Making Sense of *Penn Central*

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"[W]e have frequently observed that whether a particular restriction will be rendered invalid by the government's failure to pay for any losses proximately caused by it depends largely upon the particular circumstances [in that] case."
–Penn Central Transportation Co. v. City of New York, 438 U.S. 104, 124 (1978).

"[A] 'totality of the circumstances' analysis masks intellectual bankruptcy."
- Thomas Merrill, "The Economics of Public Use," 72 *Cornell L. Rev*. 61, 92 (1986).

INTRODUCTION

In *Penn Central Transportation Co. v. City of New York,*[2] the Supreme Court famously observed that it had been "unable to develop any 'set formula' for determining when 'justice and fairness' require" payment under the Takings Clause, and that it was therefore compelled to rely on "essentially ad hoc, factual inquiries."[3] In an apparent effort to begin to give *some* content to regulatory takings analysis, the Court identified three factors with "particular significance" in a takings case: (1) the "economic impact" of the government action, (2) the extent to which the action "interferes with distinct investment-backed expectations," and (3) the "character" of the action.[4] Yet, over the following twenty-five years, the Court has provided little guidance on the meaning and proper application of these three factors,[5] perpetu-

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2. 438 U.S. 104 (1978).

3. *Id.* at 124

4. *Id.* The Court's statement that these three factors have "particular significance" might be read to suggest that other factors could be relevant as well. However, the Court has never explicitly expanded upon this list of factors.

5. *See* Holly Doremus, *Takings and Transition*, 19 J. LAND USE & ENVTL. L. 1, 7 (2003) ("The Court has many times repeated the list of *Penn Central* factors, but has

ating the essentially *ad hoc* approach to takings analysis[6] and contributing to the widespread view that regulatory takings is an especially confused field of law.[7] The Court's failure to come to grips with the meaning of *Penn Central* is especially striking in view of the substantial progress the Court has made recently in resolving other questions about regulatory takings doctrine.[8] The next "big thing" — perhaps the last big thing — in regulatory takings law will be resolving the meaning of the *Penn Central* factors.

At one point, the Court appeared poised to jettison the *Penn Central* analysis altogether. During the 1980's and 1990's, as an antidote to the chronic vagueness of the *Penn Central* framework, the Court attempted to develop a set of alternative, bright line tests.[9] In *Lucas v. South Carolina Coastal Council*,[10] the Court ruled that a regulation that denies the owner "all economically viable use" of private property represents a *per se* taking. And in *Loretto v. Teleprompter Manhattan CATV Corp.*,[11] the Court said that a regulation resulting in a permanent physical occupation of private property also represents a *per se* taking.[12] From the perspective of property rights advocates, this approach

never refined the meaning of those factors, or explained how they should be weighted.").

6. *See Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency*, 535 U.S. 302, 326 (2002), *quoting Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1015 (1992), in turn quoting *Penn Central*, 438 U.S., at 124 ("In the decades following [*Penn Central*], we have 'generally eschewed' any set formula for determining how far is too far, choosing instead to engage in 'essentially ad hoc, factual inquiries."').

7. *See, e.g.*, D. Benjamin Barros, *The Police Power and the Takings Clause*, 58 U. MIAMI L. REV. 471, 471 & n.1 (2002) (bemoaning the "widespread confusion" created by Supreme Court takings jurisprudence and citing numerous prior articles making similar complaints).

8. *See, e.g,. Lingle v. Chevron U.S.A., Inc.*, 125 S.Ct. 2074 (2005) (repudiating the "substantially advances" takings test); *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency*, 535 U.S. 302 (2002) (clarifying "temporary takings"). *See generally* John D. Echeverria, *Lingle, Etc.: the U.S. Supreme Court's 2005 Takings Trilogy*, 35 ELR 10577 (2005); John D. Echeverria, *A Turning of the Tide: The Tahoe-Sierra Regulatory Takings Decision*, 32 ELR 11235 (2002).

9. *See generally* Molly McUsic*, Looking Inside Out: Institutional Analysis and the Problem of Takings*, 92 Nw.U.L.Rev. 591 (1998) (describing the evolution of the Supreme Court's "bright line" takings tests).

10. 505 U.S. 1003 (1992).

11. 458 U.S. 419 (1982).

12. As the Court made clear in *Lucas*, these *per se* rules are subject to important qualifications, particularly when background principles of "property" or "nuisance" law bar a takings claimant from asserting a protected property right to engage in activities in certain locations or with certain types of external impacts. *Id.* at 1029-30 (explaining that regulations which prohibit an activity that was always unlawful do

appeared to lead reliably to findings of takings liability, albeit in narrowly defined circumstances. Even from the perspective of defenders of government regulatory authority, this approach had the potential benefit of identifying actions that would be safely immune from takings liability – assuming these *per se* tests came to define not only the grounds, but also the outer limits, of takings liability.[13]

The effort to construct a more rule-based takings doctrine has plainly faltered, returning *Penn Central* to the forefront. In recent years, the Court has given the *Loretto per se* rule a narrow interpretation, confining the test to a "relatively rare, easily identified" set of actions.[14] The Court has given the *Lucas per se* rule an even narrower reading, characterizing the *Lucas* test as applying only to "the complete elimination of a property's value."[15] Few if any regulations have such a drastic effect on property value, meaning that *Lucas* has been converted to a precedent of largely symbolic significance. At the same time, the Court's most recent regulatory takings decisions have explicitly reasserted the centrality of the *Penn Central* framework. For example, in *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency*,[16] the Court said that "[o]ur polestar. . . remains the principles set forth in *Penn Central* itself," which call for a "careful examination and weighing of all the relevant circumstances."[17] The upshot is that the law of regulatory takings today looks remarkably similar to the law as it existed in 1978 after *Penn Central* was decided.

The *per se* approach to regulatory takings failed in part because it has proven very difficult to cabin the complex fairness questions raised by takings claims with hard and fast rules. For example, the physical invasion of private space by third parties, in the abstract, represents a serious type of invasion of private

not constitute takings). *See also* 1028-29 (indicating that background principles can bar a taking claim based on the *per se* physical occupation theory).

13. *See* John D. Echeverria, *Is the Penn Central Three-Factor Test Ready for History's Dustbin?,* 52 LAND USE LAW & ZONING DIGEST 3 (January 2000) (arguing that the Court's *per se* tests, viewed not as supplemental takings tests, but as a complete reformulation of regulatory takings law, provided a potentially promising foundation for a regulatory takings doctrine that would provide clear rules and be quite respectful of government regulatory authority).

14. *See Tahoe-Sierra,* 535 U.S. at 324.

15. *See Lingle,* 125 S.Ct. at 2082.

16. 535 U.S. 302, 326 (2002).

17. *Id*. at 326 n. 23, quoting *Palazzolo v. Rhode Island*, 533 U.S. 606, 633 (2001) (O'Connor J., concurring).

property rights. But the burden imposed in the *Loretto* case by the requirement that Ms. Loretto accept placement of television equipment on the exterior of her building was actually quite trivial compared to the burden imposed by many restrictions on property use that plainly do not rise to the level of takings.[18] In addition, the *per se Lucas* rule is potentially subject to artful manipulation by clever investors who can structure land acquisitions in order to manufacture apparent regulatory wipeouts and create potential claims under that precedent.

Furthermore, the ideological middle of the Court, represented by Justice Anthony Kennedy and former Justice Sandra Day O'Connor, consistently resisted the effort by the more conservative wing of the Court, led by Justice Antonin Scalia, to develop a more rule-based approach to takings. They both preferred approaches that involved more nuanced examination of the factual circumstances of each case.[19] Eventually their preferences prevailed, throwing the Court back to the prior *Penn Central* analysis.

The upshot is that *Penn Central* now provides the only plausible path to reform of regulatory takings doctrine. An unsuccessful effort has been made to build a coherent, predictable law of regulatory takings by working around *Penn Central.* Now, as a practical matter, *Penn Central* is here to stay. Thus, the challenge ahead is figuring out how to convert *Penn Central* into the foundation for a manageable legal doctrine. To date, the *ad hoc Penn Central* analysis has appeared to mask, if not intellectual bankruptcy, to use Professor Merrill's provocative terminology, at least considerable uncertainty about the fundamental parameters

18. *See Concrete Pipe & Prods. v. Construction Laborers Pension Trust*, 508 U.S. 602, 645 (1992) (emphasizing that very severe economic impact is ordinarily required to support a regulatory takings claim).

19. For example, in *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992), Justice Kennedy joined in the judgment but filed a concurring opinion objecting to the suggestion in the majority opinion authored by Justice Scalia that a regulatory takings claim based on a regulation destroying all property value can only be defeated if the regulation parallels common law "background principles." Kennedy wrote, "Coastal property may present such unique concerns for a fragile land system that the State can go further in regulating its development and use than the common law of nuisance might otherwise permit." *Id.* at 1036. Similarly, in *Palazzolo,* Justice O'Connor disagreed with Justice Scalia's view that a claimant's advance notice of a regulatory restriction should be completely irrelevant in regulatory takings analysis, *see* 533 U.S. at 636-37 (Scalia, J., concurring), preferring instead to treat a claimant's advance notice of regulatory restrictions as a relevant but not necessarily dispositive factor in takings analysis. *See id.* at 632-36 (O'Connor, J., concurring).

of takings law. If the *Penn Central* test is to serve as more than legal decoration for judicial rulings based on intuition, it is imperative to clarify the meaning of *Penn Central*.[20]

This article seeks to achieve a modest objective using relatively modest analytic tools. Fundamental questions can, of course, be raised about the legitimacy of the entire regulatory takings enterprise.[21] But this article takes the Supreme Court's apparent commitment to *some* type of regulatory takings doctrine as a given. Moreover, a variety of competing theories have been advanced to explain and rationalize regulatory takings doctrine.[22] Rather than focus on those theories, this article primarily uses the holdings and reasoning of the Court's major takings precedents as building blocks in an effort to constrict a simpler, more predictable legal doctrine. A major theme of this article is that the Court's most recent takings decisions, *Lingle v. Chevron USA, Inc.*,[23] in particular, should resolve a good deal of the confusion that has reigned in this field of law.

Two of the most baffling and contentious questions surrounding *Penn Central* have been whether the takings analysis is affected by (1) the magnitude of the public interest served by a regulatory program, or (2) the degree to which a regulation is designed to avoid "harms" to the public or other citizens instead of generating "public benefits." A primary contribution of this article is to attempt to offer answers to these critical questions.

As to the first question, it is intuitively appealing to conclude that, the greater the public interest served by a regulatory program, the less willing the courts should be to assess takings liability and thereby deter government from addressing public concerns. But, given that regulatory takings doctrine is a subset of condemnation law, it makes no logical sense to excuse the government from liability on the ground the takings power is being

20. For different perspectives on *Penn Central*, *see, e.g.,* Marc R. Poirier, *The Virtue of Vagueness in Takings Doctrine*, 24 CARDOZO L. REV. 93 (2002) (defending the value of vagueness and uncertainty in the *Penn Central* analysis); Gary Lawson, Katherine A. Ferguson, Guillermo A. Montero, "*Oh Lord, Please Don't' Let Me Be Understood!": Rediscovering the Mathews v. Eldridge and Penn Central Frameworks*," 81 Notre Dame L. Rev. 1 (2005) (defending the *Penn Central* analysis as reasonably successful in accomplishing a modest debate-framing function).

21. *See, e.g.*, J. Peter Byrne, *Ten Arguments for the Abolition of the Regulatory Takings Doctrine*, 22 ECOLOGY L.Q. 89 (1995).

22. *See generally* Ellickson & Been, LAND USE CONTROLS, CASES AND MATERIALS 145-58 (2005) (surveying various legal policy justifications for regulatory takings doctrine).

23. 125 S.Ct. 2074 (2005).

used to accomplish an important public purpose. After all, no one would argue that the government should be able to avoid paying for a right-of-way because a road will serve an important transportation purpose. The solution to this conundrum offered in this article is, first, to acknowledge that a regulatory takings claim cannot properly be rejected on the ground that the public value or importance of what the government is trying to accomplish somehow "outweighs" the burden on a private property owner. On the other hand, at least when a regulation applies fairly broadly across the community, the value or importance of the government program should influence the outcome of a takings case. The reason is that a regulation which applies broadly across the community not only burdens the property owner but also benefits the owner by restricting activities that can reduce neighboring property values and enhancing the character of the community generally. The greater the value or importance of a government program to the community, the more significant the reciprocal benefits from regulation for each affected owner, and hence the less likely a taking has occurred. In sum, the public importance of a regulatory program is relevant in takings analysis, but for a different reason than has generally been considered.

As to the second issue, this article posits that the harm-preventing versus benefit-conferring nature of a regulation should be a relevant consideration in *Penn Central* analysis. Prior to the Court's decision in *Lucas v. South Carolina Coastal Council*,[24] it was generally understood that a regulation designed to protect the public from serious harms did not constitute a taking. While sometimes referred to as the "nuisance exception," this principle was not limited to traditional nuisance activity and applied more generally to activities that the legislature, in its judgment, concluded were harmful.[25] In *Lucas* Justice Scalia famously observed that it is "difficult, if not impossible, to discern. . . an objective, value-free basis" for distinguishing between harm-preventing and benefit-conferring regulations.[26] Justice Scalia's statement has sometimes been interpreted as banishing consideration of the harm-preventing character of a regulation in

24. 505 U.S. 1003 (1992).

25. *See Keystone Bituminous Coal Ass'n. v. DeBenedictis,* 480 U.S. 470, 491 (1987), *quoting Mugler v. Kansas*, 123 U.S. 623, 665 (1887) (observing that "[l]ong ago it was recognized that 'all property in this country is held under the implied obligation that the owner's use of it shall not be injurious to the community'").

26. 505 U.S. at 1026.

determining takings liability[27] But it appears that too much may have been read into Justice Scalia's statement. First, the statement was made in the context of a case involving regulation that rendered property valueless, and the decision cannot necessarily be read as repudiating the harm-benefit distinction outside that context, that is, in a *Penn Central* case. More fundamentally, as discussed in greater detail below, the distinction between harm–preventing and benefit-conferring regulations reflects a difference in the fundamental nature of governmental actions that should properly inform the outcome of regulatory takings cases.

Most of the balance of this article is devoted to analyzing and attempting to develop a clear and concise definition for each of the *Penn Central* factors. The first section surveys various alternative ways of assessing "economic impact," rejects one current approach (focused on profitability), and recommends use of one or both of two other approaches, one using the traditional "before and after" calculation and another focused on the original cost basis. The next section discusses the investment-backed expectations factor, and offers several recommendations on how this factor should be defined at different levels of generality in takings analysis. The third section addresses the most problematic of the *Penn Central* factors, the "character" factor. I first lay out the numerous different and inconsistent definitions of this term suggested by Supreme Court precedent; the large number of alternative definitions of character helps explain much of the confusion surrounding the *Penn Central* analysis. I then explain how the Supreme Court's 2005 decision in *Lingle v. Chevron USA,* should resolve much of the confusion about the character factor. Lastly, I lay out a condensed, if not completely seamless, set of definitions for "character." In this context, I discuss in detail how the public importance of the government program should factor into takings analysis, and the relevance of whether the government action is harm-preventing or benefit-conferring. The final section offers some thoughts on how the different *Penn Central* factors should be combined or weighed against each

27. Michael C. Blumm & Lucus Ritchie, *Lucas's Unlikely Legacy: The Rise of Background Principles as Categorical Takings Defenses*, 29 HARV.ENVTL.L.REV. 321, 332-33 (2005) (contending that Justice Scalia's opinion "shifted judicial focus from the traditional nuisance exception [based on *Mugler*] to a background principles inquiry).

other. I conclude with an optimistic vision of the future direction of takings law.

I.
ECONOMIC IMPACT.

Economic impact is the least problematic of the *Penn Central* factors. Generally speaking, the greater the economic impact of a government action the greater the likelihood of a taking. Furthermore, in the absence of a very significant economic impact, a regulatory taking claim will generally fail; as the Supreme Court has explained, takings recovery is limited to "extreme circumstances."[28] Recently, in *Lingle v. Chevron USA,* the Supreme Court underscored the point by stating that the goal of regulatory takings analysis is to identify regulatory actions that are so burdensome that they are "functionally equivalent to the classic taking in which government directly appropriates private property or ousts the owner from his domain."[29]

In *Lucas,* the Court said that a regulation that denies an owner *all* economic use of property should be deemed a *per se* taking. The Court characterized this type of claim as a "categorical" claim, to be distinguished from a multi-factor *Penn Central* claim. However, it is also possible to interpret the *Lucas* test as an application of the *Penn Central* analysis; under this view, the special feature of a *Lucas* claim is that the economic impact is so substantial that this factor establishes a taking without regard to the other factors. The year after it decided *Lucas*, the Court, in the context of a *Penn Central* case, said that economic impact alone cannot establish a taking.[30] In sum, apparently, an actual economic wipeout is sufficient by itself to establish a taking, but even severe economic impact short of a total wipeout – without more – cannot demonstrate a taking.

28. *See, e.g., United States v. Riverside Bayview Homes*, 474 U.S. 121, 124 (1985).

29. 125 S.Ct. at 2083. There is something of a logical tension built into the *Lingle* Court's equation of regulatory takings with physical occupations because, according to the Supreme Court's own teaching, permanent physical occupations can result in takings even if they have minimal effect on property value. What the Court apparently has in mind is that regulatory restrictions that impose very severe economic burdens are *qualitatively* similar to regulations and other government actions that result in physical occupations of private property. *See Loretto,* 458 U.S. at 420 ("we have long considered a physical intrusion by government to be a property restriction of an unusually serious character for the purposes of the Takings Clause").

30. *See Concrete Pipe*, 508 U.S. at 645 ("Mere diminution in the value of property, however serious, is insufficient to demonstrate a taking.").

There are numerous, diverse reasons why a high level of economic impact should be necessary to establish a regulatory taking. First, both the language[31] and original understanding[32] of the Takings Clause provide no direct support for the concept of a regulatory taking. This suggests, as the Court indicated in *Lingle*, that regulations can properly be viewed as takings only when they have such severe economic impacts that they are qualitatively similar to the kinds of direct appropriations within the core meaning of the clause. Second, a broad and uncertain rule of takings liability, especially applied to units of local government, would make it virtually impossible for government to function.[33] Third, an expansive theory of regulatory takings would enmesh the courts in frequent review of executive and legislative policy making, pushing the courts beyond both their proper constitutional role and their institutional competence. Finally, the actual economic effects of regulations are often difficult to measure and indeed it may be impossible, outside of the extreme *Lucas*-type case, to determine whether the net economic effect of a regulation is positive or negative.[34] While regulations limit an owner's use of her property, they simultaneously benefit her by placing the same or similar restrictions on other nearby properties. As a result, an expansive regulatory takings doctrine, rather than providing "compensation" for burdens imposed, would confer taxpayer-funded windfalls on owners who share (sometimes quite handsomely) in the community-wide benefits of effective regulatory programs.

31. *See Tahoe-Sierra*, 535 U.S. at 321-22 ("[The] plain language [of the Takings Clause] requires the payment of compensation whenever the government acquires private property for a public purpose, whether the acquisition is the result of a condemnation proceeding or a physical appropriation. But the Constitution contains no comparable reference to regulations that prohibit a property owner from making certain uses of her private property.").

32. *See, e.g.*, John F. Hart, *Colonial Land Use Law and Its Significance for Modern Takings Doctrine*, 109 HARV. L. REV. 1252 (1996); William Michael Treanor, *The Original Understanding of the Takings Clause and the Political Process*, 95 COLUM. L. REV. 782 (1995).

33. *Pennsylvania Coal Co. v. Mahon,* 260 U.S. 393, 413 (1922) ("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."). *See also Eastern Enterprises v. Apfel*, 524 U.S. 498, 542 (1998) (Kennedy, J., concurring) (arguing that the majority's expansive reading of the Takings Clause would "subject States and municipalities to the potential of new and unforeseen claims in vast amounts").

34. As the Supreme Court observed in *Tahoe-Sierra*, "[l]and-use regulations are ubiquitous and most of them impact property values in some tangential way— often in completely unanticipated ways." *Tahoe-Sierra,* 535 U.S. at 324.

While it is clear that only severe economic impact can support a finding of a taking, actually implementing this principle has turned out to be technically challenging. The most familiar and widely used approach for measuring economic impact is to estimate the difference, as of the date of the alleged taking, between the "fair market value" of the property (1) subject to the regulatory constraint being challenged, and (2) assuming the regulation being challenged did not apply. Applying this approach, the Supreme Court has indicated that reductions in value of over 90% are not necessarily sufficiently onerous to constitute a taking.[35] A Colorado Supreme Court decision appears to accurately summarize U.S. Supreme Court precedent as "provid[ing] an avenue of redress [only] for a landowner whose property retains value that is slightly greater than de minimis," a test that is reserved for the "truly unusual case."[36] Similarly, the U.S. Court of Federal Claims, the specialized federal court with jurisdiction over most takings claims against the United States, has summarized its case law by stating that the court generally has "relied on diminutions well in excess of 85 percent before finding a regulatory taking."[37]

Contrary to a popular and understandable misconception, these high percentage thresholds do not demonstrate a constitutional "stinginess" in terms of private property protection. Rather, they reflect the fundamental difficulty of determining whether a regulation imposes *any* actual economic burden on a specific property owner. The "with and without" approach systematically *overstates* the actual impact of a restriction because it calculates the effect of lifting the regulation as to the claimant's property while implicitly assuming the regulation will continue to apply to other properties in the community. This one-sided

35. *See, e.g., Agins v. City of Tiburon*, 447 U.S. 255 (1980) (no taking with an eighty-five percent reduction in value); *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 36 (1926) (no taking with a seventy-five percent reduction in value); *Hadacheck v. Sebastian*, 239 US. 394 (1915) (no taking with a 92.5% diminution in value).

36. *Animas Valley Sand & Gravel, Inc. v. Board of County Com'rs of County of La Plata*, 38 P.3d 59, 66 (Colo. 2001).

37. *Walcek v. United States*, 49 Fed. Cl. 248, 271 (2001). The *Walcek* court cited one anomalous decision, *Florida Rock Indus., Inc. v. United States*, 45 Fed.Cl. 21, 43 (1999), in which the court had concluded that a 73.1% diminution in value was indicative of a *Penn Central* taking. However, the significance of this outlier should be discounted because the court also relied in part on a finding that the owner could only recoup half of its original investment in the property. That calculation was based on the assumption that the owner's basis in the property should be adjusted for inflation, an approach that was subsequently disapproved by the Federal Circuit in its decision affirming the trial court's ruling in *Walcek*. *See Walcek v. United States*, 303 F.3d 1349, 1356-57 (Fed. Cir. 2002).

arithmetic grants a claimant credit for the negative effects of regulatory restrictions while giving the public no credit for the positive effects of regulation on the claimant's property due to the restrictions on neighboring properties. Stated differently, this calculation allows the claimant to claim a "loss" of private property value when a large part of the value of the property has actually been created by the public through regulatory controls. In theory, the *right* question is not what the value of a claimant's property would be if the restriction were lifted as to that property, but what the value would be if the restriction did not exist at all. But that hypothetical calculation is difficult if not impossible to perform, which is why courts have turned to the manageable, but inherently misleading, with-and-without approach.[38] Because this approach seriously exaggerates the actual effect of a regulation on property values, only regulations with impacts that cross a very high threshold using this method can be said to actually impose an unfair burden.

An alternative approach to assessing economic impact is to compare the current regulated value of property with the owner's original cost basis. For example, in *Walcek v. United States*,[39] the Court of Federal Claims rejected a takings claim, relying in part on a finding that the wetland property, even subject to stringent regulatory controls, was worth more than 300% what the owner paid for it twenty years earlier (including cash outlays over the years to maintain the property). This approach has the distinct advantage over the with-and–without approach of capturing both how a regulation may have reduced the value of the owner's property and how the same regulation, applied to the rest of the community, may have simultaneously increased the value of the property. When a property owner can at least recover his cost basis in the property, a takings claim should arguably be rejected regardless of what the with-and-without approach might show.

38. Professor Fee has criticized the economic impact factor in *Penn Central* analysis because it necessarily involves a definition of the relevant parcel, which precludes "a fixed, substantive conception of property." *See* John E. Fee, *The Takings Clause As A Comparative Right*, 76 S.CAL.L.REV. 1003, 1033 (2003). It is correct that the parcel rule means that different owners will enjoy different levels of protection depending upon the size of their holdings. But, on balance, the parcel rule helps produce fairer outcomes in takings cases. The subjective losses experienced by property owners will vary depending upon the size of the owners' holdings; the parcel rule provides a way of recognizing these differences. In addition, the parcel rule provides a way for courts to take into account the countervailing benefits that regulations can confer on restricted owners.

39. *Walcek,* 49 Fed. Cl. at 248.

One obvious challenge with this test is separating out the effects of regulatory policies on land values and the effects of general inflation. The data may show that a regulated property owner's land is worth 50% more than she paid for it several years earlier, before the regulations were imposed. But, understandably, the owner may not view the regulation as costless if unregulated owners in neighboring communities have experienced increases in value of 100%. The problem of disentangling the effects of inflation obviously becomes more difficult the longer the owner has held the property. Thus, this approach is likely to be most useful when the claimant has owned the property for a relatively brief period of time.

A third, more problematic approach to measuring economic impact, which has been used by some courts, is to focus on how the regulation affects the profitability of a particular investment. For example, in the recent case of *Rose Acre Farms, Inc. v. United States,*[40] the U.S. Court of Appeals for the Federal Circuit assessed the economic impact of health regulations on an industrial chicken farming operation by comparing the plaintiff's actual and projected earnings over the several years that the restrictions were in place. This approach creates several problems. Most fundamentally, profitability has traditionally not been recognized as a protected property interest under the Takings Clause.[41] Moreover, regulation might undermine the profitability of a particular business enterprise, but not necessarily have any adverse effect on the market value of the land on which the business is located. On a more technical level, it is difficult to understand how to analyze the significance of impacts on profitability. For example, does a given reduction in profits count less if the enterprise is highly profitable to begin with, but count more if the enterprise is only marginally profitable, effectively rewarding near-failing businesses for their lack of financial success?

In sum, the most accurate and fair approach to the economic impact factor relies on either, or better yet both, the with-and-

40. 373 F.3d 1177, 1184-1190 (Fed. Cir. 2004).

41. *See, e.g., Andrus v. Allard*, 444 U.S. 51, 66 (1979) ("[L]oss of future profits – unaccompanied by any physical property restriction – provides a slender reed upon which to rest a taking claim."). *Cf. College Sav. Bank v. Florida Prepaid Postsecondary Educ. Expense Bd.,* 527 U.S. 666, 675 (1999) ("The assets of a business (including its good will) unquestionably are property, and any state taking of those assets is unquestionably a "deprivation" under the Fourteenth Amendment. But business in the sense of *the activity of doing business,* or *the activity of making a profit* is not property in the ordinary sense.") (emphasis in original).

without approach and the cost-basis approach. In either event, if property retains some economic value in the marketplace, a takings claim will likely fail, or at least the economic impact factor will not help the claimant.

II.

INVESTMENT EXPECTATIONS.

The second *Penn Central* factor is the extent to which a regulatory restriction interferes with "investment-backed expectations."

One key issue under this factor is whether a purchaser's awareness of a regulatory constraint already in place bars, or at least weighs against, a subsequent taking claim based on enforcement of the regulation. In *Palazzolo v. Rhode Island*,[42] the Supreme Court evaluated the so-called "notice rule," previously embraced by many lower federal and state courts,[43] which treated a purchaser's notice of pre-existing restrictions as an absolute bar to a subsequent takings claim. The Court rejected the rule as too strict. At the same time, a majority of the justices indicated that advance notice of a regulatory constraint is a factor to be weighed, along with other factors, in assessing a claim. While Justice Kennedy's opinion for the Court did not expressly address this specific issue, Justice O'Connor, in a concurring opinion, stated that advance notice should be a relevant factor in taking analysis.[44] Combined with the views of the four dissenting justices, who would have given the same or even greater weight to a purchaser's prior notice,[45] O'Connor's concurring opinion evidently commanded majority support on the Court. This was confirmed by the Court's subsequent decision in *Tahoe-Sierra*, which incorporated large sections from Justice O'Connor's concurring opinion in *Palazzolo* discussing this issue.[46]

Surprisingly, given the sturm und drang generated by repudiation of the notice rule, *Palazzolo* has had remarkably little impact on day-to-day litigation. Takings claims brought by purchasers with notice continue to be rejected on a fairly routine

42. 535 U.S. 606 (2001).

43. *See, e.g.*, *Loveladies Harbor, Inc. v. United States*, 28 F.3d 1171, 1777, 1179 (Fed.Cir. 1994); *Kim v. City of New York*, 681 N.E.2d 312, 313 (N.Y. 1997).

44. *Palazzolo*, 533 U.S. at 632-33.

45. *See id.* at 637-645 (Stevens, J., concurring in part and dissenting in part); *id.* at 645-654 (Ginsburg, J., dissenting, joined by Souter and Breyer, JJ); *id.* at 654 (Breyer, J., dissenting).

46. *See Tahoe-Sierra*, 535 U.S. at 336.

basis. Indeed, I am not aware of a single post-*Palazzolo* case in which a regulatory takings claim by a purchaser with notice has been accepted. Representative of this pattern is *Rith Energy, Inc. v. United States*,[47] in which the court rejected the argument by a mining company that it was "entitled to stand in the shoes of its predecessors." who had purchased the property prior to enactment of federal legislation regulating coal mining. The court recognized that the Supreme Court had "rejected the argument that when governmental action regulates the use of property, a person who purchases property after the date of the regulation may *never* challenge the regulation under the Takings Clause."[48] But it said "that reasonable investment-backed expectations [still continue to] play an important role in regulatory takings cases."[49] Taking into account the claimant's advance notice of the regulation, the court ruled that a ninety-one percent reduction in the value of the property did not effect a taking.

A second, somewhat more ambiguous version of the expectations factor focuses on whether the adoption of new regulations was foreseeable.[50] The difficulty in applying this somewhat broader understanding of the expectations factor is obviously where to draw the line. Based on the pervasiveness of regulation in our society, one could argue that every business enterprise is on notice that it might be subject to virtually any type of new regulation in the future.[51]

A relatively recent *en banc* decision by the Federal Circuit appears to strike the right balance. The court broke down the expectations analysis into three components: (1) whether the plaintiff operated in a "highly regulated industry;" (2) whether the plaintiff was aware of the problem that spawned the regulation at the time it purchased the property; and (3) whether the plaintiff could have "reasonably anticipated" the possibility of such regulation in light of the "regulatory environment" at the time of purchase.[52] This framework appears to minimize the po-

47. *Rith Energy, Inc. v. United States*, 270 F.3d 1347, 1350 (Fed. Cir. 2001).

48. *Id.* (emphasis added).

49. *Id*. at 1351.

50. *See, e.g. Connolly v. Pension Benefit Guaranty Corporation*, 475 U.S. 211, 227 (1986), *quoting FHA v. The Darlington, Inc*., 358 U.S. 84, 91 (1958) ("Those who do business in. . . [a] regulated field cannot object if the legislative scheme is buttressed by subsequent amendments to achieve the legislative end.").

51. *But cf. Rose Acre Farms*, 373 F.3d at 1191 (arguing that a business person should only be required to anticipate new regulations that are a self-evident outgrowth of preexisting regulatory policies).

52. *Appolo Fuels, Inc. v. United States*, 381 F.3d 1338, 1349 (Fed. Cir. 2004).

tential "moral hazard" problem by encouraging landowners to take steps to avoid conflicts with new and emerging regulatory policies. Yet it provides a measure of protection against regulatory conflicts that cannot reasonably be anticipated and are therefore likely to unfairly affect property owners.

Yet another perspective on the expectations issue focuses on when the property was purchased and for what purpose. The paradigmatic case of dashed expectations posited by the property rights movement is represented by David Lucas, who purchased two lots for development along the South Carolina shore for approximately $1,000,000, and then, only a few years later, was prohibited from developing the lots by new state legislation.[53] An arguably different case is presented by the long-time owner who purchased property well before the regulatory constraints were put in place, devoted the property to a particular use for many years, and is now confronted with a new regulation barring conversion of the property to some more profitable use. On the one hand, the new restrictions can be viewed as frustrating expectations regarding alternative uses that the owner might have had in mind at the time of purchase, or which she might have formed over the course of ownership. On the other hand, so long as the owner has been able to exploit the property for an extended period for its original use, it is difficult to see how "investment-backed" expectations can be said to have been frustrated. The latter reasoning was implicitly embraced in *Penn Central* itself, in which the Court emphasized that the landmark designation of Grand Central Terminal did not interfere with the Penn Central company's original and continuing use of the property as a train station.[54]

One final conundrum related to the expectations factor is how it should be applied to properties acquired by inheritance. Acquisitions of property by devise are obviously not investment-backed, and could be viewed as simple windfalls undeserving of the kind of protection that should be reserved for actual investments in property. On the other hand, the justices in *Palazzolo*

53. *But see* Vicki Been, *Lucas v. The Green Machine: Using the Takings Clause to Promote More Efficient Regulation*, in PROPERTY STORIES 221-258 (2003) (arguing that Mr. Lucas was a less than totally "innocent" purchaser).

54. *Penn Central*, 438 U.S. at 136. *See also Grenier v. Zoning Bd. of Appeals of Chatham,* 814 N.E.2d 1154 (Mass. App. Ct. 2004), *aff'd sub nom. Gore v. Zoning Bd. Of Appeals of Chatham*, 831 N.E.2d 805 (Mass. 2005) (ruling that an owner's failure, prior to enactment of a regulation, to convert the property to some alternative use should count against a takings claim).

were clearly troubled by the notion that the government could assert essentially unlimited authority to regulate inherited property on the theory that subsequent generations lack investment-backed expectations.[55] This concern can potentially be justified as much by solicitude for the expectations of the devisor as for those of the devisee. In *Hodel v. Irving*[56] and *Babbitt v. Youpee,*[57] the Court exhibited a particular concern for the property rights of devisors, concluding in both cases that federal legislation limiting the right of tribal members to pass on property to their heirs effected a taking. Because rights to pass on property are apparently entitled to heightened protection under the Takings Clause, they may call for the application of a special version of the expectations factor. As discussed below, the special status of rights to devise property also apparently informs the "character" of the government action.

III.
CHARACTER OF THE GOVERNMENT ACTION.

Compared with the economic impact and expectations factors, which present problems and uncertainties of their own, the definition of the term "character" is a veritable mess. This section (A) describes the numerous alternative, and sometimes conflicting definitions of this term suggested by Supreme Court precedent, (B) explains how the Supreme Court's decision in *Chevron v. Lingle USA*, should resolve much of the confusion about the character factor, and (C) offers an updated and simplified set of definitions for the character of the government action.

A. *Alternative Definitions.*

A review of Supreme Court takings precedents, prior to the decision in *Lingle*, reveals a minimum of *nine* plausible definitions of the term "character." This sub-section briefly describes and discusses each of these definitions.

1. Physical Occupation.

Initially the term "character," as introduced into takings law by the *Penn Central* decision itself, focused on whether the gov-

55. *See Palazzolo*, 535 U.S. at 627 ("Future generations, too, have a right to challenge unreasonable limitations on the use and value of land.").

56. 481 U.S. 704 (1987).

57. 519 U.S. 234 (1997).

ernment action could be characterized as a "physical occupation" of private property. After identifying economic impact and investment expectations as "relevant considerations," the Court continued,

> 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, *see, e. g., United States v. Causby*, 328 U.S. 256 (1946), than when interference arises from some public program adjusting the benefits and burdens of economic life to promote the common good.[58]

The *Causby* case, which the Court said exemplified this definition of the character factor, involved a taking based on government airplanes flying through private airspace immediately above a private home.

Whether a government action can be characterized as involving a physical invasion has been discussed several times in subsequent Supreme Court cases.[59] However, the significance of this definition of character was reduced, only a few years after *Penn Central* was decided, by the Court's decision in *Loretto v. Teleprompter Manhattan CATV Corp.*[60] In that case the Court ruled

58. 438 U.S. at 124.

59. *See Keystone Bituminous Coal,* 480 U.S. at 489 n.18 ("It is well settled that a 'taking' may more readily be found when the interference with property can be characterized as a physical invasion by the government. . ., than when interference arises from some public program adjusting the benefits and burdens of economic life to promote the common good."); *Connolly v. Pension Ben. Guar. Corp.,* 475 U.S. 211, 225 (1986) (rejecting a takings claim, based in part on the conclusion that "the Government does not physically invade or permanently appropriate any of the employer's assets for its own use").

60. 458 U.S. 419 (1982). In *Kaiser Aetna v. United States,* 444 U.S. 164 (1979), decided a year and a half after *Penn Central*, the Court foreshadowed the *Loretto per se* rule by asserting that "the 'right to exclude,' so universally held to be a fundamental element of the property right, falls within this category of interests that the Government cannot take without compensation." *Id.* at 179-80. Less than a year later, in *Pruneyard Shopping Center v. Robins*, 447 U.S. 74 (1980), the Court seemed to reverse course, rejecting the claim that a California court ruling granting political activists a right to distribute petitions within a privately owned shopping center effected a taking. The Court emphasized that there was "nothing" to suggest that the permitted activity would "unreasonably impair the value or use" of the property, especially given that the owner could "restrict expressive activity by adopting time, place, and manner regulations." *Id*. at 83. Under these circumstances, the Court said, "the fact that [the political activists] may have 'physically invaded' appellants' property cannot be viewed as determinative." *Id*. at 84. The Court distinguished *Kaiser Aetna*, not altogether convincingly, on the ground that the owners in that case had expended significant resources in developing a facility that they planned to open only to fee-paying members; in *Pruneyard*, by contrast, the Court said, the owners "have failed to demonstrate that the 'right to exclude others' is so essential to the use or economic value of their property that the state-authorized limitation of it

that permanent physical occupations warrant *per se* treatment under the Takings Clause. Building upon, yet departing from the *Penn Central* analysis, the Court said, "when the physical intrusion reaches the extreme form of a permanent physical occupation, a taking has occurred. In such a case, 'the character of the government action' not only is an important factor in resolving whether the action works a taking but also is determinative."[61]

The Court in *Loretto* was at pains to reconcile its new categorical rule with the discussion of the character factor in *Penn Central.* The Court insisted, perhaps somewhat disingenuously, that its discussion of the character factor in *Penn Central* was not inconsistent with "the rule that a permanent physical occupation is a government action of such a unique character that it is a taking without regard to other factors that a court might ordinarily examine."[62] Putting a seemingly new gloss on *Penn Central*, and using full italics for emphasis, the Court said: "Penn Central *simply holds that in cases of physical invasion short of permanent appropriation, the fact that the government itself commits an invasion from which it directly benefits is one relevant factor in determining whether a taking has occurred.*"[63] In reality, *Loretto* worked a major change in the *Penn Central* definition of the character factor. After *Loretto*, the fact that a government action involves a *temporary* physical occupation is still relevant to the "character" of the action under the *Penn Central* analysis. But if the action involves a *permanent* physical occupation, the taking

amounted to a taking." *Id.* Whether or not *Pruneyard* survives *Loretto* represents a difficult question. The Court in *Loretto* distinguished both *Pruneyard* and *Kaiser Aetna* on the ground that both involved "temporary limitations on the right to exclude." 458 U.S. at 436 n.12. This argument is problematic because the invasions in both cases, if not continuous, were certainly indefinite in duration. *Cf. Nollan v. California Coastal Comm'n*, 483 U.S. 825, 831 (1987) ("Had California simply required the Nollans to make an easement across their beachfront available to the public on a permanent basis in order to increase public access to the beach, rather than conditioning their permit to rebuild their house on their agreeing to do so, we have no doubt there would have been a taking."). On the hand, a broad reading of *Loretto* would appear to require overruling *Heart of Atlanta Motel, Inc v. United States*, 379 U.S. 241 (1964), in which the Court rejected a takings challenge to public accommodations provisions of the Civil Rights Act of 1964. It seems exceedingly unlikely the Supreme Court would embrace that result. In sum, the *per se* takings rule for permanent physical occupations may be less stable than some of the language in recent Court decisions suggests.

61. *Loretto*, 458 U.S. at 426.

62. *Id.* at 432.

63. *Id.* at 432. n.9

claim is governed by the special *Loretto* rule, and the *Penn Central* framework is beside the point.

2. Failure to Substantially Advance.

A second definition of the character factor focuses on whether the government action "substantially advances a legitimate state interest." This takings test was first articulated by the Court in *Agins v. City of Tiburon*,[64] handed down just a few years after the decision in *Penn Central*. The Court said that a regulation effects a taking if it "does not substantially advance legitimate state interests, . . . or denies an owner economically viable use of his land."[65] In *Lingle*, the Court overruled *Agins*, unanimously repudiating the substantially advances takings formula as a free-standing test. However, there has long been, and still remains, the question whether a substantially advances inquiry might be part of "character" analysis under *Penn Central*.

The Court hinted at this possibility in *Keystone Bituminous Coal Assn. v. DeBenedictis*.[66] The Court at several points equated the substantially advances inquiry with an examination of the "character" or "nature" of the government action.[67] The same theme appears in subsequent Supreme Court[68] as well as lower court[69] decisions. More recently, commentator R. S. Radford, a long-time proponent of the substantially advances takings test, has contended that, following *Lingle,* the substantially advances inquiry should at least retain vitality as part of the character analysis under *Penn Central.*[70] As I discuss below, I believe

64. 447 U.S. 255 (1980). *But cf. Penn Central*, 438 U.S. at 127 (presaging the *Agins* substantially advances test by stating, "[i]t is. . . implicit in *Goldblatt v. Hempstead*, 369 U.S. 590 (1962)], that a use restriction on real property may constitute a 'taking' if not reasonably necessary to the effectuation of a substantial public purpose").

65. *Agins*, 447 U.S. at 260.

66. 480 U.S. 470 (1987).

67. *Id.* at 485, 488.

68. *See Palazzolo,* 535 U.S. at 634 (O'Connor, J., concurring), *quoting Penn Central*, 438 U.S. at 124, 127 ("Another [factor] is 'the character of the government action. The purposes served as well as the effects produced by a particular regulation inform the takings analysis. '[A] use restriction on real property may constitute a taking if not reasonably necessary to the effectuation of a substantial public purpose. . . .'").

69. *See Smith v. Town of Mendon*, 789 N.Y.S.2d 696, 699 (2004) (equating the "character" factor with the substantially advances test by describing the substantially advances test as simply "a different formulation of the character factor").

70. *See* R.S. Radford, *Just a Flesh Wound? The Impact of Lingle v. Chevron on Regulatory Takings* (paper presented at Georgetown Conference on Litigating Regulatory Takings Claims, October 27-28, 2005).

Lingle is properly read as banishing the substantially advances inquiry from takings law, whether as a free-standing test or as part of the multi-factor *Penn Central* analysis.

3. Public Interest.

A third definition of the character factor focuses on the public interest served by the government action, suggesting the need to balance the burden on the landowner against the public interest being served. For example, the Court in *Keystone* justified rejection of the takings claim in part because the legislature believed "important public interests" were being served, and the legislature's purposes "were genuine, substantial, and legitimate."[71] Similarly, in *Agins*, the Court said that "the determination that governmental action constitutes a taking is, in essence, a determination that the public at large, rather than a single owner, must bear the burden of an exercise of state power in the public interest," an inquiry that "necessarily requires a weighing of private and public interests."[72]

Recent case law from the U.S. Court of Appeals for the Federal Circuit displays a fascinating back and forth in the use of this definition of the character factor. In its 1994 decision in *Loveladies Harbor, Inc. v. United States,*[73] in an opinion by Judge Jay Plager, the court characterized the Federal Circuit's established definition of character under *Penn Central* analysis as "requir[ing] that a reviewing court consider the purpose and importance of the public interest reflected in the regulatory imposition." "In effect, a court [is] to balance the liberty interest of the private property owner against the government's need to protect the public interest through imposition of the restraint."[74] However, Judge Plager read the Supreme Court's *Lucas* decision, handed down two years earlier, as transforming the legal landscape: "The question [after *Lucas* is] . . . not one of balance between competing public and private claims. Rather the question is simply one of basic property ownership rights: within the bundle of rights which property lawyers understand to constitute property, is the right or interest at issue, as a matter of law, owned by the property owner or reserved to the state?"[75] Judge

71. *Id*. at 485.
72. *Agins*, 447 U.S. at 260-261.
73. 28 F.3d 1171, 1176 (Fed. Cir. 1994).
74. *Id.* at 1176.
75. *Id.* at 1179.

Plager read *Lucas* as working a "dramatic change" in the definition of the character factor, "from one in which courts . . . were called upon to make ad hoc balancing decisions, balancing private property rights against state regulatory policy, to one in which state property law, incorporating common law nuisance doctrine, controls. This sea change removed from regulatory takings the vagaries of the balancing process, so dependent on judicial perceptions with little effective guidance in law."[76] Under this view, the character factor was changed from one of several factors to be weighed in deciding whether there was a "taking," to part of the threshold inquiry into whether the claimant possesses a "property" interest sufficient to support a takings claim.[77]

More recently, however, the Federal Circuit, in an opinion by Judge Arthur Gajarsa, ruled that the Supreme Court's subsequent takings decisions have affirmed the Federal Circuit's original approach. In *Bass Enterprises Production Co. v. United States,*[78] the court ruled that the Supreme Court's decisions in *Palazzolo* and *Tahoe-Sierra* effectively superseded *Loveladies Harbor*'s definition of the character factor, restoring the pre-*Lucas* definition. To support this conclusion, Judge Gajarsa relied primarily on the sharp distinction drawn by the Supreme Court between the *Lucas* and *Penn Central* tests, which he interpreted as refuting the idea that *Lucas,* in addition to establishing a categorical test for total takings, fundamentally transformed the *Penn Central* analysis. Judge Gajarsa also pointed to Justice O'Connor's separate (yet decisive) concurring opinion in *Palazzolo* emphasizing that the *Penn Central* analysis should focus on the "purposes served as well as the effects produced by a particular regulation."[79]

As indicated in the Introduction, I believe that the strength or importance of the public interest served by a regulation should be a factor in takings analysis, but in a somewhat more nuanced

76. *Id.*

77. A number of subsequent Federal Circuit decisions followed *Loveladies Harbor* on this point. *See, e.g., Palm Beach Isles Assocs. v. United States*, 231 F.3d 1354 (Fed. Cir. 2000), *Creppel v. United States*, 41 F.3d 627 (Fed. Cir. 1994). *But see Maritrans, Inc. v. United States*, 342 F.3d 1344, 1356 (Fed. Cir. 2003) (seemingly ignoring *Loveladies Harbor*, and stating that the character factor "requires a court to consider the purpose and importance of the public interest underlying a regulatory imposition").

78. 381 F.3d 1360 (Fed. Cir. 2004).

79. *Id.* at 1369-70.

way than has previously been discussed. I discuss this issue in detail below.

4. Reciprocity/Generality.

A fourth definition of character focuses on whether the regulation creates an "average reciprocity of advantage."[80] The concept is based on the idea that a regulation that applies broadly across a community, even if it may restrict an owner's use of his property, is likely to benefit the owner by restricting others' use of their properties. A regulation can benefit property owners by helping to preserve community amenities and thereby protect a property's locational advantage, as well as by restricting development opportunities and driving up the market value of development opportunities that remain. In the Supreme Court's words, "Under our system of government, one of the State's primary ways of preserving the public weal is restricting the uses individuals can make of their property. While each of us is burdened somewhat by such restrictions, we, in turn, benefit greatly from the restrictions that are placed on others."[81] Because the reciprocal effects of certain regulations can reduce or even avoid any *net* negative effect on a particular owner, these effects offer a powerful equitable defense against takings claims.

Significantly for present purposes, the issue of generality vs. particularity was the primary point of division between Justice Brennan, writing for the majority in *Penn Central*, and Justice Rehnquist, in dissent. Justice Rehnquist began his dissent with a direct attack on the targeted nature of the New York City Landmarks Law:

> Of the over one million buildings and structures in the city of New York, appellees have singled out 400 for designation as official landmarks. The owner of a building might initially be pleased that his property has been chosen by a distinguished committee of architects, historians, and city planners for such a singular distinction. But he may well discover, as appellant Penn Central Transportation Co. did here, that the landmark designation imposes upon him a substantial cost, with little or no offsetting benefit except for the honor of the designation.[82]

In response, Justice Brennan rejected the characterization of the Landmarks Law as targeting specific property owners, asserting

80. *Keystone Bituminous,* 480 U.S. at 488, *quoting Mahon*, 260 U.S. at 415.
81. *Keystone*, 480 U.S. at 491.
82. *Penn Central,* 438 U.S. at 138-39 (Rehnquist, J., dissenting).

that the "law embodies a comprehensive plan to preserve structures of historic or aesthetic interest wherever they might be found in the city; . . . over 400 landmarks and 31 historic districts have been designated pursuant to this plan."[83] Whatever the merits of each side of the argument – and no doubt the *relatively* targeted nature of the landmarks law helps explain why *Penn Central* was such a controversial case – both sides clearly understood that the generality versus particularity of regulation is a key issue in evaluating a regulation under the Takings Clause.[84]

Justice John Paul Stevens has been a particular advocate of the view that the relative generality of regulation should be an important consideration in takings analysis. In his *Lucas* dissent, he observed, "In analyzing takings claims, courts have long recognized the difference between a regulation that targets one or two parcels of land and a regulation that enforces a statewide policy."[85] Thus, he found it significant that the South Carolina Beachfront Management Act "does not target particular landowners, but rather regulates the use of the coastline of the entire State."[86] Like Justice Rehnquist, Justice Stevens believes that the generality of a regulation softens the apparent economic burden imposed by the regulation. But his emphasis on the generality of a regulatory restriction also reflects the Court's "broader understandings of the Constitution as designed in part to control the 'mischiefs of faction.'"[87] In Justice Stevens' view, so long as regulation applies broadly across a community, there should be a strong presumption that the regulation represents a legitimate outcome of the political process rather than the high jacking of the process by some special interest.

5. Harmful Action.

Yet another definition of the character factor focuses on whether the regulated activity is properly characterized as "harmful" to other property owners or the community at large. For example, referring back to the seminal case of *Mugler v.*

83. *Id.* at 132.

84. The Court implicitly made the same distinction in *Dolan v. City of Tigard*, 512 U.S. 374 (1994), in which the Court called for relatively stringent review of land use exactions imposed through *ad hoc* administrative decision-making, *see id.* at 391, but indicated that a more deferential standard should apply to exactions imposed through general legislation. *See id.* at 391 n.8.

85. *Lucas*, 505 U.S. at 1073.

86. *Id.* at 1074.

87. *Id.* at 1072 n.7 (Stevens, J., concurring).

Kansas,[88] the Supreme Court has said, "Long ago it was recognized that 'all property in this country is held under the implied obligation that the owner's use of it shall not be injurious to the community.'"[89] While sometimes described as being rooted in the law of nuisance,[90] this version of the character of the government action was not traditionally limited to classical common law nuisances.[91]

The decision in *Lucas* may – or may not – have superseded this definition of character. In *Lucas*, the State, relying on *Mugler* and its progeny, defended its coastal regulation, even though the regulation ostensibly rendered Lucas's property valueless, on the ground that it was designed to protect the coastal environment and neighboring property owners from serious harms. Justice Scalia, speaking for the Court, rejected the State's reliance on *Mugler*. In his words, "the distinction between regulation that 'prevents harmful use' and that which 'confers benefits' is difficult, if not impossible, to discern on an objective, value-free basis."[92] Accordingly, he said, "it becomes self-evident that noxious-use logic cannot serve as a touchstone to distinguish regulatory 'takings' – which require compensation – from regulatory deprivations that do not require compensation."[93] Taken at face value, these statements can be read to repudiate the distinction between harm-preventing and benefit-conferring regulations in takings cases across the board, not only in *Lucas*-type cases but in *Penn Central* cases as well.

The *Lucas* decision did not, of course, eliminate consideration of whether a regulated activity would constitute a nuisance from takings analysis. Instead, the Court said that issue should be addressed in deciding whether a takings claimant has a vested property entitlement permitting him to pursue a takings claim, that is, whether "background principles" of state law, including nuisance doctrine, bar him from claiming a protected property right to engage in the activity.[94] Read broadly, *Lucas* suggests that the

88. *Mugler v. Kansas*, 123 U.S. 623, 665 (1887).

89. *Keystone*, 480 U.S. at 491-92, *quoting Mugler*, 123 U.S. at 665.

90. See *Keystone*, 480 U.S. at 491, 492 & n.22 (referring to a regulatory statute as controlling activity "tantamount to a public nuisance," "abat[ing] a public nuisance," or regulating "activities similar to public nuisances").

91. *See Penn Central*, 438 U.S. at 126 (observing that the Court had upheld against takings challenges regulations prohibiting land uses that were "inconsistent with neighboring uses").

92. *Lucas,* 505 U.S. at 1026.

93. *Id.*

94. *Id.* at 1027-29.

background-principles nuisance inquiry should be substituted for the earlier, broader inquiry into the harm-preventing character of government action, in both *Lucas* and *Penn Central* cases.

But this appears to stretch *Lucas* too far. The Court in *Lucas* made clear that it was particularly concerned about the government's reliance on *Mugler* when regulation rendered the property valueless. As Justice Scalia said, unlimited application of the *Mugler* harm-prevention principle would "nullify *Mahon*'s affirmation of limits to the noncompensable exercise of the police power."[95] But even in a total takings case, the Court recognized that the government should not be liable under the Takings Clause for "destruction of 'real and personal property, in cases of actual necessity, to prevent the spreading of a fire' or to forestall other grave threats to the lives and property of others."[96] Moreover, notwithstanding his seemingly blanket condemnation of the distinction between harm-preventing and benefit-conferring regulation, Justice Scalia left the door open to considering the harm-preventing character of a regulation in a *Penn Central* case. He observed that "[n]one" of the Court's prior cases "that employed the logic of 'harmful use' prevention to sustain a regulation involved an allegation that the regulation wholly eliminated the value of the claimant's land."[97] This suggests that the Court might well affirm in some future case that the *Mugler* harm-prevention logic is still available in *Penn Central* cases. As discussed below, defining the character factor in terms of the harm-preventing purpose of a government action not only seems permissible under Supreme Court precedent, but it makes good sense in terms of the purposes and overall of structure of takings doctrine.

6. Restricting the Right to Devise.

Another, more specialized definition of the character factor focuses on whether government action interferes with the right to devise private property. In *Hodel v. Irving*,[98] the Supreme Court struck down federal legislation designed to deal with the fractionation of Indian lands through inheritance as an unconstitutional impairment of Indians' right to devise their property.

95. *Id.* at 1026.

96. *Id.* at 1029, n.16, *quoting Bowditch v. Boston*, 101 U.S. 16, 18-19 (1880).

97. *Id.* at 1026 n.16, citing *e.g., Hadacheck v. Sebastian*, 239 U.S. 394 (1915); *Goldblatt v. Hempstead*, 369 U.S. 590 (1962).

98. 481 U.S. 704 (1987).

Looking at the other two *Penn Central* factors, the Court indicated that it might well have rejected the claim. Nonetheless, the Court held that the legislation effected a taking on the ground that the "character of the Government regulation here is extraordinary."[99] The Court compared the legislation to the government-compelled physical occupation held to be a taking in *Kaiser Aetna,* where the Court "emphasized that the regulation destroyed 'one of the most essential sticks in the bundle of rights that are commonly characterized as property – the right to exclude others.' "[100] Similarly in this case, the Court said, "the regulation here amounts to virtually the abrogation of the right to pass on a certain type of property – the small undivided interest – to one's heirs. In one form or another, the right to pass on property – to one's family in particular – has been part of the Anglo-American legal system since feudal times."[101] The Court's subsequent decision in *Babbitt v. United States*,[102] involving a slightly revised federal statute addressing the same subject, reflects similar reasoning.

The Court did not explain why the right to engage in intergenerational transfers should receive greater protection than, for example, the right to use or sell property. However, the Court's opinion suggests that this special rule rests on the long historical pedigree of the right to devise, and its special importance to the maintenance of families through time. In a variety of other contexts, the Court has been protective of the family relationship,[103] and using the Takings Clause to protect the right to pass on property to one's descendants can be viewed as part of that tradition. In any event, *Hodel* and *Babbitt* are part of the Court's takings jurisprudence, and certainly have to be taken into account in crafting a comprehensive set of definitions of the character factor.

7. Retroactivity.

The four-justice plurality opinion in *Eastern Enterprises v. Apfel,*[104] identified another potential definition of character fo-

99. *Id.* at 716.

100. *Id.*

101. *Id.*

102. 519 U.S. 234 (1997).

103. *See, e.g.*, *Moore v. City of East Cleveland*, 431 U.S. 494 (1977) (striking down as a violation of the Due Process Clause a housing ordinance that restricted occupancy of residential dwellings to narrowly defined family units).

104. 524 U.S. 498 (1998).

cusing on the degree to which legislation imposes retroactive burdens. *Eastern Enterprises* involved a challenge to federal legislation that imposed large, unexpected obligations to pay health care costs of retired coal workers on companies that had exited the coal mining business years, sometimes decades, earlier. Applying the three-factor *Penn Central* test, the plurality concluded that the legislation should be deemed a taking, emphasizing the fact that the legislation imposed liability "based on the employer's conduct far in the past."[105] While every new rule or regulation can be viewed as imposing retroactive burdens on those holding property at the time the restriction is enacted, the imposition of a new financial liability based on employment relationships far in the past obviously represents a retroactive burden of a severe and unusual kind. This type of severe retroactivity, *Eastern Enterprises* suggests, should be considered under the rubric of character.

It remains to be seen whether the Supreme Court will embrace this aspect of the *Eastern Enterprises* plurality opinion. A majority of the Court (Justice Kennedy, concurring in the judgment, and four dissenters) rejected the taking claim on the ground that the plaintiffs' allegations raised a challenge to the legitimacy of the federal legislation, a claim that should have been brought under the Due Process Clause rather than the Takings Clause.[106]

8. Cause and Effect.

Yet another definition of character – which draws support from the *Eastern Enterprises* plurality opinion as well as several other Court opinions – focuses on the degree to which regulated entities can be said to be the cause of the social problem the government is attempting to address. In *Eastern Enterprises*, the plurality, in addition to emphasizing the retroactive nature of the legislation, stated that the burdens imposed were "unrelated to any commitment that the employer made or to any injury they caused."[107] Similarly, the Court's decision in *Nollan v. California Coastal Comm'n*[108] arguably turned in part on the fact that the claimants' proposed beach construction was not the "cause" of the beach access problem the coastal commission was seeking to

105. *Id.* at 537.

106. *Id.* at 540 (Kennedy, J., concurring in the judgment and dissenting in part); *id.* at 554 (Breyer, J., dissenting).

107. *Id.* at 537.

108. 483 U.S. 825 (1987).

address.[109] And in a dissenting and concurring opinion in *Pennell v. City of San Jose,*[110] Justice Scalia, in perhaps the most explicit articulation of this theory, argued that the Takings Clause demanded a "cause-and-effect relationship between the property use restricted by the regulation and the social evil that the regulation seeks to remedy."

As discussed below, the viability of this definition of the character factor appears to turn on the validity of the related "substantially advances" takings theory.

9. Bad Faith/Good Faith.

The final alternative definition of character relates to whether or not the government action can be said to have been taken in "bad faith." In *Tahoe-Sierra*, in the course of reviewing a series of possible takings theories the plaintiffs might have advanced (but did not), the Court said, "were it not for the findings of the District Court that [the Tahoe Regional Planning Agency] acted diligently and in good faith, we might have concluded that the agency was stalling in order to avoid promulgating" regulatory standards.[111] In support, the Court offered a "cf." citation to its decision in *Monterey v. Del Montes Dunes at Monterey, Ltd.*[112] In that case, the Court upheld a finding of a taking based on the theory that the city's actions failed to "substantially advance a legitimate state interest." In particular, the Court ruled that a series of inconsistent and increasingly more stringent decisions by the city supported the conclusion that the city had no legitimate regulatory purpose in blocking the proposed development. The significance of *Del Monte Dunes* as legal precedent is clouded by the fact that the city waived any objection to use of the "substantially advance" test, and a majority of the justices either wrote or joined in opinions explicitly reserving the question whether a "substantially advances" claim represented a viable takings theory. In any event, the language in *Tahoe-Sierra*, and the Court's reference to *Del Monte Dunes,* has given rise to the idea that the relative bad faith versus good faith of govern-

109. *See, e.g.*, Douglas Kmiec, *The Jurisprudence of Takings: The Original Understanding of the Taking Clause Is Neither Weak Nor Obtuse*," 88 COLUM. L. REV. 1630 (1988).

110. 485 U.S. 1, 20 (1988).

111. 535 U.S. at 333.

112. 526 U.S. 687 (1999).

ment officials may be a relevant factor in takings analysis.[113] Again, the validity of this definition appears to turn on the validity of the related "substantially advances" takings theory.

B. *Lingle* to the Rescue.

The basic problem with regulatory takings doctrine – exemplified by the varying and contradictory definitions of the term "character" – is that it has been asked to carry too much weight. Properly interpreted, regulatory takings doctrine should focus exclusively on providing financial compensation for legitimate government actions that single out one or a few property owners for severe, disproportionate economic burdens. Too often, however, the Takings Clause has been treated as establishing a kind of catch-all constitutional remedy for alleged wrongs by government actors affecting property. As a result, the Takings Clause has been offered up as the appropriate remedy for what, more logically, should be viewed as potential due process violations. It is obvious that property rights advocates have asserted expansive readings of the Takings Clause because they are dissatisfied with the well-worn traditions of judicial deference in due process cases. They hoped to find in relatively immature takings doctrine sufficient maneuvering room to support the kind of robust judicial intervention in economic policymaking not seen since the era of *Lochner*. This brand of judicial activism is certainly problematic for various reasons.[114] But the critical point for present purposes is that the effort to use the Takings Clause to prosecute claims that more logically should proceed under other constitutional headings has contributed to making takings a muddled legal doctrine.

Fortunately, the Supreme Court's 2005 decision in *Lingle v. Chevron USA*,[115] in a single stroke, goes a long way toward narrowing takings doctrine and clarifying the definition of the "character" factor in a *Penn Central* case. As discussed, the issue in *Lingle* was the validity of the "substantially advances" takings test. The Court concluded that this test "prescribes an inquiry in the nature of a due process, not a takings, test, and that it has no proper place in our takings jurisprudence." While the Court had

113. *See* Steven Eagle, *Planning Moratoria and Regulatory Takings: the Supreme Court's Fairness Mandate Benefits Landowners*, 31 FLA. ST. U. L. REV. 429 (2004).

114. *See* J. Peter Byrne, *Regulatory Takings and "Judicial Supremacy,"* 51 ALA. L. REV. 949 (2000).

115. 125 S.Ct. 2074, 2083 (2005).

never squarely relied on this takings test to support a finding of a taking, it had recited the formula numerous times and cited it as a building block in its decisions addressing regulatory "exactions."[116] A number of lower federal and state courts, following what they thought was the Supreme Court's lead, had relied on this test to support takings findings.[117]

The *Lingle* case grew out of the state of Hawaii's efforts to control the consumer price of gasoline. The District Court struck down Hawaii Act 257, limiting the maximum rents that oil companies could charge independent dealers, on the ground that the law would likely be ineffective in achieving its price-control goal.[118] The U.S. Court of Appeals for the Ninth Circuit affirmed in a 2 to 1 decision.[119] The Supreme Court unanimously reversed, repudiating the substantially advances test altogether. The Court first observed that the Court's *Agins* decision had borrowed this ostensible takings test from due process precedents. More fundamentally, the Court said that the test was not "tethered" to the basic function and purpose of regulatory takings doctrine, which is to provide compensation for unduly burdensome regulations.[120] The substantially advances test, the Court observed, "reveals nothing" about the burden imposed by a regulation.[121] Equally significant, the test is inconsistent with the fundamental premise of any claim under the Takings Clause that the government action must serve a legitimate public use. If the government action is "impermissible," the Court said, for example because it "fails to meet the 'public use' requirement or is so arbitrary as to violate due process — that is the end of the inquiry. No amount of compensation can authorize such action."[122]

First, and perhaps most obviously, the Court's decision in *Lingle* forecloses defining the character of the government action in terms of whether the action fails to substantially advance a legitimate government interest. *Lingle*, of course, jettisons the substantially advances test as a free-standing test. But, as discussed,

116. *See Dolan v. City of Tigard*, 512 U.S. 374 (1994); *Nollan v. California Coastal Comm'n*, 483 U.S. 825 (1987).

117. *See, e.g., Richardson v. City and County of Honolulu,* 124 F.3d 1150 (9th Cir. 1997); *State ex rel. Shemo v. Mayfield Heights,* 75 N.E.2d 345 (Ohio 2002).

118. *Chevron USA, Inc. v. Cayetano*, 198 F.Supp.2d 1182 (D.Haw. 2002).

119. *Bronster v. Cayetano*, 363 F.3d 846 (9th Cir. 2004).

120. 125 S.Ct at 2084.

121. *Id.*

122. *Id*. at 2084.

some have argued that the decision does not necessarily foreclose the possibility of a substantially advances inquiry as part of the character analysis. That position appears untenable. The Court's reasoning in *Lingle* is that the substantially advances test has no place in takings law because it is actually a due process test and because it is inconsistent with the basic nature of the takings inquiry. This reasoning requires abandonment of the substantially advances theory altogether, whether as a free-standing test or as one factor in a multi-factor analysis.[123]

Lingle also should be read to resolve the question whether the retroactive nature of a legislative measure is relevant in the character inquiry. As discussed, the plurality in *Eastern Enterprises* believed that the retroactivity of the federal legislation was a relevant factor in deciding whether the law effected a taking. But Justice Kennedy and the four dissenters took the view that the retroactivity of the law raised a concern, not about distributional fairness, but about the legitimacy of the enactment. Hence, in their view, the claim was properly viewed as raising an issue under the Due Process Clause rather than the Takings Clause. *Lingle*, which emphasizes that a legitimate government action is

123. Interestingly, during oral argument before the U.S. Supreme Court in *City of Monterey v. Del Monte Dunes at Monterey Ltd*, 526 U.S. 687 (1999), the Court specifically focused on the question of whether the character factor should be equated with the substantially advances inquiry. In response to Deputy Solicitor General Edwin Kneedler's argument that the substantially advances test was not a valid independent takings test, Justice Souter asked whether essentially the same type of inquiry might be conducted under the rubric of character. Kneeler's response was "no."

> JUSTICE SOUTER: Would this be a—Mr. Kneedler, would this be a possible different way of looking at it in nonprocedural terms? We—the discussion up to this point has been largely in terms of the language that was used in Agins, but if you look at the Penn Central multifactor formulation, one of the sort of broad subjects to be addressed is the nature of the governmental action, and if we take that into consideration properly, isn't the issue of bad faith something that may be considered right up front under that particular heading?
>
> MR. KNEEDLER: I think not. The purpose of the just compensation clause is to address the situation where the Government has taken lawful action, but lawful action that benefits the entire community in a way that it's unfair to visit that cost of a lawful action on a particular individual. Bad faith, arbitrary action, those are not aspects of lawful governmental action. Those are aspects of unlawful governmental action, and as this Court said way back in the Pennsylvania Coal Company case the basis for the award of compensation under the Fifth Amendment presupposes that the action is being taken for a public purpose. It presupposes lawful, proper governmental action. It is a question of who must pay for it. And we think this is reinforced by the structure of the Fifth Amendment, which separately addresses the question of the propriety of the governmental purpose.

(available at http://www.oyez.org/pyez/resource/case/888).

a precondition for a valid taking claim, resolves this debate in favor of Kennedy and the dissenters.

In addition, *Lingle* appears to preclude the notion that the character of the government action should turn on the good faith versus bad faith of government officials. As discussed above, this potential definition of character derives from the *Del Monte Dunes* case, which involved a legal claim premised on the substantially advances theory. Because *Lingle* has repudiated the substantially advances test relied upon in *Del Monte Dunes*, the bad faith theory derived from that decision is certainly undermined. More fundamentally, an allegation of bad faith appears to be a mere variant of an allegation that government action is illegitimate. Because *Lingle* holds that the illegitimacy of the government action cannot provide the basis for a taking claim, *Lingle* appears to preclude the notion that allegations of bad faith can support a taking claim. Allegations of bad faith, like substantially advances claims, sound in due process rather than in takings.[124]

Finally, *Lingle* should bar the notion that the character factor may involve investigation into the causal connection between a takings claimant's use of her property and the social problem that the government is seeking to address. As discussed, the only Supreme Court decision that has been read as offering direct support for this theory is the Court's 1987 ruling in *Nollan v. California Coastal Commission*.[125] That decision invoked, and arguably depended upon, the "substantially advances" formulation from the *Agins* decision. The Court in *Lingle* made clear it was not overruling *Nollan*. However, the Court said that *Nollan* (and the companion decision in *Dolan*) establish a specialized, narrow test to deal with the situation where government demands physical access to private property as a condition of a regulatory permit.[126] Thus, *Lingle* certainly undermines *Nollan* as precedent for the idea that takings analysis should include a broad ranging inquiry into cause and effect. Furthermore, a lack of causal connection appears to raise, again, a concern about the potential ar-

124. *See, e.g., UA Theater Circuit v. Warrington*, 316 F.3d 392 (3d. Cir. 2003) (to establish that local zoning officials violated the Due Process Clause, plaintiff must show that the government action "shocked the conscience," and did not simply reflect "improper motive").

125. Note, *Taking a Step Back: A Reconsideration of the Takings Test of Nollan v. California Coastal Commission*, 102 HARV. L. REV. 448 (1988).

126. *Lingle,* 125 S.Ct. at 2086.

bitrariness of the government action, raising once more an issue properly assigned to due process rather than takings.

C. The Character Factor After *Lingle.*

Lingle's thorough pruning of regulatory takings doctrine leaves two discrete, narrow definitions of character, and two more general definitions. The first two can be dealt with quickly. The second two require somewhat more extended discussion.

First, based on the language of *Penn Central* itself as well as subsequent Supreme Court decisions, one proper definition of character is whether or not a government action involves a physical occupation of private property. As discussed, this definition is limited to temporary physical occupations, because permanent physical occupations are governed by the independent *Loretto per se* rule. Of course, because character is only one factor in the analysis, the fact that the government has temporarily invaded private property will not necessarily result in a finding of a taking. For example, in *Boise Cascade Corp. v. United States*,[127] the court affirmed a trial court decision rejecting a takings claim against the United States based on an endangered species survey conducted by U.S. Fish and Wildlife Service employees on private land. Given the "extremely limited and transient nature of the intrusion in this case," the court had no difficulty concluding that "a finding that a taking occurred [is precluded] as a matter of law."[128] Nonetheless, everything else being equal, the fact that the government has invaded private property, even temporarily, should weigh in favor of a takings claim.

Second, based on the authority of *Hodel* and *Babbitt,* the character factor must include consideration of whether a regulation impairs the right to devise private property to one's heirs. As discussed, the Court has never explained in detail why this type of government action is subject to special scrutiny, but it appears to be related to the Court's longstanding support, in various contexts, of the family unit. In any event, this definition of character is embedded in takings doctrine. Importantly, while the Court compared interference with the right to devise with a physical occupation of private property, apparently not every impairment of the right to devise is a *per se* taking. Rather, as the Court

127. 296 F.3d 1339 (Fed. Cir. 2002).

128. *Id.* at 1357.

indicated in *Babbitt*, only a restriction that "severely" impairs the right to devise will be deemed taking.[129]

The third, more general definition of character, which deserves even greater emphasis in regulatory takings cases than it has received to date, focuses on whether the regulation targets one or a few owners or is more general in application.[130] As discussed, the Court's precedents have frequently invoked the idea of "reciprocity of advantage," which implicitly refers to the generality of the regulation. Furthermore, the relative generality of regulation is highly relevant to the "fairness" and "justice" concerns that animate takings doctrine.[131] Most importantly, it speaks to whether the apparent burden imposed by a regulation may be offset in whole or in part by corresponding benefits due to the fact that neighbors and others in the community are similarly restricted. Thus, examining the generality versus particularity of a regulation provides useful insight into whether a regulation imposes an unfairly onerous burden.[132]

Consider, for example, the case of agricultural-use zoning. In general, agricultural zoning has been upheld by the courts against takings claims.[133] But the fairness of agricultural land protection will vary depending upon whether a regulation protects a substantial number of farms in a still relatively rural area, or represents, in effect, a form of "spot zoning" designed to preserve one or a few last farms in an urbanizing community or region. A broadly applicable agricultural law not only preserves the rural environment for all affected landowners, but can protect the value of the land for its primary agricultural use by precluding

129. 519 U.S. at 244.

130. *See* Doremus, *supra* note 5 (also advocating increased focus on the generality versus particularity of regulation). By contrast, Professor Fee, while recognizing that a sensible takings doctrine should take into account the countervailing benefits of regulation for regulated owners, adopts the relatively extreme position that compensation should be due whenever the direct benefits of regulation to a regulated owner do not match or exceed the detriments. *See* Fee, *supra* note 38. *See also* Lynda J. Oswald, *The Role of the "Harm/Benefit and "Average Reciprocity of Advantage" Rules in a Comprehensive Takings Analysis*, 50 VAND. L. REV. 1449 (1997).

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

132. For an example of a thoughtful Court of Federal Claims decision defining the character factor in part in terms of whether a regulation creates a reciprocity of advantage, *see Walcek,* 49 Fed. Cl. at 271, *aff'd*, 303 F.3d 1349 (Fed. Cir. 2002).

133. *See* Mark Cordes, *Takings, Fairness, and Farmland Preservation*, 60 OHIO ST. L.J. 1033, 1061-62 (1999), See also Mark Cordes, *Fairness and Farmland Preservation: A Response to Professor Richardson*, 20 J. LAND USE & ENVTL. L. 371 (2005) (rebutting criticisms of the argument that agricultural zoning is generally fair to land owners).

land uses that are incompatible with intensive agriculture. Accordingly, the generality of an agricultural zoning law should weigh against a finding of a taking. On the other hand, if an agricultural zoning law affects only one farm in the community, imposing only burdens and providing no direct corresponding benefits, a finding of a taking is more likely to be justified.

The reciprocity of advantage concept cannot logically be confined to examining the countervailing benefits produced by the specific regulation under challenge. Justice Louis Brandeis, in his famous dissent in *Pennsylvania Coal Co. v. Mahon*,[134] objected to the notion that takings liability could be denied solely when a strict reciprocity of advantage could be established. Regulations can sometimes be justified, he believed, by "the advantage of living and doing business in a civilized community,"[135] a thought repeated in several subsequent majority Supreme Court opinions.[136] Even if one owner is disproportionately burdened, say, by a wetlands regulation, he may be benefited by other owners' compliance with other laws, such as species or historic preservation statutes. On the one hand, considering all of the countervailing benefits of different regulatory programs may make it virtually impossible to determine whether a regulated party is suffering a net loss from all of a society's regulatory programs. On the other hand, ignoring all of these reciprocal benefits from regulation would miss an important element of fairness. This broader version of the reciprocity argument obviously reinforces the case for using a high economic threshold in regulatory takings cases.

As suggested in the Introduction, the concept of reciprocity of advantage also provides the key to understanding how the relative public value of government action should factor into takings analysis. On one level, it makes sense that the risk of takings liability should be lower if the government is trying to produce important public benefits. The prospect of takings liability, by design, deters the government from acting, and therefore the social costs of takings liability increase as the magnitude of the benefits of foregone government action increases. On the other hand, this reasoning raises what Professor Fee has described as "the public interest problem," that is, "that the more the govern-

134. 260 U.S. 393 (1922).

135. *Id.* at 422.

136. *See, e.g., Kirby Forest Industries, Inc. v. United States*, 467 U.S. 1, 14 (1984); *Andrus v. Allard*, 444 U.S. 51, 67 (1979).

ment has to gain from a change in regulation, the less likely it will have to pay for the change."[137] When society benefits a great deal from the pursuit of important public goals, it is arguably fairer, not less fair, to ask the public to redistribute the gains to those who have been burdened in the process.

It might be suggested that the Supreme Court's repudiation in *Lingle* of the "substantially advances" test logically compels the conclusion that the importance or value of the government action cannot count as a factor weighing against a taking claim. If *illegitimate* government action does not provide the basis for a claim under the Takings Clause, then the fact that the government action serves some *legitimate* public purpose arguably cannot be advanced as a defense against a takings claim. But there is no necessary incompatibility. As the Supreme Court has emphasized, a legitimate public purpose is a precondition for a valid taking claim.[138] Thus, the alleged illegitimacy of government action raises a threshold question about whether the Takings Clause can properly be applied at all. Once that threshold question has been resolved, it is a conceptually distinct question whether the importance of the government's purpose might be a relevant consideration in deciding the takings issue.

Nonetheless, in my judgment, the value or importance of what the government is trying to accomplish cannot logically be invoked as a direct justification to avoid takings liability. The same basic substantive rules govern regulatory takings claims and straightforward exercises of the eminent domain power. The essential equivalence of these two doctrines is demonstrated by the fact that regulatory takings claims are commonly called "inverse condemnation" claims. It would make no sense in a condemnation case, for example, to suggest that the government should be excused from its obligation to pay for a school site because the school will serve a vital educational need. Likewise, given the equivalence of condemnations and inverse condemnations, it makes no sense to suggest that the government's liability to pay compensation on account of its regulatory actions should vary with the importance of the public purpose served by the regulation.[139]

137. *See* Fee, *supra* note 38, at 1006.

138. *See, e.g., Brown v. Legal Foundation of Washington,* 538 U.S. 216 (2003).

139. In addition, insofar as a primary argument against the "substantially advances" test has been that it permitted courts to engage in inappropriate second-guessing of the wisdom of government policies, permitting courts to inquire into

However, the public value or importance of the government action is not irrelevant in takings analysis. As discussed, broadly applicable regulations both burden individual property owners and benefit the same owners by restricting the activities of their neighbors and others in the community. The magnitude of these reciprocal benefits will depend in substantial part on the public importance and value of the objective served by the regulations. So long as a regulation applies broadly across the community, the value or importance of what the government is seeking to accomplish should weigh against the takings claim. The greater the value of the government program for the community, including the takings claimant, the less likely that even a seemingly onerous regulation should be held to be a taking.

The final definition of the character factor focuses on whether a regulation is benefit-conferring or harm-preventing. Everything else being equal, a regulation that is designed to protect neighboring owners and the community as a whole from serious harms should be less likely to generate a finding of a taking than a benefit-conferring regulation. Justice Scalia, writing for the Court in *Lucas*, disparaged the entire notion that benefit-conferring regulations could be distinguished, "on an objective, value-free-basis," from harm-preventing regulations. But, for the reasons discussed above, *Lucas* does not necessarily overrule the judicial tradition, dating back over a century, of considering the harm-prevention goal of a regulation in takings cases.

Scalia is probably correct that distinguishing between harm-preventing and benefit-conferring action will often be difficult at the margins. But the fact remains that these two categories present distinctly different cases in terms of society's understanding of land owner rights and responsibilities. The preservation of Grand Central terminal in its historically pure form, at stake in the *Penn Central* case, can fairly be characterized as providing a public benefit. On the other hand, protecting campers from a serious risk of flooding, the issue at stake in the *First English* case, is more naturally characterized as protecting citizens from harm.[140] The fact that some cases may be hard to categorize can-

whether government action serves valuable or important public purposes is potentially subject to the same criticism.

140. On remand, following the Supreme Court's decision, the California Court of Appeals found no taking in part because the zoning regulation "involves this highest of public interests – the prevention of death and injury." *First English Evangelical Lutheran Church v. County of Los Angeles*, 210 Cal.App.3d 1353, 1370, 258 Cal.Rptr. 893, 904 (1989).

not obscure the fact that some types of private property uses are more obviously affirmatively harmful to others than other uses. Legislators are entitled to make normative judgments about what activities are harmful to their constituents, and those judgments are entitled to respect from the courts. In economic policy terms, while it will sometimes make sense to require those who benefit from regulation to redistribute the gains to those burdened by the regulations, it will generally make less sense to require those protected from harm to pay those who have been restrained from harming others and the community.

Lastly, the legitimacy of this definition of the character factor is supported by the concept of "nuisance" as a background principle. Under *Lucas*, regulations restricting nuisance activities are completely immune from takings liability, on the theory that no owner can claim a vested right to engage in a nuisance. It would be illogical to give blanket immunity to nuisance activities but then treat the harm-preventing character of a regulation as completely irrelevant simply because the regulated activity is one step short of being an actual nuisance. Under those circumstances, it makes more sense to treat the harm-preventing character of the regulation as a relevant, if not necessarily dispositive, consideration in a *Penn Central* case.

IV.

WEIGHING THE *PENN CENTRAL* FACTORS.

The final issue is how the three *Penn Central* factors are supposed to be considered together in resolving specific cases. The Court has provided no meaningful guidance on this point. Sometimes the *Penn Central* analysis has been described as a "balancing test," but this seems nonsensical because the *Penn Central* factors are completely incommensurate. Furthermore, the *Penn Central* analysis is more accurately described as a framework for analysis rather than as a "test" yielding determinative legal answers. The *Penn Central* analysis cannot be applied by mechanically toting up a "score" under each factor to arrive at an overall evaluation. Rather, the Court appears to have in mind a more flexible approach in which the persuasive force of each factor will vary with the facts of each case. While a takings claim will presumably fail if all three factors point in favor of the government, a takings claim can apparently succeed, depending upon the facts, even if less than all of the factors point in favor of the plaintiff. As discussed, the Court's *per se* takings rules, though gener-

ally described as free-standing tests, can be viewed as applications of the *Penn Central* framework in which one factor is so overwhelming that a claim will be upheld without the need to consider the other factors.

Within this framework, the most important factor is economic impact. Assuming no permanent physical occupation is involved, unless the regulation eliminates all or substantially all of the property's value, there will generally be no taking. This high economic threshold removes many garden variety regulatory programs from the ambit of the Takings Clause. On the other hand, in special cases, involving *Penn Central* claims based on non-permanent physical occupations, or interferences with the right to devise, a taking claim might succeed based on a lesser showing of economic impact.

Outside of these special cases, and assuming the economic impact is sufficiently severe to support a finding of a taking, a *Penn Central* case will turn on application of the various nuanced definitions of reasonable-investment-backed expectations and, under character, such factors as the generality of the regulation and whether the regulation can fairly be described as harm-preventing rather than benefit-conferring. No ready metric for weighing all of these different considerations appears to be available. It may be beyond the law's capacity to develop a more determinative test to deal with the myriad types of takings claims that arise. Having said this, it appears relatively clear that a claimant who purchased property with notice of the regulation will generally not be able to succeed on a takings claim.[141] Furthermore, regardless of whether the claimant had notice of a regulatory re-

141. The courts have not yet resolved whether a claimant's advance notice is a relevant consideration in, if not a complete bar to a *Lucas*-type takings case. *Compare Good v. United States*, 189 F.3d 1355, 1361 (Fed. Cir. 1999) ("The *Lucas* Court did not hold that the denial of all economically beneficial or productive use of land eliminates the requirement that the landowner have reasonable, investment-backed expectations of developing his land.") *with Palm Beach Isles Assoc. v. United States*, 231 F.3d 1354, 1364 (Fed. Cir. 2000) ("[W]hen a regulatory taking, properly determined to be 'categorical,' is found to have occurred, the property owner is entitled to a recovery without regard to consideration of investment-backed expectations"). The better view is that expectations cannot logically be excluded from consideration in a *Lucas*-type case. *See* John D. Echeverria, *A Turning of the Tide: The Tahoe-Sierra Regulatory Takings Decision*, 32 ELR 11,235, 11,251 (2002) (arguing that *Tahoe-Sierra* supports the *Good* view). This question became relatively less consequential after the Supreme Court adopted the position that *Lucas* is confined to the situation where regulation renders property completely valueless. *See Lingle,* 125 S.Ct. at 2082 (stating that a *Lucas* claim is based on "the complete elimination of a property's value").

striction, a regulation that applies broadly across the community, or that is designed to prevent harms to neighboring property owners or the community as a whole, will be very unlikely to support a successful takings claim.

CONCLUSION

This attempt to inject more determinative meaning into the *Penn Central* analysis has not yielded a neat and tidy doctrine. But it has hopefully succeeded in articulating a somewhat more manageable set of rules to guide regulatory takings claims. The analysis of economic impact should consider not only "with and without" values, but also the value of the regulated property today compared with its original cost basis. Under the expectations factor, courts should consider whether the owner has been able to carry out her original intentions in acquiring the property, whether the claimant purchased the property with notice of the regulatory constraint, the regulatory environment at the time the claimant purchased the property, and the foreseeability of public concerns associated with a particular property use. Under the character factor, apart from special cases involving interferences with the ability of owners to exclude or to devise, the primary questions are whether the regulation applies broadly across the community and creates a reciprocity of advantage, the magnitude of the benefits conferred by the regulatory program, and whether the program is designed to protect the community or individuals citizens from harm. For better or for worse, applying these various factors, individually and as a package, will continue to depend to a significant degree on sound judicial judgment.