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# CORNERING THE QUARK: INVESTMENT-BACKED EXPECTATIONS, ECONOMICALLY VIABLE USES, AND HARM/BENEFIT IN TAKINGS ANALYSIS+

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# CORNERING THE QUARK: INVESTMENT-BACKED EXPECTATIONS, ECONOMICALLY VIABLE USES, AND HARM/BENEFIT IN TAKINGS ANALYSIS

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 remains "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 a regulatory taking[4] has evaded capture.

Although the Supreme Court has repeatedly stressed the "ad hoc, factual" nature of regulatory takings inquiries,[5] over time, the Court has come to identify factors relevant to the inquiry. Prominent among these factors are two economic-based 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] thirteen cases refer to "economically viable uses" or "economically beneficial uses."[9] The true set of cases is 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 government 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 impact of the regulation upon the property owner. Thus, the investment-backed expectations test and economically viable use test 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 claim. 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.

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 inflicts an unduly oppressive burden upon property owners. In Part II, I urge the resurrection of existing but long-ignored police power and eminent domain theory, 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 the 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 ruled in its 1922 decision in *Pennsylvania Coal Co. v. Mahon* that a regulation could, under certain conditions, effect a taking,[15] 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.*,[16] which finds a taking whenever there is a "permanent physical occupation" by the government, regardless of how minimal the intrusion or how important the government interest at stake.[17] 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.[18]

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,[19] guided always by notions of "justice and fairness."[20] The Court attempted to minimize the ad hoc nature of regulatory takings analysis by announcing a second per se test in its most recent major takings case: its 1992 decision in *Lucas v. South Carolina Coastal Council.*[21] 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,"[22] provided the regulated activity is not a nuisance-like activity prohibited or constrained at common law.[23] This second per se test focuses directly upon the economic impact of the disputed regulation as opposed to the

character (physical versus nonphysical invasion) of the contested government action.[24] As such, it directly implicates the two economic tests that are the subject of this Article.

The two per se tests cover only a very small subset of government actions. Few regulations deprive owners of all use of their property; fewer still will result in a permanent physical occupation of property.[25] Most challenged regulations will fall somewhere outside their territories. 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.'"[26]

In attempting to create workable rules that would produce rational, predictable outcomes in these grey 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 stated that the two tests are analytically distinct, in practice the Court has treated them as being overlapping, though not identical. In addition, while the Court has stated that the "economically viable use" test of *Agins* applies in the context of facial challenges to regulations and the *Penn Central* investment-backed expectations test applies in the case of an "as applied" challenge,[27] the Court has failed to honor this distinction on numerous occasions.[28] Moreover, it has often treated the two tests as being interchangeable,[29] further blurring the analytic distinction between them.

Nonetheless, the potency of the property owner's economic interests in determining the validity of regulation has increased steadily over the past fifteen years.[30] Ultimately, in *Lucas*, the Court officially held the economic tests to be determinative of at least a certain subset of takings claims.[31] The *Lucas* Court never clearly discussed the theoretical bases for the economic tests, however, or 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 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.[32] This test originated in *Penn Central Transportation Co. v. City of New York*[33] where Justice Brennan, writing for the Court, noted that the Court had not adopted a "set formula" for Takings Clause analysis, but that, rather, the Court must engage in case-by-case evaluations.[34] He listed the following factors as among those that would control such inquiries: (1) the degree to which the regulation interferes with the "distinct, investment-backed expectations" of the owner; (2) the "economic impact" of the regulation on the property owner; and (3) the character of the government action involved.[35]

*Penn Central* involved a challenge to New York City's Landmark Preservation Law brought by the owners of Penn Central Terminal, which, as "a magnificent example of the French beaux-arts style,"[36] 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.[37] 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.[38] 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 physical invasion,[39] the diminution in value of the property,[40] and a determination of whether the regulation was intended to prevent a harm or provide a benefit.[41] Justice Brennan stated that the investment-backed expectations test arose from Justice Holmes' opinion in the landmark case of *Pennsylvania Coal Co. v. Mahon*,[42] yet nowhere in that case does the phrase "investment-backed expectations" appear.[43] The phrase was apparently coined in a leading article on Takings Clause compensation authored by Professor Frank Michelman a decade prior to the *Penn Central* decision,[44] an article which was cited by Justice Brennan in his opinion.[45]

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.[46] His argument was based in part upon Rawlsian notions of fairness,[47] 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."[48] "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."[49]

Michelman rejected the notion, however, that utilitarian property theory would demand the payment of compensation in every instance of government action that disappointed "justified, investment-backed expectations."[50] 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."[51] The "investment-backed

expectations" factor, which Michelman identified in the context of the diminution in value test,[52] 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,[53] and that the purpose of such a test was "to prevent a special kind of suffering on the part of people who have grounds for feeling themselves the victims of unprincipled exploitation."[54]

The diminution in value test raises a difficult question regarding segmentation of property interests, however. Although some degree of diminution in value must be tolerated without compensation,[55] 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.[56] Thus, the ultimate question becomes what has been taken from the owner relative to what has been left to the owner.[57] Such a calculation cannot be made without first defining the underlying property interest against which the loss is to be gauged.[58] 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 be the property be segmented in some manner reflecting the nature of the government action?[59]

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 has resisted resolution to date.[60] 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.[61] 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.[62] Michelman argued that the proportion of loss was not the significant factor; rather, the correct question as "whether or not the

measure in question can easily be said to have practically deprived the claimant of some *distinctly perceived, sharply crystallized, investment-backed expectations.*"[63]

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 using 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."[64] Thus, the law should see no illogic in grandfathering an existing use while simultaneously barring a new use of the same type.

Justice Brennan was clearly influenced by Michelman's analysis 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.[65] 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 and, particularly, the extent to which the regulation has interfered with distinct investment-backed expectations," as well as "the character of the government action."[66]

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.[67] 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."[68] 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."[69]

The *Penn Central* Court seemed to adopt the principle that a regulation that rendered property worthless, or near-worthless, was a taking.[70] 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,"[71] the regulation did not interfere with the owners' "primary expectation" regarding the use of the land.[72] 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.[73]

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.[74] 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 fraught with uncertainties. If a taking occurs only when a property owner is denied *all* reasonable return on its investment,[75] the Court is reduced not only to calculating a "reasonable return" for various types of property (such as farms, residences, commercial and industrial properties),[76] but it must also define 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?).[77] Thus, the "reasonable return" analysis necessarily implicates the segmentation of property issue.[78]

Finally, Justice Rehnquist argued that while case law was settled that a complete destruction of property rights rendering it impossible for an owner to make a reasonable return on his property would render an otherwise valid regulation a taking,[79] 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 its property.[80]

Justice Rehnquist's dissent in *Penn Central* was prescient in identifying the problems inherent in the majority's articulation of the investment-backed expectations factor. 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,"[81] that expectations of "profit" enter into the calculus (in some undefined manner),[82] and that the expectation must be more than a "unilateral expectation or an abstract need."[83] The Court has replaced its original reference to "distinct" expectations in *Penn Central*[84] with the term "reasonable" investment-backed expectations[85] in subsequent cases, 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.[86]

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 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 words to indicate that a property owner, at least under some circumstances, ought to anticipate further government regulation.

#### 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."[87] For example, the Court has established that expectations do not necessarily create property rights, particularly where those expectations arise from governmental action.[88] 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 hesitant, however, to allow the creation of property rights in such a manner because of its concern that it might "foreclos[e] exercise of sovereign

authority."[89] By denying that the expectation is a property right, the Court ensures that the State's actions are not constrained by constitutional protections afforded private property.[90]

By the same token, however, the Court has also used the word "expectations" to refer to protected property interests.[91] 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.[92] Justice Scalia was 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 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*: "if 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."[93] This is a trap in which the Court has unwittingly fallen in the past. In *Phillips Petroleum Co. v. Mississippi*,[94] for example, the Court noted "the importance of honoring reasonable expectations of property interests,"[95] but emphasized that "such expectations can only be of consequence where they are 'reasonable' ones,"[96] and that expectations "contrary" to state definitions of property are inherently unreasonable.[97] 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 government regulation. It reduces the constitutional analysis to a situation in which the fox is the sole guard of the henhouse.

### 2) "Expectations" of Future Government 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 of the difference between the value of the land with and without the compensation is "weak."[98] 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.[99] 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.[100]

Michelman's argument is fraught with difficulty, as he himself recognized when he noted that it required "gingerly handling." Michelman was concerned that his argument opened up the possibility of government 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 taking.[101]

Michelman's argument has additional weaknesses 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 which, prior to the passing of legislation, presumably could have been developed in some productive manner. If legislation banning all use of the property is passed, the owner of the property 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 will pass along with the title to the land.[102] Although the market might discount the value of the property slightly to account for the hassles attendant 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.[103]

The weakness of 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"). 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. If we were to adopt 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 diminishing of 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 the analytical and theoretical flaws of this argument, it has nonetheless wormed 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 government regulation of the property involved. Most recently, 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 government regulation -- was articulated in earlier Court opinions as well.[106] In *Ruckelshaus v. Monsanto Co.*,[107] 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 make it clear 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] Moreover, in the Court's view, the heavily regulated nature of the pesticide industry should have put the petitioner on notice that future disclosure might occur.[113]

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 be conditioned upon "legitimate permitting requirements," but "cannot be remotely 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] One might well wonder how such a perversion ever found its way into regulatory takings law. 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.[121] 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 taking of the entire property interest without payment of compensation.

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 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"

Why should we look at the "investment-backed" expectations of the owner? Does the phrase mean that non-"investment-backed" expectations are not protected by the constitutional dictates of just compensation? Does it mean that all investments made by owners are entitled to such protection?

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 of determining 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 only 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.[125]

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 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.[126] Indeed, the Court has noted in the past that "unilateral" expectations or "abstract" needs do not rise to the level of constitutionally protected interests.[127]

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.[128] The *Penn Central* Court emphasized that its holding was based upon the fact that owners were able to use the Terminal for "its intended purpose and in a gainful fashion." The opinion further suggested that a change in circumstances that rendered the Terminal's use economically *non*viable would have entitled 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 were they 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 the disappointed heirs or devisees. Although the Court ultimately struck down the provision because of the "extraordinary" nature of the regulation,[131] the majority opinion, penned by Justice O'Connor, contained disturbing dicta stating that the existence of investment-backed expectations was "dubious" under the circumstances, as virtually all of the owners had acquired their interests "through gift, descent, or devise."[132]

Taken literally, the statement is ridiculous. 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.[133] Would the *Irving* Court have 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 own share through inheritance or gift?

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" opened 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

Although the *Penn Central* Court did mention "economically viable" uses, the reference was tangential and confined to a footnote.[134] This test was not explicitly articulated until the Supreme Court decided *Agins v. Tiburon*[135] 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 land.[136] Since then, the Supreme Court has repeated so often the notion that a land-use regulation effects a taking if it denies the owner "economically viable use" of his or her land that it has taken on the aura of an incantation.[137]

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."[138] 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."[139] The Court did not discuss this aspect of the regulation 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-backed expectations by submitting a development plan to local officials."[140]

In *Lucas*, Justice Scalia discussed the possible justifications for such the economically viable uses rule. As a general matter, the right to "use" property has long been viewed as a fundamental characteristic of property,[141] and the Supreme Court has been reluctant to allow excessive governmental interference with this right. The right to "use" is not absolute, however, and a long line of Supreme Court cases establish 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."[142] As Justice Scalia, noted, however, from the landowner's viewpoint, total deprivation of economic use is no different than a physical appropriation.[143] Where such a deprivation has occurred, the legislature is not simply "adjusting the benefits and burdens of economic life" so as to achieve an "average reciprocity of advantage" to all concerned.[144] Rather, where a regulation deprives an owner of all economically beneficial or productive uses of his or her land, it becomes more likely that the regulation masks an invalid effort to press private property into public service.[145]

Despite its hazy underpinnings, 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 Uses"

#### a. The Economics of an Economically Viable Use

The 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 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,[146] although it has also stated that the

"interest in anticipated gains has traditionally been viewed as less compelling than other property-related interests."[147] Certainly, the owner has no constitutional entitlement to make "the most profitable use" of his or her property.[148] The question is whether the owner is constitutionally guaranteed the right to make *a* profit, and if so, how that profit should be calculated.

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, $10,000 of annual net income 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 such a calculation can be made, however, it is necessary to identify the underlying property value on which the return is calculated. One possibility is the purchase price: 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 that discussed above in the context of investment-backed expectations:[149] can a property owner who has overpaid for property based upon an unrealistic unilateral expectation regarding future uses claim she has been denied economically viable use of the property? The answer here, as in the investment-backed expectations context, must be "no."

In addition, the timing of ownership influences purchase price and thus, presumable, could also influence the determination of economically viable uses. 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. As Justice Blackmun noted 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

moveable trailer."[150] The owner could also sell the land to others, or exclude other parties from it -- both important attributes of property ownership.[151] 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 for $96,600 in 1979.[152] 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 underlying property values, the constitutionality of regulation is, at least to some extent, determined by market forces -- an incongruous notion, as it means that regulations would be more likely to be unconstitutional in times of rising property values than in times of stagnating values.

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? The uses left to the property might well be "economically viable" given the reduced market value of the property.[153] That would mean, however, that the validity of regulation would be tied to the identity of the property owner -- a very strange prospect indeed, and one that would create massive uncertainty for government regulators and that would 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 *Andrus* Court indicated that "timing of acquisition" was "relevant to a takings analysis."[154] 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.

Rejection of purchase price as the basis for determining economically viable uses leads us to the second possibility: economically viable uses must be calculated relative to the fair market value of the property. This formulation eliminates the possibility of unilateral manipulation by the property owner but poses 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 renders the entire analysis circular.[155]

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 diminution in return on investment may cause the zoning change to be labeled a taking. Indeed, under this approach, few regulations would survive a taking challenge. Regulations that reduce a property's rate of return in furtherance of a legitimate government 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 which a property owner is entitled. The *Penn Central* Court, for example, seemed to assume that continuation of current use (provided it is profitable) is the most to which an owner is entitled.[156] 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. Although *A* can continue to get a reasonable return on her rental house,[157] 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 since *A* was left with a reasonable return on investment. The disparity in zoning between *A*'s property and the surviving property deprives *A* of any reciprocal benefit from the government regulation;[158] thus, the regulation is invalid.[159]

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 *A* owns property zoned for single-family residential use; it is *A*'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 *A* begins construction, however, the city determines that a need for multi-family, low-income housing exists in the area, and that *A*'s property is the ideal location for such a use. It rezones *A*'s property for that use, barring all less intense uses

(including single-family residential use). All other property in the area is zoned for single-family use. 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, *A* will sell the property to a developer who will undertake such a project.

*A* 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 the 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, *A* will not be heard to complain. If not, the regulation is invalid, despite the fact that *A*'s property has not diminished in market value (and has, in fact, increased in value).[160]

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. 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 in the property. Nonetheless, the regulation does not result in a taking because the government interest at stake is undeniably legitimate.[161]

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 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.[162] Even in *Lucas*, the Court did not actually hold that the deprivation of all economically viable use automatically 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.[163] 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.[164] 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.[165]

In *Lucas*, Justice Scalia opened the door to further debate on this issue. As he noted,[166] a major failing of the deprivation of all economically viable use rule is that it does not indicate the "property interest" against which the loss of value is to be measured. 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 interpreted. If the regulation is interpreted as being a partial taking of the entire parcel, no compensation would be mandated under the *Lucas* holding. 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.[167]

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?

### 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,[168] although he found that the "historical compact" memorialized in the Takings Clause would prohibit the total elimination of economically valuable use in *land*.[169] Scholars are confounded by this "naked assertion," for which Justice Scalia offered no external support.[170]

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*.[171] 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.

The *Andrus* Court stated that a mere reduction in property value alone does not create a taking.[172] 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, fatuously suggesting that the appellees might charge admission to view the bird parts.[173] The parts were not confiscated by the government, nor were they subjected to restraint or physical invasion.[174] The profit that the appellees might have expected to earn from their sale had that sale not been rendered illegal was considered

too speculative and uncertain to support a claim that a property interest had been taken.[175]

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.[176] Those cases are distinguishable from *Andrus*. In the alcoholic beverages cases, the government had made a determination (whether correct or not) that the sale and ingestation 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 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.[177] What is less clear is whether prohibiting the sale of bird parts legally obtained prior to the ban furthered that legislative goal of species protection, or whether the governmental purpose might have been achieved through a less restrictive means, such as banning sales of future parts but permitting transactions in previously existing objects.[178]

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 real/personal property distinction drawn by Justice Scalia 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.[179]

## II. RESURRECTING THE CORRECT PARADIGM 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 impact of the regulation upon the property owner. The Court has apparently ignored the difficulties associated with the investment-backed expectations and economically viable uses tests. Although the regulatory takings issue is by no means subject to facile resolution, neither is it as intractable as many would make it out to be. If we sweep aside the economic tests, and all of their congenital defects, the solution becomes obvious. Regulatory takings analysis does not require new theories. Existing police power and eminent domain theory, properly revived and carefully reconstructed, provides 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,[180] the economic tests provide no answers to the more difficult analytic issues raised by regulatory takings. The segmentation problem[181] 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.[182] Because no clearly identifiable base value exists, however, 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),[183] the manner in which they acquired the property,[184] or the time at which they acquired it.[185]

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*.[186] True, the deprivation of an economic interest may well indicate the taking of a protected property right. However, no one-to-one equivalency exists here. Not all economic interests are protected property rights.[187] 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.[188] Likewise, unilateral expectations of economic value or use by the property owner do not rise to the level of constitutionally protected private property rights.[189]

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 monochromic interests in land whose impairment will invite exceedingly close scrutiny under the Takings Clause."[190] Although Justice Scalia's statement is absolutely correct, he missed the more important point: those monochromic 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."[191] Regulations may easily deprive owners of incidents of their property ownership which, while of minimal or no economic value, are nonetheless very real confiscations.[192] The lack of economic impact goes to the measure of damages, not to the determination of the taking.[193]

By failing to recognize that monochromic property rights are indeed property interests entitled to the same protection as economic property interests, the Court finds itself pursuing incorrect analytical leads. In *PruneYard Shopping Center v. Robins*,[194] for example, the Court held that the property interests of shopping center owners were not taken by a state court 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,"[195] and that that right had been "taken."[196] 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 impact the value or use of their property."[197] The Court quite clearly regarded the showing of economic harm as an essential precursor to the finding of a taking.[198] 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."[199] It then rejected the property owner's 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 not a taking because it did not impair the economic value of the property to the landowners.[200] The Court did

not inquire into the state interest at stake or whether that interest could properly be pursued using the police power. Suppose that the Court found no adverse economic impact from a regulation requiring the shopping center owners to make available its fountains for model boat races; would that end its inquiry into the validity of the regulation? Adverse economic impact 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 which 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 wrongly conclude 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.[201] 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.[202] If, in fact, the regulation was based in the eminent domain power, compensation was constitutionally mandated.[203]

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 government interest at stake is sufficiently important and the action is properly grounded in the police power, intrusion upon the economic interests of the property owner is permissible. The prototypical examples are regulations banning contraband, such as illegal drugs or alcohol. Suppose, for example,

that the legislature determined that the public safety risks posed by handguns were so grave that the manufacture, sale, and distribution of these products must be banned. Setting aside any Second Amendment arguments,[204] there is no doubt that the legislature could ban these handguns, just as it has banned substances such as cocaine, heroin, or marijuana.[205]

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 handguns. 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 handguns. His expectation was undeniably backed by the monetary investment he made in purchasing the handguns from the manufacturer for resale. Nonetheless, any arguments by *A* that the government should be required to pay just compensation for the now worthless handguns will fail.

The result cannot be explained away by Justice Scalia's contention that personal property (such as handguns) receives less constitutional protection than real property. Imagine, for example, *B*, a handgun manufacturer with a factory designed and devoted exclusively to the manufacture of these now forbidden objects. 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. Schooner*,[206] 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.*,[207] 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. The key to each of these cases lies not in the economic impact upon the property owner (which was undeniably complete in its devastation), but in the importance of the government objective underlying the government action, and in the close relationship between that government 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 Paradigm 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.

Traditional regulatory takings law has viewed exercises of the police power and the eminent domain power as anchoring opposite ends of a continuum.[208] As a police power act moves closer and closer to some 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 impact of the regulation upon the property owner has the practical effect of a physical taking. The investment-backed expectations and economically viable uses tests thus act as a proxy for physical takings in the regulatory setting.

Following the continuum analysis to its logical conclusion, Supreme Court opinions predating *Lucas* suggest that a regulatory taking occurs only when the economic tests are satisfied. Indeed, the analysis suggested that where 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,[209] 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.[210]

The direction of doctrinal development was troublesome, for it elevated the status of the extremely problematic economic tests to that of touchstone for regulatory takings. This was the abyss that Justice Scalia 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,[211] Justice Scalia recognized that the economic interests of the property owner alone could not be permitted to determine the validity of government regulation -- hence, the exception for deprivations permitted by "background" principles of state nuisance law.

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. However, the nuisance test uses an inflexible historical standard to define those instances. It does not allow for development of rational standards 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.[212]

### 2. Resurrecting the Correct Regulatory Takings Analysis

The notion of a police power/eminent domain continuum is inherently flawed. Under the continuum analysis, a government 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 heuristic 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.* Although the practical effect of invalidating a regulation may be much the same as concluding that a regulation constitutes a regulatory taking,[213] the analysis used to evaluate each differs in very important ways. Incorrect classification of the government interest will lead to incorrect analysis and, very likely, an incorrect outcome.

If the continuum theory 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 government actions that infringe upon private property rights must fall under either the eminent domain power[214] or the police power[215] -- 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. In *Mugger v. Kansas*,[216] the Supreme Court held that regulation intended to prohibit uses of property detrimental to public health, safety, or welfare were valid exercises of the police power. 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.[217] No compensation is required in such an event.[218] As the *Keystone* Court phrased it, "[s]ince 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."[219]

In recent years, the harm/benefit distinction has been vilified by courts and commentators alike as being unmanageable and difficult to apply.[220] In *Lucas*, Justice Scalia rejected the harm/benefit distinction because of the uncertainties associated with it,[221] 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.[222] In *Lucas*, for example, the regulation at issue could be characterized as either protecting the environment from "harm" 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.[223]

Under traditional regulatory takings analysis, the harm/benefit distinction is seen as the sole 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.

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 frame the analysis of the validity of the action. Moreover, the criticism of the harm/benefit analysis is premised on 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 of the police power because it conveys reciprocal benefits to all burdened property owners.[224]

In a recent article, Professor Jed Rubenfeld proposed a "usings" theory of eminent domain,[225] which may be helpful in identifying the subset of benefit-conveying actions that are grounded in the eminent domain power. 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.[226] He provided the example of a car impounded by the police because they suspect that it is a stolen vehicle.[227] Rubenfeld argued 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."[228]

The harm/benefit rule and Rubenfeld's thesis may be helpful in drawing the line between exercises of the police power and the eminent domain power. The inquiry does 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.[229]

An exercise of the eminent domain power involves the "taking" of private property for "public use;"[230] "just compensation" must be provided for the taking.[231] Subject to these strictures, the government is always permitted to achieve its legislative objectives through the exercise of this power.[232]

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] In 1894, the Supreme Court set forth the 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."[234]

Thus, police power actions raise a substantive due process analysis: (1) is the government interest at stake legitimate; and (2) if so, is the relationship between the regulatory means chosen and the government interest reasonably close; and (3) if so, does the government interest at stake outweigh the burden the regulation inflicts on the

property owner?[235] 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 economic tests should not be dealt a fatal blow, but neither should they be permitted to dictate the outcome of takings claims.

Police power analysis is not new; neither has it been completely ignored in regulatory takings jurisprudence. In *Nollon v. California Coastal Commission,*[236] 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.[237]

Despite this promising opinion, police power analysis has not received the amount of judicial or scholarly attention that it deserves in recent years.[238] One criticism raised by some commentators is that such an analysis would require the judiciary to scrutinize legislative actions. This is true, but no more true in this area than in cases where issues of due process or equal protection are raised. Moreover, as the next subsection illustrates, explicit revival of the police power analysis would provide workable, predictable solutions to virtually all regulatory takings issues.

### 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 lot. *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. Neither *A* nor *B* will use their property in a way that interferes with the rights of others, and the city's actions likely would not satisfy the requirements of common law nuisance. Accordingly, it appears that application solely of the economic tests would provide *A* and *B* with a strong basis for their challenge.[239]

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 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 likely 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 loss of her ocean view from her own two-story home. Hence, she persuades the city to adopt a regulation providing a height restriction for new homes constructed in the area. The stated purpose of the regulation is preserve aesthetics and public views of the ocean. Under the regulation, *A* can only build a one-story house.

Traditional analysis would focus on the economic impact of the regulation on the property owner. Accordingly, it is likely that little or no analysis would be made of the governmental interest, the motivation for the regulation, or the process by which it was enacted. Height restrictions are common land use restrictions and this regulation, on its face, applies to a broad area.[240]

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 type of home she desires will not interfere substantially with her expectations.

The correct starting point of the analysis should be the nature of the governmental action. Unlike in 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 are not. The governmental action, if it is valid, must be based in the eminent domain power, rather than the police power.[241] If the regulation is to continue, compensation must be paid.[242]

*Hypothetical 3:*

> Assume that 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. The city has no scientific evidence to support these recitals, however.

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 police power 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 government interest at stake is undeniably legitimate (erosion control), the regulation nonetheless fails because there is no evidence that the regulation furthers that goal. 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.

*Hypothetical 4:*

> A city adopts a wetland land 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 that the wetlands perform important ecosystem functions, including filtering of run-off and control of flood waters. *A* acquired a lot that is 90% covered by wetlands 5 years before the ordinance was enacted. Under the ordinance, she will be unable to build on her lot. *B*'s lot is only 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 could build on her land; that expectation and all economically viable uses of her land have been eliminated by the ordinance. 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 the doctrine encompasses emerging understandings about integrated ecosystems and the importance of wetlands.

*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. The economic impact on *A* does not control, however. On the other hand, *B* faces a burden which appears unnecessary to accomplish the goal of the regulation. Thus, while *B*'s burden is less than that of *A*, it should not be imposed. The fact that *B* acquired his land after the ordinance was passed should be irrelevant. *B* must take the rights of his predecessor; otherwise, it is *B*'s predecessor who has no redress for the burden imposed on 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*.

## III. CONCLUSION

Ever since Justice Holmes opened Pandora's box by declaring in *Pennsylvania Coal Co. v. Mahon*[243] that a regulation that "goes too far" is a taking,[244] 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 imps set loose upon the legal world by Justice Holmes' action have proven devilishly hard to subdue.

The investment-backed expectations and economically viable use tests infuse a confusion into takings law that irretrievably muddy the already dark waters of takings law. Instead concentrating upon the economic impact of the government action upon the individual owner, the Court needs to refocus on the nature of the power being exercised by the government.

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

1. U.S. Const. am. V & XIV.

2. CHARLES HAAR, LAND-USE PLANNING 766 (3d ed. 1976) (*quoted in* Williamson County Regional Planning Comm'n v. Hamilton Bank of Johnston City, 473 U.S. 172, 199 n.17 (1985)).

3. *See* LAWRENCE M. KRAUSS, FEAR OF PHYSICS 44 (1993).

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

5. This phrase apparently first appeared in Penn Central Transp. Co. v. New York City, 438 U.S. 104, 124 (1978), but has been reiterated by the Court in virtually every takings case since then. However, the notion that regulatory takings cases defy the application of any "set formula," see Goldblatt v. Hempstead, 369 U.S. 590, 594 (1962), and that case-specific determinations are required, see United States v. Central Eureka Mining Co., 357 U.S. 155, 168 (1958), certainly predates *Penn Central.*

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

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

8. *See* Concrete Pipe & Prods. of Cal., Inc. v. Construction Laborers Pension Trust for Southern California, 113 S. Ct. 2264 (1993); Lucas v. South Carolina Coastal Council, 112 S. Ct. 2886 (1992); Nordlinger v. Hahn, 112 S.Ct. 2326 (1992); Nollan v. California Coastal Commission, 483 U.S. 825 (1987); Bowen v. Gilliard, 483 U.S. 586 (1987); Hodel v. Irving, 481 U.S. 703 (1987); Keystone Bituminous Coal Ass'n v. DeBenedictis, 480 U.S. 470 (1987); MacDonald, Sommer & Frates v. Yolo County, 477 U.S. 340 (1986); Connolly v. Pension Benefit Guaranty Corp., 475 U.S. 211 (1986); United States v. Riverside Bayview Homes, Inc., 474 U.S. 121 (1985); Thomas v. Union Carbide Agric. Prod. Co., 473 U.S. 568 (1985); Williamson County Regional Planning Comm'n v. Hamilton Bank of Johnson County, 473 U.S. 172 (1985); United States v. Locke, 471 U.S. 84 (1985); Ruckelhaus v. Monsanto Co., 467 U.S. 986 (1984); Kirby Forest Industries v. United States, 467 U.S. 1 (1984); Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419 (1982); Hodel v. Virginia Surface Mining & Reclamation Ass'n, 452 U.S. 264 (1981); PruneYard Shopping Center v. Robins, 447 U.S. 74 (1979); Kaiser Aetna v. United States, 444 U.S. 164 (1979); Andrus v. Allard, 444 U.S. 51 (1979); Penn Central Transp. Co. v. New York City, 438 U.S. 104 (1977).

9. The following cases refer to "economically viable uses:" *Lucas*, 112 S. Ct. 2886 (1992); Pennell v. City of San Jose, 485 U.S. 1 (1988); *Nollan*, 483 U.S. 825 (1987); *Riverside*, 474 U.S. 121 (1985); *Keystone*, 480 U.S. 470 (1987); *Hamilton Bank*, 473 U.S. 172 (1985); *Kirby Forest*, 467 U.S. 1 (1984); *Virginia Surface*, 452 U.S. 264 (1981); Schad v. Borough of Mt. Ephraim, 452 U.S. 61 (1981); San Diego Gas & Elec. Co. v. City of San Diego, 450 U.S. 621 (1981); Agins v. Tiburon, 447 U.S. 255 (1980).

The following cases refer to "economically feasible uses:" *Concrete Pipe*, 113 S. Ct. 2264 (1993); *Lucas*; *McDonald, Sommer & Frates*, 477 U.S. 340 (1986); Hodel v. Indiana, 452 U.S. 314 (1981).

10. *See supra* notes 8 & 9.

11. *See, e.g.*, Thomas v. Union Carbide Agricultural Prod. Co., 473 U.S. 568 (1985); Locke v. United States, 471 U.S. 84 (1985); Hodel v. Indiana, 452 U.S. 314 (1981); Schad v. Borough of Mount Ephraim, 452 U.S. 61 (1981).

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 35 and accompanying text. This test has not played a prominent role in recent Supreme Court analysis, however, *see* Lucas v. South Carolina Coastal Council, 112 S. Ct. 2886 (1992) (analyzing regulatory takings in terms of investment-backed expectations and economically viable uses), and appears to have been subsumed in the economically viable uses test and the diminution of value test (discussed *infra* note 39). *See* Andrea L. Peterson, *The Takings Clause: In Search of Underlying Principles Part*, 77 CAL. L. REV. 1301, 1325 (1989).

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

14. *See infra* notes 234 & 235 and accompanying text (discussing test for evaluating validity of police power regulations).

15. 260 U.S. 393, 415 (1922).

16. 458 U.S. 419 (1982).

17. *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 n.10 (1946) (physical invasion of airspace).

18. Although the test is easy to apply, the wisdom of the test itself has been questioned. *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 (1983).

19. *See, e.g.*, Ruckelshaus v. Monsanto Co., 467 U.S. 986, 1005 (1984) (determination of whether a taking has occurred is essentially an ad hoc, factual inquiry); *Penn Central*, 438 U.S. at 124 (noting that the Supreme Court has been unable to formulate a definitive test for when a regulatory taking has occurred).

20. *See, e.g.*, Penn Central Transp. Co. v. City of New York, 438 U.S. 104, 124 (1978); Armstrong v. United States, 364 U.S. 40, 49 (1960).

21. 112 S. Ct. 2886 (1992).

22. *Id.* at 2895 (italics in original).

23. *Id.* Although *Lucas* articulated the per se test for deprivation of all economically viable uses 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. San Diego, 450 U.S. 621, 652-53 (1981) (Brennan, J., disssenting); *Penn Central*, 438 U.S. at 149-50 (Rehnquist, J., dissenting). Commenators too had predicted the direction of this doctrinal development several years before *Lucas* was handed down. *See, e.g.*, Frank Michelman, *Takings, 1987,* 88 COLUM. L. REV. 1600, 1622 (1988) (citations omitted) (quoted *infra* at text accompanying note 209).

24. Justice Rehnquist's dissent in Keyston 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 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.

25. Indeed, in light of the clear per se rule set forth in *Loretto*, only a truly stupid government body would draft such a regulation.

26. MacDonald, Sommer & Frates v. County of Yolo, 477 U.S. 340, 348-49 (1986).

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

28. *See, e.g.*, Nollan v. California Coastal Comm'n, 483 U.S. 470 (1987) (case involved an "as applied" challenge, but Court applied the *Agins* test); Keystone Bituminous Coal Ass'n v. DeBenedictis, 480 U.S. 825 (1987) (case involved a facial challenge, but Court used both the *Penn Central* and *Agins* tests); Connolly v. Pension Benefit Guar. Corp., 475 U.S. 211 (1986) (case involved a facial challenge, but Court applied the *Penn Central* test). *But see* Pennell v. City of San Jose, 485 U.S. 16, 17-18 (1988) (Scalia, J., concurring part, dissenting in part) (correctly drawing distinction).

29. *See, e.g.*, Lucas v. South Carolina Coastal Council, 112 S. Ct. 2886 (1992) (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 econmically 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 use of the property or frustrat[ion of] reasonable investment-backed expectations").

30. *See, e.g.*, *PruneYard Shopping Center*, 477 U.S. at 84, where the Court stated that the property owners before it had "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.'" 447 U.S. at 84. Thus, the Court seemed to suggest that the only interests that matter (at least for constitutional purposes) are economic ones.

31. *See supra* notes 21-24 and accompanying text.

32. *See, e.g.*, Concrete Pipe & Prod. v. Const. Laborers Pension Trust, 113 S. Ct. 2264, 2291 (1993); Nollan v. California Coastal Comm'n, 483 U.S. 825, 853 (1987); Bowen v. Gilliard, 483 U.S. 587, 606 (1987); Hodel v. Irving, 481 U.S. 704, 714 (1987); Keystone Bituminous Coal Ass'n v. DeBenedictis, 480 U.S. 470, 495 (1987); MacDonald, Sommer & Frates v. Yolo County, 477 U.S. 340, 349 (1986); Connolly v. Pension Benefit Guar. Corp., 475 U.S. 211, 225 (1986); United States v. Locke, 471 U.S. 84, 107 (1985); Ruckelshaus v. Monsanto Co., 467 U.S. 986, 1005 (1984); Kirby Forest Indus., Inc. 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 Center 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.20 (1979); Penn Central 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 Central*, 438 U.S. at 124, its more recent formulations have referred to "reasonable" expectations. *See, e.g.*, *Concrete Pipe*, 113 S. Ct. at 2291; *Riverside Bayview*, 474 U.S. at 129; *PruneYard Shopping Center*, 447 U.S. at 83.

33. 438 U.S. 104 (1978).

34. *Id.* at 124.

35. *Id.* 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. In *Monsanto*, however, the Court seemed to indicate that in the absence of an interference with investment-backed expectations, no taking can exist. *Monsanto*, 467 U.S. at 1005. Although the investment-backed expectations test was first articulated in *Penn Central*, the Court did not have to evaluate whether the regulation at issue affected such interests in that case because the property owners conceded that, even in the face of the regulation, they were able to make a reasonable return on their investment in the property. 438 U.S. at 129. The Court established in *Loretto* that: "When the 'character of the government action is a permanent physical occupation of real property, there is a taking to the exent of the occupation without regard to whether the action achieves an important public benefit or has only minimal economic impact upon the owner." 458 U.S. at 434-35. The Court has held other types of actions, such as prohibitions on descent and devise of real property, to indicate impermissible government action as well. *See* Hodel v. Irving, 481 U.S. 703 (1987). 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 government 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. For a discussion of the "economic impact" factor, see *supra* note 12 and accompanying text.

36. 438 U.S. at 115.

37. *Id.* at 116.

38. *Id.* at 118-19. The owners also alleged a Fourteenth Amendment due process deprivation. *Id.* at 119.

39. The Supreme Court originally established that a physical invasion could constitute a taking in Pumpelly v. Green Bay 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 16-18 and accompanying text), where the Court held that even minimal physical invasion will lead to a taking.

40. The diminution in value theory, first articulated in *Pennsylvania Coal 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 is insufficient to support a finding of a taking. *See Mahon*, 260 U.S. at 413 ("government could hardly gone on if to some extent values incident to property could not be diminished without paying for every such change in the general law"); *Kirby Forest*, 467 U.S. at 15 ("impairment of the market value of real property incident to otherwise legitimate government action ordinarily does not result in a taking"); *Penn Central*, 438 U.S. at 131 ("The decisions uniformly reject the proposition that diminution in property value, standing alone, can establish a 'taking'."). The Court noted in *Mahon*, 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.*, Euclid v. Ambler Realty Co., 272 U.S. 365 (1926) (75% diminution in value); Hadacheck v. Sebastian, 239 U.S. 394 (1915) (87 1/2% diminution in value). The actual dollar amount of the loss is likewise irrelevant. As Justice Steven noted, "[t]he Fifth Amendment draws no distinction between grand larceny and petty larceny." Hodel v. Irving, 481 U.S. 704, 727 (1987) (Stevens, J., concurring). In *Penn Central*, the Court asserted that a mere diminution in value, by itself, cannot constitute a "taking," 438 U.S. at 131; instead, the Court seemed to focus on the economic impact of the regulation as measured by the uses left to the property owner. *See also Concrete Pipe*, 113 S. Ct. at 2290 ("mere diminution in the value of property, however serious, is insufficient to demonstrate a taking"). Even Justice Rehnquist, who appears to be

among the most sympathetic of the Justices to individual property rights, suggested in his dissent in *Keystone* that while "complete extinction of the value of a parcel of property" is constitutionally prohibited, 480 U.S. at 513 (Rehnquist, J. dissenting), regulations that preserve at least a part of the value are permissible. *Id.* (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").

41. The harm-benefit test was first articulated in Mugler v. Kansas, 123 U.S. 623, 667-69 (1887), 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 v. Hempstead, 369 U.S. 590 (1962); Miller v. Schoene, 276 U.S. 272 (1928); Hadacheck v. Sebastian, 239 U.S. 394 (1915). The harm-benefit distinction was rejected in Lucas v. South Carolina Coastal Council, 112 S. Ct. 2886 (1992), however. *See infra* notes 221-23 and accompanying text. Nonetheless, it holds the key to correct formulation of a workable regulatory takings paradigm. *See infra* text following note 223.

42. 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.'").

43. 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. 438 U.S. at 127 (citing 260 U.S. at 414). *Mahon* did discuss the diminution in value of property, however. This factor is more closely related to the economically viable use test (discussed *infra* Part I.B).

44. Frank Michelman, *Property, Utility, and Fairness: Comments on the Ethical Foundations of "Just Compensation" Law*, 80 HARV. L. REV. 1166 (1967).

45. 438 U.S. at 128 (citing Michelman, *supra* note 44, at 1229-34).

46. Michelman, *supra* note 44, at 1223.

47. 438 U.S. at 122-24.

48. Michelman, *supra* note 44, at 1212.

49. *Id.* at 1212.

50. *Id.* at 1213.

51. *Id.* at 1241.

52. *Id.* at 1229-34. *See supra* note 40 and accompanying text (discussing diminution in value test).

53. *Id.* at 1190.

54. *Id.* at 1230.

55. *Id.* at 1191.

56. *Id.* at 1232-33.

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

58. *Id.* at 1192.

59. *Id.* at 1192-93.

60. 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,* 112 S. Ct. at 2894 n.7. Justice Rehnquist has argued that segmentation is permitted. *See Keystone*, 480 U.S. at 517 (Rehnquist, J., dissenting) ("[T]here is no need for further analysis where the government by regulation existinguishes 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, suggested that segmentation was not permitted. *See* 438 U.S. at 130-31 ("'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."). As the Court 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." *See also Keystone*, 480 U.S. at 497; Hodel v. Indiana, 452 U.S. 314 (1981). In its most recent examination of the two economic tests, the Court reemphasized that segmentation is not permitted. *See Concrete Pipe*, 113 S. Ct. at 2290.

61. Michelman, *supra* note 44, at 1232.

62. *Id.* at 1232-33.

63. *Id.* at 1233 (emphasis added).

64. *Id.*

65. Landmarks preservation is a desirable and appealing government objective, and it seems possible that the Court was more concerned with finding a basis for legitimizing the City's actions than in setting forth a coherent doctrine applicable across the wide range of takings cases.

66. 438 U.S. at 124.

67. *Id.*

68. *Id.* at 125 (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, *Takings and the Police Power*, 74 YALE L.J. 36, 61-62 (1964). The 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.

69. *Id.* at 130.

70. *Id.* at 127-28. In addition to *Mahon*, the Court cited in support of this proposition Armstrong v. United States, 364 U.S. 40 (1960); Hudson Water Co. v. McCarter, 209 U.S. 349, 355 (1908); Michelman, *supra* note 44, at 1229-34.

71. 438 U.S. at 136.

72. *Id.*

73. *Id.*

74. *Id.* at 143 (Rehnquist, J., dissenting) (quoting Boom Co. v. Patterson, 98 U.S. 403, 408 (1879)).

75. 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 reasonable return was a per se taking (at least under some circumstances), *see* 112 S. Ct. at 2895; 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 before the Court.

76. 438 U.S. at 149 n.13 (Rehnquist, J., dissenting).

77. *Id.*

78. *See supra* note 60 and accompanying text (discussing segmentation of property issue).

79. 438 U.S. at 149-50 (citing United States v. Lynah, 188 U.S. 445, 470 (1903)).

80. *Id.*

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

82. *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") (emphasis added). *See also Keystone*, 480 U.S. at 496 (the regulation was valid because there was not even "a single mine that could no longer be mined for profit"), *id.* (there was no indication that "mining in any specific location . . . ha[d] been unprofitable"), *id.* at 501_ ("[P]etitioners may continue to mine coal profitably"); *Hamilton Bank*, 473 U.S. at 200 (discussing the need for "investment-backed profit expectations"); *Penn Central*, 438 U.S. at 136 (the regulation permitted the property owner "not only to profit from the Terminal, but also to obtain a 'reasonable return' on its investment").

83. Webb's Fabulous Pharmacies, Inc. v. Beckworth, 449 U.S. 155, 162 (1980) ("a mere unilateral expectation or an abstract need is not a property interest entitled to protection"). This point was first made by Justice Brennan in *Penn Central*: "the submission that [the owners] may establish a 'taking' simply by showing that they have been denied the ability to exploit a property interest they heretofore had believed was available for development is quite simply untenable." 438 U.S. at 130. *See also* Ruckelshaus v. Monsanto Co., 467 U.S. 986, 1005 (1984).

84. 438 U.S. at 124.

85. *See, e.g.*, Williamson County Regional Planning Comm'n v. Hamilton Bank, 473 U.S. 172, 191 (1985); Ruckelshaus v. Monsanto Co., 467 U.S. 986, 1005 (1984); PruneYard Shopping Center v. Robins, 447 U.S. 74, 83 (1980).

86. *See* Richard 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.").

87. *See, e.g.*, Deltona Corp. v. United States, 657 F.2d 1184, 1193 (Ct. Cl. 1989); Yale Auto Parts v. Johnson, 758 F.2d 54, 59 (2d Cir. 1985). As Epstein stated:

> 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 86, at 1379.

88. *See, e.g.*, Bowen v. Public Agencies Opposed to Social Security 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 (1973) (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, 470-71 (1973) (plurality opinion) (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).

89. *Public Agencies Opposed to Social Security Entrapment*, 477 U.S. at 52.

90. *See, e.g.*, United States v. Willow River Power Co., 324 U.S. 499, 502 (1945) ("Only 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.").

91. *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).

92. 112 S. Ct. at 2894 n.7.

93. *Id.* 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 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. 1393, 1501 (1991) ("Over time, . . . the more the Court's own pronouncements tend to shape public expectations, the more the Court's reliance on those expectations threatens to deteriorate into a blatant case of self-fulfilling prophecy.").

94. 484 U.S. 469 (1988).

95. *Id.* at 482.

96. *Id.*

97. *Id.*

98. Michelman, *supra* note 44, at 1238.

99. *Id.*

100. *Id.*

101. *Id.* at 1238 n.123. 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.

102. 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. *Nollon*, 483 U.S. at 833. *See also* RICHARD EPSTEIN, TAKINGS: PRIVATE PROPERTY AND THE POWER OF EMINENT DOMAIN 155 (1985) ("In this case of threatened expectations, the original owner of the land does not hold his title at the pleasure of the state. Instead, he has rights that are

good as against the state; there is no reason why he cannot convey to his purchaser whatever rights he has against the state.").

103. *See* EPSTEIN, *supra* note 102, at 155 (noting that Michelman "has the relatationship betwen prices and rights backwards. We do not use prices to determine rights; we use rights to determine prices.").

104. Although the Supreme Court has never directly referred to this section of Michelman's analysis, other courts have. *See* HFH, Ltd. v. Superior Court, 15 Cal. 3d 508, 521, 542 P.2d 237, 246, 135 Cal. Rptr. 365, 374 (1975), and the force of the argument is easliy recognized in the Supreme Court's opinions, as discussed *infra* notes 105-20 and accompanying text.

105. 112 S. Ct. at 2899 (citing *Mahon*, 260 U.S. at 413).

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. 985 (1984).

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

109. 467 U.S. at 1005.

110. *Id.*

111. The Court rejected the petitioner's claim that the choice presented to it was unconstitutional because it 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 expectations 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 1011-13. *See also* Connolly v. Pension Benefit Guaranty Corp., 475 U.S. 211, 227 (1986) (those who do business in a regulated field must anticipate amendments to regulation); Bowen v. Gilliard, 483 U.S. 586, 607 (1987) (recipients of child support payments must anticipate changes in law might reduce those payments).

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

115. The actual holding in *Nollon* was based on police power grounds. *See infra* note 237 and accompanying text.

116. *Id.* at 859 (Brennan, J., dissenting) and 866 (Blackmun, J., dissenting).

117. 483 U.S. 586 (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.

118. *Id.* at 833 n.2 (citing *Monsanto*, 467 U.S. at 1007; *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, *id.* 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 (1965)). If the child

has no property interest in future support payments, goverment modification of the right to receive such payments can hardly 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 infra* note 217 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, I would argue that *Gilliard* and *Monsanto* are not analogous.

119. 438 U.S. at 607. Justice Brennan rejected this distinction, stating: "If the Court is somehow suggesting that 'the right to build on one's 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*, 113 S. Ct. at 2292 (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 Guarantee 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 impose additional financial obligations upon them). In Bowen v. Gilliard, 483 U.S. 587 (1987), the Supreme Court refused to find an interference with "vested protectable expectation[s]", *id.* at 607, where the government changed the requirements for a welfare program. The Court noted that the government must remain free to modify legislation. *Id.* *Gilliard* presents a weaker case than *Monsanto* or *Connolly*, however, for in *Gilliard*, the petitioner's property interest arose from a welfare program voluntarily created by the government (and thus more clearly subject

to government modification). In *Monsanto* and *Connolly*, on the other hand, the petitioners had property interests cognizable under state law that did not arise from government largesse.

Likewise, in Kirby Forest Indus. v. United States, 467 U.S. 1, 14 (1984), the Court noted that the principle underlying the investment-backed expectations factor is that where the "burdens of government action" are "substantial and unforeseeable," they must, in "justice and fairness," be "borne by the public as a whole."

121. As Epstein so succintly put it, "[e]ach round of government regulation thus provides justification for the next." Epstein, *supra* note 86, at 1371.

122. Surely 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 promissory estoppel, and would be based in quasi-contract, rather than in the Takings Clause. It is hard to say that any *constitutional* violation (as opposed to a *contractual* one) has occurred here. *See* Daniel R. Mandelker, *Investment-Backed Expectations: Is There a Taking?*, 31 J. CONTEMP. & URBAN L. 3, 37-41 (1987).

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." *Id.* at 183 n.2 (Blackmun, J., dissenting). In his view, the outcome should be the same, "whether the developer invested $100 or . . .'millions of dollars.'" *Id.*

125. In contrast, landowners who have made substantial expenditures in good faith reliance on govermental acts or regulations are protected from value-depleting changes in regulation through the estoppel and vested rights doctrines. *See* Mandelker, *supra* note 122, at 5. *See also Kaiser Aetna*, 444 U.S. at 179 (action of government officials 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"). In Williamson County Regional Planning Comm'n v. Hamilton Bank of Johnson City, 473 U.S. 172 (1985), the Court declined to state whether the "economic viability" test would apply to a taking claim based upon "vested rights" or "expectation interest." *Id.* at 191 n.12.

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

127. *See supra* note 83 and accompanying text.

128. Or perhaps even in light of overpayment by subsequent owners. *See supra* notes 124-25 and accompanying text.

129. 438 U.S. at 138 n.6.

130. 481 U.S. 703 (1987).

131. *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.

132. *Id.* at 716.

133. *See* Epstein, *supra* note 86, at 1370.

134. *See* 438 U.S. at 138 n.36 ("The city conceded at oral argument that if [the owners] can demonstrate at some point in the future that 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 factual setting of *Penn Central* made it a poor vehicle for delineating the economically viable use factor. The property owners 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.

135. 447 U.S. 255 (1980).

136. *See, e.g., id.* at 260. In applying the first part of the test, the Court generally applies the minimum rationality standard of substantive due process. *See* Peterson, *supra* note 12, at 1327-30. As discussed *infra*, I would argue that a regulation that fails to substantially advance a legitimate state interest may not be a taking at all, but rather an *invalid* regulation. *See infra* note 213 and accompanying text.

137. *See, e.g.*, Nollan v. California Coastal Comm'n, 483 U.S. 825, 834 (1987) (striking down regulation on grounds that it did not advance a legitimate state interest); 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); 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, Inc., 452 U.S. 264, 296 (1981); Schad v. Borough of Mount Ephraim, 452 U.S. 61, 68 (1981).

138. 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 related to geology, fire and flood, and other demonstrated consequences of urban sprawl." *Id.* at 261 n.8 (citation omitted).

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

140. *Id.*

141. *See, e.g.*, Dickman v. Comm'r, 465 U.S. 330, 336 (1984) (quoting Passailaigne v. United States, 224 F. Supp. 682, 686 (M.D. Ga. 1963)) (emphasis in original):

> 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 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.

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

142. *See, e.g.*, *Keystone*, 480 U.S. at 497-98; *Penn Central*, 438 U.S. at 130-31; *see also* cases cited in note 9 *supra* and accompanying text.

143. 112 S.Ct. at 2894.

144. *Id.* (quoting *Penn Central*, 438 U.S. at 124 & 145).

145. *Id.* at 2895 (citations omitted).

146. *See, e.g.*, *Keystone*, 480 U.S. at 495-96 (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, 126 n.4 (1985) (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) ("[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"); *Penn Central*, 438 U.S. 104, 138 n.36 (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) (regulation making property "commercially impracticable" to use "has very nearly the same effect for constitutional purposes as appropriating or destroying it).

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

148. *See* Goldblatt v. Town of Hempstead, 369 U.S. 590, 592 (1962); United States v. Central Eureka Mining Co., 357 U.S. 155, 168 (1958).

149. *See supra* notes 124-25 and accompanying text.

150. 112 S. Ct. at 2908.

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

152. *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 $96,600, sold in 1984 for $187,500, then in 1985 for $260,000 and finally, to Lucas in 1986 for $475,000.").

153. Under Michelman's analysis, the answer would be no because the new owner purchased the property knowing of the restrictions. *See supra* notes 98-101 and accompanying text.

154. *Andrus*, 444 U.S. at 64 n.21. The government had argued that the property owners had not clearly indicated they had purchased their prohibited bird parts before the regulation 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.*

155. The Court recognized this in an analogous setting of rate-making. *See* Duquesne Light Co. v. Barasch, 109 U.S. 609, 616 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"). **{need US cite}** *See generally*, Humbach, *supra* note 124, at 364.

156. *See supra* notes 71-72 and accompanying text.

157. This raises the problematice issue, of course, of how a reasonable return ought to be calculated. *See infra* Part I.B.2.a.

158. *See generally Penn Central*, 438 U.S. at 133-35 (discussing relative benefits and burdens of regulation); *Mahon*, 260 U.S. at 415.

159. 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 74 and accompanying text). Though invalid, the regulation is *not* a taking -- a critical distinction that is discussed further at note 213 *infra* and accompanying text.

160. This is, 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 is not rendered constitutional merely because damages are small or difficult to evaluate. In *Loretto*, for example, the Court found that the the physical intrusion caused by the installation of cable television equipment no "bigger than a bread box," 458 U.S. at 438 n.16, 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 43

(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 $1. *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 $1. Loretto v. Teleprompter Manhattan CATV Corp., 446 N.E.2d 428 (N.Y. 1983).

161. Moreover, the regulation substantially furthers that legitimate purpose and the government's interest in the regulation outweights the burden placed on the property owner. *See infra* note 234 and accompanying text (discussing test for determining validity of police power action).

162. *See, e.g.*, *Nollon*, 438 U.S. at 838-42 (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).

163. 112 S. Ct. at 2900-01. 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 Commission v. Hamilton Bank, 473 U.S. 172, 191 (1985); MacDonald, Sommer & Frates v. Yolo County, 477 U.S. 340, 352-53 (1986), although it 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, Inc., 344 U.S. 149 (1952) (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) (no taking occurred where government destroyed decorative cedar trees infected by a disease that threatened commercial apple trees). In United States v. Riverside Bayview Homes, Inc., 474 U.S. 121 (1985), the Court suggested that deprivation of all economically viable use was a prerequisite to finding a taking "only when a permit is denied and the effect of the denial is to prevent 'economically viable' use of the land in question can it be said that a taking has occurred." *Id.* at 127.

164. *See supra* notes 55-63 and accompanying text.

165. *See supra* note 60 and accompanying text.

166. 112 S.Ct. at 2894 n.7.

167. *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.").

167. *Id.* at 2895 n.8. 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 86, at 1376. In the first instance, property has been taken and used by the goverment; in the second, no property interest has been taken so the reduction in value is not constitutionally compensable. *Id.*; *see also* Jed Rubenfeld, *Usings*, 102 YALE L.J. 1077, 1080 (arguing that property must be "conscripted" for government use in order to constitute a taking). Moreover, even if the analogy were correct, Justice Scalia ought to explain why such all-or-nothing siuations should be tolerated. Surely their mere existence alone is not sufficient justification for their continued perpetuation.

168. 112 S.Ct at 2894 (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 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 transctions in legally obtained bird parts. *See infra* notes 171-76 and accompanying text.

169. *Id.* 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. Interestingly, the real/personal property distinction drawn by Justice Scalia in *Lucas* was foreshadowed in Kirby Forest Industries v. United States, 467 U.S. 1 (1984), where the Court stated: "We 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 (citing Andrus v. Allard, 444 U.S. at 66-68).

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

171. 444 U.S. 51 (1979). Justice Scalia is clearly 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. 720 (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. 480 U.S. at 518 (Rehnquist, 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 "completely destroy[ing] any interest in a segment of property." *Id.*

172. 444 U.S. at 66.

173. 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).

174. 444 U.S. at 65.

175. *Id.*

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

177. 444 U.S. at 52-53.

178. 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 is attenuated.

179. 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 birds." 444 U.S. at 66. The *Irving* Court, on the other hand, seemed to suggested that donated or devised property was not deserving of constitutional protection because it was not supported by investment-backed expectations. Does this mean that the government could confiscate personal property without compensation through a two-step analysis -- 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 seem to be ludicrous, yet a literal reading of the two opinions would seem to support it.

180. *See supra* Part I.

181. *See supra* notes 55-63 and accompanying text.

182. *See supra* notes 124-29; 146-55 and accompanying text.

183. *See supra* notes 168-79 and accompanying text.

184. *See supra* notes 130-33 and accompanying text.

185. *See supra* notes 150-54 and accompanying text.

186. 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).

187. The Supreme Court has used circular language to explain this fact: "[Not all economic interests are 'property rights'; only those economic advantages are 'rights' which have the law back of them, and only when they are recognized may courts compel others to forbear from interfering with them or to compensate for their invasion." *See* United States v. Willow River Power Co., 324 U.S. 499, 502-03 (1945). Of course, this is the same circular argument discussed and dismissed earlier. *See supra* notes 93-97 and accompanying text.

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

189. *See supra* note 83 and accompanying text.

190. 112 S. Ct. at 2895 n.8. Justice Scalia went on to note that the interest in excluding strangers from one's land is just such an interest, citing *Loretto*.

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

192. 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).

193. Thus, for example, the property owner in *Loretto* received "just compensation" of $1 for the taking that she suffered. *See supra* note 160.

194. 447 U.S. 74 (1980).

195. *Id.* at 82.

196. *Id.*

197. *Id.* at 83.

198. *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.'" 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. Indeed, the message to be taken away from *Loretto* and *PruneYard* seems to be that an invasion of private property by small mechanical devices is a taking, but an invasion of private property by indeterminate numbers of persons is not.

199. 447 U.S. at 81.

200. *Id.* at 83.

201. 438 U.S. at 129.

202. As discussed below, *see infra* note 234 and accompanying text, the legitimacy of the regulatory purpose and the means used to achieve it are the critical issues in determining whether a regulatory taking exists. 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 234 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 goal," and that the challenged regulations were an "appropriate means" of achieving that goal. *Id.* at 129.

203. The facts seem to suggest that the city may have viewed it as such, as the city had provided some compensation for the loss of their air rights in the form of transferable development rights. *Id.* The owners conceded that these rights were "valuable, even if not as valuable as the rights to construct above the Terminal," *id.*, but contended that the transferable development rights were insufficient to constitute just compensation. *Id.* at 136 n.33 (citation omitted). The dissent would have remanded for a factual determination on this issue. *Id.* at 151-52 (Rehnquist, J., dissenting).

204. U.S. Const. amend. II.

205. Legislation banning contraband falls within the bounds of a legitimate exercise of the police power. *See infra* notes 226 and accompanying text.

206. 276 U.S. 272 (1928).

207. 334 U.S. 149 (1952).

208. This concept is grounded in Justice Holmes' opinion in *Mahon*, where he stated: "[W]hen [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. at 413. Prior to *Mahon*, 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 theory; eminent domain is another.").

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

210. Michelman, *supra* note 23, at 1622.

211. And indeed, as discussed *infra* note 235 and accompanying text, the economic tests do have some, limited, role to play in takings analysis.

212. 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.*, Rubenfeld, *supra* note 167, at 1093 (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*, 447 U.S. at

84 ("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 v. Roth, 408 U.S. 564, 577 (19872) ("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 an impenetrable thicket, it is hard to see how the infusion of state nuisance law will make the situation intolerable.

However, other criticisms are meatier. *See infra* note 220 and accompanying text (discussing similarities between nuisance analysis and the harm/benefit test vilified by commenators and the Court).

213. Although a full analysis of the remedy issue is beyond the scope of this manuscript, 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, however. Thus, the remedy for such invalid government 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.

214. *See supra* note 1.

215. The Supreme Court explored the nature and scope of the police power in Mugler v. Kansas, 123 U.S. 623 (1887). The Court there rejected the claim of a beer manufacturers that a legislative prohibition against the manufacture and sale of alcoholic beverages constituted a taking of his property. *Id.* at 631-37. Justice Harlan, writing for the majority, noted that a state has broad powers to regulate matters of health, safety, and public morals, powers collectively knowed as the "police power." *Id.* at 658 (citing Berman v. Parker, 348 U.S. 26, 31 (1954)). Exercise of the police power does not require compensation, even if the regulation infringes upon private

property rights. *See* Sax, *supra* note 68_, at 46-50 (regulations that fall within a state's police power do not require compensation).

216. 123 U.S. 623 (1887).

217. *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)

218. 123 U.S. at 669. ("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 manner that does not injure the public. *Id.* at 660 (citing Munn v. Illinois, 94 U.S. 113, 124, 128-29 (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) ("debatable questions as to the reasonableness are not for the courts but for the legislature").

219. 480 U.S. at 491 n.20. The 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.*, Hudson County Water Co. v. McCarter, 209 U.S. 349 355 (1908) ("[I]t is recognized that the State . . . has standing in the courts to protect the atmosphere, the water and the forests within its territory, irrespective of the assent or dissent of the private owners of land most immediately concerned."); Mugler v. Kansas, 123 U.S. 623, 655 (1887) ("[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 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 diffused -- *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 KUBASEK, ENVIRONMENTAL LAW 90-91 (1993).

220. *See, e.g.*, *Lucas*, 112 S. Ct. at 2897-98; Glynn S. Lunney, Jr., *A Critical Reexamination of the Takings Jurisprudence*, 90 MICH. L. REV. 1892, 1933-35 (1992); Daniel B. Frier, Note, *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*. *See, e.g.*, Joseph L. Sax, *Takings and the Police Power*, 74 Yale L.J. 36, 37 (1964). 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," 480 U.S. at 492 n.22, and found that the state law at issue there posed 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.

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." *Id.* at 2915 (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 circumstances in which the land is presently found." *Id.* at 2902 n.18. Implicit in Justice Scalia's statement is a belief that the courts are more likely to be objective than the legislatures in the area of defining nuisances.

221. 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.").

222. 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.").

223. As Justice Scalia rather acidly put it, "Since 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.

224. 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 benefitted 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 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.

225. Rubenfeld, *supra* note 167, at 1080 ("when government, conscripts someone's property for state use, then it must pay").

226. Thus, in "contraband" cases, such as the handgun scenario presented above, *see supra* note 204 and accompanying text, the government is confiscating the property to destroy it, it is not taking it to use it (*e.g.*, to distribute to the National Guard or

members of the armed forces). *Id.* at 1151-52. While I do not agree with all of Rubenfeld's analysis, the power of his theory is compelling, and certainly aids in removing much of the analytical muddle surrounding takings analysis.

227. *Id. at* 1115.

228. The analysis must extend further, however, to an evaluation of whether the impounding survives a police power challenge. *See infra* note 234 and accompanying text.

229. 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." *Id.* at 1119 (italics in original).

230. *See* U.S. Const. amend. V.

231. *Id.*

232. The Constitution also requires that the taking be for a "public use." The Court has read this restriction so narrowly in recent years, *see* Hawaii Housing Auth. v. Midkiff, 467 U.S. 229, 241 (1984) (taking 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 167, at 1078-79.

233. Mugler v. Kansas, 123 U.S. 623, 668 (1887).

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

235. The *Penn Central* Court itself recognized that: "a use restriction may constitute a 'taking' if not reasonably necessary to the effectuation of a substantial government purpose." 438 U.S. at 127. The Court has not definitely stated what type of relationship is required, although it has stated in dicta that a relationship stronger than

that contemplated by the rational basis test of due process or equal protection is required. *See Nollon*, 487 U.S. at 834 n.3.

236. 487 U.S. 825 (1987).

237. *Id.* at 837.

238. A few scholars have examined the substantive due process analysis in recent years. *See, e.g.*, Suslan E. Looper-Friedman, *Constitutional Rights As Property? The Supreme Court's Solution to the "Takings Issue"*, 15 COLUM. J. ENVTL. L. 31 (1990); McGinley, *Regulatory "Takings": The Remarkable Resurrection of Economic Substantive Due Process Analysis in Constitutional Law*, 17 Envtl. L. Rep. (Envtl. L. Inst.) 10369 (1987).

239. 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.

240. Even if the egregious facts of this example might support an attack on the regulation itself as directly benefiting a single, politically powerful member of the community, the more likely scenario involving a group of concerned residents would be much more likely to survive attack.

241. If the public use restriction on the eminent domain power were to be revived, we would likely strike this regulation down as seizing a benefit for private, rather than public, use.

242. The careful observer might notice the similarities between this hypothetical and *Penn Central.*

243. 260 U.S. 393 (1922).

244. *Id.* at 415.