tions by declaring it "inappropriate" to use case law from either realm as controlling precedent in the other.[722] Physical invasions falling short of permanent physical occupations remain subject to *Penn Central*.

A second *per se* taking rule is of more recent vintage. Land use controls constitute takings, the Court stated in *Agins v. City of Tiburon*, if they do not "substantially advance legitimate governmental interests," or if they deny a property owner "economically viable use of his land." [723] This second *Agins* criterion creates a categorical rule: when, with respect to the parcel as a whole, the landowner "has been called upon to sacrifice *all* economically beneficial uses in the name of the common good, that is, to leave his property economically idle, he has suffered a taking." [724] The only exceptions, the Court explained in *Lucas*, are for those restrictions that come with the property as title encumbrances or other legally enforceable limitations. Regulations "so severe" as to prohibit all economically beneficial use of land "cannot be newly legislated or decreed (without compensation), but must inhere in the title itself, in the restrictions that background principles of the State's law of property and nuisance already place upon land ownership. A law or decree with such an effect must, in other words, do no more than duplicate the result that could have been achieved in the courts—by adjacent land owners (or other uniquely affected persons) under the State's law of private nuisance, or by the State under its complementary power to abate [public] nuisances . . . , or otherwise." [725] Thus, while there is no broad "noxious use" exception separating police power regulations from takings, there is a narrower "background principles" exception based on the law of nuisance and unspecified "property law" principles.

Together with the investment-backed expectations factor of *Penn Central*, background principles were viewed by many lower courts as supporting a "notice rule" under which a taking claim was absolutely barred if based on a restriction imposed under a regulatory

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[722] *Tahoe-Sierra*, 535 U.S. at 323. *Tahoe-Sierra's* sharp physical-regulatory dichotomy is hard to reconcile with dicta in Lingle v. Chevron U.S.A. Inc., 544 U.S. 528, 539 (2005), to the effect that the *Penn Central* regulatory takings test, like the physical occupations rule of *Loretto*, "aims to identify regulatory actions that are functionally equivalent to the classic taking in which government directly appropriates private property or ousts the owner from his domain."

[723] 447 U.S. 255, 260 (1980).

[724] Lucas v. South Carolina Coastal Council, 505 U.S. 1003, 1019 (1992) (emphasis in original). The *Agins/Lucas* total deprivation rule does not create an all-or-nothing situation, since "the landowner whose deprivation is one step short of complete" may still be able to recover through application of the *Penn Central* economic impact and "distinct [or reasonable] investment-backed expectations" criteria. Id. at 1019 n.8 (1992). *See also Palazzolo*, 533 U.S. at 632.

[725] 505 U.S. at 1029.