

INTEREST, PRINCIPAL, AND CONCEPTUAL SEVERANCE

Abstract: When considering applications of the Takings Clause to appropriations of interest and principal, courts rely on the quaintly expressed 18th century rule that "interest shall follow the principal, as the shadow the body." Since that time, an elaborate body of regulatory takings law has evolved. As part of this evolution, courts delved into questions of temporary takings of property, occurring both as a result of outright physical occupation and through regulatory limitations. This Note argues that courts should reject the old "interest follows principal" rule and adopt the modern temporary takings rules. In particular, this Note explores the results of such a change in three cases involving prisoners alleging an unconstitutional taking when their interest was deposited in accounts with the Departments of Corrections while incarcerated. Adopting a temporary takings analysis would not only bring consistency between the analyses of takings of money and takings of land, but also offer a more consistent outcome within this group of prisoner interest cases.

INTRODUCTION

The law surrounding regulatory takings has been filled with contradictory holdings and conflicting justifications since its inception in 1922 with *Pennsylvania Coal Co. v. Mahon*.¹ Meanwhile, the number and variety of situations to which the caselaw has been applied has been steadily expanding.² One interesting expansion of the law has been in the area of takings of money, and in particular, interest.³ Cases in this line have been decided according to a traditional common law "interest follows principal" rule, which begins by asking whether or not principal is "owned" by the claimant, and if so, concludes by finding that any loss of interest is a compensable taking.⁴

¹ See 260 U.S. 393, 413 (1922); see also Jed Rubenfeld, *Usings*, 102 YALE L.J. 1077, 1078 n.2 (1993) (providing a synopsis of scholarly opinions on the chaos in the field).

² See, e.g., *Brown v. Legal Found. of Wash.*, 538 U.S. 216, 231-35 (2003) (finding no taking resulting from state use of interest earned on accounts); *E. Enters. v. Apfel*, 524 U.S. 498, 522-23 (1998) (finding a taking as a result of legislation requiring retroactive contributions to pension plans); *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 1003-04 (1984) (finding a taking could result from legislation requiring disclosure of trade secrets).

³ See *Brown*, 538 U.S. at 231-35; *Phillips v. Wash. Legal Found.*, 524 U.S. 156, 163-72 (1998); *Webb's Fabulous Pharmacies v. Beckwith*, 449 U.S. 155, 160-64 (1980).

⁴ See *Brown*, 538 U.S. at 235; *Phillips*, 524 U.S. at 165-66; *Webb's*, 449 U.S. at 162.

The difficulty with the common law analysis is that it presumes two distinct, severed items, the principal and the interest it earns.⁵ Regulatory takings law, by comparison, has developed to eliminate the kind of severance this analysis represents, making that two-part inquiry appear artificial.⁶

A strand of recent cases involving the interest earned on prisoners' accounts continues to present the question of how takings of interest should be treated under regulatory takings law.⁷ Federal circuit courts of appeals have reached different results due to the courts' disparate treatment of the inmates' underlying property interest.⁸ This Note attempts to sidestep that disagreement by rejecting the severed principal/interest analysis and instead applies a regulatory takings approach that looks at the parcel as a whole.⁹ Such an approach brings consistency to the treatment of regulatory takings cases by bringing the prisoner interest cases under the same caselaw that dominates the rest of regulatory takings claims.¹⁰

In 2004, the Eleventh Circuit Court of Appeals in *Givens v. Alabama Department of Corrections* ruled that for purposes of the Takings Clause¹¹, inmates had no protected property interest in the interest that accrued on principal earned from work-release wages.¹² This ruling permitted the Alabama Department of Corrections to retain the interest earned on inmate accounts.¹³ The Eleventh Circuit's holding largely followed the reasoning laid out in 2000 in *Washlefske v. Winston*, in which the Fourth Circuit Court of Appeals found that prisoners do not have a property interest in the interest earned on principal accumulated from payments for their labor while in prison.¹⁴ In 1998, in *Schneider v. California Department of Corrections*, the Ninth Circuit Court of Appeals reached the opposite conclusion, holding that because prisoners had a property interest in the principle in their prison ac-

⁵ See *Brown*, 538 U.S. at 234–35; *Phillips*, 524 U.S. at 164; *Webb's*, 449 U.S. at 160–61.

⁶ See *Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency*, 535 U.S. 302, 331 (2002); *Penn Cent. Transp. Co. v. City of New York*, 438 U.S. 104, 130 (1978).

⁷ See *Givens v. Ala. Dep't of Corr.*, 381 F.3d 1064, 1068 (11th Cir. 2004); *Washlefske v. Winston*, 234 F.3d 179, 185 (4th Cir. 2000); *Schneider v. Cal. Dep't of Corr.*, 151 F.3d 1194, 1199 (9th Cir. 1998).

⁸ See *Givens*, 381 F.3d at 1068; *Washlefske*, 234 F.3d at 185; *Schneider*, 151 F.3d at 1199.

⁹ See *infra* notes 133–238 and accompanying text.

¹⁰ See *infra* notes 65–124 and accompanying text.

¹¹ U.S. CONST. amend. V.

¹² 381 F.3d at 1070.

¹³ See *id.*

¹⁴ See *Washlefske*, 234 F.3d at 180–81.

count, that interest extended to the interest earned.¹⁵ Under this ruling, the California Department of Corrections did not retain the interest earned on inmate accounts.¹⁶ In each of the above examples, the court looked to the common law rule that "interest follows principle."¹⁷

Part I of this Note discusses the history of the common law "interest follows principal" rule and applications of the rule to prisoner interest cases.¹⁸ Part II outlines a brief history of regulatory takings, the emergence of conceptual severance, and the denominator problem as formidable obstacles to developing a consistent framework for analysis.¹⁹ It characterizes the separation of ownership of interest and principal in the regulatory takings analysis as one more example of conceptual severance.²⁰ Part III applies a regulatory takings analysis to the prisoner interest cases by first choosing the most appropriate test and then applying it to find no taking.²¹

I. EVOLUTION OF THE INTEREST FOLLOWS PRINCIPAL RULE AND ITS APPLICATION TO TAKINGS

A. *The History of the Interest Follows Principal Rule*

The traditional common law rule that "interest follows principle" dates to at least the eighteenth century.²² The United States Supreme Court first applied the rule in a Takings Clause context in 1980 in *Webb's Fabulous Pharmacies v. Beckwith*.²³ In *Webb's*, the Court found that for purposes of the Takings Clause, a party had a protected property interest in the interest earned on the monies deposited in an interpleader fund, which was required by state law to be deposited with the registry of the court while creditors were paid.²⁴ The State of Florida argued that while deposited with the court, the principal and the in-

¹⁵ See 151 F.3d at 1201.

¹⁶ See *id.*

¹⁷ See *Givens*, 381 F.3d at 1067; *Washlefske*, 234 F.3d at 184; *Schneider*, 151 F.3d at 1198.

¹⁸ See *infra* notes 22–64 and accompanying text.

¹⁹ See *infra* notes 65–132 and accompanying text.

²⁰ See *infra* notes 125–32 and accompanying text.

²¹ See *infra* notes 133–238 and accompanying text.

²² See *Himely v. Rose*, 9 U.S. (5 Cranch.) 313, 319 (1809) (holding that "interest goes with the principal as the fruit with the tree"); *Beckford v. Tobin*, 27 Eng. Rep. 1049, 1051 (Ch. 1749) (holding that "interest shall follow the principal, as the shadow the body").

²³ See 449 U.S. 155, 162 (1980).

²⁴ *Id.* at 164–65.

terest belonged to the State as "public property."²⁵ During that time, the State argued, the depositor and the depositor's creditors had no property interest in the principal, and so no property interest in the interest it earned.²⁶ The language the Court used in describing its reasoning highlights the overlapping logic of both the "interest follows principal" rule and the more modern doctrine of temporary takings.²⁷ The Court stated the following:

The earnings of a fund are incidents of ownership of the fund itself and are property just as the fund itself is property. The state statute has the practical effect of appropriating for the county the value of the use of the fund for the period in which it is held in the registry.²⁸

In its analysis the Court focused on the ownership of the principal during the relevant time period and described the ability to earn interest on that principal as incidental to the principal itself.²⁹ This suggests an analysis that considers the right to earn interest as just one strand in a bundle of property rights attaching to the ownership of the principal, rather than looking at the ownership of the interest as a separate and distinct entity from the ownership of the principal.³⁰ The Court also rejected the State's argument that appropriating the interest could be characterized as a fee imposed by the court because a separate amount, limited by statute, had already been deducted from the principal for the payment of court fees.³¹

More recently, in 1998, in *Phillips v. Washington Legal Foundation*, the Supreme Court applied the "interest follows principal" rule to Interest on Lawyers Trust Accounts ("IOLTA") and held that lawyers' clients have a protected property interest in the interest earned under IOLTA legislation.³² Because the funds held by lawyers were unarguably the property of the clients, the only question for the Court was whether or not the clients also "owned" the interest those funds gen-

²⁵ *Id.* at 158-59.

²⁶ *Id.*

²⁷ *See id.* at 164.

²⁸ *Webb's*, 449 U.S. at 164.

²⁹ *See id.*

³⁰ *See id.*

³¹ *See id.* at 162.

³² 524 U.S. 156, 160, 172 (1998). In 2003, in *Brown v. Legal Foundation of Washington*, the Court went on to find that although there was a protected property interest, no compensation was due because there was no value in the interest to the lawyers' clients. *See* 538 U.S. 216, 240 (2003).

erated while held by the lawyer.³³ The Court reiterated the holding of *Webb's*, that a state may not appropriate the property interest created through the traditional rule that "interest follows principal" by attempting to disavow that rule with a statute.³⁴ It noted, in language echoing *Webb's*, that one of the "incidents of ownership" of principal was the ability to distribute the interest it earned.³⁵ The Court's language describing the ownership of the interest suggested that it was merely another aspect of the ownership of the principal, or, in other words, another stick in the bundle of rights which attaches to the principal.³⁶ The analysis the Court actually applied, however, carefully separated the question of the ownership of the interest and the ownership of the principal.³⁷

Justice Stephen Breyer's dissenting opinion in *Phillips* attempts to reframe the question, transforming it from one of separate interests in principal and interest to one of a temporary intrusion into the property interests of the principal.³⁸ This Note explores the implications of Justice Breyer's alternative analysis by abandoning the old "interest follows principal" rule, which analyzes interest and principal separately, in favor of a temporary takings analysis that treats interest as a right of ownership that attaches to principal.³⁹ It determines how such an alternative analysis might shed light on the different conclusions the federal circuit courts of appeals have reached on whether or not a department of corrections may appropriate the interest earned on a prisoner's principal without compensation.⁴⁰

B. *Application of the Interest Follows Principal Rule to the Prisoner Interest Cases*

In *Givens v. Alabama Department of Corrections*, a case decided by the Eleventh Circuit Court of Appeals in 2004, inmates in Alabama prisons who participated in a work-release program were required by state law to have their wages deposited with the Department of Cor-

³³ See *Phillips*, 524 U.S. at 164.

³⁴ *Id.* at 167.

³⁵ See *id.*

³⁶ See *id.* at 164.

³⁷ See *id.*

³⁸ See *Phillips*, 524 U.S. at 180 (Breyer, J., dissenting). Justice Breyer stopped short of the perspective this Note advocates, however, because his analysis goes on to identify a claimant's right to earn interest independent from any other rights attaching to ownership of principal. See *id.* at 181-82.

³⁹ See *infra* notes 133-238 and accompanying text.

⁴⁰ See *infra* notes 133-238 and accompanying text.

rections.⁴¹ Fees were deducted from this account by the Department of Corrections, but state law imposed a limit on the percentage of the wages that could be deducted, limiting the Department to taking forty percent of the inmates' wages as fees.⁴² Alabama deducted the maximum amount allowed by statute and then deposited the remainder of the wages in an account with the Department of Corrections in the prisoner's name.⁴³ Although the Department of Corrections placed the prisoners' wages in interest-bearing accounts, the Department retained the interest earned on the wages.⁴⁴ The court sided with the Department of Corrections, holding that there was no taking when the Department appropriated the interest.⁴⁵ The court began its analysis by stating that the Takings Clause only protects preexisting property interests (and cannot create property interests) and such property interests must be found in state law.⁴⁶ The court noted the common law rule that interest follows principal.⁴⁷ It also noted, however, that at common law, prisoners had no ability to earn wages, let alone interest.⁴⁸ Furthermore, although legislation granted inmates a property interest in the principal earned from their wages, the statute granted no corresponding property interest in the interest earned on those wages.⁴⁹ Because such a property interest had not existed at common law, without the statutory grant, the prisoners had no claim to the interest their principal earned.⁵⁰

In 2000, in *Washlefske v. Winston*, the Fourth Circuit Court of Appeals addressed an inmate's claims that the Virginia Department of Corrections violated the Takings Clause when it retained the interest earned on the principal in his account, called a "spend account," during his incarceration.⁵¹ Unlike the Alabama statute in *Givens*, the Vir-

⁴¹ See 381 F.3d 1064, 1065 (11th Cir. 2004).

⁴² See *id.*

⁴³ See *id.*

⁴⁴ See *id.* By comparison, in *Washlefske v. Winston* and *Schneider v. California Department of Corrections* the interest was deposited into a fund for the benefit of prisoners, invoking some faint reciprocity of advantage argument for the Department. See *Washlefske v. Winston*, 234 F.3d 179, 181 (4th Cir. 2000); *Schneider v. Cal. Dep't of Corr.*, 151 F.3d 1194, 1195-96 (9th Cir. 1998). In *Givens* there is no mention of how the appropriated interest is spent. See 381 F.3d at 1065.

⁴⁵ See *Givens*, 381 F.3d at 1070.

⁴⁶ *Id.* at 1067.

⁴⁷ See *id.*

⁴⁸ *Id.* at 1068-69.

⁴⁹ See *id.* at 1070.

⁵⁰ *Givens*, 381 F.3d at 1069.

⁵¹ 234 F.3d at 180. The principal in the account was earned through payments in compensation for labor while in prison, at a rate of 90 cents/hour. *Id.* at 181. The interest ap-

ginia statute in *Washlefske* enabled inmates to send funds outside the prison to be invested in interest bearing accounts on their behalf.⁵² The "spend accounts" at issue in *Washlefske* were maintained for the purpose of allowing the inmates a source from which to spend money while in prison.⁵³ The court began, as the Eleventh Circuit later would in *Givens*, by noting that at common law a prisoner had no property interest in the results of his labor.⁵⁴ Any property interest an inmate had in money earned from labor, the court reasoned must be the result of a specific grant of a property interest by state statute.⁵⁵ In this case, the statute which granted inmates the right to earn wages also explicitly dictated that control over the interest earned from those wages would vest in the prison official, not in the inmate himself.⁵⁶ The statute only "gave" the wages to inmates for use while in prison under certain limited circumstances, and the limited rights granted by statute not only did not mention interest with respect to inmates, but explicitly gave the ownership of the interest to the Department of Corrections.⁵⁷

In 1998, the Ninth Circuit Court of Appeals came to a different conclusion in *Schneider v. California Department of Corrections*, holding that the right to receive interest income generated on the principal was a sufficiently fundamental property interest associated with the ownership of the principal that a state could not appropriate the interest without violating the Fifth Amendment.⁵⁸ The *Schneider* court acknowledged that the statute did not explicitly grant ownership of the interest itself to the inmates—the same argument later presented in *Washlefske* and *Givens*.⁵⁹ In fact, in *Schneider*, as in *Washlefske*, a statute explicitly assigned ownership of the interest to the Department of Corrections.⁶⁰ Nevertheless, the *Schneider* court noted that the existence of a statute giving the property interest to someone other than the inmate was not sufficient to show that the inmate had no right to the interest.⁶¹ Citing

propriated by the Department of Corrections was used for "the general benefit of inmates under the State's care." *Id.*

⁵² *See id.*

⁵³ *Id.*

⁵⁴ *See id.* at 184–85. The court went further, pointing out that at early common law an inmate had no right to hold personal property at all. *See id.* at 185.

⁵⁵ *See id.*

⁵⁶ *See Washlefske*, 234 F.3d at 185.

⁵⁷ *See id.* at 181.

⁵⁸ 151 F.3d 1194, 1201 (9th Cir. 1998).

⁵⁹ *See id.* at 1199.

⁶⁰ *See id.*

⁶¹ *Id.*

Webb's, in which a state statute entitled the court clerk to keep the interest, and *Phillips*, in which state law required IOLTA contributions, *Schneider* held that under some circumstances a state's declaration that no property right existed was not sufficient to extinguish such a property right.⁶² In weighing the statute which eliminated the inmate's property interest against the common law rule that "interest follows principal," the court found the common law rule prevailed because of its long pedigree and near universal endorsement by American courts.⁶³ The court held that the "interest follows principal" rule to be sufficiently fundamental that a state violated the Fifth Amendment if it attempted to change that rule by statute.⁶⁴

II. THE EVOLUTION OF REGULATORY TAKINGS LAW AND ITS APPLICATION TO TAKINGS OF INTEREST

Regulatory takings analysis, compared to the common law "interest follows principal" rule, has more recent origins.⁶⁵ For the first 130 years after the adoption of the U.S. Constitution, the protection granted in the Takings Clause of the Fifth Amendment was understood to be limited to require compensation for physical appropriations of property under the state's power of eminent domain.⁶⁶ In 1922, the United States Supreme Court decided *Pennsylvania Coal Co. v. Mahon*, which for the first time required compensation for a taking that resulted not from the physical invasion or appropriation of property, but from the imposition of government regulations that limited the owner's use of the property.⁶⁷ Whereas in one sense this innovation addressed the inequity of compensating for physical appropriations and not regulations imposing comparable economic harm, it also created a set of new complications.⁶⁸ In the wake of the *Pennsyl-*

⁶² See *id.*

⁶³ See *Schneider*, 151 F.3d at 1201.

⁶⁴ See *id.* The court in *Schneider* comes to this conclusion with no mention of the competing common law tradition that prisoners have no rights to earn wages or interest. See *id.* But see *Givens*, 381 F.3d at 1068; *Washlefske*, 234 F.3d at 186.

⁶⁵ See *Pa. Coal Co. v. Mahon*, 260 U.S. 393, 415-16 (1922).

⁶⁶ See U.S. CONST. amend. V; *Transportation Co. v. Chicago*, 99 U.S. 635, 642 (1879); *Legal Tender Cases*, 79 U.S. (12 Wall.) 457, 551 (1871).

⁶⁷ See *Pa. Coal*, 260 U.S. at 415. See generally WILLIAM A. FISCHER, *REGULATORY TAKINGS* 13-63 (1995).

⁶⁸ See *Pa. Coal*, 260 U.S. at 415; see also RICHARD A. EPSTEIN, *TAKINGS* 57-58, 63-64 (1985); Frank I. Michelman, *Property, Utility, and Fairness: Comments on the Ethical Foundations of "Just Compensation" Law*, 80 HARV. L. REV. 1165, 1184-90 (1967) (reviewing the inequities resulting from using physical invasion as the primary test for compensation).

vania Coal decision, courts were left to decide what regulations were legitimate exercises of the police power of the state (like zoning regulations and nuisance laws) and what regulations were so excessive that they required compensation under the Fifth Amendment.⁶⁹ This proved to be a challenging task.⁷⁰

A. *The Penn Central Multifactor Test, the Denominator Problem, and the Question of Conceptual Severance*

The modern multifactor approach to regulatory takings analysis was outlined by the U.S. Supreme Court in 1978 in *Penn Central Transportation Co. v. City of New York*.⁷¹ In that case, the Court applied an "essentially ad hoc, factual inquir[y]" to determine whether or not a governmental action rose to the level of a taking.⁷² One of the factors the Court considered was the economic impact of the regulation.⁷³ A second factor was the regulation's interference with distinct, investment-backed expectations of the claimant.⁷⁴ The third factor was the character of the governmental action, including whether or not there was a physical invasion of the property, as well as determining whether or not the regulation arose merely "from some public program adjusting the benefits and burdens of economic life to promote the common good."⁷⁵ Although courts have struggled with how to apply these factors, they have remained the primary framework for deciding regulatory takings cases.⁷⁶ In combination, the three factors compare the economic impact of the regulation in question on the

⁶⁹ See, e.g., *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1028–29 (1992) (finding a taking where limits on use destroyed all economic value in property); *Village of Euclid v. Ambler Realty, Co.*, 272 U.S. 365, 390–97 (1926) (finding no taking as a result of zoning regulations); *Hadacheck v. Sebastian*, 239 U.S. 394, 409–10 (1915) (finding no taking as a result of limits of use as for purposes of nuisance regulation).

⁷⁰ See, e.g., *Penn Cent. Transp. Co. v. City of New York*, 438 U.S. 104, 123 (1978); see also EPSTEIN, *supra* note 68, at 107; Rubinfeld, *supra* note 1, at 1088–91 (reviewing the conflict between various factors and principles used in defining takings).

⁷¹ See 438 U.S. 104, 124 (1978).

⁷² *Id.*

⁷³ *Id.*

⁷⁴ *Id.*

⁷⁵ *Id.*

⁷⁶ See *Palazzolo v. Rhode Island*, 533 U.S. 606, 633 (2001) (O'Connor, J., concurring); see also FISCHER, *supra* note 67, at 50–51; Andrea L. Peterson, *The Takings Clause: In Search of Underlying Principles: Part I—A Critique of Current Takings Clause Doctrine*, 77 CAL. L. REV. 1299, 1317 (1989); Rubinfeld, *supra* note 1, at 1089–91 (reviewing the conflict between various factors and principles used in defining takings).

individual property owner with the extent and importance of the public benefit it creates.⁷⁷

In 1992, the U.S. Supreme Court carved out an exception to the multifactor test articulated in *Penn Central*.⁷⁸ In *Lucas v. South Carolina Coastal Council*, the Court adopted a per se rule that declared that in the "extraordinary circumstance" in which a regulation caused a property owner to lose all economically beneficial uses of the land, a taking necessarily resulted.⁷⁹ The Court justified this rule by looking at the background principles and common law rules that predated the regulation in question.⁸⁰ To support this rule, the Court noted that real property owners hold title with the expectation that it will be subject to *some* regulation that might limit its value, but not that *all* economic value could be lost through regulation.⁸¹ Only when preexisting background principles or common law suggested that the owner should have expected the possibility of losing all economic uses could such a regulation have avoided the requirement of compensation.⁸²

The introduction of the *Lucas* per se rule exacerbated a problem inherent in even the very first regulatory takings cases—that of determining against which parcel the diminution in value should be measured—a problem often referred to as finding the appropriate denominator.⁸³ Justice Brandeis raised the difficulty of determining appropriate denominators in his dissenting opinion in *Pennsylvania Coal*, noting that in order to evaluate the extent of the diminution of property value, a point of reference is needed to be meaningful.⁸⁴ The harm resulting from a regulation will vary depending on whether one measures the loss against just the portion of the parcel affected by the regulation, the parcel as measured by its physical boundaries, or even

⁷⁷ See Carol M. Rose, Mahon *Reconstructed: Why the Takings Issue is Still a Muddle*, 57 S. CAL. L. REV. 561, 593–94 (1984).

⁷⁸ *Lucas*, 505 U.S. at 1019.

⁷⁹ See *id.* at 1017, 1019. The Court reiterated the importance and difficulty of finding no economic use in *Tahoe-Sierra Preservation Council v. Tahoe Regional Planning Agency*. See 535 U.S. 302, 330 (2002).

⁸⁰ See *Lucas*, 505 U.S. at 1027.

⁸¹ See *id.* at 1027–28. The *Lucas* rule is explicitly limited to land. See *id.* The Court stated that "in the case of personal property, by reason of the State's traditionally high degree of control over commercial dealings, [an owner of personal property] ought to be aware of the possibility that new regulation might even render his property economically worthless." See *id.* at 1027. This limitation lends support to the argument that the *Lucas* per se rule has no place in a Takings Clause case concerning money. See *id.*

⁸² See *id.*

⁸³ See *id.* at 1016 n.7; *Pa. Coal*, 260 U.S. at 419 (Brandeis, J., dissenting).

⁸⁴ See 260 U.S. at 419 (Brandeis, J., dissenting).

the parcel as measured against all the property held by the owner affected by the regulation.⁸⁵ Manipulating denominators along physical boundaries and conceptual lines complicates the measurement problem.⁸⁶ Conceptually, property owners could divide ownership into the individual "sticks" of the bundle representing the collection of rights with respect to property.⁸⁷ According to such a division, any reduction in the ability of an owner to use property might be recharacterized as a total loss of one individual stick in the bundle—the stick corresponding to the use limited or forbidden by the regulation.⁸⁸ This manipulation is often referred to as "conceptual severance."⁸⁹ Such a characterization has the potential to at least strengthen the economic impact prong of the multifactor *Penn Central* test and to at most invoke the per se "total economic loss" rule created in *Lucas* in all but select cases involving relatively small losses of value.⁹⁰

The application of the "economic impact" and "investment-backed expectations" prongs of the multifactor test in *Penn Central* illustrates the effect of the denominator problem.⁹¹ In *Penn Central*, the owners of Grand Central Station claimed that they lost all value of the right to develop the space above the station when the Landmarks Preservation Commission designated Grand Central Station a landmark under New York City's Landmarks Preservation Law, thereby

⁸⁵ See Michelman, *supra* note 68, at 1192; Rose, *supra* note 77, at 566–69; Rubinfeld, *supra* note 1, at 1090–91 (discussing the results of the denominator problem as it appears in *Penn Central* and *Keystone*). Compare *Pa. Coal*, 250 U.S. at 414 (holding that laws restricting coal mining operations resulted in a taking), with *Keystone Bituminous Coal Assoc. v. DeBenedictis*, 480 U.S. 470, 497–502 (1987) (finding nearly identical laws resulted in no taking, due primarily to a manipulation of the relevant denominator).

⁸⁶ See, e.g., *Andrus v. Allard*, 444 U.S. 51, 65–66 (1979) (rejecting an attempt at severing the right to alienation); *Penn Cent.*, 438 U.S. at 130 (rejecting an attempt at severing air rights); see also Michelman, *supra* note 68, at 1192–93 (describing the results of conceptual severance); Margaret Jane Radin, *The Liberal Conception of Property: Cross Currents in the Jurisprudence of Takings*, 88 COLUM. L. REV. 1667, 1676 (1988) (describing the emergence of conceptual severance).

⁸⁷ See, e.g., *Andrus*, 444 U.S. at 65–66; *Penn Cent.*, 438 U.S. at 130; see also Michelman, *supra* note 68, at 1193 (describing the results of conceptual severance); Radin, *supra* note 86 (describing an application of conceptual severance).

⁸⁸ See *Lucas*, 505 U.S. at 1016 n.7; *Pa. Coal*, 250 U.S. at 419, (Brandeis, J., dissenting); see also Michelman, *supra* note 68, at 1193 (describing the illogical extremes of conceptual severance); Radin, *supra* note 86 (describing some applications of conceptual severance, and the Court's wariness).

⁸⁹ See *Tahoe-Sierra*, 535 U.S. at 331; Radin, *supra* note 86.

⁹⁰ See, e.g., *Tahoe-Sierra*, 535 U.S. at 331; see also Michelman, *supra* note 68, at 1192 (describing the results of conceptually severing elements of property ownership).

⁹¹ See *Penn Cent.*, 438 U.S. at 124–38.

preventing plans to build a fifty-story tower on top of the building.⁹² Even before the introduction of the *Lucas* per se rule for total economic loss, Penn Central argued that such a significant deprivation should weigh favorably for determining the economic impact of the regulation on its investment-backed expectations.⁹³ The *Penn Central* Court, however, declined to look exclusively at the value of the "air rights" and instead, measured the economic impact against the company's investment-backed expectations in the property as a whole.⁹⁴

Using the investment of a property owner to measure the economic impact of a regulation, as this method purports to do, could result in inequitable results.⁹⁵ For example, compare the interference with the investment of a long-time property owner who has recovered any initial investment in the property with a recent investor who invested a similar amount but has yet to see a return on the investment.⁹⁶ Those two owners, with similar investments in similar properties, might be treated differently under the Takings Clause due largely to the length of time they owned the property in question.⁹⁷ Similarly, it is not clear that the economic impact factor would have resulted in the same outcome in *Penn Central* if applied to a developer who had purchased the same property, only a few years before, intending to develop a skyscraper.⁹⁸ As an illustration of that point, consider that of particular significance to the Court in *Penn Central* was the fact that the property could still be used profitably as a train station and rental office space.⁹⁹ In fact, the Court went beyond even the investment in the parcel in question in applying the economic impact factor, noting that the designation of landmark status and the transferable development rights that accompanied such status would benefit other property held by the same company.¹⁰⁰ Essentially, the Court ex-

⁹² *Id.* at 119.

⁹³ *Id.* at 130.

⁹⁴ *See id.*

⁹⁵ *See infra* notes 96-98 and accompanying text.

⁹⁶ *See Penn Cent.*, 438 U.S. at 135-38 (discussing length of ownership as a factor in takings analysis).

⁹⁷ *See id.*

⁹⁸ *See id.* at 137 n.36. Professor Frank I. Michelman, in an article that predates *Penn Central* but upon which *Penn Central* relied in its reasoning, justifies this inequity to the extent that such a measure protects the special kind of harm that comes from the psychological impact a property owner suffers when her actual, legally distinct expectations are thwarted seemingly as the result of unprincipled exploitation. *See Michelman, supra* note 68, at 1229-31.

⁹⁹ *See Penn Cent.*, 438 U.S. at 129, 136, 138 n.36.

¹⁰⁰ *See id.* at 115, 138.

panded the denominator beyond the bounds of the property in question to encompass additional property held by the same owner.¹⁰¹

*B. Rejection of Conceptual Severance and Temporal Severance,
and the Expansion of Regulatory Takings
Law Beyond Real Property*

Penn Central, in which the Supreme Court emphasized that regulatory takings analyses would look to the parcel as a whole as the appropriate denominator, effectively rejected physical severance.¹⁰² Conceptual severance, however, remained a troubling problem despite the Court's attempt to emphasize the importance of measuring the "parcel as a whole."¹⁰³ The difficulty in determining the appropriate denominator only grew as claimants began to argue for temporal severance as a specific instance of conceptual severance.¹⁰⁴ In 2002, in *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency*, landowners argued that they should be compensated under the *Lucas* "total economic loss" per se rule because they temporarily lost all economic value in their land during a thirty-two month development moratorium.¹⁰⁵ The Court dismissed their argument, attempting to declare an end to all severance—physical, conceptual, and temporal—and thus rein in the denominator problem that had grown so troublesome.¹⁰⁶ Emphasizing *Penn Central's* end to physical severance, the Court went on to deny conceptual severance, declaring that the destruction of one strand from the bundle of property rights is not a

¹⁰¹ See *id.* at 138; see also *Lucas*, 505 U.S. at 1016 n.7 (describing the *Penn Central* approach as "extreme" and "unsupportable"); Rose, *supra* note 77, at 567–68 (describing *Penn Central's* "expansive" measure of diminution of value against all of the Company's property).

¹⁰² See *Penn Cent.*, 438 U.S. at 130. In addition to the holding in *Penn Central*, the event that prevented physical severance from creating the same confusion that occurred in the area of conceptual severance was the holding in *Loretto v. Teleprompter Manhattan CATV Corp.*, which declared all permanent physical invasions to be per se takings. See *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 434–35 (1982). It does not matter with respect to which parcel the size of the taking is measured if every physical invasion is a taking, no matter how small. See *id.*

¹⁰³ See *Penn Cent.*, 438 U.S. at 130–31.

¹⁰⁴ See *Tahoe-Sierra*, 535 U.S. at 320; *First English Evangelical Lutheran Church v. County of Los Angeles*, 482 U.S. 304, 318–19 (1987); *San Diego Gas & Elec. Co. v. City of San Diego*, 450 U.S. 621, 657 (1980) (Brennan, J., dissenting).

¹⁰⁵ *Tahoe-Sierra*, 535 U.S. at 320.

¹⁰⁶ See *id.* at 326–27; see also Thomas E. Roberts, *Regulatory Takings in the Wake of Tahoe-Sierra and the IOLTA Decision*, 35 URB. LAW. 759, 759–63 (2003) (describing *Tahoe-Sierra's* resolution of the question of severance).

taking.¹⁰⁷ In addition, *Tahoe-Sierra* explicitly rejected temporal severance.¹⁰⁸ The Court declined to apply the *Lucas* per se rule to the temporary loss of all economic use of the property, turning instead to the multifactor test laid out in *Penn Central*.¹⁰⁹

In 1982, in *Loretto v. Teleprompter Manhattan CATV Corp.*, the Supreme Court created yet another per se rule as an exception to the *Penn Central* multifactor test.¹¹⁰ In *Loretto*, a New York City law required that apartment building owners permit cable companies to lay cable along the outside of their buildings.¹¹¹ The space occupied by the cable and junction box on Jean Loretto's building was estimated to be approximately one square foot.¹¹² The Court relied heavily on the traditional strength of property owners' right to exclude, characterizing it as one of the most important rights in the "bundle of sticks."¹¹³ Because of the significance of the right to exclude, the Court declared that any permanent, physical invasion of property, no matter how small, is a taking.¹¹⁴ Even the minimal imposition of a wire laid across a building triggered the protections of the Takings Clause, because it resulted in a permanent physical imposition which deserved the strongest protection of the Takings Clause.¹¹⁵

In the years since *Pennsylvania Coal*, regulatory takings cases have expanded beyond protecting interests in land.¹¹⁶ Recent cases have considered requiring compensation for required disclosure of trade secrets¹¹⁷ and retroactive liability for employee health benefits, among other things.¹¹⁸ Some of the most challenging applications of the Takings Clause to personal property involve government appropriations

¹⁰⁷ See *Tahoe-Sierra*, 535 U.S. at 327.

¹⁰⁸ See *id.* at 331-32.

¹⁰⁹ *Id.* at 332.

¹¹⁰ See 458 U.S. at 432.

¹¹¹ *Id.* at 423.

¹¹² *Id.* at 438 n.16.

¹¹³ See *id.* at 426.

¹¹⁴ See *id.* at 434.

¹¹⁵ See *Loretto*, 458 U.S. at 438.

¹¹⁶ See, e.g., *Brown v. Legal Found. of Wash.*, 538 U.S. 216, 231 (2003) (applying the Takings Clause to appropriations of interest earned on accounts); *E. Enters. v. Apfel*, 524 U.S. 498, 537 (1998) (finding a taking as a result of legislation requiring retroactive contributions to pension plans); *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 1003-04 (1984) (finding a taking could result from legislation requiring disclosure of trade secrets).

¹¹⁷ See *Ruckelshaus*, 467 U.S. at 1003-04.

¹¹⁸ See *E. Enters.*, 524 U.S. at 537.

of money.¹¹⁹ The Supreme Court has applied the Takings Clause to government appropriations of money in at least three cases,¹²⁰ but some commentators question whether this is a reasonable or workable use of the Takings Clause.¹²¹ There are several arguments against using the Takings Clause to prohibit government appropriations of money, but perhaps the most constitutionally compelling one is that if courts applied the Takings Clause to appropriations of money, then the plenary power of the government to tax would be confused with its limited ability to appropriate property without compensation.¹²² An investigation into the circumstances under which the Takings Clause provides the appropriate framework to analyze appropriations of money is beyond the scope of this Note.¹²³ Relying on those cases which have already applied the Takings Clause to monetary exactions, this Note assumes the general applicability of the Takings Clause to government appropriations of money.¹²⁴

¹¹⁹ See *Brown*, 538 U.S. at 231–41; *Phillips v. Wash. Legal Found.*, 524 U.S. 156, 163–72 (1998); *E. Enters.*, 524 U.S. 529–37; *Webb's Fabulous Pharmacies v. Beckwith*, 449 U.S. 155, 160–164 (1980).

¹²⁰ See *Brown*, 538 U.S. at 231–35; *Phillips*, 524 U.S. at 163–68; *Webb's*, 449 U.S. at 160–64.

¹²¹ See EPSTEIN, *supra* note 68, at 99–100, 283–305 (arguing that the Takings Clause applies equally to taxes and appropriations and regulations of real property); Robert Brauneis, Eastern Enterprises, Phillips, Money, and the Limited Role of the Compensation Clause in Protecting Property “in Its Larger and Juster Meaning,” 51 ALA. L. REV. 937, 938 (2000) (rejecting the bundle of rights metaphor, and arguing that the Takings Clause should protect ordinary objects and not legal rights); Michael Allen Wolf, *Taking Regulatory Takings Personally: The Perils of (Mis)Reasoning by Analogy*, 51 ALA. L. REV. 1355, 1361–62 (2000) (arguing that the Takings Clause should not apply to government exactions of money, and that instead the constitutionality of such exactions should be decided under the Due Process or Equal Protection Clauses).

¹²² See Brauneis, *supra* note 121, at 944–47. Brauneis argues that only specific liabilities imposed by the government, associated with identifiable pieces of property, should be subject to the Takings Clause, and that general monetary liabilities, like those imposed in *Eastern Enterprises*, should be analyzed under the ability of the government to tax. See *id.*

¹²³ For a more in depth discussion of this problem, see EPSTEIN, *supra* note 68, at 283–305; Brauneis, *supra* note 121, at 947–48; Wolf, *supra* note 121, at 1356–63.

¹²⁴ See *Brown*, 538 U.S. at 231–35; *E. Enters.*, 524 U.S. at 529–37; *Phillips*, 524 U.S. at 163–68; *Webb's*, 449 U.S. at 160–64. The case for the application of the Takings Clause in *Givens v. Alabama Department of Corrections* was strengthened by the fact that in that case, the interest was taken in addition to a statutorily limited percentage appropriated as a fee. See *Webb's*, 449 U.S. at 162; *Givens v. Ala. Dep't of Corr.*, 381 F.3d 1064, 1065 (11th Cir. 2004). This prevented the Department of Corrections from recharacterizing the appropriation of the interest as a fee or tax. See *Webb's*, 449 U.S. at 158; *Givens*, 381 F.3d at 1065.

C. *Applying Regulatory Takings Law to Takings of Interest Instead of the Severed "Interest Follows Principal" Approach*

Courts seem to pay little attention to the history of regulatory takings in their analyses of the inmate interest cases.¹²⁵ Each court presented with the question has relied entirely on the "interest follows principal" rule to guide the discussion, weighing the relative strength of that rule against the common law rule that prisoners hold minimal property rights in the fruits of their labor.¹²⁶ The "interest follows principal" rule, however, artificially separates the ownership of principal and the earned interest in a way that is surprisingly similar to the now discarded notion of conceptual severance.¹²⁷ The right to earn interest on principal, and to direct that interest to designated beneficiaries, is just one right from the bundle of rights that represents ownership of the principal.¹²⁸ Put in a slightly different way, courts could approach the issue as one of a temporary taking of the principal rather than a total taking of the interest, as Justice Breyer suggested in his dissenting opinion in *Phillips*.¹²⁹ If courts employed that analysis, the practice of focusing on whether an inmate "owns" the interest earned distinct from the principal would be revealed as equivalent to temporal severance, with the interest retained by the department of corrections representing the value of the temporary ownership of the principal.¹³⁰ Courts would use the interest lost as only one measure of the economic value of owning the principal for a period of time.¹³¹ If the courts looked at the ownership of the "parcel as a whole" both temporally and conceptually, instead of splitting their discussion into distinct inquiries into principal and interest, a very different analysis would result.¹³²

¹²⁵ See *Givens*, 381 F.3d at 1068; *Washlefske*, 234 F.3d at 185-86; *Schneider*, 151 F.3d at 1199.

¹²⁶ See *Givens*, 381 F.3d at 1068; *Washlefske*, 234 F.3d at 185-86; *Schneider*, 151 F.3d at 1199.

¹²⁷ See *Givens*, 381 F.3d at 1068; *Washlefske*, 234 F.3d at 185-86; *Schneider*, 151 F.3d at 1199.

¹²⁸ See *Webb's*, 449 U.S. at 164.

¹²⁹ See *Phillips*, 524 U.S. at 180 (Breyer, J., dissenting). Oddly, although Justice Breyer suggests the temporary taking of the principal as the starting point for his analysis, he seems to assume that even so, the appropriate rule in most cases is still that "interest follows principal." See *id.*

¹³⁰ See *id.*; cf. *United States v. General Motors Corp.*, 323 U.S. 373, 382-83 (1945) (finding the compensation due after a temporary taking of a warehouse includes the rental value of the property for the period of time during which it was taken).

¹³¹ See *Tahoe-Sierra*, 535 U.S. at 328-30; *General Motors*, 323 U.S. at 381-83.

¹³² See *infra* notes 133-238 and accompanying text.

III. ANALYSIS: APPLYING REGULATORY TAKINGS LAW TO FIND NO TAKING OF INTEREST

Abandoning the artificial, conceptual severance of interest and principal results in the prisoner interest cases appearing as instances of temporary regulatory limits on principal, which prevent the owners from using principal to earn interest.¹³³ This analysis replaces the current analysis which sees a potential taking of two distinct properties, the conceptually severed principal and its interest, and its reliance on the common law "interest follows principal" mantra.¹³⁴ One of the first hurdles to this analysis is determining which of the several established judicial tests of regulatory takings provides the most appropriate and consistent framework.¹³⁵ Complicating the question of which test to use in the case of the prisoner interest cases is the unusual circumstance of applying the Takings Clause to money and not real property.¹³⁶ This is because, in such instances, the courts' reliance on conceptual severance and the "interest follows principal" rule resulted either in finding no property interest to trigger a takings analysis or the total interest to be completely taken, so that the court never identified the appropriate test.¹³⁷

A. *Determining Which Regulatory Takings Test Is the Most Appropriate to Apply to Takings of Interest*

The *Penn Central Transportation Co. v. City of New York* multifactor test, the *Lucas* per se rule, and the *Loretto* per se rule are the most relevant tests within the regulatory takings jurisprudence.¹³⁸ In 2003, in *Brown v. Legal Foundation of Washington*, the Supreme Court decided

¹³³ See *Phillips v. Wash. Legal Found.*, 524 U.S. 156, 180 (1998) (Breyer, J., dissenting); cf. *United States v. General Motors Corp.*, 323 U.S. 373, 382-83 (1945) (finding the compensation due after a temporary taking of a warehouse includes the rental value of the property for the period of time during which it was taken).

¹³⁴ See *Brown v. Legal Found. of Wash.*, 538 U.S. 216, 234 (2003); *Phillips*, 524 U.S. at 164; *Webb's Fabulous Pharmacies v. Beckwith*, 449 U.S. 155, 162-64 (1980); *Givens v. Ala. Dep't of Corr.*, 381 F.3d 1064, 1067-70 (11th Cir. 2004); *Washlefske v. Winston*, 234 F.3d 179, 180 (4th Cir. 2000); *Schneider v. Cal. Dep't of Corr.*, 151 F.3d 1194, 1199-200 (9th Cir. 1998).

¹³⁵ See *Brown*, 538 U.S. at 233-35.

¹³⁶ See *Brauneis*, *supra* note 121, at 937-38; *Wolf*, *supra* note 121, at 1355-57.

¹³⁷ See *Givens*, 381 F.3d at 1070; *Washlefske*, 234 F.3d at 185-86; *Schneider*, 151 F.3d at 1201.

¹³⁸ See *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1019 (1992); *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 435-36 (1982); *Penn Cent. Transp. Co. v. City of New York*, 438 U.S. 104, 124 (1978).

the second of the two IOLTA cases by analogy to "the kind of per se taking that occurred in *Loretto*."¹³⁹ The Court did so because it was deciding whether the loss of interest was a taking, without reference to the use of the principal.¹⁴⁰ In *Eastern Enterprises v. Apfel*, in contrast, a plurality of the Supreme Court found that a general liability to pay the government is *not* the kind of permanent physical occupation that invokes the *Loretto* per se rule.¹⁴¹ The difference in the Court's decision to apply the *Loretto* per se rule in the two cases might be because in *Brown*, the Court dealt with the appropriation of specific funds and in *Eastern Enterprises*, the Court dealt with the imposition of a general monetary obligation.¹⁴² Although the distinction between general and specific obligations may be useful to distinguish between those monetary exactions which should be treated as a tax and those which should be analyzed under the Due Process Clause, that distinction is less useful in determining whether an appropriation of money is like a permanent, physical invasion.¹⁴³ The right to exclude formed the basis, in large part, for the *Loretto* per se rule.¹⁴⁴ In the case of monetary takings, however, there is no question of a right to exclude; only rights to disposition and use are implicated.¹⁴⁵ Taking into account the vague language surrounding the mention of *Loretto* in *Brown*, it does not make sense to use *Loretto*'s physical invasion test, which was developed to protect the right to exclude others from land.¹⁴⁶

The "exclusive possession" justification for the *Loretto* rule highlights one of the interesting wrinkles of applying the Takings Clause to money, and one of the reasons why money may be less protected by the Takings Clause than land or personal property.¹⁴⁷ The most protected element from the bundle of rights with respect to property in

¹³⁹ See *Brown*, 538 U.S. at 235. The Court went on to find that no compensation was due despite the per se taking because the interest lost had no economic value to the owner of the principal. See *id.* at 239-40.

¹⁴⁰ See *id.* at 234.

¹⁴¹ See *E. Enters. v. Apfel*, 524 U.S. 498, 530 (1998) (plurality opinion).

¹⁴² See *Brown*, 538 U.S. at 235; *E. Enters.*, 524 U.S. at 530; see also Brauneis, *supra* note 121, at 937 (discussing the distinction between general liabilities, like taxes, and specific property interests, which are governed by the Takings Clause).

¹⁴³ See Brauneis, *supra* note 121, at 943-44 (arguing that specific and general obligations deserve different treatment under the Constitution).

¹⁴⁴ See *Loretto*, 458 U.S. at 435; see also Radin, *supra* note 86, at 1678-80.

¹⁴⁵ See *Loretto*, 458 U.S. at 435; see also Radin, *supra* note 86, at 1678-80.

¹⁴⁶ See *Brown*, 538 U.S. at 235.

¹⁴⁷ See *supra* notes 144-46 and accompanying text.

regulatory takings cases is the right to exclude.¹⁴⁸ In questions of taking money, however, the right to exclude has no meaning.¹⁴⁹ The only meaningful property rights to protect with respect to money are the right to use and dispose of it.¹⁵⁰ Although certainly worthy of protection, the Supreme Court has not protected these rights as strongly as the right to exclude.¹⁵¹

B. *The Lucas Per Se Test Is Not Appropriate for Takings of Money*

The *Lucas* per se test presents an attractive alternative to the *Loretto* test when applied to the appropriations of money.¹⁵² The *Lucas* test finds a per se taking when a property owner loses all economically beneficial or productive use of land.¹⁵³ Rather than protecting the exclusive possession of land, as in *Loretto*, the *Lucas* test protects the use of land, which is a more meaningful right with respect to money.¹⁵⁴ On the one hand, if the interest and principal in the prisoner cases were considered separately, then because the departments of corrections completely appropriated the interest, the "no economically viable use" interpretation of the loss of interest becomes appealing.¹⁵⁵ On the other hand, when the test is applied to the money "as a whole," that is, to the interest and principal together, application of this test appears less appropriate because some economically beneficial use remains for the principal.¹⁵⁶

Application of the *Lucas* test requires overcoming two hurdles.¹⁵⁷ First, the Supreme Court limited the *Lucas* rule to real property, explic-

¹⁴⁸ See *Nollan v. Cal. Coastal Comm'n*, 483 U.S. 825, 831 (1987); *Loretto*, 458 U.S. at 435; see also Radin, *supra* note 86, at 1678-80 (discussing the importance of the right to exclude in recent takings jurisprudence generally, and arguing that courts engage in conceptual severance primarily in cases where to do so would protect an owner's right to exclude).

¹⁴⁹ See, e.g., *Brown*, 538 U.S. at 235 (omitting any reference to the right to exclude in determining the nature of the taking of money).

¹⁵⁰ See *General Motors*, 323 U.S. at 378 (listing the three protected rights with respect to property as the rights to possess, use, and dispose of property).

¹⁵¹ Compare *Loretto*, 458 U.S. at 435-36 (relying strongly on the importance of protecting the right to exclusive possession), with *Andrus v. Allard*, 444 U.S. 51, 65-66 (1979) (holding that the relatively weak protection for the right to dispose of property supported the lack of violation of the Takings Clause for eliminating the right to sell property).

¹⁵² See *supra* notes 78-82 and accompanying text.

¹⁵³ 505 U.S. at 1019.

¹⁵⁴ See *id.*

¹⁵⁵ See *Webb's*, 449 U.S. at 164; *Schneider*, 151 F.3d at 1201.

¹⁵⁶ Cf. *Lucas*, 505 U.S. at 1016 n.7.

¹⁵⁷ See *infra* notes 158-67 and accompanying notes.

itly rendering it inapplicable to personal property.¹⁵⁸ While at first glance that appears to provide a strong argument for declining to apply the *Lucas* rule to appropriations of money, the justification for the Court's limitation suggests a potentially reasonable extension to appropriations or limitations on use of money.¹⁵⁹ The Court relied on the understanding that owners of personal property hold their property with the expectation that government regulations may someday render it valueless.¹⁶⁰ According to the Court, however, owners of real property have no such understanding, and expect that regulations may diminish, but not erase, the value of their land.¹⁶¹ The viability of an extension of the *Lucas* rule from land to money then turns on whether owners of money hold their money with the expectation that government regulation may cause their money to become worthless, or merely less valuable.¹⁶² The answer to whether extension of the *Lucas* rule is reasonable is beyond the scope of this Note. The result is the same whether or not the ownership of principal and interest are considered separately, as when the two are conceptually severed, or as part of a unified "parcel as a whole."¹⁶³ Either the *Lucas* per se rule is inappropriate to apply to either principal or interest, leading to application of the *Penn Central* multifactor test,¹⁶⁴ or *Lucas* would be potentially appropriate for both, leading to the second hurdle described below.¹⁶⁵

Assuming that the *Lucas* test can provide an appropriate framework for analyzing regulatory takings of money, the test also requires showing that the property owner has lost "all economically beneficial or productive use" of the property.¹⁶⁶ In this inquiry, a difference emerges between the analysis that severs interest and principal and one that joins the two.¹⁶⁷ Any *Lucas* argument that relies upon the fact that the inmates have lost all economically viable use of their interest also relies on the conceptual severance of the interest from the principal.¹⁶⁸ Under a "parcel as a whole" approach, in contrast, the rele-

¹⁵⁸ See *Lucas*, 505 U.S. at 1027-28. The Court limited the "no economically viable use" per se rule to real property in part because the Court had already held that denying the ability to sell property at all was not necessarily a taking. See *id.*; *Andrus*, 444 U.S. at 66-67.

¹⁵⁹ See *Lucas*, 505 U.S. at 1027-28.

¹⁶⁰ See *id.*

¹⁶¹ See *id.*

¹⁶² See *id.*

¹⁶³ See *id.*

¹⁶⁴ See *Lucas*, 505 U.S. at 1027-28.

¹⁶⁵ See *id.* at 1015-16.

¹⁶⁶ See *id.* at 1015.

¹⁶⁷ See *id.* at 1016 n.7.

¹⁶⁸ See *Brown*, 538 U.S. at 234-35; *Webb's*, 449 U.S. at 164; *Schneider*, 151 F.3d at 1201.

vant inquiry is whether the inmates retain any economically viable use of the principal *or* interest.¹⁶⁹ The ability to earn interest represents only one use of the principal.¹⁷⁰ In each of the prisoner interest cases the inmate is at least permitted to retain the principal after leaving prison, so the deprivation imposed by the regulation is at most a temporary total economic deprivation.¹⁷¹ Under the Supreme Court's decision in *Tahoe-Sierra*, even a total economic deprivation, if it is only temporary, does not automatically trigger a per se taking.¹⁷² In *Washlefske* and *Schneider*, inmates were able to spend principal from prison accounts in the prison commissary and so retained some economically viable use of the principal even while in prison.¹⁷³ In *Washlefske*, inmates were permitted to send the principal to recipients outside the prison, including for deposit in interest-bearing accounts.¹⁷⁴ Thus, inmates retained at least some use of their principal.¹⁷⁵ Because inmates retain significant rights to use and dispose of their principal during and after incarceration, application of the *Lucas* per se test would fail for lack of a total economic deprivation.¹⁷⁶ This result would differ if the analysis viewed the loss of interest independent from the use of the principal.¹⁷⁷

C. Applying the Penn Central Multifactor Test

Discarding both the *Lucas* and the *Loretto* per se rules, the remaining test is the *Penn Central* multifactor approach.¹⁷⁸ As articulated by the Supreme Court in *Penn Central*, the multifactor approach imposes no set formula but rather requires a series of "ad hoc, factual inquiries" into the "particular circumstances of that case."¹⁷⁹ Among the relevant factors, the Court lists the character of the governmental action, the economic impact of the regulation, and its interference with distinct, investment-backed expectations.¹⁸⁰

¹⁶⁹ See *Lucas*, 505 U.S. at 1016 n.7.

¹⁷⁰ See *Phillip's*, 524 U.S. at 180 (Breyer, J., dissenting); *Webb's*, 449 U.S. at 164.

¹⁷¹ See *Givens*, 381 F.3d at 1065; *Washlefske*, 234 F.3d at 181; *Schneider*, 151 F.3d at 1195.

¹⁷² *Tahoe-Sierra Pres. Council v. Tahoe Reg'l Planning Agency*, 535 U.S. 302, 332 (2002).

¹⁷³ See *Washlefske*, 234 F.3d at 181; *Schneider*, 151 F.3d at 1195.

¹⁷⁴ See *Washlefske*, 234 F.3d at 181.

¹⁷⁵ See *id.*

¹⁷⁶ See *Tahoe-Sierra*, 535 U.S. at 330; *Lucas*, 505 U.S. at 1019.

¹⁷⁷ See *Brown*, 538 U.S. at 235; *Webb's*, 449 U.S. at 164; *Schneider*, 151 F.3d at 1201.

¹⁷⁸ See *Tahoe-Sierra*, 535 U.S. at 334; *Penn Cent.*, 438 U.S. at 124.

¹⁷⁹ *Penn Cent.*, 438 U.S. at 123-24.

¹⁸⁰ See *id.* at 124.

1. The Character of the Government Action Prong

The Court first described the character of the governmental action prong in *Penn Central*, explaining that a regulation that imposed a physical invasion on a property owner was worse than a regulation that "adjusted the benefits and burdens of economic life to promote the common good."¹⁸¹ Four years later, *Loretto*, which found a per se taking in all cases of a permanent physical invasion, supplanted the physical invasion element of this factor.¹⁸² The other element of the "character" prong as first described in *Penn Central* is whether or not the regulation in question merely "adjusts benefits and burdens" for the common good.¹⁸³ For the most part, the public use requirement of the Takings Clause does not determine the outcome of the "character" factor.¹⁸⁴ In more recent cases, courts interpret the "common good" element of the character of the governmental action to include whether the regulation in question was imposed retroactively, whether the regulation targeted a small number of people or entities to bear a communal burden, as well as the importance of the government purpose the taking served.¹⁸⁵

In the prisoner interest cases, the character of the governmental action prong of the multifactor test results in either a neutral outcome or a finding of no taking.¹⁸⁶ The laws foreclosing the ability to earn interest do not represent a physical invasion, and so fail under that element of the character of the government action prong in the initial *Penn Central* articulation of the test.¹⁸⁷ The laws also pass the low hurdle of appropriately "adjusting the benefits and burdens of economic life," a hurdle which differs little from the "public use" requirement of any government taking.¹⁸⁸ In *Washlefske* and *Schneider*,

¹⁸¹ See *id.*; see also FISCHEL, *supra* note 67, at 50 (noting that the court provided little guidance in interpreting the broad parameters laid out by this prong).

¹⁸² See *Loretto*, 458 U.S. at 434-35; see also Peterson, *supra* note 76, at 1317-18 (explaining that before *Loretto*, courts used the 'character' prong to ask whether there was a physical invasion).

¹⁸³ See *Penn Cent.*, 438 U.S. at 124.

¹⁸⁴ See Peterson, *supra* note 76, at 1318-19.

¹⁸⁵ See *E. Enters.*, 524 U.S. at 537; *Bass Enters. Prod. Co. v. United States*, 381 F.3d 1360, 1370 (Fed. Cir. 2004); *Appollo Fuels, Inc. v. United States*, 381 F.3d 1338, 1350-51 (Fed. Cir. 2004); see also Peterson, *supra* note 76, at 1317-19 (arguing that recent developments in the character of the governmental action prong are moving towards incorporating the retroactive or targeted nature of the action).

¹⁸⁶ See *infra* notes 187-92 and accompanying text.

¹⁸⁷ See *Penn Cent.*, 438 U.S. at 124. But see *Brown*, 538 U.S. at 235 (suggesting the *Loretto* per se rule for takings of interest).

¹⁸⁸ See *Penn Cent.*, 438 U.S. at 124; see also Peterson, *supra* note 76, at 1318-19.

this factor could strengthen the Departments of Corrections' argument because the regulation required the interest to be deposited in a fund that went toward the benefit of the inmates.¹⁸⁹ Even under the recent expansion of this element, the regulations in question are not retroactive and do not appear to unfairly target a small group.¹⁹⁰ The character of the government action prong of the multifactor test, therefore, appears to weigh against the inmates.¹⁹¹ This result remains unchanged whether or not the interest is conceptually severed from the principal or the two are treated as a single parcel, because the relative magnitude of the regulation's impact is irrelevant to the outcome of this factor.¹⁹²

2. The Economic Impact Prong

The economic impact prong and the interference with distinct, investment-backed expectations prong of the multifactor test have evolved through several interpretations since the Supreme Court described them in 1978.¹⁹³ In the Court's initial introduction of the multifactor test in *Penn Central*, the economic impact prong included the investment-backed expectation inquiry as one element.¹⁹⁴ In later cases, however, the Court separated the two into two distinct factors of a three-factor test.¹⁹⁵ The economic impact prong, when applied independently from the investment-backed expectations prong, in accordance with courts' most recent practice, measures only the dollar amount of the economic loss suffered by the property owner.¹⁹⁶

¹⁸⁹ See *Washlefske*, 234 F.3d at 181; *Schneider*, 151 F.3d at 1195.

¹⁹⁰ See *Givens*, 381 F.3d at 1065–66; *Washlefske*, 234 F.3d at 181–82; *Schneider*, 151 F.3d at 1195–96.

¹⁹¹ See *supra* notes 181–90 and accompanying text.

¹⁹² See *Webb's*, 449 U.S. at 164–65 (finding a taking as a result of the overwhelming economic impact of the regulation on the loss of interest, but omitting any discussion of the character of the government action).

¹⁹³ See *Tahoe-Sierra*, 535 U.S. at 315 n.10; *E. Enters.*, 524 U.S. at 529; *Penn Cent.*, 438 U.S. at 124; see also Calvert G. Chipcase, *From Grand Central to the Sierras: What Do We Do with Investment-Backed Expectations in Partial Regulatory Takings?*, 23 VA. ENVTL. L.J. 43, 56–66 (2004) (discussing evolution from “distinct” to “reasonable” investment-backed expectations); Steven J. Eagle, *The Rise and Rise of “Investment-Backed Expectations,”* 32 URB. LAW. 437, 442–46 (2000) (following the evolution from distinct to reasonable investment-backed expectations); Peterson, *supra* note 76, at 1320, 1325–27 (chronicling the variety of interpretations of these terms).

¹⁹⁴ See *Penn Cent.*, 438 U.S. at 124.

¹⁹⁵ See, e.g., *Tahoe-Sierra*, 535 U.S. at 315 n.10; *Palazzolo v. Rhode Island*, 533 U.S. 606, 617 (2001); *E. Enters.*, 524 U.S. at 529.

¹⁹⁶ See, e.g., *Brown*, 538 U.S. at 235; *E. Enters.*, 524 U.S. at 529; see also Peterson, *supra* note 76, at 1325.

In the inmate interest cases, the outcome of the economic impact prong is identical regardless of whether a court separates the interest from the principal or examines the interest and the principal together as an entire parcel.¹⁹⁷ In both analyses, the economic impact of the regulation is the dollar amount of the economic loss of the inmate, which is equivalent to the lost interest.¹⁹⁸ The regulation "took" exactly one right from the prisoner with respect to his property, the right to earn interest on principal earned from a work release program.¹⁹⁹ The dollar amount of the economic impact is difficult to establish because neither the amount of money the inmates would have earned as interest, nor the total amount of interest earned by the departments of corrections, appear in *Givens* or *Schneider*.²⁰⁰ In *Washlefske*, the court notes that interest from the pooled amounts of all inmate accounts (none of which provided interest to inmates) earned the Department of Corrections \$5,479.45 in 1998.²⁰¹ In addition to that amount, the prison also earned an average of \$59.86 per month from a smaller checking account made up of inmate accounts.²⁰²

Interpretation of that dollar amount of economic loss—the interest lost, in other words—in the multifactor test is less straightforward.²⁰³ *Washlefske* contained the amount of money the Department of Corrections earned, but not the corresponding loss to the individual inmate.²⁰⁴ The economic impact of a potential taking is measured from the perspective of what the claimant lost, not what the government gained.²⁰⁵ Whether that economic impact is so severe as to rise to the level of a taking depends on how large an impact the regulation imposed in comparison to the remaining rights and economic value the property owner retained in the property.²⁰⁶ This is the famil-

¹⁹⁷ See *Brown*, 538 U.S. at 234–35; *Webb's*, 449 U.S. at 160; *Schneider*, 151 F.3d at 1119.

¹⁹⁸ See *Brown*, 538 U.S. at 234–35; *Webb's*, 449 U.S. at 160; *Schneider*, 151 F.3d at 1119.

¹⁹⁹ See *Brown*, 538 U.S. at 234–35; *Webb's*, 449 U.S. at 164; *Schneider*, 151 F.3d at 1119.

²⁰⁰ See *Givens*, 381 F.3d 1064; *Schneider*, 151 F.3d 1194.

²⁰¹ *Washlefske*, 234 F.3d at 181.

²⁰² See *id.* *Washlefske* also includes the most detailed information about the amount of money involved from the perspective of an individual inmate. See *id.* The inmate in this case earned an average of \$108.76 per month from being paid \$0.90 per hour for labor while in prison. See *id.* The inmate kept an average monthly closing balance of \$87.05 in the two non-interest-bearing accounts maintained in his name by the Department of Corrections. See *id.*

²⁰³ See FISCHEL, *supra* note 67, at 50–51; Peterson, *supra* note 76, at 1325.

²⁰⁴ See *Washlefske*, 234 F.3d at 181–82.

²⁰⁵ See *Brown*, 538 U.S. at 236–37.

²⁰⁶ See *E. Enters.*, 524 U.S. at 530–32; *Penn Cent.*, 438 U.S. at 138 n.36 (finding significant the remaining use of Grand Central as a train station in limiting the strength of the economic impact).

iar denominator problem, and it provided the original motivation for the investment-backed expectations prong of the multifactor test.²⁰⁷ Courts that have divorced the two prongs have nevertheless been forced to find other methods to weigh the outcome of this prong.²⁰⁸

In all of the prisoner interest cases, inmates were able to use and dispose of the principal in at least some way while in prison.²⁰⁹ In some cases, inmates could transfer the principal to recipients outside the prison.²¹⁰ In other cases, inmates could spend the principal within the prison in the commissary.²¹¹ In all cases, the principal would be returned to the inmate at the conclusion of the prison term.²¹² Although none of the facts relating to the use and disposition of the principal is relevant when considering the deprivation of the interest alone, these facts do become relevant when looking at the entirety of both the principal and the interest as a unified parcel.²¹³ Under a unified analysis of the parcel as a whole, and thus viewing earned interest as only one of many uses attaching to ownership of the principal, the loss of that interest is no longer a per se taking because the size of the deprivation of interest appears less significant with respect to the remaining uses of the principal.²¹⁴

²⁰⁷ See *Penn Cent.*, 438 U.S. at 124; see also Michelman, *supra* note 68, at 1229-34 (using the distinctly perceived interest of the property owner (or, the owner's "investment-backed expectations") to define the boundaries of the affected parcel for purposes of measuring the extent of harm).

²⁰⁸ See *E. Enters.*, 524 U.S. at 530-32 (finding significant the lack of proportionality between the economic impact and the claimant's participation in the affected regulatory scheme).

²⁰⁹ See *Givens*, 381 F.3d at 1065 (concerning prisoners able to make withdrawals from the "PMOD" account); *Washlefske*, 234 F.3d at 181 (explaining that money from "spend accounts" in prison may be spent in the prison commissary, and inmates may send money outside the prison to be invested in interest-bearing accounts, but at least \$25 must remain in a "hold account"); *Schneider*, 151 F.3d at 1195 (explaining that only money from a non-interest-bearing "TTA" can be spent in the prison commissary, and an interest-bearing "IPSA" may only be established if there is at least \$25 in an "TTA").

²¹⁰ See *Washlefske*, 234 F.3d at 181; *Schneider*, 151 F.3d at 1195.

²¹¹ See *Washlefske*, 234 F.3d at 181; *Schneider*, 151 F.3d at 1195.

²¹² See *Givens*, 381 F.3d at 1070; *Washlefske*, 234 F.3d at 181; *Schneider*, 151 F.3d at 1195.

²¹³ See *Brown*, 538 U.S. at 234-35; *Webb's*, 449 U.S. at 164; *Schneider*, 151 F.3d at 1201 (all three cases looking at the loss of interest without considering the remaining use of principal).

²¹⁴ See *Andrus*, 444 U.S. at 65-66 (finding that loss of one "stick in the bundle," the right to disposition, does not necessarily constitute a taking).

3. The Interference with Distinct Investment-Backed Expectations Prong

The final prong of the *Penn Central* multifactor test is the extent to which the regulation interferes with distinct, investment-backed expectations.²¹⁵ This prong of the test has caused courts considerable difficulty over the years, so much so that even the term itself has evolved.²¹⁶ Professor Frank I. Michelman first introduced the term in his article, describing it as a "distinctly perceived, sharply crystallized, investment-backed expectation,"²¹⁷ and Justice Brennan adopted it in *Penn. Central* as "distinct investment-backed expectations."²¹⁸ In later Supreme Court cases, the inquiry became one of "reasonable investment-backed expectations."²¹⁹ The test initially measured whether the economic impact of a regulation had gone too far.²²⁰ In recent years, though, the prong has developed a life of its own, sometimes taking on new meaning, and sometimes being ignored entirely.²²¹ A modern interpretation of distinct or reasonable investment-backed expectations involves the amount of notice afforded the property owner (less

²¹⁵ See *Penn. Cent.*, 438 U.S. at 124.

²¹⁶ See FISCHER, *supra* note 67, at 50-51; Peterson, *supra* note 76, at 1320-25; see also *Givens*, 381 F.3d at 1070; *Washlefske*, 234 F.3d at 181; *Schneider*, 151 F.3d at 1195.

²¹⁷ Michelman, *supra* note 68, at 1233.

²¹⁸ *Penn. Cent.*, 438 U.S. at 124.

²¹⁹ See, e.g., *Kaiser Aetna v. United States*, 44 U.S. 164, 175 (1979).

²²⁰ See *Penn. Cent.*, 438 U.S. at 124; Michelman, *supra* note 68, at 1233. Professor Michelman's method for determining when compensation should be due required determining "demoralization costs" which he defined as

the total of (1) the dollar value necessary to offset disutilities which accrue to losers and their sympathizers specifically from the realization that no compensation is offered, and (2) the present capitalized dollar value of the lost future production . . . caused by demoralization of uncompensated losers, their sympathizers, and other observers disturbed by the thought that they themselves may be subject to similar treatment on some occasion.

Michelman, *supra* note 68, at 1214. Interference with "distinctly perceived, sharply crystallized, investment-backed expectation" leads to high demoralization costs. See *id.* at 1229-34. For a refreshingly clear explanation of this analysis, see FISCHER, *supra* note 67, at 142-51.

²²¹ See Chipcase, *supra* note 193, at 66-73 (arguing that "reasonable" should be discarded and courts should return to "distinct"); Richard A. Epstein, *Lucas v. South Carolina Coastal Council: A Tangled Web of Expectations*, 45 STAN. L. REV. 1369, 1371-72 (arguing against the use of reasonable expectations as a test for notice); Robert J. Goldstein, *The Future of Environmental Law: Adjusting Expectations After Tahoe-Sierra*, 19 PACE ENVTL. L. REV. 489, 497-99 (2002) (arguing for limiting "reasonable" to "ecologically supportable"); Gregory M. Stein, *Takings in the 21st Century: Reasonable Investment-Backed Expectations After Palazzolo and Tahoe-Sierra*, 69 TENN. L. REV. 891, 910-19, 935-37 (2002) (following the emergence of notice as a replacement for the otherwise ambiguous "investment-backed expectations").

protection is provided for those in highly regulated industries, and more protection is provided for retroactive regulations) and any reasonable reliance the owner had on the absence of the regulation.²²²

In this more recent incarnation, divorced from the economic impact of the regulation, the investment-backed expectations prong of the multifactor test fails to fulfill its initial purpose—how to measure the relative importance of economic loss on a property owner by determining a comparative property loss.²²³ For example, a million-dollar economic impact may, in isolation, appear significant, but not if it occurs with respect to a piece of property valued at several billion dollars.²²⁴ Similarly, an economic impact of a few hundred dollars may seem trivial to a court unless it is revealed that it is lost from a piece of property worth only one thousand dollars.²²⁵ This, of course, is a version of the “denominator problem” mentioned above.²²⁶

Applying the earlier version of the investment-backed expectations test to the prisoner interest cases, the question becomes to what extent does a prisoner perceive the right to earn interest as a distinct right, crystallized and worthy of protection.²²⁷ One indicator of such a right would be an owner’s independent, “distinct” investment in such a right, but other indicators are possible.²²⁸ For example, the legal treatment of principal/interest cases, which analyzes the two parts separately, would argue for a common understanding of the right to earn interest as a distinct, protectable interest.²²⁹ The right to earn interest on principal, however, is not ordinarily considered a separate, protected right attached to property ownership.²³⁰ The air rights at issue in *Penn Central*, for example, are more easily thought of as dis-

²²² See *E. Enters.*, 524 U.S. at 532–36 (discussing retroactivity under reasonable investment-backed expectations prong); *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 1007 (1984) (finding no reasonable investment-backed expectation because plaintiff had sufficient notice of the regulation); *Appolo Fuels*, 381 F.3d at 1349–50 (finding notice and a highly regulated industry relevant to the reasonable investment-backed expectation analysis).

²²³ See *Penn Cent.*, 438 U.S. at 124; Michelman, *supra* note 68, at 1229–34.

²²⁴ See *Penn Cent.*, 438 U.S. at 138 n.36 (finding no taking because the property could still be profitably used as a railroad station); *id.* at 141 (Rehnquist, J., dissenting) (describing the lost revenue resulting from the regulation as at least \$3 million per year); see also Rose, *supra* note 77, at 566–69.

²²⁵ See Michelman, *supra* note 68, at 1190; Rose, *supra* note 77, at 566–69.

²²⁶ See *supra* notes 83–101 and accompanying text.

²²⁷ See *Penn Cent.*, 438 U.S. at 124–25; Michelman, *supra* note 68, at 1233.

²²⁸ See *Penn Cent.*, 438 U.S. at 124–25; Michelman, *supra* note 68, at 1233.

²²⁹ See *Phillips*, 524 U.S. at 163–66; *Webb’s*, 449 U.S. at 160–62; *Givens*, 381 F.3d at 1068; *Washlefske*, 234 F.3d at 185–86; *Schneider*, 1199–201.

²³⁰ See *Phillips*, 524 U.S. at 170 (discussing interest as government created value).

tinct from the ownership of the earth underneath, both legally (with the invention of "transferable development rights") and physically; yet the Supreme Court declined to find that the loss of value of those air rights involved separable, distinct, investment-backed expectations.²³¹ Under a unified, "parcel as the whole" analysis, the investment-backed expectations prong of the *Penn Central* test would probably weigh in favor of the department of corrections, reasoning that the economic impact of the lost interest is a relatively insignificant imposition on inmates given the remaining uses of the principal.²³²

An analysis of the investment-backed expectations prong using more recent court interpretations based on notice or reliance is also likely to weigh in favor of no taking.²³³ Inmates are in a highly regulated environment, calling into question any reasonable expectation they may have for earning interest.²³⁴ In one sense, inmates' reliance on the interest might be great because they have no other options.²³⁵ A prison is such a heavily regulated environment, however, that a court is likely to find that reliance unreasonable.²³⁶ Furthermore, notice problems are minimal because the regulations are not retroactive and inmates are informed of the regulation before depositing money in the prison accounts.²³⁷ Thus, under either early or late versions of the investment-backed expectations prong, a court would likely find that the interference with prisoners' expectations is relatively minor when considered in conjunction with the remaining benefits of ownership of principal, leading this prong to weigh against finding a taking.²³⁸

CONCLUSION

Courts that rely on the "interest follows principal" rule incorporate the idea of conceptual severance into regulatory takings law. This conflicts with the development of regulatory takings decisions, which have consistently attempted to disavow the practice of conceptual severance. The most explicit disavowal of conceptual severance has come in decisions concerning attempted temporal severance, yet the uni-

²³¹ See *Penn Cent.*, 438 U.S. at 130.

²³² See *id.* at 137-38.

²³³ See, e.g., *E. Enters.*, 524 U.S. at 533-36; *Ruckelshaus*, 467 U.S. at 1005-08.

²³⁴ See *Ruckelshaus*, 467 U.S. at 1007; *Appolo Fuels*, 381 F.3d at 1349.

²³⁵ See *Schneider*, 151 F.3d at 1196.

²³⁶ See *Ruckelshaus*, 467 U.S. at 1007; *Appolo Fuels*, 381 F.3d at 1349; see also *Eagle*, *supra* note 193, at 443-44.

²³⁷ See *E. Enters.*, 524 U.S. at 532-36; *Appolo Fuels*, 381 F.3d at 1350.

²³⁸ See *supra* notes 215-37 and accompanying text.

versally applied "interest follows principal" rule is an example of temporal severance. Although such a rule may have been useful in the eighteenthth century, and is still useful in many areas of the law, in the area of regulatory takings, it is no longer needed. Not only would the disavowal of the "interest follows principal" rule be consistent with the rest of regulatory takings law, but this is one circumstance in which an application of regulatory takings doctrine would provide a clearer, rather than more ambiguous, outcome.

REBECCA ROGERS