Washington Law Review

Volume 70 | Number 1

1-1-1995

Cornering the Quark: Investment-Backed Expectations and Economically Viable Uses in Takings Analysis

Lynda J. Oswald

CORNERING THE QUARK: INVESTMENT-BACKED EXPECTATIONS AND ECONOMICALLY VIABLE USES IN TAKINGS ANALYSIS

Lynda J. Oswald*

Abstract: Although stressing the "ad hoc, factual" nature of regulatory takings analysis, the United States Supreme Court has, over time, elevated the prominence of two economic tests in its analysis. In this Article, the author criticizes the importance placed on the tests and argues that the validity of a regulation must be determined based on the legitimacy of the governmental objective and the relationship between that objective and the challenged regulation, and not on the economic impact of the regulation on the property owner. The author rejects the notion that exercises of the eminent domain power and valid exercises of the police power anchor separate ends of a single continuum. Rather, the author asserts that a valid exercise of the police power may deprive a property owner of all economic use of his or her property, and an exercise of the eminent domain power requiring compensation may leave a property owner with significant enjoyment of the rights of an owner. Accordingly, the Article urges a resurrection of police power theories in regulatory takings analysis and a refocusing on the nature of the governmental power being exercised (police or eminent domain) and the validity of that exercise.

Regulatory takings are proving to be one of the enduring legal dilemmas of the twentieth century. The question is a simple one: at what point does a regulation so infringe upon a property interest that compensation is required by the Fifth or Fourteenth Amendments?[1] Despite the extensive attention afforded it by scholars and courts, the question remains impervious to pat answers or easy analysis. In the wry words of Professor Charles Haar, the search for a definitive test for regulatory takings is the "lawyer's equivalent of the physicist's hunt for the quark."[2] Unfortunately, while physicists have made much progress in recent years in cornering their elusive prey,[3] a definitive, workable test for regulatory takings[4] has evaded capture.

---

*Assistant Professor of Business Law, University of Michigan School of Business Administration. J.D., M.B.A., A.B., University of Michigan. I gratefully acknowledge the research support of the University of Michigan School of Business Administration.

1. U.S. Const. amends. V & XIV, § 1. The Fifth Amendment provides "nor shall private property be taken for public use without just compensation." The U.S. Supreme Court has determined that this protection is made applicable to the states through the Due Process clause of the Fourteenth Amendment. Chicago, B. & Q. R.R. v. City of Chicago, 166 U.S. 226, 235–41 (1897).

2. Charles Haar, *Land-Use Planning* 766 (3d ed. 1976), *quoted in* Williamson County Regional Planning Comm'n v. Hamilton Bank, 473 U.S. 172, 199 n.17 (1985).

3. *See* Lawrence M. Krauss, *Fear Of Physics* 44, 45 (1993).

4. A regulatory taking occurs when the government enacts a law or undertakes an action that results in a de facto "taking" of property but does not formally exercise its power of eminent domain.

Although the United States Supreme Court has repeatedly stressed the "ad hoc, factual" nature of regulatory takings analysis,[5] over time the Court has come to identify factors relevant to the inquiry. Prominent among these factors are two economic tests: the investment-backed expectations test, articulated in 1978 in *Penn Central Transportation Co. v. City of New York*,[6] and the "economically viable use" test, set forth in 1980 in *Agins v. City of Tiburon*.[7]

The Supreme Court has created and developed these two economic tests within a relatively small universe of cases: twenty-one Supreme Court decisions make reference to "investment-backed expectations;"[8] sixteen cases refer to "economically viable use[s]," "economically beneficial use[s]," or "economically feasible use[s]."[9] The true set of cases is

---

5. Although the Supreme Court apparently first used this phrase in Penn Cent. Transp. Co. v. City of New York, 438 U.S. 104, 124 (1978), the Court has reiterated it in virtually every takings case since then. However, the notions that regulatory takings cases defy the application of any "set formula," Goldblatt v. Town of Hempstead, 369 U.S. 590, 594 (1962), and that case-specific determinations are required, United States v. Central Eureka Mining Co., 357 U.S. 155, 168 (1958), certainly predate *Penn Central*.

6. 438 U.S. 104, 124 (1978).

7. 447 U.S. 255, 260 (1980).

8. Concrete Pipe & Prods., Inc. v. Construction Laborers Pension Trust, 113 S. Ct. 2264, 2291 (1993); Lucas v. South Carolina Coastal Council, 112 S. Ct. 2886, 2895 n.8 (1992); Nordlinger v. Hahn, 112 S. Ct. 2326, 2333 n.4 (1992); Nollan v. California Coastal Comm'n, 483 U.S. 825, 853 (1987) (Brennan, J., dissenting); Bowen v. Gilliard, 483 U.S. 587, 606 (1987); Hodel v. Irving, 481 U.S. 704, 715 (1987); Keystone Bituminous Coal Ass'n v. DeBenedictis, 480 U.S. 470, 485 (1987); MacDonald, Sommer & Frates v. Yolo County, 477 U.S. 340, 349 (1986); Connolly v. Pension Benefit Guar. Corp., 475 U.S. 211, 226 (1986); United States v. Riverside Bayview Homes, Inc., 474 U.S. 121, 129 n.6 (1985); Thomas v. Union Carbide Agric. Prod. Co., 473 U.S. 568, 577 (1985); Williamson County Regional Planning Comm'n v. Hamilton Bank, 473 U.S. 172, 191 (1985); United States v. Locke, 471 U.S. 84, 107 (1985); Ruckelshaus v. Monsanto Co., 467 U.S. 986, 1005 (1984); Kirby Forest Indus. v. United States, 467 U.S. 1, 14 (1984); Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419, 426 (1982); Hodel v. Virginia Surface Mining & Reclamation Ass'n, 452 U.S. 264, 295 (1981); PruneYard Shopping Ctr. v. Robins, 447 U.S. 74, 83 (1980); Kaiser Aetna v. United States, 444 U.S. 164, 175 (1979); Andrus v. Allard, 444 U.S. 51, 65 n.21 (1979); Penn Cent. Transp. Co. v. City of New York, 438 U.S. 104, 124 (1978).

9. The following cases refer to "economically viable use[s]": Dolan v. City of Tigard, 114 S. Ct. 2309, 2316 (1994); *Lucas*, 112 S. Ct. at 2894; Pennell v. City of San Jose, 485 U.S. 1, 17 (1988) (Scalia, J., concurring in part and dissenting in part); *Nollan*, 483 U.S. at 834; *Riverside*, 474 U.S. at 127; *Keystone*, 480 U.S. at 485; *Hamilton Bank*, 473 U.S. at 191 n.12; *Kirby Forest*, 467 U.S. at 14; *Virginia Surface*, 452 U.S. at 296; Schad v. Borough of Mount Ephraim, 452 U.S. 61, 68 (1981); San Diego Gas & Elec. Co. v. City of San Diego, 450 U.S. 621, 647 (1981); *Agins*, 447 U.S. at 260.

The following cases refer to "economically beneficial use[s]": *Dolan*, 114 S. Ct. at 2316 n.6; Stevens v. City of Cannon Beach, 114 S. Ct. 1332, 1334 (1994) (*cert. denied*, Scalia, J., dissenting), *Concrete Pipe*, 113 S. Ct. at 2290; *Lucas*, 112 S. Ct. at 2893; *MacDonald, Sommer & Frates*, 477 U.S. at 360 (White, J., dissenting); Hodel v. Indiana, 452 U.S. 314, 335 (1981).

The following cases refer to "economically feasible use[s]": *MacDonald, Sommer & Frates*, 477 U.S. at 362 (White, J., dissenting); *Hamilton Bank*, 473 U.S. at 191.

even smaller than these numbers would indicate, as some cases fall in both categories,[10] and other cases make only tangential or inconsequential references to either of the two tests.[11] From the remaining small body of case law has arisen a line of takings jurisprudence that focuses primarily on economic considerations and that defies rational or coherent classification or analysis.[12]

The appeal of the investment-backed expectations and economically viable use tests lies in their apparent simplicity.[13] Instead of focusing on the complex issue of the legitimacy of the governmental objective at stake, and the relationship between that objective and the challenged regulation,[14] the Court can, by using one of these two tests, focus almost exclusively on the economic effect of the regulation upon the property owner. Thus, the investment-backed expectations and economically viable use tests provide the Court with a surrogate for a true takings analysis, a surrogate that allows the Court to avoid the more difficult questions associated with regulations alleged to be takings. While this shorthand analysis may be conceptually easier to apply in the simpler cases, it ultimately proves unsatisfying in the more difficult ones.

Part I of this Article looks at the historical antecedents of the investment-backed expectations and the economically viable use tests and examines the inherent ambiguities of each of the economic tests. Part II rejects the economic tests as the proper standard for evaluating regulatory takings claims. Because the economic tests focus on the wrong issue—the economic impact of the regulation upon the property owner, rather than the regulation's effect upon constitutionally protected property rights—they can (and often do) lead to incorrect outcomes in takings cases.

---

10. *See supra* notes 8–9.

11. *See, e.g., Thomas*, 473 U.S. at 577; *Locke*, 471 U.S. at 87, 107; Hodel v. Indiana, 452 U.S. 314, 335 (1981); *Schad*, 452 U.S. at 68.

12. The Supreme Court has articulated a third economic factor as well: the economic impact of the regulation upon the property owner. *See infra* note 65 and accompanying text. However, this test has not played a prominent role in recent Supreme Court analysis, *see Lucas*, 112 S. Ct. at 2886 (analyzing regulatory takings primarily in terms of investment-backed expectations and economically viable use), and appears to have been subsumed in the economically viable use test and the diminution in value test. *See infra* note 41 (discussing the diminution in value test); Andrea L. Peterson, *The Takings Clause: In Search of Underlying Principles Part I — A Critique of Current Takings Clause Doctrine*, 77 Cal. L. Rev. 1301, 1325 (1989).

13. I say "apparent" because, as the following analysis indicates, close examination reveals that the tests are rife with landmines.

14. *See infra* notes 235–36 and accompanying text (discussing test for evaluating validity of police power regulations).

I propose that the economic tests be relegated to their proper role as one of several factors to be considered in determining whether a regulation takes private property in contravention of the Constitution. In Part II, I urge the resurrection of existing but long-ignored police power[15] and eminent domain theories[16] and a restructuring of those theories in a new pattern. Correct analysis of a regulatory takings claim should focus on the nature of the power being exercised by the government and upon whether that power is being exercised in a valid manner. I provide a series of hypotheticals illustrating the fundamental flaws of the economic tests and the strengths of the revived police power analysis. Part III contains concluding remarks.

I. THE DEVELOPMENT AND APPLICATION OF THE ECONOMIC TESTS

Once the Supreme Court held in its 1922 decision in *Pennsylvania Coal Co. v. Mahon* that a regulation could, if it goes "too far," effect a

---

15. The Supreme Court explored the nature and scope of the police power in Mugler v. Kansas, 123 U.S. 623 (1887), where the Court rejected the claim of a beer manufacturer that a legislative prohibition against the manufacture and sale of alcoholic beverages constituted a taking of his property. Justice Harlan, writing for the majority, noted that a state has broad powers to regulate matters of health, safety, and public morals, powers collectively known as the "police power." *See id.* at 657–59 (citing Thurlow v. Massachusetts, 46 U.S. (5 How.) 504 (1847)).

Professor Ernst Freund defined the police power as follows:

> The state places its corporate and proprietary resources at the disposal of the public by the establishment of improvements and services of different kinds; and it exercises its compulsory powers for the prevention and anticipation of wrong by narrowing common law rights through conventional restraints and positive regulations which are not confined to the prohibition of wrongful acts. It is this latter kind of state control which constitutes the essence of the police power.

Ernst Freund, *The Police Power: Public Policy and Constitutional Rights* 6 (1904) (emphasis omitted). Exercise of the police power does not require compensation, even if the regulation infringes upon private property rights. *See* Joseph L. Sax, *Takings and the Police Power*, 74 Yale L.J. 36, 46–50 (1964) (arguing that regulations that fall within a state's police power do not require compensation).

16. Although modern doctrine tends to obfuscate the distinction between the police and eminent domain powers, they are, in their original conceptions, very different. Freund provided the classic definition:

> Under the police power, rights of property are impaired not because they become useful or necessary to the public, or because some public advantage can be gained by disregarding them, but because their free exercise is believed to be detrimental to public interests; it may be said that the state takes property by eminent domain because it is useful to the public, and under the police power because it is harmful . . . .

Freund, *supra* note 15, at 546–47. For a further discussion of this harm/benefit distinction, see *infra* notes 42, 224–28 and accompanying text.

taking,[17] it was left with the herculean task of identifying the circumstances under which such a taking would arise. The Court has identified two per se tests for takings; all other cases are decided under ad hoc rules. The easiest takings cases are those involving permanent physical invasions. These cases fall within the per se test articulated in *Loretto v. Teleprompter Manhattan CATV Corp.*,[18] which finds a taking whenever there is a "permanent physical occupation" by the government, regardless of how minimal the intrusion or how important the governmental interest at stake.[19] Physical occupations generally are easy to identify and unambiguous; thus, application of this test (and resolution of the takings claim) is usually noncontroversial and certain.[20]

Cases not involving permanent physical invasions are much more difficult to resolve. Historically, the Supreme Court has addressed nonphysical takings on a case-by-case basis,[21] guided always by notions of "justice and fairness."[22] The Court attempted to minimize the ad hoc nature of regulatory takings analysis by announcing a second per se test in its 1992 decision in *Lucas v. South Carolina Coastal Council*.[23] The Court there held that a taking occurs whenever the owner of real property is "called upon to sacrifice *all* economically beneficial uses in the name of the common good,"[24] provided that the regulated activity is not a nuisance-like activity prohibited or constrained at common law.[25] This

17. 260 U.S. 393, 415 (1922) ("The general rule at least is that while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking.").

18. 458 U.S. 419 (1982).

19. *Id.* at 426. The Court stated that a permanent physical occupation is such an interference with the owner's property interests that it constitutes a taking "without regard to whether the action achieves an important public benefit or has only minimal economic impact on the owner." *Id.* at 434–35. *See also* United States v. Causby, 328 U.S. 256, 265 (1946) (holding that physical invasion of airspace is a taking even though "the owner does not in any physical manner occupy that stratum of airspace or make use of it in the conventional sense").

20. Although the test is easy to apply, commentators have questioned the wisdom of the test itself. *See, e.g.*, John J. Costonis, *Presumptive and Per Se Takings: A Decisional Model for the Taking Issue*, 58 N.Y.U. L. Rev. 465, 523 (1983) (concluding the per se rule for "permanent physical occupations" should be abandoned).

21. *See, e.g.*, Ruckelshaus v. Monsanto Co., 467 U.S. 986, 1005 (1984) (stating that determination of "whether a taking has occurred is essentially an 'ad hoc, factual' inquiry") (citing Kaiser Aetna v. United States, 444 U.S. 164, 175 (1979)); Penn Cent. Transp. Co. v. City of New York, 438 U.S. 104, 124 (1978) (noting that the Supreme Court has been unable to formulate a definitive test for when a regulatory taking has occurred).

22. *See, e.g.*, *Penn Central*, 438 U.S. at 124.

23. 112 S. Ct. 2886 (1992).

24. *Id.* at 2895 (emphasis in original).

25. *Id.* at 2900. ("[R]egulations that prohibit all economically beneficial use of land . . . cannot be newly legislated or decreed (without compensation) but must inhere in the title itself, in the

second per se test focuses upon the economic effect of the disputed regulation as opposed to the character (physical versus nonphysical invasion) of the contested governmental action.[26] As such, it directly implicates the two economic tests that are the subject of this Article.

These two per se tests cover only a very small subset of governmental actions. Few regulations deprive owners of all use of their property; fewer still will result in a permanent physical occupation of property. Most challenged regulations will fall somewhere outside the boundaries of these tests. In the words of the Court, in evaluating such regulations, there is "no 'set formula to determine where regulation ends and taking begins.' Instead, we rely 'as much [on] the exercise of judgment as [on] the application of logic.'"[27]

In attempting to create workable rules that would produce rational, predictable outcomes in these gray cases, the Court has identified several relevant factors to be considered. Among these are the impact of the regulation on investment-backed expectations and economically viable uses. Although the Supreme Court has intimated that the two tests are analytically distinct,[28] in practice the Court has treated them as being

---

restrictions that background principles of the State's law of property and nuisance already place upon land ownership.").

Although *Lucas* articulated the per se test for deprivation of all economically viable use most explicitly, the notion that a complete destruction of economically viable use was a taking had appeared in earlier cases. *See* First English Evangelical Lutheran Church v. County of Los Angeles, 482 U.S. 304, 316–17 (1987); San Diego Gas & Elec. Co. v. City of San Diego, 450 U.S. 621, 652–53 (1981) (Brennan, J., dissenting); *Penn Central*, 438 U.S. at 149–50 (Rehnquist, J., dissenting). The *Lucas* Court, in fact, treated this second per se test as established precedent. 112 S. Ct. at 2893 (stating that "[t]he second situation in which we have found categorical treatment appropriate is where regulation denies all economically beneficial or productive use of land"). Commentators too had predicted the direction of this doctrinal development several years before *Lucas* was handed down. *See, e.g.*, Frank Michelman, *Takings*, 88 Colum. L. Rev. 1600, 1622 (1988) (quoted *infra* at text accompanying note 216).

26. Justice Rehnquist's dissent in Keystone Bituminous Coal Ass'n v. DeBenedictis, 480 U.S. 470 (1987), foreshadowed Justice Scalia's majority opinion in *Lucas* in several ways. In particular, Justice Rehnquist indicated that where the government has physically taken property, the *Penn Central* three-factor test (discussed *infra* note 65 and accompanying text) is unnecessary as "[p]hysical appropriation by the government leaves no doubt that it has in fact deprived the owner of all uses of the land." 480 U.S. at 517 (Rehnquist, J., dissenting). Thus, Justice Rehnquist apparently viewed *Loretto's* per se test for physical invasions as simply another variant of the total deprivation of economically viable use scenario.

27. MacDonald, Sommer & Frates v. Yolo County, 477 U.S. 340, 348–49 (1986) (alterations in original) (citations omitted).

28. For example, the Court repeatedly lists the two tests as separate factors to be considered in a takings inquiry. *See, e.g.*, Kaiser Aetna v. United States, 444 U.S. 164, 175 (1979).

overlapping, although not identical.[29] In addition, while the Court has indicated that the "economically viable use" test of *Agins* applies in the context of a facial challenge to regulations[30] and the *Penn Central* investment-backed expectations test applies in the case of an "as applied" challenge,[31] the Court has failed to honor this distinction on numerous occasions.[32]

Despite the Court's inconsistency in application of these two tests, the potency of the property owner's economic interests in determining the validity of regulation has increased steadily over the past fifteen years.[33] Ultimately, in *Lucas*, the Court officially held the economic tests to be determinative of at least a certain subset of takings claims, *i.e.*, those in which all economic value has been destroyed by regulation.[34] The *Lucas* Court never clearly discussed the theoretical bases for the economic tests, however, nor why they should be elevated to such high status within takings jurisprudence. Had the Court undertaken such a task, it would have failed. As the following discussion reveals, the foundations of the

29. *See, e.g.*, Lucas v. South Carolina Coastal Council, 112 S. Ct. 2886 (1992) wherein Justice Scalia, writing for the majority, seemed to treat deprivation of economically beneficial use and denial of reasonable expectations as interchangeable tests; *Keystone*, 480 U.S. at 485 (noting the property owners had not shown a denial of economically viable use because they had not shown the challenged regulation made it "impossible" for them "to profitably engage in their business, or that there has been undue interference with their investment-backed expectations"); United States v. Riverside Bayview Homes, Inc., 474 U.S. 121, 129 n.6 (1985) (stating the Court was unable to evaluate a takings claim because the property owner had failed to introduce evidence of interference with "economically viable uses of the property or frustrat[ion of] reasonable investment-backed expectations").

30. *See, e.g.*, Hodel v. Virginia Surface Mining & Reclamation Ass'n, 452 U.S. 264, 295–96 (1981).

31. *See, e.g.*, Williamson County Regional Planning Comm'n v. Hamilton Bank, 473 U.S. 172, 200 (1985).

32. *See, e.g.*, Nollan v. California Coastal Comm'n, 483 U.S. 825 (1987) (involving an "as applied" challenge, but applying the *Agins* test); Keystone Bituminous Coal Ass'n v. DeBenedictis, 480 U.S. 470 (1987) (involving a facial challenge, but applying both the *Penn Central* and *Agins* tests); Connolly v. Pension Benefit Guar. Corp., 475 U.S. 211 (1986) (involving a facial challenge, but applying the *Penn Central* test). *See generally* Peterson, *supra* note 12, at 1360–61.

33. *See, e.g.*, PruneYard Shopping Ctr. v. Robins, 447 U.S. 74, 84 (1980), where the Court stated that the property owners "failed to demonstrate that the 'right to exclude others' is so essential to the use or economic value of their property that the state-authorized limitation of it amounted to a 'taking.'" Thus, the Court seemed to suggest that the only interests that matter (at least for constitutional purposes) are economic ones, despite the fact that the right to exclude has historically been viewed as a critical element of property rights. *See, e.g.*, Kaiser Aetna v. United States, 444 U.S. 164, 176 (1979) ("[O]ne of the most essential sticks in the bundle of rights that are commonly characterized as property [is] the right to exclude others.").

34. *See supra* notes 23–26 and accompanying text.

tests are theoretically infirm and their function within regulatory takings jurisprudence suspect.

A. The Investment-Backed Expectations Test

1. The Historical Antecedents of the Investment-Backed Expectations Test

The Supreme Court has repeatedly stated that a regulation that interferes with "reasonable" or "distinct" investment-backed expectations can give rise to a compensable taking.[35] This test originated in *Penn Central Transportation Co. v. City of New York*,[36] which involved a challenge to New York City's Landmark Preservation Law brought by the owners of Penn Central Terminal. The terminal, "a magnificent example of the French beaux-arts style,"[37] was a designated, regulated landmark. The owners wanted to lease to a third party the right to construct a multi-story office building above the terminal.[38] After the Landmark Preservation Commission denied the petition for use, the terminal owners brought suit alleging a taking without compensation in violation of the Fifth and Fourteenth Amendments.[39] In rejecting the owners' claim that the City's historic landmark regulation effected a taking, the Supreme Court articulated the investment-backed expectations test.

The antecedents of the investment-backed expectations test are, at best, murky. Prior to *Penn Central,* the Court's evaluation of regulatory takings claims focused primarily on factors such as the presence of a

35. *See, e.g.*, Concrete Pipe & Prods. v. Const. Laborers Pension Trust, 113 S. Ct. 2264, 2291 (1993); *Nollan*, 483 U.S. at 853 (Brennan, J., dissenting); Bowen v. Gilliard, 483 U.S. 587, 606 (1987); Hodel v. Irving, 481 U.S. 704, 714 (1987); MacDonald, Sommer & Frates v. Yolo County, 477 U.S. 340, 349 (1986); *Connolly*, 475 U.S. at 226; United States v. Locke, 471 U.S. 84, 107 (1985); Ruckelshaus v. Monsanto Co., 467 U.S. 986, 1005 (1984); Kirby Forest Indus. v. United States, 467 U.S. 1, 14 (1984); Hodel v. Virginia Surface Mining & Reclamation Ass'n, 452 U.S. 264, 295 (1981); *PruneYard Shopping Ctr.*, 447 U.S. at 83; *Kaiser Aetna*, 444 U.S. at 175; Penn Cent. Transp. Co. v. City of New York, 438 U.S. 104, 124 (1978). Although the Court originally referred to "distinct" investment-backed expectations, *see* Penn Cent. Transp. Co. v. City of New York, 438 U.S. 104, 124 (1978), its more recent formulations have referred to "reasonable" investment-backed expectations. *See, e.g., Concrete Pipe*, 113 S. Ct. at 2291; *Riverside*, 474 U.S. at 129 n.6; *PruneYard Shopping Ctr.*, 447 U.S. at 83.

36. 438 U.S. 104 (1978).

37. *Id.* at 115.

38. *Id.* at 116.

39. *Id.* at 119. The owners also alleged a Fourteenth Amendment due process deprivation. *Id.*

physical invasion,[40] the diminution in value of the property,[41] and a determination of whether the regulation was intended to prevent a harm or provide a benefit.[42] Justice Brennan stated that the investment-backed expectations test arose from Justice Holmes' opinion in the landmark case of *Pennsylvania Coal Co. v. Mahon*,[43] yet nowhere in that case does the phrase "investment-backed expectations" appear.[44] The phrase was

---

40. The Supreme Court originally established that a physical invasion could constitute a taking in Pumpelly v. Green Bay & Mississippi Canal Co., 80 U.S. (13 Wall.) 166 (1871), stating that the invasion must be so severe as to "destroy [the property's] value entirely," and "in effect, subject it to total destruction." *Id.* at 177–78. Over the next 90 years, this test evolved into the per se takings test of Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419 (1982) (discussed *supra* notes 18–20 and accompanying text), where the Court held that even minimal physical invasion will lead to a taking.

41. The diminution in value theory, articulated in Pennsylvania Coal Co. v. Mahon, 260 U.S. 393 (1922), examines the proportion of the value of the property that has been destroyed or taken as a result of the regulation. Mere diminution in value alone is insufficient to support a finding of a taking. *See id.* at 413 ("Government hardly could go on if to some extent values incident to property could not be diminished without paying for every such change in the general law."); *see also* Concrete Pipe & Prods., Inc. v. Construction Laborers Pension Trust, 113 S. Ct. 2264, 2291 (1993) ("[M]ere diminution in the value of property, however serious, is insufficient to demonstrate a taking."); Kirby Forest Indus. v. United States, 467 U.S. 1, 15 (1984) ("[I]mpairment of the market value of real property incident to otherwise legitimate government action ordinarily does not result in a taking."); Penn Cent. Transp. Co. v. City of New York, 438 U.S. 104, 131 (1978) ("[T]he decisions . . . uniformly reject the proposition that diminution in property value, standing alone, can establish a 'taking' . . ."). The *Mahon* Court noted, however, that if the diminution in value created by the regulation is too great, the regulation will constitute a taking. 260 U.S. at 415. The Supreme Court has, in fact, upheld regulations which have severely diminished the value of property. *See, e.g.*, Village of Euclid v. Ambler Realty Co., 272 U.S. 365 (1926) (75% diminution in value); Hadacheck v. Sebastian, 239 U.S. 394 (1915) (87.5% diminution in value). Even Justice Rehnquist, who appears to be among the most sympathetic of the Justices to private property rights, suggested in his dissent in *Keystone* that while "complete extinction of the value of a parcel of property" is constitutionally prohibited, regulations that preserve at least a part of the value are permissible. Keystone Bituminous Coal Ass'n v. DeBenedictis, 480 U.S. 470, 513–14 (1987) (Rehnquist, J., dissenting) (noting that in Mugler v. Kansas, 123 U.S. 623 (1887), Miller v. Schoene, 276 U.S. 272 (1928), and Goldblatt v. Town of Hempstead, 369 U.S. 590 (1962), the regulations may have made the instant properties "of little value," but they "did not completely extinguish the value").

42. The harm/benefit test was articulated in *Mugler*, 123 U.S. at 667–69, where the Court held that regulations intended to prevent injurious use of property did not create takings. The Court has applied the test on numerous instances since. *See, e.g., Goldblatt*, 369 U.S. 590; *Miller*, 276 U.S. 272; *Hadacheck*, 239 U.S. 394. The Supreme Court rejected the harm/benefit distinction in Lucas v. South Carolina Coastal Council, 112 S. Ct. 2886, 2897–99 (1992). *See infra* notes 224–28 and accompanying text. Nonetheless, it plays a role in correct formulation of a workable regulatory takings theory. *See infra* text following note 228.

43. *See Penn Central*, 438 U.S. at 127 ("Pennsylvania Coal Co. v. Mahon, 260 U.S. 393 (1922), is the leading case for the proposition that a state statute that substantially furthers important public policies may so frustrate distinct investment-backed expectations as to amount to a 'taking.'").

44. In *Mahon*, a state statute prohibited most mining of coal that would lead to the subsidence of any house, rendering it "commercially impracticable" for the owners of the coal to mine it. *Penn Central*, 438 U.S. at 127 (citing 260 U.S. at 414). *Mahon* did discuss the impact of a diminution in

apparently coined in a leading article on Takings Clause compensation authored by Professor Frank I. Michelman a decade prior to the *Penn Central* decision,[45] an article which was cited by Justice Brennan in his opinion.[46]

Michelman's thesis was that compensation for regulatory takings ought to depend upon considerations such as settlement costs, efficiency gains, and disproportionate infliction of harm upon particular individuals.[47] His argument was based in part upon Rawlsian notions of fairness,[48] and in part upon Bentham's utilitarian property theory. The latter, according to Michelman, characterizes "property" as "'a basis of expectations' founded on existing rules."[49] "Unpredictable" or "capricious" redistributions of property will defeat individuals' willingness to engage in productive labor and in investment, and will ultimately decrease society's "material well-being."[50]

---

value of property on a takings claim, a factor more closely related to the economically viable use test (discussed *infra* part I.B).

45. Frank I. Michelman, *Property, Utility, and Fairness: Comments on the Ethical Foundations of "Just Compensation" Law*, 80 Harv. L. Rev. 1165 (1967).

46. 438 U.S. at 128 (citing Michelman, *supra* note 45, at 1229–34). Justice Brennan cited Michelman's article in support of the proposition that complete destruction of economic value may render a regulation a taking, not as the genesis for the investment-backed expectations test.

47. Michelman, *supra* note 45, at 1223.

48. *Id.* at 1219–21. Michelman identified two fundamental principles that flow from Rawls's notion of "justice as fairness":

> The first principle is a general presumption that social arrangements should accord no preferences to anyone, but should assure to each participant the maximum liberty consistent with a like liberty on the part of every other participant. The second principle defines a justification for departures from the first: an arrangement entailing differences in treatment is just so long as (a) everyone has a chance to attain the positions to which differential treatments attach, and (b) the arrangement can reasonably be supposed to work out to the advantage of every participant, and especially the one to whom accrues the least advantageous treatment provided for by the arrangement in question.

Id. at 1220. Michelman went on to state:

> It is not insuperably difficult to see how Rawls's two principles are to be applied by analogy to test the justice of a compensation practice. Analogous to the equal liberty principle would be a rule forbidding all efficiency-motivated social undertakings, which have the prima facie effect of impairing "liberties" unequally, unless corrective measures (compensation payments) are employed to equalize impacts. The second principle, however, would permit a departure from this uncompromising rule of full compensation if it could be shown that some other rule should be expected to work out best for each person insofar as his interests are affected by the social undertakings giving rise to occasions of compensation.

Id. at 1221.

49. *Id.* at 1211–12.

50. *Id.* at 1212.

Michelman rejected the notion, however, that utilitarian property theory would demand the payment of compensation in every instance of governmental action that disappointed "justified, investment-backed expectations."[51] Rather, compensation is not required for the taking of investments "which, when they were made, either (a) interrupted someone else's enjoyment of an economic good, as should have been apparent; or (b) were of a sort which society had adequately made known should not become the object of expectations of continuing enjoyment."[52] The "investment-backed expectations" factor, which Michelman explored in the context of the diminution-in-value test,[53] provided one example of such an instance. He noted that, to many courts, the availability of compensation turned on the degree of loss inflicted upon the property owner,[54] and that the purpose of compensation is "to prevent a special kind of suffering on the part of people who have grounds for feeling themselves the victims of unprincipled exploitation."[55]

The diminution in value test, however, raises a difficult question regarding segmentation of property interests. Although some degree of diminution in value must be tolerated without compensation,[56] at some point the loss inflicted upon the owner becomes impermissibly and disproportionately large in comparison to the property interest left to the owner, and compensation becomes mandated.[57] Thus, the ultimate question becomes what has been taken from the owner relative to what has been left to the owner.[58] Such a calculation cannot be made without first defining the underlying property interest against which the loss is to be gauged.[59] If the loss in value to the regulated property supplies the numerator of the fraction, what supplies the denominator? Is it the property as a whole, or may the property be segmented in some manner reflecting the nature of the governmental action?[60]

---

51. *Id.* at 1213.

52. *Id.* at 1241.

53. *Id.* at 1229–34. *See supra* note 41 (discussing diminution in value test)

54. *Id.* at 1190.

55. *Id.* at 1230.

56. *See id.* at 1191.

57. *Id.* at 1232–33.

58. Michelman suggested that the "critical proportion" that would tip the scale from a noncompensable governmental action to a compensable taking "probably [lies] somewhere between fifty and one hundred percent." *Id.* at 1233.

59. *Id.* at 1192–93.

60. *Id.*

This question—what interest supplies the denominator of the fraction—is a fundamental inquiry in takings analyses based upon economic interests of the property owner. It is a thorny issue and one which has resisted resolution to date.[61] Michelman proposed a solution to the question based not upon the proportionate loss to the owner, but rather upon the *nature* of the property interest taken by the government. Traditionally, he argued, the diminution in value test was applied by first identifying the denominator of the fraction—the "thing" that had been taken.[62] Only then did the court inquire as to what the owner had lost. If the regulation took "practically all" of the identified property interest, compensation was due.[63] Michelman argued that the proportion of loss was not the significant factor; rather, the correct question is "whether or not the measure in question can easily be seen to have practically deprived the claimant of some *distinctly perceived, sharply crystallized, investment-backed expectation.*"[64]

---

61. In *Lucas*, Justice Scalia noted that "this uncertainty regarding the composition of the denominator in our 'deprivation' fraction has produced inconsistent pronouncements by the Court," but declined to resolve the issue because the denominator in the instant case was clearly the fee simple interest. Lucas v. South Carolina Coastal Council, 112 S. Ct. 2886, 2894 n.7 (1992). Justice Rehnquist has argued that segmentation is permitted. *See* Keystone Bituminous Coal Ass'n v. DeBenedictis, 480 U.S. 470, 517 (1987) (Rehnquist, J., dissenting) ("[T]here is no need for further analysis where the government by regulation extinguishes the whole bundle of rights in an identifiable segment of property, for the effect of this action on the holder of the property is indistinguishable from the effect of a physical taking."). The *Penn Central* Court, on the other hand, indicated that segmentation was not permitted. *See* Penn Cent. Transp. Co. v. City of New York, 438 U.S. 104, 130–31 (1978) ("'Taking' jurisprudence does not divide a single parcel into discrete segments and attempt to determine whether rights in a particular segment have been entirely abrogated."). The Court also stated in Andrus v. Allard, 444 U.S. 51, 65–66 (1979): "[D]enial of one traditional property right does not always amount to a taking. At least where an owner possesses a full 'bundle' of property rights, the destruction of one 'strand' of the bundle is not a taking, because the aggregate must be viewed in its entirety." In a recent examination of the two economic tests, the Court reemphasized that segmentation is not permitted. *See* Concrete Pipe & Prods., Inc. v. Construction Laborers Pension Trust, 113 S. Ct. 2264, 2290 (1993) ("[A] claimant's parcel of property [cannot] first be divided into what was taken and what was left" to show existence of a taking.).

62. Michelman, *supra* note 45, at 1232.

63. *Id.* at 1232–33.

64. *Id.* at 1233 (emphasis added). This expectation interest, Michelman argued, could be used to explain such apparent dichotomies in the law as the rules attaching to nonconforming uses. In instituting new zoning plans, governmental entities usually grandfather existing uses that will be nonconforming under the new scheme, while simultaneously rejecting new uses of the same type. The difference in treatment, according to Michelman, can be attributed to the fact that:

> actual establishment of the use demonstrates that the prospect of continuing it is a discrete twig out of his fee simple bundle to which the owner makes explicit reference in his own thinking, so that enforcement of the restriction would, as he looks at the matter, totally defeat a distinctly crystallized expectation.

Michelman's analysis clearly influenced Justice Brennan as he wrote the majority opinion in *Penn Central*. The opinion reveals a pervasive, albeit unfocused, emphasis on the economic effects of the regulation upon the landowner, or, more specifically, the lack of such effects. Justice Brennan began by noting that regulatory takings claims must be resolved by "ad hoc, factual inquiries," which should be guided by "several factors" of "particular significance," including "[t]he economic impact of the regulation on the claimant . . . , the extent to which the regulation has interfered with distinct investment-backed expectations," and "the character of the governmental action."[65]

Justice Brennan seemed to use the term "expectations" as a way of defining the compensable property interest itself. He stated, for example, that mere adverse effect upon economic values was insufficient to render a regulation a taking.[66] Rather, the regulation must affect some sort of recognized "property" interest; no taking occurred where a challenged regulation "caused economic harm, [but] . . . did not interfere with interests that were sufficiently bound up with the reasonable expectations of the claimant to constitute 'property' for Fifth Amendment purposes."[67]

Id. Thus, the law should see no illogic in grandfathering an existing use while simultaneously barring a new use of the same type.

65. 438 U.S. at 124. Although the investment-backed expectations test was first articulated in *Penn Central*, the Court in that case did not have to evaluate whether the regulation at issue affected such interests. The *Penn Central* property owners conceded that, even in the face of the regulation, they were able to make a reasonable return on their investments in the property. *Id.* at 129. Justice Brennan's inclusion of "investment-backed expectations" in a list of "factors" to be considered suggests that interference with investment-backed expectations alone is not sufficient to support a finding of a taking, although the opinion does not state so specifically.

The *Penn Central* Court described the "character of the governmental action" factor as follows: "A 'taking' may more readily be found when the interference with property can be characterized as a physical invasion by government than when interference arises from some public program adjusting the benefits and burdens of economic life to promote the common good." *Id.* at 124 (citation omitted). Similarly, the Court stated in *Loretto* that "when the 'character of the governmental action' is a permanent physical occupation of property, our cases uniformly have found a taking to the extent of the occupation without regard to whether the action achieves an important public benefit or has only minimal economic impact on the owner." 458 U.S. at 434–35 (citation omitted). The Court has held other types of actions, such as prohibitions on descent and devise of real property, to indicate impermissible governmental action as well. *See* Hodel v. Irving, 481 U.S. 704, 704 (1987) (discussed *infra* notes 130–33 and accompanying text). Actions that serve "genuine, substantial, and legitimate" state interests, on the other hand, are merely valid exercises of the police power; the character of these governmental actions would militate against finding a taking. *See Keystone*, 480 U.S. at 486. For further discussion of the Court's application of the "character of the governmental action" factor, see Peterson, *supra* note 12, at 1317–19.

66. *Penn Central*, 438 U.S. at 124.

67. *Id.* at 124–26 (citing United States v. Willow River Power Co., 324 U.S. 499 (1945); United States v. Chandler-Dunbar Water Power Co., 229 U.S. 53 (1913); Demorest v. City Bank Co., 321 U.S. 36 (1944); Muhlker v. Harlem R. Co., 197 U.S. 544 (1905); Sax, *supra* note 15, at 61–62). The

Thus, Justice Brennan roundly rejected the owners' contention that the deprivation of their "air rights" above the terminal was a taking, stating that it was "quite simply untenable" that property owners might establish a taking by showing that they had "been denied the ability to exploit a property interest that they heretofore had believed was available for development."[68]

The *Penn Central* Court appeared to adopt the principle that a regulation that rendered property worthless, or nearly worthless, was a taking.[69] Regulations that left profitable uses to the owners, on the other hand, were simply valid exercises of the police power. Justice Brennan stated that because the owners of the terminal could "continue to use the property precisely as it has been used for the past 65 years: as a railroad terminal,"[70] the regulation did not interfere with the owners' "primary expectation" regarding the use of the land.[71] Moreover, the law permitted the owners "not only to profit" from the use of their property, but to receive a "'reasonable return'" on their investment as well.[72]

In his dissent, Justice Rehnquist criticized the majority on several points. First, he argued that it was "irrelevant" that the owners were not currently using the air rights over the terminal. Like existing uses, uses that might be "reasonably expected in the immediate future" may also give rise to a takings claim.[73] Thus, owners are entitled to more than a mere continuation of current profitable uses.

Second, Justice Rehnquist found the majority's reliance on the existence of a "'reasonable return'" to be laden with uncertainties. If a taking occurs only when a property owner is denied *all* reasonable return on his or her investment,[74] the Court is reduced not only to calculating a

---

Penn Central Court also cited the taxing power as another example of a situation in which a regulation could damage economic values without resulting in a taking. 438 U.S. at 124.

68. 438 U.S. at 130.

69. *Id.* at 127–28. In addition to Pennsylvania Coal Co. v. Mahon, 260 U.S. 393 (1922), the Court cited in support of this proposition Armstrong v. United States, 364 U.S. 40 (1960); Hudson County Water Co. v. McCarter, 209 U.S. 349, 355 (1908); Michelman, *supra* note 45, at 1229–34.

70. 438 U.S. at 136.

71. *Id.*

72. *Id.*

73. *Id.* at 143 n.6 (Rehnquist, J., dissenting) (emphasis omitted) (quoting Mississippi & Rum River Boom Co. v. Patterson, 98 U.S. 403, 408 (1879)).

74. Although the majority did not actually state this as a rule, it could be fairly inferred from Justice Brennan's opinion. In *Lucas*, the Court indicated that a denial of all economically beneficial use was a per se taking (at least under some circumstances), *see* Lucas v. South Carolina Coastal Council, 112 S. Ct. 2886, 2895 (1992); the *Lucas* Court clearly contemplated that a regulation that took less than all economically viable use might also effect a taking, although that issue was not

"reasonable return" for various types of property (such as farms, residences, and commercial and industrial properties),[75] but also to defining the property unit against which the determination is to be made (*i.e.*, may property be segmented for purposes of this calculation or must the property be treated as a whole?).[76] Thus, the "reasonable return" analysis necessarily implicates the segmentation of property issue.[77]

Finally, Justice Rehnquist argued that while case law was settled that a complete destruction of property rights making it impossible for an owner to make a reasonable return on his or her property would render an otherwise valid regulation a taking,[78] the converse was not necessarily true. An otherwise compensable taking does not become a valid exercise of the police power merely because it leaves the owner some "reasonable" use of his or her property.[79]

Justice Rehnquist's dissent in *Penn Central* was prescient in identifying the problems inherent in applying the majority's investment-backed expectations test. As the next subpart discusses, these problems were brought to the fore in later Supreme Court opinions and have never been adequately resolved by the Court. Indeed, these problems are incapable of judicial resolution because, as discussed below, they reflect the fundamental analytical flaws of the investment-backed expectations factor as a test for regulatory takings.

2. *Ambiguities Inherent in the Investment-Backed Expectations Test*

The Supreme Court has done little to expound on what actually constitutes an "investment-backed expectation" in the sixteen years since *Penn Central* was decided. The Court has indicated that the concept is grounded in notions of "'justice and fairness,'"[80] that expectations of "profit" enter into the calculus (in some undefined manner),[81] and that

---

before the Court. *Id.* at 2895 n.8 (noting that although a property owner "whose deprivation is one step short of complete" does not qualify under *Lucas*'s "categorical formulation," the investment-backed expectations and economic impact tests may well lead to a finding of a compensable taking).

75. *Penn Central*, 438 U.S. at 149 n.13 (Rehnquist, J., dissenting).

76. *Id.*

77. *See supra* note 61 and accompanying text (discussing segmentation of property issue).

78. *Penn Central*, 438 U.S. at 149–50 (Rehnquist, J., dissenting) (citing United States v. Lynah, 188 U.S. 445, 470 (1903)).

79. *Id.*

80. *See* Kirby Forest Indus. v. United States, 467 U.S. 1, 14 (1984).

81. *See, e.g.*, Williamson County Regional Planning Comm'n v. Hamilton Bank, 473 U.S. 172, 200 (1985) (noting that resolution of the taking question would require "an analysis of the effect [the regulation] had on the value of respondent's property and investment-backed *profit* expectations")

the expectation must be more than a "unilateral expectation or an abstract need."[82] The Court has replaced its original reference to "distinct" investment-backed expectations in *Penn Central*[83] with the term "reasonable" investment-backed expectations in subsequent cases,[84] suggesting that the owner's expectations should be gauged by some objective standard. The net outcome of all of the Court's efforts is that the meaning of the phrase remains uncertain, rendering its effectiveness as a legal doctrine questionable at best.[85]

The difficulties associated with the concept of investment-backed expectations are legion: what does "expectation" mean? what does "investment-backed" mean? what types of property interests are affected by such an analysis? As the next subsection illustrates, these problematic issues alone ought to be enough to ring the death knell for the investment-backed expectations test. When the inefficacy of the concept in evaluating a regulatory taking claim is also considered, it becomes difficult to understand how the factor ever came into being, much less why its use has persisted.

a. The Meaning of "Expectations"

Before investment-backed expectations can be analyzed in a specific case, the term "expectations" must be defined. The Supreme Court has not attached a clear meaning to this term. In some instances, it has used the term to refer to things that, conversely, either are or are not protected property interests; in other instances, it has used the word to indicate that a property owner, at least under some circumstances, ought to anticipate further governmental regulation.

(emphasis added). *See also* Keystone Bituminous Coal Ass'n v. DeBenedictis 480 U.S. 470, 496 (1987) (finding the regulation valid because there was not even "a single mine that [could] no longer be mined for profit"), *id.* at 501 ("Petitioners may continue to mine coal profitably."); *Penn Central*, 438 U.S. at 136 (explaining that the regulation permitted the property owner "not only to profit from the Terminal but also to obtain a 'reasonable return' on its investment").

82. Webb's Fabulous Pharmacies, Inc. v. Beckwith, 449 U.S. 155, 161 (1980) ("[A] mere unilateral expectation or an abstract need is not a property interest entitled to protection."). *See also Penn Central*, 438 U.S. at 130 (quoted in text at *supra* note 68).

83. 438 U.S. at 124.

84. *See, e.g.*, Concrete Pipe & Prods., Inc. v. Construction Laborers Pension Trust, 113 S. Ct. 2264, 2291 (1993); Ruckelshaus v. Monsanto Co., 467 U.S. 986, 1005 (1984); PruneYard Shopping Ctr. v. Robins, 447 U.S. 74, 83 (1980).

85. *See, e.g.*, Richard A. Epstein, *Lucas v. South Carolina Coastal Council: A Tangled Web of Expectations*, 45 Stan. L. Rev. 1369, 1370 (1993) ("All in all, we should be deeply suspicious of the phrase 'investment-backed expectations' because it is not possible to identify even the paradigmatic case of its use.").

(1) "Expectations" as Property Interests

The word "expectations" is suspect in the takings lexicon; courts often use "expectation" to refer to an interest less deserving of protection than a "right."[86] For example, the Court has established that expectations do not necessarily create property rights, particularly where those expectations arise from governmental action.[87] Governmental action may result in an increase in value to an individual, and thus create an expectation in the individual that the increased value is a property right protected at law. The Court is concerned, however, that the creation of property rights in such a manner might "foreclose[ ] Congress' exercise of [sovereign] authority."[88] By denying that the expectation is a property right, the Court ensures that the state's actions are not constrained by the constitutional protections afforded private property.[89]

By the same token, however, the Court has also used the word "expectations" to refer to protected property interests. For example, in *Lucas*, Justice Scalia referred to expectations "shaped by the State's law of property" in discussing the "property" against which diminutions in value must be gauged.[90] Justice Scalia was apparently trying to indicate that state-law definitions of "property" help to determine which expectations are protected legal interests and which are mere unilateral hopes or

86. *See, e.g.*, Yale Auto Parts, Inc. v. Johnson, 758 F.2d 54, 59 (2d Cir. 1985); Deltona Corp. v. United States, 657 F.2d 1184, 1193 (Ct. Cl. 1981), *cert. denied*, 455 U.S. 1017 (1982). As Professor Epstein has noted: "In some situations, an expectation is considered the antithesis of a property right; in others, expectation appears to be the basis of the property right. In still other cases, expectations seem to embody property rights." Epstein, *supra* note 85, at 1379.

87. *See, e.g.*, Bowen v. Public Agencies Opposed to Soc. Sec. Entrapment, 477 U.S. 41 (1986) (holding that where Congress retained the explicit right to amend or repeal legislation, the legislation did not create a contractual property right in the state participants); United States v. Fuller, 409 U.S. 488, 488–89, 494 (1973) (holding that expectations created through issuance of federal grazing permit did not ripen into property interests). Expectations created through actions of private parties may be more likely to lead to protectable property interests. *See, e.g.*, Almota Farmers Elevator & Warehouse Co. v. United States, 409 U.S. 470, 474 (1973) (plurality opinion) (finding that reasonable expectation that lease would be renewed could be considered in determining market value of property because expectation would have been reflected in price a willing buyer would have paid a willing seller).

88. *Public Agencies Opposed to Soc. Sec. Entrapment*, 477 U.S. at 52.

89. *See, e.g.*, United States v. Willow River Power Co., 324 U.S. 499, 502–03 (1945) ("[O]nly those economic advantages are 'rights' which have the law back of them . . . whether it is a property right is really the question to be answered.").

90. 112 S. Ct. 2886, 2894 n.7 (1992). *Cf.* Nordlinger v. Hahn, 112 S. Ct. 2326, 2333 n.4 (1992) (noting that "[o]utside the context of the Equal Protection Clause, the Court has not hesitated to recognize the legitimacy of protecting reliance and expectational interests," and citing *Penn Central* in support).

desires on the part of property owners that do not ripen into legally cognizable interests.

When used in this sense, however, the term "expectations" becomes circular—a problem noted by Justice Kennedy in his concurrence in *Lucas*: "[I]f the owner's reasonable expectations are shaped by what courts allow as a proper exercise of governmental authority, property tends to become what courts say it is."[91] This is a trap in which the Court has been caught in the past. In *Phillips Petroleum Co. v. Mississippi*,[92] for example, the Court noted "the importance of honoring reasonable expectations in property interests"[93] but emphasized that "such expectations can only be of consequence where they are 'reasonable' ones,"[94] and that expectations "contrary" to state definitions of property are inherently unreasonable.[95] Thus, the expectation is legitimate if state law regards it as such, but is not legitimate if state law regards it otherwise—a profoundly unhelpful statement when the goal is to define permissible limits of governmental regulation. It reduces the constitutional analysis to a situation in which the fox is the sole guard of the henhouse.

(2) "Expectations" of Future Governmental Regulation

Michelman suggested that property owners are not entitled to compensation for value-depleting changes in regulation that were easily anticipated. He posed a hypothetical in which an individual purchased scenic land along a highway in the midst of public debate over the forbidding of all development upon such land. In Michelman's view, the market ought to reflect (through a reduced purchase price) the risk of legislation banning development of the property. If such legislation is ultimately passed, the new owner's claim to compensation in the amount

---

91. 112 S. Ct. at 2903 (Kennedy, J., concurring). Justice Kennedy went on to state that circularity is inevitable in constitutional matters and that circularity in this particular instance was diminished by the fact that "[t]he expectations protected by the Constitution are based on objective rules and customs that can be understood as reasonable by all parties involved." *Id.*

To the extent that those "objective rules and customs" arise from judicial decisions, however, the circularity problem is not avoided. See Jeremy Paul, *The Hidden Structure of Takings Law*, 64 S. Cal. L. Rev. 1395, 1505 (1991) ("Over time, . . . the more the Court's own pronouncements tend to shape public expectations, the more the Court's reliance on these expectations threatens to deteriorate into a blatant case of self-fulfilling prophecy.").

92. 484 U.S. 469 (1988).

93. *Id.* at 482.

94. *Id.*

95. *Id.*

of the difference between the value of the land with and without the regulation is "weak."[96] Because the new owner purchased property at a discounted price reflecting the possibility of the restrictions, the owner got "exactly" that for which she bargained.[97] The redistribution in this instance, in Michelman's view, is no different than the redistribution that occurs when society refuses to refund the price of a losing lottery ticket.[98]

Michelman's argument is fraught with difficulty, as he himself recognized when he noted that it required "gingerly handling."[99] Michelman was concerned that his argument opened up the possibility of governmental abuse, as government officials could engage in strategic declarations of intent to regulate in the future, thus reducing property values and, concomitantly, eventual costs of takings.[100]

Michelman's argument falters on other grounds as well. In the instance of the lottery ticket, the purchaser buys from the state the right to one chance to win a pool of money. If the purchaser were to sell the ticket to a third party, the price would remain constant because the bargained-for value is fixed—the right to one chance to win the money. In Michelman's highway scenario, however, the original owner had a piece of property that, prior to the passing of legislation, presumably could have been developed in some productive manner. If legislation is passed that constitutes a taking of this property, the owner has a constitutional right to expect a full and equivalent compensation from the state for the loss of value suffered. If the property were to change hands during the public debate period, the right to obtain that compensation would pass along with the title to the land.[101] Although the market might discount the value of the property slightly to account for the hassles attendant

96. Michelman, *supra* note 45, at 1238.

97. *Id.*

98. *Id.*

99. *Id.* at 1238 n.124.

100. *Id.* He posited, for example, a situation in which a government official, intending the future construction of a highway and wishing to hold down the costs of future condemnation, could discourage construction along the proposed route merely by periodically reminding potential builders of the government's plans.

101. Justice Scalia recognized this point in *Nollan*, where, in writing for the majority, he stated that "the prior owners must be understood to have transferred their full property rights in conveying" their land; thus, a land-use restriction invalid as against the existing owner is invalid as against later owners as well. Nollan v. California Coastal Comm'n, 483 U.S. 825, 834 n.2 (1987). *See also* Richard A. Epstein, *Takings: Private Property and the Power of Eminent Domain* 155 (1985) ("In this case of threatened restrictions, the original owner of the land does not hold his title at the pleasure of the state. Instead, he has rights that are good against the state; there is no reason why he cannot convey to his purchaser whatever rights he has against the state.").

upon a taking of the property, the constitutional guarantee of just compensation will ensure that it will not discount the full development value of the parcel.[102]

The flaw in Michelman's position is easily illustrated if we simply assume that the property does not change hands during the debate period. If the legislation were passed and all development forbidden, the original owner surely would be entitled to compensation for the loss of the property interest (which is undoubtedly a "sharply crystallized investment-backed expectation").[103] The change in ownership during the debate period should not result in a different outcome regarding the availability of compensation because change in ownership does not defeat the existence of any type of property interest. Under Michelman's analysis, however, the transferring owner would experience an uncompensated taking because the new owner would discount the property's price to reflect the risk of an uncompensated loss of development rights. The practical effect of Michelman's rule would be a reduction in the marketability of property during periods of proposed regulatory change as owners sought to protect themselves against diminution of their property values by avoiding market transactions.

Despite its analytical and theoretical weaknesses, Michelman's argument has worked its way into takings jurisprudence.[104] The Supreme Court has, on numerous occasions, discussed the property owner's "expectations" in the context of the owner's reasonable expectation of future governmental regulation of the property involved. For example, in *Lucas*, Justice Scalia stated that property owners "necessarily" expect their property to periodically be subject to additional restrictions by the state, provided such restrictions are enacted as valid exercises of the police power.[105]

This notion—that the property owner's expectations are somehow bound up in the owner's ability to anticipate governmental regula-

---

102. *See* Epstein, *supra* note 101, at 155 (noting that Michelman "has the relationship between prices and rights backward. We do not use prices to determine rights; we use rights to determine prices.").

103. *See supra* note 64 and accompanying text.

104. Although the Supreme Court has never directly referred to this section of Michelman's analysis, other courts have. *See, e.g.*, HFH, Ltd. v. Superior Court, 542 P.2d 237, 246 (Cal. 1975), *cert. denied*, 425 U.S. 904 (1976). The influence of the argument is easily recognized in the Supreme Court's opinions, as discussed *infra* notes 106–20 and accompanying text.

105. 112 S. Ct. at 2899 (citing Pennsylvania Coal Co. v. Mahon, 260 U.S. 393, 413 (1922)).

tion—was articulated in earlier Court opinions as well.[106] In *Ruckelshaus v. Monsanto Co.*,[107] for example, the Court evaluated the petitioner's claim that it would suffer a compensable taking if the government were permitted to publicly disclose data (including trade secrets) that the petitioner had been required to submit in order to obtain registration of a pesticide under a federal statute.[108] The Court analyzed the issue in terms of the *Penn Central* three-part test, finding that the investment-backed expectations test was the controlling one under the facts before it.[109]

The *Monsanto* Court concluded that the challenged regulation did not interfere with investment-backed expectations because the petitioner had submitted its data to the government after the statute had been amended to clarify that disclosure might occur.[110] The petitioner was thus "on notice" regarding the government's ability to disclose the data. It had the option of either applying for registration for the pesticide and risking disclosure of its trade secrets, or forgoing the application procedure in order to protect its property interest.[111] The petitioner also had no legitimate claim of investment-backed expectations with respect to data submitted prior to the amendment of the statute because the government had never promised to keep such information private.[112] More important, the Court found that the heavily regulated nature of the pesticide industry should have put the petitioner on notice that future disclosure might occur.[113]

---

106. Each of which, incidentally, involved *non*-real property interests. *See infra* notes 107–19 and accompanying text (discussing *Monsanto*, *Connolly*, and *Gilliard*).

107. 467 U.S. 986 (1984).

108. The statute was the Federal Insecticide, Fungicide, and Rodenticide Act, 7 U.S.C. §§ 136–136y (1988). The property interest at stake was the petitioner's interest in its data, to the extent that that data were cognizable as trade-secret property rights under state law. *Monsanto*, 467 U.S. at 1003.

109. 467 U.S. at 1005.

110. *Id.* at 1006.

111. The Court rejected the petitioner's claim that the options presented to it were unconstitutional because they forced the petitioner to choose between obtaining registration or protecting its property interest. The Court noted that the government was free to regulate marketing and sale of pesticides and that the petitioner had the option of selling in foreign markets if it was unwilling to risk disclosure of its data. *Id.* at 1007 & n.11.

112. *Id.* at 1008 ("[A]bsent an express promise, [the petitioner] had no reasonable, investment-backed expectation that its information would remain inviolate in the hands of [the government].").

113. *Id.* at 1008–09. The Court further noted that between 1972 and 1978, the statutory scheme in effect permitted petitioners to designate data as trade secrets at the time of submitting the data, thus protecting the data from disclosure. The government's promise of confidentiality under those circumstances created "reasonable, investment-backed expectations" that that data would remain secret. If the government were to attempt to disclose that information, the Court concluded, a compensable taking would arise. *Id.* at 1011. *See also* Bowen v. Gilliard, 483 U.S. 587, 607 (1987)

One year later, the Court faced the same issue again, in *Nollan v. California Coastal Commission.*[114] This time, however, the Court found in favor of the property owner, not the government.[115] The California Coastal Commission had conditioned a building permit upon the property owners granting the public an easement to cross their beach. Both Justices Brennan and Blackmun, writing separate dissents, found it significant that the property owners had been aware of the Commission's policy before they purchased the property.[116] That knowledge, in their view, put the owners on notice of the restriction and prevented the owners from asserting a takings claim. The majority disagreed that *Nollan* was analogous to *Monsanto* or *Bowen v. Gilliard,*[117] finding that those two cases involved the yielding of a property right in exchange for a "valuable Government benefit."[118] Justice Scalia, writing for the majority, stated that the right to build on one's own private property may

---

(explaining that recipients of child support payments must anticipate that changes in law might reduce those payments); Connolly v. Pension Benefit Guar. Corp., 475 U.S. 211, 227 (1986) (finding that those who do business in a regulated field must anticipate amendments to regulation; thus, change in withdrawal liability provisions of federal statute did not work a taking as to trustees of pension funds affected by such change).

114. 483 U.S. 825 (1987).

115. The actual holding in *Nollan* was based on police power grounds. *See infra* note 239 and accompanying text.

116. *Nollan*, 483 U.S. at 859 (Brennan, J., dissenting) and 866 (Blackmun, J., dissenting).

117. 483 U.S. 587 (1987). *Gilliard* involved a regulation that reduced welfare benefits to families as a result of child support payments received by a single member of the family. The Supreme Court refused to find an interference with "vested protectable expectation[s]," noting that the government must remain free to modify legislation. *Id.* at 607. *Gilliard* presents a weaker case than *Monsanto* or *Connolly*, for in *Gilliard*, the petitioner's property interest arose from a welfare program voluntarily created by the government (and thus more clearly subject to governmental modification). In *Monsanto* and *Connolly*, on the other hand, the petitioners had property interests cognizable under state law that did not arise from governmental largesse.

118. 483 U.S. at 833–34 n.2 (citing Ruckelshaus v. Monsanto, 467 U.S. 986, 1007 (1984); *Gilliard*, 483 U.S. at 605). It is unclear what "property right" was at stake in *Gilliard.* Although the allegation was that a mandatory assignment of child support payments to the state in exchange for welfare benefits for the family unit was a taking of the child's private property, 483 U.S. at 595–96, the Court noted that under state law, "support is 'not a property right of the child.'" *Id.* at 607 (citing Layton v. Layton, 139 S.E.2d 732, 734 (N.C. 1965)). If the child has no property interest in future support payments, governmental modification of the right to receive such payments cannot work a taking.

The welfare payments at issue in *Gilliard* clearly did involve the granting of a government benefit to which conditions may be attached. *Monsanto*, on the other hand, involved the marketing of a product. While the government is entitled to regulate such marketing through police power actions intended to prevent harm to public safety and welfare, *see supra* note 15 and accompanying text, the right to market the product itself is hardly a "government benefit." The correct analysis in *Monsanto* should have centered on the legitimacy of the regulation under the police power. Thus, *Gilliard* and *Monsanto* are not analogous cases.

be conditioned upon "legitimate permitting requirements," but "cannot remotely be described as a 'governmental benefit.'"[119]

Thus, the Court has taken the position that property owners, at least under certain circumstances, ought to anticipate changes in the law and that anticipated changes will not constitute an interference with reasonable investment-backed expectations such that a compensable taking will arise.[120] This position leads to perverse outcomes. If we accept the premise that enactment of one piece of legislation puts a property owner "on notice" that more restrictive regulations might be enacted in the future as well, we find ourselves faced with a *reductio ad absurdum*—the existence of the first regulation will defeat any claims the owner might have regarding the sanctity of the property interest in the future. By merely enacting one regulation (even a relatively non-intrusive one that is clearly a legitimate exercise of the police power), the government opens a path for eventual, incremental taking of the entire property interest without payment of compensation.[121]

This position is untenable. The expectations of the property owner that a change in legislation might or might not occur, whether reasonable or not, and whether "investment-backed" or not, are utterly irrelevant to takings law. Provided it stays within the constraints of the police power, the government clearly has the power and the right to amend a regulation if it so wishes, regardless of whether that amendment is foreseeable to or expected by the affected property owner.[122] On the other hand, even a

---

119. *Nollan*, 483 U.S. at 834 n.2. Justice Brennan rejected this distinction, stating: "If the Court is somehow suggesting that 'the right to build on one's own property' has some privileged natural rights status, the argument is a curious one. By any traditional labor theory of value justification for property rights, Monsanto would have a superior claim . . . ." *Id.* at 860 n.10 (Brennan, J., dissenting) (citations omitted).

120. *See, e.g.*, Concrete Pipe & Prods., Inc. v. Construction Laborers Pension Trust, 113 S. Ct. 2264, 2292 (1993) (holding that those doing business in a regulated field have no "reasonable expectation" that they will not face additional financial liability as a result of changes in legislation); Connolly v. Pension Benefit Guar. Corp., 475 U.S. 211, 227 (1986) (noting that "prudent" petitioners were on notice from earlier amendments to the challenged statutes that future amendments might not only be enacted, but also impose additional financial obligations upon them). *Cf.* Kirby Forest Indus. v. United States, 467 U.S. 1, 14 (1984) (explaining that the principle underlying the investment-backed expectations factor is that where the "burdens consequent upon government action" are "substantial and unforeseeable," they must, in "justice and fairness," be "borne by the public as a whole").

121. As Epstein so succinctly put it, "Each round of government regulation thus provides justification for the next." Epstein, *supra* note 85, at 1371.

122. In the face of a legitimate exercise of the police power, property owners have no right to rely upon an expectation that the government will not alter an existing regulation *unless* the government promised that it would not *and* the owner relied upon that promise. In those instances, however, the owner's claim would seem to arise under estoppel or vested rights doctrine, not under the Takings

completely foreseeable regulatory change, if it exceeds the bounds of the police power, is impermissible. The foreseeability of regulatory amendment does not render that amendment constitutional; conversely, the difficulty of predicting the amendment does not render the regulation a taking.[123]

b. *The Meaning of "Investment-Backed"*

The mere fact that a property owner has an expectation backed by a monetary investment cannot be the basis for constitutional protection; if it were, this test would shift the power to determine the validity of regulations to property owners.[124] Suppose, for example, that a developer purchases a large parcel of land zoned for agricultural use for $100,000. As agricultural land, the property is worth $25,000; as commercial land, the property would be worth $200,000. The developer hopes to have the land rezoned for a higher density use and has paid a $75,000 premium for the land because of that expectation or desire. If the municipality refuses to rezone the land, the developer's *investment-backed* expectations have, without doubt, been interfered with, yet it is ludicrous to argue that the developer has suffered a compensable taking as a result of the municipality's refusal to change the existing zoning on the property.

A unilateral hope by the purchaser that the land will be rezoned to a higher use cannot, by itself, give rise to a compensable taking, for that

---

Clause. *See* Daniel R. Mandelker, *Investment-Backed Expectations: Is There a Taking?*, 31 Wash. U. J. Urb. & Contemp. L. 3, 5, 37–41 (1987). In Williamson County Regional Planning Comm'n v. Hamilton Bank, 473 U.S. 172 (1985), the Court declined to state whether the "economic viability" test would apply to a takings claim based upon "vested rights" or "expectation interest." *Id.* at 191–92 n.12. *Cf.* Kaiser Aetna v. United States, 444 U.S. 164, 179 (1979) (stating that action of a government official cannot "estop" the government, but "it can lead to the fruition of a number of expectancies embodied in the concept of 'property'—expectancies that, if sufficiently important, the Government must condemn and pay for").

123. *See* Louis Kaplow, *An Economic Analysis of Legal Transitions*, 99 Harv. L. Rev. 511, 524–25 (1986) (noting that arguments that actors should always anticipate legal change "begs the normative question . . . because the fact that legal change is expected does not imply that compensation is never appropriate in response").

124. This point is ably discussed in John A. Humbach, *Law and a New Land Ethic*, 74 Minn. L. Rev. 339, 360–65 (1989), in the context of economically viable uses. The same analysis applies to investment-backed expectations.

Justice Blackmun, dissenting in *Kaiser Aetna*, raised the concern that the extent of the owner's investment should not be permitted to influence the Court's analysis of a takings claim. He rejected the majority opinion, at least in part, because it "embrace[d] . . . an implication that the *amount* of the private investment somehow influences the legal result." Kaiser Aetna v. United States, 444 U.S. 164, 183 n.2 (1979) (Blackmun, J., dissenting). As he correctly noted, the outcome should be the same "whether the developer invested $100 or . . . 'millions of dollars.'" *Id.* at 184 n.2.

would mean that any individual willing to overpay for property could force a change in regulation. It may be that the undefined requirement that investment-backed expectations be "reasonable" is intended to address these types of concerns.[125] Indeed, the Court has noted in the past that "unilateral" expectations or "abstract" needs do not rise to the level of constitutionally protected interests.[126]

Nevertheless, Justice Brennan's discussion in *Penn Central* of "reasonable return" on investment could be read as stating that the government has an obligation (through modification of regulations) to assure owners a reasonable rate of return on their investments, even in light of changing circumstances.[127] The *Penn Central* Court emphasized that its holding was based upon the fact that the owners were able to use the Terminal for "its intended purposes and in a gainful fashion."[128] The opinion further suggested that a future change in circumstances that rendered the Terminal's use economically *non*-viable might entitle the owners to relief.[129]

The term "investment-backed" raises a second question: by using that term, does the Supreme Court mean to indicate that expectations that would be protected if they were investment-backed will not be protected if the owner received them through gift, inheritance, or devise? The Supreme Court seemed to suggest this result in *Hodel v. Irving*.[130] In response to extreme fractionalization of Indian lands, Congress enacted the Indian Land Consolidation Act of 1983, which provided for escheat of certain lands to the tribe, and which prohibited descent of those lands by intestacy or devise. The statute contained no provision for compensating disappointed heirs or devisees. The Court analyzed the statute under the familiar, three-prong inquiry regarding "the economic impact of the regulation, its interference with reasonable investment backed expectations, and the character of the governmental action."[131] Although the Court ultimately struck down the provision because of the

125. The Court has never indicated what makes an expectation "reasonable" or "unreasonable."

126. *See supra* note 82 and accompanying text.

127. Or perhaps even in light of overpayment by subsequent owners. *See supra* note 124 and accompanying text.

128. Penn Cent. Transp. Co. v. City of New York, 438 U.S. 104, 138 n.36 (1978).

129. *Id.* (noting that "[t]he city conceded at oral argument that if appellants can demonstrate at some point in the future that circumstances have so changed that the Terminal ceases to be 'economically viable,' appellants may obtain relief") (citation omitted).

130. 481 U.S. 704 (1987).

131. *Id.* at 714 (quoting Kaiser Aetna v. United States, 444 U.S. 164, 175 (1979)).

"extraordinary" nature of the regulation,[132] the majority opinion, penned by Justice O'Connor, contained disturbing dicta. The Court noted that virtually all of the owners had acquired their interests "by gift, descent, or devise"; thus, the Court concluded that it was "dubious" whether any of the owners had "investment-backed expectations in passing on [their] property." [133]

Taken literally, the Court's dicta leads to a ludicrous outcome. Surely the donee of property has the same rights regarding the use of his or her property that the purchaser of that property would have.[134] It seems highly improbable that the *Irving* Court would have actually held that a claimant who had purchased her fractionalized share of Indian lands was permitted to devise it, while simultaneously denying that right to a claimant who had received his share through inheritance or gift.[135]

Constitutional protection of property does not, and should not, depend upon either the unilateral actions of the property owner or the manner in which the property was acquired. The phrase "investment-backed," however, opens up the possibility that such impermissible considerations will be taken into account in evaluating a takings claim, and increases the likelihood that incorrect determinations will be made.

B. The Economically Viable Use Test

1. The Historical Antecedents of the Economically Viable Use Test

The second economic test developed by the Supreme Court is the economically viable use test. Although the *Penn Central* Court did mention "economically viable" uses, the reference was tangential and confined to a footnote.[136] This test was not explicitly articulated until the Supreme

---

132. *Id.* at 716–17 (recognizing the importance of the right to leave property to others through descent and devise within the American legal system and finding that a "total abrogation" of such rights is not permitted). Thus, the regulation was actually held invalid under the "character of the government action" prong of the *Penn Central* test.

133. *Id.* at 715. The Court indicated that none of the appellees could "point to any specific investment-backed expectations beyond the fact that their ancestors agreed to accept allotment only after ceding to the United States large parts of the original Great Sioux Reservation." *Id.*

134. *See* Epstein, *supra* note 85, at 1370.

135. The Court's language seems to suggest such an outcome: "Though it is conceivable that some of these interests were purchased with the expectation that the owners might pass on the remainder to their heirs at death, the property has been held in trust for the Indians for 100 years and is overwhelmingly acquired by gift, descent, or devise." 481 U.S. at 715.

136. *See* Penn Cent. Transp. Co. v. City of New York, 438 U.S. 104, 138 n.36 (1978) ("The city conceded at oral argument that if [the owners] can demonstrate at some point in the future that

Court decided *Agins v. City of Tiburon*[137] two years after *Penn Central*. In *Agins*, the Court held that a regulation constitutes a taking if the regulation fails to substantially advance a legitimate state interest *or* if it denies a property owner economically viable use of his or her property.[138] Since then, the Supreme Court has so often repeated the notion that a land-use regulation effects a taking if it denies the owner "economically viable use" of his or her property that its recitation has taken on the aura of an incantation.[139]

Although the Court introduced the economically viable use factor in *Agins*, the facts of the case made it a poor vehicle for exploring the boundaries of such a concept. *Agins* involved a challenge to a city plan that had reduced the permitted density on five acres of undeveloped land. In a short opinion, the Court unanimously held that the challenged regulation substantially advanced the legitimate state goal of protecting the city residents "from the ill effects of urbanization."[140] The Court went on to state that while the regulation undoubtedly did limit development of the land, it neither prevented the "best use" of the land nor "extinguish[ed] a fundamental attribute of ownership."[141] The Court did

---

circumstances have so changed that the Terminal ceases to be 'economically viable,' [the owners] may obtain relief."). The Court also noted that a regulation may "perhaps" constitute a taking "if it has an unduly harsh impact upon the owner's use of the property." *Id.* at 127. In fact, the property owners in *Penn Central* conceded that, even in the face of the regulation, they were able to make a reasonable return on their investment. *Id.* at 129. Thus, an economically viable use of the property undeniably existed; it simply was not the more profitable use desired by the owners.

137. 447 U.S. 255 (1980).

138. *See id.* at 260. In applying the first part of the test, the Court generally either applies the minimum rationality standard of substantive due process or looks to see whether the government is preventing nuisance-like conduct. *See* Peterson, *supra* note 12, at 1327–30. As discussed *infra* note 220 and accompanying text, I would argue that a regulation that fails to substantially advance a legitimate state interest is not a taking at all, but is rather an *invalid* regulation.

139. *See, e.g.*, Nollan v. California Coastal Comm'n, 483 U.S. 825, 834 (1987); Keystone Bituminous Coal Ass'n v. DeBenedictis, 480 U.S. 470, 485 (1987); MacDonald, Sommer & Frates v. County of Yolo, 477 U.S. 340, 349 (1986); United States v. Riverside Bayview Homes, Inc., 474 U.S. 121, 126 (1985); Williamson County Regional Planning Comm'n v. Hamilton Bank, 473 U.S. 172, 191 (1985); Kirby Forest Indus., Inc. v. United States, 467 U.S. 1, 14 (1984); Hodel v. Virginia Surface Mining & Reclamation Ass'n, 452 U.S. 264, 296 (1981); Schad v. Borough of Mount Ephraim, 452 U.S. 61, 68 (1981).

140. 447 U.S. at 261. According to the Court:

> The City Council . . . found that "[i]t is in the public interest to avoid unnecessary conversion of open space land to strictly urban uses, thereby protecting against the resultant adverse impacts, such as air, noise and water pollution, traffic congestion, destruction of scenic beauty, disturbance of the ecology and environment, hazards to geology, fire and flood, and other demonstrated consequences of urban sprawl."

Id. at 261 n.8 (citation omitted).

141. *Id.* at 262 (citations omitted).

not discuss the regulation's impact on development in terms of the economically viable use concept it had just introduced but rather noted that state law regulations on development ensured that the owners were "free to pursue their reasonable investment expectations by submitting a development plan to local officials."[142]

Although the Court applied the economically viable use test in several subsequent cases,[143] it was not until its 1992 decision in *Lucas* that the Court discussed the possible justifications underlying the test. Justice Scalia, writing for the *Lucas* majority, noted that as a general matter, the right to "use" property has long been viewed as a fundamental characteristic of property,[144] and the Supreme Court has been reluctant to allow excessive governmental interference with this right. The right to "use" is not absolute; thus, the *Agins* line of cases establishes that a taking of a substantial part of a property will not result in a compensable taking where the property as a whole retains an "economically viable use."[145] However, as Justice Scalia noted, from the landowner's viewpoint, total deprivation of economic use is no different from a physical appropriation.[146] Where such a deprivation has occurred, the legislature is not simply "adjusting the benefits and burdens of economic life"[147] so as to achieve an "average reciprocity of advantage" to all concerned.[148] Rather, where a regulation deprives an owner of all economically bene-

---

142. *Id.*

143. *See, e.g.*, Nollan v. California Coastal Comm'n, 483 U.S. 825, 853 (1987); Kirby Forest Indus., Inc. v. United States, 467 U.S. 1, 14 (1984); Hodel v. Virginia Surface Mining & Reclamation Ass'n, 452 U.S. 264, 296 (1981); San Diego Gas & Elec. Co. v. City of San Diego, 450 U.S. 621, 621 (1981). *See generally* cases cited *supra* note 9.

144. 112 S. Ct. 2886, 2893–95 (1992); *See also* Dickman v. Commissioner, 465 U.S. 330, 336 (1984) (quoting Passailaigue v. United States, 224 F. Supp. 682, 686 (M.D. Ga. 1963)):

> We have little difficulty accepting the theory that the use of valuable property . . . is itself a legally protectible property interest. Of the aggregate rights associated with any property interest, the right of use of property is perhaps of the highest order.
>
> One court put it succinctly: "'Property' is more than just the physical thing—the land, the bricks, the mortar—it is also the sum of all of the rights and powers incident to ownership of the physical thing. It is the tangible and the intangible. Property is composed of constituent elements and of these elements the right to *use* the physical thing to the exclusion of others is the most essential and beneficial. Without this right all other elements would be of little value."

Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419, 435 (1982); *See also* United States v. General Motors Corp., 323 U.S. 373, 378 (1945).

145. See cases cited *supra* note 9 and accompanying text.

146. 112 S. Ct. at 2894 (citing San Diego Gas & Elec. Co., 450 U.S. 621, 652 (1981) (Brennan, J., dissenting)).

147. *Id.* (quoting Penn Cent. Transp. Co. v. City of New York, 438 U.S. 104, 124 (1978)).

148. *Id.* (quoting Pennsylvania Coal Co. v. Mahon, 260 U.S. 393, 415 (1922)).

ficial or productive uses of his or her property, it becomes more likely that the regulation masks an invalid effort to press private property into public service.[149]

The economically viable use test has come to dominate regulatory takings cases. Like the investment-backed expectations test, however, the economically viable use test is salted with analytical ambiguities and flaws that make reasoned application of the test difficult, if not impossible.

2. *Ambiguities Inherent in the Notion of "Economically Viable Use"*

a. *The Economics of an Economically Viable Use*

The Supreme Court has never acknowledged the assumptions implicit in the phrase "economically viable use." An "economically viable use" can only be judged in reference to some base price, *i.e.*, as a return on investment. The Supreme Court has suggested in dicta on numerous occasions that the notion of "profit" is relevant to determining the existence of a regulatory taking,[150] although it has also stated that the "interest in anticipated gains has traditionally been viewed as less compelling than other property-related interests."[151] Certainly, the owner has no constitutional entitlement to make the "most beneficial use" of his or her property.[152] The question is whether the owner is constitutionally guaranteed the right to make a profit, and if so, how that profit should be calculated.

---

149. *Id.* at 2894–95 (citations omitted).

150. *See, e.g.*, Keystone Bituminous Coal Ass'n v. DeBenedictis, 480 U.S. 470, 495–96 (1987) (indicating that regulation will effect a taking if the uses remaining to the owner are "commercially impracticable . . . to continue"); United States v. Riverside Bayview Homes, Inc., 474 U.S. 121, 127 n.4 (1985) (stating that if uses left to owner are not "productive," the regulation may effect a taking); Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419, 436 (1982) (stating that "[a]lthough deprivation of the right to use and obtain a profit from property is not, in every case, independently sufficient to establish a taking . . . it is clearly relevant") (citation omitted); Penn Cent. Transp. Co. v. City of New York, 438 U.S. 104, 138 n.36 (1978) (stating that if the uses left for the owner are not "gainful," the regulation may effect a taking); Pennsylvania Coal Co. v. Mahon, 260 U.S. 393, 414 (1922) (indicating that regulation making property "commercially impracticable" to use "has very nearly the same effect for constitutional purposes as appropriating or destroying it").

151. Andrus v. Allard, 444 U.S. 51, 66 (1979). *See also Loretto*, 458 U.S. at 436 (stating that "deprivation of the right to use and obtain a profit from property is not, in every case, independently sufficient to establish a taking").

152. *See* Goldblatt v. Town of Hempstead, 369 U.S. 590, 592 (1962) (noting that if regulation is otherwise a valid police power act, "the fact that it deprives the property of its most beneficial use does not render it unconstitutional"); United States v. Central Eureka Mining Co., 357 U.S. 155, 168 (1958) (same).

Suppose that a regulation permits a use of property that generates $10,000 of net income each year. Whether that use is economically viable will depend in part upon the relevant interest rate and in part upon the value assigned to the underlying property. If the property is valued at $100,000, an annual net income of $10,000 probably is an economically viable use (assuming an interest rate that conforms to historical patterns). If the property is valued at $10 million, however, rational investors would regard the use as economically *non*viable.

Before a calculation of whether the use is "economically viable" can be made, therefore, it is necessary to identify the underlying property value on which the return is calculated. That underlying property value can be defined in several different ways. One possibility is the purchase price as the profitability of property necessarily is a function of the amount the owner paid for the property. Using purchase price to evaluate the economically viable use of property poses the same problem as using purchase price to evaluate investment-backed expectations:[153] can a property owner who has overpaid for property based upon an unrealistic unilateral expectation regarding future uses claim she has suffered a taking because she has been denied economically viable use of the property? The answer here, as in the investment-backed expectations context, must be "no." Takings jurisprudence cannot turn on the unilateral or subjective expectations of property owners.

In *Lucas*, for example, the property owner paid $975,000 for the two lots at issue. A short time later, the lots were rezoned so as to substantially restrict the uses to which they could be put.[154] As Justice Blackmun stated in his dissent, the property was not *completely* without use: the owner could "picnic, swim, camp in a tent, or live on the property in a movable trailer."[155] The owner could also sell the land to others or exclude other parties from it—both important attributes of property ownership.[156] The problem, in the majority's view, was that those uses were insufficient given the underlying value of the land. As Justice Blackmun noted, however, the lots had changed hands several times in the seven years before Lucas had purchased them. One of the lots originally sold

153. *See supra* note 124 and accompanying text.

154. Lucas v. South Carolina Coastal Council, 112 S. Ct. 2886, 2889 (1992).

155. *Id.* at 2908.

156. *Id.* Whether alienability of land so restricted in use is a valuable or meaningful property interest is a separate question, however, and one which Justice Blackmun did not address.

for $96,660 in 1979.[157] Had the person who purchased the property in 1979 still owned the property, would the uses left to the property have been deemed economically viable ones in that individual's hands? If the determination of economically viable use changes with purchase price, the constitutionality of regulation is, at least to some extent, determined by timing of ownership and market forces—an incongruous notion, as it means that regulations would be more likely to be unconstitutional as applied to a new owner who purchased the property in times of rising property values than in times of stagnating values, regardless of the fact that the regulation was in place when she bought the property.

Or suppose that Lucas had decided to cut his losses and had sold the property after the regulation for $50,000. Would the new owner be heard to complain?[158] The uses left to the property might well be "economically viable" given the reduced price of the property. That would mean, however, that the validity of regulation would be tied to the identity of the property owner and to the purchase price he or she paid—a very strange proposition indeed, and one that would both create massive uncertainty for government regulators and embroil courts in messy determinations of fact.

The correct analysis, of course, is that the timing of the property owner's acquisition of the property at stake is irrelevant to the determination of whether the regulation effects a taking. Nonetheless, the Court has indicated that "timing of acquisition" is "relevant to a takings analysis."[159] Timing of acquisition may well affect whether the owner has any expectations with regard to the use of the property, but it has nothing to do with the *constitutionality* of the underlying regulation. An invalid regulation does not become valid just because the property is now in the hands of a new, post-regulation owner.

---

157. *Id.* at 2905 n.3 ("The properties were sold frequently at rapidly escalating prices before Lucas purchased them. Lot 22 was first sold in 1979 for $96,660, sold in 1984 for $187,500, then in 1985 for $260,000, and, finally, to Lucas in 1986 for $475,000.").

158. Under Michelman's analysis, the answer would be "no" because the new owner purchased the property knowing of the restrictions. *See supra* notes 97–100 and accompanying text.

159. Andrus v. Allard, 444 U.S. 51, 65 n.21 (1979). In *Andrus*, the government had argued that the property owners had not clearly indicated they had purchased their avian artifacts before the regulation prohibiting the sale of such items had gone into effect, and that if the owners had purchased them *after* the regulation, the owners could not complain about any diminution in value caused by the challenged regulation. The Court seemed to accept this argument, noting that "[t]he timing of acquisition of the artifacts is relevant to a takings analysis of [the owners'] investment-backed expectations." *Id.* *See generally infra* notes 178–85 and accompanying text (discussing *Andrus*).

Rejection of purchase price as the basis for determining economically viable uses leads us to a second possibility: economically viable uses could be calculated relative to the fair market value of the property. This formulation would eliminate the possibility of unilateral manipulation by the property owner but would pose a separate issue of its own: should the market value be calculated before or after the effects of the disputed regulation are taken into account? Market value (at least of commercial and industrial property) is ordinarily a function of the rate of return on investment, which, at least in part, is a function of applicable land use regulations. Thus, using fair market value to determine economically viable use renders the entire analysis circular.[160]

For example, suppose that the highest and best use of property under current zoning practices generates $10,000 of annual income. If property of that type trades for 10 times earnings, the property's fair market value is $100,000. Assume that after the current owner paid that price for the property, a zoning ordinance is enacted that reduces annual earnings to $6,000. If the economically viable use of the property is calculated based upon the fair market value of the property *before* the regulation is placed into effect, any non-trivial diminution in return on investment could cause the zoning change to be labeled a taking. Indeed, under this approach, few regulations would survive a takings challenge. Regulations that reduce a property's rate of return in furtherance of a legitimate governmental objective would be as likely to be struck down as those that are really nothing more than disguised takings.

If the economically viable use is calculated based upon fair market value *after* the regulation is placed into effect, the existence of impermissible takings will be shielded by market forces. In the above example, the question would become whether $6,000 was an economically viable return on property now valued at $60,000 (10 times earnings). Obviously, this rate of return is identical to that received by the property owner when the property generated $10,000 a year on an underlying investment of $100,000. Virtually all regulations, provided they leave *some* return to property, would survive this formulation of the rule.

Also inherent in the economically viable use test is an assumption that maintenance of the status quo is the most to which a property owner is entitled. The *Penn Central* Court, for example, seemed to assume that

160. The Court recognized this in an analogous setting of rate-making. *See* Duquesne Light Co. v. Barasch, 488 U.S. 299, 309 n.5 (1989) ("capital assets [cannot] be valued by the stream of income they produced because setting that stream of income was the very object of the rate proceeding"). *See generally* Humbach, *supra* note 124, at 364.

continuation of current use (provided it is profitable) is the most to which an owner is entitled.[161] This is not necessarily true. Suppose, for example, that a property owner, *A*, builds a home on land zoned for single-family use, which she then leases for a profitable rent. Over time, the vacant land around her is rezoned and developed for industrial uses. Assume further that *A* can continue to get a reasonable return on her rental house,[162] but that her property would be far more valuable if rezoned and redeveloped for industrial uses. If the city were to refuse to rezone *A*'s land, despite the changed character of the area, it could scarcely claim that its refusal was conclusively a legitimate exercise of the police power simply because *A* was left with a reasonable return on investment. The disparity in zoning between *A*'s property and the surrounding property deprives *A* of any reciprocal benefit from the governmental regulation;[163] thus, the regulation is invalid.[164]

In sum, there is no certain base against which to measure the existence of "economically viable" uses. Without a clear foundation upon which to build, the economically viable use analysis necessarily fails.

b. The Relevancy of the Economically Viable Use Test to Takings Claims

The economically viable use factor, standing alone, provides little or no information regarding the validity of the takings claim. The true issue is the legitimacy of the governmental interest at stake. Suppose that *B* owns property zoned for single-family residential use; it is *B*'s intent to build a single-family home on the property for his own personal use in the near future. Zoned for this use, the property is worth $20,000. Before *B* begins construction, however, the city determines that a need for multi-family, low-income housing exists in the area, and that *B*'s property is the ideal location for such a use. It rezones *B*'s property for that use, prohibiting all less intense uses (including single-family residential use). All other property in the area is zoned for single-family use.

---

161. *See supra* notes 70–71 and accompanying text.

162. Of course, this raises the problematic issue of how a reasonable return ought to be calculated.

163. *See generally* Penn Cent. Transp. Co. v. City of New York, 438 U.S. 104, 133–35 (1978) (discussing relative benefits and burdens of regulation); Pennsylvania Coal Co. v. Mahon, 260 U.S. 393, 415 (1922); *see generally infra* note 229 and accompanying text.

164. This is the point that Justice Rehnquist made in his dissent in *Penn Central*. 438 U.S. at 143 (Rehnquist, J., dissenting) (discussed *supra* note 79 and accompanying text). Though invalid, the regulation is *not* a taking—a critical distinction that is discussed further at note 220 *infra* and accompanying text.

With the rezoning in place, the property is now worth $50,000. The city has no intention of building the multi-family, low-income housing itself; rather, it is hopeful that because it has zoned the property for such a use, *B* will sell the property to a developer who will undertake such a project.

B is now barred from developing his property in the way that he prefers. He is also prohibited from using his property in the same way that all of his neighbors are permitted to use theirs. He has suffered no loss in economically viable use, however; in fact, the value of his property has increased substantially. In such an instance, the court cannot rely solely upon the economically viable use factor in determining the validity of the regulation; rather, it must examine the regulation to determine whether it advances a legitimate state interest. If so, *B* will not be heard to complain. If not, the regulation is invalid, despite the fact that *B*'s property has not diminished in market value (and has, in fact, increased in value).[165]

Similarly, a regulation may deny an owner all economically viable use without effecting a taking. The classic example is that of arid land suitable only for uranium mining.[166] The government is clearly entitled to ban uranium mining by the public, but if it does so, it will deprive the land owner of any economically viable use of the property. Nonetheless, the regulation does not result in a taking because the governmental interest at stake is undeniably legitimate.[167]

Thus, the economically viable use factor sheds no light on whether a particular regulation has effected a taking. A taking may exist when a property owner retains economically viable use; similarly, no taking may be present even though a property owner has been totally deprived of

---

165. This, of course, raises the issue of what compensation is due under these circumstances. Determination of compensation is a separate issue from identification of a taking, however; an action that is otherwise an impermissible taking or invalid exercise of the police power is not rendered constitutional merely because damages are small or difficult to evaluate. In *Loretto*, for example, the Court found that the physical intrusion caused by the installation of cable television equipment no "bigger than a bread box," 458 U.S. 419, 438 n.16 (1982), resulted in a taking, even though the damages were extremely small. The property owner had contended that her loss should be measured in terms of a percentage of the gross revenues received by the television company from her building. *Id.* at 443 (Blackmun, J., dissenting). A state agency determined that her loss was measured by the damage to her building, and assessed a one-time payment of one dollar. *Id.* at 423–24. The Supreme Court did not address the damage issue, but remanded it to the state courts, which upheld the award of one dollar. *See* Loretto v. Teleprompter Manhattan CATV Corp., 446 N.E.2d 428 (N.Y. 1983).

166. *See, e.g.*, William W. Fisher III, *The Trouble with Lucas*, 45 Stan. L. Rev. 1393, 1403 (1993).

167. Moreover, the regulation substantially furthers that legitimate purpose, and the government's interest in the regulation outweighs the burden placed on the property owner. *See infra* note 236 and accompanying text (discussing test for determining validity of police power action).

economically viable use of his or her property. The Supreme Court has implicitly recognized this fact. In the few cases in which the Court has struck down a regulation as an invalid taking, the holdings have often been based upon determinations that the regulations did not properly further a legitimate state interest.[168] Even in *Lucas*, the Court did not actually hold that the deprivation of all economically viable use inevitably leads to a taking; rather, the majority found that total deprivation of economically viable use was permitted when supported by underlying principles of state law.[169] Retention or deprivation of economically viable use is not a litmus test for regulatory takings.

c. *Defining the Underlying Property Interest*

The economically viable use test implicates the segmentation issue raised by the investment-backed expectations test as discussed above.[170] In earlier cases, the Supreme Court had suggested that in determining whether all economically viable use of property has been appropriated, the "property" is the parcel as a single whole. The Court will not segment the property into different property interests in evaluating whether a regulatory taking has occurred.[171]

In *Lucas*, Justice Scalia opened the door to further debate on this issue. As he noted, a major failing of the deprivation of all economically

---

168. *See, e.g.*, Nollan v. California Coastal Comm'n, 438 U.S. 825, 838–42 (1987) (striking down a building permit condition requiring property owners to grant the public an easement across their beach because the condition did not further a legitimate police-power purpose); Hodel v. Irving, 481 U.S. 704, 717–18 (1987) (holding that governmental objective of consolidating Indian lands was valid, but that the regulation that prevented the descent and devise even of non-fractionalized lands did not further that goal).

169. 112 S. Ct. 2886, 2900–01 (1992). The Court had intimated in earlier cases as well that confiscation of all use of property would generally constitute a taking, *see, e.g.*, Williamson County Regional Planning Comm'n v. Hamilton Bank, 473 U.S. 172, 191 (1985); MacDonald, Sommer & Frates v. County of Yolo, 477 U.S. 340, 352–53 (1986), although it had also suggested that a taking of all use would be allowed if contemplated by common law rules of nuisance. *See* First English Evangelical Lutheran Church v. County of Los Angeles, 482 U.S. 304, 313 (1987) ("We . . . have no occasion to decide whether the ordinance at issue actually denied appellant all use of its property or whether the county might avoid the conclusion that a compensable taking had occurred by establishing that the denial of all use was insulated as a part of the State's authority to enact safety regulations.") (footnote and citations omitted). *See also* United States v. Caltex (Philippines), Inc., 344 U.S. 149 (1952) (finding no taking occurred where government destroyed oil company facilities in the Philippines during World War II to prevent them from falling into the hands of the enemy); Miller v. Schoene, 276 U.S. 272 (1928) (finding no taking occurred where government destroyed decorative cedar trees infected by a disease that threatened commercial apple trees).

170. *See supra* notes 56–64 and accompanying text.

171. *See supra* note 61 and accompanying text.

viable use rule is that it does not indicate the "property interest" against which the loss of value is to be measured.[172] If a regulation prohibits use of 90% of a tract, should the burdened parcel be defined as the 90% of the whole so burdened or as the entire parcel itself? The distinction is a critical one because the per se rule laid down in *Lucas* applies only to total takings, not to partial ones. A single regulation could give rise to two different outcomes, depending upon how the segmentation issue is resolved. If the regulation is interpreted as being a partial taking of the entire parcel, no compensation would be mandated under *Lucas*. If the regulation were interpreted as effecting a total taking of the burdened portion, on the other hand, compensation would be required. The *Lucas* Court found that it need not reach the issue because the regulation there clearly effected a total deprivation of use of the entire parcel. Justice Scalia thus left the issue unresolved, although he suggested that underlying state law property principles would influence the outcome.[173]

The prototypical case involves a partial taking, however; total takings are rare. Thus, *Lucas* avoids the most pressing question regarding the economically viable use test: what is the property interest against which the loss of use is to be gauged?

---

172. 112 S. Ct. at 2894 n.7.

173. *Id.* ("The answer to this difficult question may lie in how the owner's reasonable expectations have been shaped by the state's law of property—*i.e.*, whether and to what degree the state's law has accorded legal recognition and protection to the particular interest in land with respect to which the takings claimant alleges a diminution in—or elimination of—value."). Nonetheless, Justice Scalia clearly saw a distinction between a regulation that takes *all* economically beneficial uses of private property, and one that takes less than all, even if the taking approaches totality. In his dissent, Justice Stevens criticized the majority's holding as being arbitrary, noting that "[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." *Id.* at 2919 (Stevens, J., dissenting). While Justice Scalia conceded this might well be true in some cases, he contended that "that occasional result" was no different than the differing outcomes reached when a landowner's property was taken for a highway (where recovery is full) and a landowner whose property value is reduced to 5% by the construction of the highway (where no recovery is available). *Id.* at 2895 n.8. In his words, "[t]akings law is full of these 'all-or-nothing' situations." *Id.*

As Epstein points out, Justice Scalia's analogy is faulty. It compares physical condemnation of land, which "is a taking in the traditional sense of that term," to diminution in value caused by construction of a highway elsewhere, which is "merely a form of competition against which no landowner is ever entitled to compensation." Epstein, *supra* note 85, at 1376. In the first instance, property has been taken and used by the government; in the second, no property interest has been taken so the reduction in value is not constitutionally compensable. *Id.* Moreover, even if the analogy were correct, Justice Scalia ought to explain why such all-or-nothing situations should be tolerated. Their mere existence alone is not sufficient justification for their continued perpetuation.

d. The "Personal/Real Property" Dichotomy

In *Lucas*, Justice Scalia indicated that property owners ought reasonably to expect that their *personal* property could be rendered economically valueless,[174] although he found that the "historical compact" memorialized in the Takings Clause would prohibit the total elimination of economically valuable use in *land*.[175] Scholars are confounded by this "naked assertion," for which Justice Scalia offered no external support.[176] No previous Supreme Court decision had made such a bald distinction between personal and real property.[177]

The *Lucas* Court's observation apparently stems from its attempt to reconcile its decision with the Court's unanimous decision in a 1979 opinion, *Andrus v. Allard*.[178] In *Andrus*, the Court upheld a regulation prohibiting commercial transactions in legally obtained bird parts (more specifically, feathers of eagles and other protected birds). The regulation severely limited the uses to which appellees could put the avian artifacts that they owned and prohibited the sale of such artifacts.

---

174. 112 S. Ct. 2886, 2899 (1992) ("in the case of personal property," the property owner "ought to be aware of the possibility that new regulation might even render his property economically worthless (at least if the property's only economically productive use is sale or manufacture for sale)") (citing Andrus v. Allard, 444 U.S. 51, 66–67 (1979)). In *Andrus*, the Court upheld a federal regulation that prohibited commercial transactions in legally obtained bird parts. *See infra* notes 178–85 and accompanying text.

175. *Lucas*, 112 S. Ct. at 2900 (footnote omitted). Justice Scalia did not explain the "historical compact" that rendered these two classes of property subject to differing levels of constitutional protection.

176. *See, e.g.*, Frank I. Michelman, *Property, Federalism, and Jurisprudence: A Comment on Lucas and Judicial Conservatism*, 35 Wm. & Mary L. Rev. 301, 322–23 (1993).

177. However, the real/personal property distinction drawn by Justice Scalia in *Lucas* was foreshadowed in Kirby Forest Indus. v. United States, 467 U.S. 1 (1984), where the Court stated: "[w]e have no occasion here to determine whether an abrogation of an owner's right to sell *real* property, combined with a sufficiently substantial diminution of its utility to the owner, would give rise to a taking." *Id.* at 15 n.25 (emphasis added).

178. 444 U.S. 51 (1979). Justice Scalia is apparently no fan of the *Andrus* decision (in which he took no part as he had not yet joined the Court). In Hodel v. Irving, 481 U.S. 704 (1987), for example, Justice Scalia indicated in a concurrence that he found the statutes at issue in *Irving* and *Andrus* "indistinguishable" and that he would thus interpret the *Irving* decision as "effectively limit[ing] [*Andrus*] to its facts." *Id.* at 719 (Scalia, J., concurring). The *Andrus* decision has proven unsettling to other Justices as well. In his dissent in *Keystone*, Justice Rehnquist sought to distinguish *Andrus* on the grounds that the government had not confiscated the avian artifacts in that case, nor had the government prohibited every use of the property. Keystone Bituminous Coal Ass'n v. DeBenedictis, 480 U.S. 470, 517 (1987) (Rehnquist, C.J., dissenting). Justice Rehnquist concluded that *Andrus* survived the takings challenge because the government had "merely inhibit[ed] one strand in the bundle," rather than "destroy[ing] completely any interest in a segment of property." *Id.* at 518.

In reaching its holding, the *Andrus* Court stated that a mere reduction in property value alone does not create a taking.[179] Although the reduction in value in *Andrus* was substantial, the Court found that the appellees did retain some ability to derive an economic profit from the artifacts, suggesting that the appellees might charge admission to view the bird parts.[180] The parts were not confiscated by the government, nor were they subjected to restraint or physical invasion.[181] The Court considered the profit that the appellees might have expected to earn from the sale of the artifacts had that sale not been rendered illegal too speculative and uncertain to support a claim that a property interest had been taken.[182]

The *Andrus* Court cited in support of its holding two cases in which bans on the sale of alcoholic beverages were upheld in the face of claims that the regulations effected a taking as to those individuals who had previously acquired stocks of alcohol that could not now be sold.[183] Those cases are distinguishable from *Andrus*. In the alcoholic beverages cases, the government had made a legislative determination (whether correct or not) that the sale and ingestion of alcoholic beverages had a detrimental impact upon the public welfare. In order to prevent the identified harm, *no* alcoholic beverages could be sold or drunk, whether manufactured (or acquired) before or after the regulation was enacted. The issue was one of identifying a public harm and undertaking a valid police power action to counteract it. To the extent that the bans were valid exercises of the police power, they did not effect a taking.

Andrus does not present the same clear issue of preventing a future harm. The ban on the sale of bird parts from certain species was intended to prevent the destruction of these species—an undeniably legitimate legislative goal.[184] What is less clear is whether prohibiting the sale of bird parts legally obtained *prior* to the ban furthered that legislative objective of species protection, or whether the governmental purpose might have been achieved through a less restrictive means, such

179. 444 U.S. at 66.

180. One is reminded of Justice Blackmun's suggestion in *Lucas* that the petitioner's property was not rendered valueless because he could still "picnic, swim, camp in a tent, or live on the property in a movable trailer." 112 S. Ct. at 2908 (Blackmun, J., dissenting).

181. 444 U.S. at 65.

182. *Id.* at 66.

183. *See* James Everard's Breweries v. Day, 265 U.S. 545 (1924); Jacob Ruppert, Inc. v. Caffey, 251 U.S. 264 (1920).

184. 444 U.S. at 52–53.

as banning sales of future artifacts but permitting transactions in previously existing objects.[185]

Although the *Andrus* Court acknowledged that the prohibition virtually eliminated the value of the appellees' property, it nonetheless denied that a taking had occurred. That decision might well be correct, if indeed the prohibition was necessary to promote the governmental goal. The *Andrus* Court failed to address this critical question, however. Moreover, having said in *Andrus* that virtual destruction of economic value will not necessarily lead to a taking, the Court found itself in a bind when it wanted to hold in *Lucas* that a total destruction of economic value was a per se taking. The Court adopted the real/personal property distinction drawn by Justice Scalia as its way out of this conceptual dilemma. This distinction is not only artificial, it is wrong. Either total destruction of private property is constitutionally permissible or it is not; the Constitution draws no distinction between the natures of the underlying property interests.[186]

II. RESURRECTING THE CORRECT FRAMEWORK FOR TAKINGS ANALYSIS

Over the past sixteen years, the Supreme Court has increasingly committed itself to a regulatory takings analysis that focuses extensively, if not exclusively, upon the economic effects of the regulation upon the property owner. The Court has ignored the difficulties associated with the investment-backed expectations and economically viable use tests. Although the regulatory takings issue is by no means subject to facile resolution, neither is it completely intractable. If we sweep aside the economic tests, and all of their congenital defects, the solution becomes apparent. Regulatory takings analysis does not require new theories. Existing police power and eminent domain theories, properly revived and

185. One could, perhaps, argue that the continued sale of legally obtained parts would undermine the protection extended to those species under the new act, but the argument seems attenuated.

186. In addition, juxtaposing the *Irving* and *Andrus* cases raises an interesting question. The *Andrus* Court held that the regulated bird parts had not been taken because the owners retained the rights "to possess and transport their property, and to donate or devise the protected birds." 444 U.S. at 66. The *Irving* Court, on the other hand, seemed to suggest that donated or devised property was not deserving of constitutional protection because it was not supported by investment-backed expectations. 481 U.S. 704, 715 (1987). Does this mean that the government could confiscate personal property without compensation through a two-step process—by first regulating away all but the right to donate or devise the property on the grounds that some incidents of ownership had been left to the owner, and then by confiscating the property once it had changed hands on the ground that the new owner had no investment-backed expectations in the property? Such a result would be ludicrous, yet a literal reading of the two opinions would seem to support it.

carefully reconstructed, provide the tools for correct resolution of regulatory takings cases.

A. Rejection of the Economic Tests

In *Penn Central* and its early progeny, the Supreme Court used the investment-backed expectations and economically viable use tests as ways to measure whether a particular regulation was merely a constitutionally compensable taking in disguise. Instead of providing workable standards for gauging regulatory takings, however, the tests moved the Court ever closer to inappropriate determinations.

As discussed above,[187] the economic tests provide no answers to the more difficult analytic issues raised by regulatory takings. The segmentation problem[188] persists under these tests; no rational rule can be created for the vast majority of takings cases until that issue is resolved. In addition, both tests turn on the notion of the property owner's investment: neither economically viable uses nor investment-backed expectations can be gauged except in reference to some underlying base value.[189] Because no clearly identifiable base value exists, application of both tests is suspect. Finally, the tests can lead to inconsistent treatment of property owners. The tests potentially apply in different manners to different persons, depending upon the nature of their property (*i.e.*, whether real or personal),[190] the manner in which they acquired the property,[191] or the time at which they acquired it.[192]

More fundamentally, however, the economic tests fail because they focus on the wrong inquiry. The Constitution mandates compensation for the taking of *property interests*, not for the infliction of negative *economic impacts*.[193] True, the deprivation of an economic interest may well signal the taking of a protected property right. However, no one-to-one equivalency exists here. Not all economic interests are protected prop-

187. *See supra* part I.

188. *See supra* notes 56–64 and accompanying text.

189. *See supra* notes 124–29, 150–58 and accompanying text.

190. *See supra* notes 174–86 and accompanying text.

191. *See supra* notes 130–35 and accompanying text.

192. *See supra* notes 154–59 and accompanying text.

193. As Justice Brennan wrote: "Suffice it to say that government regulation—by definition—involves the adjustment of rights for the public good. Often this adjustment curtails some potential for the use or economic exploitation of private property. To require compensation in all such circumstances would effectively compel the government to regulate by *purchase*." Andrus v. Allard, 444 U.S. 51, 65 (1979).

erty rights.[194] For example, the government may rescind a government-issued permit without paying compensation, even though that permit might trade in the private marketplace for value.[195] Likewise, unilateral expectations of economic value or use by the property owner do not rise to the level of constitutionally protected private property rights.[196]

In addition, not all protected property rights have noticeable economic value. Because their value is not easily measured in monetary terms, these interests often receive short shrift from the Court. In *Lucas*, for example, Justice Scalia noted that "there are plainly a number of non-economic interests in land whose impairment will invite exceedingly close scrutiny under the Takings Clause."[197] Although Justice Scalia's statement is absolutely correct, it obscures the more important point: those noneconomic interests to which he refers are *property rights* and ought to be addressed as such.

As Justice Stevens has noted, the Constitution "draws no distinction between grand larceny and petty larceny."[198] Regulations may easily deprive owners of incidents of their property ownership which, while of minimal or no economic value, are nonetheless very real confiscations.[199] The lack of economic impact goes to the measure of damages, not to the determination of the taking.[200]

By failing to recognize that noneconomic property rights are indeed property interests entitled to the same protection as economic property interests, the Court finds itself venturing down incorrect analytical paths. In *PruneYard Shopping Center v. Robins*,[201] for example, the Court held

194. The Supreme Court has used circular language to explain this proposition: "[N]ot all economic interests are 'property rights'; only those economic advantages are 'rights' which have the law back of them, and only when they are so recognized may courts compel others to forbear from interfering with them or to compensate for their invasion." United States v. Willow River Power Co., 324 U.S. 499, 502–03 (1945). This is the same circular argument discussed and dismissed earlier. *See supra* notes 91–95 and accompanying text.

195. *See* United States v. Fuller, 409 U.S. 488, 488–89 (1973).

196. *See supra* note 82 and accompanying text.

197. 112 S. Ct. 2886, 2895 (1992). Justice Scalia went on to note that the interest in excluding strangers from one's land is just such an interest, citing *Loretto*. *Id.*

198. Hodel v. Irving, 481 U.S. 704, 727 (1987) (Stevens, J., concurring).

199. As Justice Stevens noted in his dissent in *Lucas*, a regulation which "arbitrarily prohibit[ed] an owner from continuing to use her property for bird-watching or sunbathing" could well be a taking even though the use might have little market value. 112 S. Ct. at 2919 n.3 (Stevens, J., dissenting).

200. Thus, for example, the property owner in *Loretto* received "just compensation" of one dollar for the taking that she suffered. *See supra* note 165.

201. 447 U.S. 74 (1980).

that the property interests of shopping center owners were not taken by a state court's determination that the state constitution protecting free speech forbade the owners from banning solicitors from their premises. The *PruneYard* Court acknowledged that "one of the essential sticks in the bundle of property rights is the right to exclude others" and that that right had been "take[n]."[202] Nonetheless, the Court found that there was no violation of the Takings Clause because there was no evidence that requiring the owners to permit solicitation on their property would "unreasonably impair the value or use of their property."[203] The Court quite clearly regarded the showing of economic harm as an essential precursor to the finding of a taking.[204] Because the Court found no economic impact, it found no taking, and perforce, held the regulation valid.

The *PruneYard* Court's analysis was both circular and simplistic. The Court noted that "[i]t is . . . well established that a State in the exercise of its police power may adopt reasonable restrictions on private property so long as the restrictions do not amount to a taking without just compensation or contravene any other federal constitutional provision."[205] It then rejected the property owners' allegation that the requirement that the shopping center permit solicitors "to exercise state-protected rights of free expression and petition on shopping center property" was a taking, finding that the requirement did not impair the economic value of the property to the landowners.[206] The Court did not inquire into the state interest at stake or whether that interest could properly be pursued using the police power. Ignoring these inquiries can lead to incorrect outcomes. For example, suppose that the Court found no adverse economic impact from a regulation requiring the shopping center owner to make available its fountains for model boat races. The *PruneYard* analysis suggests that such a finding would end the Court's inquiry into the validity of the regulation—a ludicrous result. Adverse economic impact,

202. *Id.* at 82.

203. *Id.* at 83.

204. *Id.* at 84. "[H]ere [the owners] have failed to demonstrate that the 'right to exclude others' is so essential to the use or economic value of their property that the state-authorized limitation of it amounted to a 'taking.'" *Id.* One might wonder how such a showing would be made. Clearly, the owners perceived that a loss of the right to ban solicitors harmed their interests, or they would not have brought the suit. Moreover, as the *Loretto* Court implicitly recognized, the loss of the right to exclude is a loss of a real, constitutionally protected property right, whether accompanied by an economic harm or not. *See supra* note 165.

205. 447 U.S. at 81.

206. *Id.* at 83.

while relevant to the takings issue, cannot be a *mandatory* element in invalidating a regulation.

Moreover, there are clearly instances in which regulations effect a taking even though there are economic interests at stake that have not been destroyed. Because the economic impact on the property owner falls short of precluding all use of the property, the Court can be led to conclude wrongly that no taking exists. *Penn Central* is just such a case. The facts there indicated that the challenged regulation had very little impact on the historic and current uses of the Terminal. Indeed, the property owners conceded that the regulation did not prevent them from earning a reasonable return on their investment.[207] In effect, the *Penn Central* Court stated that as long as the status quo regarding current use was maintained, and as long as the owners received a "reasonable return," the challenged regulations would not effect a taking. The Court ignored the more fundamental questions, however, which were whether the governmental objectives underlying the regulations were legitimate and whether these objectives were accomplished through a valid exercise of the police power.[208] If, in fact, the regulation was based in the eminent domain power, compensation was constitutionally mandated.[209]

Finally, the economic tests ignore the fact that, under certain circumstances, valid regulations may indeed take all economically viable use or destroy all reasonable investment-backed expectations. Where the governmental interest at stake is sufficiently important and the action is properly grounded in the police power, intrusion, even total intrusion, upon the economic interests of the property owner is permissible. The prototypical examples are regulations banning contraband, such as illegal

---

207. 438 U.S. 104, 129 (1978).

208. As discussed below, the legitimacy of the regulatory purpose and the means used to achieve it are the critical issues in determining whether a regulatory taking exists. *See infra* note 236 and accompanying text. In order to determine whether the challenged regulations in *Penn Central* were takings, we need to determine whether the preservation of historic landmarks legitimately promotes the public welfare, *see infra* note 236 and accompanying text, or whether such regulations are a taking of private property for a public use, for which compensation must be paid. In fairness to the *Penn Central* Court, that issue was not actually before it because the property owners had conceded that the city's goal of preserving historic landmarks was "an entirely permissible governmental goal" and that the challenged regulations were an "appropriate means" of achieving that goal. 438 U.S. at 129.

209. The facts seem to suggest that the city may have viewed the regulation as being based in the eminent domain power as the city had provided some compensation for the loss of the air rights in the form of transferable development rights. *Id.* The owners conceded that these rights were "valuable," *id.*, but contended that the transferable development rights were insufficient as a monetary matter to constitute just compensation. *Id.* at 136 n.33. The dissent would have remanded for a factual determination on this issue. *Id.* at 151–52 (Rehnquist, J., dissenting).

drugs or alcohol. Suppose, for example, that the legislature determined that the public safety risks posed by fireworks were so grave that the manufacture, sale, and distribution of these products must be banned. There is little doubt that the legislature could ban fireworks, just as it has banned substances such as cocaine, heroin, and marijuana.[210]

Equally clearly, the legislation will have a substantial and negative impact upon investment-backed expectations and economically viable uses. Imagine, for example, *A*, a distributor with a warehouse full of cases of fireworks. As a result of the legislative ban, *A*'s inventory is now rendered worthless. Prior to the legislation, *A* clearly had an expectation that he had a protected property interest in those fireworks. His expectation was undeniably backed by the monetary investment he made in purchasing the fireworks from the manufacturer for resale. Nonetheless, any arguments by *A* that the government should be required to pay just compensation for the now worthless fireworks will fail.

The result cannot be explained away by Justice Scalia's contention that personal property (such as fireworks) receives less constitutional protection than real property. Imagine, for example, *B*, a fireworks manufacturer with a factory designed and devoted exclusively to the manufacture of these now forbidden items. Her factory is rendered useless, and thus worthless, by the ban. Although *B* presumably could tear down the factory, or modify it for other use, it is not unlikely that the costs of doing so would exceed the value of the underlying real property. Suppose the factory and land, the day prior to regulation, had a market value of $1 million. If the underlying land is valued at $300,000, and the costs of demolishing or modifying the building are $500,000, it is easy to see that *B* has lost all economically viable use of the property. Yet, again, it is unlikely that courts would find that *B* had suffered a compensable taking.

The Supreme Court has upheld total destruction of property in a number of cases. In *Miller v. Schoene*,[211] for example, the Court permitted the destruction without compensation of privately owned red cedar trees in order to prevent them from spreading disease to nearby apple trees. Likewise, in *United States v. Caltex (Philippines), Inc.*,[212] the Court permitted the destruction without compensation of property by the Army in an effort to prevent the property from being seized by enemy forces.

---

210. Legislation banning contraband falls within the bounds of a legitimate exercise of the police power. *See supra* note 16 and accompanying text.

211. 276 U.S. 272 (1928).

212. 344 U.S. 149 (1952).

The key to each of these cases lies not in the economic effect upon the property owner (which was undeniably complete in its devastation), but in the importance of the governmental objective underlying the governmental action, in the close relationship between that governmental objective and the challenged act, and in the nature of the power being exercised.

The economic tests turn regulatory takings jurisprudence on its head by focusing primarily, if not exclusively, on the economic effects of the challenged action upon the individual property owner. While this issue may be of some relevance in analyzing a takings claim, the important issue, as discussed in the next section, is the legitimacy of the governmental objective at stake and the character of the governmental action taken in pursuit of that goal.

B. Towards a Correct Framework for Takings Analysis

1. Traditional Analysis and the Regulatory Takings Continuum

If we are to clear away the debris created by the economic tests, we must address the critical question: how should regulatory takings claims be resolved? The answer to this question does not require the formulation of radical new takings theories. The building blocks of a coherent and correct takings theory already exist; they simply need to be resurrected and reassembled in the proper fashion.

Recent regulatory takings law has viewed exercises of the police power and the eminent domain power as anchoring opposite ends of a continuum.[213] As a police power act moves closer and closer to some

213. This concept is grounded in Justice Holmes' opinion in *Mahon*, where he stated: "When [regulation] reaches a certain magnitude, in most if not in all cases there must be an exercise of eminent domain and compensation to sustain the act." 260 U.S. 393, 413 (1922). Originally, the continuum notion did not exist. *See* William B. Stoebuck, *Police Power, Takings, and Due Process*, 37 Wash. & Lee L. Rev. 1057, 1069 (1980) ("Stated in their simplest, starkest forms, *Mugler v. Kansas* and the numerous decisions following it stand for the proposition that no exercise of the police power is a taking; police power is one thing; eminent domain another."). As Professor Costonis pointed out, the police and eminent domain powers are, in certain ways, polar opposites:

> Through the welfare principle, the police power deliberately envisages the redistribution of utility, often in the form of recognized interests in real property, as a means of furthering the community's "health, safety, morals, or general welfare.". . . The eminent domain power, through its indemnity principle, cuts the other way: its charge is protection of the individual, not the community, by making the individual whole in the wake of governmental acts that redistribute his or her property rights to others.

Costonis, *supra* note 20, at 478 (footnotes omitted). Twentieth-century legal doctrine has ignored this distinction and has caused the powers to converge. *Id.* at 479.

invisible line, it ceases to be a valid exercise of the police power and becomes instead a "regulatory taking"—a back-door exercise of the eminent domain power for which compensation is constitutionally mandated.

The mooring of the eminent domain end of the continuum is easy to identify—the conventional physical taking of property. Traditional analysis uses that familiar starting point and attempts to construct from it a paradigm for determining when a regulation has substantially the same effect as a physical taking and hence becomes a "regulatory taking." The economic tests are the direct, and even natural, result of this effort. Where no physical taking is present, the Court looks to see whether the economic effect of the regulation upon the property owner has the practical effect of a physical taking.[214] The investment-backed expectations and economically viable uses tests thus act as proxies for physical takings in the regulatory setting.

Following the continuum analysis to its logical conclusion, Supreme Court opinions predating *Lucas* suggested that a regulatory taking occurs *only* when the physical occupation or economic tests were satisfied. Indeed, these opinions suggested that if the tests are satisfied, a per se taking exists. This, in fact, was precisely the result toward which many commentators thought regulatory takings jurisprudence was headed. In evaluating the impact of the three takings cases decided by the Supreme Court in its 1987 term,[215] Michelman summed up the state of takings doctrine as follows:

> Doctrine appears to be moving in the direction of resolution into a series of categorical "either-ors": *either* (a) the regulation is categorically a taking of property because (i) it works a permanent physical occupation (however practically trivial) of private property by the government, or, perhaps, specifically undermines a "distinct investment-backed expectation," or (ii) it totally eliminates the property's economic value or "viability" to its nominal owner, *or* (b) the regulation is categorically not a taking.[216]

The direction of doctrinal development was troublesome, for it elevated the status of the extremely problematic economic tests to that of a touchstone for regulatory takings. This was the abyss that Justice Scalia

---

214. *See, e.g.*, Lucas v. South Carolina Coastal Council, 112 S. Ct. 2886, 2894 (1993).

215. These cases, commonly known as the "Takings Trilogy," were Nollan v. California Coastal Comm'n, 483 U.S. 825 (1987); First English Evangelical Lutheran Church v. County of Los Angeles, 482 U.S. 304 (1987); and Keystone Bituminous Coal Ass'n v. DeBenedictis, 480 U.S. 470 (1987).

216. Michelman, *supra* note 25, at 1622.

saw looming before the Court in *Lucas*, and his opinion in that case represents an imperfect but valiant effort to step back from the brink of jurisprudential disaster. Although he was unwilling to forsake the economic tests altogether,[217] Justice Scalia recognized that the economic interests of the property owner alone could not be permitted to determine the validity of governmental regulation—hence, his explicit recognition of the exception for complete deprivations permitted by "background" principles of state nuisance law.[218]

Unfortunately, the nuisance test only partially addresses one of the problems associated with the economic tests. It recognizes that regulations may be valid even though they leave no economically viable use to the property owner. However, the nuisance test uses an inflexible historical standard to define those instances; it does not allow for ongoing development of rational principles for determining when such severe burdens may be imposed upon property owners. In addition, the nuisance test does not address the difficulties in applying the economic tests or their failure to address fundamental takings issues.[219] Thus, the nuisance test is not a panacea for regulatory takings cases. Something more is needed.

---

217. And indeed, as discussed *infra* note 236 and accompanying text, the economic tests do have some limited role to play in takings analysis.

218. *Lucas*, 112 S. Ct. at 2900 (discussed *supra* note 25 and accompanying text).

219. The nuisance test has been subjected to many criticisms, some of which carry little weight. For example, commentators complain that if state nuisance law is used to gauge the existence of a regulatory taking, federal takings law will quickly degenerate into fifty separate sets of rules, depending upon the state in which the action originates. *See, e.g.*, Jed Rubenfeld, *Usings*, 102 Yale L.J. 1077, 1093 (1993) (stating that *Lucas* "is astonishing . . . because it makes takings analysis turn on the various common-law precedents of the fifty states"). Federal takings law *already* is in this position, however, as "property" interests themselves are defined by state, not federal, law. *See* PruneYard Shopping Ctr. v. Robins, 447 U.S. 74, 84 (1980) ("Nor as a general proposition is the United States, as opposed to the several States, possessed of residual authority that enables it to define 'property' in the first instance."); Board of Regents of State Colleges v. Roth, 408 U.S. 564, 577 (1972) ("Property interests, of course, are not created by the Constitution. Rather, they are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law . . . ."). If the state law influence in the definition of property rights has not yet rendered takings law intolerable, it is hard to see how the infusion of state nuisance law will make the situation that much worse.

However, other criticisms are more substantial. For a discussion of those criticisms, *see infra* note 225 and accompanying text (discussing similarities between nuisance analysis and the harm/benefit test vilified by commentators and the Court). Professor Stoebuck pointed out that the "noxious-use" test is "a false test of whether a taking has occurred. It is in fact a test of whether the regulatory measure addresses a problem that the government might legitimately try to solve. That is, the test actually focuses on whether the regulatory measure was lacking in substantive due process." Stoebuck, *supra* note 213, at 1062.

2. *Resurrecting the Correct Regulatory Takings Analysis*

The notion of a police power/eminent domain continuum is inherently flawed. Under the continuum analysis, a governmental action can only be classified in one of two ways. If the action does not cross the invisible line to become an exercise of the eminent domain power requiring compensation, it must be a valid exercise of the police power. Thus, the continuum model obscures a very potent fact: an invalid exercise of the police power is not necessarily an exercise of the eminent domain power requiring compensation; rather, it may be an *invalid regulation.*[220] Although the practical effect of invalidating a regulation may be much the same as concluding that a regulation constitutes a regulatory taking,[221] the analysis used to evaluate each differs in very important ways. Incorrect classification of the governmental interest will lead to incorrect analysis and, very likely, an incorrect outcome.

If the continuum model is abandoned, regulatory takings analysis falls naturally into a bifurcated process. The first step is to determine the *nature of the power* being exercised by the government. All legitimate governmental actions that infringe upon private property rights must fall under either the eminent domain power[222] or the police power[223]—the only two tools at the government's disposal when it is pursuing its legislative goals. The second, and perhaps more important, step requires a determination of the *validity of the exercise* of the implicated power. This two-step analysis provides the flexibility needed to reconcile apparent inconsistencies in takings outcomes.

In drawing the distinction between exercises of the police power and exercises of the eminent domain power, the Court traditionally has used the harm/benefit test. Governmental actions intended to confer benefits are exercises of the eminent domain power; governmental actions

---

220. *Cf.* Stoebuck, *supra* note 213, at 1061 (stating that even though an exercise of the police power is not a taking, it may be "void as lacking substantive due process"); John J. Costonis, *The Disparity Issue: A Context for the Grand Central Terminal Decision*, 91 Harv. L. Rev. 402, 405 (1977) (suggesting that enactments exceeding the police power are invalid regulations, not takings).

221. Although a full analysis of the remedy issue is beyond the scope of this article, I would argue that the remedies for a regulatory taking and an invalid regulation are not identical. The former requires payment of just compensation for property "taken." Invalid regulations do not "take" property. Thus, the remedy for such invalid governmental actions ought to be nullification of the regulation and payment of damages to the property owner for injuries actually incurred as a result of the invalid act.

222. *See supra* note 1.

223. *See supra* note 15.

intended to prevent harm are exercises of the police power.[224] Under traditional regulatory takings analysis, the harm/benefit distinction is seen as the separating line between exercises of the eminent domain power and the police power. The inquiry is treated as an all-or-nothing one: if a regulation confers a benefit, it is an exercise of the eminent domain power for which compensation is constitutionally mandated. If a regulation prevents a harm, it is a presumptively valid exercise of the police power for which no compensation is required. No middle ground exists—there is no way of finding that a regulation does indeed prevent a harm but is nonetheless invalid.

In recent years, the harm/benefit distinction has been vilified by courts and commentators alike as being unmanageable and difficult to apply.[225]

---

224. *See supra* notes 15–16.

225. *See, e.g.*, Lucas v. South Carolina Coastal Council, 112 S. Ct. 2886, 2897–98 (1992); Glynn S. Lunney, Jr., *A Critical Reexamination of the Takings Jurisprudence*, 90 Mich. L. Rev. 1892, 1933–35 (1992); Alfred P. Levitt, Comment, *Taking on a New Direction: The Rehnquist-Scalia Approach to Regulatory Takings*, 66 Temple L. Rev. 197, 204 (1993). The harm/benefit rule of *Mugler* co-exists uneasily at best with the economic tests of *Mahon*. The Court appears to have developed the economic tests, at least in part, to avoid the close determinations required by the harm/benefit test. The Court has issued conflicting pronouncements regarding these two tests, often in a single opinion. In *Keystone*, for example, the Court noted that "a State need not provide compensation when it diminishes or destroys the value of property by . . . abating a public nuisance," Keystone Bituminous Coal Ass'n v. DeBenedictis, 480 U.S. 470, 492 n.22 (1987), and found that the state law at issue there was passed to arrest a threat to the "common welfare," *id.* at 485. The Court then went on to hold that the diminution in value of the property at issue was insufficient to support a taking claim, *id.* at 496–502—a point utterly irrelevant if the Court were correct on the first in its nuisance analysis.

The "solution" to the harm/benefit "problem" proposed by Justice Scalia raises the same types of issues, however. Justice Scalia turned to "background" principles of state nuisance law to determine when a regulation that denies all economically viable use would constitute a taking. And, in its most basic form, nuisance law does provide a rough-and-ready proxy for the difficult harm/benefit distinction.

As Justice Blackmun noted in his dissent in *Lucas*, however, in determining what constitutes a nuisance under common law, state courts engage in precisely the same type of harm/benefit analysis that the majority found inappropriate: "Common-law public and private nuisance law is simply a determination whether a particular use causes harm." 112 S. Ct. at 2914 (Blackmun, J., dissenting). The determination must be made at some level, either by the courts or by the legislature. There seems to be no good reason why the latter body should be excluded from participating in the determination.

In response to Justice Blackmun's criticism that this reliance on the background principles of nuisance law was just as subject to manipulation as the harm/benefit distinction rejected by the majority, Justice Scalia stated: "[A]n affirmative decree eliminating all economically beneficial uses may be defended only if an *objectively reasonable application* of relevant precedents would exclude those beneficial uses in the circumstances in which the land is presently found." *Id.* at 2902 n.18. In Stevens v. City of Cannon Beach, 114 S. Ct. 1332, 1334 (1994) (*cert. denied*, Scalia, J., dissenting), Justice Scalia again emphasized that states may not avoid takings "by invoking nonexistent rules of state substantive law," stating that "[o]ur opinion in *Lucas* . . . would be a nullity if anything that a

In *Lucas*, Justice Scalia rejected the harm/benefit distinction because of the uncertainties associated with it,[226] not least of which is the inherent malleability of the rule. As Justice Scalia noted, drawing the line between preventing a public harm and promoting the public good is often difficult.[227] In *Lucas*, for example, the regulation at issue could be characterized as either protecting the environment from the "harm" caused by building in a coastal zone or, alternatively, as providing for the "benefit" of an ecological preserve. Justice Scalia was clearly concerned that the legislature's characterization of the regulation as "harm-preventing" alone not control, as the validity of the regulation would thus depend upon a rote recitation by the legislature as to the remedial purpose of the regulation.[228]

The bifurcated analysis reduces the stakes in the harm/benefit game. A finding that a regulation is intended to prevent harm will not end the inquiry. It will merely aid in framing the analysis of the validity of the action: should the regulation be evaluated as an exercise of the police power or as an exercise of the eminent domain power? Moreover, criticism of the harm/benefit analysis is premised upon another all-or-nothing assumption that an action that conveys a benefit rather than preventing a harm is necessarily grounded in the eminent domain power. In fact, while all eminent domain actions convey benefits, some exercises of the police power may also be viewed as conveying benefits, such as zoning ordinances and similar measures that result in reciprocal benefits. For example, a requirement that all development within a municipality adhere to certain set-back restrictions may be based solely in aesthetics rather than in considerations of public health, safety, and welfare. Nonetheless, such a requirement may well be viewed as a valid exercise

---

State court chooses to denominate 'background law'—regardless of whether it is really such—could eliminate property rights." Implicit in Justice Scalia's statements is a belief that the courts are more likely to be objective than the legislatures in the area of defining nuisances.

226. Interestingly, in a dissent in a 1988 case, Pennell v. City of San Jose, 485 U.S. 1 (1988), Justice Scalia had argued that if "there is a cause-and-effect relationship between the property use restricted by [a] regulation and the social evil that the regulation seeks to remedy," no regulatory taking occurs. *Id.* at 20 (Scalia, J., concurring in part and dissenting in part). Justice Scalia went on to state: "Since the owner's use of the property is (or, but for the regulation, would be) the source of the social problem, it cannot be said that he has been singled out unfairly." *Id.*

227. *Lucas*, 112 S. Ct. at 2897–98 (noting that "the distinction between 'harm-preventing' and 'benefit-conferring' regulation is often in the eye of the beholder").

228. As Justice Scalia rather acidly put it, "Since such a justification can be formulated in practically every case, this amounts to a test of whether the legislature has a stupid staff." *Id.* at 2898 n.12.

of the police power because it conveys reciprocal benefits to all burdened property owners.[229]

The harm/benefit rule is helpful in drawing the line between exercises of the police power and the eminent domain power. The inquiry does

---

229. The Supreme Court typically has upheld regulations that afford "an average reciprocity of advantage" to property owners affected by the regulation. Pennsylvania Coal Co. v. Mahon, 260 U.S. 393, 415 (1922). As Justice Rehnquist explained in his dissent in *Penn Central*:

> Typical zoning restrictions may . . . so limit the prospective uses of a piece of property as to diminish the value of that property in the abstract because it may not be used for the forbidden purposes. But any such abstract decrease in value will more than likely be at least partially offset by an increase in value which flows from similar restrictions as to use on neighboring properties. All property owners in a designated area are placed under the same restrictions, not only for the benefit of the municipality as a whole but also for the common benefit of one another.

438 U.S. 104, 139–40 (1978) (Rehnquist, J., dissenting). Likewise, historic preservation ordinances that cover all of a specific area confer benefits upon the public as a whole (preservation of historic buildings and sites). Although each regulated landowner incurs a burden as a result of the regulation, each receives a benefit as well—the maintenance of a historically significant area, which presumably enhances the stability of the area and protects property values. Owner *A* may be burdened by the fact that he is unable to alter his historic home, but he is benefited by the fact that his neighbors are likewise prohibited from altering the character of the neighborhood. Contrast this scenario with the landmark regulation at issue in *Penn Central*. There, isolated property owners were singled out for regulation while their neighbors were not subject to such restrictions. In such an instance, it is more difficult to maintain that the property owner ought to bear the burden of regulation clearly intended to preserve aesthetic values for the public as a whole. If preservation of a landmark is a worthy public goal, it should be pursued through compensatory means, such as tax credits for rehabilitation and conservation easements, or directly through condemnation.

In a recent article, Professor Jed Rubenfeld proposed a "usings" theory of eminent domain, which may be helpful in identifying the subset of benefit-conveying actions that are grounded in the eminent domain power. *See* Rubenfeld, *supra* note 219, at 1080 ("when government conscripts someone's property for state use, then it must pay"). He suggested that the distinction between a compensable taking and a noncompensable exercise of the police power must lie in the distinction between taking private property for public *use* and a regulation which, while it regulates property, does not actually confiscate it for public use. Thus, in "contraband" cases, such as the fireworks scenario presented above, *see supra* note 210 and accompanying text, the government is confiscating the property to destroy it, it is not taking the property to use it (*e.g.*, to distribute to cities for Independence Day celebrations). Rubenfeld, *supra* note 219, at 1151–52. Rubenfeld provides the example of a car impounded by the police because they suspect that it is a stolen vehicle. *Id.* at 1115. He argues that as long as the car is merely impounded and not used by the state for transportation or other purposes, no taking has occurred because the car is not being subjected to "public use." Rubenfeld's analysis should extend further, however, to an evaluation of whether the impounding survives a police power challenge. *See infra* note 236 and accompanying text.

Professor Sax offered a theory similar to Rubenfeld's in a 1964 article, in which he stated:

> The rule proposed here is that when economic loss is incurred as a result of government enhancement of its resource position in its enterprise capacity, then compensation is constitutionally required . . . . But losses, however severe, incurred as a consequence of government acting merely in its arbitral capacity are to be viewed as a non-compensable exercise of the police power.

Sax, *supra* note 15, at 63.

not stop there, however. Not all exercises of the eminent domain or police power are automatically legitimate. Rather, there is a critical second step to the analysis, which distinguishes between *valid* and *invalid* exercises of those powers.[230]

An exercise of the eminent domain power involves the "taking" of private property for "public use;"[231] "just compensation" must be provided for the taking.[232] Subject to these strictures, however, the government is always permitted to achieve its legislative objectives through the exercise of this power.

Under the police power, the government is permitted to intrude upon private property interests, provided such infringements are needed to prevent injury to the health, safety, or general welfare of the community.[233] If the test is satisfied, no compensation is required.[234] In *Lawton*

---

230. Rubenfeld hints at this distinction when he notes that immediately preceding the Compensation Clause is the Due Process Clause, which "expressly deal[s] with *deprivations* of property." Rubenfeld, *supra* note 219, at 1119 (italics in original).

231. *See* U.S. Const. amend. V (quoted *supra* note 1). The Court has read the public use restriction so narrowly in recent years, *see* Hawaii Housing Auth. v. Midkiff, 467 U.S. 229, 240–41 (1984) (stating that the "'public use' requirement is . . . coterminous with the scope of a sovereign's police powers" and that the exercise of the eminent domain power must be upheld if it is "rationally related to a conceivable public purpose"), that it is generally viewed as having little, if any, restraining effect upon the exercise of the eminent domain power. *See generally* Lynda J. Oswald, *Goodwill and Going-Concern Value: Emerging Factors in the Just Compensation Equation*, 32 B.C. L. Rev. 283, 295 (1991); Rubenfeld, *supra* note 219, at 1078–79; Comment, *The Public Use Limitation on Eminent Domain: An Advance Requiem*, 58 Yale L.J. 599 (1949).

232. *See* U.S. Const. amend. V (quoted *supra* note 1).

233. Mugler v. Kansas, 123 U.S. 623, 668 (1887). In subsequent cases, the Supreme Court upheld regulations that imposed severe economic costs upon property owners on the grounds that they were necessary to prevent a public harm. *See, e.g.*, Goldblatt v. Town of Hempstead, 369 U.S. 590 (1962); Miller v. Schoene, 276 U.S. 272 (1928); Hadacheck v. Sebastian, 239 U.S. 394 (1915).

234. *See Mugler*, 123 U.S. at 669, where the court stated:

> The power which the States have of prohibiting such use by individuals of their property as will be prejudicial to the health, the morals, or the safety of the public, is not—and, consistently with the existence and safety of organized society, cannot be—burdened with the condition that the State must compensate such individual owners for pecuniary losses they may sustain, by reason of their not being permitted, by a noxious use of their property, to inflict injury upon the community.

In *Mugler*, Justice Harlan reasoned that the government has the power to require each citizen to use his or her property in a manner that does not injure the public. *Id.* at 660 (citing Munn v. Illinois, 94 U.S. 113, 124 (1876)). Of course, the power to define that injurious behavior "must exist somewhere," and Justice Harlan concluded that that "somewhere" is in the legislature. *Id.* at 660–61. *See also* Sproles v. Binford, 286 U.S. 374, 388 (1932) (finding that "debatable questions as to reasonableness are not for the courts but for the legislature"). As the *Keystone* Court phrased it, "since no individual has a right to use his property so as to create a nuisance or otherwise harm others, the State has not 'taken' anything when it asserts its power to enjoin the nuisance-like activity." Keystone Bituminous Coal Ass'n v. DeBenedictis, 480 U.S. 470, 491 n.20 (1987). The

v. Steele, decided in 1894, the Supreme Court set forth a means-end test for evaluating police power actions: in assessing the validity of a police power action, the Court must determine: "first, that the interests of the public . . . require such interference; and second, that the means are reasonably necessary for the accomplishment of the purpose, and not unduly oppressive upon individuals."[235]

Thus, police power actions require the following substantive due process analysis: (1) is the governmental interest at stake legitimate; (2) if so, is the relationship between the regulatory means chosen and the governmental interest reasonably close; and (3) if so, does the governmental interest at stake outweigh the burden the regulation inflicts on the property owner?[236] Note that the economic tests may well play a role in answering the last inquiry. The distinction is that the tests, in this context, are but one factor to consider; they do not present the Court with the all-or-nothing choice currently found in takings jurisprudence. The eco-

---

Latin maxim "*sic utere tuo et alienum non laedes*" ("use what is yours so that others are not injured") has been implicitly, if not explicitly, embraced by the Supreme Court. *See, e.g., Mugler*, 123 U.S. at 665 ("[A]ll property in this country is held under the implied obligation that the owner's use of it shall not be injurious to the community.") (citing Boston Beer Co. v. Massachusetts, 97 U.S. 25, 32 (1877)).

A regulation designed to prevent harm by prohibiting a harmful use in advance makes more social and economic sense than providing compensation to the injured parties through a nuisance suit for damages after the harm has occurred. Moreover, in instances in which the harm is more diffuse—*e.g.*, damage to a regional ecosystem because of development in a wetlands—it may be difficult to identify a plaintiff who is both willing and able to bring a private nuisance suit; in addition, the government may be unwilling to press a public nuisance suit, and so the harm may go uncontrolled and unremedied. In such an instance, regulation is the most logical and efficient means of preventing harm. Indeed, these are precisely the rationales commonly provided to explain the growth in environmental regulation over the past two decades. *See* Nancy K. Kubasek, *Environmental Law* 90–91 (1994).

235. Lawton v. Steele, 152 U.S. 133, 137 (1894).

236. The Supreme Court has recognized this test, although it has often confused the terminology. The *Penn Central* Court, for example, stated that "a use restriction . . . may constitute a 'taking' if not reasonably necessary to the effectuation of a substantial public purpose." Penn Cent. Transp. Co. v. City of New York, 438 U.S. 104, 127 (1978). In 1987, the Supreme Court determined in the context of an exactions case that the government must demonstrate a "nexus" between the specific governmental restriction at issue and the purported governmental objective. Nollan v. California Coastal Comm'n, 483 U.S. 825, 837 (1987). The *Nollan* Court indicated that conditions "reasonably related to the public need or burden" created by the regulated activity would not give rise to a taking. *Id.* at 838. Because the Court found that the nexus between the condition and the burden in *Nollan* failed "even the most untailored standards," it did not definitively state what type of relationship is required. *Id.* The *Nollan* Court indicated in dicta that a relationship stronger than that contemplated by the rational basis test of due process or equal protection was required. *Id.* at 834 n.3.

In its 1994 decision in Dolan v. City of Tigard, 114 S. Ct. 2309 (1994), the Court reexamined this question of the required nexus. It determined that "[n]o precise mathematical calculation is required" but that a "rough proportionality," as evidenced by "some sort of individualized determination," is necessary. *Id.* at 2319.

nomic tests should not be dealt a fatal blow, but neither should they be permitted to dictate the outcome of takings claims.

Obviously, this analysis is not new,[237] nor has it been completely ignored in regulatory takings jurisprudence. In *Nollan v. California Coastal Commission*,[238] for example, the Supreme Court struck down an act of the California Coastal Commission conditioning the issuance of a development permit upon the property owners granting the public a right-of-way across their private beach. While the Court accepted the Commission's assertion of a proper state interest (in providing access to public beaches), it found that the Commission's act did not promote that interest and was, in fact, an extortive attempt to gain a public right-of-way without paying for it.[239] The lack of a means-end fit invalidated the regulation.

The Supreme Court's 1994 decision in *Dolan v. City of Tigard*[240] even more explicitly revives the police power analysis.[241] The *Dolan* Court found that the city had articulated legitimate governmental interests in preventing flooding and reducing traffic congestion.[242] The Court also agreed that a nexus existed between those objectives and the city's attempt to condition a building permit upon the property owner's agreeing not to build in the floodplain and to construct a bicycle/pedestrian path.[243] However, the relationship between the city's objectives and the exactions it sought to extract from the property owner was not suffi-

---

237. *See generally* James L. Oakes, *"Property Rights" In Constitutional Analysis Today*, 56 Wash. L. Rev. 583 (1981) (discussing the rise and decline of substantive due process in constitutional analysis).

Lochner v. New York, 198 U.S. 45 (1905), is generally regarded as the high point of the Supreme Court's excursion into substantive due process analysis. The Court there stated:

> The mere assertion that the subject relates though but in a remote degree to the public health does not necessarily render the enactment valid. The act must have a more direct relation, as a means to an end, and the end itself must be appropriate and legitimate, before an act can be held to be valid which interferes with the general right of an individual to be free in his person and in his power to contract in relation to his own labor.

198 U.S. at 57–58. As Judge Oakes states, "the established doctrine has been that substantive due process came to a dead end with the New Deal Court, commencing with *West Coast Hotel Co. v. Parrish.* [300 U.S. 379 (1937)]." Oakes, *supra*, at 592–53.

238. 483 U.S. 825 (1987).

239. *Id.* at 837.

240. 114 S. Ct. 2309 (1994).

241. In fact, the *Dolan* dissent criticized the majority's opinion as a revival of substantive due process. *See id.* at 2327 (Stevens, J., dissenting).

242. *Id.* at 2317–18.

243. *Id.* at 2318.

ciently close.[244] Although the city might legitimately prohibit the owner from building in the floodplain, its attempt to require the owner to dedicate the space as a public greenway was impermissible.[245] Moreover, the city's failure to quantify its findings that a pathway would offset increased traffic congestion was fatal.[246]

Police power analysis has not received the amount of judicial or scholarly attention that it deserves in recent years[247] despite calls for a re-examination of the doctrine by some commentators.[248] As the next subsection illustrates, explicit revival of the police power analysis would provide workable, predictable solutions to many, if not all, regulatory takings issues.

---

244. *Id.* at 2320–21.

245. *Id.* at 2321.

246. *Id.* at 2322.

247. As Professor Stoebuck has pointed out, "[c]onfusion over the proper role of substantive due process and over the relationship between due process and takings is a pervasive problem in judicial decisions and in scholarly writing." Stoebuck, *supra* note 213, at 1081. A few commentators have examined the relationship between substantive due process analysis and takings jurisprudence in recent years, not always favorably. *See, e.g.*, Glen E. Summers, Note, *Private Property Without Lochner: Toward a Takings Jurisprudence Uncorrupted by Substantive Due Process*, 142 U. Pa. L. Rev. 837 (1993); C. Kevin Kelso, *Substantive Due Process as a Limit on Police Power Regulatory Takings*, 20 Willamette L. Rev. 1 (1984); Robert A. Williams, Jr., *Legal Discourse, Social Vision and the Supreme Court's Land Use Planning Law: The Genealogy of the Lochnerian Recurrence in First English Lutheran and Nollan*, 59 U. Colo. L. Rev. 427 (1988); Patrick C. McGinley, *Regulatory "Takings": The Remarkable Resurrection of Economic Substantive Due Process Analysis in Constitutional Law*, 17 Envtl. L. Rep. (Envtl. L. Inst.) 10,369 (1987); J. Freitag, Note, *Takings, 1992: Scalia's Jurisprudence and a Fifth Amendment Doctrine to Avoid Lochner Redivivus*, 28 Val. U. L. Rev. 743 (1994). A number of scholars have re-examined substantive due process in recent years and urge its revitalization in various contexts. *See, e.g.*, Norman Karlin, *Substantive Due Process: A Doctrine for Regulatory Control*, 13 Sw. U. L. Rev. 479 (1983); Michael J. Perry, *Substantive Due Process Revisited: Reflections on (and Beyond) Recent Cases*, 71 Nw. U. L. Rev. 417 (1976); Bernard H. Siegan, *Rehabilitating Lochner*, 22 San Diego L. Rev. 453 (1985); Mark Tushnet, *The Newer Property: Suggestion for the Revival of Substantive Due Process*, 1975 Sup. Ct. Rev. 261; Christopher T. Wonnell, *Economic Due Process and the Preservation of Competition*, 11 Hastings Const. L.Q. 91 (1983).

248. For example, Judge Oakes, writing in 1981, inquired:

> [If] "taking law" is insufficient to handle the complex matter of legislation affecting property, should we—despite the supposed demise of *Lochner*—look back again to the due process clause for protection of property rights in a substantive sense? After virtual judicial abdication, are we coming full circle to substantive due process? Would this be bad in light of the chaotic state of takings law?

Oakes, *supra* note 237, at 609.

3. *Applying the Police Power Analysis*

The force of the police power analysis (and the failings of the economic tests) are easily illustrated through a series of hypotheticals:

Hypothetical 1:

> Assume that a residential subdivision of 25 lots is developed, the lots are sold to individuals who intend to build single-family homes, and six homes are actually built. Several sinkholes appear in the area; one causes the partial collapse of a home. Geological studies indicate a general instability in the area and a high probability that future sinkholes will appear without warning. The city condemns the existing homes in the subdivision and prohibits the issuance of building permits for the remaining lots. *A*, whose home is undamaged by the existing sinkholes, and *B*, who owns a vacant lot, challenge the city's actions.

Under the economic tests, both *A* and *B* have been deprived of all economically viable use of their property. Both, and most especially *A*, who has completed his home, have reasonable investment-backed expectations with which the city has interfered. Application solely of the economic tests would provide *A* and *B* with a strong basis for their challenge.[249]

However, the city's actions will survive a police power analysis. The actions are intended to eliminate a dangerous situation and advance public safety. The city's actions protect residents of the subdivision, their guests, service providers, and others who may be drawn to the area. The proper analysis would view the governmental interest as legitimate and

---

249. This is not to argue that a court would not find a way to uphold the regulation, for undoubtedly it would, but the court would do so in contravention of the results suggested by the economic tests, illustrating the inability of the tests to cut across broad categories of regulatory takings.

Justice Scalia provided a similar example in *Lucas* involving "a corporate owner of a nuclear generating plant [who] is directed to remove all improvements from its land upon discovery that the plant sits astride an earthquake fault." Lucas v. South Carolina Coastal Council, 112 S. Ct. 2886, 2900 (1992). Justice Scalia framed his solution in terms of "background principles" of state law:

> Such regulatory action may well have the effect of eliminating the land's only economically productive use, but it does not proscribe a productive use that was previously permissible under relevant property and nuisance principles. The use of [this property] for what [is] now [an] expressly prohibited purpose[] was *always* unlawful, and (subject to other constitutional limitations) it was open to the State at any point to make the implication of those background principles of nuisance and property law explicit.

Id. at 2900–01.

the relationship between the action taken and the governmental interest as sufficiently close. Absent an economically feasible method of addressing the geological instability, the burden on the landowner could not be said to outweigh the governmental interest, and the regulation would be upheld.

Hypothetical 2:

> Property owner *A* purchases the last remaining vacant lot along a beach. All of the existing homes along both sides of the road are two stories high. A city council member who lives directly across the street from *A*'s lot is displeased about the imminent loss of her ocean view from her own two-story home. Hence, she persuades the city to adopt a regulation imposing a height restriction on new homes constructed in the area. The stated purpose of the regulation is to preserve aesthetics and public views of the ocean. Under the regulation, *A* can only build a one-story house.

In evaluating the impact on the property owner, the economic tests, standing alone, would seem to suggest this regulation would be valid. The property owner can still build a one-story house. Although its value may be somewhat less than a two-story house built on the same lot, the difference is unlikely to be so significant as to destroy all "economically viable use." Moreover, while *A* may have a reasonable investment-backed expectation that she will be able to build a home, her inability to build the precise type of home she desires will not interfere substantially with her expectations.

Again, the economic tests lead to an incorrect outcome. The correct starting point of the analysis should be the nature of the governmental action. Unlike Hypothetical 1, there is no intent to eliminate a dangerous condition or to otherwise directly promote the public health, safety, and welfare. The regulation addresses aesthetics and therefore confers a benefit. The benefits conferred are not reciprocal, as *A* is burdened by the height restriction but her neighbors (all of whom have existing two-story homes) are not. The governmental action thus cannot be validly grounded in the police power. The regulation, if valid, must be grounded in an exercise of the eminent domain power, and if it is to continue, compensation must be paid.[250]

---

250. Even if analyzed under the eminent domain power, this regulation ought to be struck down as seizing a benefit for private, rather than public, use. As Judge Oakes inquired, "does not the 'overregulation equals taking' syllogism, insofar as it implies that the regulation is proper if the

Hypothetical 3:

> Assume the same facts as in Hypothetical 2, but this time the regulation also contains recitals to the effect that the restriction is needed to control erosion and avoid destructive wind patterns created by two-story houses. However, the city has no scientific evidence to support these recitals.

The change in facts highlights the criticism of the harm/benefit distinction made by Justice Scalia in *Lucas*. The governmental entity has rephrased its legislative goal in terms of preventing a harm. Thus, under the proposed analysis, the regulation should be analyzed as a police power exercise because it purports to prevent harm to the public. The purported purpose does not control the outcome, however. Although the governmental interest at stake is undeniably legitimate (erosion control), the regulation nonetheless fails because there is no evidence that the regulation furthers that goal.[251] Moreover, the regulation inflicts a significant burden upon *A*, the land owner. Thus, the regulation must be struck down. If the city wishes to achieve its purpose, it must exercise its eminent domain power and compensate *A* for the property interest taken.[252]

Hypothetical 4:

> A city adopts a wetlands ordinance preventing the filling of wetlands for development purposes and the construction of any building within 1,000 feet of a wetland. The ordinance is based on findings, supported by scientific evidence, that wetlands perform important ecosystem functions, including filtering of run-off and control of flood waters. Five years before the ordinance was enacted, *A* acquired a lot that is 90% covered by wetlands. Under the ordinance, she will be unable to build on her lot. *B*'s lot is only

---

property owner is compensated for the decline in value of his property, become a method in ambiguous or gray-area cases of requiring the public to bear costs that are really private in nature?" Oakes, *supra* note 237, at 608–09.

251. As the *Mugler* Court stated: "If . . . a statute purporting to have been enacted to protect the public health, the public morals, or the public safety, has no real or substantial relation to those objects, . . . it is the duty of the courts to so adjudge, and thereby give effect to the Constitution." Mugler v. Kansas, 123 U.S. 623, 661 (1887). This scenario is analogous to the Supreme Court's recent decision in Dolan v. City of Tigard, 114 S. Ct. 2309 (1994), where the Court held that the city's legislative goals of preventing floods and reducing traffic congestion were legitimate, but that the city failed to meet its burden of demonstrating that its regulation furthered those goals.

252. Again, though, the exercise of the eminent domain power should not be allowed here because the regulation confers benefits for private, not public use.

20% covered by wetlands, and he acquired it after the ordinance was passed. *B* will be able to build but the most desirable building site is 600 feet from a wetland. Experts have determined that building within 600 feet of the wetlands will have no adverse impact on the wetland if certain simple and inexpensive measures regarding drainage and run-off are taken. *A* and *B* challenge the wetland ordinance.

Under the traditional analysis, *A* will stand a better chance of having the ordinance invalidated. She had a reasonable investment-backed expectation that she would be able to build on her land; that expectation and all economically viable uses of her land have been eliminated by the ordinance.[253]

B's case is weaker under traditional analysis. *B*'s investment-backed expectations may not be reasonable because he purchased his lot after the ordinance was passed. Moreover, *B* is able to build on his lot; his burden is simply that he cannot build on his desired site.

The result reached under traditional analysis is unsatisfactory. First, if the city has determined in a rational manner that the destruction of wetlands threatens the public safety and welfare, it is entitled to take measures to prevent that harm. The economic impact on *A* is important; it must be taken into account in determining if the governmental interest justifies the burden placed on *A* or if the governmental interest could be achieved in a less burdensome manner. However, the economic impact on *A* should not control. On the other hand, *B* faces a burden that appears unnecessary to accomplish the goal of the regulation. Thus, while *B*'s burden is less than that suffered by *A*, it should not be imposed. Moreover, the fact that *B* acquired his land after the ordinance was passed is irrelevant. *B* must take the rights of his predecessor; otherwise, it is *B*'s predecessor who has no redress for the burden imposed upon him.

The correct analysis recognizes that the regulation is based in the police power and balances the governmental interest against the burden imposed on the property owners. Thus, if the burden imposed on *A* were unavoidable and justified by the harm prevented, the regulation would be valid as applied to *A*. Conversely, if the regulation were overbroad in its application to *B*'s situation, the regulation would be invalid as applied to *B*.

---

253. While the city may be able to argue that *A* could be prevented from building under the doctrine of common law nuisance, it is not clear that background principles of state law encompass emerging understandings about integrated ecosystems and the importance of wetlands.

III. CONCLUSION

Ever since Justice Holmes opened Pandora's box by declaring in *Pennsylvania Coal Co. v. Mahon*[254] that a regulation that "goes too far" is a taking,[255] the United States Supreme Court has struggled to determine where that line of "too far" should be drawn. The box needed to be unsealed; Justice Holmes was undeniably correct in stating that a regulation can just as easily effect a taking of property interests as can a physical confiscation. Nonetheless, the evils set loose upon the legal world by Justice Holmes's action have proven devilishly hard to subdue.

The investment-backed expectations and economically viable use tests inject unnecessary confusion into takings law. Instead of concentrating upon the economic effect of the governmental action upon the individual owner, the Court needs to refocus on the nature of the power being exercised by the government. The distinction between exercises of the police power and exercises of the eminent domain power needs to be revived and the role of police power analysis re-examined.

The quark has been cornered; surely regulatory takings can be brought to bay as well.

254. 260 U.S. 393 (1922).

255. *Id.* at 415.