

WEIGHING THE NEED TO ESTABLISH REGULATORY TAKINGS DOCTRINE TO JUSTIFY TAKINGS STANDARDS OF REVIEW AND PRINCIPLES

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This article revisits and examines whether the fairness and justice doctrine of *Armstrong v. United States*¹ can justify and fashion standards of review to protect the right to just compensation of the Takings Clause.² The Court has relied on *Armstrong* to show the purpose of the Takings Clause in many takings decisions.³ However, can *Armstrong* serve a

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¹ *Armstrong v. United States*, 364 U.S. 40, 49 (1960). Parts V and VI of this article contain thoughts and ideas used in another article published by the authors. See James E. Holloway & Donald C. Guy, *Tahoe-Sierra Preservation Council, Inc.: A Shift or Compromise in the Direction of the Court on Protecting Economic and Property Rights*, 10 ALB. L. ENVTL. OUTLOOK J. 229, 263–70 (2005) (discussing how the United States Supreme Court used or applied the fairness and justice doctrine of *Armstrong*, 364 U.S. at 49, in *Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg’l Planning Agency*, 535 U.S. 302, 303–04 (2002)).

² U.S. CONST. amend. V, cl. 4. The Takings Clause of the Fifth Amendment of the United States Constitution is made applicable to the States through the Due Process Clause of the Fourteenth Amendment. *Chicago, Burlington and Quincy R.R. Co. v. Chicago*, 166 U.S. 226, 239 (1897).

³ See *Lingle v. Chevron U.S.A., Inc.*, 544 U.S. 528, 537 (2005); *City of Monterey v. Del Monte Dunes at Monterey*, 526 U.S. 687, 702 (1999); *United States v. Winstar Corp.*, 518 U.S. 839, 883 (1996).

greater purpose? In *Dolan v. City of Tigard*, the United States Supreme Court applied the unconstitutional conditions doctrine to justify the need for a standard of review to protect the right to just compensation.⁴ The Court transported questionable constitutional doctrine to validate Justice Holmes's regulatory takings theory. Yet, in *Tahoe-Sierra Preservation Council v. Tahoe Regional Planning Agency*, the Court applied *Armstrong's* fairness and justice doctrine to justify not applying standards of review to a complete range of factual theories of regulatory takings theory.⁵ Therefore, the Court leads one to ask whether the *Armstrong* fairness and justice doctrine should be considered in justifying the selection of standards of review and principles to protect the right to just compensation.

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⁴ *Dolan v. City of Tigard*, 512 U.S. 374, 385 (1994).

⁵ *Tahoe-Sierra Pres. Council*, 535 U.S. at 303–04.

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INTRODUCTION

Regulatory takings theory and analytics have generated little takings doctrine but have formed a *disconnected mass* of United States Supreme Court decisions that have been, and will remain, evidence of theoretical and analytical failures in the maturation of Takings Clause⁶ jurisprudence until regulatory takings doctrine evolves.⁷ Evidence exists of the absence of unique theoretical and analytical doctrine to guide the development of Justice Holmes's regulatory takings theory and the Court's

⁶ U.S. CONST. amend. V, cl. 4.

⁷ See Holloway & Guy, *supra* note 1, at 288–95.

justification of takings standards of review and principles.⁸ This particular absence has led to the doctrinal importation of other legal doctrines⁹ and doctrinal avoidance of the economic principles in determining, justifying, and fashioning takings standards of review and principles.¹⁰ Regulatory takings jurisprudence is the application of mostly ad hoc factual inquiries¹¹ and vague propositions in regulatory takings claims.¹²

Any theoretical and analytical doctrine¹³ should conjoin (connect through a line of analysis) standards of review and coalesce (create a coherent substantive body) takings principles in the growth and development of a stable, descriptive regulatory takings theory. Yet, this doctrinal importation and avoidance show a failure to develop effective regulatory takings doctrine to grow and develop regulatory takings theory.¹⁴ As a consequence, this doctrinal importation and avoidance show few, if any, United States Supreme Court precedents that justify, establish, and fashion takings standards of review and principles providing proportionality between

⁸ See *id.* at 289.

⁹ See *id.* at 236–37.

¹⁰ See *id.* at 272.

¹¹ See *id.* at 264.

¹² See *id.* at 289.

¹³ See Emerson H. Tiller & Frank B. Cross, *What Is Legal Doctrine?*, 100 NW. U. L. REV. 517 *passim* (2006). Professors Tiller and Cross identify several forms and types of legal doctrine. See *id.* at 517. These forms can be factually intensive inquiries or broad, general propositions. *Id.* Doctrine can be generally described as standards or rules. See *id.* Professors Tiller and Cross describe these forms:

Legal doctrine sets the terms for future resolution of cases in an area. Doctrine may take many forms; it may be fact-dependent, and therefore limited, or sweeping in its breadth. One doctrinal distinction commonly discussed in the law is the distinction between “rules” and “standards.” Rules are strict requirements that define the answer to a dispute, once the predicate facts are established. A rule is something like “any subsequent and unauthorized use of another’s mark constitutes trademark infringement.” Standards, by contrast, are more amorphous guides to resolving disputes, often listing a set of factors to be considered and balanced. A standard would be a law that directed “trademark infringement occurs when there is a likelihood of confusion between the senior and junior marks, as determined by weighing the following factors” Both doctrinal approaches are found in the law, but there is little analysis of why one might prefer a rule or a standard and what the subsequent effects of the two types of doctrine might be. It is frequently presumed that standards leave space for more ideological judging, but this claim has never been demonstrated.

Id. at 517–18 (citation omitted).

¹⁴ See Holloway & Guy, *supra* note 1, at 238.

government responses and the public burden imposed on landowners; nor does this doctrinal importation and avoidance show precedents creating a greater predictability in the outcome of disputes regarding these responses and newly imposed burdens.¹⁵ This article seeks to show that somewhere between Justice Holmes's regulatory takings theory,¹⁶ and the

¹⁵ See *id.* at 236.

¹⁶ *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 413 (1922). In *Pennsylvania Coal*, Justice Holmes, writing for the majority, set forth the analytical foundation of regulatory takings theory when he stated:

Government hardly could go on if to some extent values incident to property could not be diminished without paying for every such change in the general law. As long recognized, some values are enjoyed under an implied limitation and must yield to the police power. But obviously the implied limitation must have its limits, or the contract and due process clauses are gone. One fact for consideration in determining such limits is the extent of the diminution. When it reaches a certain magnitude, in most if not in all cases there must be an exercise of eminent domain and compensation to sustain the act. So the question depends upon the particular facts. The greatest weight is given to the judgment of the legislature, but it always is open to interested parties to contend that the legislature has gone beyond its constitutional power.

Id.

In addition, Justice Holmes set forth the substantive foundation of regulatory takings theory when he stated:

The general rule at least is, that while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking. It may be doubted how far exceptional cases, like the blowing up of a house to stop a conflagration, go—and if they go beyond the general rule, whether they do not stand as much upon tradition as upon principle. In general it is not plain that a man's misfortunes or necessities will justify his shifting the damages to his neighbor's shoulders. We are in danger of forgetting that a strong public desire to improve the public condition is not enough to warrant achieving the desire by a shorter cut than the constitutional way of paying for the change. As we already have said, this is a question of degree—and therefore cannot be disposed of by general propositions. But we regard this as going beyond any of the cases decided by this Court.

Id. at 415–16 (citation omitted).

In *Keystone Bituminous Coal Ass'n v. DeBenedictis*, 480 U.S. 470 (1987), Chief Justice Rehnquist, writing for the dissent, stated both the analytical and substantive importance of *Pennsylvania Coal* when he stated that:

[T]he holding in *Pennsylvania Coal* . . . has for 65 years been the foundation of our “regulatory takings” jurisprudence. We have, for example, frequently relied on the admonition that “if regulation goes too far it will be recognized as a taking.” Thus, even were I willing to assume that the opinion in *Pennsylvania Coal* standing alone is reasonably subject to an

Court's takings analytics and substance,¹⁷ is the eminent need for regulatory takings doctrine to execute takings theory. This article explores the need to move, though with caution, regulatory takings theory beyond *Pennsylvania Coal Co. v. Mahon*.¹⁸ This article proffers that unique regulatory takings doctrine is necessary to execute less predictable regulatory takings theory.¹⁹ This doctrine justifies standards of review and fashions principles reflective on Justice Holmes's values of private property and limits of legislative judgment.²⁰

This article consists of an introduction, six explanatory parts, and a conclusion that illustrate how the meager beginning of *Armstrong v. United States*²¹ catalogs the destructive nature of government actions to redistribute public obligations to groups and individuals in society.²² These parts examine and discuss how *Armstrong* can be viewed as takings doctrine with the substantive capacity and analytical force to determine, justify, and fashion takings standards of review and principles. The Introduction presents the doctrinal argument that seeks to persuade federal and state courts to give greater protection to the guarantees of the right to just compensation. This argument embodies Justice Holmes's notion that the Takings,²³ Due Process,²⁴ and Contract²⁵ Clauses are fully complementary. Part I introduces the theory and analytics, which Justice Holmes set forth and the Court subsequently followed, that secure constitutional protection of private property rights by justifying and establishing takings standards of review and principles that ensure proportionality

interpretation that renders more than half the discussion "advisory," I would have no doubt that our repeated reliance on that opinion establishes it as a cornerstone of the jurisprudence of the Fifth Amendment's Just Compensation Clause.

Id. at 508 (Rehnquist, C.J., dissenting) (citation omitted).

Now, the jurisprudential question is how the United States Supreme Court will move, execute, extend, and validate the analytics and substance of Justice Holmes's regulatory takings theory in *Pennsylvania Coal*.

¹⁷ See *infra* Part I and accompanying notes (discussing the significance of the seminal takings cases decided by the United States Supreme Court).

¹⁸ *Pennsylvania Coal*, 260 U.S. at 393.

¹⁹ See *infra* Part VI and accompanying notes (discussing the significance of the application of *Armstrong* to takings cases).

²⁰ See *Pennsylvania Coal*, 260 U.S. at 413.

²¹ 364 U.S. 40 (1960).

²² See *infra* Parts IV–VI.

²³ U.S. CONST. amend. V, cl. 4.

²⁴ U.S. CONST. amend. V, cl. 3.

²⁵ U.S. CONST. art. I, § 10, cl. 1.

between government regulatory responses and the public burdens on landowners. Part II sets forth economic, policy-making, and constitutional justifications to establish and fashion a range of regulatory takings standards of review and principles under the Takings Clause. Part III discusses the constitutional need and ultimate constitutional source for takings doctrine to justify, fashion, and establish takings standards of review and principles to guide and control the growth and development of regulatory takings theory. These first three parts show how the Court has used the *Armstrong* doctrine and should continue to develop its use of the *Armstrong* doctrine to determine, justify, and fashion deferential, intermediate, and *per se* standards of review and other principles under the Takings Clause.²⁶ One or two Court decisions may not *a priori* create constitutional or takings doctrine that can survive constitutional muster, but these decisions may still serve as the genesis of stabilizing theoretical-analytical doctrine in a field of law unsettled for slightly less than a century,²⁷ circa 1922.²⁸

A judicial backdrop of several cases may go far in showing the need for theoretical-analytical doctrine to conjoin and coalesce a morass or body of unruly or untamed takings standards and principles.²⁹ Consequently, Parts IV–VI examine judicial support and doctrinal justifications for takings doctrine to determine, justify, and fashion standards of review and other takings principles. Part IV examines *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency*³⁰ and *Palazzolo v. Rhode Island*³¹ to show the presence and need for the *Armstrong* takings doctrine to weigh and balance conflicting government objectives, economic needs, and social welfare concerns of community policies under the Takings Clause. Part V discusses the need to rely on firm constitutional doctrine to test means and ends of distributing and redistributing the public burdens and benefits of community policy-making for economic, political, and social programs. Part VI discusses the need for constitutional doctrine to address public and private concerns regarding benefits and advantages of regulation to further government objectives burdening private property.

²⁶ U.S. CONST. amend. V, cl. 4; see *infra* Part VI and accompanying notes (discussing the significance of the application of *Armstrong* to takings cases).

²⁷ See *infra* Part I.C.

²⁸ *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393 (1922).

²⁹ See *Tiller & Cross*, *sup ra* note 13.

³⁰ 535 U.S. 302 (2002).

³¹ 533 U.S. 606 (2001).

Finally, the Conclusion demonstrates uses or applications of *Armstrong* doctrine in *Tahoe-Sierra Preservation Council* and *Palazzolo* to find and support, respectively, proportionality under the *Penn Central Transportation Co. v. New York City*³² inquiry and the *Lucas v. South Carolina Coastal Council*³³ *per se* test to create a neophytic doctrine. The neophytic doctrine includes consideration of the nature of government action and the economic effects on property rights of burdensome government regulation.³⁴ This neophyte is more than ambiguous case law or superfluous judicial dicta.³⁵ Instead, *Tahoe-Sierra Preservation Council* and *Palazzolo* elevate *Armstrong's* widely used language that embodies the Framer's purpose and intent of the Takings Clause to a basic and inherent takings doctrine.³⁶ Purposely, this neophytic doctrine can determine, justify, and fashion proportionate standards of review and takings principles to resolve claims arising under the Takings Clause and regulatory takings theory of *Pennsylvania Coal*.³⁷

I. RETURNING TO HOLMESIAN THEORY AND ANALYTICS IN TAKINGS JURISPRUDENCE³⁸

Land use, real estate, and corporate attorneys, and a few federal trial and appellate judges have not been successful in persuading the Court to justify, establish, and fashion standards of review providing heightened scrutiny of regulation and takings principles providing greater substantive protection for private property rights.³⁹ These standards and principles would apply to land use, environmental and social regulation, and state and municipal condemnations for economic development and revitalization.⁴⁰ Landowners challenge these takings of land and other private property as repugnant or a violation of the Takings Clause of the Fifth Amendment.⁴¹ Simply, the Court has rejected constitutional

³² 438 U.S. 104 (1978).

³³ 505 U.S. 1003 (1992).

³⁴ See *infra* Conclusion.

³⁵ See *infra* Conclusion.

³⁶ See *infra* Conclusion.

³⁷ See *infra* Conclusion.

³⁸ *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 413 (1922).

³⁹ See *Holloway & Guy*, *supra* note 1, at 242–43.

⁴⁰ See *id.* at 294.

⁴¹ See *Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency*, 535 U.S. 302 (2002).

arguments supporting the creation of stringent standards of review to weigh and balance legislative judgment and has refused to establish takings principles or general propositions to judge the economic effects of regulation in regulatory takings claims.⁴²

A. *Diverging Lines of Cases and Approaches of the Rehnquist Court*

The determination of proportionality between government responses and newly shifted burdens, especially economic and business expectations and impacts, has resulted in two distinct lines of takings disputes.⁴³ The Court has shown a markedly different approach to determine outcomes of each line of disputes where regulatory takings theory of *Pennsylvania Coal* calls for the application of a factual inquiry, gives the greater weight to legislative judgment, and finds little or no use for general takings principles or propositions.⁴⁴ In one line of disputes, the Court refused to impose heightened scrutiny on a public use claim in *Kelo v. City of New London*;⁴⁵ to create an intermediate standard of review for takings claims challenging a rent control regulation in *Lingle v. Chevron U.S.A., Inc.*;⁴⁶ to impose

⁴² See, e.g., *Kelo v. City of New London*, 545 U.S. 569 (2005); *Tahoe-Sierra Pres. Council*, 535 U.S. at 302. *Pennsylvania Coal* includes weighing, balancing and judging public needs and legislative and private interests and economic effects as aspects of regulatory takings theory. *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 413 (1922). These analytics seek a proportionate redistribution of public burdens and distribution of public benefits in American communities. See *id.* at 415–16. Federal and state courts are subject to *Pennsylvania Coal*, which establishes a factual inquiry to judge regulatory takings disputes under presumptively normal circumstances. See *id.* Moreover, these courts are bound by *Pennsylvania Coal's* allocation of the greater weight or deference to legislative judgment and actions subject to judicial scrutiny. See *id.* *Pennsylvania Coal's* factual inquiry and legislative deference permit courts to ascertain the proportionality of the balance between public needs and landowner obligations that affect the redistribution of public burdens, thus determining when government goes too far. *Id.*

⁴³ See Holloway & Guy, *supra* note 1, at 247–52.

⁴⁴ *Pennsylvania Coal*, 260 U.S. at 415–16.

⁴⁵ *Kelo*, 545 U.S. at 484. In *Kelo*, the Court concluded that heightened scrutiny is not the appropriate standard of review for public use claims challenging an exercise of eminent domain power to take or condemn private property for community revitalization or economic development regulations, policies, or projects. *Id.* at 484–85. Instead, the Court held that rational basis (actually a deferential test) was the most appropriate standard of review when legislative bodies exercise eminent domain power to condemn private properties for public use to further economic development, giving an expansive interpretation to the Public Use Clause. *Id.* at 488–89.

⁴⁶ 544 U.S. 528, 545 (2005). In *Lingle*, the Court concluded that heightened scrutiny does not exist as an intermediate standard of review for takings claims challenging an exercise

a categorical *per se* test on a moratorium in *Tahoe-Sierra Preservation Council*;⁴⁷ or to strengthen review of the economic impact and expectations analyses in *Palazzolo*.⁴⁸ Moreover, the Court refused to impose heightened

of police power to impose rent control obligations on the owners and landlords of commercial private property to protect tenants from unjust rent increases. *Id.* at 545. The Court held that the “substantially advances” language of *Agins v. City of Tiburon*, 447 U.S. 255, 260 (1980), does not create an intermediate standard of review for a rent control statute challenged as a regulatory taking of private property for public use. *See Lingle*, 545 U.S. at 548.

⁴⁷ 535 U.S. 302, 342 (2002). In *Tahoe-Sierra Preservation Council*, the Court concluded that a heightened scrutiny or *per se* test is not the appropriate standard of review for regulatory takings claims challenging an exercise of police power to impose an interim development control or land use moratorium to control development for roughly thirty-two months. *Id.* at 341–42. Instead, the Court held that the deferential *Penn Central* inquiry is the most appropriate standard of review when legislative bodies exercise police power to control development while municipalities, counties, and agencies are creating or modifying environmental, land use, and growth management regulatory schemes for communities and regions. *Id.* at 342.

⁴⁸ *Palazzolo v. Rhode Island*, 533 U.S. 606, 632 (2002). In *Palazzolo*, the Court concluded that the acquisition of land that had been subject to land use or environmental regulations, but for which the grantor had never filed or perfected a ripe regulatory takings claim, would cut off or deny the grantee (new landowner) the right to challenge this regulation under the Takings Clause, though neither could the grantor (original owner) have done so due to the lack of a ripe regulatory takings claim. *Id.* at 629–30. The Court held that wetlands regulations did not deny all economically viable use of the property in question, in that a few acres of the tract of land could be used to construct one or more houses, and remanded the decision to the Rhode Island Supreme Court for it to apply the *Penn Central* standard. *Id.* at 632.

In *Palazzolo*, Justices O'Connor and Scalia did not agree on how lower courts should decide the takings issues regarding the determination of the economic impact and investment-backed expectations of the landowners. *Compare id.* at 632–36 (O'Connor, J., concurring), *with id.* at 636–37 (Scalia, J., concurring). Justice O'Connor would apply the *Penn Central* inquiry and takings principles to the financial, economic, regulatory, and political circumstances, such as original land value, to determine whether a regulatory taking had occurred through the economic effects of the wetlands regulation. *Id.* at 636 (O'Connor, J., concurring). Justice O'Connor stated that “[t]he Takings Clause requires careful examination and weighing of all the relevant circumstances in this context.” *Palazzolo*, 533 U.S. at 632 (O'Connor, J., concurring). Justice Scalia would rely on established takings principles, such as background principles of common law, but would not consider whether past regulatory circumstances that were not background principles of common law caused or played any role in an interference with reasonable, distinct, investment-backed expectations. *Id.* at 637 (Scalia, J., concurring). Justice Scalia stated:

In my view, the fact that a restriction existed at the time the purchaser took title (other than a restriction forming part of the “background principles of the State’s law of property and nuisance,” *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1029 (1992)) should have no bearing upon the determination of whether the restriction is so substantial as to constitute a taking.

scrutiny to find a takings but instead gave less weight to the economic impact and made a facial takings challenge almost insurmountable in *Keystone Bituminous Coal Association v. DeBenedictis*.⁴⁹ Simply, this line of cases, or their analytical approach, finds a reasonable proportionality between these government responses and their private impacts under a deferential analysis. This line of disputes and its analytical approaches show little need to expose regulation, either means or ends, to greater scrutiny in testing the proportionality between regulation and its public burden when regulation redistributes public burdens and creates public benefits.

In the other line of disputes, the Court has accepted common law and constitutional arguments and even a more pragmatic argument⁵⁰ in

Id.

⁴⁹ 480 U.S. 470, 495 (1987). The *Keystone Bituminous Coal Ass'n* Court affirmed the doctrine underpinning the difficulty of mounting a successful challenge to a federal, state, or local regulation on its face when the government has not had time to apply the legislation to a parcel or tract of land and thus its economic, social, or political impacts remain technically unknown. *Id.* at 495–96. In *Keystone Bituminous Coal Ass'n*, the petitioners filed a facial takings claim that challenged the constitutionality of a Pennsylvania legislative act on its face or its application to a specific parcel or tract of land. *Id.* The Court referred to this challenge as “an uphill battle.” *Id.* at 496. Justice Stevens, writing for majority, stated:

Petitioners thus face an uphill battle in making a facial attack on the Act as a taking. The hill is made especially steep because petitioners have not claimed, at this stage, that the Act makes it commercially impracticable for them to continue mining their bituminous coal interests in western Pennsylvania.

Id. at 495–96.

⁵⁰ See *Keystone Bituminous Coal Ass'n*, 480 U.S. at 487–88. In *Keystone Bituminous Coal Ass'n*, the Court relied on the nature of the government action to justify its decision and to distinguish a public interest from private interests protecting community needs. *Id.* Justice Stevens added pragmatism or practice when he stated:

Thus, the Subsidence Act differs from the Kohler Act in critical and dispositive respects. With regard to the Kohler Act, the Court believed that the Commonwealth had acted only to ensure against damage to some private landowners' homes. Justice Holmes stated that if the private individuals needed support for their structures, they should not have “take[n] the risk of acquiring only surface rights.” Here, by contrast, the Commonwealth is acting to protect the public interest in health, the environment, and the fiscal integrity of the area. That private individuals erred in taking a risk cannot estop the Commonwealth from exercising its police power to abate activity akin to a public nuisance. The Subsidence Act is a prime example that “circumstances may so change in time . . . as to clothe with such a [public] interest what at other times . . . would be a matter of purely private concern.”

Id. (citation omitted).

several takings disputes creating standards of review and taking principles providing heightened scrutiny and stringent economic effects and expectations analyses, respectively.⁵¹ Specifically, the Court relied on a constitutional argument to limit the conditional demands on the exercise of a fundamental right by requiring a minimum connection between the purpose of legislative judgment and the implementation of its regulation in *Nollan v. California Coastal Commission*.⁵² The Court went even further by explicitly accepting problematic constitutional doctrine to limit conditional demands on the exercise of a questionable fundamental right by requiring heightened scrutiny between legislative judgment and the direct cause for the exercise of this judgment in *Dolan v. City of Tigard*,⁵³

⁵¹ See, e.g., *id.* at 470.

⁵² 483 U.S. 825, 828 (1987). In *Nollan*, the Court concluded that conditions and prohibitions do not always go hand-in-hand and showed some reliance on the doctrine of unconstitutional conditions in protecting the right to just compensation by stating:

The Commission argues that a permit condition that serves the same legitimate police-power purpose as a refusal to issue the permit should not be found to be a taking if the refusal to issue the permit would not constitute a taking. We agree. Thus, if the Commission attached to the permit some condition that would have protected the public's ability to see the beach notwithstanding construction of the new house—for example, a height limitation, a width restriction, or a ban on fences—so long as the Commission could have exercised its police power (as we have assumed it could) to forbid construction of the house altogether, imposition of the condition would also be constitutional. Moreover (and here we come closer to the facts of the present case), the condition would be constitutional even if it consisted of the requirement that the Nollans provide a viewing spot on their property for passersby with whose sighting of the ocean their new house would interfere. Although such a requirement, constituting a permanent grant of continuous access to the property, would have to be considered a taking if it were not attached to a development permit, the Commission's assumed power to forbid construction of the house in order to protect the public's view of the beach must surely include the power to condition construction upon some concession by the owner, even a concession of property rights, that serves the same end. If a prohibition designed to accomplish that purpose would be a legitimate exercise of the police power rather than a taking, it would be strange to conclude that providing the owner an alternative to that prohibition which accomplishes the same purpose is not.

Id. at 836–37.

The Court concluded that prohibition and conditions cannot be used interchangeably in all circumstances of land use regulation and conditions may exact an interest in land for which government must compensate. *Id.* at 837.

⁵³ 512 U.S. 374, 385 (1994). In *Dolan*, the Court concluded that the doctrine of unconstitutional conditions protected the right to just compensation, contrasting *Dolan* against

and agreed with common law doctrine to limit land use environmental restrictions on beachfront development in *Lucas v. South Carolina Coastal Council*.⁵⁴ Moreover, the Court has accepted common law arguments to protect the right to transfer under transferable development

Pennsylvania Coal Co. v. Mahon, 260 U.S. 393, 413 (1922) and *Agins v. City of Tiburon*, 447 U.S. 255, 260 (1980). The Court stated:

The sort of land use regulations discussed in the cases just cited, however, differ in two relevant particulars from the present case. First, they involved essentially legislative determinations classifying entire areas of the city, whereas here the city made an adjudicative decision to condition petitioner's application for a building permit on an individual parcel. Second, the conditions imposed were not simply a limitation on the use petitioner might make of her own parcel, but a requirement that she deed portions of the property to the city. In *Nollan* we held that governmental authority to exact such a condition was circumscribed by the Fifth and Fourteenth Amendments. Under the well-settled doctrine of "unconstitutional conditions," the government may not require a person to give up a constitutional right—here the right to receive just compensation when property is taken for a public use—in exchange for a discretionary benefit conferred by the government where the benefit sought has little or no relationship to the property.

Petitioner contends that the city has forced her to choose between the building permit and her right under the Fifth Amendment to just compensation for the public easements.

Id. at 385–86 (citation omitted).

In *Dolan*, the Court explicitly concluded that a condition on receipt of public or government benefit may cause a constitutional violation, namely the surrender of a fundamental, if not an important, right. *Id.* at 392.

⁵⁴ 505 U.S. 1003, 1027 (1992). In *Lucas*, the Court concluded that implied limitations or restrictions that were part of land title at common law could be used to restrict use and development by writing that:

Where the State seeks to sustain regulation that deprives land of all economically beneficial use, we think it may resist compensation only if the logically antecedent inquiry into the nature of the owner's estate shows that the proscribed use interests were not part of his title to begin with. This accords, we think, with our "takings" jurisprudence, which has traditionally been guided by the understandings of our citizens regarding the content of, and the State's power over, the "bundle of rights" that they acquire when they obtain title to property. It seems to us that the property owner necessarily expects the uses of his property to be restricted, from time to time, by various measures newly enacted by the State in legitimate exercise of its police powers; "[a]s long recognized, some values are enjoyed under an implied limitation and must yield to the police power." *Pennsylvania Coal Co. v. Mahon*, 260 U.S. at 413.

Id. at 1027.

In *Lucas*, the Court also concluded that denial of beneficial or economically viable use could exist if this severe limitation had been part of the title to the land at common. *Id.*

rights (“TDR”) regulation in *Suitum v. Tahoe Regional Planning Agency*⁵⁵ and to prevent the abrogation of the rights of descent and devise in limiting the impact of government regulation on descendants’ estates in *Hodel v. Irving*.⁵⁶ Simply, this line of disputes and analytical approaches show the lack of reasonable proportionality between regulation and its public burden and expose this regulation, either means or ends, to greater scrutiny in testing the proportionality when particular regulation redistributes public burdens from government to landowners.

*B. Holmesian Theory and Analytics in Regulatory Takings Jurisprudence*⁵⁷

These lines of cases,⁵⁸ or their analytical approaches, are doctrinally deficient by lacking doctrine within their own constitutional or theoretical substance, namely the Takings Clause.⁵⁹ They undermine Holmesian theory and analytics of regulatory takings⁶⁰ by developing and applying the regulatory principles on an ad hoc approach with little theoretical and analytical guidance of a takings doctrine to establish standards of review

⁵⁵ 520 U.S. 725, 741 (1997). In *Suitum*, the Court limited the impact of TDR regulation on the right to transfer by a landowner when it stated:

[A]s to *Suitum*’s right to transfer her TDRs, the only contingency apart from private market demand turns on the right of the agency to deny approval for a specific transfer on grounds that the buyer’s use of the TDRs would violate the terms of the scheme or other local land use regulation, and the right of a local regulatory body to deny transfer approval for the latter reason. . . . While a particular sale is subject to approval, salability is not, and the agency’s own position assumes that there are many potential, lawful buyers for *Suitum*’s TDRs, whose receipt of those rights would unquestionably be approved.

Id. at 741.

In *Suitum*, although the takings issue involved the valuation of TDRs, the sale or transfer of land would only be an issue if it violated land use or environmental regulation. *Id.* at 729, 741.

⁵⁶ 481 U.S. 704, 716–17 (1987); *see also* *Kaiser Aetna v. United States*, 444 U.S. 164, 176 (1979) (recognizing the importance of the right to exclude others in the bundle of rights and imposing a limit on government regulation to redistribute public burdens, namely providing access to a dredged pond).

⁵⁷ *Pennsylvania Coal*, 260 U.S. at 413.

⁵⁸ *See supra* Part I.A and accompanying notes (establishing two divergent lines of cases and their analytical approaches).

⁵⁹ U.S. CONST. amend. V, cl. 4.; *see infra* Part I.B and accompanying notes (discussing the nature and force of Holmesian analytics embodied by regulatory takings theory).

⁶⁰ *See Pennsylvania Coal*, 260 U.S. 393, 413 (1922).

and general principles.⁶¹ Putting aside the Court's predilection for ideologically different views from the cathedral, the major difference between the two groups of Court decisions is that the latter⁶² has grounds in constitutional or other doctrine protecting the right to just compensation as the constitutional means to protect private property under the Takings Clause. The latter group is represented mostly by *Lucas*⁶³ and seems to conclude that precisely-framed and narrowly-tailored propositions, which include takings standards of review and general principles, are less likely to disrupt regulatory and policy-making processes and programs.⁶⁴ These propositions and standards are more likely to readjust the proportionality between the exercise of legislative judgment and the limitation of the right to just compensation in redistributing public burdens and distributing public benefits of market, industrial, educational, and other changes in our society.⁶⁵ This limitation protects property rights by forcing government to weigh the costs of redistributing public burdens and distributing new public benefits through condemnation, regulation, contract, and other actions likely to take private property.⁶⁶ However, the first group

⁶¹ See *infra* Part II and accompanying notes (discussing the lack of, and need for, takings doctrine in justifying and establishing standards of review and general principles).

⁶² See *Suitum v. Tahoe Reg'l Planning Agency*, 520 U.S. 725 (1997); *Dolan v. City of Tigard*, 512 U.S. 374 (1994); *Lucas v. S.C. Coastal Council*, 505 U.S. 1003 (1992); *Hodel v. Irving*, 481 U.S. 704 (1987); *Nollan v. Cal. Coastal Comm'n*, 483 U.S. 825 (1987).

⁶³ See *Lucas*, 505 U.S. at 1003.

⁶⁴ See *infra* Part III.B and accompanying notes (discussing balancing takings standards of review against government policy-making processes).

⁶⁵ See Tiller & Cross, *supra* note 13, at 525–26. Professors Tiller and Cross discuss the impact of legal doctrine on judicial decision-making, stating:

Mark Richards and Bert Kritzer found that certain Supreme Court decisions established new “jurisprudential regimes” that dictated the structure of subsequent decisions. The decisions had influence by “establishing which case factors are relevant for decision making and/or by setting the level of scrutiny or balancing the justices are to employ in assessing case factors.” This approach came close to a true study of doctrine and found some effect even at the Supreme Court level. The research did not address the questions of why the Justices crafted specific language or exactly how different language mattered, but it established the very important point that doctrine *does* matter in future decisions.

As noted above, the primary power of doctrine lies in its ability to influence decisions by lower courts. A number of political scientists have studied this particular issue and found that Supreme Court doctrine does appear to drive subsequent lower court opinions.

Id. (citation omitted).

⁶⁶ See *infra* Part III.A and accompanying notes (discussing Court efforts to consider costs of redistributing public burdens and distributing public benefits when these actions may result in the taking of private property).

of Court decisions⁶⁷ share an underlying dependence on a uniquely ad hoc, factual inquiry of *Penn Central*⁶⁸ to weigh policy, regulatory, and economic circumstances of regulatory takings disputes.⁶⁹ This ad hoc factual inquiry is likely not to limit sufficient government power, likely to defer to government in the redistribution of public burdens and benefits, and likely to skew proportionality to favor a greater redistribution of burdens to holders of property rights.⁷⁰ Looking at both groups, one can find the need for stable, consistent takings doctrine to determine and judge the need for takings standards of review and principles. This article offers a doctrinal solution. Sadly, both groups contribute too little to the regulatory takings theory of *Pennsylvania Coal*.⁷¹

The competing lines of cases show that regulatory takings theory suffers an analytic and substantive disconnect between the development of sound takings doctrine and the application of takings standards of review and principles.⁷² The problem is that community policy-makers will encounter policy uncertainty, fiscal liability, and legal risks.⁷³ In addition, landowners and other private property owners will face regulatory liability, economic uncertainty, and financial risks.⁷⁴ Both governments and these owners face constant exposure to a confusing takings environment: the indefinite nature and piecemeal development of federal takings standards of review and general takings principles that scrutinize and judge, respectively, land use, growth management, and environmental and other regulation.⁷⁵ Takings doctrine inhering to the Takings Clause is needed to alleviate much of the existing uncertainty surrounding the constitutional conflict between government judgment and property rights foisted onto communities and states by the Court's inability to use its theory to establish and develop a coherent body of analytics and

⁶⁷ See *Kelo v. City of New London*, 545 U.S. 569 (2005); *Lingle v. Chevron U.S.A., Inc.*, 544 U.S. 528 (2005); *Palazzolo v. Rhode Island*, 533 U.S. 606 (2002); *Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency*, 535 U.S. 302 (2002); *Penn Cent. Transp. Co. v. New York City*, 483 U.S. 104 (1978).

⁶⁸ See *Penn Cent. Transp. Co.*, 483 U.S. at 104.

⁶⁹ See *infra* Part II and accompanying notes (discussing the development of the ad hoc *Penn Central* inquiry in weighing the circumstances surrounding takings disputes).

⁷⁰ See *infra* Part II and accompanying notes.

⁷¹ *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 413 (1922).

⁷² See *infra* Part II and accompanying notes.

⁷³ See *infra* Part IV and accompanying notes (discussing the *Armstrong* doctrine and its capacity to address the needs of community policymaking).

⁷⁴ See *infra* Part IV and accompanying notes.

⁷⁵ See *infra* Part IV and accompanying notes.

substance.⁷⁶ Consequently, our first step is to know and accept the existence of regulatory takings theory and to look within the Court's takings precedents for constitutional doctrine upon which to build analytics and substance. Therefore, this article offers a doctrinal solution that, on the first hand, conjoins the factual analytics of *Penn Central*,⁷⁷ economic analytics of *Lucas*,⁷⁸ and constitutional analytics of *Dolan*,⁷⁹ and, on the other hand, coalesces the weak legal-economic theory underlying *Penn Central*,⁸⁰ the infirm legal-policy theory of *Tahoe-Sierra Preservation Council*,⁸¹ and the unfulfilled temporary-permanent dichotomy of *First English Evangelical Lutheran Church of Glendale v. County of Los Angeles*.⁸²

C. *Emerging Takings Doctrine of the Holmesian Theory and Analytics*

This jurisprudential solution is the use, development, and application of *Armstrong* to conjoin analytics and coalesce substance of takings

⁷⁶ See *infra* Parts II.B and III.B and accompanying notes (discussing the need for a coherent takings doctrine to clear up uncertainty with property rights and government action).

⁷⁷ See *Penn Cent. Transp. Co. v. New York City*, 483 U.S. 104 (1978); see also *infra* Part II and accompanying notes (discussing the development of the ad hoc, factual inquiry of *Penn Central* (the *Penn Central* inquiry) to weigh regulatory, policy, and economic circumstances in resolving regulatory takings claims).

⁷⁸ See *Lucas v. S.C. Coastal Council*, 505 U.S. 1003 (1992); see also *infra* Part II.A and accompanying notes (discussing the common law grounds to justify the *Lucas per se* test to resolve regulatory takings claims involving a denial of all economically viable use).

⁷⁹ *Dolan v. City of Tigard*, 512 U.S. 374 (1994).

⁸⁰ See *Penn Cent. Transp. Co.*, 483 U.S. at 104; see also *infra* Part II.A and accompanying notes (discussing the constitutional grounds to justify creating heightened scrutiny in *Dolan* and *Nollan* to resolve regulatory takings claims involving objectives and needs for land dedication conditions).

⁸¹ See 535 U.S. 302 (2002); see also *infra* Part IV.A and accompanying notes (discussing the application of takings principles in *Tahoe-Sierra Preservation Council* to resolve regulatory takings claims by weighing heavily the impact on municipal policymaking in finding established regulation unconstitutional).

⁸² 482 U.S. 304 (1987). In *First English*, the Court concluded that government regulations can create a temporary taking of private property that would require the payment of just compensation. *Id.* at 322. The Court stated:

Here we must assume that the Los Angeles County ordinance has denied appellant all use of its property for a considerable period of years, and we hold that invalidation of the ordinance without payment of fair value for the use of the property during this period of time would be a constitutionally insufficient remedy.

Id.

jurisprudence. The *Armstrong*⁸³ doctrine embodies the fairness, or equity, and justice, or process, of the Takings Clause and its intent where the limitation on government power is a great economic force and less personal burden for government actions. This limitation must not succumb to the deferential weight or preferential need for public needs, objectives, and purposes in redistributing public burdens and creating public benefits to resolve conflicting public needs and private opportunities.⁸⁴ *Armstrong*'s most representative doctrinal statement is: "The Fifth Amendment's guarantee that private property shall not be taken for a public use without just compensation was designed to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole."⁸⁵

It is well settled that the *Armstrong* doctrinal statement is a firm, resilient measure of *Armstrong*'s ability to contribute a substantive purpose and intent to takings disputes,⁸⁶ but its use must also include a deeper analytical capability and broader substantive force to execute both purpose and intent.⁸⁷ In *Tahoe-Sierra Preservation Council*,⁸⁸ the Court's insightful application and confident use show *Armstrong*'s ability to contribute analytics and substance in light of *Pennsylvania Coal*'s⁸⁹ descriptive regulatory takings theory.⁹⁰ The Court's explicit use, if not definitive application, creates a bridge between constitutional theory and its executing or implementing constitutional doctrine. This bridge or portal is the path for regulatory takings disputes and claims raising takings issues requiring the application of constitutional or other doctrine to justify, establish, and fashion takings standards of review and principles.⁹¹

As stated above, one or two Court decisions may not *a priori* create constitutional or takings doctrine that can survive constitutional muster in guiding the creation and development of takings standards of review

⁸³ *Armstrong v. United States*, 364 U.S. 40, 49 (1960).

⁸⁴ See *infra* Part IV and accompanying notes (examining the need for an *Armstrong*-based takings doctrine conflicting needs of the government and private property owners).

⁸⁵ See *Armstrong*, 364 U.S. at 49.

⁸⁶ See *Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency*, 535 U.S. 302, 303–04 (2002).

⁸⁷ See *infra* Part IV and accompanying notes (discussing the need for *Armstrong* doctrine to have expanded analytical capability and broader substantive force).

⁸⁸ See *Tahoe-Sierra Pres. Council*, 535 U.S. at 303–04.

⁸⁹ *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 413 (1922).

⁹⁰ See *infra* Parts V–VI and accompanying notes (discussing the use of *Armstrong* doctrine to justify, fashion, and apply takings standards of review and principles).

⁹¹ See *infra* Parts V–VI and accompanying notes.

and principles.⁹² Somewhere, as with all things, there must be a genesis. In the beginning, *Armstrong* may serve only to birth, if not stabilize, remnants of theoretical-analytical doctrine in a field of law unsettled for slightly less than a century, circa 1922.⁹³ The two lines of analytical approaches go far in showing the need for theoretical-analytical doctrine to conjoin and coalesce a morass or body of unruly or untamed takings standards and principles.⁹⁴ *Tahoe-Sierra Preservation Council* and *Palazzolo* go far in elevating *Armstrong*.⁹⁵ Moreover, the repeated and insistent use of *Armstrong* to identify the Framers' purpose and intent for the Takings Clause⁹⁶ is hollow.⁹⁷ To give effect to the Framers' intent and purpose, *Armstrong*⁹⁸ must logically expand the theoretical capacity and analytical forces to guide and execute the Takings Clause, by creating substance and analytics. For the time being, *Armstrong* is either the genesis or stabilizer of takings substance and analytics to determine, justify, and fashion proportionate standards of review and general takings principles to resolve takings claims arising under the Takings Clause and regulatory takings theory of *Pennsylvania Coal*.⁹⁹

II. FINDING TAKINGS DOCTRINE AMONG THE COURT'S TAKINGS DECISIONS

Armstrong illustrated the destructive nature of government actions to redistribute public obligations to groups and individuals in society,

⁹² See *supra* Introduction and accompanying notes.

⁹³ See Robert Brauneis, "The Foundation of Our 'Regulatory Takings' Jurisprudence": *The Myth and Meaning of Justice Holmes's Opinion in Pennsylvania Coal Co. v. Mahon*, 106 YALE L.J. 613, 615–17 (1996).

⁹⁴ See *supra* Part I.A (discussing the diverging lines of Taking Clause cases).

⁹⁵ *Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency*, 535 U.S. 302, 303–04 (2002); *Palazzolo v. Rhode Island*, 533 U.S. 606, 618 (2002).

⁹⁶ U.S. CONST. amend. V, cl. 4.

⁹⁷ *Armstrong v. United States*, 364 U.S. 40, 48–49 (1960) (observing that the Fifth Amendment was intended to "bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole"). *Id.* at 49.

⁹⁸ *Id.*

⁹⁹ *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 413 (1922); see *Armstrong*, 364 U.S. at 49 ("The Fifth Amendment's guarantee that private property shall not be taken for a public use without just compensation was designed to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole."); see also Richard A. Epstein, *From Penn Central to Lingle: The Long Backwards Road*, 40 J. MARSHALL L. REV. 593, 600 (2007) (arguing that the *Armstrong* decision established a "relatively strong statement about property rights," but without a "set formula" to evaluate subsequent cases).

notwithstanding the most worthy objectives of community and state policymakers.¹⁰⁰ *Armstrong* possesses the substantive capacity and analytical force necessary to become regulatory takings doctrine. Its force and capacity enable it to determine, justify, and fashion takings principles and standards of review. This doctrine is necessary to complete the guarantee to protect private property rights by justifying and establishing takings standards of review and principles. The Takings Clause can reach its fullness when its applications establish proportionality between policymaking responses to community needs and public burdens of land owners under regulation of land development impacts, natural resources degradation, environmental quality, social welfare problems, or other public areas. Part II sets forth economic, policymaking, and constitutional justifications to establish and fashion a range of standards of review under the Takings Clause.

A. *Eliminating Factual Theories to Dispose of Standards of Review and Other Principles*

*Tahoe-Sierra Preservation Council*¹⁰¹ and *Palazzolo*¹⁰² offer renewed hope to attorneys who have yet to be successful, since *Dolan*¹⁰³ (nearly thirteen years ago), in finding constitutional doctrine to justify greater protection of the right to just compensation, which, in turn, means providing greater protection to private property rights. *Tahoe-Sierra Preservation Council*¹⁰⁴ and *Palazzolo's*¹⁰⁵ strong reliance on *Armstrong* pass the point of using mere dicta to illuminate or illustrate points of law and their applications or lack thereof. *Tahoe-Sierra Preservation Council* applied *Armstrong* to evaluate the utility of and eliminate the need for factual theories underlain by a full set or complete range of standards of review under the Takings Clause.¹⁰⁶ One cannot ignore that evaluating and eliminating factual theories by using the *application* of a range of standards of review and takings principles calls into play constitutional doctrine

¹⁰⁰ *Armstrong*, 364 U.S. at 41–46.

¹⁰¹ *Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency*, 535 U.S. 302, 336–42 (2002).

¹⁰² *Palazzolo v. Rhode Island*, 533 U.S. 606, 626–32 (2001).

¹⁰³ *Dolan v. City of Tigard*, 512 U.S. 374, 384 (1994).

¹⁰⁴ *Tahoe-Sierra Pres. Council*, 535 U.S. at 332–35.

¹⁰⁵ *Palazzolo*, 533 U.S. at 617–18.

¹⁰⁶ U.S. CONST. amend. V, cl. 4.; *Tahoe-Sierra Pres. Council, Inc.*, 535 U.S. at 333–35.

possessing, and thereafter birthing, enough substance, analysis, and reasoning to determine, justify, and fashion standards of review and other principles under the Takings Clause.¹⁰⁷ These theories are underlain, if not illustrative, of the full set and complete range of takings standards of review, where such theories illustrate deferential,¹⁰⁸ intermediate,¹⁰⁹ and strict scrutiny,¹¹⁰ and a categorical *per se* test,¹¹¹ supported or reliant upon an ad hoc inquiry,¹¹² constitutional doctrine¹¹³ and common law principle,¹¹⁴ respectively. The jurisprudential question, then, is: If *Armstrong* can evaluate, differentiate and eliminate standards of review and principles among the complete set of takings standards of review, then how far can it go to determine, justify, and fashion a takings standard of review or principle to protect the right to just compensation, including its constitutionally valid and repugnant condemnations and regulations?¹¹⁵

¹⁰⁷ U.S. CONST. amend. V, cl. 4.; see *Dolan*, 512 U.S. at 385. The Court applied the unconstitutional doctrine to determine, justify, and fashion the rough proportionality test, an intermediate standard of review, to review takings claims involving land dedication conditions. *Dolan*, 512 U.S. at 385. Equally important, the Court evaluated and eliminated various state standards of review that had been applied to review takings claims involving land dedication of conditions. *Id.* at 389–91. In *Dolan*, the Court's evaluation, elimination, and selection of a standard of review took place in light of the unconstitutional conditions doctrine. *Id.* at 385.

¹⁰⁸ See *City of Monterey v. Del Monte Dunes at Monterey, Ltd.*, 526 U.S. 687, 702–03 (1999) (concluding that deferential review is appropriate for legislative decisions); *Penn Cent. Transp. Co. v. New York City*, 438 U.S. 104, 124–25 (1978) (finding that zoning regulations need not amount to a takings).

¹⁰⁹ See *Dolan*, 512 U.S. 374, 391 (1994) (concluding that an intermediate standard is appropriate to review adjudicative decisions requesting an interest in land).

¹¹⁰ See *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 441 (1982) (finding that a local regulation permitting the location of an antenna on the rooftop of a private structure was a physical occupation and thus a physical taking subject to strict scrutiny by the Court, reviewing both ends and means).

¹¹¹ See *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1027 (1992) (concluding that a categorical *per se* standard is most appropriate when government denies all economically viable use of the land).

¹¹² See *Penn Cent. Transp. Co.*, 438 U.S. at 124–25 (fashioning a deferential test based on deference to government in making zoning and other land use regulations of property rights to further land use and other policies).

¹¹³ See *Dolan*, 512 U.S. at 391 (fashioning an intermediate standard of review under the unconstitutional conditions doctrine).

¹¹⁴ See *Lucas*, 505 U.S. at 1027 (fashioning a categorical *per se* test that is based on the common law doctrine).

¹¹⁵ See *infra* Part IV.B and accompanying notes (examining the use of *Armstrong* doctrine in *Tahoe-Sierra Preservation Council* to examine factual theories put forth by the United States Supreme Court).

B. *Jurisprudential Need to Justify Standards of Review and Other Principles*

Of course, a single judicial decision may not create takings doctrine, but the intrigue of examining the long standing use and more recent application of *Armstrong* to attenuate the purpose, accentuate the intent, and perpetuate the force of the Takings Clause cannot go unnoticed by scholars seeking a foundational but compelling means to conjoin various threads of takings standards and coalesce the morass of principles and precedents into a coherent, harmonious body of takings analytics and substance befitting the Holmesian theory and analytics¹¹⁶ that underpin *Pennsylvania*

¹¹⁶ See *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 413 (1922). In *Pennsylvania Coal*, Justice Holmes sets forth the threshold percept as the development of substance law by government to perpetuate society, but with incidental effects on private property rights not exceeding limits already existing in the Due Process and Contract Clauses to preserve private property. *Id.* In this same line of thinking, Justice Holmes established that the incidental effects are an implied limitation on the value, use, and other rights of private property. *Id.* Moreover, Justice Holmes concluded commenting on this precept by stating that an implied limitation without limits or bounds may weaken the Due Process and Contract Clauses. *Id.* In setting forth the percept grounding regulatory takings theory, Justice Holmes stated:

Government hardly could go on if to some extent values incident to property could not be diminished without paying for every such change in the general law. As long recognized, some values are enjoyed under an implied limitation and must yield to the police power. But obviously the implied limitation must have its limits, or the contract and due process clauses are gone.

Id.

Therefore, any analytic of regulatory takings theory must be underpinned by doctrine grounded on Justice Holmes's precept binding together limits on government powers and protection of private property rights where the exercise of government powers limits the values or rights of private property to such an extent that the protection of the private property under the Contract or Due Process Clause is null and void.

Justice Holmes's precept analyzes incidental effects and scrutinizes government policymaking to determine if this regulation extends beyond the limitations of the Due Process and Contract Clauses and denies protection to private property. *Pennsylvania Coal*, 260 U.S. at 413. Justice Holmes starts the economic or property analytics by first judging the extent of the regulation of property value, and enters economics through judging the magnitude of any incidental effects. *Id.* at 413–14. However, Justice Holmes grounds regulatory takings theory in common law factual or policy analytics, wherein the second consideration would be the government's judgment and giving the greater weight to this judgment by retaining deference to government policymaking for the public safety, health and welfare. *Id.* In setting forth the analytic logic of balancing economics and politics (policymaking), Justice Holmes stated:

Coal. In constitutional and common law jurisprudence, Holmesian theory and analytics must create or rely on fundamental doctrine to justify and establish, and then develop and use, means-ends tests, principles, and their applications under a stable theoretical takings thread growing from the Takings Clause.¹¹⁷ This article outlines our approach to furthering

One fact for consideration in determining such limits is the extent of the diminution. When it reaches a certain magnitude, in most if not in all cases there must be an exercise of eminent domain and compensation to sustain the act. So the question depends upon the particular facts. The greatest weight is given to the judgment of the legislature, but it always is open to interested parties to contend that the legislature has gone beyond its constitutional power.

Id. at 413.

Holmesian analytics include weighing the magnitude of incidental effects against the impact of repugnant incidental effects on the values of private property beyond the reach of Due Process and Contract Clauses. *Id.* But, this permits judicial scrutiny to begin with a factual inquiry where government judgment is given deference under the Takings Clause. *Pennsylvania Coal*, 260 U.S. at 413–16. Holmesian analytics create the need for an array of takings standards of review and an effective list of substantive principles. Why? These standards and principles determine the extent of the magnitude of economic effects and scrutinize government judgment within the factual inquiry, or factual analytics, employed to weigh economic, political and other circumstances. *Id.* at 415–16. In Holmesian analytics, these standards and principles exist independently of the factual inquiry. *Id.* at 413. This independent existence creates a theoretical-analytical need to determine, fashion, and justify takings standards of review and principles independent of the factual inquiry.

This theoretical-analytical need is takings doctrine that has been slow to evolve under factual analytics. It is doctrine that establishes standards and principles to determine the magnitude of economic effects and to scrutinize government judgment, which possesses the greater weight in determining a taking and the need for just compensation. *See id.* at 413. Takings doctrine establishes standards and principles that create a constitutional norm and create predictability, though not absolute, in shifting the burdens of the public to owners of real and personal property. *See Brauneis, supra* note 93, at 615–17. Justice Holmes must have foreseen legal doctrine when he concluded that a limit to burden-shifting regulation exists beyond the Due Process and Contract Clauses, stating, “The general rule at least is, that while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking.” *Pennsylvania Coal*, 260 U.S. at 415. Justice Holmes recognized then, what is most obvious today, that private property is subject to regulation by government in many circumstances. *Id.* at 413. Yet, Justice Holmes went further, limiting regulation by recognizing that exceptional cases may not stand on tradition rather than principle. *Id.* at 415–16. He found that it is not readily understood—shifting certainty and an orderly evolution of regulatory takings theory.

¹¹⁷ U.S. CONST. amend. V, cl. 4; *see also Pennsylvania Coal*, 260 U.S. at 415–16. Justice Holmes sets forth analytics of regulatory takings theory, questioning whether government power shifting the burden of hardships from one individual to another is justifiable under all or many circumstances. Justice Holmes stated:

In general it is not plain that a man’s misfortunes or necessities will justify his shifting the damages to his neighbor’s shoulders. We are in

Holmesian analytics applied to examine and judge regulation that provides benefits to individuals and the public where these benefits may signal an unconstitutional shift of public burdens to owners of private property by limiting the utility and economics of private property.¹¹⁸

The logic and structure of Holmesian analytics leave little doubt regarding the nature of the *dominant* analytical inquiry, but do not limit or bound economic or other types of regulatory effects challenged as being

danger of forgetting that a strong public desire to improve the public condition is not enough to warrant achieving the desire by a shorter cut than the constitutional way of paying for the change.

Id. at 416 (citation omitted).

Holmesian analytics determine if the judgment of government is permitted to transfer or shift social, economic, and other burdens of social life, public welfare, or economic transactions to groups or individuals, such as landowners. *Id.*

Holmesian analytics establish the factual inquiry, and recognize that the application of factual inquiry to the regulatory takings claim is a “question of degree.” *Id.* This outcome depends on the extent of the magnitude of the incidental effects on private property and scrutiny of the government’s judgment possessing greater weight. *Id.* at 415–16. Holmesian analytics guard against the use of bright line tests or “general propositions,” and recognize that the facts of *Pennsylvania Coal* were entirely different from earlier takings decisions caused by the emergency circumstances of World War I, and that these facts presented an entirely different issue for the Court to decide. *Id.* Justice Holmes finds that the takings decisions caused by the war were at the edge of the takings and just compensation limitations but were permissible because the emergency was temporary and just compensation was provided. *Pennsylvania Coal*, 260 U.S. at 416. Justice Holmes stated:

As we already have said, this is a question of degree—and therefore cannot be disposed of by general propositions. But we regard this as going beyond any of the cases decided by this Court. The late decisions upon laws dealing with the congestion of Washington and New York, caused by the war, dealt with laws intended to meet a temporary emergency and providing for compensation determined to be reasonable by an impartial board. They went to the verge of the law but fell far short of the present act.

Id. (citation omitted).

Holmesian analytics favor a factual inquiry, abhor general propositions to resolve takings claims, and see a limit on regulation even for temporary emergencies. *Id.* at 415–16. Against a backdrop of Holmesian analytics to execute regulatory takings theory, the Court’s precedents do not coherently explain theoretical-analytical or doctrinal approaches it has taken to execute regulatory takings theory. *See supra* Part I.A and accompanying notes (discussing the Court’s reliance on common law and constitutional doctrine and pragmatism to establish standards of review and other principles); *see also* Brauneis, *supra* note 93, at 616–17.

¹¹⁸ *See Pennsylvania Coal*, 260 U.S. at 415–16; *supra* Part I.B and accompanying text (explaining how Holmesian analytics seek to enforce the limitations imposed by government seeking to shift more public and individual hardships and misfortunes to landowners and other groups).

more than incidental.¹¹⁹ In the preferred analytical inquiry, Holmesian analytics place great weight on government judgment by relying on the fact that some circumstances, not including the exceptional cases, may show a sufficient lack of judgment to undermine the utility, economics, and other values of property rights where such values are guaranteed protection but are not protected or secured by the Due Process¹²⁰ and Contract¹²¹ Clauses of the Constitution.¹²² Herein lies the need for the Takings Clause.¹²³ The protection of the right to just compensation, which protects the value of private property, fosters a doctrinal need to continue the development and growth of regulatory takings theory.¹²⁴

Except for a few fruitless and less productive threads of takings jurisprudence,¹²⁵ Holmesian analytics are mostly underdeveloped and patently piecemeal in the development of regulatory takings theory.¹²⁶ In fact, this theory rests mostly on an ad hoc, factual inquiry that actually reduces or undermines the nature and force of regulatory takings theory.¹²⁷ The Court uses factual inquiries to develop theory, create doctrine, and resolve claims, thus resting the development of regulatory takings theory on unique factual patterns or the circumstances of a few communities.¹²⁸ Therefore, regulatory takings theory has moved only a small jurisprudential step from its origin in *Pennsylvania Coal*.¹²⁹

¹¹⁹ See *supra* note 116 and accompanying text.

¹²⁰ U.S. CONST. amends. V, cl. 3 & XIV, § 1, cl. 3.

¹²¹ U.S. CONST. art. I, § 10, cl. 1.

¹²² See *supra* Part I.B and accompanying notes (discussing the logic and structure of the Holmes analytic in weighing incidental effects, creating a factual inquiry, and examining government judgment).

¹²³ U.S. CONST. amend. V, cl. 4.

¹²⁴ See Alberto B. Lopez, *Weighing and Reweighing Eminent Domain's Political Philosophies Post-Kelo*, 41 WAKE FOREST L. REV. 237, 282–83 (2006).

¹²⁵ See *supra* Part I.A and accompanying notes (discussing the use of problematic constitutional and common law doctrines to create takings standards of review and principles).

¹²⁶ Gary Minda, *The Dilemmas of Property and Sovereignty in the Postmodern Era: New Solutions for the Regulatory Takings Problem*, in TAKING PROPERTY AND JUST COMPENSATION: LAW AND ECONOMICS PERSPECTIVES OF THE TAKINGS ISSUE 125, 130–31 (Nicholas Mercurio ed., 1992).

¹²⁷ See *supra* Part I.B and accompanying notes (discussing the role and use of the ad hoc inquiry of *Penn Central* in applying a deferential standard of review under regulatory takings theory).

¹²⁸ Susan Rose-Ackerman, *Regulatory Takings: Policy Analysis and Democratic Principles*, in TAKING PROPERTY AND JUST COMPENSATION: LAW AND ECONOMICS PERSPECTIVE OF THE TAKINGS ISSUE 25, 27 (Nicholas Mercurio ed., 1992).

¹²⁹ See *supra* note 42 and accompanying text (explaining the Court's refusal to expand and crystalize the holding of *Pennsylvania Coal* in subsequent cases).

It is not safe to assume that every American city is similar and uses the same plans, policies, and regulations.¹³⁰ A theoretical-analytical intermediacy between theoretical development and factual analytical inquiry is missing in regulatory takings jurisprudence.¹³¹ Doctrinal borrowing from common law and constitutional doctrine shows the lack of development of takings doctrine and its analytics.¹³² Reinserting or reviving the jurisprudential development of Holmesian analytics to execute regulatory takings will yield a more stable and predictable theoretical-analytical doctrine,¹³³ which will coalesce diverging takings standards of review and principles. In Holmesian analytics, these standards and principles determine the extent of the magnitude of economic effects of regulation and scrutinize the limit of government judgment possessing the greater weight.¹³⁴

C. *Doctrinal or Ad Hoc Thinking to Justify Standards of Review and New Principles*

Explaining away *Armstrong's*¹³⁵ doctrine as illustrative dicta and relying on *Lingle v. Chevron U.S.A., Inc.*¹³⁶ to eliminate takings dicta cannot logically follow; the Court straightforwardly applied *Armstrong's* fairness and justice doctrine in *Tahoe-Sierra Preservation Council*¹³⁷ (and perhaps did so going far beyond any ad hoc inquiry or its prelude, thus examining, and then eliminating, factual theories). Of course, one application of

¹³⁰ Compare SAN FRANCISCO PLANNING DEPARTMENT, PLAN ELEMENT: TRANSPORTATION (PART I) (2009), <http://www.sf-planning.org/index.aspx?page=1617> (focusing on reducing traffic to increase sustainability), with BOSTON REDEVELOPMENT AUTHORITY, URBAN RING TRANSIT PROJECT (2008), <http://www.bostonredevelopmentauthority.org/planning/PlanningInitsIndividual.asp?action=ViewInit&InitID=2> (focusing on adding a transportation route to shorten travel times).

¹³¹ See *supra* Part I.A.

¹³² Holloway & Guy, *supra* note 1, at 246–51 (showing the disconnect between the Court's decisions and the different sources the Court used to arrive at those decisions).

¹³³ See *supra* Part II.A–B and accompanying notes (explaining the need for takings doctrine to execute the regulatory takings theory of *Pennsylvania Coal*).

¹³⁴ See *supra* note 116 and accompanying text (explaining the need for a theoretical-analytical doctrine of regulatory takings theory that is executed by balancing the different takings standards of review and principles).

¹³⁵ *Armstrong v. United States*, 364 U.S. 40, 49 (1960).

¹³⁶ 544 U.S. 528 (2005).

¹³⁷ *Tahoe-Sierra Pres. Council v. Tahoe Reg'l Planning Agency*, 535 U.S. 302, 321 (2001) (“Next we shall explain why the *Armstrong* principle requires rejection of that rule as well as the less extreme position advanced by petitioners at oral argument.”).

Armstrong does not create unassailable takings doctrine, but the Court has used the *Armstrong* doctrine in numerous cases to validate the Framers' purpose and intent of the Takings Clause.¹³⁸ The Court goes much further, and perhaps too far to turn back, by using *Armstrong* doctrine to eliminate factual theories underlain by the other takings standards of review and fundamental takings principles.¹³⁹ This judicial and constitutional validation gives *Armstrong* doctrine more takings credibility and weight to guide the creation of regulatory takings standards of review and principles.

Tahoe-Sierra Preservation Council uses a uniquely theoretical application of the *Armstrong* doctrine to eliminate factual patterns containing

¹³⁸ U.S. CONST. amend. V, cl. 4; see, e.g., *Tahoe-Sierra Pres. Council*, 535 U.S. at 302; *Dolan v. City of Tigard*, 512 U.S. 374, 384 (1994); *Nollan v. Cal. Coastal Comm'n*, 483 U.S. 825, 835 n.4 (1987).

The dissent has also relied on *Armstrong* to show that the Court's majority opinion did not necessarily foster the fairness and justice of the Takings and Public Use Clauses, U.S. CONST. amend. V, cl. 4; see, e.g., *Kelo v. City of New London*, 545 U.S. 469, 497 (2004) (O'Connor, J., dissenting). In *Kelo*, Justice O'Connor, writing for one of the dissents, stated:

While the Takings Clause presupposes that government can take private property without the owner's consent, the just compensation requirement spreads the cost of condemnations and thus "prevents the public from loading upon one individual more than his just share of the burdens of government." The public use requirement, in turn, imposes a more basic limitation, circumscribing the very scope of the eminent domain power: Government may compel an individual to forfeit her property for the *public's* use, but not for the benefit of another private person. This requirement promotes fairness as well as security.

Id. (citation omitted).

Moreover, in *Lucas*, Justice Blackmun, writing for one dissent, addressed the conflict that arises when the Court creates heightened scrutiny under the Takings Clause:

Viewed more broadly, the Court's new rule and exception conflict with the very character of our takings jurisprudence. . . . This is unavoidable, for the determination whether a law effects a taking is ultimately a matter of "fairness and justice," and "necessarily requires a weighing of private and public interests." The rigid rules fixed by the Court today clash with this enterprise: "fairness and justice" are often disserved by categorical rules.

. . . .
The Just Compensation Clause "was designed to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole."

Lucas v. S.C. Coastal Council, 505 U.S. 1003, 1071 (1992) (Blackmun, J., dissenting) (citation omitted).

¹³⁹ See *Tahoe-Sierra Pres. Council*, 535 U.S. at 302, 336–37 (explaining that a *per se* rule based on a specific set of facts would not be supported by the *Armstrong* doctrine).

different takings standards of review and principles.¹⁴⁰ This application directly implicates both the constitutional equity and the judicial process of the Federal Judiciary's scrutiny of government regulatory actions, and by extension, the outcomes of regulatory takings disputes undertaken to protect property rights under the Takings Clause.¹⁴¹ Specifically, this application weighs whether government responses are proportionate to the private actions and circumstances justifying the redistribution of public burdens to further the legislature's community objectives.¹⁴² The least doctrinal significance of *Tahoe-Sierra Preservation Council* must be recognized as embryonic takings doctrine that could potentially coalesce and conjoin a morass of takings laws and issues.¹⁴³

Of course, the Court may continue to haphazardly establish standards of review and takings principles under an ad hoc approach. This approach is best suited to judge factual circumstances concerning constitutional equity and judicial process through the application of takings standards of review and principles.¹⁴⁴ The Court creates a dual use of the *Penn Central*¹⁴⁵ inquiry when it uses the inquiry as an ad hoc factual inquiry to apply takings principles, and as doctrine to justify takings standards and principles resting mostly on evolving regulation and changing factual patterns.¹⁴⁶ Although any factual, ad hoc approach may rest on *Pennsylvania Coal's*¹⁴⁷ takings theory, it critically contains too little theory and analytics (theoretical-analytical capacity) at its core to serve as takings doctrine.¹⁴⁸ This factual ad hoc approach lacks a stable framework capable of connecting regulation to its impact on the fundamental right

¹⁴⁰ See *Tahoe-Sierra Pres. Council*, 535 U.S. at 336–37.

¹⁴¹ U.S. CONST. amend. V, cl. 4.; see *Tahoe-Sierra Pres. Council*, 535 U.S. at 336–37 (“The concepts of ‘fairness and justice’ . . . are less than fully determinate.”); see also *Lucas*, 505 U.S. at 1027 (finding no fairness or equity where the government, in a disproportionate response, takes all beneficial use of land and lacks a valid state purpose to justify the taking); *Dolan*, 512 U.S. at 385 (finding no justice or process when the government limits a fundamentally important right and offers a benefit of “little or no relationship”).

¹⁴² Holloway & Guy, *supra* note 1, at 253.

¹⁴³ See *Tahoe-Sierra Pres. Council*, 535 U.S. at 336–37.

¹⁴⁴ See, e.g., *Penn Cent. Transp. Co. v. New York City*, 438 U.S. 104, 124 (1978) (using ad hoc, factual inquiries to determine what important factors were at play).

¹⁴⁵ *Id.*

¹⁴⁶ Compare *supra* Part I.B and accompanying notes, with *supra* note 112 and accompanying text.

¹⁴⁷ *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393 (1923).

¹⁴⁸ See *infra* note 214 and accompanying text (showing one of the limitations of the factual, ad hoc inquiry).

of just compensation.¹⁴⁹ This connection is what justifies the standards of review and principles that protect that right.¹⁵⁰ There is little to no evidence of a theoretical-analytical model of constitutional doctrine in the line of the Court's takings decisions.¹⁵¹ How? These decisions frequently undermine one another in order to protect the right to just compensation.¹⁵² They consist mostly of a piecemeal approach to evaluating legislative judgment and weighing the economic effects of takings disputes.¹⁵³ Therefore, the Court has not shown enough constitutional equity and judicial process to establish a proportionate redistribution of public burdens by limiting numerous government policies threatening to circumvent or undermine the right to just compensation.

Economic interests, constitutional limitations, public policy concerns, and governmental policymaking needs must be analyzed and weighed in determining, justifying, and fashioning a full range of standards of review and other principles under the Takings Clause.¹⁵⁴ *Tahoe-Sierra Preservation Council* and *Palazzolo* show that *Armstrong* contains basic constitutional doctrine that can be applied or used to determine, justify, and fashion standards of review and other takings principles.¹⁵⁵ Equally important, this doctrine should not disturb or undermine existing standards built on sound constitutional reasoning. These standards and other principles include fundamental justice and fairness, which would not undermine but broaden the equity, process, and outcomes of the factual, ad hoc approach of *Penn Central*.¹⁵⁶ An emerging doctrine must not undermine soundly reasoned precedents protecting the fundamental

¹⁴⁹ Holloway & Guy, *supra* note 1, at 250–51.

¹⁵⁰ *Id.* (finding that the lack of a stable framework can allow a heavy public burden to be placed on individuals).

¹⁵¹ *See supra* Part I.A.

¹⁵² Compare *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1028–32 (1992) (concluding that a regulation denied all economically viable use and thus did not allow personal use to rise to the level of the landowner's preexisting potential for economic use), with *Palazzolo v. Rhode Island*, 533 U.S. 606, 616 (2001) (concluding that an upland tract in the middle of the wetlands tract permitted economic use, even if only a personal dwelling, and thus there was not a denial of all economically viable use).

¹⁵³ *See supra* Part I.B and accompanying notes (illustrating the clearly diverging lines of cases under the Takings Clause, U.S. CONST. amend. V, cl. 4.).

¹⁵⁴ U.S. CONST. amend. V, cl. 4; *see infra* note 225 and accompanying text.

¹⁵⁵ *Tahoe-Sierra Pres. Council v. Tahoe Reg'l Planning Agency*, 535 U.S. 302 (2001); *Palazzolo*, 533 U.S. at 606; *Armstrong v. United States*, 364 U.S. 40, 49 (1960); *see infra* Part IV.A.

¹⁵⁶ *Penn Cent. Transp. Co. v. New York City*, 438 U.S. 104 (1978); *see supra* note 141 and accompanying text.

constitutional right to receive just compensation.¹⁵⁷ Instead, the doctrine must give this right greater constitutional validity by protecting and furthering the social welfare, political, and economic interests underlying government regulation and its objectives.¹⁵⁸

III. TAKINGS DOCTRINE TO JUSTIFY AND FASHION STANDARDS OF REVIEW AND OTHER PRINCIPLES

In protecting the Constitution and its rights, powers, and limitations, the *Armstrong* doctrine must address the needs, manner, and range of the full set of standards of review and takings principles necessary to scrutinize and judge the plethora of takings claims arising under the Takings Clause.¹⁵⁹ In the nature of *Pennsylvania Coal* and its creation of regulatory takings theory, the *Armstrong* doctrine's genesis is unique to the Takings Clause and the protection of private property in a constitutional democracy because it bestows powers and imposes limitations on government policymaking and regulation.¹⁶⁰ The *Armstrong* doctrine goes to the heart of the Takings Clause and fulfills its purpose and intent by protecting the right to just compensation, including its abuse and misuse by government, as a means to protect property rights beyond the limits of the Due Process and Contract Clauses.¹⁶¹ In light of both *Penn Central* and *Pennsylvania Coal* and their predilection for giving greater weight and traditional deference to government judgment,¹⁶² the *Armstrong* doctrine still seeks to capture and weigh the public utility, economic impact, and personal worth of property rights against government policymaking that imposes new public obligations and creates new public benefits by redistributing public burdens in an emerging, competitive global economy and changing natural environment.¹⁶³ In reflecting on *Lucas*¹⁶⁴ and giving weight to the economics of private property, the *Armstrong* doctrine seeks

¹⁵⁷ See *supra* Part I.C.

¹⁵⁸ See *infra* Part III.B.

¹⁵⁹ U.S. CONST. amend. V, cl. 4; see *infra* Part IV.B (discussing the Court's use of the *Armstrong* doctrine in seven different factual examples in *Tahoe-Sierra Preservation Council*).

¹⁶⁰ U.S. CONST. amend. V, cl. 4; see *supra* Part I.C.

¹⁶¹ See *infra* Part III.C.

¹⁶² *Penn Cent. Transp. Co. v. New York City*, 438 U.S. 104 (1978); *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393 (1923); see *supra* note 16 and Part I.C (discussing the foundation of *Penn Central* and *Pennsylvania Coal* as deferential to the government, as compared to *Armstrong*'s foundation's focus on fairness and justice).

¹⁶³ *Armstrong v. United States*, 364 U.S. 40, 49 (1960); see *infra* Part III.B.

¹⁶⁴ *Lucas v. S.C. Coastal Council*, 505 U.S. 1003 (1992).

to accord economic use, value, expectations, and other values of private property proportionate weight in justifying and fashioning standards of review to protect the right to just compensation.¹⁶⁵ Yet, in a proportionate balance of shifting public and private burdens, the Holmesian value of private property can never be the sole or determinative factor in deferential scrutiny, intermediate scrutiny, strict scrutiny, or any other takings proposition applied to scrutinize government regulation and its objectives.¹⁶⁶ As for constitutional limitations and property interests other than economic value, the right of the Takings Clause is the right to receive just compensation,¹⁶⁷ and its purpose is to protect private property against unjust regulation and condemnation beyond the limits of the Due Process and Contract Clauses.¹⁶⁸

A. *Nature of Takings Limitations, Property Rights, and Their Uses*

Federal constitutional rights-based arguments best protect property rights when they invoke and protect the stature of the right to just compensation in takings disputes, thus directly involving broader Fifth Amendment limitations.¹⁶⁹ Takings and public use provisions are limitations on the exercise of government powers, and successful claims challenging takings and public use result in a remedy, either equitable or compensatory. When government takes property by regulation and condemnation, government directly triggers the right to just compensation, which is a right conditional on taking for public use.¹⁷⁰

Protecting the right to just compensation protects property rights by forcing government to weigh the costs of redistributing public burdens against gaining uncompensated benefits via government condemnation, regulation, contract, and other actions that are likely to take private property but which do not do so for a public use. The Court is not silent here. *Dolan*, *Lucas*, and *Nollan* protect the right to receive just compensation as an important constitutional right, and protect private property rights

¹⁶⁵ *Armstrong*, 364 U.S. at 49; see *infra* Part III.B.

¹⁶⁶ There must also be some consideration of the public interest that is involved. See Gregory Daniel Page, *Lucas v. S.C. Coastal Council and Justice Scalia's Primer on Property Rights: Advancing New Democratic Traditions by Defending the Tradition of Property*, 24 WM. & MARY ENVTL. L. & POLY REV. 161, 179 (2000).

¹⁶⁷ U.S. CONST. amend. V, cl. 4.

¹⁶⁸ See *infra* Part III.A.

¹⁶⁹ See *supra* Part I.B and accompanying notes (recognizing that two lines of takings cases exist, whereas one line has had successful arguments).

¹⁷⁰ U.S. CONST. amend V, cl. 4.

by imposing heightened scrutiny.¹⁷¹ Setting forth this Fifth Amendment protection, the Court made it abundantly clear that takings standards of review must rest on doctrine, either constitutional or common law, to protect the right to just compensation.¹⁷² In the aftermath of *Dolan*,¹⁷³ a few takings claims have sought greater protection for property rights and may not have fully implicated the need to protect the right to just compensation.¹⁷⁴ Obviously, a doctrinal approach would not be foreign to the Court in justifying, establishing, and fashioning standards of review and principles to protect private property rights by giving greater force to the right to receive just compensation of the Fifth Amendment.¹⁷⁵ The doctrinal approach recognizes that the right to receive just compensation, after *Dolan*,¹⁷⁶ may be slowly but surely returning to this lowly stature in the mix of fundamental and important rights.

Property rights are not fundamental constitutional rights, but are so ubiquitous that creating unbridled *per se* and heightened scrutiny tests threaten to decimate the takings, public use, and just compensation limitations of the Fifth Amendment.¹⁷⁷ Moreover, these loose or unstructured *per se* claims could easily threaten to paralyze the making of equitable and sustainable land use, economic development, and other policies under police and other powers, as almost everything is virtually private property and endowed with the same inalienable property rights. Property rights protect both real and personal property in the common law legal system. Their societal ubiquity does not mean that government is free to work its will by judicial logic, political rationality, or bureaucratic force. If government can take at will, the limitations of the Takings Clause are

¹⁷¹ *Dolan v. City of Tigard*, 512 U.S. 374 (1994); *Lucas v. S.C. Coastal Council*, 505 U.S. 1003 (1992); *Nollan v. Cal. Coastal Comm'n*, 483 U.S. 825 (1987).

¹⁷² See *supra* Part I.A and accompanying notes (discussing the use of common law and constitutional doctrine in justifying takings standards of review to protect property rights).

¹⁷³ *Dolan*, 512 U.S. at 374.

¹⁷⁴ See *Lingle v. Chevron U.S.A., Inc.*, 544 U.S. 528, 545 (2005) (refusing to apply heightened scrutiny or an intermediate standard of review to judge a rent control statute imposed on commercial property); see also *Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency*, 535 U.S. 302, 342 (2002) (refusing to apply heightened scrutiny or *per se* test to judge, if not eliminate, many moratoria or interim development controls on land use).

¹⁷⁵ See *Dolan*, 512 U.S. at 389 (applying the rough proportionality test as heightened scrutiny under established constitutional doctrine); see also *Lucas*, 505 U.S. at 1026–27 (applying a categorical *per se* test as heightened scrutiny under common law doctrine); see also *Nollan*, 483 U.S. at 837 (applying an essential nexus test as heightened scrutiny in the shadows of established constitutional doctrine).

¹⁷⁶ *Dolan*, 512 U.S. at 389.

¹⁷⁷ U.S. CONST. amend. V, cl. 4.

worthless to limit public use, contain takings, and ensure just compensation. In this regard, common law doctrine does not go far enough. Inversely, this looks as though giving protection, credence, or stature to private property rights protects the right to just compensation. If so, this would imply strongly a *Property Rights Clause* in the Constitution but would undermine the guarantees of the Due Process and Contract Clauses.¹⁷⁸ Therefore, constitutional doctrine is necessary to determine, justify, and fashion takings standards of review and principles for the use of heightened scrutiny, or for a *per se* test to protect what the Framers enumerated in the Constitution to protect property rights, and not what common law courts reasoned to protect feudal estates of real and personal property. The right to just compensation protects property rights under the Constitution, even though the right to just compensation exists solely as a means to further the interests of private property.

B. Need to Find and Establish Middle Ground in the Redistribution of Public Burdens

The provision of fairness and justice under the Takings Clause¹⁷⁹ goes far to support an underlying theoretical-analytical doctrine to justify standards of review and underpin takings principles. This doctrine can justify and reaffirm deferential, intermediate, or heightened scrutiny to protect the right to just compensation in securing or guaranteeing equitable legislative judgment and policymaking and permitting appropriate scrutiny and weighing of this judgment and policymaking by federal and state courts. In *Armstrong*, the Court held that the termination of a government contract by breach or default of a private contractor would not cut off materialmen's liens that attached to the delivery of construction materials during the performance of the contract for the United States Navy.¹⁸⁰ The Court concluded that materialmen's liens that attached to construction materials were property under Maine law with compensable value.¹⁸¹ The contractual rights of the United States that compelled transfer of the partially completed boats and unused materials to the United States did not terminate these liens, even though these liens could not be enforced against the United States.¹⁸² The lack of enforceability of the liens was a

¹⁷⁸ *But see Lucas*, 505 U.S. at 1029–30.

¹⁷⁹ U.S. CONST. amend. V, cl. 4; *see Armstrong v. United States*, 364 U.S. 40, 49 (1960).

¹⁸⁰ *Armstrong*, 364 U.S. at 48.

¹⁸¹ *Id.* at 46.

¹⁸² *Id.* at 46–47.

destruction of the liens,¹⁸³ and this destruction was a taking of private property for public use.¹⁸⁴ The Court noted that the means of taking by contract did not “reliev[e] the Government from its constitutional obligation to pay just compensation for the value of the liens the petitioners lost and of which loss the Government was the direct, positive beneficiary.”¹⁸⁵

Evidence of *Armstrong*'s foothold toward greater doctrinal substance to justify standards of review is found in Justice O'Connor's concurring opinion in *Palazzolo*,¹⁸⁶ but the advantage favored redistributing the burden borne by government policymaking to landowners by giving too much weight to past and present circumstances.¹⁸⁷ Quintessentially, *Armstrong*'s foothold toward greater doctrinal significance is Justice Stevens's majority opinion in *Tahoe-Sierra Preservation Council*, where Justice Stevens relied in part on Justice O'Connor's concurring opinion in *Palazzolo* to support a deferential review.¹⁸⁸ But, again the advantage favored government

¹⁸³ *See id.*

¹⁸⁴ *Id.* at 48. In *Armstrong*, Justice Black, writing for the majority, stated:

The total destruction by the Government of all value of these liens, which constitute compensable property, has every possible element of a Fifth Amendment “taking” and is not a mere “consequential incidence” of a valid regulatory measure. Before the liens were destroyed, the lienholders admittedly had compensable property. Immediately afterwards, they had none. This was not because their property vanished into thin air.

Id.

¹⁸⁵ *Id.* at 49.

¹⁸⁶ *Palazzolo v. Rhode Island*, 533 U.S. 606, 632–36 (2001) (O'Connor, J., concurring).

¹⁸⁷ *Id.*

¹⁸⁸ *Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency*, 535 U.S. 302, 334–35 (2002). Justice Stevens, writing for the majority, stated:

More importantly, for reasons set out at some length by Justice O'Connor in her concurring opinion in *Palazzolo v. Rhode Island*, 533 U.S., [sic] at 636, we are persuaded that the better approach to claims that a regulation has effected a temporary taking “requires careful examination and weighing of all the relevant circumstances.” . . . Her comments on the “fairness and justice” inquiry are, nevertheless, instructive:

“Today's holding does not mean that the timing of the regulation's enactment relative to the acquisition of title is immaterial to the *Penn Central* analysis. Indeed, it would be just as much error to expunge this consideration from the takings inquiry as it would be to accord it exclusive significance. Our polestar instead remains the principles set forth in *Penn Central* itself and our other cases that govern partial regulatory takings. Under these cases, interference with investment-backed expectations is one of a number of factors that a court must examine. . . .

policymaking facing future land use changes and relying on well-established land use policies.¹⁸⁹ Yet, the analytics and logic of *Tahoe-Sierra Preservation Council* and *Palazzolo*, which demand *Armstrong* justice and fairness but show no doctrinal calculus to determine, justify, and fashion a standard of review to weigh public burdens and regulatory circumstances, most often raise one or more questions regarding proportionality in the redistribution of public burdens and benefits.¹⁹⁰

In fundamental fairness and justice, the *Armstrong* doctrine must play a role in establishing standards of review. These standards weigh and measure whether the redistribution of public burdens and creation of benefits under government regulation are proportional to restrictions and limitations imposed on exercises of property rights in furthering public needs, notwithstanding reciprocity of advantages to the community

“The Fifth Amendment forbids the taking of private property for public use without just compensation. We have recognized that this constitutional guarantee is ‘‘designed to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole.’’ *Penn Central*, [438 U.S.], [sic] at 123–24 (quoting *Armstrong v. United States*, 364 U.S. 40, 49 (1960)). The concepts of ‘fairness and justice’ that underlie the Takings Clause, of course, are less than fully determinate.”

Id. at 335–36.

Notwithstanding Justice O’Connor’s reliance on the *Penn Central* inquiry, the thrust of our argument is that the indeterminate nature of *Armstrong* doctrine can only develop in takings jurisprudence when justice and fairness are treated as constitutional doctrine to justify, fashion, and establish a coherent body of takings standards of review and principles.

¹⁸⁹ *Id.* at 334–35. Justice Stevens, writing for the majority, stated:

With respect to these theories, the ultimate constitutional question is whether the concepts of “fairness and justice” that underlie the Takings Clause will be better served by one of these categorical rules or by a *Penn Central* inquiry into all of the relevant circumstances in particular cases. From that perspective, the extreme categorical rule that any deprivation of all economic use, no matter how brief, constitutes a compensable taking surely cannot be sustained. . . . A rule that required compensation for every delay in the use of property would render routine government processes prohibitively expensive or encourage hasty decisionmaking. Such an important change in the law should be the product of legislative rulemaking rather than adjudication.

Id.

Justice Stevens’s questions could be interpreted as asking whether the “fairness and justice” doctrine of *Armstrong* protects the right to just compensation as the only constitutional alternative remaining to protect private property rights from interim development controls that exist for a combined duration of thirty-two months.

¹⁹⁰ *Tahoe-Sierra Pres. Council*, 535 U.S. at 334–35; *Palazzolo*, 533 U.S. at 606; see *Armstrong*, 364 U.S. at 40.

as a whole. The ultimate need for the *Armstrong* doctrine in establishing standards of review and other takings principles is to protect the right to just compensation. Specifically, this need includes determining, justifying, and fashioning deferential, intermediate, and heightened scrutiny to find if the appropriate kind of proportionality exists in the distribution or redistribution of public burdens between property owners and government. Doctrinally, the *Armstrong* doctrine would determine the relevance, connection, or germaneness between the right to just compensation and government regulation in establishing more proportionate standards of review to weigh and measure the redistribution of public burdens.

Our emphasis on the right to just compensation is the complete or total reliance on the Framers' intent for the utility and capacity of federal constitutional limitations and rights, such as public use and just compensation, to protect property rights.¹⁹¹ Unequivocally, bare or naked property rights do not protect private property in constitutional *rights-limitations* regimes between property owners and governments, who are neither common law trespassers nor judges but legislative policymakers.¹⁹² Many of the public use, just compensation, and takings claims discussed *supra* appear to use or rely on the economic force and democratic nature of American property rights to justify the protection of private property.¹⁹³ However, the ubiquitous nature and importance of property rights under the Constitution counter this argument. The argument is circuitous, thus leaving attorneys to argue that property rights are valuable so they should be protected, when they also acknowledge or admit that just about everything is or could be property. So, do we give all property rights paramount protection under the Constitution, thus making capital (land) more important than books (knowledge)? Obviously not!

C. *Looking within the Takings Clause of the Fifth Amendment for Constitutional Doctrine*

The *Armstrong* doctrine gives real estate, land use, corporate, and other attorneys a way to protect property rights by advocating for greater protection of a federal constitutional right.¹⁹⁴ *Armstrong's* doctrinal approach is the use of constitutional doctrine to argue for protection of a constitutional right and limitation. This protection of a constitutional

¹⁹¹ William Michael Treanor, *The Original Understanding of the Takings Clause and the Political Process*, 95 COLUM. L. REV. 782, 785–97 (1995).

¹⁹² See *Kelo v. City of New London*, 545 U.S. 469 (2005).

¹⁹³ See *id.*; *Tahoe-Sierra Pres. Council*, 535 U.S. at 302; *Palazzolo*, 533 U.S. at 606.

¹⁹⁴ Jan C. Laitos, *Takings and Causation*, 5 WM. & MARY BILL RTS. J. 359, 362 (1997).

right secures the guarantees that protect private interests, such as private property rights.¹⁹⁵ Of course, government officials, policymakers, and their attorneys would benefit from the *Armstrong* doctrine's development of more stable standards of review and takings principles.¹⁹⁶ This argument uses what the Framers enumerated in the Constitution to grow, refine, and finally establish a body of constitutional doctrine to underlie and underpin the associated constitutional rights, and not forsake those rights that are difficult to apply in their development.¹⁹⁷

The impact of *Tahoe-Sierra Preservation Council*¹⁹⁸ and *Palazzolo*¹⁹⁹ on takings jurisprudence in the Rehnquist Court goes far to eliminate the confusion surrounding the three-prong analytical inquiry of *Penn Central*.²⁰⁰ In *Tahoe-Sierra Preservation Council*, the majority bestows on *Armstrong* greater constitutional purpose by using it to eliminate factual theories of regulatory takings disputes.²⁰¹ Even earlier, in a concurring opinion of *Palazzolo*, Justice O'Connor relied on *Armstrong* to justify greater weight for circumstances justifying or supporting burdensome government regulation.²⁰² Now, the *Armstrong* doctrine includes an examination of justice and fairness in the application of takings principles and touches upon the diminution of value and other principles underlying the three factors of the *Penn Central*²⁰³ inquiry.²⁰⁴ In *Tahoe-Sierra Preservation Council*, the Court went further than it did in *Palazzolo* and actually applied *Armstrong* doctrine to factual theories representing or illustrating various types of regulatory takings disputes.²⁰⁵

The jurisprudential question is whether the *Armstrong* fairness and justice doctrine broadly supports or shows enough basic fairness and justice in the aftermath of *Palazzolo* and *Tahoe-Sierra Preservation Council* to provide equity and process in judging takings claims.²⁰⁶

¹⁹⁵ *Id.* at 362.

¹⁹⁶ For example, "*Dolan* provided constitutional justifications for a higher standard of review for burdensome constitutional demands." Holloway & Guy, *supra* note 1, at 285.

¹⁹⁷ Laitos, *supra* note 194, at 362.

¹⁹⁸ *Tahoe-Sierra Pres. Council*, 535 U.S. 302 (2002).

¹⁹⁹ *Palazzolo v. Rhode Island*, 533 U.S. 606 (2001).

²⁰⁰ *Penn Cent. Transp. Co. v. New York City*, 438 U.S. 104, 138 (1978).

²⁰¹ *Tahoe-Sierra Preservation Council*, 535 U.S. at 326.

²⁰² *Palazzolo*, 533 U.S. at 632–36 (O'Connor, J., concurring).

²⁰³ *Penn Cent. Transp. Co.*, 438 U.S. at 138.

²⁰⁴ *See Tahoe-Sierra Pres. Council*, 535 U.S. at 333–34.

²⁰⁵ *Tahoe-Sierra Preservation Council*, 535 U.S. at 333–34; *see infra* Part IV.B and accompanying notes (discussing the use of *Armstrong* by Justices O'Connor and Stevens to support the application of a factual inquiry in *Tahoe-Sierra Preservation Council*).

²⁰⁶ *See* Holloway and Guy, *supra* note 1, at 237–38.

Armstrong doctrine must be constitutionally robust enough to support the takings theory and principles of *Pennsylvania Coal*²⁰⁷ and fertile enough to birth new standards and takings principles under the *Penn Central*²⁰⁸ inquiry. The outcome of this question means that any takings standards and principles that flow from *Armstrong's* application are a part of takings jurisprudence for an analytically decisive scrutiny of government means and ends, an analytically active economic effects analysis of economic impacts and financial expectations, and an analytically sensitive approach for determining just compensation. These standards and principles result in a burden on landowners under the Takings Clause.²⁰⁹ First, analytically decisive scrutiny determines whether the means, purposes, and objectives of government responses are proportionate and thus valid to further community interests.²¹⁰ Secondly, an analytically sensitive economic effects analysis determines, weighs, or considers basic economic theories and principles germane to determining whether land owners, developers, and others are enduring or bearing a disproportionately heavy private burden, namely the temporary loss of use, severe restrictions on use, or other economic effects.²¹¹ Third, an analytically sensitive approach to just compensation determines damages and equity by weighing land values and long standing communal and personal relationships and capturing the loss of community, aesthetics, place, and purpose in the creation of valuable public-private benefits.²¹² In sum, the ad hoc or pragmatic approach places much weight on land or real estate values under judicially crafted principles of ill defined markets²¹³ and often overlooks economic circumstances that should be weighed by courts to understand basic real estate, economic, and business thinking.²¹⁴

²⁰⁷ *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393 (1923).

²⁰⁸ *Penn Cent. Transp.*, 438 U.S. 104, 138 (1978).

²⁰⁹ U.S. CONT. amend. V, cl. 4; see Holloway and Guy, *supra* note 1, at 264.

²¹⁰ See Holloway and Guy, *supra* note 1, at 278 n.242.

²¹¹ See *id.* at 236–37.

²¹² *But cf. Lopez*, *supra* note 124, at 278–82 (discussing the longstanding tradition of using market value to determine damages).

²¹³ See *Palazzolo v. Rhode Island*, 533 U.S. 606, 630 (2001). Justice Kennedy, writing for a majority that included Chief Justice Rehnquist and Justices Scalia, O'Connor, and Thomas, permitted land value to mitigate a denial of economically viable use. *Id.* at 630. Justice O'Connor listed circumstances that should be weighed in determining land value in a claim involving an interference with reasonable investment-backed expectations. *Id.* at 632–36 (O'Connor, J., concurring). Justice Scalia noted that market circumstances should be given the greater weight. *Id.* at 636–37 (Scalia, J., concurring).

²¹⁴ For an example of a more market-sensitive evaluation, see *Cienega Gardens v. United States*, 331 F.3d 1319 (Fed. Cir. 2003). In *Cienega*, Congress passed acts restricting the pre-payment options of the mortgages of low-income housing development owners, allegedly

IV. EQUITY AND PROCESS SCRUTINY OF THE PRAGMATIC APPROACH TO FIT REGULATION TO CIRCUMSTANCES

This part discusses the use of the *Armstrong* fairness and justice doctrine by the Court under a pragmatic approach and shows the doctrine's capacity to address both economic and social needs and concerns of community policymaking. This part also discusses the need for a doctrinal constitutional underpinning for standards of review, including an ad hoc approach, running through Takings Clause jurisprudence.

A. *Armstrong Fairness and Justice Doctrine to Create Equity and Judicial Process in Reviewing Regulation*

In *Tahoe-Sierra Preservation Council*, the Court applied the *Armstrong* doctrine to determine if the facts fit one or more factual theories illustrating various types of regulatory takings disputes.²¹⁵ Of course, one Court decision may not create doctrine, but the intrigue of examining a Court-established precept that holds any potential of coalescing inconsistent precedents, confusing principles, and various standards of review of regulatory takings theory is too great to forsake. The *Armstrong* doctrine determines whether the public burden shared by government and landowners is *proportionate* under government regulatory and policy constraints and landowners' economic and social burdens.²¹⁶ The public burdens borne by property owners include the acceptance of obligations, hardships, and other incidents unique to their class, but these burdens

causing harm by prohibiting certain uses of the property. *Id.* at 1323–24. The Federal Circuit held that the “[o]wners’ loss of the contractual prepayment rights was both total and immediate. They were barred from the unregulated rental market and other more lucrative property uses.” *Id.* at 1344. In the related case of *City Line Joint Venture v. United States*, 503 F.3d 1319 (Fed. Cir. 2007), the Federal Circuit preferred to hear similar claims based on contract theory instead of as a takings claim, noting that the claimant had contracted with the government and that “a finding of privity of contract is to find a waiver of sovereign immunity.” *Id.* at 1322. The court declined to hear takings arguments until the breach of contract claim had been determined. *Id.* at 1323; *see also* Phillip Morris, Inc. v. Reilly, 312 F.3d 24 (1st Cir. 2002) (finding that, where a state law required tobacco companies to disclose their ingredient lists, the companies had reasonable investment-backed interests in their ingredients lists as trade secrets, and forced disclosure would effect a taking); *Franconia Assocs. v. United States*, 240 F.3d 1358 (Fed. Cir. 2001) (holding that a similar contractual issue between the federal government and a property owner involved a property interest and raised a takings issue), *rev'd on other grounds*, 536 U.S. 129 (2002).

²¹⁵ *Tahoe-Sierra Pres. Council v. Tahoe Reg'l Planning Agency*, 535 U.S. 302, 321 (2002).

²¹⁶ *Armstrong v. United States*, 364 U.S. 40, 49 (1960).

could be borne by the public under different obligations or compensation or both.²¹⁷ The public must share or retain a proportionate burden under the *Armstrong* doctrine, thus not externalizing constraints on fiscal and other resources.²¹⁸

Although *Tahoe-Sierra Preservation Council* gives insight into creating new takings doctrine by applying a takings precept to the broadest of factual patterns and substantive principles,²¹⁹ this application of the *Armstrong* doctrine by the Court could lead to an imbalance in the development of takings standards of review. This imbalanced development could favor deferential scrutiny and include the less heightened scrutiny of means, the still lesser scrutiny of ends analysis, and the least stringent scrutiny of economic effect analysis.²²⁰ In *Palazzolo*, Justice O'Connor used the *Armstrong* doctrine to justify the impact of past regulatory circumstances on an issue of takings liability.²²¹ In implicating an economic effects analysis, Justice O'Connor looked back at past circumstances in reasoning that the *Penn Central*²²² inquiry should weigh past regulatory schemes in determining liability and compensation for some takings claims.²²³ Obviously, real estate, financial, and economic principles, such as risk-return and market expectations, normally would not support totally denying or restricting any returns on investments held for decades by giving the original book value.²²⁴ Following Justice O'Connor's line of reasoning, the Court in *Tahoe-Sierra Preservation Council* applied *Armstrong* doctrine to examine the economic, regulatory, and policy circumstances and factual takings theories.²²⁵ In finding an inconsequential temporary burden, the Court saw no long-lasting economic impact.²²⁶ Yet,

²¹⁷ See Laitos, *supra* note 194, at 363.

²¹⁸ *Armstrong*, 364 U.S. at 40.

²¹⁹ See *Tahoe-Sierra Pres. Council*, 535 U.S. at 307–12, for a discussion of the facts.

²²⁰ See Holloway & Guy, *supra* note 1, at 246.

²²¹ See *Palazzolo v. Rhode Island*, 533 U.S. 606, 633 (2001) (O'Connor, J., concurring).

²²² *Penn Cent. Transp. Co. v. New York City*, 438 U.S. 104 (1978).

²²³ *Palazzolo*, 533 U.S. at 634–36.

²²⁴ Justice O'Connor specifically noted such investment-backed expectations in her concurrence in *Palazzolo*. *Id.* at 633–34.

²²⁵ *Tahoe-Sierra Pres. Council v. Tahoe Reg'l Planning Agency*, 535 U.S. 302, 335 (2002).

²²⁶ *Id.* at 341. In *Tahoe-Sierra Preservation Council*, Justice Stevens, writing for the majority, stated:

Moreover, with a temporary ban on development there is a lesser risk that individual landowners will be “singled out” to bear a special burden that should be shared by the public as a whole. At least with a moratorium there is a clear “reciprocity of advantage,” because it protects the interests of all affected landowners against immediate construction

some land use restrictions might become permanent, and would redistribute hardships and transfer benefits as increases in land value and aesthetics to other landowners.²²⁷ *Tahoe-Sierra Preservation Council* used the *Armstrong* doctrine to determine if *Lucas*'s²²⁸ *per se* approach should be applied to interim development controls or moratoria.²²⁹ In avoiding the reliance on doctrine, the Court's pragmatic approach included too little judicial process and not enough outcome equity in determining if moratoria or interim development controls were proportionate responses to the public burdens and restrictions on property rights of landowners.

B. Armstrong Fairness and Justice of the Per Se Approach in a Pragmatic Context

In *Tahoe-Sierra Preservation Council*, the Court applied *Armstrong* doctrine to seven factual theories to determine whether the doctrine supported finding a temporary regulatory taking in a temporary ban on the development of the land.²³⁰ The Court identified those theories that could be applied to determine whether the Tahoe Regional Planning Agency's ("TRPA") moratoria could be a regulatory taking under a set of factual theories squarely grounded in a complete set of takings standards of review and other important takings principles.²³¹ The underlying analytics of an illustrative application cannot be contained in fitting this set of factual theories to one regulatory taking. This seismic application is plainly more than the mere application of law to facts; nor is it simply the application of dicta. Many standards of review and other takings principles underpinning

that might be inconsistent with the provisions of the plan that is ultimately adopted. "While each of us is burdened somewhat by such restrictions, we, in turn, benefit greatly from the restrictions that are placed on others." In fact, there is reason to believe property values often will continue to increase despite a moratorium. . . . Such an increase makes sense in this context because property values throughout the Basin can be expected to reflect the added assurance that Lake Tahoe will remain in its pristine state. Since in some cases a 1-year moratorium may not impose a burden at all, we should not adopt a rule that assumes moratoria always force individuals to bear a special burden that should be shared by the public as a whole.

Id. (citation omitted).

²²⁷ See Holloway & Guy, *supra* note 1, at 291 (briefly explaining other economic and aesthetic benefits of the moratoria on surrounding land values and the community).

²²⁸ *Lucas v. S.C. Coastal Council*, 505 U.S. 1003 (1992).

²²⁹ See *Tahoe-Sierra Pres. Council*, 535 U.S. at 333.

²³⁰ *Id.* at 333-34.

²³¹ *Id.*

these factual theories do not show much success in challenging government responses to private actions, such as real estate development. These standards and principles also do not indicate viable takings or substantive doctrine—presently resting on less viable constitutional and common law thinking²³²—to determine and justify narrow, weak, or inchoate standards of review and principles.

The Court's seven factual theories show the ad hoc nature of developing regulatory takings theory in search of deferential or bright-line tests, rather than sound takings doctrine to determine, justify, and fashion standards and other principles capable of determining proportionate government responses in light of the right to just compensation.²³³ The Court's seven theories include the following: (1) a categorical or *per se* regulatory taking, (2) a temporary taking, (3) a short delay of less than five years causing a taking, (4) a rolling moratoria causing a taking, (5) a longer delay of more than five years causing a taking, (6) challenging a regulation before its application in a facial takings challenge, and (7) challenging a regulation after its application as an as-applied taking.²³⁴ The seven factual theories include different regulations that are subjected to different takings standards of review²³⁵ to accord protection to the right to just compensation, which, in turn, protects property rights. The Court has found only one *per se* or categorical taking²³⁶ and a burdensome, but usually long, delay of more than five years to be regulatory taking.²³⁷ Both theories included government responses that imposed extreme public burden and economic impact, but the Court applied entirely different standards of review in both takings claims.²³⁸

In *Tahoe-Sierra Preservation Council*, the *Lucas*, or *per se* taking, was the standard of review and narrow takings claim that landowners were requesting the Court to apply, on the theory that these landowners suffered a *per se* takings in that all economically viable use had been denied

²³² See *supra* Part II.A and accompanying notes (discussing the more modern unconstitutional conditions doctrine and the antiquated common law prohibitions, where both have shown little sustainable success in protecting private property rights from regulatory restrictions); see also Holloway & Guy, *supra* note 1, at 264–68 (discussing the factual theories that the Court set forth in *Tahoe-Sierra Preservation Council*).

²³³ See *Tahoe-Sierra Preservation Council*, 535 U.S. at 322 (quoting Penn Cent. Transp. Co. v. City of New York, 438 U.S. 104, 124 (1978)).

²³⁴ See *id.* at 333–34.

²³⁵ *Id.* at 334–42.

²³⁶ *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1019 (1992).

²³⁷ *City of Monterey v. Del Monte Dunes at Monterey, Ltd.*, 526 U.S. 687, 698 (1999).

²³⁸ Compare *Lucas*, 505 U.S. at 1019, with *Del Monte Dunes*, 526 U.S. at 698.

for a duration of three years.²³⁹ The first and second theories discussed by the Court involved *Lucas*²⁴⁰ and *First English*,²⁴¹ demonstrating a strict standard and takings principles, respectively.²⁴² The property owners had coupled the concept of *Lucas per se* takings, which is only applied to takings claims involving a denial of all economically viable use,²⁴³ with *First English*'s temporary taking theory²⁴⁴ to create a claim for a temporary *per se* taking.²⁴⁵ *Lucas* was a *per se* taking that was a total denial of all beneficial or economically viable use.²⁴⁶ *First English* concluded that a landowner can receive just compensation as a remedy for a temporary taking by regulation;²⁴⁷ it did not conclude that a temporary taking existed on the facts before it and thus included no findings of a temporary taking under any standard of review. In the end, the suggestion of a temporary *per se* taking was not successful in *Tahoe-Sierra Preservation Council*.²⁴⁸ *Lucas* represents a *per se* or categorical standard of review that determines the existence of takings only where a regulation denies all economically viable use.²⁴⁹ *First English* is simply a type of taking based on the duration of the government's response and depends on other standards of review to determine the exact takings that the duration would create.²⁵⁰

²³⁹ *Tahoe-Sierra Pres. Council*, 535 U.S. at 306.

²⁴⁰ *Lucas*, 505 U.S. at 1019.

²⁴¹ *First English Evangelical Lutheran Church of Glendale v. County of Los Angeles*, 482 U.S. 304 (1987).

²⁴² *Lucas* concerned the extraordinary situation of a regulation permanently ending all productive use of a piece of property, and *First English* considered the question of the appropriateness of a takings remedy to compensate a temporary taking.

²⁴³ *Lucas*, 505 U.S. at 1019.

²⁴⁴ *First English*, 482 U.S. at 318.

²⁴⁵ See *Tahoe-Sierra Preservation Council*, 535 U.S. at 341–42.

²⁴⁶ *Lucas*, 505 U.S. at 1019.

²⁴⁷ See *First English*, 482 U.S. at 321.

²⁴⁸ *Tahoe-Sierra Pres. Council*, 535 U.S. at 341–42.

²⁴⁹ See *Lucas*, 505 U.S. at 1019.

²⁵⁰ *First English*, 482 U.S. at 321. Specifically, in *First English*, Chief Justice Rehnquist, writing for the majority, stated:

We merely hold that where the government's activities have already worked a taking of all use of property, no subsequent action by the government can relieve it of the duty to provide compensation for the period during which the taking was effective.

We also point out that the allegation of the complaint which we treat as true for purposes of our decision was that the ordinance in question denied appellant all use of its property. We limit our holding to the facts presented, and of course do not deal with the quite different questions that would arise in the case of normal delays in obtaining

The *Lucas* and *First English* theories were eliminated by the Court in *Tahoe-Sierra Preservation Council* when the Court rejected a temporary *per se* taking of private property for the duration of the moratoria.²⁵¹

The third and fourth takings theories examined by the *Tahoe-Sierra Preservation Council* Court involved a takings claim that had been decided by a deferential standard of review,²⁵² and would not have survived constitutional muster under the Court's application of *Armstrong* doctrine.²⁵³ An extreme example of a *Del Monte Dunes*-type takings claim would be a short but burdensome delay in approving development permits,²⁵⁴ when the results of the delay are similar to the five-year duration of the delay in *Del Monte Dunes*.²⁵⁵ Federal or state courts would have more likely applied a deferential standard of review and a weakened economic effects analysis under the deferential *Penn Central* inquiry.²⁵⁶ Next, in the

building permits, changes in zoning ordinances, variances, and the like which are not before us.

Id.

²⁵¹ See *Tahoe-Sierra Preservation Council*, 535 U.S. at 332. The Court stated:

Neither *Lucas*, nor *First English*, nor any of our other regulatory takings cases compels us to accept petitioners' categorical submission. In fact, these cases make clear that the categorical rule in *Lucas* was carved out for the "extraordinary case" in which a regulation permanently deprives property of all value; the default rule remains that, in the regulatory taking context, we require a more fact specific inquiry.

Id.

²⁵² See *City of Monterey v. Del Monte Dunes at Monterey, Ltd.*, 526 U.S. 687, 702–03 (1999) (rejecting the heightened scrutiny established in *Dolan* to review land dedication conditions).

²⁵³ See *Tahoe-Sierra Preservation Council*, 535 U.S. at 332–33 & n.27.

²⁵⁴ See *Del Monte Dunes*, 526 U.S. at 721–22. In *Del Monte Dunes*, Justice Kennedy, writing for the majority, stated:

Our decision is also circumscribed in its conceptual reach. The posture of the case does not present an appropriate occasion to define with precision the elements of a temporary regulatory takings claim; although the city objected to submitting issues of liability to the jury at all, it approved the instructions that were submitted to the jury and therefore has no basis to challenge them.

.....

Rather, to the extent *Del Monte Dunes*' challenge was premised on unreasonable governmental action, the theory argued and tried to the jury was that the city's denial of the final development permit was inconsistent not only with the city's general ordinances and policies but even with the shifting ad hoc restrictions previously imposed by the city.

Id.

²⁵⁵ *Id.* at 698 (finding a duration of approximately five years).

²⁵⁶ See *id.* at 754 (finding that while the submission of narrow questions of fact to the jury

longer *Del Monte Dunes* claim, the heightened scrutiny was rejected and a deferential *Penn Central* inquiry was applied to an as-applied takings claim,²⁵⁷ but the Court found a regulatory takings only after the government response resulted in an extraordinary five-year delay in developing the land.²⁵⁸ In fact, the landowner eventually sold the property to the state during the pendency of the litigation.²⁵⁹ Any as-applied takings challenge to these moratoria would not have been successful with such a limited economic impact.

The fifth, sixth, and seventh theories enumerated in *Tahoe-Sierra Preservation Council* include takings standards and other principles.²⁶⁰ *Agins* was a facial challenge, which is not always successful.²⁶¹ Facial takings claims have an inherently heavy burden to overcome in proving the existence of regulatory takings on the faces of ordinances or statutes.²⁶² They are not always successful in their uphill battle against a government regulation that has not yet been applied to an actual site.²⁶³ *Tahoe-Sierra Preservation Council* was a facial challenge and suffered the same fate as *Agins*.²⁶⁴ Next, the Court looked at *Penn Central* as an as-applied challenge

is appropriate, with respect to whether a body has acted in accordance with its own ordinances, the question is better put to a judge as a matter of law).

²⁵⁷ *Id.* at 702–03.

²⁵⁸ *Id.* at 698. In *Del Monte Dunes*, the Court stated:

In short, the question submitted to the jury on this issue was confined to whether, in light of all the history and the context of the case, the city's particular decision to deny Del Monte Dunes' final development proposal was reasonably related to the city's proffered justifications. This question was couched, moreover, in an instruction that had been proposed in essence by the city, and as to which the city made no objection.

Thus, despite the protests of the city and its *amici*, it is clear that the Court of Appeals did not adopt a rule of takings law allowing wholesale interference by judge or jury with municipal land-use policies, laws, or routine regulatory decisions. To the extent the city argues that, as a matter of law, its land-use decisions are immune from judicial scrutiny under all circumstances, its position is contrary to settled regulatory takings principles. We reject this claim of error.

Id. at 706–07.

²⁵⁹ *Del Monte Dunes*, 526 U.S. at 701–02.

²⁶⁰ *Tahoe-Sierra Pres. Council v. Tahoe Reg'l Planning Agency*, 535 U.S. 302, 333–34 (2002).

²⁶¹ *Agins v. City of Tiburon*, 447 U.S. 255 (1980).

²⁶² *See id.* at 262 (holding that to have a successful facial challenge, litigants must prove that the regulations either “prevent the best use of [their] land” or “extinguish a fundamental attribute of ownership”).

²⁶³ *See id.* at 260.

²⁶⁴ *See id.*; *Tahoe-Sierra Pres. Council*, 535 U.S. at 302.

that was not a successful takings claim under the Takings Clause.²⁶⁵ The application of *Penn Central* has often accorded much deference to government and found insufficient economic hardships or other effects in assessing the public burdens borne by landowners under regulatory takings claims.²⁶⁶ Finally, the use of rolling moratoria to limit development in a community would most likely not survive the deferential scrutiny of the *Penn Central*²⁶⁷ inquiry or its application to the extraordinarily long delay of *Del Monte Dunes* with its weak consideration of economic impact, value, and expectations.²⁶⁸ In sum, the Court rarely finds a regulatory taking under the *Penn Central*²⁶⁹ deferential inquiry in light of the *Agins* uphill facial challenge,²⁷⁰ and *Del Monte Dunes* exceptionally long delay.²⁷¹ The Court subjects these claims to deferential scrutiny and weak economic effect analysis to review government regulation, namely ordinances and statutes.²⁷²

One must ask whether the facial and as-applied takings claims fully addressed the redistribution of public burdens challenged under the various factual theories of regulatory takings. We doubt so. The doctrinal role of *Armstrong* is patently obvious in light of the genesis of regulatory takings doctrine in *Pennsylvania Coal*.²⁷³ Why? The Court has proffered little or no inherent takings doctrine that would justify the appropriate level of scrutiny applied in deferential and narrow takings standards of review under the Takings Clause. In addition, the Court has proffered mostly a *Penn Central*²⁷⁴ inquiry and no other underlying takings doctrine that would justify piecemeal takings principles or their applications to analyze and weigh regulatory, policy, and economic circumstances and constraints accompanying various government responses.²⁷⁵

²⁶⁵ *Penn Cent. Transp. Co. v. New York City*, 438 U.S. 104, 104 (1978).

²⁶⁶ See *Holloway & Guy*, *supra* note 1, at 234.

²⁶⁷ See *Penn Cent. Transp. Co.*, 438 U.S. at 135–37 (declaring *Penn Central*'s Takings claim unsuccessful on the economic impact and investment-backed expectations issues).

²⁶⁸ See *City of Monterey v. Del Monte Dunes at Monterey, Ltd.*, 526 U.S. 687, 717–18 (1999) (illustrating a successful takings claim, but only a recovery of money damages to compensate for an unconstitutional denial of just compensation).

²⁶⁹ See *Penn Cent. Transp. Co.*, 438 U.S. at 104.

²⁷⁰ See *Agins v. City of Tiburon*, 447 U.S. 255 (1980).

²⁷¹ See *Del Monte Dunes*, 526 U.S. at 687; see *Holloway & Guy*, *supra* note 1, at 234.

²⁷² See *Holloway & Guy*, *supra* note 1, at 238.

²⁷³ *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393 (1922).

²⁷⁴ *Penn Cent. Transp. Co.*, 438 U.S. at 104.

²⁷⁵ See, e.g., *Del Monte Dunes*, 526 U.S. at 687; *Dolan v. City of Tigard*, 512 U.S. 374 (1994); *Lucas v. S.C. Coastal Council*, 505 U.S. 1003 (1992).

C. *Too Much Reliance on Deference and Single Circumstance to Justify Proportionality*

These theories and disputes are underlain by, if not illustrative of, the complete range of standards of review and several takings principles of the Takings Clause. These theories are underlain by legislative deference,²⁷⁶ problematic constitutional doctrine,²⁷⁷ and overused common law doctrine.²⁷⁸ This particular application of the *Armstrong* doctrine analyzed dissimilar underlying analytical frameworks of these factual theories and sought some abstruse connection to fit to the facts at hand in *Tahoe-Sierra Preservation Council*. Here, the use of the *Armstrong* doctrine came close to employing a jurisprudential analysis akin to the *Lucas* and *Dolan* analytics.²⁷⁹ The Court's analysis failed when it relied too

²⁷⁶ See, e.g., *Penn Cent. Transp. Co.*, 438 U.S. at 124–25 (applying a deferential standard to determine if regulation has gone too far). In *Penn Central*, the Court found that:

In engaging in these essentially ad hoc, factual inquiries, the Court's decisions have identified several factors that have particular significance. The economic impact of the regulation on the claimant and, particularly, the extent to which the regulation has interfered with distinct investment-backed expectations are, of course, relevant considerations. So, too, is the character of the governmental action. A "taking" may more readily be found when the interference with property can be characterized as a physical invasion by government than when interference arises from some public program adjusting the benefits and burdens of economic life to promote the common good.

"Government hardly could go on if to some extent values incident to property could not be diminished without paying for every such change in the general law," and this Court has accordingly recognized, in a wide variety of contexts, that government may execute laws or programs that adversely affect recognized economic values. Exercises of the taxing power are one obvious example. A second are the decisions in which this Court has dismissed "taking" challenges on the ground that, while the challenged government action caused economic harm, it did not interfere with interests that were sufficiently bound up with the reasonable expectations of the claimant to constitute "property" for Fifth Amendment purposes.

Id. at 124–25 (citation omitted).

The Court's reliance on *Pennsylvania Coal* and wide legislative discretion in zoning and other regulation shows much deference for government policies and regulations furthering legislative purposes and objectives of public interests.

²⁷⁷ See *Dolan*, 512 U.S. at 385–86 (applying the unconstitutional conditions doctrine that had been used during the substantive due process era).

²⁷⁸ See, e.g., *Lucas*, 505 U.S. at 1027 (applying common law reasoning that certain lands were not restricted by common law principles and rules of real property and nuisance).

²⁷⁹ Compare *Tahoe-Sierra Pres. Council v. Tahoe Reg'l Planning Agency*, 535 U.S. at 302 (2002), with *Lucas*, 505 U.S. at 1003, and *Dolan*, 512 U.S. at 374.

heavily on an inductively pragmatic or practical approach that favored giving deference to government and relying on a single takings proposition or principle, such as diminution of value, to avoid disrupting government processes.²⁸⁰ With a full set of takings standards of review and several takings principles as the backdrop, the Court differentiated and eliminated several standards and principles to show why it should not apply or create a categorical *per se* test.²⁸¹ However, the Court left intact an exercise of government power and economic circumstances mostly free of the remedial limitation, namely the right to receive just compensation.²⁸²

The Court applied the *Armstrong* doctrine, but its practical or pragmatic approach skewed the *Armstrong* analytical framework to favor less rigorous or less direct scrutiny of questionable regulatory, policy, market, and economic circumstances. Justifying and fashioning a deferential standard under the *Armstrong* doctrine in all or most circumstances will fail to guarantee just compensation and its protection of property rights. In *Tahoe-Sierra Preservation Council*, the Court concluded that the burdens imposed on government's land use practices, policies, and policymaking through government's use of moratoria to redistribute public burdens and benefits would be too great.²⁸³ The Court permits government to redistribute public burdens to landowners and permits burdensome government regulation of use and development by relying on practical or pragmatic reasons for favoring deferential scrutiny.²⁸⁴ The choice between *per se* and deferential scrutiny in *Tahoe-Sierra Preservation Council* that was put forth by the Court²⁸⁵ is begging the question of whether the need to protect the right to just compensation, the guarantor of fairness and justice, would be better served by deferential, intermediate, or *per se* scrutiny. Naturally, the *Armstrong* analytical framework should have included protecting the right to just compensation, and if the moratoria undermine this guarantee to landowners, then the nature of connection or relevance between the right to just compensation and the moratoria would have determined the type or nature of the standard of review. In weighing germaneness, the impact on policies and policymaking of government

²⁸⁰ See *Tahoe-Sierra Pres. Council*, 535 U.S. at 302.

²⁸¹ *Id.*

²⁸² *Id.* at 313.

²⁸³ *Id.* at 335–41. The Court was hesitant to impose an unnecessary burden on “informed decisionmaking by regulatory agencies.” *Id.* at 338–39. The Court also sought to limit takings analysis to fewer policy and regulatory circumstances. *Id.* at 335–38.

²⁸⁴ See, e.g., *id.* at 315.

²⁸⁵ *Id.* at 334.

processes and procedures²⁸⁶ should be among the facts, forces, and circumstances to be analyzed and weighed by the Court. The fact that a *per se* test would render normal government operations costly and make public policy or decision making hasty²⁸⁷ should not be determinative, but weighed in the mix of other circumstances likely to determine germaneness, so as to avoid skewing the analytical framework.

The Court in *Tahoe-Sierra Preservation Council* applied *Armstrong* doctrine, but left intact an outcome-determinative or overly relaxed standard of review and almost outcome-determinative takings principles.²⁸⁸ The Court applied *Armstrong* doctrine to reach a conclusion that greatly favored the *Penn Central* inquiry's reliance on value or another circumstance as determinative of the economic outcome of impact or investment-backed expectations.²⁸⁹ Justice Stevens's analysis and reasoning rest on Justice O'Connor's concurring opinion in *Palazzolo*, in which she proffers that the Court should rely on a case-by-case analysis,²⁹⁰ which is fact-intensive and includes time and other circumstances, as the best analytical approach.²⁹¹ Property values or duration of moratoria are circumstances that should rarely be a determinative factor under *Armstrong* doctrine.²⁹² Moreover, the *per se* approach applied to economic circumstances and transactions not foreseen or weighed by markets and policymaking shows the Court's inability to deal with the Framers' patented lack of clairvoyance and Court's own inability to use foresight. The Court applied the *Armstrong*

²⁸⁶ See *Tahoe-Sierra Pres. Council*, 535 U.S. at 337–38.

²⁸⁷ See *id.* at 335. However, Justice Holmes in *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393 (1922), warned the Court against weighing too heavily the difficulty imposed on government when it intentionally or unintentionally destroys property rights. He stated: “We are in danger of forgetting that a strong public desire to improve the public condition is not enough to warrant achieving the desire by a shorter cut than the constitutional way of paying for the change.” *Id.* at 416. In *Tahoe-Sierra Preservation Council*, the Court placed great weight on the burden borne by government and forced landowners near Lake Tahoe to shoulder the weight of this burden temporarily. *Tahoe-Sierra Pres. Council*, 535 U.S. at 302. This redistribution does not cause government to be more efficient in using resources or more effective in achieving policy objectives, and thus will permit future unnecessary bans on development to exist. Such temporary states of inactivity do not seem to be consistent with *Armstrong*. See *infra* Part V.A and accompanying notes.

²⁸⁸ *Tahoe-Sierra Pres. Council*, 535 U.S. at 302.

²⁸⁹ See *id.* at 321.

²⁹⁰ *Id.*

²⁹¹ *Id.* at 335 (citing *Palazzolo v. Rhode Island*, 533 U.S. 606, 636 (2001) (O'Connor, J., concurring)).

²⁹² See, e.g., *id.* at 337 (“[W]e do not hold that the temporary nature of a land-use restriction precludes finding that it effects a taking; we simply recognize that it should not be given exclusive significance one way or the other.”).

doctrine to weigh policy, economic, and regulatory circumstances in a facial challenge, but saved established regulation and decision-making processes, and ignored economic circumstances and protection from government powers by permitting the redistribution of public burdens to landowners.²⁹³

V. RELYING ON DOCTRINE TO TEST MEANS AND ENDS OF ESTABLISHED POLICIES

This part discusses the need to rely on firm constitutional doctrine to test means and ends of distributing and redistributing the public burdens and benefits of community policy-making for economic, political, and social programs. *Armstrong* fairness and justice doctrine is more than takings dicta that illuminates or illustrates the purpose of the Takings Clause. This doctrine can go much further to protect the right to just compensation that protects private property rights. Foremost, *Armstrong* fairness and justice doctrine should weigh the need for more judicial scrutiny, both process and equity, in the fashioning and applying standards of review and other takings principles in regulatory takings and other claims resolved under the Takings Clause.

A. *Supporting Armstrong and Its Application as a Doctrinal Approach*

The *Armstrong* doctrine must guide federal and state courts in justifying standards of review and fashioning takings standards of review and principles. Federal and state courts need standards and principles to determine the weight or substantiality of landowner's burdens, economic effects, public interests, and community benefits in redistributing old and distributing new public burdens to landowners and communities. These courts need standards of review to weigh the nature of a "proportional response" to the risk of public harm²⁹⁴ in protecting the right to just compensation from government actions furthering public ends, even the indirect benefits or objectives. *Armstrong* doctrine can recalibrate existing

²⁹³ *Id.* at 337–38. The Court made several observations and findings to support its conclusion. Excluding normal delays under a *per se* rule "would still impose serious financial constraints on the planning process," and interim development controls are an "essential tool of successful development." *Id.* at 337–38. The *per se* or categorical rule ignored the "good faith of the planners, the reasonable expectations of the landowners, or the actual impact of the moratorium on property values." *Id.* at 338.

²⁹⁴ See *Tahoe-Sierra Pres. Council*, 535 U.S. at 314 n.9.

analytical frameworks that permit most any regulation or response to survive constitutional muster by using most any doctrine or substance to weigh mostly economic effects and other regulatory circumstances.

The application of *Armstrong* doctrine in *Tahoe-Sierra Preservation Council* appears as mostly a pragmatic analytical framework to determine whether moratoria are *per se* takings²⁹⁵ but comes to full fruition in justifying, establishing, and fashioning any standard of review when the Court assumes government judgment is mostly sacrosanct under all circumstances involving the right to just compensation.²⁹⁶ The Court relied on the need to maintain conclusive policy-making and regulatory stability, thus placing greater weight on the need to make and enforce land use controls and other regulations.²⁹⁷ Following the theory of *Pennsylvania Coal*²⁹⁸ to the most prescriptive outcome by giving the greater weight to stable policymaking and policies avoids the need to draw any connection to the protection of the right to just compensation.²⁹⁹ Narrowly, this only shows the application or fit of a *Lucas per se* approach to a moratorium.³⁰⁰ In fact, this policymaking advantage creates a virtually inactive right to just compensation by subjecting it to a judicial process with little or no equity for the loss of property rights.³⁰¹

In *Tahoe-Sierra Preservation Council*, the dissent found the duration of the ban to be much longer than did the majority, but the dissent offered no new doctrine to deal with new burdens of development and scarcity, other than similarity to a past physical taking.³⁰² The dissent consisted

²⁹⁵ *Id.* at 339–41.

²⁹⁶ See *supra* Part VI.A and accompanying notes (discussing the imbalance in the weight assigned to government judgment and property rights that are limited and secured, respectively, by the right to just compensation).

²⁹⁷ See *Tahoe-Sierra Preservation Council*, 535 U.S. at 339–41.

²⁹⁸ *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393 (1922).

²⁹⁹ *Tahoe-Sierra Pres. Council*, 535 U.S. at 325–26.

³⁰⁰ *Id.* at 326.

³⁰¹ See Lopez, *supra* note 124, at 278–82 (finding the right to just compensation to be ineffective under the Court's takings jurisprudence giving deference to city and state governments). In determining the standard of review for some policies and regulations, theoretical-analytical doctrine may also justify a deferential review or general proposition to further government's judgment to protect underrepresented classes and groups in urban and rural communities. See J. Peter Bryne, *Condemnation of Low Income Residential Communities Under the Takings Clause*, 23 UCLA J. ENVTL. L. & POL'Y 131, 136–38 (2005) (finding the need for a deferential review to support low-income residents in urban neighborhoods, but advocating a broader interpretation of just compensation would be more encompassing).

³⁰² *Tahoe-Sierra Pres. Council*, 535 U.S. at 343, 348 (Rehnquist, C.J., dissenting).

of Chief Justice Rehnquist and Justices Scalia and Thomas, and found that the ban on all development lasted almost six years and did not appear to be traditional land use policymaking.³⁰³ Doctrinally, the dissent would have relied on physical takings doctrine and principles to establish a temporary taking of possession and use by government, as in a leasehold or rental period.³⁰⁴ The dissent relied on physical takings doctrine and its *per se* approach to justify applying *Lucas's per se* approach that is underpinned by only common law doctrine operating to limit the power of the state to protect the right to just compensation.³⁰⁵ Simply put, the dissent placed greater weight on the duration of the ban and its resemblance to a physical taking.³⁰⁶ The dissent relied on more constitutional doctrine and invoked and rested on common law doctrine.³⁰⁷ However, *Armstrong* doctrine offers substance, analysis, and reasoning to justify a *per se* or deferential analysis, and does not assess whether a *per se* test fits a set of facts.³⁰⁸

B. Recognizing the Doctrinal Downside of Relying on Ad Hoc Inquiry and Pragmatic Approach

The *Armstrong* doctrine ascertains whether the purpose of the Takings Clause would be fulfilled by increasing or decreasing the level of scrutiny courts apply to economic circumstances and policy influences of property ownership and government policymaking.³⁰⁹ The *Armstrong* doctrine of *Tahoe-Sierra Preservation Council* appears more pragmatic in its analytical framework to resolve whether a particular taking is *per se* or not under a particular regulatory scheme.³¹⁰ Foremost, *Armstrong* analysis includes an unavoidable scrutiny of the redistribution of particular public burdens.³¹¹ However, *Armstrong* doctrine is a double-edged blade and cuts both ways. This doctrine can never accord lesser weight to any public burden borne by government, even if the magnitude of the public

³⁰³ *Id.* at 343.

³⁰⁴ *Id.* at 346–48.

³⁰⁵ *Id.* at 349–51.

³⁰⁶ *See id.* at 343, 348.

³⁰⁷ *Id.* at 343.

³⁰⁸ *See* Holloway & Guy, *supra* note 1, at 268–69.

³⁰⁹ *Tahoe-Sierra Pres. Council*, 535 U.S. at 335–41; *see also* Holloway & Guy, *supra* note 1, at 263–64.

³¹⁰ *See* Holloway & Guy, *supra* note 1, at 268–70.

³¹¹ *See* *Armstrong v. United States*, 364 U.S. 40, 49 (1960).

inconvenience would be costly under the Takings Clause.³¹² Ignoring problematic or troublesome public burdens under any standards of review allows government to avoid the payment of just compensation, thus precipitating a gradual destruction of private property rights by undermining the right to just compensation.

When federal courts cannot totally agree or precisely determine the nature of government actions, such as length of duration or nature of the public burden,³¹³ under any analytical framework for a regulatory takings analysis, the takings standard of review or principle applied by these courts cannot necessarily defer to the government policymakers. This deference would be tantamount to siding with the thief when the stolen property is consumed or destroyed by the thief for a personal or public benefit. The *Armstrong* Court identified one of its concerns regarding government actions erosive to personal property:

It is true that not every destruction or injury to property by governmental action has been held to be a “taking” in the constitutional sense. This case and many others reveal the difficulty of trying to draw the line between what destructions of property by lawful governmental actions are compensable “takings” and what destructions are “consequential” and therefore not compensable.³¹⁴

A default to deference clearly is not *Armstrong*. The *Armstrong* doctrine must create standards of review and takings principles that can separate the incidental and insubstantial burdens, and effects of government actions from more disproportionate actions or responses regulating traditional exercises of private property. The *Armstrong* doctrine must include analytical capability and substantive force to guide and control the growth and development of Holmesian analytics and substance of regulatory takings theory.³¹⁵

C. *Recognizing the Burdens and Benefits Distributed under Regulation*

The *Armstrong* doctrine justifies standards of review and principles to scrutinize and judge, respectively, a “valid regulatory measure”

³¹² See Holloway & Guy, *supra* note 1, at 290.

³¹³ See *Tahoe-Sierra Pres. Council*, 535 U.S. at 343 (Rehnquist, C.J., dissenting).

³¹⁴ *Armstrong*, 364 U.S. at 48 (citation omitted).

³¹⁵ Holloway & Guy, *supra* note 1, at 288–89.

that causes a loss of value, profit, or other interest that amounts to more than incidental redistribution of public burdens and creation of public benefits.³¹⁶ The *Armstrong* doctrine justifies standards of review and principles to scrutinize and judge, respectively, a “valid regulatory measure” that makes government the “direct, positive beneficiary” of a ban on development and use restriction.³¹⁷ These standards determine if the public burdens redistributed to landowners and the benefits received by government are more than a “mere ‘consequential incidence.’”³¹⁸

Tahoe-Sierra Preservation Council illustrates how government regulation, namely the moratorium, redistributes burdens and benefits to the government, community, and landowners.³¹⁹ Preserving Lake Tahoe is a worthy cause, but its preservation preserves natural resources, namely the lake and its watershed and water quality, thus conveying public benefits and business advantages to government, landowners, and the community, and leaving other landowners with entirely new public burdens and private hardships.³²⁰ The government moratoria preserving Lake Tahoe maintain substantial aesthetic, social, and economic benefits that will not be most beneficial to landowners who had their property rights temporarily banned, permanently restricted, or totally destroyed by the moratorium on development.³²¹ *Tahoe-Sierra Preservation Council* relies on the *Armstrong* doctrine in determining if an equitable redistribution of burdens, and if sufficient judicial process to scrutinize this redistribution, took place in conferring supposedly inconsequential benefits and advantages on the public and landowners.³²² *Tahoe-Sierra Preservation Council*'s somewhat pragmatic approach in relying on *Armstrong* is not mistaken, but misapplied by the Court.³²³

VI. CONSTITUTIONAL CONTEXT FOR TRIGGERING AND APPLYING ARMSTRONG DOCTRINE

Part VI discusses the need for unique takings doctrine to address concerns regarding the distribution of public burdens and benefits via

³¹⁶ *Armstrong*, 364 U.S. at 48.

³¹⁷ *Id.*

³¹⁸ *Id.*

³¹⁹ See *Tahoe-Sierra Pres. Council*, 535 U.S. 302 (2002).

³²⁰ See Holloway & Guy, *supra* note 1, at 291.

³²¹ See *Tahoe-Sierra Pres. Council*, 535 U.S. at 341; see also Holloway & Guy, *supra* note 1, at 281.

³²² See *Tahoe-Sierra Pres. Council*, 535 U.S. at 306–07.

³²³ See *id.*

government regulation, which can substantially burden private property rights. The burdens and benefits of government regulation must be reasonably certain or relatively understood in the context of their impact on the right to receive just compensation.³²⁴ Although the impact of government regulation is on property rights, the takings claim to either enjoin government or compensate landowners arises under the Takings Clause.³²⁵

A. *Redistributing Burdens and Benefits as the Context for Armstrong Doctrine*

Takings doctrine must address both public burdens and benefits of government regulation.³²⁶ Government regulation must not give benefits to the public or landowners that could have not been conferred by a private party in a market transaction.³²⁷ Notwithstanding the reciprocity of advantages, the redistribution of a burden among the whole community may not always justify the denial of just compensation.³²⁸ When the community benefits gained include now-public resources and funds, this relationship between a personal loss and a community boon demands greater constitutional care to protect the right to just compensation.

The *Armstrong* doctrine encompasses the concepts of fairness and justice to address burdens of regulation that cause a loss of property value, profits, or other interests as well as to consider the advantages and benefits conferred on government, the public, and other landowners.³²⁹

³²⁴ See Holloway & Guy, *supra* note 1, at 245.

³²⁵ U.S. CONST. amend. V, cl. 4.

³²⁶ Lucas v. S.C. Coastal Council, 505 U.S. 1003, 1047 (1991) (stating that a determination of a taking “necessarily requires a weighing of private and public interests”) (quoting Agins v. City of Tiburon, 447 U.S. 255, 261 (1979)).

³²⁷ See *Armstrong v. United States*, 364 U.S. 40, 48–49 (1960).

³²⁸ See *id.* at 48. In *Armstrong*, Justice Black, writing for the majority, pointed out constitutional concerns regarding benefits and advantages conferred on the public by regulation when he wrote:

It was because the Government for its own advantage destroyed the value of the liens, something that the Government could do because its property was not subject to suit, but which no private purchaser could have done. Since this acquisition was for a public use, however accomplished, whether with an intent and purpose of extinguishing the liens or not, the Government’s action did destroy them.

Id.

³²⁹ See *Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg’l Planning Agency*, 535 U.S. 302, 320–21 (2002) (using *Armstrong* principles of justice and fairness to void petitioner’s argument that a “temporary deprivation . . . of all economically viable use” constitutes

These benefits and advantages are caused by government actions that are destructive inasmuch as they cause a loss of value, benefits, and interests of private property.³³⁰ These benefits and advantages are unassailable if they do not come within the reach of the right to receive just compensation under the Takings Clause.³³¹ The *Armstrong* doctrine protects the right to just compensation by establishing a level of scrutiny to determine if the equitable redistribution of public burdens is congruent with either the indirect or direct public benefits taken by government.³³² This redistribution must be set forth in proportionate government actions or responses even though government must shoulder a burden it did not intend to bear alone.³³³ *Armstrong* doctrine justifies the need for standards of review in weighing or considering both intended and unintended public benefits and advantages that are gained by imposing reciprocal burdens that are destructive to property rights.

B. Triggering the Application of Armstrong Doctrine in the Context of Takings to Justify a Standard of Review

In *Tahoe-Sierra Preservation Council*, the *Armstrong* doctrine would justify and determine whether moratoria on development that had existed for three years to preserve natural resources and control development undermined the right to just compensation.³³⁴ Foremost, a ban on development for a temporary duration must show or demonstrate how its effects on transfer and other property interests significantly differ from a permanent ban that closes out real estate markets and denies transfers for substantial value.³³⁵ When a ban on development for a limited duration causes

a *per se* taking); *City of Monterey v. Del Monte Dunes at Monterey, Ltd.*, 526 U.S. 687, 702 (1998) (observing that “concerns for proportionality animate the Takings Clause”) (citing *Armstrong*, 364 U.S. at 49).

³³⁰ See, e.g., *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1027–28 (1991).

³³¹ U.S. CONST. amend. V, cl. 4.

³³² See *Armstrong v. United States*, 364 U.S. 40 (1960).

³³³ See *Del Monte Dunes*, 526 U.S. at 702.

³³⁴ *Tahoe-Sierra Preservation Council*, 535 U.S. at 321–43 (holding that building moratoria, preventing development, were not *per se* takings of property).

³³⁵ See *Nollan v. Cal. Coastal Comm'n*, 483 U.S. 825, 836–37. In *Nollan*, Justice Scalia, writing for the majority, stated:

Although such a requirement, constituting a permanent grant of continuous access to the property, would have to be considered a taking if it were not attached to a development permit, the Commission’s assumed power to forbid construction of the house in order to protect the public’s

the same or similar market or transfer effects as a permanent ban, the temporary ban would not be germane to the right to receive just compensation where a permanent ban would frustrate efforts to transfer for investment or other business needs.³³⁶ The effects of this temporary ban would not be entirely germane to the right to just compensation, but this disconnect between a takings limitation and government regulation would need to cause a forfeiture or loss of the benefits of this limitation, namely the right to just compensation. This ban greatly restricts the right to transfer by forcing market-exiting transfers, cannibalization of property rights, indirect transfer of aesthetic benefits, unexpected limits on investment expectations, and other landowner burdens. The ban on development also induces landowners and developers to exit real estate markets and transfer land.³³⁷ Often, local government agencies, not-for-profit organizations, or adjacent landowners are buyers of the untimely transfer of the estate or one or more of its cannibalized rights, primarily for conservation or other compatible uses.³³⁸ Yet, the right to just compensation is a limit on government takings that should prevent public burdens and other obligations from causing a transfer for less than fair market value or extracting uncompensated public benefits. Therefore, the *Armstrong* doctrine would first determine if such a temporary ban on development lacks enough germaneness or connection to the right to just compensation to require strict, intermediate, or deferential scrutiny, which, in turn, would determine the protection afforded to private property rights.

view of the beach must surely include the power to condition construction upon some concession by the owner, even a concession of property rights, that serves the same end. If a prohibition designed to accomplish that purpose would be a legitimate exercise of the police power rather than a taking, it would be strange to conclude that providing the owner an alternative to that prohibition which accomplishes the same purpose is not.

Id.

³³⁶ See *Tahoe-Sierra Preservation Council*, 535 U.S. at 316 n.12 (describing the value and sale of environmentally sensitive land before the expiration of moratoria); *Del Monte Dunes*, 526 U.S. at 700 (“The State of California’s purchase of the property during the pendency of the litigation may have bolstered the credibility of Del Monte Dunes’ position.”).

³³⁷ See *Penn Cent. Transp. Co. v. New York City*, 438 U.S. 104, 130–31 (1978). The *Penn Central* inquiry sees the property estate as a whole subject to regulation, but permits bifurcation of the estate by regulation to cannibalize and transfer the right to development. See *id.*

³³⁸ See, e.g., *Del Monte Dunes*, 526 U.S. at 698–702 (describing eventual transfer of land subject to an extraordinarily long moratorium on development).

C. *Using Armstrong Doctrine to Place Regulation in a Takings Context*

Removing temporary bans from the protection of the right to just compensation leaves little deterrent to takings by, what can be, the most burdensome of government actions.³³⁹ Landowners can be subtly forced to exercise the right to transfer for value, or take a lesser return on investment in real estate transactions from government agencies or not-for-profits that acquire the land for aesthetics, conservation, or other purposes with a lesser investment potential. The transactions forced by government regulation subtly redistribute aesthetic and economic benefits to adjoining or other landowners at no cost to government or its agencies.³⁴⁰ This is a transfer of value in enjoyment, such as aesthetics, open space, and other benefits, and may go unnoticed or out of reach by the just compensation guarantee in regulatory takings disputes.

The right to just compensation should limit or prohibit induced or forced transfers³⁴¹ that include a redistribution of substantial property benefits by government regulation when the transfer of these benefits are accompanied by greatly diminished land value caused by eliminating the most immediate and obvious financial expectations,³⁴² such as retirement income. Protecting the right to just compensation requires scrutiny of the government's redistribution of burdens and benefits caused by bans on development closely followed or accompanied by land transfers. This protection requires scrutiny: a rational basis under *Penn Central*,³⁴³ intermediate scrutiny under *Dolan*,³⁴⁴ or *per se* under *Lucas*.³⁴⁵ Presumably, the

³³⁹ See *Tahoe-Sierra Preservation Council*, 535 U.S. at 321–43 (discussing how a temporary moratorium can not be considered a taking without analyzing the particular facts and circumstances).

³⁴⁰ See *Suitum v. Tahoe Reg'l Planning Agency*, 520 U.S. 725, 741–42 (1996) (recognizing that government can bear the risk of loss when it enters land markets to further a regulatory scheme).

³⁴¹ See *id.* at 741 (recognizing that the right to transfer is of some importance in the bundle of rights and the impact of government regulation on transfer of rights and land for value). But see *Hodel v. Irving*, 481 U.S. 704 (1987) (recognizing the *inter vivos* right to transfer does cut off the rights of descent and devise in the bundle of rights).

³⁴² See *Palazzolo v. Rhode Island*, 533 U.S. 606, 625 (2001) (citing *Olson v. United States*, 292 U.S. 246, 255 (1934)); 4 JULIUS L. SACKMAN, NICHOLS ON EMINENT DOMAIN § 12.01 (rev. 3d ed. 2000)).

³⁴³ *Penn Cent. Transp. Co. v. New York City*, 438 U.S. 104 (1978).

³⁴⁴ *Dolan v. City of Tigard*, 512 U.S. 374 (1993).

³⁴⁵ *Lucas v. S.C. Coastal Council*, 505 U.S. 1003 (1991).

justification for lesser or heightened scrutiny for various types of emerging and evolving government actions shall always be an ongoing federal question—so long as the public does not succumb to the tyranny of landowners and policymakers.

To protect the guarantees of the right to just compensation, a moratorium banning substantially all development, with the effect of forcing an exit from land markets, demands that the courts apply constitutional doctrine to determine, justify, and fashion the most appropriate level of scrutiny and standard of review.³⁴⁶ The *Armstrong* doctrine has the potential to determine, justify, and fashion the most appropriate analytical framework within which to protect the right to compensation, which, in turn, ensures that the protection of property rights is consistent with the purpose and intent of the Constitution, and not merely the immediate public or private wants.³⁴⁷

CONCLUSION

We ultimately propose that land use, real estate, and constitutional law attorneys should consider using the *Armstrong* fairness and justice of *Tahoe-Sierra Preservation Council* and *Palazzolo* to determine, justify, and fashion proportionate standards of review for regulatory takings claims. *Armstrong* fairness and justice doctrine may permit a jurisprudential compromise that permits the Court to seek an analytical framework with less confusing conclusions on regulatory takings disputes. As a much-needed starting point, the *Armstrong* fairness and justice doctrine is an opportunity for the Court to look first to the Constitution, and

³⁴⁶ See *Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency*, 535 U.S. 302, 321–43 (2002).

³⁴⁷ See *id.* at 332–33. The Court used *Armstrong* to create a *per se* test that is much more stringent than intermediate scrutiny, and which requires government to advance a substantial interest once moratoria extend beyond one year. *Id.* The Court acknowledged that *Armstrong* applies to “partial takings as well as total takings.” *Id.* at 332 n.27. We argue that the full potential of *Armstrong* would not be realized if the Court were to restrict *Armstrong* to determining the need for a *per se* test, but not using it to determine the appropriate level of scrutiny for ascertaining whether a lengthy moratorium is a “proportional response to a serious risk of harm,” to the community. *Id.* at 334. A categorical or *per se* test is an extremely strict means-ends test that permits few, if any, government ends to justify the imposition of a particular burden, such as the loss of all beneficial use, see *Lucas v. S.C. Coastal Council*, 505 U.S. 1003 (1992), or a physical occupation with permission of government. See *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982).

second at land use practices and common law rules, to develop takings doctrine. Generally, a few limitations on government's powers and inexact reviews of newly created government means for taking private property permit government to avoid paying just compensation and thus undermine the Takings Clause.

The fairness and justice doctrine of *Armstrong* must be more than a cleverly pragmatic invocation by the Stevens Coalition to justify moratoria and other restrictive land use regulations. We believe that *Armstrong* has more to offer. It could be the foundation upon which to fashion takings doctrine consistent with the political purpose and jurisprudential nature of the Takings Clause. Such foundation would not be based on, but would underpin the common law, economics, and land use practices underlying takings doctrine, and thus could go far beyond the takings doctrine of *Pennsylvania Coal*. Moreover, *Armstrong* can further the constitutional guidance of *Penn Central* in justifying and developing an ad hoc approach and takings principles to determine the existence of regulatory takings where public needs are evident in the face of scarcity and the redistribution of public burdens can potentially affect every other person equitably in a community. Therefore, *Armstrong* provides fairness and justice in fashioning a proportional regulatory response to development-induced risk of harm or degradation, and provides fairness and justice in creating a balance in imposing economic burdens to secure public interests. *Tahoe-Sierra Preservation Council* and *Palazzolo* can actually offer doctrine to strengthen the foundation of takings jurisprudence by protecting the right to receive just compensation.

Notwithstanding some inductive uncertainty, the *Armstrong* fairness and justice doctrine offers the best hope, in the aftermath of *Palazzolo* and *Tahoe-Sierra Preservation Council*, to justify and fashion takings standards of review complementary to the pragmatic or ad hoc approach of *Penn Central*; the *Armstrong* doctrine can justify, fashion, and coalesce takings principles to further the doctrine of *Pennsylvania Coal*. The applications of *Armstrong* in *Tahoe-Sierra Preservation Council* and *Palazzolo* found and supported, respectively, proportionality under the *Penn Central* inquiry and the *Lucas per se* test. In both cases, the consideration of the nature of government action and its economic impacts on investment-backed expectations strongly indicates the creation of more than unessential case law or superfluous dicta. Instead, *Tahoe-Sierra Preservation Council* and *Palazzolo* elevate *Armstrong's* widely quoted language, embodying the purpose and intent of the Takings Clause, to

the level of basic, inherent takings doctrine. Treated as such, *Armstrong* can determine, justify, and fashion badly needed proportionate standards of review and other takings principles to resolve claims arising under the Takings Clause and the regulatory takings theory of *Pennsylvania Coal*.