties despite the disappearance of small-scale agriculture should at least give pause to contemporary adherents of that position.

Ellickson's libertarian account of the importance of land is thus ultimately unconvincing. It is far from clear that private landownership is necessary for the satisfaction of deeply-held human desires in a way that personal property is not. Nor is it clear that the protection of property in land adds anything to the direct protection of an individual right to privacy. Finally, the libertarian ideal of the self-sufficient individual alone on his land depends at least as much on the private enjoyment of personal property as it does on private property in land.

2. Liberty and the American Dream

Whether or not landownership is uniquely necessary to Ellickson's self-sufficient recluses, and regardless of whether land has declined as a source of income for most Americans, no one could reasonably deny that landownership remains particularly important to Americans because of its unparalleled role in the mythology of our culture. After all, is it not every American's dream to own her own home? Is it not therefore the case that this American Dream is intrinsically tied to ownership of land? As Sonia Solamon has pointed out, "[a]mong urban and suburban populations, a home (that combines land with a dwelling) represents achievement of the American Dream in the same way as does control of farmland in rural areas."\textsuperscript{185} But while landownership is, as a practical matter, necessary to the achievement of the American Dream, it is not sufficient by itself to realize the American dream.

Homeownership certainly confers substantial status within our society.\textsuperscript{186} Consider the cultural implications of landownership, for

\begin{itemize}
  \item \textsuperscript{184} See supra note 136.
  \item \textsuperscript{185} Sonya Salamon, \textit{Cultural Dimensions of Land Tenure in the United States}, in \textit{WHO OWNS AMERICA?}, supra note 124, at 159, 174–75; see also \textsc{Jan Cohn}, \textit{The Palace or the Poorhouse: The American Home as a Cultural Symbol} 223 (1979) ("[f]or the majority of Americans, house and home coexist; home flourishes most successfully in the privately owned, detached single-family dwelling.").
  \item \textsuperscript{186} See Constance Perin, \textit{Everything in its Place: Social Order and Land Use in America} 32 (1977) ("In American society, the form of tenure—whether a household owns or rents its place of residence—is read as a primary social sign, used in categorizing and evaluating people, in much the same way that race, income, occupation, and education are.").
\end{itemize}
example, by comparing the status of the owners of single-family dwellings to life-long apartments renters and the residents of mobile home parks. Yet while ownership of land has significant symbolic value within the context of American culture, for a variety of reasons, personal property is also necessary to the realization of the American Dream.

As already suggested, homeownership goes well beyond the mere ownership of land and would be meaningless without personal property. To begin with, the home itself is made up of personal property, such as bricks and wood, affixed to the land. Although such "fixtures" are technically "real property," they were personal property before being joined with the land. Lack of access to personal property (e.g., paint, plaster, wood, tools) needed to maintain such fixtures inevitably results in their destruction. Anyone who has visited Havana in the years since the collapse of the Soviet Union will immediately appreciate the dire consequences for structures that can result from lack of access to personal property, such as construction materials. In addition to being constructed out of personal property, the house is a "home" in large part because of the personal property contained within it: furniture, appliances, photographs, clothing, and much more. Thus, access to personal property—not just land—is necessary to realize the American dream. Indeed, the bulk of the persuasive work done by the American dream argument may be performed by personal property attached to and placed on land.

A thought experiment might help to convey the limits of the importance of land within our mythology of homeownership. Consider the example of houseboats. Houseboats can be just like houses built on land in all relevant respects except that they float and are moored to a dock instead of sitting on a foundation dug into the earth. In cities like Seattle, houseboats are a desirable sort of home, commanding a significant premium over the market price of comparably-sized dwellings built on land. The homes are attached to docks, which homeowners may either lease or own, often through cooperative or condominium

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187. See supra notes 174-177 and accompanying text.
188. See, e.g., Se derrumba un edificio durante una fiesta de quince años, CUBANET INDEPENDIENTE, Dec. 5, 2000, at (http://64.21.33.164/CNews/y00/dec00/05a9.htm) (describing the collapse of a private home in Havana, Cuba during a birthday party and noting the general deterioration of private homes in Havana due to the lack of access to construction materials).
190. See Sloper, supra note 189. In 2002, based on a sampling of ten houseboats for sale on Lake Union, the median price was $375,000, see id., as compared to a median price of $313,000 for land-based homes in Seattle in 2003. See Rachel Tuinstra, Voters Backing Levy to Rebuild, Renovate City's Fire Stations, SEATTLE TIMES, Nov. 5, 2003, at A13.
arrangements, but are otherwise unconnected to the earth. As such, they remain personal property.

A comparison between a well-appointed houseboat and a normal, land-based home yields few meaningful differences. Unlike mobile homes, houseboats do not suffer from any stigma of poverty. The question, then, is what does ownership of land add to the equation? Though landownership may add some conveniences (a yard, for example), it is difficult to argue that the two types of dwellings are essentially different. Owning a houseboat would satisfy, and even exceed, the American Dream for the vast majority of Americans. Finally, compare the houseboat with an undeveloped piece of land. It is clear that the houseboat comes much closer to satisfying the American Dream than mere landownership.

The point here is not that landownership adds nothing to the American Dream of homeownership. Land may offer some sense of permanence that a houseboat lacks. Moreover, given the scarcity of shorefront space, land-based homes are necessary if more than a small number of people are to enjoy homeownership. As a result, landownership is, as a practical matter, a necessity for the satisfaction of the American Dream by more than just a token number of people. But landownership is not a conceptual necessity. As the case of houseboats demonstrates, landownership, as such, contributes far less to the American Dream than often assumed. The bulk of the American Dream is satisfied by the structure of the house, which was once—and in the case of houseboats still is—personal property, by the home’s contents (again personal property), and by the social status and financial benefits.

191. As a result of an ordinance passed in 1907, a number of houseboat-owners along the Lake Union shoreline in Seattle own the submerged land underlying their floating homes. See http://www.discoverhouseboating.com/trivia.htm (last visited Feb. 19, 2004). For the purposes of this thought experiment, however, the reader should assume that no such ownership exists.

192. The value of houseboats in Seattle is taxed as personal property. See id.; CAL. ADMIN. CODE tit. 22, § 50425 (listing “houseboats” as a form of “personal property” that may serve as a principal residence).

193. There may have been a time when immigrants came to the United States primarily to take advantage of the opportunity to own economically productive land. See Harvey M. Jacobs, The “Wisdom,” but Uncertain Future, of the Wise Use Movement, in WHO OWNS AMERICA?, supra note 124, at 29, 36; SCOTT, supra note 128, at 6–9 (describing the opportunity for landownership as a substantial inducement for colonists to emigrate from Europe to colonial America). Under such circumstances, conclusions about the substance of the “American Dream” would have tilted more in favor of mere landownership. As the statistics on the number of Americans making their living from farming indicate, however, those days are long gone. See supra note 182 and accompanying text. Moreover, even under such a land-focused conception of the American Dream, personal property has a necessary role to play in the productive use of the land.

194. In Bromley’s words, landownership increasingly provides little more than “space and place.” See Bromley, supra note 124, at 27.
associated with homeownership. The American Dream is at least as intimately connected with personal property as it is with land.

Attempts to ground the Court’s favoritism toward land in the American Dream of homeownership also confront the problem that a blanket rule in favor of landowners is a dramatically over-inclusive tool for protecting the homeowners. Land for homes represents less than five percent of the total land in the United States and less than ten percent of all privately owned land. Around three quarters of the land in the United States is cropland, grazing land, or forestland, and that land is owned by very few people. Indeed, the top one half of one percent of landowners, including corporations, owns forty percent of the privately held land in the United States; in contrast, the bottom three quarters of American landowners own just three percent of the private land. A blanket rule in favor of land built on the need to protect the American Dream would thus constitute an enormous windfall to a small number of highly concentrated, and primarily nonresidential, landowners.

Perhaps it is unsurprising, then, that homeowners have not been the forefront of a property-rights movement focused on the protection of land. As Alfred Olivetti and Jeff Worsham observed in their study of

195. See Salamon, supra note 185, at 162. As the case of houseboats demonstrates, however, these side-benefits of home-ownership are not exclusively connected to the ownership of land as such.

196. It might be tempting to argue that the favored position of land within regulatory takings law includes the personal property attached to land. Ironically, although homeownership arguably might provide strong rhetorical support for a rule favoring land (at least if land is considered in a broad sense as including the personal property attached to the land), the Supreme Court’s favoritism towards land, at least in Lucas, is focused on land in the narrow sense. In Lucas, the Court indicated that a regulation could render a structure attached to the land useless—and valueless—without constituting a per se taking; only a regulation that deprived an owner of all economically beneficial uses of the underlying land would constitute a per se taking. See Lucas v. S.C. Coastal Council, 505 U.S. 1003, 1026 & n.13 (1992) (distinguishing Mugler, Reinman, and Hadacheck on the ground that the regulations at issue in those cases did not “wholly eliminate[] the value of the claimant’s land” (emphasis added)).


198. See Vesterby & Krupa, supra note 197, at 22.

199. See Harvey M. Jacobs, Conclusion: Who Owns America? in WHO OWNS AMERICA, supra note 124, at 245, 247 (observing that five percent of the U.S. population owns seventy-five percent of the private land base).

200. See Vesterby & Krupa, supra note 197, at 22–23; see also Geisler, supra note 128, at 533. Roughly sixty percent of the land in the United States is privately owned. See id. Such concentrations of landownership are, according to Geisler, “comparable to [concentrations found in] many Third-World countries.” See Geisler, supra note 128, at 539.

201. See ALFRED M. OLIVETTI, JR. & JEFF WORSHAM, THIS LAND IS YOUR LAND, THIS LAND IS MY LAND: THE PROPERTY RIGHTS MOVEMENT AND REGULATORY TAKINGS 38–44 (2003). Indeed, it is in the very states where landownership is most concentrated and where non-
the property-rights movement, its agenda has been spearheaded by "western agriculture and mineral interests, joined and funded by multinationals involved in extractive mineral industries." Although the movement often draws support from libertarian principles, the property-rights movement that has formed around these land-using enterprises has not sought to expand property rights for purely abstract, philosophical reasons. Rather, motivated by concrete economic interests, it has pursued the very practical and relatively narrow goal of blunting the force of (primarily environmental) land-use regulations on its members' ability to exploit the land as freely and profitably as they have in the past.

In pursuit of that goal, the property-rights movement has focused on requiring government compensation for regulations that affect its favored uses of land. This narrow focus on land-use regulation is reflected in the compensation statutes enacted at the behest of property-rights advocates. Those statutes, which generally call for compensation to be paid to property owners whose property value has declined by a specified amount because of government regulation, have invariably defined "property" to include only property in land. Florida's compensation statute, for example, applies by its plain language only to "real property." Mississippi's is limited even more narrowly to "forest and agricultural land." And Texas's compensation statute applies only to "private real property." Similarly, Oregon's compensation initiative, Measure 7, which was invalidated by the Oregon Supreme Court, limited compensation to "real property."

In sum, the American Dream depends as much on personal property as it does on land. Moreover, a rule granting favored status for land in order to protect homeowners, would be grossly over-inclusive because it would apply to all land, even though the vast majority of the privately owned land in this country has nothing to do with homeownership. The mythology of the American Dream therefore offers little support for categorical favoritism towards land in regulatory takings jurisprudence.

residential uses of land predominate that the property-rights movement has found its greatest support. See id.; see also Geisler, supra note 128, at 539–40; Douglas T. Kendall & Charles P. Lord, The Takings Project: A Critical Analysis and Assessment of the Progress So Far, 25 B.C. ENVTL. AFF. L. REV. 509, 529–30 (1998) (arguing that "the Takings Project had little to do with protecting individual landowners" and more to do with combating commercial regulation).

202. OLIVETTI & WORSHAM, supra note 197, at 39–42; see Kendall & Lord, supra note 201, at 529–30.

203. See OLIVETTI & WORSHAM, supra note 197, at 37–39.

204. FLA. STAT. ANN. § 70.001 (West 2004).


208. The assumption that justifies differential treatment of individual homeownership would also appear to support only a rule in favor of land owned by individuals.
3. **Liberty and Sovereignty**

In contrast to the fundamentally individualistic notion of land as uniquely essential to liberty, a different conceptualization of the connection between land and liberty views land as necessary for the maintenance of communal sovereignty. From this perspective, land is uniquely capable of defining communal boundaries, providing communities with a geographic space within which to carry on their political and cultural life freely. This argument has been made most forcefully in the context of Native American tribes, but could just as easily be extended to sovereigns of other sorts, such as states and municipalities.

Territorial boundaries define the limits of a sovereign’s political power, whether that sovereign is a tribe, city, or state. Deprivations of property rights in land, whether by eminent domain or by regulation, therefore may represent particularly grave threats to the political and cultural autonomy of sovereigns. Infringements on that territorial integrity arguably strike at the heart of the sovereign in a way that deprivation or regulation of personal property does not.

As with the American Dream, this argument disregards the essential role of personal property in the everyday functions of both individual and communal life. While regulation or deprivation of land certainly affects the sovereign in a powerful way, regulation of personal property may do equal violence. Withholding personal property through an embargo or blockade constitutes a powerful tool for coercing a sovereign without infringing its territorial integrity.

Moreover, for some communities, such as Native American tribes, the preservation of cultural activities constitutes a principal value of sovereignty. Depriving those sovereigns of the personal property necessary for the conduct of their cultural traditions (for example, the peyote used in the cultural practices of certain indigenous communities)

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210. See id. at 424-25 ("Native Americans and tribes share a meaningful and culturally significant connection to land far exceeding western notions of land and property typically held by non-Indians.").

211. Although the Takings Clause refers only to “private property,” see U.S. CONST. amend. V, the courts have consistently required the federal government to compensate state and local governments and Indian tribes for takings of their property. See Schill, supra note 153, at 830-31; see also Tee-Hit-Ton Indians v. United States, 348 U.S. 272, 277 (1955) (“Where the Congress by treaty or other agreement has declared that thereafter Indians were to hold the lands permanently, compensation must be paid for subsequent taking.”).

212. See McCoy, supra note 209, at 424-25, 435-36.
diminishes the value of their sovereignty just as surely as depriving them of the land on which to carry out those traditions.\textsuperscript{213}

The sovereignty argument fails for two additional reasons. First, it gives the false impression that ownership of land, by itself, can confer sovereignty separate from the direct protection of sovereign prerogatives. Without a preexisting commitment to respect communal sovereignty, naked landownership provides scant protection.\textsuperscript{214} Second, as with homeownership, assigning a privileged status to all land in order to protect domestic sovereigns from depredations on their territorial integrity, is vastly over-protective. The great majority of American land is privately owned,\textsuperscript{215} and the bulk of publicly owned land is held by the federal government, not by subsidiary sovereigns in need of protection.\textsuperscript{216} State and local government land accounts for only nine percent of American land; tribal trust land represents just two percent.\textsuperscript{217} The desire to protect sovereignty therefore presents a poor reason for favoring all land over other forms of property.

To summarize, land alone cannot secure individual liberty or communal sovereignty, and it cannot satisfy the American Dream. Moreover, the land involved in the pursuit of such goals is a relatively small percentage of the land in the United States. Accordingly, libertarian considerations do not support favoritism towards land as such within the law of regulatory takings.

\section*{B. Takings and Personhood}

Personhood theories of takings likewise fail to supply a basis for the Court's favoritism toward landowners. Such theories ground their arguments for private ownership in the relationship between exclusive control over items in the material world and the development of the self. The most prominent recent proponent of such a theory is Margaret Radin, whose theory of property builds on the insights of Georg Hegel's \textit{Philosophy of Right}.\textsuperscript{218}

Radin's (and Hegel's) theory justifies private ownership on the basis of its essential connection to the formation and maintenance of a person's autonomy and "personhood."\textsuperscript{219} At its most basic level, property is necessary for the development of a person's will because by imposing his

\begin{footnotesize}
\begin{enumerate}
\item \textsuperscript{213} See Employment Div. Dep't of Human Res. of Or. v. Smith, 494 U.S. 872 (1990).
\item \textsuperscript{214} See Nevada v. Hicks, 533 U.S. 353 (2001).
\item \textsuperscript{215} See Versterby & Krupa, supra note 197, at 23.
\item \textsuperscript{216} See id. (noting that the federal government owns twenty-eight percent of land in America).
\item \textsuperscript{217} See id.
\item \textsuperscript{218} See Margaret Jane Radin, \textit{Property and Personhood}, 34 STAN. L. REV. 957, 977-78 (1982).
\item \textsuperscript{219} See id. at 977-79; Stillman, supra note 159, at 137-40.
\end{enumerate}
\end{footnotesize}
will on material objects over an extended period of time, through his powers of appropriation and ownership, a person accomplishes three things essential to his moral development: first, his autonomous will is manifested in a meaningful way in the world; second, his will is made more rational and, third, his free will is recognized by others.\(^{220}\) A person's will is manifested in the material world by his sheer manipulation of material objects—in moving an object from one place to another, or in changing the form of an object in some way, a person makes the material world the object of his will, and in the process, leaves the mark of his will on the world itself. Private property helps to make a person's will more rational by enabling him to plan future use of his material possessions. Such planning allows a person's will to become more rational through the need to think prudentially about how certain manipulations of property will yield the particular results that the person desires over time. Finally, private property allows a person's will to be recognized by others who observe a person's physical manipulation and respect that person's superior rights over privately owned objects.\(^{221}\)

Radin draws upon Hegel's understanding of the role of private property for personal development to posit a theory in which some categories of property are more important than others.\(^{222}\) Specifically, Radin argues that property lying closer to the core of an individual's self-definition, such as the home, is more worthy of legal protection than more peripheral property, such as speculative investment property.\(^{223}\) Though such a hierarchical conception of property rights might seem promising for the Court's distinction between land and personal property, Radin's theory, and personhood theories generally, turn out to be particularly unhelpful.

Radin's conception of property does not explain the Court's favoritism for land in regulatory takings because it acknowledges the deep connections between an individual's self-conception and her personal property. For example, Radin discusses at length the connection between an individual and her car. The car is both an instrumental tool and a mobile physical environment in which we store our personal

\(^{220}\) See WALDRON, supra note 157, at 373–77.

\(^{221}\) See id. 353–57, 372–75; Stillman, supra note 159, at 136–40.

\(^{222}\) See Radin, supra note 218, at 978–79, 986–88.

\(^{223}\) See id. at 986–88. As Radin acknowledges, without some objective check on the reasonability of certain self-conceptions, personhood theories are open to the challenge that they allow for infinite subjectivism in the valuing of property. See id. at 968–70. In subsequent articles, Radin appears to have embraced the Aristotelian notion of "human flourishing" as the basis for such an objective, external check. See Margaret Jane Radin, Market Inalienability, 100 HARV. L. REV. 1849 (1987); see also Margaret Jane Radin, The Liberal Conception of Property: Cross Currents in the Jurisprudence of Takings, 88 COLUM. L. REV. 1667, 1694–95 (1988) ("[T]he 'compleat capitalist' embodies an inferior conception of human flourishing, and one we should reject.").
belongings and "carry[] on private thoughts or intimate relationships."²²⁴ She analogizes the car to the home and argues that cars should be given, at least for some purposes, the same legal protections currently reserved for dwellings.²²⁵ In the takings context, Radin argues for stronger legal protection of property that is more central to a person's identity, whether that property is personal or real.²²⁶ "[I]f someone returns home to find her sofa has disappeared," Radin says, "that is more disorienting than to discover that her house has decreased in market value by 5%. If, by magic, her white sofa were instantly displaced by a blue one of equal market value, it would cause no loss in net worth but would still cause some disruption in her life."²²⁷

Radin's respect for personal property is not an accidental feature of her particular version of personhood theory. If the institution of private property is rooted in our need to manipulate objects in the external world in order to form a free and rational will, personal property is at the heart of that property system. After all, personal property is far easier to manipulate than land. Moreover, when a person does manipulate land, she can only do so (in any meaningful way) through the use of tools and other items of personal property. Finally, although land plays an important role in our self-identity, that role is at a minimum matched in importance by the personal property people wrap around their bodies and carry with them through society. The personhood theory of property simply cannot supply the basis for the Court's distinction between personal property and land.

C. Takings and Utility

Like libertarian explanations, utilitarian theories abound in the academic discussion of takings law.²²⁸ Although economists generally reject the economic significance of the categorical distinction between personal property and land,²²⁹ the distinction might serve as a useful

²²⁴. See Radin, supra note 218, at 1000-01.
²²⁵. See id.
²²⁶. See id. at 1004.
²²⁷. See id.
²²⁹. See Bosselman, supra note 24, at 39 ("Economic theory now recognizes no basic distinction between land and other forms of capital.") (citing Daniel W. Bromley, Regulatory Takings: Coherent Concept or Logical Contradiction?, 17 VT. L. REV. 647, 677-78 (1993));
proxy for some other characteristic that utilitarians do find significant. Consequently, it is worth considering the distinction from the point of view of the dominant utilitarian theory of takings, the theory put forward by Frank Michelman in his landmark 1967 article in the *Harvard Law Review.* This Section begins by sketching the outlines of Michelman's theory and then questions whether the theory justifies a distinction between land and personal property.

Michelman builds his theory out of the interaction of three concepts: efficiency gains, demoralization costs, and settlement costs. Efficiency gains are "the excess of benefits produced by a measure over losses inflicted by" that measure. Michaelman defines benefits as "the total number of dollars which prospective gainers would be willing to pay to secure adoption." Losses are "the total number of dollars which prospective losers would insist on as the price of agreeing to adoption." "Demoralization costs" are defined as the value of "disutilities" (which in this context can be thought of as losses, including unhappiness or subjective dissatisfaction) that would result if the government were to adopt a policy without compensating the losers. Demoralization costs also include the value of lost future production caused by the demoralization of uncompensated losers, their sympathizers, and other observers disturbed by the government's actions. Finally, "settlement costs" are the value of the "time, effort, and resources which would be required in order to reach compensation settlements adequate to avoid demoralization costs." For Michelman, the goal of takings law is to maximize overall social welfare. He concludes that the government should only pursue a policy if the efficiency gains it will generate would exceed either the demoralization costs or the settlement costs necessary to avoid demoralization costs. Once it opts to pursue the policy, the government should "pay" either the settlement costs or the demoralization costs,

Jacobs, *supra* note 199, at 245, 247-48 (observing that classical economic theory recognizes land as an important factor of production but arguing that "as capitalism has matured over the course of the last one-hundred years, and especially in the last twenty-five years, land seems to be ever more irrelevant").

230. Michelman's article actually sets forth two theories of takings, one rooted in utilitarian considerations and one applying Rawls' contractarian ethical theory. See Michelman, *supra* note 29, at 1214-1224. My focus will be on the utilitarian version of his thesis, which has generated more scholarly interest.

231. *Id.* at 1214.

232. *Id.*

233. *Id.*

234. *Id.*

235. *Id.*

236. *Id.* at 1215.
whichever is lower. The question here is whether government action affecting land is likely to impact “efficiency gains,” “demoralization costs,” or “settlement costs” in ways that differ systematically from the impacts caused by government action affecting property generally. That is, does this utilitarian approach support the Lucas Court’s distinction between land and personal property?

1. Efficiency Gains

Of Michelman’s three concepts, efficiency gains are most closely related to the standard economic analysis performed by welfare economists. Given economists’ failure to distinguish between land and personal property in their work, it seems unlikely that the regulation of the two categories of property would have systematically different effects on efficiency gains.

2. Demoralization Costs

Demoralization costs, the disutilities caused by the government’s failure to compensate for losses sustained because of a particular government action affecting property, are a highly subjective measure. Whether the notion of demoralization costs justifies the Court’s differential treatment of land and personal property depends on whether individuals’ subjective reaction to the uncompensated taking of land is likely to differ from their reaction to the uncompensated taking of personal property. Moreover, it depends on whether those reactions differ with sufficient consistency to justify using the category of personal property as a proxy for situations in which a claimant is unlikely to be entitled to compensation under Michelman’s scheme.

At first glance, it appears easy to reject such a suggestion. After all, people are at least as subjectively attached to their personal property as they are to their land. People’s connections to deeply cherished items of personal property, such as objects used in religious worship, photographs, cars, wedding rings, or family heirlooms, may match or exceed their attachment to a piece of land. And, for the reasons discussed above regarding liberty, people are as dependent upon personal property for their material well being as they are upon land.

237. Id. Michelman’s theory has been described as a brilliant compromise between the excessively constraining Pareto and the overly permissive Kaldor-Hicks measures of efficiency. See FISCHEL, supra note 180, at 147–48.
238. See FISCHEL, supra note 180, at 144 (“The efficiency gains criterion is where economists may be tempted to stop.”).
239. See supra note 229 and accompanying text.
240. See FISCHEL, supra note 180, at 145.
The distinction between personal property and land, however, may serve as a proxy for some other feature that has a significant impact on demoralization costs. The most attractive candidate for such a feature is value. As a general matter, demoralization costs arguably will track the absolute value of an individual's monetary loss from a given government regulation. Since an individual’s holding in land (typically, her home) is likely to be her single largest material asset, a government action affecting the value of that land is likely to have a larger effect on her bottom line than government action affecting personal property. Thus, the regulation of land is likely to generate more substantial demoralization costs than regulation of personal property.

This version of the argument actually employs land as a proxy for a proxy. First, it uses situations involving large monetary losses as proxies for circumstances in which demoralization costs are high. Second, it treats interests in land as proxies for situations involving large monetary losses. On the basis of these combined proxies, the argument concludes that heightened protection for all land is the best way to get at situations involving high demoralization costs.

This argument has several problems at each step along the way. First, if one’s goal is to isolate claims involving takings of “expensive” parcels of property, that is, claims involving regulations that impose large monetary losses on property owners, then the obvious and most direct way to accomplish this would be to establish a minimum amount in controversy for regulatory takings claims. In other words, it is not clear why any proxy for high demoralization costs is necessary.

Even assuming the desirability of such a proxy, the argument that land should serve as the proxy for large demoralization costs because land is most people’s largest asset implicitly rests upon the rhetorical power of the same paradigm of individual homeownership as the “libertarian” argument from the American Dream. As I have already observed, residential property represents less than five percent of

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243. See supra note 241.
all land in the United States and less than ten percent of all privately owned land.\textsuperscript{244} Moreover, both the subjective and objective value of the home extends well beyond the value of the land underlying it.\textsuperscript{245}

In addition to these factual objections, there are two broader conceptual problems with using monetary value as a proxy for demoralization costs. First, value, at least in an objective, monetary sense, is an unreliable proxy for Michelman's demoralization costs. "Demoralization" is a highly subjective measurement. Thus, an attempt to use monetary value as a proxy for demoralization costs can only succeed by ignoring the frequently unpredictable relationship between the objective, monetary value of a piece of property and its ability to generate subjective feelings of attachment.\textsuperscript{246} The regulation of small items of certain highly prized personal property, such as materials used in religious worship, would predictably generate extremely high demoralization costs. Similarly, the demoralization caused by the taking of a small piece of land which has special emotional value (e.g., the proverbial "family farm") would likely exceed the demoralization caused by the taking of an equivalently sized piece of property whose owner views it as completely fungible. Furthermore, the subjective attachment most people feel towards "real" property is not directed solely toward the land; it also encompasses the items of personal property attached to that land.\textsuperscript{247}

More systematically, the notion that there is a decreasing marginal subjective value to wealth suggests that the "proportional" value of property (i.e., its value relative to a claimant's overall wealth) might be more predictive of demoralization costs than its "absolute" monetary value. In other words, even a large absolute loss might not generate enormous demoralization costs for a person of great wealth. Conversely, a much smaller loss might be devastating to a person for whom it represents his life savings. Without a predictable relationship between absolute monetary value and demoralization costs, the fact that items of personal property may be on average less valuable than parcels of land is

\textsuperscript{244} See supra notes 197–198 and accompanying text.
\textsuperscript{245} See supra Part III.A.2.
\textsuperscript{246} To the extent that Michelman adheres to a purely utilitarian theory of property, he must view such sentimental attachments as fully compensable. Of course, to non-utilitarians, the ability to compensate for such sentimental property rests on highly questionable views about commensurability. Indeed, the denial of such commensurability forms the basis for a dominant species of argument against the cogency of utilitarianism as an ethical system. The utilitarian countermove to this reference to sentimental value would be to say that sentimental demoralization costs will normally generate high settlement costs. There are broad categories of property, particularly property associated with family life, however, for which sentimental demoralization costs will be predictably high and will, as a consequence, be roughly compensable without generating unduly high settlement costs.
\textsuperscript{247} See supra Part III.A.
not sufficiently predictive of the outcome of the Michelman analysis to justify a categorical distinction between personal property and land.

Even if objective monetary value were a good predictor for high demoralization costs under Michelman's theory, the distinction between personal property and land is a poor proxy for absolute monetary value. As cases like *Irving* and *Lorretto* demonstrate, interests in land can be nominal in value.\(^{248}\) In contrast, a concentrated interest in personal property, particularly a commercial interest—such as the one at issue in *Everard's Breweries*—is normally quite substantial.\(^{249}\) Even at the household level, valuable items of personal property, such as vehicles, can account for a significant percentage of a family's assets, particularly for families that do not own a home.\(^{250}\)

To summarize, the personal property/land distinction is, for the purposes of the Michelman theory, a proxy on top of a proxy yielding an overbroad conclusion. That is, it starts with the assertion that there is a reliable correlation between the monetary value of property and the subjective demoralization costs takings would generate. Second, it depends upon the notion that the distinction between land and personal property can serve as an adequate proxy for monetary value. Finally, assuming the prior two assumptions to be sound, it concludes that protecting all land as a category is a good way to protect most people's largest assets (their homes) even though ninety percent of the protected category of privately owned land is used for other purposes. When the flaws in these assumptions are combined with the fact that there is no apparent need for such a proxy (since an amount in controversy requirement could be used instead), the attempt to ground the distinction between personal property and land in Michelman's theory of demoralization costs falls apart.

### 3. Settlement Costs

Settlement costs will likely be higher when demoralization costs are spread over a large number of individuals.\(^{251}\)

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249. See, e.g., *Everard's Breweries v. Day*, 265 U.S. 545, 556 (1924) (describing Everard's loss as "heavy").

250. See *id.* (listing vehicles as accounting for, on average, 6.5% of the average family's nonfinancial assets); see also *Jacobs, Conclusion, supra* note 199, at 247 (noting the highly concentrated nature of landownership in the United States).

251. See *Michelman, supra* note 29, at 1223 (risks of unfairness are low when "burdens similar to that for which compensation is denied are concomitantly imposed on many other people (indicating that settlement costs are high and that those sustaining the burden are..."
generally to consist of less valuable, more widely affordable and standardized items, regulation of personal property seems more likely to generate such a diffuse pattern of demoralization costs. Because high settlement costs weigh against the need for compensation under Michelman's theory, it might be argued that his theory favors a general presumption against compensation for takings of personal property.

The first problem with this position, however, is that, as with demoralization costs, the easiest and most direct way to filter out high settlement costs is simply to create a minimum amount in controversy for individual takings claims. Moreover, for the same reasons already discussed in the context of demoralization costs, the distinction between personal property and land is a flawed proxy for high settlement costs. Big-ticket items of personal property, such as industrial equipment, or concentrated commercial holdings of personal property are likely to be less diffusely held than inexpensive items of personal property. Compensation for the regulation of such categories of personal property, which are likely to account for the bulk of personal property regulatory takings claims, would not generate unusually high settlement costs. Thus, Michelman's utilitarian theory provides scant support for the Court's heightened protection of land over other forms of property.

D. Takings and Public Choice

Public choice theories view the Takings Clause as a means of protecting property holders from breakdowns in the representative political process. The "public choice" label encompasses a broad range of theories about what constitutes failure in the political process. This discussion focuses on the particular application of public choice theory that seems best suited to justify the Court's favoritism within regulatory takings law towards property in land: the public choice theory of takings advocated by William Fischel.

Fischel's theory is built around the notion that representative government is disciplined by the ability of its constituents to exercise rights of "voice" and "exit." By "voice," Fischel means the ability to influence the political process through participation, and by "exit," he means the ability to vote with one's feet by moving out of the jurisdiction. In Fischel's view, landowners seeking to develop their

probably incurring relatively small net losses—else, being many, they probably could have been mobilized to deflect the measure which burdens them")

253. See Treanor, supra note 133, at 867.
254. FISCHEL, supra note 180, at 134-39.
255. See id.
property are vulnerable to majoritarian politics because they are usually a numerical minority of the property holders in a jurisdiction. More importantly, because land is fixed in place, owners of property subject to a regulation imposed against their will may not have the option of "exit[ing]" the jurisdiction and taking their land with them. In a majoritarian setting, lacking the option of "exit" or "voice," landowners seeking to develop their property will not be able to rely on the political process giving adequate weight to their interests.

According to Fischel, local governments are particularly majoritarian in their decision-making. In this respect, they differ from larger governmental units, which tend to be more pluralistic and therefore offer a more hospitable environment to minority groups with substantial resources. Thus, Fischel concludes, while judges reviewing allegations of regulatory takings should generally defer to the regulatory decisions of state and federal governments, local government regulation of land use should be scrutinized more closely under the Takings Clause than other forms of government regulation.

Fischel's analysis of landowners' supposed lack of an exit option could support the Court's heightened protection for land. Fischel suggests that because land is always immobile owners of undeveloped land will always be uniquely disadvantaged in a majoritarian system. A careful analysis of Fischel's premises, however, casts some doubt on such a categorical understanding of his theory.

As Fischel himself points out, his theory depends upon the immobility of regulated property to establish the absence of an exit option. Fischel sometimes seems to treat mobility or immobility as if it were an all or nothing proposition: land is immobile, other property is not necessarily so. Yet mobility is invariably a question of degree. While land itself is certainly immobile, land uses and owners are often quite

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256. See id. at 297.
257. See id. at 271, 285, 303, 331. Professor Been challenges Fischel's argument that the owners of landed property have no exit options when dealing with local government. See Vicki Been, "Exit" as a Constraint on Land Use Exactions: Rethinking the Unconstitutional Conditions Doctrine, 91 COLUM. L. REV. 473, 531–33 (1991) (arguing that developers' ability to choose to invest in less regulated communities amounts to an exit option).
258. See FISCHEL, supra note 180, at 134–39.
260. See FISCHEL, supra note 180, at 131–39, 303.
261. Indeed, Fischel himself sometimes seems to espouse such a view. See supra note 257.
262. See id. Owners of undeveloped land are not differently situated from any other minority group with respect to "voice."
263. See id. at 303, 331.
264. See id. at 271, 285, 303, 331.
mobile.\textsuperscript{265} As Fischel acknowledges, a commercial developer denied permission to build in one town, can vote with his feet by selling his property and building in another jurisdiction.\textsuperscript{266} Even an existing land user zoned out of business in one location (for example, an adult bookstore owner forced to leave a location as a result of zoning regulations restricting the permissible locations for adult businesses) may be able to move his business and dispose of his property in land to someone desiring to engage in a non-restricted use. Thus, not every regulation of land would trigger Fischel's heightened concerns. Rather, the conditions justifying heightened scrutiny under Fischel's theory would only seem to arise with a particular subset of land use regulations: those that directly prevent the landowner from selling his property and moving on by locking the landowner into a particular use, as certain types of rent-control statutes might do,\textsuperscript{267} or those that impose substantial costs on the landowners' sale of property, as occurred in \textit{Lucas}.

It might be argued that the sale of property is never an adequate "exit" option because the restriction on land use that prompts the landowner to flee will inevitably cause a decrease in the property's value. But costs incurred in relocation are not unique to the owners of regulated land. Any attempt to exit to a less regulated jurisdiction—even by moving personal property—will impose costs.\textsuperscript{268} Call such costs, "immobility costs." For both personal property and land, these costs are not binary, but are continuously variable in nature. For both types of owners, immobility costs will consist of the total costs of moving either businesses, personal property, or both to a less regulated jurisdiction.

In many cases, the immobility costs of avoiding regulation will be the same, whether the regulation is styled as a land use regulation or a regulation of personal property. For example, it is impossible to differentiate between the immobility costs imposed upon an adult bookstore forced to move to another jurisdiction because of a zoning ordinance and one that is forced to move to another jurisdiction because of a ban on the sale of adult books.\textsuperscript{269}

Immobility costs for landowners will not always be high. Indeed, it is not even clear that they will usually be high. The immobility costs

\begin{itemize}
  \item \textsuperscript{265} See Been, \textit{supra} note 257, at 532; Carol M. Rose, Book Review, \textit{Takings, Federalism, Norms}, 105 \textit{Yale L.J.} 1121, 1133 (1996); Fischel, \textit{supra} note 259, at 891.
  \item \textsuperscript{266} See FISCHEL, \textit{supra} note 180, at 303-04 ("Apartment owners in most other instances vote against rent control by withholding new capital."); See also Fischel, \textit{supra} note 259, at 891.
  \item \textsuperscript{267} See FISCHEL, \textit{supra} note 180, at 303-05.
  \item \textsuperscript{268} See Baldwin Park Redevelopment Agency v. Irving, 156 Cal. App. 3d 428, 434 (1984) (describing an auto wrecking operator whose inventory was reduced in value from $312,000 to $50,000 after her business was shut down because the cost of moving the inventory to a new location was prohibitively high).
  \item \textsuperscript{269} The First Amendment considerations in such regimes may be somewhat different. See City of Renton v. Playtime Theatres, Inc., 475 U.S. 41, 53 (1986).
\end{itemize}
imposed by a regulation on landowners, and therefore on the price of the landowners' exit options, will depend on a variety of factors, including: the nature of the regulation (does it proscribe existing uses or merely prevent certain planned uses?); the identity of the landowner (is the landowner someone with strong ties to the community and for whom a location is non-fungible, or is the landowner a large corporation for whom the regulated location is just a "dot on map"); the identity of the community (does it possess certain unique characteristics that make relocation less attractive?); and the breadth of the restrictions imposed by the regulation compared with the balance of remaining permissible uses.

Conversely, as Fischel correctly acknowledges, the immobility costs of personal property can easily be quite high. In some cases, they will be magnified by the regulation itself. For example, during Prohibition, it was not only illegal to sell alcohol, it was illegal to transport it. Similarly, the prohibition on the sale of eagle feathers in Andrus was accompanied by an immobilizing prohibition on their export. Indeed, it was precisely these legal immobilizations that led the prohibitions at issue in Everard's Brewery and Andrus to deprive owners of alcohol and eagle feathers of virtually all of their property's value.

There are other ways in which the immobility costs of property other than land can increase such that its owners lack a viable means of removing that property from the reach of local government regulation. First, immobility costs can be increased because personal property is connected to a particular location. This can occur, for example, when an enterprise would go out of business if forced to sacrifice the goodwill it has generated due to its longstanding operation in a particular location, or when highly specialized equipment becomes useless when separated from the location where it is used. Second, immobility costs can increase when, either because of the property's size or the distance to the

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270. See Been, supra note 257, at 473, 539-43; Stewart E. Sterk, Competition Among Municipalities as a Constraint on Land Use Exactions, 45 VAND. L. REV. 831, 858-67 (1992). Indeed, in their nature and complexity, immobility costs appear to be quite similar to Michelman's demoralization and settlement costs.

271. See FISCHEL, supra note 180, at 310-11 (discussing mobile homes).

272. See U.S. CONST. amend. XVIII.


274. See supra note 78. For owners of contraband property willing to break the law, that property retained some residual value, but the costs to such owners (in terms of criminal, civil, and moral sanctions) were correspondingly high.

275. See City of New York v. Atl. Terminal Renewal, 338 N.Y.S.2d 504 (1972) (large molds, physically unconnected to the property—held to be compensable in a condemnation proceeding because they had no value if removed from the property-holder’s operations on the condemned realty).
less regulated market, the cost of moving the personal property to market would be prohibitively high. 276

It is difficult to see why, under Fischel's theory of voice and exit, owners of personal property who incur immobility costs as a result of local government regulation should be treated differently, in a categorical way, than owners of land whose exit option is impeded by reductions in the value of their real estate resulting from local land-use regulation. 277 In all cases, the value of the property owner's exit option will be inversely proportional to the immobility costs he incurs in exercising it. It is this cost to the owner, and not the nature of the underlying property, that does the work in Fischel's analysis. And, as already discussed in the context of Michelman's demoralization and settlement costs, a categorical distinction between land and other forms of property adds little to a direct focus on the "costs" (whatever name one wants to give them) incurred by the owners of the regulated property in question. 278

Upon closer analysis, Fischel's theory has less to say about differences between land and other forms of property than might initially appear to be the case. Fischel's more important, though no less controversial, observations relate to his contentions about the differences between local government and other levels of government with respect to the "voice" exercised by minorities in those polities. 279 But his theory should not be read to support a strong distinction between personal property and land within the law of regulatory takings.

E. Takings and Thomistic Natural Law

The final perspective from which this Article analyzes the Court's distinction between personal property and land is the Thomistic natural law tradition. Although less frequently discussed in modern American legal academic discourse, the Thomistic tradition, which draws heavily on Aristotle's ethics, has exercised substantial influence on the development of Western thinking about property law. 280 The social theory of property that emerges from Thomistic thought closely resembles the civic republican tradition that many property scholars have identified as

276. See Baldwin Park Redevelopment Agency v. Irving, 156 Cal. App. 3d 428, 434 (1984); see also supra note 78.

277. Cf. id. at 540 (noting the dearth of "empirical evidence regarding who actually bears the costs" of certain land-use regulation).

278. See supra Part III.C.

279. See Treanor, supra note 133, at 867. At best, Fischel's theory would justify heightened judicial scrutiny of very narrow categories of local regulation, but any comprehensive list of such narrow categories would necessarily include regulations affecting both land and personal property.

having a strong influence on this country's founding generation.\textsuperscript{281} Moreover, in recent years Thomistic natural law thinking has generated renewed interest within the philosophy of law.\textsuperscript{282}

Thomistic natural law reasoning revolves around the normative notion of a shared human nature and the view that human actions and institutions should seek to foster "human flourishing."\textsuperscript{283} Actions or institutions that are utterly inconsistent with human flourishing violate the natural law.\textsuperscript{284} But because, as John Finnis has observed, "the human good is as multiple as human nature is complex," human flourishing can be encouraged by a broad range of actions and institutional structures.\textsuperscript{285} Positive law, the law of human communities, may either restate the natural law or constrain individual choices within the broad outlines of that natural law in order to pursue specific human goods.\textsuperscript{286} But positive law may not contravene natural law and must have as its principal goal the pursuit of the "common good,"\textsuperscript{287} that is, the good of all members of the community as equal human beings.\textsuperscript{288}

The Thomistic tradition views human nature as essentially social and, consequently, posits community as a fundamental human good.\textsuperscript{289} Unlike the liberal tradition, which draws as the starting point for its discussion of property rights the autonomous individual in the "state of nature,"\textsuperscript{290} Thomistic thought begins its discussion of property rights from the standpoint of the community already in existence.\textsuperscript{291}

\textsuperscript{281} See id. \& n.496; see also ROSE, supra note 120, at 52, 61; see generally ALEXANDER, supra note 156 (describing a persistent struggle in American property thought between liberal and republican notions of property).


\textsuperscript{283} See JOHN FINNIS, AQUINAS: MORAL, POLITICAL, AND LEGAL THEORY (1998); LISSKA, supra note 282, at 104-05. "Human flourishing" is a broad concept that, despite its connotation, extends well beyond mere material well-being. See LISSKA, supra note 282, at 104-05 (noting that, for Thomistic thinkers, "human flourishing" means "the functioning well of the essential properties common to the individual in a specific natural kind.").

\textsuperscript{284} See FINNIS, supra note 283, at 139-40.

\textsuperscript{285} See FINNIS, supra note 283, at 140; see also ROBERT P. GEORGE, IN DEFENSE OF NATURAL LAW 104 (1999) ("Of course, most of our choices are not between right and wrong options, but rather between incompatible right options."); LISSKA, supra note 282, at 206 ("It is important to realize that the conclusions of a theory of natural law in terms of what can be justified are limited and moderate at best.").

\textsuperscript{286} See GEORGE, supra note 285, at 107-09.

\textsuperscript{287} ST. THOMAS AQUINAS, SUMMA THEOLOGIAE, I-II, Q. 96, a.1.

\textsuperscript{288} See JOHN FINNIS, NATURAL LAW AND NATURAL RIGHTS 167-69 (1980).

\textsuperscript{289} See FINNIS, supra note 288, at 88, 143-44.

\textsuperscript{290} See JOHN LOCKE, TWO TREATISES OF GOVERNMENT 287-96 (Peter Laslett ed. 1967); See NOZICK, supra note 28, at 3-25.

\textsuperscript{291} Aquinas's justification for private ownership presupposes the existence of a community. In his discussion of private ownership in the Summa Theologiae, for example, Aquinas observed that private ownership is the best way to make sure no one shirks his duties, helps to avoid confusion as to who is responsible for what, and helps to maintain communal peace. See AQUINAS, supra note 287, at II-II, Q. 66, a.2; see also FINNIS, supra note 283, at 189
In this respect, the Thomistic approach to property law is quite similar to the social theory of property elaborated by such contemporary property scholars as Joseph Singer and Eric Freyfogle. Their theories, like Aquinas's, take as a foundational premise the fact that human beings invariably live—and property rights only take on meaning—within a community. Such a standpoint gives rise to a notion of property rights as inherently limited by the robust demands of community life.

Thomists acknowledge that community recognition of private ownership, as a practical matter, may often yield material results for a community that are superior to those generated by other forms of ownership. Yet, because the justification for private ownership is rooted in the common good, the property rights recognized within Thomistic systems are necessarily subject to substantial social limitation. Thus, far from prohibiting government interference with property rights, Thomism will, if anything, often affirmatively compel such interference. Moreover, the Thomistic natural law tradition generally views particular private property regimes not as a direct product of natural law but rather as a permissible subject of positive law. Human beings have a natural right, as against other human beings, to the material possessions they need to survive and, to a lesser extent, to flourish. So long as a property regime is directed towards the common good and is consistent with these constraints, however, the natural law permits a relatively wide array of particular property arrangements.

In the specific context of takings law, the traditional natural law understanding of property as an institution created by positive law and subject to substantial communal control yields a permissive attitude towards government expropriation. As Finnis has observed, Aquinas's
theory of property rights endorses an active role for the state in ensuring a just distribution of property, even if that means taking property from those with more and giving it to those with less. In a similar vein, other Thomists have argued that expropriation of private property by the state without compensation is consistent with the natural law.

The Thomistic tradition therefore would generally consider questions concerning when the government must compensate for takings of property to be primarily questions for positive law. At the margins, however, the natural law would impose limits on the government's ability to take its citizens' property. For example, it would not permit the state to take a citizen's property without compensation when such a taking deprived the citizen of the necessities of life or when, considered against the background legal norms, it prevented that citizen from pursuing human flourishing. Conversely, a natural law approach to property would preclude a takings regime that was so protective of individual holdings of property that it prevented the government from forcibly redistributing property in order to provide for the necessities of its poorer citizens. Within these parameters, the natural law would generally allow a community to determine for itself the level of protection it would grant to private property against takings, regulatory or otherwise.

Consequently, for the Thomistic property theorist, the question whether land should be granted heightened protection under the doctrine of regulatory takings would frequently reduce to an analysis of the relevant positive legal authorities. Natural law would only have some bearing on the justifiability of such a distinction if there were some reason to believe that the uncompensated regulatory taking of land would be more likely to deprive an individual of the necessities of life or to prevent human flourishing.

There might be societies in which the importance of land is such that its deprivation constitutes a grave interference with a person's ability to survive or flourish. Such concerns might arise, for example, in a society of subsistence farmers with little or no social welfare system. Whether or not such circumstances ever predominated in this country, it is undoubtedly the case that our current situation bears little resemblance to such an agrarian society. In our modern urban (or suburban) culture, the suggestion that private landownership is uniquely essential to human survival or flourishing in a way not shared with other forms of property is

299. See FINNIS, supra note 283, at 195; see also AQUINAS, supra note 287, at II-II, Q. 66, a. 7.

300. See FRANCISCO SUAREZ, DE LEGIBUS, bk. I, ch. ix, para. 3 (1612), reprinted in CLASSICS OF INTERNATIONAL LAW (James Brown Scott ed. 1944).

301. See supra notes 181–182 and accompanying text.
not credible. Thus, the broad prescriptions of natural law theory fail to provide much affirmative support for the Supreme Court’s favoritism towards land as a form of property.

VI. THE COURT’S UNJUSTIFIED FAVORITISM TOWARD LAND AS A REASON FOR REJECTING THE LUCAS RULE

Despite the weak intellectual foundations for a distinction between land and personal property in regulatory takings law, the modern Court’s regulatory takings jurisprudence undoubtedly has been characterized by favoritism towards land. What has caused the Court to persist in such favoritism despite the weak normative basis underlying its distinction? One possibility is that the land preference reflects a convenient convergence between the intuitively appealing (though ultimately unfounded) notion that landownership is more important than other forms of property, and the specific self-interested concerns of the property-rights movement, with which the conservative majority of the Court appears to sympathize.

Several scholars have argued that the Supreme Court’s regulatory takings revival is firmly rooted in the conservative political movement. The Court’s distinction between personal property and land may offer further evidence of these ideological roots. In its favoritism towards property in land, the Court’s doctrine closely mirrors the land-focused political rhetoric of the property-rights movement. Viewed in this light, the distinction makes perfect sense: it has allowed the Court to strike down the regulations that most trouble it (primarily environmental regulations affecting land), while leaving for another day the “innumerable” economic regulations affecting the value of personal property. In seeking to keep its Lucas rule (and, arguably, its regulatory takings doctrine as a whole) within the relatively narrow bounds of land use regulation, the Court, or at least its “property rights” majority, can be understood as exhibiting a pragmatic desire to limit the scope of its own

302. See Geisler, supra note 128, at 542 (observing the declining importance of land “as a factor of production, social status, and basis of wealth” in modern society).
303. See supra notes 17–20 and accompanying text.
304. See supra notes 201–207 and accompanying text.
305. See OLIVETTI & WORSHAM, supra note 197, at 71 (“While one can identify a property-rights bloc—Scalia, Rehnquist, Kennedy, O’Connor, and Thomas—it is harder to identify a lasting, clearly enunciated, property rights rationale that ties the voting bloc together.”).
307. See supra notes 201–207 and accompanying text.
308. See Sugameli, supra note 12, at 986 (explaining the distinction as a means of allowing the Court to find a taking in Lucas without calling into question “the innumerable instances where regulations destroy all value and use of personal property”).
potentially far-reaching regulatory takings doctrine to the core set of cases that, for political reasons, it finds most troubling. 309

No matter how superficially appealing it might seem, however, a sharp distinction between personal property and land in the regulatory takings context is not justified. Whatever its motives, the Court's effort to cabin the implications of its own expansion of regulatory takings law amounts to little more than an ipse dixit. The Court cannot, by simply waving its hands, avoid taking the bad with the good. In the Lucas context, for example, it should either apply the Lucas rule across the board to both personal property and land, or it should reject the Lucas doctrine altogether.

Between these two choices—Lucas expanded to cover personal property, or no Lucas rule at all—the preferable option is clearly the rejection of the Lucas per se rule. The parade of horribles presented by Justice Stevens in his Lucas dissent provides a compelling argument that the results of the diminution-in-value rule simply do not match most people's intuitions about the government's ability to regulate property. 310 Justice Stevens was undoubtedly correct that the Lucas rule, if applied consistently, would severely hinder the government's ability to regulate the economy in ways that historically have been uncontroversial. 311

Extending the Lucas rule to personal property would undoubtedly constitute a substantial shift in the understanding of the Takings Clause. Indeed, even the most laissez faire of courts has refused to employ takings law to require compensation for total deprivations of economic value resulting from regulation of personal property. At the height of the Lochner 312 era, the Court repeatedly affirmed the power of the state to ban commerce in alcohol, without considering the effect of such bans on the economic value of those goods or the applicability of "background principles" of state law, such as the common law of nuisance. 313 Such

309. Of course, in Eastern Enterprises, a subset of the Court's property-rights wing expressed an eagerness to employ its regulatory takings doctrine to invalidate a statute that had nothing to do with land use. Tellingly, however, the coalition that stood behind the Court's modern regulatory-takings doctrine found itself unable to hold together in that case, with Justice Kennedy defecting from the plurality's Takings Clause analysis in favor of a Due Process rationale. See Eastern Enters. v. Apfel, 524 U.S. 498, 540 (1998) (Kennedy, J., concurring in the judgment and dissenting in part) ("Our cases do not support the plurality's conclusion that the Coal Act takes property.").


311. See id. These dramatic effects of an across-the-board application of Lucas's diminution-in-value test are unaffected by the Court's recent scaling back of the Lucas rule in Tahoe-Sierra. See supra note 81.


313. Lucas, 505 U.S. at 1029-30 (stating that a law that deprives a property owner of all economically beneficial use of the land is not a taking if it merely replicates limitations on the owner's ability to use the land contained within "background principles of nuisance and property law").

314. See supra note 86.
regulations almost invariably destroyed all economic value of the goods for those left with large quantities on hand. Nevertheless, as the Court indicated on several occasions, they did not constitute the “appropriation of private property” without compensation in violation of the Takings Clause but instead represented “merely a lessening in value due to a permissible restriction.”

The category of regulations that would deprive an owner of all economically beneficial use of personal property extends well beyond prohibitions of alcohol. The government has frequently banned commerce in items even where the use of such items would not violate “background principles” of state law as that notion was understood by the Lucas Court. Recreational drugs, for example, were banned largely for moral, political, and sometimes racial reasons, without regard to their status as “nuisances.” Few would argue, however, that the government should have to pay compensation when banning, for whatever the reason, recreational drugs that might be developed in the future.

Moreover, even government regulation that falls far short of outright prohibition may eliminate the value of personal property. For example, when the FDA refuses to approve a drug for human medical use, it can eliminate the value of both tangible stocks of the drug and the intellectual property behind it. Few would argue that such routine regulatory conduct gives rise to a valid claim for compensation by affected property-holders.

A takings doctrine that required the state to compensate owners of personal property for the consequences of such routine government regulation would constitute a radical reconceptualization of our system of government as it has existed for over two centuries. The Lucas Court's apparent discomfort with the implications of its deprivation-of-value test for personal property is therefore unsurprising, as is its accompanying attempt to reach for an unprincipled distinction between land and other forms of property to avoid having to extend that rule to its logical stopping point.

315. See Rubenfeld, supra note 1, at 1151.
318. See, e.g., Justin Gillis, ImClone CEO, Chairman Step Down, WASH. POST, Apr. 30, 2003, at E1 (noting the direct connection between rumors concerning FDA approval of a company’s cancer drug and the value of the company’s stock).
Indeed, the Court's apparent discomfort, and the reasons behind it, provides a strong argument that there is a fundamental problem with the *Lucas* per se analysis. The *Lucas* majority has already indicated that it believes its diminution-in-value test is not an appropriate means for determining when a particular regulation of personal property has become a taking. If the *Lucas* majority itself thought that its diminution-in-value rule was too blunt an instrument to distinguish reliably between permissible and impermissible regulation of property (properly understood as including personal property), that acknowledgement is a good reason for rethinking *Lucas*’s per se rule altogether.

Indeed, the Court's narrowing of the *Lucas* rule in *Tahoe Sierra* may well reflect a growing discomfort with the implications of the *per se Lucas* rule. But even the *Lucas* rule as narrowed by *Tahoe Sierra* would constitute a radical departure from prior practice if extended to cover personal property. In light of the unprincipled nature of the Court's refusal to extend *Lucas* to personal property, and the confusion its distinction between land and personal property has generated among the lower courts it is apparent that the Court's decision in *Tahoe Sierra* does not go far enough to limit the impact of the *Lucas* rule. The Court should go the distance and make clear that *Lucas* is no longer good law.

In light of the confusion surrounding much of the Court's regulatory takings jurisprudence, the desire for bright line standards, such as *Lucas*’s diminution-in-value rule or its personal property exception, is understandable. Contrary to Professor Rose-Ackerman's contention that virtually "any consistent, publicly articulated approach [to regulatory takings] is better than none," adopting the wrong bright line standard can easily do as much harm as continuing to muddle along with the broad and flexible standards of *Penn Central*. *Lucas* demonstrates the danger of choosing the wrong rigid rules in this area of law. Applied consistently to takings of both land and personal property, *Lucas*’s diminution-in-value rule would prevent local, state, and national governments from engaging in regulatory activities that have been universally accepted as constitutionally uncontroversial.

Per se rules adopted solely for the sake of increasing clarity and predictability are not the answer. Indeed, as Marc Poirier has argued, there may be very good reasons for the persistent murkiness of the standards for finding a regulatory taking. Regulatory takings claims

319. See supra Part I.C.
320. See supra notes 1–7 and accompanying text.
321. Rose-Ackerman, supra note 6, at 1711.
322. See Ruppert v. Caffey, 251 U.S. 264, 303 (1920); Everard's Breweries v. Day, 265 U.S. 545, 563 (1924); Rubenfeld, supra note 1, at 1151.
often simultaneously implicate questions of basic fairness, distributive justice, utility and efficiency, an individual's ability to rely on settled expectations in pursuit of life plans, and society's need to regulate private activity for the sake of health, safety and the preservation of the environment for future generations. These diverse considerations suggest that it will be the rare bright line test that can consistently do justice across a broad array of takings cases. The much-maligned balancing test set forth in *Penn Central* provides the needed flexibility. Whether the vague factors outlined in that case are the right ones is subject to debate. But the Court's ad hoc approach in *Penn Central* gives judges ample room to weigh the competing values typically implicated in takings cases.

As is the case in the specific context of the *Lucas* rule, it is reasonable to think that the modern Court's focus on land has made its takings revival, as a whole, considerably more palatable. Because of the general favoritism towards land in the regulatory takings area, fewer oxen have been gored by judicial invalidations of regulations during the Court's expansion of regulatory takings law over the past two decades. To the extent that this has been the case, the unprincipled nature of that favoritism towards land provides an argument for reconsidering that expansion altogether. Deprived of the crutch of its artificially narrow focus on land use, the Court might well find that it prefers a less robust regulatory takings doctrine.

**CONCLUSION**

Neither the historical treatment of property, the differences in expectations cited by the Court in *Lucas*, nor the examined normative theories of property and takings supports a sharp distinction between land and personal property in regulatory takings law. To the extent that this conclusion conflicts with vague intuitions about the primacy of property in land, those intuitions are most likely rooted in cultural assumptions based on outmoded notions of the ways in which most people use land. The image of the self-sufficient "yeoman farmer" is one such outdated concept. Alternatively, those intuitions may be based upon legitimate beliefs about the importance of a particular type of land use: ownership of one's dwelling. As argued here, however, the work done by

324. *See supra* note 60 and accompanying text.


327. *See* Byrne, *supra* note 17, at 127-28 (arguing that, applying the regulatory takings doctrine to "assets other than land" would "approach denying the legitimacy of legislation tout court," something that the Supreme Court has shown no interest in doing); McUsic, *supra* note 17, at 653-58.
landownership in generating the symbolic and emotional importance of homeownership, while real, is generally overstated. Furthermore, protecting land to protect homeownership is vastly over-inclusive. Deprived of an artificially narrow focus on land use regulation, both the Court's *Lucas* rule and its expanded regulatory takings doctrine as a whole are far more radical in their implications and, as a consequence, far less appealing.

Despite frequent pleas by scholars for the introduction of bright line tests into the law of regulatory takings, this is an area of law particularly ill-suited to such inflexible standards. Per se rules, like the one adopted by the Court in *Lucas*, will often be incapable of giving adequate weight to the broad range of interests implicated by takings claims. Far from being a sign of sickness, the Court's historical reluctance to adhere to rigid standards in the law of regulatory takings may reflect an attempt to give judges the room necessary to do justice in this challenging area of law.