Note

Derailing *Penn Central*: A Post-*Lingle*, Cost-Basis Approach to Regulatory Takings

Joshua P. Borden*

Introduction

Is there any body of law in worse shape than regulatory takings? Scholars have described the law of regulatory takings as "a [m]uddle,"[1] a "disarray,"[2] and "incoherent."[3] The inevitable question is whether the Supreme Court's approach, as convoluted and seemingly arbitrary as it may be,[4] is the best method available. At first blush, the answer might appear to be yes, because legal scholars have proposed countless alternative methods of assessing takings claims,

---

* J.D., 2010, The George Washington University Law School; B.A., 2007, University of Connecticut. I would like to thank, first and foremost, Professor Joshua Schwartz for the invaluable guidance and numerous suggestions he provided. I would also like to thank former Notes Editor Mary Pohanka and Adjunct Professor Ryan Watson. Lastly, many thanks are due to Craig Reiser, Nima Mohebbi, and Ben Grillot, who provided many thoughtful comments throughout the writing process.

1 Carol M. Rose, Mahon *Reconstructed: Why the Takings Issue Is Still a Muddle*, 57 S. Cal. L. Rev. 561, 561 (1984).

2 Andrea L. Peterson, *The Takings Clause: In Search of Underlying Principles Part I–A Critique of Current Takings Clause Doctrine*, 77 Cal. L. Rev. 1299, 1303–04 (1989).

3 James R. Gordley, *Takings: What Does Matter? A Response to Professor Peñalver*, 31 Ecology L.Q. 291, 291 (2004).

4 *See* Lucas v. S.C. Coastal Council, 505 U.S. 1003, 1064 (1992) (Stevens, J., dissenting) (asserting that the per se rule is wholly arbitrary because "[a] landowner whose property is diminished in value 95% recovers nothing, while an owner whose property is diminished 100% recovers the land's full value").

June 2010 Vol. 78 No. 4

only to have them rejected as seriously flawed.[5] Nevertheless, this Note argues that the Court's current method of regulatory takings analysis is fraught with so many issues that one cannot help but believe that a better, sounder, approach *must* exist.

To illustrate the problems created by the Court's current approach to regulatory takings, this Note examines a hypothetical situation. After years of carefully saving, John decided to invest in a small business and purchase a popular trailer park for $400,000. He rented out each lot, and the steady flow of rent payments promised to provide John with a profit. All indications were that John had made a wise investment.

However, John was notified that the town had enacted a zoning ordinance prohibiting trailer homes.[6] The town believed that such properties were an eyesore and that new residents would be attracted to the area now that the trailer parks were gone. Unfortunately, the regulation did not coincide with John's interests. He had invested his hard-earned life savings in the park, and although John could sell the property, the zoning ordinance had caused the property's value to plummet to $100,000.

The economic deprivation, caused directly by government action, seemed manifestly unfair to John, and he promptly brought an inverse condemnation suit, claiming that the regulation constituted an unconstitutional taking of his property. He argued that the Fifth Amendment required that he be given just compensation for the government's taking of his land. Unfortunately, John faces a difficult task and must overcome the complex, unclear, and often burdensome law of regulatory takings.

---

5 *See* Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency, 535 U.S. 302, 333–34 (2002) (rejecting a proposed rule for land use restrictions, advanced by the Institute of Justice as amicus curiae, that would replace *Penn Central*).

6 It is understood that, in practice, the zoning ordinance would likely include an amortization period to protect against a compensable taking.

> Some states permit the discontinuation of nonconforming uses without compensation after the owners have had a reasonable time to enjoy the fruits of the uses and, in effect, a reasonable opportunity to recoup their investments. Amortization constitutes a form of transition relief; it is a form of delayed implementation of a new legal regime.

Jonathan Remy Nash & Richard L. Revesz, *Grandfathering and Environmental Regulation: The Law and Economics of New Source Review*, 101 Nw. U. L. Rev. 1677, 1731–32 (2007) (footnotes omitted). It is possible, however, that the town would choose not to include an amortization period because it prefers the immediate removal of the trailer parks. This example is provided to explore what would happen under current takings law to property owners like John should a town opt not to include an amortization period.

The Fifth Amendment's Takings Clause prohibits the taking of private property for public use "without just compensation."[7] The Supreme Court has long interpreted the Takings Clause as encompassing not only physical confiscations of property, but also certain scenarios where a government regulation detrimentally affects privately owned property.[8] The Justices of the Supreme Court, along with other legal scholars, have debated whether regulatory takings doctrine should take the form of an ad hoc balancing test, an exclusive set of strict per se rules, or a combination of both, as is currently the case.[9]

The primary test for determining whether regulation effects a Fifth Amendment taking is the *Penn Central* ad hoc balancing test, which examines three factors: the regulation's economic impact, the claimant's distinct investment-backed expectations, and the character of the governmental action.[10] In addition to the *Penn Central* balancing test, the current takings doctrine includes the per se rules of *Lucas* and *Loretto*. *Lucas* holds that a taking ordinarily occurs[11] if the "regulation denies all economically beneficial or productive use of the land."[12] *Loretto* holds that a taking ordinarily occurs[13] if the regulation causes a permanent physical occupation on the land.[14] Alongside this confusing structure existed yet another per se test that held that a taking occurred if the regulation did not substantially advance a legiti-

7 U.S. Const. amend. V.

8 *See infra* text accompanying notes 20–22.

9 *See infra* pp. 106–08.

10 Penn Cent. Transp. Co. v. New York City, 438 U.S. 104, 124 (1978). It can be argued, however, that the *Penn Central* balancing test examines only two factors. In *Penn Central*, the Court explained that "[t]he economic impact of the regulation on the claimant and, particularly, the extent to which the regulation has interfered with distinct investment-backed expectations are, of course, relevant considerations." *Id.* This may suggest that the test only consists of two factors: (1) the economic impact, in light of the distinct investment-backed expectations, and (2) the character of the governmental action. *See* Gary Lawson, Katharine Ferguson & Guillermo A. Montero, "*Oh Lord, Please Don't Let Me Be Misunderstood!": Rediscovering the* Mathews v. Eldridge *and* Penn Central *Frameworks*, 81 Notre Dame L. Rev. 1, 32 (2005).

11 Although a taking ordinarily occurs if the per se rule is satisfied, it is not always the case, as the regulation may fall within the nuisance exception. Under this exception, compensation is not due if the prohibited use is impermissible under the "background principles" of the common law. *See* Lucas v. S.C. Coastal Council, 505 U.S. 1003, 1029 (1992). The Court has been hesitant "to find a taking when the State merely restrains uses of property that are tantamount to public nuisances." Keystone Bituminous Coal Ass'n v. DeBenedictis, 480 U.S. 470, 491 (1987). It may be argued that the nuisance exception is actually a third per se rule, in that it acts as a categorical exemption. There is thus automatically no taking and no just compensation awarded if the nuisance exception applies. *See* David A. Dana & Thomas W. Merrill, Property: Takings 111 (2002).

12 *Lucas*, 505 U.S. at 1015.

13 *See* Dana & Merrill, *supra* note 11, at 95.

14 *See* Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419, 426 (1982).

mate state interest,[15] but this test was recently repudiated in *Lingle v. Chevron U.S.A. Inc*.[16]

Applying the *Penn Central* balancing test to John's case, it is uncertain whether his inverse condemnation claim will be successful. The meanings of the test's factors are far from clear, which has led to varying interpretations and uncertainty as to the results of the test's application. John would spend a substantial sum of money in legal fees for his claim ultimately to be subjected to what this Note contends is a vague and indeterminate test that could easily turn on the judge's subjective beliefs. Although a regulatory takings doctrine consisting of only the per se rules would be more predictable in its application, *Lucas* and *Loretto* offer property owners like John incomplete protection. The ordinance at issue, which prohibits trailer homes, neither denies John all economically beneficial or productive use of his land nor causes a permanent physical occupation.

This Note proposes a regulatory takings doctrine that addresses problems of uncertainty and insufficient protection of property rights that have long pervaded regulatory takings jurisprudence. Specifically, this Note argues that the *Lingle* decision has threatened the character prong of the *Penn Central* balancing test, which ultimately may require the Supreme Court to revisit its method of regulatory takings analysis. The Court may decide to continue with its application of the indeterminate, but more comprehensive, balancing test of *Penn Central*, or, alternatively, it may choose to apply only the more predictable, but incomplete, pair of per se rules. This Note argues, however, that the Court should abandon *Penn Central* and should instead apply a modified version of the per se rules, replacing *Lucas* with a new per se rule that holds a taking to occur if the regulation proximately causes property value to drop to such an extent that the owner is unable to recoup his cost basis.[17]

---

15 Agins v. City of Tiburon, 447 U.S. 255, 260 (1980).

16 Lingle v. Chevron U.S.A. Inc., 544 U.S. 528 (2005).

17 Cost basis, for the purposes of this Note, refers to the initial cost of the property. It is not to be equated with the cost basis used in the Internal Revenue Code. A property owner's cost basis for tax purposes will likely differ from his cost basis under the proposed regulatory takings analysis. It is true that the proposed cost-basis rule adopts certain concepts from the Internal Revenue Code. For example, there is a stepped-up basis for inherited properties. *See infra* Part VI.A. There are also, however, several key differences. One such difference is that the cost-basis concept embraced by this Note does not refer to an adjusted basis; depreciation does not factor into the determination of a property owner's cost basis. *See* 26 U.S.C. § 1011 (2006).

Although it is discussed in detail later in the Note,[18] it is important to mention at the outset that the proposed rule does not strictly adhere to the cost-basis economic philosophy. To put it simply, a property owner's cost basis is only protected to the extent that it does not exceed the property's fair market value at the time of purchase. This is because a regulation is not proximately responsible for the gap between the property's value and the purchase price if the purchase price is in excess of fair market value. The rule does not protect unreasonable investments.

Additionally, the proposed rule does not offer complete protection to investments, even those that are reasonably made. A property owner's cost basis, assuming it does not exceed fair market value at the time of purchase, is protected from the effects of regulatory constraint. If, however, the decline in property value is proximately caused by something other than government regulation (e.g., economic recession), there is no taking.

The proposed method of analysis will provide for a regulatory takings test that is more predictable than that of *Penn Central*. Most important is that the increased predictability and clarity does not come at the expense of property owners' protections. Unlike the existing law of regulatory takings, the proposed test provides property owners with the protection that they not only deserve, but are also constitutionally guaranteed.

Part I describes and assesses the current state of regulatory takings law. Understanding the evolution of regulatory takings analysis to date is vital to understanding the rationale for imposing a new doctrine. Part II analyzes the *Lingle* case and explains that its holding may have drastic implications for the *Penn Central* balancing test. It is argued that *Lingle* may be understood as precipitating a major shift in the Court's judicial philosophy. Part III considers two routes forward that the Court may take in applying regulatory takings analysis after *Lingle*, but ultimately concludes that both options are inadequate. Part IV then proposes that the Court embrace an alternative method of analyzing regulatory takings claims. This Part provides an in-depth examination of the proposed per se rule, which is rooted in a cost-basis economic theory. Part V considers various theories as to why compensation should be provided for government takings. Because this Note proposes a new takings analysis, it is necessary to address the policies behind the constitutional award of just compensation and

---

18 *See infra* Part IV.D.

to illustrate how the proposed analysis effectuates these policies. Finally, Part VI addresses the criticism that would likely emerge if the Court adopted such an alternative regulatory takings test. It seeks to confute such criticism by ultimately demonstrating that the proposed method of analysis offers the fairest and most easily understood solution to the confusing world of regulatory takings jurisprudence.

I. The Evolution of Regulatory Takings Jurisprudence

The Takings Clause of the Fifth Amendment provides: "[N]or shall private property be taken for public use, without just compensation."[19] Prior to *Pennsylvania Coal Co. v. Mahon*,[20] the Supreme Court applied the Takings Clause solely to those circumstances where the government directly appropriated private property.[21] In *Mahon*, however, the Court, per Justice Holmes, altered its interpretation of the Fifth Amendment and held that "while property may be regulated to a certain extent, if a regulation goes too far it will be recognized as a taking."[22] This landmark decision inevitably led to a question that legal scholars, even today, are unable to clearly and reliably answer: when does a regulation go too far?

For the fifty-plus years following *Mahon*'s recognition of regulatory takings, the Court acknowledged that it was "unable to develop any 'set formula'" for ascertaining when a taking requiring just compensation occurs.[23] In *Penn Central Transportation Co. v. New York City*, the Court noted that, "[i]n engaging in . . . ad hoc, factual inquiries[, its] decisions have identified several factors that have particular significance."[24] Even in *Penn Central*, the Court never announced a fixed test to determine when a regulation effects a taking necessitating just compensation.[25] Three specific factors were, however, especially prominent in the Court's decision: the economic impact on the claimant, the extent to which the regulation interfered with the claimant's distinct investment-backed expectations, and the character of the gov-

---

19 U.S. Const. amend. V.

20 Pa. Coal Co. v. Mahon, 260 U.S. 393 (1922).

21 *See* Lucas v. S.C. Coastal Council, 505 U.S. 1003, 1014 (1992) (noting that, prior to *Mahon*, "it was generally thought that the Takings Clause reached only a 'direct appropriation' of property . . . or the functional equivalent of a 'practical ouster of [the owner's] possession'" (citations omitted)).

22 *Mahon*, 260 U.S. at 415.

23 Penn Cent. Transp. Co. v. New York City, 438 U.S. 104, 124 (1978).

24 *Id.*

25 *See* John D. Echeverria, *Is the* Penn Central *Three-Factor Test Ready for History's Dustbin?*, 52 Land Use & Zoning Dig. 3, 4 (2000) (arguing that the three factors were not intended to be a "determinative" test for regulatory takings).

ernmental action.[26] Despite the fact that the Court in *Penn Central* merely identified "factors that have particular significance,"[27] the Court cited these exact factors a year later in *Kaiser Aetna v. United States*.[28] These factors have come to be known as the *Penn Central* three-factor test.[29]

Thereafter, however, the Court recognized a pair of per se rules that, in the author's view, created doubt about the appropriate analysis for regulatory takings claims. In *Loretto v. Teleprompter Manhattan CATV Corp.*,[30] the Court held that a taking occurs if the regulation causes a permanent physical occupation.[31] Subsequently, the Court established a second per se rule for regulatory takings in *Lucas v. South Carolina Coastal Council*,[32] holding that a taking occurs if the regulation denies the owner all economically viable use of the land.[33]

It was arguable that the per se rules were meant to replace *Penn Central* as the sole source of regulatory takings analysis.[34] A significant amount of evidence indicated that the Court had indeed abandoned ad hoc balancing in favor of bright-line rules. First, the language in *Penn Central* stating that diminution in property value alone cannot establish a taking[35] cannot be reconciled with the holding of *Lucas*,[36] which states that a complete economic wipeout constitutes a per se taking.[37] Second, Justice Scalia, the Court's chief proponent of bright-line rules, authored the majority opinion in *Lucas*, and to

---

26 *Penn Cent.*, 438 U.S. at 124.

27 *Id.*

28 Kaiser Aetna v. United States, 444 U.S. 164, 174 (1979).

29 *See* Peterson, *supra* note 2, at 1317.

30 Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419 (1982).

31 *See id.* at 426 (holding that the mandatory installation of cable facilities on a property constituted a regulatory taking because the government intrusion was a permanent physical occupation).

32 Lucas v. S.C. Coastal Council, 505 U.S. 1003, 1015 (1992).

33 *See id.* (holding that a per se taking occurs "where regulation denies all economically beneficial or productive use of the land").

34 *See* John D. Echeverria, *Making Sense of* Penn Central, 23 UCLA J. ENVTL. L. & POL'Y 171, 172–73 (2005) (noting that "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").

35 *See* Penn Cent. Transp. Co. v. New York City, 438 U.S. 104, 131 (1978) (recognizing that past decisions "uniformly reject the proposition that diminution in property value, standing alone, can establish a 'taking'").

36 *See* Echeverria, *supra* note 25, at 5 (questioning how *Penn Central*'s insistence that no diminution in property value is sufficient to establish a taking can be reconciled with *Lucas*'s bright-line rule that a taking occurs "where regulation denies all economically beneficial or productive use of land").

37 *See Lucas*, 505 U.S. at 1019.

read *Lucas* "to preserve the vague and uncertain *Penn Central* test . . . contradicts the judicial philosophy of the author of the *Lucas* opinion."[38] An additional argument supporting the notion that *Lucas* and *Loretto* replaced *Penn Central* is that the character prong of *Penn Central*'s balancing test only views a "physical invasion by the government" as weighing in favor of finding a taking.[39] Considering that *Loretto* held such permanent physical occupation to constitute a per se taking, the character factor of *Penn Central* arguably lost any separate residual significance.[40] Despite the evidence pointing towards the supplanting of *Penn Central*, the Court has continued to cite *Penn Central* as the "polestar" of regulatory takings jurisprudence.[41]

As though regulatory takings doctrine was not confusing enough, the Court appeared to recognize yet another per se test in *Agins v. City of Tiburon*.[42] It stated that "[t]he application of a general zoning law to a particular property effects a taking if the ordinance does not substantially advance legitimate state interests."[43] Although it long remained unclear how the *Agins* test fit in with the *Penn Central* balancing test and the per se rules of *Loretto* and *Lucas*, the courts recognized the test, though primarily in dicta, until the recent Supreme Court decision of *Lingle v. Chevron U.S.A. Inc.*, which rejected the rule articulated in *Agins*.[44]

---

38 *Id.* at 7 (citing Antonin Scalia, *The Rule of Law as a Law of Rules*, 56 U. CHI. L. REV. 1175 (1989)); *see also* Cass R. Sunstein, *Justice Scalia's Democratic Formalism*, 107 YALE L.J. 529, 566 (1997) (book review) (discussing Justice Scalia's "strong commitment to rule-bound justice").

39 *Penn Cent.*, 438 U.S. at 124 (stating that the "character of the governmental action" is a third factor to consider in the ad hoc, fact-based inquiry and "[a] 'taking' may more readily be found when interference with property can be characterized as a physical invasion by government").

40 *See* Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419, 426 (1982); *see also* Echeverria, *supra* note 25, at 5 (arguing that "[t]he difficulty with viewing [the character] factor as part of a three-factor test is that the Court subsequently transmuted it into a per se test for a regulatory taking [in *Loretto*]").

41 *See, e.g.*, Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency, 535 U.S. 302, 336 (2002) (holding that "our polestar . . . remains the principles set forth in *Penn Central* itself" (quoting Palazzolo v. Rhode Island, 533 U.S. 606, 633 (2001) (O'Connor, J., concurring))).

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

43 *Id.* at 260.

44 *See* Lingle v. Chevron U.S.A. Inc., 544 U.S. 528, 540 (2005).

II. *An Analysis of* Lingle v. Chevron U.S.A. Inc.

A. *The Basics of* Lingle

The Court in *Lingle* was presented with a seemingly straightforward regulatory takings claim.[45] The Hawaii legislature enacted Act 257 "in response to concerns about the effects of market concentration on retail gasoline prices."[46] In an effort to keep gasoline prices reasonable for consumers, "Act 257 limit[ed] the amount of rent that an oil company may charge a lessee-dealer to fifteen percent of the dealer's gross profits from gasoline sales plus fifteen percent of gross sales of products other than gasoline."[47] The proposed state interest was to lower gasoline prices, but oil companies, such as Chevron, could simply maneuver around the rent limitation by increasing the wholesale price of oil.[48] The lower courts held that, because the policy objectives of Act 257 were so easily circumvented, it did not "substantially advance any legitimate state interest" as required by *Agins*, and, accordingly, a regulatory taking had occurred.[49]

Justice O'Connor, writing for the majority, reversed the lower court's decision and held that the "substantially advances" test (i.e., the *Agins* test) "is not a valid method for discerning whether private property has been 'taken' for purposes of the Fifth Amendment."[50] The *Agins* test, Justice O'Connor explained, suggests a means-ends analysis, and such an inquiry may only occur under the rubric of a due process challenge, as opposed to a regulatory takings claim.[51] Instead, the proper focus for a regulatory takings analysis is on whether the regulation's effects "are functionally equivalent to the classic taking in which government directly appropriates private property or ousts the owner from his domain."[52]

Justice O'Connor offered several reasons to justify the rejection of the *Agins* test. First, she stated that a means-ends "inquiry is logically prior to and distinct from the question whether a regulation effects a taking," because the taking must already be for a "public use" according to the Fifth Amendment.[53] Additionally, the regulation

---

[45] *See id.* at 528.

[46] *Id.* at 533.

[47] *Id.*

[48] *Id.* at 535.

[49] *Id.* at 535–36.

[50] *Id.* at 542.

[51] *Id.*

[52] *Id.* at 539.

[53] U.S. Const. amend. V; *Lingle*, 544 U.S. at 543; *see also* Kelo v. City of New London,

must not be so arbitrary as to violate due process.[54] Second, Justice O'Connor expressed concern that if the *Agins* test were to prevail as an authoritative method of analyzing regulatory takings, the Court would become, in essence, a superlegislature.[55] The district court had heard testimony concerning "the views of two opposing economists as to whether Hawaii's rent control statute would help to prevent concentration and supracompetitive prices in the State's retail gasoline market."[56] Justice O'Connor specifically focused on, and explicitly condemned, the fact that the district court, applying *Agins*, bypassed the legislative policy judgment in favor of the testimony it found most persuasive.[57] Application of the *Agins* "substantially advances" test would hinder government action, as all legislation would be subjected to this heightened scrutiny.[58] Last, Justice O'Connor concluded that the *Agins* test leads to inequitable results.[59] "[T]he owner of a property subject to a regulation that *effectively* serves a legitimate state interest may be just as singled out and just as burdened as the owner of a property subject to an *ineffective* regulation."[60]

---

545 U.S. 469, 484 (2005) (interpreting the "public use" requirement as mandating that the taking be for a "public purpose").

54 *See Lingle*, 544 U.S. at 543. It is unclear whether the public use requirement, after *Kelo*, provides any protection in excess of the Due Process Clause. *Kelo* weakened the public use requirement by requiring only a public purpose, *Kelo*, 545 U.S. at 484, and thus it may ultimately amount to no more than a rational basis due process inquiry. However, this issue is outside the scope of this Note. It will be assumed that the public use and due process inquiries are distinct.

55 *Lingle*, 544 U.S. at 544 ("The *Agins* formula can be read to demand heightened means-end review of virtually any regulation of private property.").

56 *Id.* at 544–45.

57 *Id.*

> If the courts were to evaluate takings claims using essentially the same type of balancing test employed by legislatures, they would run a serious risk of intruding on the responsibilities of the political branches and, within the federal system in particular, violating the principle of separation of powers which defines the scope of federal judicial power.

Echeverria, *supra* note 25, at 8. Others would disagree, however, and state that the application of the *Agins* test does not cause the Court to act as a superlegislature because

> [t]he job of the court is to deal with a concrete claim, by an aggrieved person or persons, that their Constitutional rights under the Fifth Amendment have been violated by some governmental action. The court must proceed to analyze this claim, as any other legal claim, regardless of the consequences to government policy.

R.S. Radford, *Of Course a Land Use Regulation that Fails to Substantially Advance Legitimate State Interests Results in a Regulatory Taking*, 15 FORDHAM ENVTL. L. REV. 353, 400 (2004) (quoting Hage v. United States, 35 Fed. Cl. 147, 150–51 (1996)).

58 *See Lingle*, 544 U.S. at 544 (stating that such heightened review "would require courts to scrutinize the efficacy of a vast array of state and federal regulations—a task for which courts are not well suited").

59 *See id.* at 543.

60 *Id.*

B. A Deeper Reading of Lingle

To determine *Lingle*'s ultimate effect on regulatory takings jurisprudence, it is necessary to peel away the layers of the *Lingle* holding. At first glance, *Lingle* appears to be an innocuous opinion making a minor technical correction to the law governing regulatory takings and renouncing an erroneous dictum.[61] Justice O'Connor bluntly acknowledged that the Court had confused due process and takings law in *Agins* and wrote that, "[o]n occasion, a would-be doctrinal rule or test finds its way into our case law through simple repetition of a phrase—however fortuitously coined."[62] This technical correction would appear to have a trivial impact on takings law when one considers that the courts failed "to utilize the [*Agins*] test to place limits on government regulation."[63] *Lingle*'s voiding of the *Agins* test would then amount to no more than "a mere formality."[64]

Further consideration reveals, however, that *Lingle* may sweep much more broadly. Justice O'Connor noted that a regulatory takings test "focuses directly upon the severity of the burden that government imposes upon private property rights."[65] Although takings jurisprudence follows this approach of determining whether a regulation's impact is "functionally equivalent" to a direct appropriation,[66] due process analysis focuses on the legitimacy of the government's action. For example, due process review under the rational basis standard asks whether a regulation is rationally related to a legitimate state in-

---

61 *See generally* Daniel Jacobs, *Indigestion from Eating Crow: The Impact of* Lingle v. Chevron U.S.A., Inc. *on the Future of Regulatory Takings Doctrine*, 38 URB. LAW. 451 (2006) (arguing that the Court had to essentially "eat crow" when it admitted that it had mistakenly applied the "substantially advances" test to regulatory takings doctrine). It must be noted that Jacobs does entertain the possibility of "indigestion" occurring in the future and specifically mentions the heightened rational basis due process review Justice Kennedy hinted at in his concurring opinion. *Id.* at 486; *see infra* note 174 and accompanying text.

62 *Lingle*, 544 U.S. at 531.

63 Jacobs, *supra* note 61, at 480 n.183.

64 *See id.* at 480–81.

65 *Lingle*, 544 U.S. at 539.

66 *Id.* Justice O'Connor's reason for focusing the analysis on the regulation's burden on property rights is clear when takings law is examined from a historical perspective. The Fifth Amendment makes no mention of regulatory takings, and, prior to *Mahon*, just compensation was given only in those scenarios where the government directly appropriated the land. *See* Lucas v. S.C. Coastal Council, 505 U.S. 1003, 1014 (1992) (noting that, prior to *Mahon*, "it was generally thought that the Takings Clause reached only a 'direct appropriation' of property . . . or the functional equivalent of a 'practical ouster of [the owner's] possession'") (citations omitted).

terest.[67] The "substantially advances" test, according to Justice O'Connor,

> asks, in essence, whether a regulation of private property is *effective* in achieving some legitimate public purpose. An inquiry of this nature has some logic in the context of a due process challenge, for a regulation that fails to serve any governmental objective may be so arbitrary or irrational that it runs afoul of the Due Process Clause.[68]

However, a means-ends analysis examining the effectiveness of a regulation, according to Justice O'Connor's majority opinion in *Lingle*, has no place in regulatory takings jurisprudence.[69]

Because a takings inquiry focuses directly upon the impact of the regulation on private property rights and does not entail a means-ends analysis, it becomes possible that *Lingle* not only repudiates the *Agins* "substantially advances" test, but also logically undermines part of *Penn Central*'s ad hoc balancing test. Indeed, several legal scholars have contended that *Lingle* has effectively destroyed *Penn Central*'s character prong.[70]

To examine *Lingle*'s effect on this *Penn Central* factor, "character" must be defined and then analyzed to see if such a factor is still viable after *Lingle*'s separation of means-ends analysis from regulatory takings jurisprudence.

C. *Character and Its Relationship to* Lingle

Defining what "character of the governmental action" refers to is no easy task. "What considerations might reasonably be included in the 'character' calculus remains as great a mystery today as the day *Penn Central* was drafted."[71] Its first potential meaning is whether the regulation resulted in a permanent physical occupation. As mentioned above, this was at least part of the original understanding of

---

67 *See, e.g.*, Roe v. Wade, 410 U.S. 113, 173 (1973) (Rehnquist, J., dissenting).

68 *Lingle*, 544 U.S. at 542.

69 *See id.*

70 *See* D. Benjamin Barros, *At Last, Some Clarity: The Potential Long-Term Impact of* Lingle v. Chevron *and the Separation of Takings and Substantive Due Process*, 69 ALB. L. REV. 343, 353 (2005) (asserting that "the analysis in *Lingle* illustrates why the character of the government act generally should have no role in the takings analysis"); Echeverria, *supra* note 34, at 199–204; Dale A. Whitman, *Deconstructing* Lingle*: Implications for Takings Doctrine*, 40 J. MARSHALL L. REV. 573, 574 (2007) (noting that "if *Lingle* is taken seriously, it appears to destroy the 'character of the governmental action' prong of the *Penn Central* takings test").

71 R.S. Radford, *Just a Flesh Wound? The Impact of* Lingle v. Chevron *on Regulatory Takings Law*, 38 URB. LAW. 437, 447 (2006).

character in *Penn Central*.[72] This definition became less tenable after the *Loretto* decision, where the Court held that a regulation resulting in a permanent physical occupation not only constituted a factor to consider, but was determinative.[73]

A second plausible definition of the character prong is the importance of the regulation to the public interest. For instance, in *Keystone Bituminous Coal Ass'n v. DeBenedictis*,[74] the Court, in holding that a statute regulating coal mining did not constitute a regulatory taking, explained that the public interest outweighed private interests.[75] Defining character as relating to the public interest is also an approach commonly used by the Federal Circuit.[76]

A third possible definition of the character prong is whether the government is acting in bad faith. The Court in *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency*, at the very least considered such a meaning.[77] In that case, the Court mentioned bad faith among various possible justifications for relief, but ultimately held that the district court had already determined that the agency acted in good faith.[78] Like the public interest definition of character, the Federal Circuit has also applied the bad faith meaning.[79]

Another meaning assigned to the character factor may be that it relates to whether the regulation fails to substantially advance a legitimate state interest. As stated above, however, this definition was advanced as a test independent from *Penn Central* in *Agins*[80] and was

---

72 *See supra* note 39 and accompanying text.

73 *See* Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419, 426 (1982).

74 Keystone Bituminous Coal Ass'n v. DeBendictis, 480 U.S. 470 (1987).

75 *See id.* at 506. The commonwealth enacted the regulation "to protect the public interest in health, the environment, and the fiscal integrity of the area." *Id.* at 488.

76 *See, e.g.*, Bass Enter. Prod. Co. v. United States, 381 F.3d 1360, 1370 (Fed. Cir. 2004) (holding that courts should examine the purpose and importance of the public interest underlying the enactment of a regulation when deciding regulatory takings claims).

77 Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency, 535 U.S. 302, 333 (2002).

78 *See id.* The Court analyzed whether moratoriums on development, which lasted thirty-two months, constituted a regulatory taking. *See id.* at 306. The moratoriums' purposes were to allow for research to be conducted on the impact of development on Lake Tahoe so that, ultimately, a comprehensive land use plan could be devised. *See id.* The Court noted that, if not for the district court's holding, it "might have concluded that the agency was stalling in order to avoid promulgating the environmental threshold carrying capacities and regional plan mandated by [a previous agreement]." *Id.* at 333.

79 *See, e.g.*, Cooley v. United States, 324 F.3d 1297, 1307 (Fed. Cir. 2003) (holding that, "[i]n conducting a *Penn Central* analysis, the trial court may weigh whether . . . conduct evinces elements of bad faith").

80 *See* Agins v. City of Tiburon, 447 U.S. 255, 260–61 (1980).

repudiated by *Lingle*.[81] Nonetheless, speculation continues that the "substantially advances" formula is capable of finding a home under the character prong of the *Penn Central* balancing test.[82] This position does not acknowledge the possibility that the Court not only recognized *Agins* as an error, but may also have held that a determination of whether a regulation "substantially advances" a legitimate state interest has no place in takings jurisprudence whatsoever.[83]

A last potential meaning of the character prong is whether the property owner is reciprocally benefited.[84] Reciprocity of advantage receives in-depth discussion in Part VI.C. For the time being, however, it is sufficient to explain that, in this author's view, it should have no place in the *Penn Central* balancing test and, thus, should not be analyzed under *Lingle.*

This is because the economic-impact, or diminution-of-value, factor of the *Penn Central* balancing test accounts for any reciprocal benefit. The benefit provided to the community at large will be reflected in the property's value. A substantial benefit will mean that the diminution in value will be less drastic and, thus, weigh against any finding of a taking.[85] Of course, the *Penn Central* prongs may overlap, meaning that reciprocity of advantage may be addressed in the economic-impact prong as well as the character-of-the-governmental-action prong. An overlapping of prongs is, however, less than ideal, and fac-

---

[81] *See* Lingle v. Chevron U.S.A. Inc., 544 U.S. 528, 548 (2005).

[82] *See* Radford, *supra* note 71, at 449–50 (arguing that "[t]he same economic analysis and empirical research that previously informed 'failure to substantially advance' takings claims can be relatively smoothly transitioned into the *Penn Central* framework"); Alan Romero, *Ends and Means in Takings Law After* Lingle v. Chevron, 23 J. LAND USE & ENVTL. L. 333, 361 (2007) (stating that "[t]his 'character' factor could be the verbal home for appropriate considerations of means and ends in takings cases").

[83] *Lingle*, 544 U.S. at 548 (holding that "the 'substantially advances' formula is not a valid takings test, and indeed conclud[ing] that it has no proper place in our takings jurisprudence").

[84] *See, e.g.*, Christopher T. Goodin, *The Role and Content of the Character of the Governmental Action Factor in a Partial Regulatory Takings Analysis*, 29 U. HAW. L. REV. 437, 449 (2006); Romero, *supra* note 82, at 363; Laura Lydigsen, Note, *"Fairness and Justice" After* Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency*: Subsequent Regulatory Takings Decisions Under the "Parcel as a Whole" Framework*, 82 WASH. U. L.Q. 1513, 1548 (2004) (citing a New York Appellate Division court's approach and finding "some support in *Penn Central* itself").

[85] It is also not clear that reciprocity of advantage survived *Lingle*, as the concept may include such means-end inquiries reserved for due process. Echeverria acknowledges that "[i]t 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." Echeverria, *supra* note 34, at 206.

toring reciprocity of advantage into more than one prong gives the factor an unjustifiable level of importance.

Whether "character" encompasses the public interest, bad faith, or "substantially advances" definition, it is clear that the factor relies on a means-ends analysis, which *Lingle* appears to have relegated to due process inquiries. The potential definition of character as whether a regulation causes a permanent physical occupation on the claimant's property is not analyzed here because, as mentioned above, such a definition became less tenable after the Court issued its opinion in *Loretto*. Also, reciprocity of advantage is not included in the analysis because it receives ample attention in the economic-impact factor and, therefore, it need not be addressed again in the character prong.

Justice O'Connor held that a proper analysis of regulatory takings claims "focuses directly upon the severity of the burden that government imposes upon private property rights."[86] When determining whether a regulation is in the public interest, is enacted in bad faith, or substantially advances a legitimate state interest, however, the focus is exclusively on the government's reasons and motivations for enacting such regulations.[87] If each definition of the character factor has no place in post-*Lingle* takings jurisprudence, the question is ultimately how and if the *Penn Central* balancing test will be applied in future regulatory takings inquiries.[88]

Even those who believe that *Lingle* did not necessarily prohibit all means-ends inquiries from takings analysis must, at the very least, admit that *Lingle* further muddled an already vague and confusing character prong. With so many potential definitions of character, the question already existed as to whether the continued application of *Penn Central* was desirable and even practical. In light of the added uncertainty of *Lingle*, the question is more pressing than ever.

---

86 *Lingle*, 544 U.S. at 539.

87 *See* Whitman, *supra* note 70, at 581 (noting that, "[w]hile an inquiry into the reasons or motivations of the government may provide a useful background for determining whether substantive due process has been violated, it tells nothing useful about whether a taking has occurred").

88 Professor Whitman opines that a post-*Lingle* application of *Penn Central* "is now, as perhaps it should always have been, purely an inquiry into the extent of the government's intrusion into private ownership and private value." *Id.* at 582. He adds that "[t]here is no 'balancing' left to do, and there are no contravening factors that must be weighed against the intrusiveness of the regulation." *Id.*

III. *An Exploration of Post-*Lingle *Takings Jurisprudence*

With the potential death of *Penn Central*'s character prong and the Supreme Court's previous wavering between per se rules and balancing tests, one can only hypothesize how the Court will approach future claims of regulatory takings. This Part begins by assessing the Court's most likely approach, which is the continued and unaltered application of the *Penn Central* balancing test as though *Lingle* never occurred. After concluding that this approach is deficient, this Note examines an alternative approach. The merits of this second approach, which is an abandonment of *Penn Central* and a resort to the per se rules of *Lucas* and *Loretto*, are also examined, and this Note ultimately concludes that this approach is also inadequate.

A. *Option Number One: Stubbornness*

If history is any indication of which approach the Court will take, it will likely continue to apply *Penn Central*'s ad hoc balancing test. The Court has been reluctant to abandon *Penn Central*, despite past indications that this approach would be superseded. As mentioned previously, the per se tests of *Lucas* and *Loretto* were once believed by some to represent an effort to replace *Penn Central* as the sole methods of analysis.[89] Nevertheless, the Court returned to its "polestar" in subsequent regulatory takings inquiries.[90]

Therefore, it would come as little surprise if the Court continued to apply the *Penn Central* balancing test as though *Lingle* had not undermined it, just as it continued to apply *Penn Central* following *Lucas* and *Loretto*.[91] Advocates of this approach argue that *Lingle* left the character prong unscathed.[92] These advocates interpret *Lingle* narrowly and view the Court as holding only that a regulation's failure under a substantive due process analysis does not require the government to give just compensation.[93]

---

89 *See supra* notes 34–40 and accompanying text.

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

91 Another less likely option is that the Court will apply an altered version of the *Penn Central* balancing test. This would mean that the Court would acknowledge that *Lingle* foreclosed application of the character prong, but would nonetheless apply a simpler version of the *Penn Central* balancing test that focuses solely on economic impact and distinct investment-backed expectations. *See* Whitman, *supra* note 70, at 590 (arguing that the elimination of the character element of the *Penn Central* test "simplifies and rationalizes *Penn Central* in a desirable way").

92 *See, e.g.*, Romero, *supra* note 82, at 365.

93 *See id.* at 360 (advocating for the position that "[t]he Court's rejection of the substantial

Although continued use of the *Penn Central* analysis offers property owners more protection than recourse to *Lucas* and *Loretto* alone, the balancing test remains deficient. The first deficiency in *Penn Central* is that the Court never actually settles on a clear three-factor test.[94] To the contrary, the opinion only identifies certain factors to consider and by no means devises a determinative test for regulatory takings.[95]

Second, as the various contrasting definitions of the character factor demonstrate, the *Penn Central* balancing test "is so vague and indeterminate that it invites unprincipled, subjective decision making by the courts."[96] A comparison of the facts and decisions in *Penn Central* and in *Florida Rock Industries, Inc. v. United States*,[97] a decision of the Court of Federal Claims, illustrates this point. In *Penn Central*, a regulation concerning historical landmarks prohibited the owners of Grand Central Terminal from constructing office buildings above the terminal.[98] The regulation's economic impact on the owners was significant because the future office space would have been in high demand.[99] Additionally, the owners' distinct investment-backed expectations were substantially frustrated because the regulation had not yet been promulgated when the owners purchased the property.[100]

The property owners in *Florida Rock* suffered a similar hardship as a result of a denial of a wetland permit needed to mine limestone from their property.[101] The economic impact was comparatively large, and because the Clean Water Act had not yet been enacted at the time of the owners' purchase, their distinct investment-backed expectations were similarly frustrated.[102] The outcomes, however, were vastly different; the Supreme Court rejected a regulatory takings

advancement test should not be taken as rejection of such considerations of means and ends in takings law").

94 *See* Penn Cent. Transp. Co. v. New York City, 438 U.S. 104, 124 (1978) (identifying "several factors that have particular significance" in the ad hoc inquiries conducted by the Court).

95 *See id.*

96 Echeverria, *supra* note 25, at 7.

97 Fla. Rock Indus., Inc. v. United States, 45 Fed. Cl. 21 (1999).

98 *See Penn Cent.*, 438 U.S. at 115–17.

99 *See id.* at 116.

100 *See id.* at 109, 113 (noting that the New York preservation law was adopted in 1965 and Penn Central opened in 1913).

101 *See Fla. Rock*, 45 Fed. Cl. at 25.

102 *See id.* at 29, 36–39.

claim in *Penn Central*[103] and the Court of Federal Claims embraced such a claim in *Florida Rock*.[104]

Because the two cases are so similar with respect to the economic-impact and investment-backed-expectations factors, the only explanation for the disparate outcomes must lie in the application of the character prong.[105] It is likely that many of the Justices understood the importance of a law preserving such a familiar landmark.[106] On the other hand, the judge in *Florida Rock* seemed unconcerned about wetland preservation.[107] Constitutionally protected property rights should not depend on a court's subjective view of the interests advanced by regulation.

A final consideration addressed here is simply that the Supreme Court has never used the *Penn Central* test to invalidate state or local legislation.[108] This could be evidence of the Court's uncertainty in the test's application or could indicate that the test does not provide substantial protection to landowners. The Court's failure to uphold regulatory takings claims under *Penn Central* is problematic for property owners and demonstrates the need for the Court to use a less vague and more determinate test.

B. *Option Number Two: Embrace Only* Lucas *and* Loretto

This Note has explained that the continued application of *Penn Central* is a poor option. One alternative approach is to abandon

---

103 *See Penn Cent.*, 428 U.S. at 138.

104 *See Fla. Rock*, 45 Fed. Cl. at 43.

105 It is worth noting that there may be a slight difference in the investment-backed expectations of the parties in *Penn Central* and *Florida Rock*. In *Penn Central*, "the New York City law [did] not interfere in any way with the present uses of the Terminal," *Penn Cent.*, 428 U.S. at 136, whereas in *Florida Rock*, the regulation prohibited the very purpose for which the plaintiffs had purchased the land—the extraction of subsurface limestone, *Fla. Rock*, 45 Fed. Cl. at 25.

106 After *Penn Central*, "one [was] left with the distinct impression that the Court was persuaded that historic landmark preservation represented a sound public policy and that this landmark in particular . . . was worthy of protection." Echeverria, *supra* note 25, at 8.

107 Chief Judge Smith admits that the results of the mining operation would technically be classified as pollution prohibited by the Clean Water Act, but nonetheless appears sympathetic to the takings claim solely based on the "character of the governmental action." *Fla. Rock*, 45 Fed. Cl. at 30, 41. He notes that the concern guiding the denial of the wetland permit is "almost exclusively the continued existence of the wetland, not the temporary and moderate pollution incident to the occurrence of actual mining." *Id.* at 30 (quoting Fla. Rock Indus., Inc. v. United States, 791 F.2d 893, 904 (Fed. Cir. 1986)). Echeverria believes that "[t]he Court of Federal Claims's conclusion that the wetlands were not worth saving seems as squarely based on personal opinion as the Supreme Court's conclusion that Grand Central Terminal was worth saving." Echeverria, *supra* note 25, at 8.

108 *See* Stewart E. Sterk, *The Federalist Dimension of Regulatory Takings Jurisprudence*, 114 YALE L.J. 203, 251–56 (2004).

Penn Central altogether and resort to the per se rules of *Lucas* and *Loretto*. If the Court had to "eat crow" in *Lingle* by admitting that it wrongly confused due process and takings law,[109] perhaps the Court should again be prepared to "eat crow" by admitting that the balancing test from *Penn Central* is fundamentally flawed. Considering that *Lingle* has severely weakened *Penn Central*, there would be no better time to abandon this test.[110]

John Echeverria explains that abandoning *Penn Central* exclusively in favor of applying the per se rules of *Lucas* and *Loretto* would leave regulatory takings doctrine "[e]xactly where it should be, with a set of relatively well defined rules for identifying regulations that are legitimate takings."[111] A move to these bright-line rules would have many beneficial effects. Perhaps most important, *Lucas* and *Loretto* offer far more predictability than the vague ad hoc balancing test that has evolved since *Penn Central*. Additionally, the use of predictable per se rules would necessarily leave less room for subjectivity, and, thus, the Court would not be in the position to act as a superlegislature.[112] Lastly, staying true to Justice O'Connor's opinion in *Lingle*, a taking under *Lucas* or *Loretto* would be "functionally equivalent to the classic taking in which government directly appropriates private property or ousts the owner from his domain."[113]

Of course, the adoption of a regulatory takings doctrine embracing only the per se rules of *Lucas* and *Loretto* would not be without its faults, because it would substantially underprotect property rights. Most regulations, even the most intrusive, do not rid the property of all economic value as required by *Lucas*[114] or cause a permanent physical occupation as required by *Loretto*.[115] Property owners would have nowhere to turn for the relief to which they should be constitutionally

---

109 Jacobs, *supra* note 61, at 486.

110 This is especially true if the *Penn Central* test is viewed as containing only two factors. *See supra* note 10 (explaining an interpretation of the *Penn Central* test as having only two factors). If *Lingle* erased the "character of the governmental action" factor, then the *Penn Central* test would only include one factor: the economic impact of the regulation in light of the claimant's distinct investment-backed expectations.

111 Echeverria, *supra* note 25, at 10.

112 *See id.* at 11. Echeverria argues that use of the per se rules of *Lucas* and *Loretto* "makes takings law far more predictable and less susceptible to variation based on the personal predilections of the particular judge hearing the case. Determining whether a regulation has eliminated all (or nearly all) economic value of a property presents a relatively simple and straightforward issue." *Id.*

113 Lingle v. Chevron U.S.A. Inc., 544 U.S. 528, 539 (2005).

114 *See* Lucas v. S.C. Coastal Council, 505 U.S. 1003, 1015 (1992).

115 *See* Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419, 426 (1982).

entitled. The Court should not have to sacrifice the rights of property owners in exchange for a regulatory takings analysis that is both easily applied and certain.

IV. Out with the Old, In with the New: Replacing Lucas

A. The Proposed Rule

A choice between applying the *Penn Central* balancing test and paring the takings test down to the per se rules of *Lucas* and *Loretto* is inherently unsatisfactory. If the Court embraces the *Penn Central* balancing test, property owners will receive more protection than they otherwise would under the sole application of *Lucas* and *Loretto*. However, the test is vague and invites subjective decisionmaking. If the Court applies only the per se rules of *Lucas* and *Loretto*, it will finally have an analysis that provides certainty. The rights of property owners, however, would be seriously diminished. Fortunately, the Court need not choose between the two approaches.

The Court should adopt a regulatory takings doctrine consisting solely of per se rules, but must replace *Lucas* with a new per se rule holding that a regulatory taking occurs if, due to the regulation, the property owner is unable to recoup his cost basis. Under this approach, the Court would get the best of both worlds by abandoning *Penn Central* in favor of per se rules that are also favorable to property owners. This would eliminate the vagueness of a balancing test while also providing property owners with ample opportunity to recover if a regulation severely infringes upon their property rights. Although the Court should continue applying *Loretto*, it is imperative that *Lucas* be replaced with a broader per se rule. Requiring that a regulation "den[y] all economically beneficial or productive use of the land"[116] before a taking occurs allows the government to regulate at will without having to worry about the effect regulations have on landowners because such a strict test would likely be impossible to satisfy.[117] The Court should move to guard property rights more robustly by replacing *Lucas* with the proposed per se rule, finding that a regulatory taking occurs if a regulation prevents the property owner from recovering his cost basis. The dispositive questions become whether

116 *Lucas*, 505 U.S. at 1015.

117 There are, to be sure, political repercussions for reprehensible conduct by elected representatives. However, regulations may have a beneficial effect on much of the population. The issue is not with the creation of such regulations, as they may very well be necessary, but instead with the need for those property owners adversely affected to be rightfully compensated as the Constitution requires.

the owner is capable of recovering his original investment and, if not, whether the regulation is the proximate cause of that inability.

Using a cost-basis recovery approach in regulatory takings inquiries is a practical option, as evidenced by its application by the Court of Federal Claims to determine the economic-impact, or diminution-of-value, factor of the *Penn Central* balancing test. Although the Supreme Court measures the economic-impact factor as the comparison of the fair market value of the property in the absence of the regulation and the fair market value of the property with the regulation,[118] the Court of Federal Claims has analyzed economic impact by comparing the value of the regulated property with the owner's original cost basis. For example, in *Walcek v. United States*,[119] a takings claim was rejected even though the Clean Water Act prohibited the development of wetland property because, despite the diminution in value, the owners still had the ability to realize a return of "$305,031 over their total cash outlays."[120]

This Note proposes that the Supreme Court replace *Lucas* with a per se rule that adopts the Court of Federal Claims' cost-basis analysis to determine regulatory takings claims. Under this approach, if the regulation proximately causes a reduction in property value so that the owner is unable to recover his cost basis, a Fifth Amendment taking has occurred and the property owner is entitled to just compensation.

B. *Measuring Just Compensation*

Using this proposed rule, just compensation would be measured as the difference between the property owner's original investment and the value of the property after the regulation's enactment. For instance, John purchased the trailer park for $400,000. Assume that five years pass and the property's value appreciates to $475,000. The regulation banning trailer homes is then enacted and causes the prop-

---

118 *See* Gerald A. Fisher, *The Comprehensive Plan Is an Indispensable Compass for Navigating Mixed-Use Zoning Decisions Through the Precepts of the Due Process, Takings, and Equal Protection Clauses*, 40 Urb. Law. 831, 877 (2008) ("The comparison is expressed as a fraction, with the regulated value representing the numerator and the unregulated value representing the denominator. The fraction formed in this manner demonstrates the portion of the property's value remaining following application of the regulation.").

119 Walcek v. United States, 49 Fed. Cl. 248 (2001).

120 *See id.* at 267 (implementing the cost-basis approach to determining a regulation's economic impact). The Court explained that it would be inappropriate to consider inflation because there is "no assurance that any investment, let alone an investment in property, will increase in value in lock-step with inflation." *Id.* at 266.

erty value to tumble to $100,000. Using the proposed per se rule, a Fifth Amendment taking has occurred because the regulation caused the property value to drop so low that John is unable to recoup his initial $400,000 investment. Therefore, John would be entitled to just compensation in the amount of $300,000, which is the difference between the original investment of $400,000 and the post-regulation property value of $100,000.

C. The Need for Proximate Cause

The proposed rule requires that the regulation proximately cause the property owner's inability to recover his cost basis. Additionally, the affected property owner is entitled to just compensation only to the extent that the regulation proximately causes the decrease in property value. Suppose the trailer park John bought fell from his initial investment of $400,000 to $375,000 as the result of an economic recession, as opposed to the impact of a regulation. Although John is unable to recoup his original cost basis, his lack of recovery is not proximately caused by a regulation; thus, a Fifth Amendment taking has not occurred.

However, assume that, subsequent to the recession, the zoning ordinance banning trailer homes is enacted and causes the property's value to further plunge to $100,000. John is still unable to recover his cost basis, but this time the regulation has proximately caused a portion of the property value's reduction. Therefore, a Fifth Amendment taking has occurred. Although John is unable to recover $300,000 of his original investment, only $275,000 of that loss is proximately caused by a regulation, which means that John is entitled to $275,000 in just compensation.

D. The Owner's Cost Basis Is Protected Only to the Extent that the Investment Did Not Exceed the Fair Market Value

As mentioned in the Introduction, a property owner's cost basis is only protected to the extent that it does not exceed the property's fair market value at the time of purchase. This is merely an extension of the proximate cause requirement discussed in the preceding Section. If a property was purchased for an amount in excess of the fair market value at the time of purchase, a regulation cannot be proximately responsible for the gap between the property's subsequent value and the inflated purchase price. This protects the proposed per se rule from abuse.

For instance, assume that John and Jen are friends and that John agrees to purchase the trailer park for $800,000, even though the fair market value is only $400,000. Subsequent regulation forces the fair market value down to $100,000. John believes he has a Fifth Amendment takings claim that will allow him to recover the $700,000 of his investment that he lost. If John did, he would recover the $400,000 he overpaid for the property and Jen would escape with a $400,000 windfall.

Unfortunately for those undertaking such transactions, the inability to recoup one's cost basis is not proximately caused by the regulation. Of the $700,000 that John is unable to recover, the zoning ordinance only proximately caused a loss of $300,000. John's payment in excess of market value caused the additional loss of $400,000.

One of the most attractive aspects of the proposed rule is that it is clear and predictable. The proximate cause requirement, and the fact that the property's cost basis is only protected to the extent that it does not exceed fair market value at the time of the investment, do add an additional layer of analysis to the proposed rule. Still, when compared to the vagueness and complexity of the current takings doctrine, this small and necessary modification to the proposed per se rule is worthwhile.

V. Why Just Compensation Is Provided: The Policy Behind the Takings Clause

When evaluating a proposed method of analysis for regulatory takings, it is essential to understand *why* just compensation is provided. It may seem that compensation is awarded to offset losses incurred by property owners. However, when property owners suffer losses due to natural disasters, they are often forced to rely on compensation provided by private insurance companies, as opposed to the government.[121] Additionally, the government imposes a progressive income tax, and it is never thought that its effects on property values require that compensation be given.

---

121 This is not to say that the government never provides compensation to property owners affected by natural disasters. Government-provided compensation is one way to alleviate the burdens suffered by victims of natural disasters, along with private insurance and litigation against responsible parties. *See* Daniel A. Farber, *Basic Compensation for Victims of Climate Change*, 155 U. PA. L. REV. 1605, 1629 (2007) ("Compensation might be obtained from the government through various routes: tort claims against federal or state governments for negligence (subject to immunity defenses), claims under special compensation schemes established for particular disasters, and claims based on constitutional provisions requiring compensation for the taking (or, in some states, damaging) of property.").

What is so different about government takings that requires that just compensation be awarded? Unlike natural disasters, government takings are not random acts of nature. To the contrary, takings are a direct result of planned government action where government officials have specifically chosen property owners to shoulder a disproportionate burden. Also, unlike the federal income tax, takings are not always meant to promote equalization. Collective decisions regarding takings are not made "with any view to the preexisting incomes or accumulations of the persons incurring special losses and gains as a result."[122] It appears, then, that compensation is provided because fairness requires that property owners be compensated for these special types of losses that result from planned government action and that are not distributed according to individuals' economic positions.

A. *The Two Variables: Fairness and Efficiency*

The Court has explained that "[t]he Fifth Amendment's guarantee that private property shall not be taken for a public use without just compensation was designed to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole."[123] This explanation of the Fifth Amendment certainly articulates the fairness policy that is necessary to any analysis of regulatory takings. However, fairness is not the only consideration.

If, out of considerations of fairness, all property owners suffering any loss due to government regulation were entitled to just compensation, the government would be unable to regulate without incurring substantial costs. Therefore, a second consideration is necessary to account for the necessity of certain government regulations. This factor is efficiency.

Any regulatory takings analysis must account for both the fairness and efficiency variables. The need for property owners to be paid the compensation that fairness and justice require must be balanced against the necessity of efficient government regulation. Leading legal scholars on regulatory takings, however, disagree as to how these two variables should be balanced. Several of their theories are laid out below, and the proposed per se cost-basis approach is analyzed against these theoretical approaches to determine whether it accounts for the underlying rationale of the Takings Clause.

---

[122] Frank I. Michelman, *Property, Utility, and Fairness: Comments on the Ethical Foundations of "Just Compensation" Law*, 80 HARV. L. REV. 1165, 1183 (1967).

[123] Armstrong v. United States, 364 U.S. 40, 49 (1960).

B. *Frank Michelman's Analysis of Property, Utility, and Fairness*

Frank Michelman, in what is arguably the single most significant article on the subject, adopts a utilitarian approach to regulatory takings.[124] He explains that redistributions of property due to collective action occur because they have been deemed efficient, or when "it has been determined that a change in the use of certain resources will increase the net payoff of goods . . . to society 'as a whole.'"[125] However, according to Michelman, these redistributions are likely to be especially demoralizing to property owners.[126] Relying on the philosophy of Jeremy Bentham, Michelman explains that a "high level of productivity depends on arrangements which assure to every person who invests or labors that he will share in the fruits of his investment or labor to a predictable extent."[127]

Michelman explains that the government must incur either demoralization or settlement costs, whichever is less, each time it redistributes property.[128] Demoralization costs are defined as

> the total of (1) the dollar [value] necessary to offset disutilities which accrue to losers and their sympathizers specifically from the realization that no compensation is offered, and (2) the present capitalized dollar value of lost future production (reflecting either impaired incentives or social unrest) caused by demoralization of uncompensated losers, their sympathizers, and other observers disturbed by the thought that they themselves may be subjected to similar treatment on some other occasion.[129]

Settlement costs, then, are "the dollar value of the time, effort, and resources which would be required in order to reach compensation settlements adequate to avoid demoralization costs."[130] He further explains that certain rules of decision regarding regulatory takings may be understood by examining them through his theory.[131] For instance, Michelman states that permanent physical occupations, which are per se takings under *Loretto*, are uniquely demoralizing and

124 *See* Michelman, *supra* note 122, at 1214.

125 *Id.* at 1173.

126 *See id.* at 1210–11.

127 *Id.* at 1211.

128 *See id.* at 1215 ("When pursuit of efficiency gains entails capricious redistribution, either demoralization costs or settlement costs must be incurred.").

129 *Id.* at 1214.

130 *Id.*

131 *See id.* at 1224–45.

require limited settlement costs due to the fact that they are easily identifiable.[132]

The per se cost-basis approach also satisfies Michelman's criterion. Property is best viewed as an investment made by the purchaser. Thus, a property owner is especially demoralized when he is unable to recover his initial investment. Further, the proposed rule keeps settlement costs at a minimum. The cost-basis approach does not measure compensation as the total diminution in value caused by the regulation. Instead, the cost-basis approach provides compensation in the amount that the regulation has decreased the property's value below the initial investment. Because demoralization costs are substantial and settlement costs are kept low, Michelman's theory would support providing just compensation to those property owners who suffer a taking under the proposed rule.

C. *The Deterrence Rationale for Just Compensation*

Just compensation can also be viewed using a deterrence rationale: it is necessary to discourage the government from engaging in inefficient takings. As Michael Heller and James Krier explain, "[i]f the government were free to take resources without paying for them, it would not feel incentives, created by the price system, to use those resources efficiently. A likely consequence would be the movement of some resources from higher to lower valued uses."[133]

---

132 *See id.* at 1226–29.

133 Michael A. Heller & James E. Krier, *Deterrence and Distribution in the Law of Takings*, 112 HARV. L. REV. 997, 999 (1999). Heller and Krier provide a new approach to regulatory takings analysis that need not be discussed in depth for the purposes of this Note. In summary, they abandon the traditional no taking/no compensation and taking/compensation dichotomy. *See id.* at 997. Instead, they add in two other options: taking/no compensation and no taking/compensation. *See id.* Taking/no compensation occurs when, to deter inefficient government action, compensation is required, but fairness does not require that specific compensation be given to property owners. *See id.* at 1000. Instead, the government provides compensation to a special fund. *See id.* No taking/compensation occurs when government action is not inefficient, but fairness requires specific compensation be made to the affected property owners. *See id.* at 1001. Because efficient government action must not be deterred, the government will not be required to pay any compensation. Instead, due to fairness concerns, compensation will be paid to the property owners out of the special fund. *See id.* at 1002.

There are three main issues with Heller and Krier's proposed method of analysis. First, as discussed above, a means-ends inquiry is necessarily distinct from a takings inquiry. When courts are asked to determine whether an action is efficient, they must engage in a means-ends analysis. This would be fine if it were a due process inquiry, but analyzing whether a regulation causes a Fifth Amendment taking, especially after *Lingle*, does not entail a means-ends analysis. *See* Lingle v. Chevron U.S.A. Inc., 544 U.S. 528, 542 (2005). Second, Heller and Krier assume that judges would be able to determine whether a regulation is efficient. This vague conception of efficiency would, much like the *Penn Central* balancing test, allow for subjective judgments.

Although inefficient government action is undesirable, the just compensation requirement should not deter efficient government action. If compensation requirements are too demanding, the government may be deterred from enacting efficient government regulation.[134]

The cost-basis approach provides for the optimum level of deterrence. The rule only allows for a limited amount of just compensation (up to the amount invested, assuming that the investment did not exceed the fair market value at the time of purchase). Some property owners, disappointed by their compensation, will undoubtedly call the proposed rule unfair. However, property owners will have wide access to compensation, albeit in a limited amount, without deterring efficient government action.

D. The Extremists

There are also legal scholars who take extreme positions and fully embrace one variable while neglecting the other.

Richard Epstein's anti-rent seeking theory,[135] for instance, focuses on the fairness variable at the expense of the efficiency variable. Epstein contends that different groups with varying degrees of influence attempt to use the government's power to enrich themselves at the expense of others.[136] Therefore, Epstein proposes that just compensation should be provided not only when property values decline due to regulation, but also when changes in rules of taxation or government liability negatively affect property values.[137]

Epstein's theory provides for a Takings Clause that is unsustainable because it wholly ignores the efficiency variable. Under Ep-

---

The efficiency of a regulation is for the legislature to determine, and if judges were able to deem certain regulations inefficient, the courts would be acting as superlegislatures. Last, the proposed method assumes that compensation for those regulations that cause a taking but are nonetheless efficient will come out of the special fund. The special fund will supposedly accumulate its wealth when a taking occurs due to inefficient government action, but when fairness does not require specific compensation to the property owners. Heller & Krier, *supra*, at 1002. The main flaw with this notion is that the proposed method is meant to deter inefficient government action. If it worked as planned, inefficient government action would be brought to a minimum and, thus, the fund would become depleted.

134 *See* Louis Kaplow, *An Economic Analysis of Legal Transactions*, 99 HARV. L. REV. 509, 531 (1986) (arguing that it is more efficient for market actors to take into account the possibility of a government action prior to a transaction and build that cost into the analysis than for the government to "insulat[e]" investors from this risk).

135 *See* RICHARD A. EPSTEIN, TAKINGS: PRIVATE PROPERTY AND THE POWER OF EMINENT DOMAIN 308 (1985).

136 *See id.*

137 *See id.* at 94–95.

stein's approach, the government would be prevented from enacting necessary and efficient regulation because it would essentially be forced to provide significant compensation whenever it acted. Progressive taxation would cease to exist. Joseph Sax, in his review of Epstein's book, asks: "Just how far is Epstein willing to go in ignoring practical consequences?"[138] The answer is that, apparently, he is willing to go *very* far.[139]

Environmentalists such as John Echeverria, on the other hand, focus on the efficiency variable at the expense of the fairness variable. As discussed above, Echeverria argues for a takings analysis that encompasses only the per se rules of *Lucas* and *Loretto*.[140] Under Echeverria's proposed test, it would be extremely rare for a government regulation to require just compensation. The government may establish efficient regulations without worrying about just compensation requirements. Unfortunately, however, property owners who are subject to such regulations would be forced to shoulder a significant and disproportionate burden because no compensation would be available to offset the costs they incur.

The rule proposed in this Note attempts to find a middle ground between the two extremist positions. It is admittedly closer to Epstein's approach, because it focuses on providing property owners with increased access to compensation that fairness requires. But it is unwilling to embrace Epstein's truly unique and cost-prohibitive conception of regulatory takings. Under the proposed rule, for instance, taxation is not a taking. Additionally, there will be many instances where property values decline as a result of government efforts to redistribute wealth, but where a taking does not occur because the property owner can recoup his investment. The proposal here, unlike Epstein's, is practical and may be implemented without destabilizing the economy or bringing government to an abrupt halt.

VI. Why a Per Se Rule Based on Cost-Basis Economic Analysis Works: Responding to the Criticism

Many would object to the Court abandoning the *Penn Central* balancing test in favor of the per se cost-basis rule proposed in this Note. The potential criticisms are addressed in this Part.

---

138 Joseph L. Sax, *Takings*, 53 U. CHI. L. REV. 279, 282 (1986) (reviewing RICHARD A. EPSTEIN, TAKINGS: PRIVATE PROPERTY AND THE POWER OF EMINENT DOMAIN (1985)).

139 *See id.* (noting that Epstein would allow for transfer payments in a flood-torn town in need of food, but not for food stamps generally).

140 *See* Echeverria, *supra* note 25, at 10.

A. *This Proposal Is Unfair Because It Adversely Affects Longtime Property Owners*

The longer an owner has held a property, given the likely appreciation, the more difficult it becomes for that owner to prove that he is unable to recover his cost basis. Assuming that, after fifty years of possession, the property John purchased for $400,000 appreciates to $2 million, John would need to prove that a regulation proximately caused a $1.6 million reduction in property value before a Fifth Amendment taking occurs.

Although this may seem difficult, this is actually less harsh than current takings law. Takings jurisprudence has always set an exceptionally high bar for recovery. In fact, the Court has specifically held that takings recovery based on land use regulation is limited to "extreme circumstances."[141]

This is especially evident upon examining the Court's historical analysis of regulatory takings claims. In the past, the Court has declined to mandate compensation for regulatory takings claims even when faced with regulations that caused losses in value close to eighty-five percent.[142] Although longtime owners will have more difficulty recovering than recent purchasers under this proposed rule, longtime owners also have been unable to recover under past regulatory takings doctrine. The important aspect of a per se rule based on a cost-basis economic analysis is that, when a regulation is the proximate cause of an injury to property interests, every property owner is guaranteed to recover his initial investment.[143]

To ensure that the proposed per se rule is as equitable as possible, however, it should include an exception for those property owners who inherited the land. When a property is devised, the owner inheriting the property is, therefore, considered the new "purchaser." The per se cost-basis rule, with this qualification, treats the devisee as purchasing the inherited property for its fair market value at the time of inheritance. Although the general rule is that only the original economic investment is protected, this exception ensures that property passed on through generations receives sufficient protection from costly government regulation.[144]

---

141 United States v. Riverside Bayview Homes, Inc., 474 U.S. 121, 126 (1985).

142 *See* Walcek v. United States, 49 Fed. Cl. 248, 271 (2001) (listing Supreme Court cases where no takings were found despite large loss in value of property).

143 Of course, the property owner's initial investment is only protected to the extent that it did not exceed the property's fair market value at the time of purchase. *See supra* Part IV.D.

144 This would not be the first time that the Court has protected properties acquired

To illustrate the necessity of this exception, assume that John's grandfather originally purchased the property in 1900 for $500. John's father then inherited the property, and John eventually inherited the property in 2008. The property's fair market value at that time was $400,000, but the subsequent regulation banning trailer parks proximately caused the property value to fall to $100,000. With the exception, John is viewed as having purchased the property for $400,000 and, thus, is entitled to $300,000 in just compensation. Without the exception, however, a taking has not occurred, because the original investment is $500 and a regulation would have had to cause a $399,500 (or 99.875%) reduction in value to result in a taking.

There will undoubtedly be scenarios under this proposed doctrine where longtime property owners face a disproportionate burden when it comes to proving regulatory takings. Some may insist that providing preferential treatment to those who inherit property is unfair. It must be understood, however, that a stepped-up basis for those who inherit property is not a novel concept. In fact, section 1014 of the Internal Revenue Code provides that the basis of property acquired from a decedent shall be "the fair market value of the property at the date of the decedent's death."[145] The inheritance exception to the proposed per se rule does no more than provide the same treatment for inherited property as the Internal Revenue Code does.

Additionally, the burden is no more substantial than that to which longtime property owners are currently subjected. If anything, the inheritance exception in this proposed rule provides a better opportunity for longtime property owners to recover than current takings doctrine does. Therefore, although the argument that the proposed rule, based on a cost-basis economic rationale, places an unfair burden on longtime property owners is superficially appealing, it ultimately fails to consider the unduly burdensome law currently gov-

through inheritance from overly burdensome government regulation. When contemplating the *Penn Central* factor of distinct investment-backed expectations, given in-depth discussion below, the Court has recognized that property owners through inheritance necessarily have no such reasonable expectations. Echeverria notes that "[a]cquisitions 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." Echeverria, *supra* note 34, at 185. Nonetheless, Echeverria observes that the Court has been "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." *Id.* at 185–86 (citing Palazzolo v. Rhode Island, 533 U.S. 606, 627 (2001) (holding that "[f]uture generations, too, have a right to challenge unreasonable limitations on the use and value of land")).

145 26 U.S.C. § 1014(a)(1) (2006).

erning takings doctrine and the benefits that an inheritance exception to the proposed doctrine will provide.

B. What About the Distinct Investment-Backed-Expectations Factor?

Along with economic impact and character, the Court also enumerated a third factor, distinct investment-backed expectations, in *Penn Central*. Critics would be correct to point out that the distinct investment-backed expectations factor deserves a home in regulatory takings jurisprudence. What that criticism fails to recognize is that the per se rule based on cost-basis economic rationale accounts for such expectations. Therefore, this distinct investment-backed expectations factor has a home in the proposed regulatory takings doctrine.

When analyzing distinct investment-backed expectations, courts determine whether the purchaser of the property had notice of a regulatory constraint already in place.[146] Courts viewed notice, prior to *Palazzolo v. Rhode Island*, as either barring or, at the very least, weighing heavily against takings claims.[147] Although Justice Kennedy's opinion in *Palazzolo* rejected the notion that notice should be determinative,[148] it is Justice O'Connor's concurring opinion that has gained adherence. Justice O'Connor wrote that, although notice of a regulatory constraint should not be dispositive, such notice must be weighed along with the other *Penn Central* factors (i.e., economic impact and character).[149] Justice O'Connor explained the importance of this factor by stating that, if notice of a regulatory constraint is not considered, "some property owners may reap windfalls and an important indicium of fairness is lost."[150]

As mentioned, under a *Penn Central* analysis, the economic impact of a regulation is measured by a comparison of the fair market value of the property in the absence of the regulation and the fair market value of the property with the regulation.[151] Under such a system, if it were not for the consideration of distinct investment-backed expectations, an owner would have an incentive to purchase a heavily regulated property at a low price and then bring a Fifth Amendment takings suit to recover just compensation.

---

146 *See* Palazzolo v. Rhode Island, 533 U.S. 606, 626 (2001).

147 *See, e.g.*, Loveladies Harbor, Inc. v. United States, 28 F.3d 1171, 1177 (Fed. Cir. 1994).

148 *See Palazzolo*, 533 U.S. at 630.

149 *See id.* at 632–36 (O'Connor, J., concurring).

150 *Id.* at 635.

151 *See supra* note 118 and accompanying text.

This essential factor has an implicit home in a per se rule based on cost-basis economic theory. An owner's distinct investment-backed expectation is accounted for in the property's purchase price. An owner would not invest heavily in property when he has low expectations for its future value. For example, assume Jen owned the trailer park prior to John and that she had already been notified of the town's new regulation prohibiting trailer homes. Because of this regulatory constraint, Jen sought to sell the property for $100,000, even though the property would have been worth $400,000 absent the regulation. John then purchased the property from Jen at this discounted price and immediately brought suit, claiming a Fifth Amendment taking.

Using a *Penn Central* approach, without the distinct investment-backed expectations factor, it would appear as though the regulation had a severe impact on the land, as the court would measure the impact as the difference between the value of the property without the regulatory constraint ($400,000) and the value of the property with the regulatory constraint ($100,000). The regulation would thus be viewed as causing a $300,000 diminution in property value, which may provide evidence of a taking.

This situation would not occur if the proposed regulatory takings doctrine were adopted, even though distinct investment-backed expectations are not explicitly considered as a separate factor in the analysis. Under a cost-basis approach, the owner would have little incentive to purchase a property that is already subjected to a severe, property-value-reducing regulatory constraint. Under the proposed per se rule, a taking would occur only if the regulation made it impossible for John to recover his initial investment. Here, John's investment of $100,000 accounts for the regulatory constraint and, therefore, no regulatory taking has occurred.

If a purchaser fails to act rationally and invests substantially in property for which he has low expectations, that investment is only protected to the extent that it does not exceed the property's fair market value at the time of purchase.[152] Thus, if an owner's distinct investment-backed expectations are not gauged by the purchase price, they will be accounted for in the property's fair market value. For instance, if John purchased the trailer park from Jen for $400,000, despite knowledge that the regulatory constraint had decreased the property's value to $100,000, he may allege that the regulatory con-

152 *See supra* Part IV.D.

straint proximately caused him to lose $300,000 of his cost basis. John, however, would be incorrect. His inability to recoup his initial investment is not proximately caused by the regulation, but is instead proximately caused by the fact that he paid in excess of fair market value. If subsequent regulation were to further decrease the property's value to $75,000, John may recover $25,000, but not $325,000.

C. *Should a Regulatory Takings Analysis Consider Reciprocity of Advantage?*

Critics will also point out that the regulatory takings test proposed here, based on the per se rule compensating an owner for government-caused inability to recoup his cost basis, does not acknowledge reciprocity of advantage. Reciprocity of advantage encompasses the concept that, if a regulation confers benefits on a regulated landowner, the negative effect the regulation imposes on that landowner is significantly diminished.[153] Proponents of this concept argue that although a regulation may harm a property owner by limiting the use of their property, the regulation may concurrently benefit the owner.[154]

Whether a property owner is reciprocally benefited, however, is included in the proposed per se rule. Any reciprocal benefit is manifested in the property's fair market value. The decreased value of the property, proximately caused by a regulation, will be less extreme if a reciprocal benefit exists. The more valuable the reciprocal benefit, the less the regulation will reduce the property's value. And with a less dramatic reduction in property value, it becomes more difficult to prove that a property owner is unable to recoup his cost basis. Even if the owner is in fact unable to recover his initial investment, the award of compensation will be less if he is reciprocally benefited.

For example, the regulation prohibiting trailer homes proximately caused the property value of John's park to decrease from $400,000 to $100,000. Thus, according to the proposed per se rule, John would be awarded $300,000 in compensation. Nonetheless, it is possible that John reciprocally benefited from the regulation. More people may want to move to the town now that the regulation is enacted because families believe that the community is more attractive.

---

153 *See* Pa. Coal Co. v. Mahon, 260 U.S. 393, 415 (1922) (recognizing that reciprocity of advantage may justify a regulation).

154 *See* Echeverria, *supra* note 34, at 192 (contending that, "[b]ecause 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").

In turn, John's property may be sold for residential property to accommodate for the influx of town residents. However, the $100,000 valuation of John's property accounts for such a reciprocal benefit. Without it, the property value of John's park may have plunged even lower.

D. *Practicality Concerns: Does Application of the Proposed Doctrine Require Expertise?*

As has been explained, a major advantage of the proposed takings doctrine is that it is clearer and more objective than the doctrine currently applied. The current doctrine places much emphasis on a vague ad hoc balancing test, making the outcome difficult to predict. Theoretically, at least, the proposed doctrine is easier to apply. The proposed method of analysis holds that there is a taking whenever a regulation proximately causes property value to drop below the reasonable investment made (i.e., the cost basis, as long as it does not exceed fair market value). Critics may question, however, whether this doctrine, as theoretically appealing as it may be, is practical.

A property owner's investment is only protected to the extent that the investment is reasonable (i.e., up to the fair market value at the time of purchase). Additionally, the doctrine requires that a property's loss in value be proximately caused by government regulation. Certain aspects of the proposed rule will entail some complexity. However, the proposed doctrine surely allows for more objective decisionmaking and is more certain than the doctrine currently applied. The proposed test, though, with its challenging economic concepts, may require an increased level of expertise.

An expert may be ideal for ascertaining the fair market value of a property, as well as whether a regulation—as opposed to economic conditions—proximately causes a reduction in property value. This expertise may be found in specialized federal and state takings courts.

John Martinez explains that there are already "specialized courts for many particular areas of law, including family law, small claims, and landlord-tenant disputes. Specialized federal and state takings courts would be consistent with that tradition of establishing special tribunals for specialized areas of law."[155] Martinez, however, believes that such specialized courts are the answer to the takings doctrine's current state of disarray. He begins with "the assumption that takings

---

155 *See* John Martinez, *A Proposal for Establishing Specialized Federal and State "Takings Courts,"* 61 ME. L. REV. 467, 473 (2009).

law is incoherent, complex, and intractable" and, therefore, draws the conclusion that expertise is necessary.[156] The problem with Martinez's argument is that no level of judicial expertise can cure the current takings doctrine. Expertise may be desirable, but in order to appreciate the benefits of having an expert adjudicate takings claims, there first must be a coherent doctrine for that expert to apply. This Note accordingly proposes a new, more coherent takings doctrine, while acknowledging that its application may require expertise.

E. Is a Heightened Standard of Review Necessary to Protect Property Owners?

Another concern with the proposed regulatory takings doctrine may be that a heightened means-ends review is necessary to account for the insufficient protection provided by substantive due process and the public use requirement. Although *Lingle* rejected the view that the "substantially advances" test can be dispositive of the takings question, there are those who believe that it nonetheless deserves consideration in a *Penn Central* balancing test.[157] It is certainly arguable that substantive due process and the public use requirement do not offer property owners adequate protection because the tests are so easily satisfied. Therefore, the logical place for such protection would be takings jurisprudence, and the incorporation of a nondeterminative "substantially advances" test into the regulatory takings analysis would provide for this heightened means-ends analysis.[158] Under the proposed rule, however, a regulation that fails to prevent an owner from recovering his initial investment would not be held to be a compensable taking, even if the regulation fails to substantially advance a legitimate state interest.

Justice O'Connor, writing for the Court in *Lingle*, rightfully acknowledged that a means-ends analysis was reserved for due process claims, but her opinion does not acknowledge how substantive due process protection from zoning laws has essentially become obso-

---

156 *Id.*

157 *See* sources cited *supra* note 82.

158 The Court has noted that there is a difference between rational basis review and the requirement that a regulation "substantially advance" a legitimate state interest. Nollan v. Cal. Coastal Comm'n, 483 U.S. 825, 834 n.3 (1987) (stating that, in takings cases, the Court has "required that the regulation 'substantially advance' the 'legitimate state interest' sought to be achieved . . . not that 'the State "*could rationally have decided*" that the measure adopted might achieve the State's objective'" (citations omitted)).

lete.[159] Recovery under the theory that a regulation has violated one's right to due process has always been difficult. The Court held in *Village of Euclid v. Ambler Realty Co.*[160] that, in applying rational basis review, a regulation would only be found unconstitutional if it is "clearly arbitrary and unreasonable, having no substantial relation to the public health, safety, morals, or general welfare."[161]

In recent times, however, success on substantive due process claims has become virtually impossible because the Court has accorded substantial deference to the political branches when it comes to evaluating economic legislation, including zoning regulations.[162] There exists "a broad consensus across a wide ideological spectrum that federal courts should not employ the Due Process Clause to evaluate the wisdom of economic regulation. This has eliminated the doctrinal foundation for due process review of zoning in federal courts."[163] Instead of requiring that the regulation be "clearly arbitrary and unreasonable,"[164] the courts are adopting even more lenient standards, such as "grave unfairness,"[165] "shock the conscience,"[166] or "truly irrational."[167] In fact, due process land use challenges are the least likely to succeed.[168]

It is uncontested that applying a heightened means-ends analysis in regulatory takings would produce some benefits, such as exposing the government's potential ulterior motives for enacting regulation.[169] R.S. Radford contends that "arguments against the substantial advancement test, heightened scrutiny of takings claims, and the regulatory takings doctrine itself all share a common origin: an anachronistic yearning for expansive governmental authority over individuals and their property, untrammeled by meaningful constitutional re-

---

159 *See* Lingle v. Chevron U.S.A. Inc., 544 U.S. 528, 542 (2005) (noting that the "substantially advances" test has "some logic in the context of a due process challenge").

160 Vill. of Euclid v. Ambler Realty Co., 272 U.S. 365 (1926).

161 *Id.* at 395.

162 *See* J. Peter Byrne, *Due Process Land Use Claims After* Lingle, 34 Ecology L.Q. 471, 474–75 (2007).

163 *See id.*

164 *Vill. of Euclid*, 272 U.S. at 395.

165 George Washington Univ. v. District of Columbia, 318 F.3d 203, 209 (D.C. Cir. 2003).

166 United Artists Theatre Circuit, Inc. v. Twp. of Warrington, 316 F.3d 392, 394 (3d Cir. 2003).

167 Chesterfield Dev. Corp. v. City of Chesterfield, 963 F.2d 1102, 1104–05 (8th Cir. 1992).

168 *See* Byrne, *supra* note 162, at 478.

169 *Cf.* Dews v. Town of Sunnyvale, 109 F. Supp. 2d 526, 571 (N.D. Tex. 2000) (finding a town's building restrictions racially motivated by applying the test for discriminatory intent under the Equal Protection Clause).

straints."[170] However, Radford's far-reaching assertion is unsupported. Those who argue that the "substantially advances" test has no place in takings jurisprudence, whether as a stand-alone determinative test or as factor in a balancing test, are not harboring an "anachronistic yearning for expansive governmental authority," but instead are objectively interpreting the law:

> 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*.[171]

The use of a deferential standard of review for due process claims may very well provide insufficient protection for property owners, but it is not a justification for applying a heightened level of means-ends analysis in regulatory takings jurisprudence. Regardless of the potential benefits, a regulatory takings analysis that focuses on whether regulations are functionally equivalent to the government's direct appropriation of land is not the place to redress the alleged deficiencies of rational basis due process review. Means-ends analysis should remain distinct from a regulatory takings claim.[172]

Instead, the problems associated with such a lenient due process standard should be regarded, if anything, as evidence that the Court should abandon the extremely deferential rational basis standard currently applied in zoning-regulation due process challenges. Justice Kennedy's concurrence in *Lingle* appears to leave open the possibility of the Court applying an intermediate standard of review in future due process challenges. In *Lingle*, Kennedy cross-references his concurring opinion in *Eastern Enterprises v. Apfel*,[173] where he applied a more searching form of rational basis review.[174] Justice Kennedy's

---

170 Radford, *supra* note 57, at 401.

171 Echeverria, *supra* note 34, at 199.

172 "*Lingle* emphatically rejected any heightened scrutiny for property regulation warning that it would lead to evaluation of a 'vast array' of statutes and ordinances and force courts to 'substitute their predictive judgments for those of elected legislatures and expert agencies.'" Byrne, *supra* note 162, at 480 (quoting Lingle v. Chevron U.S.A. Inc., 544 U.S. 528, 544 (2005)).

173 E. Enters. v. Apfel, 524 U.S. 498, 539 (1998) (Kennedy, J., concurring in the judgment and dissenting in part).

174 *See* Lingle v. Chevron U.S.A. Inc., 544 U.S. 528, 548–49 (2005) (Kennedy, J., dissenting) (citing *E. Enters.*, 524 U.S. at 539 (Kennedy, J., concurring in the judgment and dissenting in part)). In *Eastern Enterprises*, Justice Kennedy, speaking for himself, found it was one of the "rare instances" where a statute did not meet the "permissive standard[s]" of due process. *E.*

opinion, and especially his reference to *Eastern Enterprises*, gives hope to property owners that they may one day receive the increased protection that a heightened means-ends standard of review provides. But Justice Kennedy is correct in viewing the home for this means-ends review as being in due process, as opposed to regulatory takings, jurisprudence.

Conclusion

For too long, property owners like John have received insufficient protection from regulatory takings. They have been forced to resort to overly complex and nontransparent tests for determining whether they are entitled to just compensation, which has has allowed the state, local, and federal governments to regulate in an overbroad fashion.

The per se rule based on whether the owner is unable to recover his original cost basis because of the government's action, combined with *Loretto*, provide property owners with a clear and objective doctrine, while also assuring that they receive ample protection from overreaching government regulation. The time is ideal for the Supreme Court to shift its approach to regulatory takings analysis. *Lingle*'s potential undermining of the character prong of the *Penn Central* balancing test may impel the Court to determine whether it should continue to apply this test. If property owners like John are to receive the protection to which they are constitutionally entitled, the Court should altogether abandon the *Penn Central* balancing test and embrace a new doctrine of regulatory takings jurisprudence.

Enters., 524 U.S. at 550 (Kennedy, J., concurring in the judgment and dissenting in part). Kennedy's citation appears "to imply the applicability of a more searching and less deferential rational basis review analogous to the more stringent economic substantive due process applied in *Eastern Enterprises* had Chevron not voluntarily dismissed its due process claim." *See* Jacobs, *supra* note 61, at 479.