

## THE PUBLIC INTEREST AND THE TAKINGS CLAUSE

by Michael Lewyn\*

\*Associate Professor, Florida Coastal School of Law. I would like to thank Blake Johnston, my former research assistant, for his valuable help; I would also like to thank Jerry Anderson for his valuable comments. However, any errors of fact, law or logic are mine alone.

The Takings Clause of the Fifth Amendment provides that private property “may not be taken for public use, without just compensation.”<sup>1</sup> Under this clause, government must compensate a property owner for losses caused by government regulation (often termed “regulatory takings”<sup>2</sup>) when such regulation has caused a permanent physical invasion of property<sup>3</sup> or has eliminated all economically beneficial uses of such property.<sup>4</sup>

But what if government regulates property in a way that merely reduces, rather than eliminating, the property’s economic value? During the 1970s and early 1980s, the Supreme Court addressed this “partial regulatory takings”<sup>5</sup> issue in two different ways. In 1978, the Court

---

<sup>1</sup>U.S. CONSTITUTION, Amend. V.

<sup>2</sup>*Lingle v. Chevron USA*, 544 U.S. 528, 537 (2005) (using term); DAVID L. CALLIES, ROBERT H. FREILICH, AND THOMAS E. ROBERTS, *CASES AND MATERIALS ON LAND USE* 320 (5<sup>th</sup> ed. 2008) (“regulatory takings doctrine ... [is] the idea that a police power regulation can, if excessive, be declared by a court to be a Fifth Amendment taking”).

<sup>3</sup>*See Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 426 (1982).

<sup>4</sup>*See Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1018 (1992). I note, however, that government may make property economically useless pursuant to “restrictions that background principles of the State’s law of property and nuisance already place upon land ownership.” *Id.* at 1029.

<sup>5</sup>*Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency*, 535 U.S. 302, 326 (2002) (using term). Of course, this term is somewhat misleading, because if the courts hold that a regulation is not sufficiently intrusive to require compensation of affected landowners, the regulation is technically not a “taking” at all. Nevertheless, I use the term in deference to the Supreme Court’s shorthand, and trust that readers will understand what I mean.

wrote in *Penn Central Transportation Company v. New York*<sup>6</sup> that courts must consider (1) the economic impact of a regulation upon a property owner, (2) the effect of such regulation upon the property owner's reasonable investment-backed expectations, and (3) the character of the governmental action.<sup>7</sup> But two years later in *Agins v. Tiburon*,<sup>8</sup> the Court wrote that non-confiscatory zoning creates a taking "if the ordinance does not substantially advance legitimate state interests."<sup>9</sup>

Until 2005, lower courts often resolved this apparent conflict by balancing the public interest favoring government regulation against a takings plaintiff's losses arising from such regulation.<sup>10</sup> Courts following this "private harm/public interest" balancing test held that the "character of the government action" element of *Penn Central* required "an inquiry into the assessment of the 'purpose and importance' of the public interest, which then must be weighed against the [property owner's] loss."<sup>11</sup> But the Supreme Court's 2005 decision in *Lingle v. Chevron USA*<sup>12</sup> called this "private harm/public interest" balancing test into question. In *Lingle*, the Supreme Court overruled the *Agins* "substantially advance" test, holding that in regulatory takings cases, the courts may not rely solely on whether regulation substantially advances a

---

<sup>6</sup>438 U.S. 104 (1978).

<sup>7</sup>*Id.* at 124.

<sup>8</sup>447 U.S. 255 (1980).

<sup>9</sup>*Id.* at 260.

<sup>10</sup>See JULIAN CONRAD JUERGENSMEYER AND THOMAS E. ROBERTS, *LAND USE PLANNING AND DEVELOPMENT LAW*, sec. 10.6 at 430 (2007) (noting that the "'character or extent of the government action' factor has been read by many courts to open up the inquiry into an assessment of the 'purpose and importance' of the public interest' which then must be weighed against the [plaintiff's] loss".) The "loss" component of this test includes both the "economic impact" and "investment-backed expectations" factors of the *Penn Central* test. See *infra* notes 51-53 and accompanying text.

<sup>11</sup>*Id.* See also *infra* note 80 (citing examples).

<sup>12</sup>544 U.S. 528 (2005).

legitimate state interest, because such a formula “prescribes an inquiry in the nature of a due process, not a takings, test and [thus] has no proper place in our takings jurisprudence.”<sup>13</sup>

Some commentators claim that by overruling *Agins*, *Lingle* also reinterpreted *Penn Central* to prohibit lower courts from considering the public benefits from regulation.<sup>14</sup> For example, a land use hornbook reasons as follows: Pre-*Lingle* precedent “inject[ed] due process considerations into the takings equation”<sup>15</sup> by considering the appropriate ends of government action.<sup>16</sup> *Lingle* rejects such “injection.” Thus, *Lingle* “eliminates evaluation of the legitimacy of the regulation, and a judicial balancing of interests should follow it to the dustbin of Supreme Court errors.”<sup>17</sup> Some commentators argue that *Lingle* effectively eliminated the “character of the government action” *Penn Central* factor;<sup>18</sup> others argue that lower courts must continue to weigh the “character” factor, but that this factor no longer encompasses the weight of the public interest favoring government regulation.<sup>19</sup>

This Article disagrees, and asserts that even after *Lingle*, courts can and should balance the harm to a takings plaintiff from land use regulation against the weight of the public interest supporting such regulation. This is so for two reasons. First, the *Lingle* decision *can* be harmonized with such a balancing test. *Lingle* holds that the existence of a valid public purpose may not, *standing alone*, justify an otherwise problematic regulation. But that rule is perfectly consistent with the proposition that this factor may be balanced against the harm to a takings

---

<sup>13</sup>*Id.* at 540.

<sup>14</sup>*See infra* Part III.

<sup>15</sup>JUEGENSMEYER AND ROBERTS, *supra* note 10, sec. 10.4 at 420.

<sup>16</sup>*Id.*

<sup>17</sup>*Id.*, sec. 10.6 at 430.

<sup>18</sup>*See infra* Part III-A.

<sup>19</sup>*See infra* Part III-B.

plaintiff.

Second, the “private harm/public interest” balancing test is easier to apply than alternative interpretations of the *Penn Central* “character” factor. Commentators who reject balancing assert that the “character” factor should be limited to (1) analysis of whether a regulation resembles a physical invasion of property, and/or (2) the extent to which a takings plaintiff is singled out for regulation.<sup>20</sup> This Article suggests that those interpretations are more difficult to apply than the “private harm/public interest” balancing test.<sup>21</sup> To be sure, the *Penn Central* test gives little guidance to judges no matter how it is interpreted, and should perhaps be overruled.<sup>22</sup> But as long as *Penn Central* continues to be good law, balancing interests is less incomprehensible and more consistent with Supreme Court precedent than the most popular alternatives. Accordingly, the court should treat the public interest favoring regulation as part of the “character” factor.

Part I of this Article outlines the history of regulatory takings doctrine. Part II explains why, as a doctrinal matter, *Lingle* does not bar courts from weighing the public interest as part of the “character” factor. Part III explains why, as a policy matter, courts should do so. Finally, Part IV shows how courts may intelligibly do so, using one recent case as an example.

---

<sup>20</sup>*See infra* Part IV.

<sup>21</sup>*Id.*

<sup>22</sup>*Cf.* JUERGENSMEYER AND ROBERTS, *supra* note 10, sec. 10.6 at 429 (Penn Central test’s “indeterminate factors provide little guidance to individuals”) (citation omitted); Stephen M. Durden, *Animal Farm Jurisprudence: Hiding Personal Predilections Behind the ‘Plain Language’ Of The Takings Clause*, 25 PACE ENVTL. L. REV. 355, 372-74 (2008) (noting diversity of scholarly opinions as to proper scope of Takings Clause; the most pro-regulation commentators argue that only physical appropriation of property by government is a “taking”, while some libertarian-minded commentators claim that all government regulations are “takings”).

## I. BACKGROUND: THE HISTORY OF REGULATORY TAKINGS LAW

Before *Penn Central*, the Supreme Court rarely addressed regulatory takings issues, although its first major regulatory takings decision appears to have balanced the economic effects of regulation against the public interest favoring such regulation.<sup>23</sup> *Penn Central* then required courts to consider the economic effects of government action and “the character” of such action, without making it clear what the latter factor meant.<sup>24</sup> However, some lower court decisions (as well as some language in the Court’s own opinions) have suggested that this factor refers to the weight of the public interest supporting regulation, thus apparently requiring courts to balance public interests favoring regulation against a property owner’s economic harm and investment-backed expectations.<sup>25</sup> Over the last several years, *Lingle* has created some confusion among lower courts, thus placing the law in flux.<sup>26</sup>

### A. In The Beginning...

Until the early 20<sup>th</sup> century, courts generally applied the Takings Clause only to the physical taking of private property, as opposed to regulations that merely limited the use of property.<sup>27</sup> But in the 1922 case of *Pennsylvania Coal Co. v. Mahon*,<sup>28</sup> the Supreme Court first applied this clause to regulatory takings.<sup>29</sup> In *Pennsylvania Coal*, a coal company challenged the constitutionality of a statute that prohibited coal mining beneath private residences in such a way

---

<sup>23</sup>See *infra* Part I-A.

<sup>24</sup>See *infra* notes 40-46 and accompanying text.

<sup>25</sup>See *infra* notes 54-57, 73-91 and accompanying text.

<sup>26</sup>See *infra* notes 106-28 and accompanying text.

<sup>27</sup>See CALLIES, FREILICH, AND ROBERTS, *supra* note 2, at 320 (1922 case of *Pennsylvania Coal v. Mahon*, discussed *infra*., “generally is viewed as the origin of the regulatory takings doctrine”).

<sup>28</sup>260 U.S. 393 (1922).

<sup>29</sup>See *supra* note 27.

as to cause subsidence (that is, a cave-in) of the residence.<sup>30</sup> The Court held that “while property may be regulated to a certain extent, if regulation goes *too far* it will be recognized as a taking.”<sup>31</sup>

In applying the “too far” test, the *Pennsylvania Coal* Court mentioned two factors. First, the Court wrote that although property “values are enjoyed under an implied limitation and must yield to the police power ... [o]ne fact for consideration in determining such limits is the extent of the diminution. When it reaches a certain magnitude, in most if not in all cases there must be an exercise of eminent domain and compensation [is necessary] to sustain the act.”<sup>32</sup> The Court then held that by making the coal company’s right to mine coal “commercially impracticable [the statute] has very nearly the same effect for constitutional purposes as appropriating or destroying it.”<sup>33</sup> In other words, the anti-subsidence statute went “too far” because it virtually destroyed the value of the coal company’s property interest.

Second, the Court wrote that the “statute does not disclose a public interest sufficient to warrant so extensive a destruction of the [coal company’s] constitutionally protected rights”<sup>34</sup> for three reasons. First, the Court pointed out that “[t]his is the case of a single private house ... usually in ordinary private affairs the public interest does not warrant much of this kind of interference. A source of damage to such a house is not a public nuisance. The damage is not common or public.”<sup>35</sup> Second, the extent of the public interest supporting the regulation “is

---

<sup>30</sup>*Pennsylvania Coal*, 260 U.S. at 412-13. The coal company owned the mineral rights to land under a house, and sought to use those rights to dig out coal. *Id.* at 412.

<sup>31</sup>*Id.* at 415 (emphasis added).

<sup>32</sup>*Id.* at 413.

<sup>33</sup>*Id.* at 414.

<sup>34</sup>*Id.*

<sup>35</sup>*Id.* at 413.

limited, since the statute ordinarily does not apply to land when the surface is owned by the owner of the coal.”<sup>36</sup> Third, the statute “is not justified as a protection of personal safety”<sup>37</sup> because homeowners were given notice that the coal company planned to mine under their houses.<sup>38</sup>

Thus, *Pennsylvania Coal* suggested that in deciding whether a taking goes “too far”, courts may consider the extent of the harm to a property owner from government regulation and the public interest protected by such regulations.

#### B. *Penn Central* And Its Successors: The Three-Part Test

The Supreme Court gave little attention to regulatory takings<sup>39</sup> until its 1978 decision in *Penn Central*. In that case, a landowner sought to build an office building above a railroad terminal.<sup>40</sup> The city prohibited construction because the terminal was a historic landmark.<sup>41</sup> The landowner then filed a takings action, asserting that the enforcement of the historic landmark ordinance unconstitutionally seized the “air rights” above its building.<sup>42</sup>

The Court wrote that its regulatory takings decisions

have identified several factors that have particular significance. The economic impact of the regulation on the claimant and, particularly, the extent to which the regulation has interfered with distinct investment-backed expectations are, of course, relevant considerations. So, too, is the character of the government action. A ‘taking’ may more readily be found when the interference with property can be characterized as a physical invasion by government, than when interference arises from some public program adjusting the benefits and

---

<sup>36</sup>*Id.* at 414.

<sup>37</sup>*Id.*

<sup>38</sup>*Id.*

<sup>39</sup>See *JUERGENSEMEYER AND ROBERTS*, *supra* note 10, sec. 10.4 at 417 (describing *Penn Central* as “[t]he next important regulatory takings decision”).

<sup>40</sup>*Penn Central*, 438 U.S. at 116.

<sup>41</sup>*Id.* at 117.

<sup>42</sup>*Id.* at 119, 130.

burdens of economic life to promote the common good.<sup>43</sup>

Thus, the Court appears to have required lower courts to consider: (1) the economic impact of a regulation upon a property owner's property interests, (2) the regulation's impact upon the property owner's investment-backed expectations, and (3) the character of the government action.

As to the first of these factors, the court found that the city's interference with the landowner's property rights was not particularly severe, because the city did not interfere with the landowner's current use of its land and did not prevent the landowner from obtaining a reasonable return on its investment.<sup>44</sup> And because the courts had generally upheld regulations relating to air rights above buildings, the Court found that the landowner's investment-backed expectations had not been disrupted.<sup>45</sup> The court further found that the city's regulations were "substantially related to the promotion of the general welfare."<sup>46</sup>

The Supreme Court again applied all three factors in the 1987 case of *Keystone Bituminous Coal Association v. DeBenedictis*.<sup>47</sup> In *Keystone* a group of coal mine operators<sup>48</sup>

---

<sup>43</sup>*Id.* at 124.

<sup>44</sup>*Id.* at 136 ("severity of the impact of the law" did not support takings claim because law "does not interfere in any way with the present uses of the Terminal" and allowed landowner "not only to profit from the terminal but also to obtain a 'reasonable return' on its investment".)

<sup>45</sup>*Id.* at 130 n. 27 (cases upholding limits on development above and below ground require court to reject claim "that full use of air rights is so bound up with the investment-backed expectations of appellants that government deprivation of these rights invariably ... constitutes a taking.") The Court also noted that because the law at issue did not interfere with the property's current use as a railroad terminal, it "does not interfere with what must be regarded as Penn Central's primary expectation concerning the use of the parcel." *Id.* at 136.

<sup>46</sup>*Id.* at 138.

<sup>47</sup>480 U.S. 470 (1987).

<sup>48</sup>*Id.* at 478 (describing plaintiffs as "an association of coal mine operators, and four corporations that are engaged, either directly or through affiliates, in underground mining of bituminous coal").

challenged the Pennsylvania Subsidence Act, which required that 50 percent of the coal beneath residences, public buildings and cemeteries be kept in place as a means of providing surface support to those structures, and authorized the state government to revoke mining permits whenever coal mining damaged such structures.<sup>49</sup> The purpose of this statute was essentially to prevent the collapse of buildings above coal mines.<sup>50</sup>

The Supreme Court upheld the Pennsylvania statute, holding that each of the three *Penn Central* factors favored the anti-subsidence statute. As to the “economic impact” and “investment-backed expectations” factors, the Court noted that the statute affected less than 2 percent of plaintiffs’ coal, much of which could not be extracted for reasons unrelated to the statute.<sup>51</sup> Thus, the regulation burdened “only a small fraction of the property that is subjected to regulation”<sup>52</sup> and there was “no showing that petitioners’ reasonable ‘investment-backed expectations’ have been materially affected by the additional duty to retain the small percentage that must be used to support the structures protected by [the statute].”<sup>53</sup> Because the minimal economic impact of the Pennsylvania law affected the Court’s “reasonable investment-backed expectations” discussion as well as its “economic harm” discussion, *Keystone* suggests that these two *Penn Central* factors are intertwined: both relate to the degree of economic harm suffered by a takings plaintiff.

And as to the “character” factor, the *Keystone* Court held that “the character of the governmental action involved here leans heavily against finding a taking; the Commonwealth of

---

<sup>49</sup>*Id.* at 477.

<sup>50</sup>*Id.* at 476 n. 6 (statute enacted to protect “surface structures against damage from cave-in, collapse, or subsidence”) (citation omitted).

<sup>51</sup>*Id.* at 496.

<sup>52</sup>*Id.* at 499 n. 27.

<sup>53</sup>*Id.* at 499.

Pennsylvania has acted to arrest what it perceives to be a significant threat to the common welfare.”<sup>54</sup> In particular, the “character” factor supported the state’s defense because there were no indicia that the “statute [was] enacted solely for the benefit of private parties”,<sup>55</sup> and the state was “exercising its police power to abate activity akin to a public nuisance”.<sup>56</sup> In sum, *Keystone* appears to hold that the three-part *Penn Central* test “requires a weighing of public and private interests”:<sup>57</sup> the “economic harm’ and “investment-backed expectations” factors require courts to examine how severely a regulation has impaired a takings claimant’s economic interests, while the “character” factor requires courts to examine the weight of the public interest supporting that regulation.

During the 1980s and 1990s, two Supreme Court decisions appeared to call *Penn Central* into question. In *Agins*, a group of landowners challenged a zoning ordinance that allowed them to build only five homes on a five-acre tract of land.<sup>58</sup> The Court held that the ordinance “substantially advance[d] legitimate governmental goals”<sup>59</sup> such as preventing open space from being converted to urban uses<sup>60</sup> and avoiding the negative results of such urbanization.<sup>61</sup> The Court later interpreted *Agins* to mean that a zoning ordinance is not a compensable taking as long

---

<sup>54</sup>*Id.* at 485.

<sup>55</sup>*Id.* at 486.

<sup>56</sup>*Id.* at 488. *See also supra* note 50 (describing risks that statute enacted to prevent).

<sup>57</sup>*Id.* at 492.

<sup>58</sup>*Agins*, 447 U.S. at 257.

<sup>59</sup>*Id.* at 261.

<sup>60</sup>*Id.*

<sup>61</sup>*Id.* at 261 n. 8 (urbanization might lead to “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”) (citation omitted).

as it substantially advances a legitimate government interest.<sup>62</sup>

In 1992, the Court's ruling in *Lucas v. South Carolina Coastal Council*<sup>63</sup> created additional confusion. In *Lucas*, the owner of beachfront property challenged the constitutionality of environmental legislation that allegedly prevented him from erecting any permanent habitable structures on his land.<sup>64</sup> The Court held that this regulation was a taking because the plaintiff had "been called upon to sacrifice *all* economically beneficial uses in the name of the common good."<sup>65</sup> The Court added, however, that even such confiscatory regulation was constitutional if it arose from background principles of property law, such as nuisance regulation.<sup>66</sup> At least one lower court decision suggested that *Lucas* "removed the weighing of public versus private interests in determining whether a taking has been effected"<sup>67</sup> and instead held that after *Lucas*, government could avoid takings liability "only if it could articulate background principles [of

---

<sup>62</sup>See *Lingle*, 544 U.S. at 540 (suggesting that *Agins* endorsed a "stand-alone regulatory takings test that is wholly independent of *Penn Central*") I note, however, that some language in *Agins* suggests otherwise. Later in its decision, the *Agins* Court pointed out that the benefits of the zoning ordinance "must be considered along with any diminution in market value that the appellants may suffer", *Agins*, 447 U.S. at 262, and that the plaintiffs "are free to pursue their reasonable investment expectations by submitting a development plan to local officials." *Id.* Because *Agins* did refer to the "harm to plaintiff" *Penn Central* factors (economic impact upon landowners and investment-backed expectations) at various points in its decision, it appears that the *Agins* Court may have actually intended to apply *Penn Central*, rather than to create a stand-alone regulatory takings test.

<sup>63</sup>505 U.S. 1003 (1992).

<sup>64</sup>*Id.* at 1006-07.

<sup>65</sup>*Id.* at 1019 (emphasis in original).

<sup>66</sup>*Id.* at 1029 (even if regulation prohibits all economically beneficial use of land, it is constitutional if regulation "inhere[s] in the title itself, in the restrictions that background principles of the State's law of property and nuisance already place upon land ownership. A law or decree with such an effect must, in other words, do no more than duplicate the result that could have been achieved in the courts [by private plaintiffs] under the State's law of private nuisance, or by the State under its complementary power to abate nuisances that effect the public generally.")

<sup>67</sup>*Bass Enterprises Production Co. v. United States*, 381 F.3d 1360, 1369 (Fed. Cir. 2004) (describing post-*Lucas* Federal Circuit cases).

property law, such as nuisance regulation] that prohibit the uses [proposed by the landowner].”<sup>68</sup>

But in the 2001 case of *Palazzolo v. Rhode Island*,<sup>69</sup> the Court reaffirmed its commitment to the three-part *Penn Central* test.<sup>70</sup> The Court held that *Lucas* applied only where a regulation eliminated all economically beneficial use of a landowner’s property, while partial regulatory takings were still subject to the *Penn Central* three-part test requiring courts to consider the economic effect of a regulation on property owners, the regulation’s interference with the property owner’s investment-backed expectations, and the character of the government action.<sup>71</sup>

The Court’s plurality opinion did not explain the meaning of the “character” factor. However, Justice O’Connor’s concurrence (which supplied the crucial fifth vote in *Palazzolo*)<sup>72</sup> noted that:

Another [significant factor in takings cases] is the character of the government action. The purposes served, as well as the effects produced, by a particular regulation inform the takings analysis ... Regulatory takings cases necessarily entail [l] complex factual assessments of the purposes and economic effects of government actions.<sup>73</sup>

By mentioning the purposes and effects of government action, Justice O’Connor’s

---

<sup>68</sup>*Id.* I note, however, that this theory was not the most plausible interpretation of *Lucas*, given the *Lucas* Court’s own suggestion that under *Penn Central*, “in at least *some* cases the landowner with 95% loss will get nothing, while the landowner with total loss will recover in full.” *Lucas*, 505 U.S. at 1018 n. 8.

<sup>69</sup>533 U.S. 606 (2001).

<sup>70</sup>*See infra* notes 71-73 and accompanying text.

<sup>71</sup>*Palazzolo*, 533 U.S. at 617.

<sup>72</sup>*Id.* at 611 (four justices dissented). On the other hand, both the plurality opinion and O’Connor’s concurrence reached their decision on grounds unrelated to the “character” factor. *Id.* at 630 (remanding case because “claim is not barred by the mere fact that title was acquired after the effective date of the state-imposed restriction.”) (plurality opinion), 634 (rejecting view that state of title at time plaintiff acquired property barred claim under “investment-backed expectations” factor) (O’Connor, J. concurring). Thus, even if Justice O’Connor’s opinion is treated as the opinion of the Court, her discussion of the “character” factor might be treated as dictum.

<sup>73</sup>*Id.* at 632, 634 (citations omitted) (O, Connor, J. concurring).

concurrence suggested that courts should continue to consider the importance of the purpose animating that action, and the relationship between that purpose and the action’s economic effects: in short, whether the government’s action effectively furthered an important purpose.

In *Tahoe-Sierra Preservation Council v. Tahoe Regional Planning Agency*,<sup>74</sup> the majority of the Court apparently endorsed the view of the “character” factor enunciated by the *Keystone* Court<sup>75</sup> and by Justice O’Connor’s *Palazzolo* concurrence.<sup>76</sup> The *Tahoe-Sierra* Court held that a temporary moratorium on real estate development was governed by the three-part *Penn Central* test, and not by the *Lucas* test.<sup>77</sup> In the course of this decision, the Court briefly described the *Penn Central* test, finding that *Penn Central* “entails complex factual assessments of the purposes and economic effects of government actions.”<sup>78</sup> The *Tahoe-Sierra* Court’s references to “purposes” implies that the purposes justifying a government action are relevant to that action’s constitutionality under *Penn Central*.<sup>79</sup>

Between 2002 (when *Tahoe-Sierra* was decided) and 2005 (when *Lingle* was decided),

---

<sup>74</sup>535 U.S. 302 (2002).

<sup>75</sup>See *supra* notes 54-57 and accompanying text (describing *Keystone* discussion of factor).

<sup>76</sup>See *supra* note 73 and accompanying text (describing Justice O’Connor’s opinion).

<sup>77</sup>See *Tahoe-Sierra*, 535 U.S. at 320-21 (rejecting the plaintiff’s contention that “the mere enactment of a temporary regulation that, while in effect, denies a property owner all economically beneficial use of her property gives rise to an unqualified constitutional obligation to compensate her for the value of its use during that period” and instead holding that such regulations are “best analyzed within the *Penn Central* framework.”)

<sup>78</sup>*Id.* at 323 (citation omitted) (emphasis added).

<sup>79</sup>I note, however, that the Court did not address the question of whether the restrictions at issue were takings under *Penn Central*, holding only that the growth moratorium should be evaluated under the *Penn Central* test. *Id.* at 317-18 (appropriate outcome under *Penn Central* not before Court, because the plaintiffs had disavowed reliance on *Penn Central*); 342 (concluding that “the [public] interest in ‘fairness and justice’ will be best served by relying on the familiar *Penn Central* approach when deciding cases like this, rather than by attempting to craft a new categorical rule.”) Thus, the Court’s language interpreting *Penn Central* is arguably dicta.

lower courts generally agreed that the *Penn Central* “character” factor required them to balance the public interest favoring regulation against the impact of regulation upon property owners.<sup>80</sup> For example, in *Bass Enterprises Production Co. v. United States*,<sup>81</sup> the plaintiffs had leased land from the federal government, and sought permits to drill oil and gas wells on that land.<sup>82</sup> The federal Bureau of Land Management (BLM) denied the permits in 1994, because the Environmental Protection Agency (EPA) was planning to acquire the lease in order to prevent drilling from affecting a nearby underground nuclear waste facility.<sup>83</sup> After EPA decided not to do so, BLM issued the permits.<sup>84</sup> The plaintiffs then sought compensation under the Takings Clause for the delay between the BLM’s denial of the permits and their subsequent approval.<sup>85</sup>

The plaintiffs alleged that the *Penn Central* “character of the government action” factor favored their claim unless the government’s action “was designed to proscribe a nuisance.”<sup>86</sup> Overruling its own precedent,<sup>87</sup> the Federal Circuit rejected this argument, quoting Justice

---

<sup>80</sup>See *infra* notes 81-91 and accompanying text (discussing *Bass Enterprises* case); *Appollo Fuels, Inc. v. United States*, 381 F.3d 1338, 1351 (Fed. Cir. 2004) (denying takings claim in part because government action “designed to protect health and safety” and “character” favor thus favored government); *Leon County v. Gluesenkamp*, 873 So. 2d 460, 468 (Fla. Dist. App. 1 2004) (“In determining the character of the government action, courts must ... balance appellees’ interests against the County’s needs to protect the public”) *But see* *K & K Construction, Inc. v. Dept. Of Environmental Quality*, 705 N.W. 2d 365, 384 (Mich. App. 2005) (focusing on “whether the government regulation singles plaintiffs out to bear the burden for the public good and whether the regulatory act being challenged is a comprehensive, broadly based regulatory scheme that benefits and burdens all citizens relatively equally.”)

<sup>81</sup>381 F.3d 1360 (Fed. Cir. 2004).

<sup>82</sup>*Id.* at 1361-62.

<sup>83</sup>*Id.* at 1363 (BLM denied permit because EPA had not yet made decision), 1366-68 (describing possible dangers from drilling in more detail).

<sup>84</sup>*Id.* at 1363-64.

<sup>85</sup>*Id.* at 1364.

<sup>86</sup>*Id.*

<sup>87</sup>*Id.* at 1369 (pre-Palazzolo Federal Circuit precedent asserted that *Penn Central* no longer good law, based on intervening Supreme Court precedent).

O'Connor's concurrence and the *Tahoe-Sierra* Court's language.<sup>88</sup> As to the latter, the court stated that "[a]s for the 'character of the government action' factor, the *Tahoe-Sierra* Court advocated an examination of the 'purpose and economic effect' of the government's actions ... We therefore consider the purpose of the regulation and its desired effects in determining whether a taking has occurred."<sup>89</sup> Applying this rule, the court rejected the plaintiffs' takings claim, based partially on "the potential impact on the public [from]... drilling near a nuclear waste site."<sup>90</sup> So *Bass Enterprises* (like numerous other courts in the mid-2000s)<sup>91</sup> held that partial regulatory takings claims generally required courts to balance a regulation's harm to plaintiff (the "economic impact" and "investment-backed expectations" factors) against the public interest supporting the regulation (the "character" factor).

### C. *Lingle* And Its Aftermath

But in 2005, the Supreme Court again addressed partial regulatory takings.<sup>92</sup> In *Lingle v. Chevron U.S.A., Inc.*,<sup>93</sup> an oil company challenged a Hawaii law that limited the rent that it could charge to gasoline dealers who leased service stations from oil companies.<sup>94</sup> The trial court held that the rent control statute failed to "substantially advance any legitimate state interest"<sup>95</sup> and thus constituted an unconstitutional taking based on the *Agins v. Tiburon* "substantially advance" test.<sup>96</sup>

---

<sup>88</sup>*Id.* at 1370.

<sup>89</sup>*Id.*

<sup>90</sup>*Id.*

<sup>91</sup>*See supra* note 80.

<sup>92</sup>*See infra* notes 93-105 and accompanying text.

<sup>93</sup>544 U.S. 528 (2005).

<sup>94</sup>*Id.* at 532-33.

<sup>95</sup>*Id.* at 534 (citation omitted).

<sup>96</sup>*Id.* at 531-32 (citations omitted). *See also supra* notes 58-62 (describing *Agins*).

The Supreme Court reversed. The Court reiterated its view that except under certain narrow circumstances,<sup>97</sup> the *Penn Central* test governs partial regulatory takings actions.<sup>98</sup> The Court then went on to write that the *Agins* “substantially advance” test was more similar to the test governing substantive due process actions than to *Penn Central*.<sup>99</sup> Just as the *Agins* test requires courts to uphold any regulation that is “effective in achieving some legitimate public purpose”,<sup>100</sup> the Court’s substantive due process precedent requires that a regulation be upheld unless it is “clearly arbitrary and unreasonable, having no substantial relation to the public health, safety, morals or general welfare.”<sup>101</sup> By contrast, *Penn Central* requires the Court to consider not just the reasonableness of government action, but the impact of such action upon a property owner.<sup>102</sup> Thus, the *Agins* “substantially advance” test was inconsistent with *Penn Central*. After pointing out the inconsistency between *Agins* and *Penn Central*, the Court went on to overrule *Agins* because a standard that fails to address the burden imposed by a regulation upon property rights “is tethered neither to the text of the Takings Clause nor to the basic justification for allowing regulatory actions to be challenged under the Clause.”<sup>103</sup> Because the lower courts erroneously applied the *Agins* test, the Court remanded the case for further

---

<sup>97</sup>These circumstances include: government regulations that create a permanent physical invasion of a landowner’s property, *id.* at 538, regulations that render property economically useless, *id.*, and exactions (that is, governmental attempts to force a landowner to dedicate property to the public as a condition for obtaining a building permit). *Id.* at 546-47.

<sup>98</sup>*Id.* at 538.

<sup>99</sup>*Id.* at 540-41.

<sup>100</sup>*Id.* at 542.

<sup>101</sup>*Id.* at 541 (citation omitted).

<sup>102</sup>*Id.* at 538-39 (factors relevant under *Penn Central* include “the economic impact of the regulation on the claimant and, particularly, the extent to which the regulation has interfered with distinct investment-backed expectations”) (citations omitted).

<sup>103</sup>*Id.* at 542.

proceedings under the *Penn Central* standard.<sup>104</sup>

In addition to reaffirming its commitment to *Penn Central* generally, the Court apparently reaffirmed its commitment to the “character” factor, stating: “‘the character of the government action’ - for instance whether it amounts to a physical invasion or instead merely affects property interests through ‘some public program adjusting the benefits and burdens of economic life to promote the common good’ - may be relevant in discerning whether a taking has occurred.”<sup>105</sup>

Post-*Lingle* cases generally agree that lower courts must apply *Penn Central* to partial regulatory takings cases, but are divided as to the meaning of the *Penn Central* “character” factor.<sup>106</sup> These cases fall into three categories: (1) cases reaffirming the “private harm/public interest” balancing test, (2) cases holding that the “character” factor is limited to physical invasions and similar situations, and (3) cases redefining the “character” factor as an inquiry into whether a small number of property owners have been unfairly burdened by a government regulation.<sup>107</sup>

At least one post-*Lingle* decision has reaffirmed the view that courts may balance the public interest favoring a regulation against its impact upon takings plaintiffs. In *Adams v. Village of Wesley Chapel*,<sup>108</sup> landowners challenged a zoning ordinance that limited the number

---

<sup>104</sup>*Id.* at 536 (describing Ninth Circuit’s decision), 548 (remanding case to Ninth Circuit).

<sup>105</sup>*Lingle*, 544 U.S. at 539 (emphasis added).

<sup>106</sup>*See infra* notes 107-28 and accompanying text.

<sup>107</sup>*See Giovenella v. Conservation Commission of Ashland*, 447 Mass. 720, 735, 857 N.E. 2d 451, 462 (2006) (some courts have focused on whether regulation unfairly singles out landowner, while others looked at whether government action resembles a physical invasion, or whether purpose of regulation was to mitigate harm to public; declining to resolve issue because under any of these tests, no taking occurred).

<sup>108</sup>2006 WL 2689376 (W.D. N.C. Sept. 18, 2006).

of lots into which their property could be subdivided.<sup>109</sup> The U.S. District Court for the Western District of North Carolina rejected the landowners' takings claim based on *Penn Central*. As to the "character" factor, the court stated: "The Supreme Court has long recognized the legitimacy of local governments seeking to protect against overcrowding and preserving the character of their areas ... Here, the Village enacted a land use restriction with the stated purpose 'to provide for residential development at low densities consistent with suitability of the land and the rural character of the village.'"<sup>110</sup> In other words, the court held that the "character" factor favored the government because its action effectively served a legitimate public purpose (limiting density in order to prevent overcrowding).

On the other hand, some courts have held that the "character" factor is relevant only to cases involving physical invasion of property.<sup>111</sup> For example, in *RAR Development Associates v. New Jersey Construction Corporation (RAR)*,<sup>112</sup> the state of New Jersey announced plans to acquire a landowner's property, and subsidized the relocation of one of the landowner's tenants.<sup>113</sup> Eventually, the state decided not to acquire the property, thus causing the landowner to be stuck with its land but with no tenant.<sup>114</sup> Because the landowner had been deprived of a tenant, it claimed that the inducements given to that tenant to vacate the property constituted a

---

<sup>109</sup>*Id.* at \*1.

<sup>110</sup>*Id.* at \*3.

<sup>111</sup>*See* *RAR Development Associates v. New Jersey Construction Corp.*, 2008 WL 2663403, \*11 (N.J. Super. A.D. July 9, 2008) (citation omitted); *Allegretti & Co. v. County of Imperial*, 138 Cal. App. 4<sup>th</sup> 1261, 1277, 42 Cal. Rptr. 3d 122, 133 (2006) ("County's action did not physically invade or appropriate [plaintiff's] property or groundwater. Accordingly, [character of government action] factor does not support a taking.") (citations omitted).

<sup>112</sup>2008 WL 2663403 (N.J. Super. A.D. July 9, 2008).

<sup>113</sup>*Id.* at \*1-2.

<sup>114</sup>*Id.* at \*2.

taking.<sup>115</sup>

The Superior Court of New Jersey held that the “character” factor “focuses primarily on whether the conduct ‘amounts to a physical invasion’.”<sup>116</sup> The court went on to uphold the government’s action, because relocation assistance did not even “cause a substantial destruction of the property’s beneficial use”,<sup>117</sup> let alone cause a physical occupation. Instead, the state was merely trying to acquire property for school construction in an orderly manner by providing affected persons with relocation assistance as early as possible.<sup>118</sup> Thus, the *RAR* decision implies that the “character” factor might be relevant only to cases involving a physical invasion of property by government.<sup>119</sup>

A third group of cases has focused on whether “the burden of the regulation falls disproportionately on relatively few property owners.”<sup>120</sup> For example, in *Wensmann Realty v.*

---

<sup>115</sup>*Id.* at \*2.

<sup>116</sup>*Id.* at \*11, citing *Lingle*, 544 U.S. at 539. I note that the court was presumably referring to temporary physical occupations, because a permanent physical occupation of property by government is always a taking, and courts need not apply the Penn Central test in such situations. *RAR Development Associates*, 2008 WL 2663403 at \*11 (citations omitted).

<sup>117</sup>*Id.* at \*13.

<sup>118</sup>*Id.* (“The governmental action here consisted of a good faith effort by the State to act within the confines of the relevant statutory sections and administrative regulations to acquire property for the construction of a school. Extended lead time was needed for [tenant’s] relocation, and the orderly process of the intended acquisition of plaintiff’s improved property necessitated its early provision of relocation assistance.”)

<sup>119</sup> But because no reported cases have cited *RAR*, the precise scope of the New Jersey court’s holding remains unclear. *Cf.* Parts II-B-1 and III-B-1 (critiquing “physical invasion” theory).

<sup>120</sup>*Wensmann Realty, Inc. v. City of Eagan*, 734 N.W. 2d 623, 639 (Minn. 2007). *See also* *Small Prop. Owners of San Francisco v. City and County of San Francisco*, 141 Cal. App. 4<sup>th</sup> 1388, 1409, 47 Cal. Rptr. 3d 121, 136 (2006) (without directly addressing impact of *Lingle* upon “character” factor, upholding ordinance as “part of a broader scheme of allocating economic benefits and burdens between landlords and tenants for the public good”); *Cf.* *Tapps Brewing Co. v. City of Sumner*, 482 F. Supp. 2d 1218, 1230 (W.D. Wash. 2007) (where landowners challenged city regulation forcing it to upgrade pipe system, “character” factor

*City of Eagan*, a landowner sought to build houses on property zoned for a golf course, and filed suit after the city rejected its application for a rezoning.<sup>121</sup> The Court interpreted the *Lingle* Court’s statement that takings jurisprudence should consider “how that burden [upon property rights caused by a regulation] is allocated’”,<sup>122</sup> to mean that courts should not balance harm to a takings plaintiff against the public interest favoring regulation, because “the appropriate focus of the character inquiry should be on the nature rather than on the merit of the governmental action.”<sup>123</sup> Instead, the court held that the decisive issue was “whether the regulation is general in application or whether the burden of the regulation falls disproportionately on relatively few property owners.”<sup>124</sup> In other words, *Wensmann* suggests that the “character” factor favors compensation when only a few owners are harmed by a regulation, and favors government regulation when the burden of a regulation is widely distributed across society.<sup>125</sup> Applying this test, the court held that the “character” factor favored the landowner, for two reasons. First, only a few private property owners were subject to the zoning category that included golf courses (“Parks, Open Space, and Regulation.”).<sup>126</sup> Second, the city had allowed other land near the plaintiffs’ golf course to be used for residential development.<sup>127</sup> Thus, the costs of this regulation disproportionately affected the plaintiff rather than being spread broadly throughout

---

supported city where “Plaintiffs fail to provide any evidence showing that the City has not required any other land owner to upgrade the pipe system”).

<sup>121</sup>*Wensmann Realty*, 734 N.W. 2d at 628-29 (describing underlying facts in more detail).

<sup>122</sup>*Id.* at 639, citing *Lingle*, 544 U.S. at 543.

<sup>123</sup>*Id.* at 640 (citation omitted).

<sup>124</sup>*Wensmann Realty*, 734 N.W. 2d at 639.

<sup>125</sup>*See infra* Parts II-B-2 and III-B-2 (critiquing this theory).

<sup>126</sup>*Wensmann Realty*, 734 N.W. 2d at 640.

<sup>127</sup>*Id.*

society.<sup>128</sup>

## II. WHY PRECEDENT FAVORS A “PRIVATE HARM/PUBLIC INTEREST” BALANCING TEST

As explained above, pre-*Lingle* precedent suggests that to give full effect to the *Penn Central* “character of the government action” factor, courts in partial regulatory takings actions should weigh the public interest favoring regulation against the other *Penn Central* factors (the economic harm to the plaintiff, and the interference with the plaintiff’s investment-backed expectations).<sup>129</sup> Justice O’Connor’s concurrence in *Palazzolo* endorsed this view,<sup>130</sup> as does some language in the Court’s full opinion in *Tahoe-Sierra*.<sup>131</sup>

Moreover, *Lingle* itself may reaffirm this “private harm/public interest” test. As noted above, the *Lingle* Court wrote that “‘the character of the government action’ - for instance whether it amounts to a physical invasion or instead merely affects property interests through ‘some public program adjusting the benefits and burdens of economic life to *promote the common good*’ - may be relevant in discerning whether a taking has occurred.”<sup>132</sup> The *Lingle* Court’s reference to the “common good” suggests that the extent to which a regulation in fact “promotes the common good” is relevant to the “character” factor. It logically follows that if the “common good” interest favoring a regulation is strong, then it is less likely to be a compensable taking.

Yet some commentators argue that *Lingle* now bars any inquiry into the broader public

---

<sup>128</sup>*Id.*

<sup>129</sup>*See supra* notes 54-57, 73-91 and accompanying text.

<sup>130</sup>*See supra* note 73 and accompanying text.

<sup>131</sup>*See supra* notes 74-79 and accompanying text.

<sup>132</sup>*Lingle*, 544 U.S. at 539 (emphasis added).

interests supporting regulation.<sup>133</sup> Some contend that *Lingle* implicitly eliminates the “character of the government action” factor altogether,<sup>134</sup> while others suggested that *Lingle* radically redefined the “character” factor.<sup>135</sup>

A. Does Character Count At All?

The *Lingle* Court went out of its way to point out that its rejection of *Agins* “does not require us to disturb any of our prior holdings”<sup>136</sup> (other than, presumably, *Agins* itself).

Nevertheless, Dale Whitman writes that “if *Lingle* is taken seriously, it appears to destroy the ‘character of the governmental action’ prong of the *Penn Central* takings test.”<sup>137</sup>

In support of this statement, Whitman focuses on the *Lingle* Court’s statement that *Penn Central* “focuses directly upon the severity of the burden that government imposes upon private property rights.”<sup>138</sup> According to Whitman, this statement excludes inquiry into “the government’s reasons or motivations for taking regulatory action.”<sup>139</sup> Whitman apparently construes the *Lingle* Court’s statement that *Penn Central* “focuses directly upon the severity of the burden [upon takings plaintiffs]”<sup>140</sup> as a suggestion that *Penn Central* excludes consideration of other factors.

But this need not be the case. Because two of the three *Penn Central* factors address the burden of a regulation upon the plaintiff,<sup>141</sup> the *Penn Central* Court obviously meant to focus upon that

---

<sup>133</sup>As do a few lower courts. See *supra* notes 116-28 and accompanying text.

<sup>134</sup>See *infra* Part II-A.

<sup>135</sup>See *infra* Part II-B.

<sup>136</sup>*Lingle*, 544 U.S. at 545.

<sup>137</sup>Dale A. Whitman, *Deconstructing Lingle, Implications for Takings Doctrine*, 40 J. MARSHALL L. REV. 573, 574 (2007).

<sup>138</sup>*Id.* at 581, citing *Lingle*, 544 U.S. at 539.

<sup>139</sup>Whitman, *supra* note 137, at 581.

<sup>140</sup>*Id.* at 581, citing *Lingle*, 544 U.S. at 539.

<sup>141</sup>The “economic impact of the regulation on the claimant and, particularly, the extent to which the regulation has interfered with distinct investment-

burden. But this emphasis does not mean that courts must focus *solely* upon that burden, to the exclusion of all other factors- especially given the *Penn Central* Court’s explicit reference to the “the character of the government action.”<sup>142</sup> And the *Lingle* Court’s explicit reference to this “character” factor<sup>143</sup> suggests that the *Lingle* Court intended to retain that factor.

Whitman also relies on the *Lingle* Court’s statement that *Penn Central* “turns in large part, albeit not exclusively, upon the magnitude of a regulation’s economic impact and the degree to which it interferes with legitimate property interests.”<sup>144</sup> According to Whitman, this “language omits any reference to the third prong of *Penn Central*, the ‘character’ test, and it inserts the [italicized “not exclusively”] language precisely because, I suspect, O’Connor [the author of *Lingle*] realized that the unmentioned ‘character’ prong was inconsistent with the *Lingle* opinion and could not survive it.”<sup>145</sup> In other words, Whitman argues that if the Court said liability does *not* turn exclusively upon the two “harm to plaintiff” factors (economic impact and interference with investment-backed expectations) it must have meant that liability in fact *does* turn on those factors. But surely, if the Court said that takings cases depend “*not* exclusively” upon the two “harm to plaintiff” factors, it must have intended another factor to be relevant- and by reiterating its commitment to the “character” factor,<sup>146</sup> the Court seems to have held that the character of the government action is that third factor.

Eric Pearson, by contrast, concedes that *Lingle* explicitly reaffirmed the *Penn Central*

---

backed expectations.” *Penn Central*, 438 U.S. at 124.

<sup>142</sup>*Lingle*, 544 U.S. at 539.

<sup>143</sup>*See supra* note 105 and accompanying text.

<sup>144</sup>Whitman, *supra* note 137, at 582 (emphasis in original), quoting *Lingle*, 544 U.S. at 540.

<sup>145</sup>Whitman, *supra* note 137, at 582.

<sup>146</sup>*See supra* note 105 and accompanying text.

character factor,<sup>147</sup> but nevertheless argues that *Lingle* “effectively eviscerates the ‘character of the government action’ factor of *Penn Central*.”<sup>148</sup> Pearson reasons as follows: the character factor “inquire[s] of the behavior of government rather than of the harm to property that behavior might produce.”<sup>149</sup> So does the *Agins* “substantially advance” test.<sup>150</sup> Thus, both tests “reside in the universe of substantive due process ... Given that identity of purpose and effect, *Lingle*’s condemnation of the *Agins* test perforce condemns the *Penn Central* character factor as well.”<sup>151</sup> In other words, Pearson asserts that it is simply illogical for the Court to reject the *Agins* test and yet uphold the “character” element of *Penn Central*, because both relate to the wisdom of government regulation rather than to the harm that such regulation causes to property owners.

But there is a difference between *Penn Central* and the *Agins* test. Under the “substantially advance” test, the constitutionality of a government regulation arguably rises or falls *solely* on the rationality of government action, regardless of its impact on private property owners.<sup>152</sup> By contrast, *Penn Central* (as interpreted by Pearson himself) considers the character of government action as one factor among several, a factor to be weighed against the effect of a government regulation upon a property owner’s economic value and investment-backed expectations.<sup>153</sup> Thus, such a balancing test is no more

---

<sup>147</sup>Eric Pearson, *Some Thoughts on the Role of Substantive Due Process In The Federal Constitutional Law of Property Rights Protection*, 25 PACE ENVTL. L. REV. 1, 32 (2008).

<sup>148</sup>*Id.*

<sup>149</sup>*Id.*

<sup>150</sup>*Id.*

<sup>151</sup>*Id.*

<sup>152</sup>*Lingle*, 544 U.S. at 540-42 (citations omitted).

<sup>153</sup>*See* Pearson, *supra* note 147, at 25 (“*Penn Central* designates three factors for balancing--economic harm, interference with investment-backed expectations, and the character of the government action. The problem is this: the first two factors ... relate to

identical to substantive due process than are any of the other balancing tests within constitutional jurisprudence.<sup>154</sup>

To understand the difference between substantive due process and a true balancing test, imagine the following hypothetical: suppose government has an excellent reason to make a policy decision that reduces the value of a landowner's property by 90 percent. Under the "substantially advance" test, the landowner's Takings Clause claim fails: government had a substantial basis for its decision, and thus prevails. By contrast, under a "private harm/public interest" balancing test, government's excellent reason is balanced against the harm to plaintiff – which means that the government might actually lose a case once in a while. Thus, the substantive due process/"substantially advance" test rejected in *Lingle* is effectively quite different from the balancing test criticized by Pearson.

Gary Lawson, Katherine Ferguson and Gulleirimo Montero argue that even if substantive due process could be distinguished in theory from a "private harm/public interest" balancing test, the *Lingle* Court itself equated substantive due process with such balancing.<sup>155</sup> They rely on the following language from *Lingle*: "whether a regulation of

---

the exercise of government power in a particular case. They inquire whether the government's regulation, when applied to an individual, so harms that individual as to cause a taking. The character factor, on the other hand, typically relates not at all to the specific exercise of government power implicated in a case. Rather, this latter factor assesses the worthiness of a statute as a general matter.")

<sup>154</sup>See, e.g., *Samson v. California*, 547 U.S. 843, 849 (2006) (describing Fourth Amendment balancing of interests); *Rankin v. McPherson*, 483 U.S. 378, 384 (1987) (when public employer terminates employee for engaging in speech, employee's First Amendment claims require balancing of parties' interests).

<sup>155</sup>Gary Lawson, Katherine Ferguson and Gulleirimo A. Montero, '*Oh Lord, Please Don't Let Me Be Misunderstood*': *Rediscovering the Matthews v. Eldridge and Penn Central Frameworks*, 81 NOTRE DAME L. REV. 1, 46 (2005) ("consideration of

private property is effective in achieving some legitimate public purpose. . . . has some logic in the context of a due process challenge . . . . [b]ut such a test is not a valid method of discerning whether private property has been ‘taken’ for purposes of the Fifth Amendment.”<sup>156</sup> Apparently, Lawson and his colleagues interpret *Lingle* to mean that because a substantial public interest favoring regulation is necessary for a due process challenge, the public interest cannot be relevant to the Takings Clause.

But a look at the full context of the language quoted might yield a more nuanced conclusion. Going from the beginning of the first sentence quoted, the relevant portion of *Lingle* reads:

Although Agins' reliance on due process precedents is understandable, the language the Court selected was regrettably imprecise. The “substantially advances” formula suggests a means-ends test: It asks, in essence, whether a regulation of private property is effective in achieving some legitimate public purpose. An inquiry of this nature has some logic in the context of a due process challenge, for a regulation that fails to serve any legitimate governmental objective may be so arbitrary or irrational that it runs afoul of the Due Process Clause. [citation omitted] ... But such a test is not a valid method of discerning whether private property has been “taken” for purposes of the Fifth Amendment.<sup>157</sup>

The quoted language undeniably rejects the idea that *any* regulation allowed by due process is also allowed by the Takings Clause. But the rule rejected in *Lingle* is not the balancing test proposed by Justice O’Connor in *Palazzolo*: that the regulation’s effectiveness in achieving a public purpose is just one of three factors to be considered in

---

the extent to which a challenged regulation actually serves the government interests sought to be advanced . . . is now foreclosed” by *Lingle*).

<sup>156</sup>*Id.*, quoting *Lingle*, 544 U.S. at 542. I note that, unlike Pearson, Lawson and his colleagues seek to redefine the “character” factor rather than eliminating that factor. See *infra* Part III-B-1 (describing and critiquing their proposed test). However, I am addressing their critique of balancing in this portion of my article because their argument is so similar to that of Pearson.

<sup>157</sup>*Id.*

ascertaining the validity of the regulation.<sup>158</sup> Under the “substantially advances” formula, the wisdom of the regulation is an automatic safe harbor against takings claims- but under the “private harm/public interest” balancing test, it is merely part of the mix of factors to be considered by the courts.

B. If the “Character” Element Survives *Lingle*, What Does It Mean?

Given that *Lingle* retains the three-part *Penn Central* test, does the *Lingle* decision allow lower courts to consider the legitimacy of state interests as part of the “character of the government action” factor? There is good reason to believe that it does, for two reasons.

First, the *Lingle* Court itself suggested that whether a regulation affects property interests through ‘some public program adjusting the benefits and burdens of economic life to promote the common good’<sup>159</sup> is relevant to its constitutionality under the “character” factor.<sup>160</sup> This language implies that a regulation’s effectiveness in facilitating the “common good” may be relevant to the regulation’s validity under the “character” factor. Second, the same justice who most vigorously affirmed the “private harm/public interest” balancing test in *Palazzolo*, Justice O’Connor,<sup>161</sup> wrote the majority opinion in *Lingle*.<sup>162</sup> If Justice O’Connor had intended an about-face, she arguably would have been more explicit about her choice.

Nevertheless, numerous commentators argue that the *Lingle* Court repudiated balancing the public interest against plaintiff’s regulation-related losses in Takings

---

<sup>158</sup>See *supra* note 73 and accompanying text.

<sup>159</sup>*Lingle*, 544 U.S. at 539.

<sup>160</sup>*Id.* (that issue “relevant in discerning whether a taking has occurred”). See also *supra* note 105 and accompanying text.

<sup>161</sup>See *supra* note 73 and accompanying text.

<sup>162</sup>*Lingle*, 544 U.S. at 530.

Clause actions. Some argue that *Lingle* limited the “character” factor to physical occupations of property by government,<sup>163</sup> while others argue that *Lingle* redefined the “character” factor as a requirement that courts focus on whether regulation disproportionately burdens a small group of property owners.<sup>164</sup> Each of these theories will be addressed in turn.

#### 1. Does *Lingle* Limit The “Character” Factor To “Physical Invasions”?

The Juergensmeyer and Roberts hornbook states: “In *Lingle*, the Court did not refer to a multi-factor balancing test. Rather, when reciting the *Penn Central* factors, the *Lingle* Court gave a physical invasion as its example of the character factor [and therefore] the government ought not be able to argue the importance of its regulation’s purpose in defense.”<sup>165</sup> Similarly, the New Jersey Supreme Court has stated that the “character” factor “focuses primarily on whether the conduct ‘amounts to a physical invasion’.”<sup>166</sup> These commentators appear to be referring to the following passage from *Lingle*: “the ‘character of the governmental action’ -for instance *whether it amounts to a physical invasion* or instead merely affects property interests through “some public program adjusting the benefits and burdens of economic life to promote the common good”-may be relevant in discerning whether a taking has occurred.”<sup>167</sup>

If the Court had intended to hold that the “character” factor was relevant only to physical invasions, it could have done so quite easily, by writing: “The ‘character of the government action’ factor means that a taking has probably occurred when government

---

<sup>163</sup>See *infra* Part II-B-1.

<sup>164</sup>See *infra* Part II-B-2.

<sup>165</sup>JUERGENSMEYER AND ROBERTS, *supra* note 10, sec. 10.6 at 430, *citing* *Lingle*, 544 U.S. at 539.

<sup>166</sup>RAR Development, 2008 WL 2663403 at \*11, *citing* *Lingle*, 544 U.S. at 539.

<sup>167</sup>*Lingle*, 544 U.S. at 539 (emphasis added.)

action amounts to a physical invasion, but is irrelevant when no physical invasion has occurred.”

Instead, the Court created a dichotomy between regulations amounting to a physical invasion (which are more likely to be takings)<sup>168</sup> and public programs “adjusting the benefits and burdens of economic life to promote the common good”<sup>169</sup> It follows that even after *Lingle*, courts may weigh a regulation’s link to the “common good” against the economic harm caused by regulation.

## 2. Does *Lingle* Redefine “Character” As Unfair Burden?

The *Lingle* Court pointed out that one reason it rejected the “substantially advances” test was because that “inquiry reveals nothing about the *magnitude or character of the burden* a particular regulation imposes upon private property rights. Nor does it provide any information about how any regulatory burden is *distributed* among property owners.”<sup>170</sup> According to Christopher Goodin, this language means that lower courts may no longer consider the strength of the public purpose favoring a regulation, because the “owner of a property that effectively serves a legitimate state interest may be just as singled out and just as burdened as a property owner subject to an ineffective regulation.”<sup>171</sup>

In other words, Goodin seems to adopt the following syllogism:

*Premise 1-* The *Lingle* Court rejected the *Agins* “substantially advance” test because that

---

<sup>168</sup>*Id.* (“physical takings require compensation because of the unique burden they impose”)

<sup>169</sup>*Id.*

<sup>170</sup>*Id.* (emphasis added)

<sup>171</sup>Christopher Goodin, *The Role and Content of the Character of the Governmental Action Factor in a Partial Regulatory Takings Analysis*, 29 U. HAW. L. REV. 437, 444 (2007) (citation omitted). *Cf. supra* note 120 (citing cases in accord with this view.)

test focuses solely on the public interest favoring a government regulation, and ignores the question of whether that regulation singles out a property owner for an unfair burden.

*Premise 2-* The “private harm/public interest” balancing test similarly ignores the question of whether a regulation singles out a property owner for an unfair burden, and is thus just as inconsistent with *Lingle* as the “substantially advance” test.

*Conclusion-* The *Lingle* Court therefore would reject such a balancing test.

Premise 1 is undeniably supported by the case law; the *Penn Central* Court wrote that the Takings Clause is “designed to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole”<sup>172</sup> and that a taking has therefore occurred “when ‘justice and fairness’ require that economic injuries caused by public action be compensated by the government, rather than remain disproportionately concentrated on a few persons.”<sup>173</sup> Thus, the Takings Clause does not bar consideration of whether a property owner has been singled out for regulation.<sup>174</sup>

But Premise 2 is flawed: even a balancing test that considers the public purpose supporting regulation may also encompass the fairness of burdening a small group of property owners to support this public purpose. Justice O’Connor’s *Palazzolo* concurrence wrote:

[The Takings Clause is] “designed to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole.” The concepts of “fairness and justice” that underlie the Takings Clause, of course, are less than fully determinate. Accordingly, we have

---

<sup>172</sup>*Penn Central*, 438 U.S. at 124 (citation omitted).

<sup>173</sup>*Id.* (citation omitted).

<sup>174</sup>*Cf.* Nestor Davidson, *The Problem of Equality in Takings*, 102 NORTHWESTERN U. L. REV. 1, 20-28 (2008) (laying out theoretical justifications for considering this factor).

eschewed “any ‘set formula’ for determining when ‘justice and fairness’ require that economic injuries caused by public action be compensated by the government, rather than remain disproportionately concentrated on a few persons.” ... We have “identified several factors that have particular significance” in these “essentially ad hoc, factual inquiries.” Two such factors are “[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.” Another is “the character of the governmental action.” The purposes served, as well as the effects produced, by a particular regulation inform the takings analysis ... Regulatory takings cases “necessarily entai[l] complex factual assessments of the purposes and economic effects of government actions”.<sup>175</sup>

In the first few sentences of the above quote, Justice O’Connor emphasizes that the Takings Clause is designed to prevent “some people alone to bear burdens which, in all fairness and justice, should be borne by the public as a whole.”<sup>176</sup> But she then explains that in deciding what fairness requires, courts may consider “the purposes and economic effects of government actions.”<sup>177</sup> Thus, Justice O’Connor sees no contradiction between protecting property owners from unfair burdens and weighing the state interests that justify those burdens.

Justice O’Connor’s view makes sense, because even if courts do not address the existence of such unfair burdens while addressing the “character” factor, such unfairness may be relevant to the “economic harm to the property owner” element of *Penn Central*.<sup>178</sup> If a land use regulation reduces a plaintiff’s property value by 90 percent, it is likely that the plaintiff has been disproportionately burdened - unless every nearby owner

---

<sup>175</sup>Palazzolo, 533 U.S. at 633-34 (O’Connor, J., concurring) (citations omitted).

<sup>176</sup>*Id.* at 633.

<sup>177</sup>*Id.* at 634.

<sup>178</sup>Alternatively, courts could interpret the “character” factor to require consideration of both the public interest underlying regulation and the extent to which plaintiffs are disproportionately burdened by regulation. But given the vagueness of both concepts, requiring courts to regularly balance the two factors may be more confusing than the balancing test addressed in the text. *See infra* Part III-B-2 (explaining why “unfair burden” concept so confusing that it should usually not be the primary focus of judicial inquiry).

of similar property has also suffered a 90 percent loss due to government regulation, hardly a common result.<sup>179</sup>

A look at two hypothetical situations illustrates how land use regulation that singles out a landowner for disproportionate burdens is likely to be accompanied by a significant economic impact upon that plaintiff. In case A, a landowner has lost 50 percent of its resale value due to a government regulation restricting development, but nearby landowners have also suffered similar losses. In this situation, the landowner's land may be less marketable than before as compared to property in other cities, but such land is no less marketable, relative to the landowner's neighbors, than before.

In case B, the landowner has lost 50 percent of its long-term resale value – but (unlike in case A) is the only property owner in its town who cannot develop its land. Thus, it could be argued that the “burden of the regulation falls disproportionately”<sup>180</sup> on the plaintiff. In case B, the landowner is worse off not just in absolute terms, but relative to its competitors (other nearby landowners). So someone who wants to purchase in the plaintiff's town is going to prefer the plaintiff's neighbors' land to the plaintiff's land.

Thus, the case B landowner has suffered more economic harm than the case A landowner. It logically follows that a landowner who (like the case B landowner) who has been singled out for regulation has a stronger claim under the “economic harm” prong of *Penn Central* – which means, contrary to Premise 2 above, that this plaintiff

---

<sup>179</sup>In fact, zoning often increases, rather than decreasing, property values. See Timlin Kate Sanders, *Making Landowners Whole Without Putting Holes in Zoning: Personal Waivers as the Solution to the Partial Regulatory Takings Compensation Issue*, 15 GEO. MASON. L. REV. 513, 541 (2008) (“the cost of housing has risen dramatically higher than the actual construction cost of homes in the past thirty years, and research shows a correlation between zoning and inflated housing prices.”)

<sup>180</sup>Wensmann Realty, 744 N.W. 2d at 639. *But see infra* notes 206-09 and 217-23 (suggesting that “disproportionate burden” concept more complex).

may prevail even if the “character” factor focuses on something else (such as the strength of the public interest supporting the regulation). Accordingly, the “private harm/public interest” balancing test is consistent with protection of singled-out property owners.

### III. BUT IS BALANCING INTERESTS GOOD POLICY?

Given the ambiguity of Supreme Court precedent, lower courts have discretion to consider public policy in deciding what the “character” factor means. As explained above, pre-*Lingle* courts often balanced the economic harm to the property owner from government regulation, the disruption to the property owner’s investment-backed expectations, and the extent to which the regulation was effective in promoting the public interest.<sup>181</sup>

The affirmative case for continuing to follow this “private harm/public interest” balancing test is simple. As long as the courts must implement the inherently unclear *Penn Central* balancing test,<sup>182</sup> they should consider the public interest because it is something courts know how to do: in a wide variety of contexts, courts use balancing tests that consider whether the broader public interest favors a plaintiff’s claim or a defendant’s defense.<sup>183</sup> Thus, the public interest in ease of administration favors treating

---

<sup>181</sup>See *supra* notes 10, 80-91 and accompanying text.

<sup>182</sup>*Cf.* JUERGENSMEYER AND ROBERTS, *supra* note 10, sec. 10.6 at 429 (Penn Central test’s “indeterminate factors provide little guidance to individuals”) (citation omitted); *id.*, sec. 10.7 at 431 (Supreme Court “has not defined ‘investment-backed expectations’”); *id.* at 433 (“there is no readily identifiable pattern to state court investment-backed expectations decisions”) (citation omitted).

<sup>183</sup>See, e.g., *Winter v. Natural Resources Defense Council, Inc.*, 129 S.Ct. 365, 377 (2008) (in deciding whether to grant preliminary injunction, courts consider “the balance of equities and the public interest” among other factors); *National Archives and Records Administration v. Favish*, 541 U.S. 157 (2004) (in interpreting Freedom of Information Act’s provision that government may not disclose law enforcement records that would constitute “an unwarranted invasion of personal privacy”, courts “balance the [decedent’s] family’s privacy interest against the public interest in disclosure”);

the “character of the public action” as “the strength of the public interest favoring the government’s regulation” (either alone or in combination with other factors).

Nevertheless, it could be argued that either (1) the “private harm/public interest” balancing test should be rejected on other grounds, or (2) that alternative tests are just as practical. Each of these contentions will be addressed in turn.

#### A. Is Balancing Fair?

Goodin contends that any balancing test that considers the purpose of a regulation creates an unfair distinction between a landowner who loses property through eminent domain and a landowner whose property is rendered less valuable by a less intrusive regulation. In the first type of action, public need does not immunize government from its duty to compensate. Goodin suggests that there is no good reason to treat the second type of action differently.<sup>184</sup>

---

Wyoming v. Houghton, 526 U.S. 295, 299-300 (1999) (where history of Fourth Amendment does not dictate whether particular governmental action violates that Amendment, “we must evaluate the search or seizure under traditional standards of reasonableness by assessing, on the one hand, the degree to which it intrudes upon an individual's privacy and, on the other, the degree to which it is needed for the promotion of legitimate governmental interests.”); Matthews v. Eldridge, 424 U.S. 319 (1976) (in deciding whether termination of government benefits violates due process, courts must consider a variety of factors, including both the recipient’s interest and “the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement [preferred by the recipient] would entail.”)

<sup>184</sup>Goodin, *supra* note 171, at 446 (any Takings Clause test that considers public interest underlying regulation “forces courts to unfairly discriminate against regulatory takings claimants. This stems from the disparate impact that results when condemnees (eminent domain) are approached differently than inverse condemnees (regulatory takings).”) *See also* John D. Echevarria, *Making Sense of Penn Central*, 23 U.C.L.A. J. ENV'T L. & POL'Y 171, 206 (2005) (rejecting direct reliance on purpose of regulation because just as it would “make no sense in a condemnation case, for example, to suggest that the government should be excused from its obligation to pay for a school site because the school will serve a vital educational need ... it makes no sense [in regulatory takings actions] to suggest that the government's liability to pay compensation on account

In fact, the two types of cases are quite different, and thus should be governed by different rules. In an eminent domain action, a landowner has lost the physical use of his property. Because his loss is so complete, it makes sense to compensate him fully for his loss regardless of the public interest involved. By contrast, a partial regulatory takings plaintiff can still use her land, even if she cannot exploit that land to its full economic potential. Unless the court is going to hold that reductions in value (or all reductions above a certain level)<sup>185</sup> are always compensable,<sup>186</sup> it must adopt some kind of test to separate the compensable losses from the non-compensable losses- which means that it must treat partial regulatory takings differently from eminent domain takings. The Supreme Court evidently agrees; *Lingle* and its predecessors directly held that litigation involving a less-than-total loss is governed by the three-factor *Penn Central* test<sup>187</sup> rather than by rules governing eminent domain actions.

#### B. Are The Alternatives Any Better?

Those commentators who assert that *Lingle* rejects the “private harm/public interest” balancing test have generally proposed defining the “character of the

---

of its regulatory actions should vary with the importance of the public purpose served by the regulation.”)

<sup>185</sup>As would be the case if the Court held that all losses above a certain percentage (say, 90% of resale value) were compensable. However, the Court rejected this view in *Palazzolo*. See *Palazzolo*, 533 U.S. at 616, 630-31 (requiring application of Penn Central balancing test even though plaintiff lost 93% of resale value due to regulation; his parcel would be worth over \$3.1 million if fully developed, but retained only \$200,000 in development value as a result of regulation).

<sup>186</sup>Indeed, some theorists argue that any reduction in property value is a compensable “taking.” See, e.g. Richard Epstein, *The Next Generation of Legal Scholarship?*, 30 STAN. L. REV. 635, 640 (1978) (“[a]ny diminution of rights in the bundle of any holder” constitutes a “taking”). But for the purposes of this article, I assume that the Supreme Court will continue to follow its current precedent rather than adopting such theories. Whether such precedent correctly interprets the Takings Clause is beyond the scope of this article.

<sup>187</sup>See *supra* Parts I-B and I-C.

government action” as (a) the government action’s similarity to physical invasions and/or other government actions generally recognized as takings, and (b) the extent to which the government has singled out a small number of property owners for regulation.<sup>188</sup> As will be shown below, neither type of rule is as practical as the “private harm/public interest” test.

### 1. The Problem With “Physical Invasion” Tests

Lawson and his colleagues assert that the most plausible understanding of the “character” factor is that “it is designed to evaluate the extent to which the government action resembles what has been uncontroversially understood to constitute a taking.”<sup>189</sup> They write that “it is sensible to envision a continuum along which government actions at one end, such as permanent physical occupations, effect a taking per se because they closely resemble the formal exercise of the eminent domain power, whereas government action at the other end, such as routine land use regulations, almost certainly would not effect a taking.”<sup>190</sup> In other words, if a regulation somehow resembles a permanent physical occupation, the “character” factor kicks in. If not, the “character” factor is irrelevant.

This version of the “character” test is fairly easy to apply when government has

---

<sup>188</sup>See *infra* Parts III-B-1 and B-2. In addition, Whitman proposes balancing the “economic harm” and “investment-backed expectations” factors against the public necessity for the government regulation at issue. See Whitman, *supra* note 137, at 582-90. However, this test, as Prof. Whitman explains, presupposes that the Lingle Court meant to eliminate the “character of the government action” element of Penn Central - a conclusion that I reject. See *supra* Part II-A (explaining why Lingle reaffirms “character” element of Penn Central test); Whitman *supra* note 137, at 581-82.

<sup>189</sup>Lawson, Ferguson & Montero, *supra* note 155, at 46.

<sup>190</sup>*Id.* See also D. Benjamin Barros, *At Last, Some Clarity: The Potential Long-Term Impact of Lingle v. Chevron and the Separation of Takings and Substantive Due Process*, 69 ALB. L. REV. 343, 354 n. 55 (2005-06) (endorsing this test); *supra* notes 111-19 and accompanying text (describing similar state court decisions).

temporarily occupied property.<sup>191</sup> In that situation, a court can weigh the length of the occupation against the economic loss to plaintiff: high economic impact<sup>192</sup> plus long occupation equals a taking, low economic loss plus short occupation equals no taking, high loss plus short occupation (or, alternatively, low loss plus long occupation) equals a close case.

But what if a landowner is challenging a development restriction rather than a physical occupation? In such a case, the government's action is (according to Lawson and his colleagues) presumably a "routine land use regulation" in which case the "character" factor disappears from view, and there is nothing to weigh the two 'harm to plaintiff' factors (economic impact plus harm to investment-backed expectations) against. How can courts weigh two similar factors against nothing? Only by dramatically reshaping *Penn Central*.

For example, the courts could hold that if the landowner's losses exceed a certain threshold,<sup>193</sup> a taking exists even though the "character" factor is irrelevant. But the *Palazzolo* Court held that even a regulation that creates a 93% loss of property value might not require compensation.<sup>194</sup> So this sort of test might be difficult to square with Supreme Court precedent. Alternatively, the courts could hold that there is almost never

---

<sup>191</sup>If government has permanently occupied property, its action is automatically a compensable taking, and *Penn Central* is irrelevant. See *Loretto v. Teleprompter Manhattan CATV, Inc.*, 458 U.S. 419, 426 (1982).

<sup>192</sup>Including not just the direct decrease in the plaintiff's property value but the effect, if any, on her reasonable investment-backed expectations. See *supra* notes 43-57 and accompanying text (describing *Penn Central* test).

<sup>193</sup>Or perhaps multiple thresholds: one in cases in which the landowner's reasonable investment-backed expectations have been adversely affected by government regulation, and a higher threshold where the landowner's expectations, if any, were unreasonable.

<sup>194</sup>See *supra* note 185 (discussing *Palazzolo*); Lawson, Ferguson & Montero, *supra* note 155, at 39 (citing case in which 87.5% loss did not require compensation).

a taking if a landowner suffers a less-than-total loss of value from a “routine” regulation, because the “character” factor is irrelevant, and the landowner’s interests are not strong enough to support his claim.<sup>195</sup> This rule would certainly be easy to apply- but would be inconsistent with the intent of the *Penn Central* Court to create an ad hoc balancing test based on “essentially ad hoc, factual inquiries.”<sup>196</sup> The *Lingle* Court noted with apparent approval that the *Penn Central* Court was “unable to develop any ‘set formula’ ” for evaluating regulatory takings claims.<sup>197</sup> Thus, *Lingle* too seems to prefer ad hoc balancing to “bright line” tests. Accordingly, any attempt to draw such a line between physical occupations and “routine” regulations might be inconsistent with *Penn Central* and *Lingle*.

## 2. Pure Reciprocity, and “Reciprocity Plus”

Numerous commentators define the “character” factor as reciprocity- the extent to which the burdens of regulation are fairly shared among the population (or not).<sup>198</sup> This test has the advantage of being at least somewhat consistent with precedent, since the Court has repeatedly referred to reciprocity in its Takings Clause decisions.<sup>199</sup> But the major reciprocity-based tests that have been proposed add additional levels of complexity to an already complex status quo and add little of value to the simpler balancing test

---

<sup>195</sup>Professor Lawson and his colleagues’ suggestion that “routine land use regulations [] almost certainly would not effect a taking”, *id.* at 46, appears to contemplate this result.

<sup>196</sup>*Penn Central*, 438 U.S. at 124; *Palazzolo*, 533 U.S. at 633 (O’Connor, J. concurring) (reaffirming commitment to ad hoc balancing).

<sup>197</sup>*Lingle*, 544 U.S. at 538, citing *Penn Central*, 438 U.S. at 124.

<sup>198</sup>*See supra* notes 120-28 and accompanying text (describing case law adopting this view).

<sup>199</sup>*See supra* notes 172-76 and accompanying text; Alan Romero, *Ends and Means In Takings Law After Lingle v. Chevron*, 23 J. LAND USE & ENVTL. L. 333, 363 (2008) (discussing relevant precedent in more detail).

proposed above. The most detailed such tests have been proposed by Goodin and by John Echeverria.

Goodin suggests that a regulation's fairness should be inferred from five factors:

\*Reciprocity of advantage- that is, whether a takings plaintiff benefits from other regulations,<sup>200</sup> or "has been unfairly singled out to shoulder a disproportionate share of public burdens without corresponding benefits."<sup>201</sup>

\*Whether a regulation abrogates a basic property right, such as the rights of "exclusive possession, use and disposition."<sup>202</sup>

\*Whether a regulatory burden is voluntarily assumed by the plaintiff.<sup>203</sup>

\*Whether a plaintiff's proposed land use is a nuisance.<sup>204</sup>

\*The existence of "rational retroactivity" - that is, whether, to the extent regulation is retroactive, past benefits implicitly compensate a takings plaintiff for any harm done by regulation.<sup>205</sup>

In other words, Goodin proposes a five-part test for the third part of the three-part *Penn Central* test, thus multiplying the complexity of the law. Moreover, not all of these elements are tremendously clear. How can a court decide when a land use regulation creates "reciprocity of advantage"? Goodin asserts that "[s]o long as the ordinance applies broadly to other people in the surrounding community, the landowner is also

---

<sup>200</sup>Goodin, *supra* note 171, at 447.

<sup>201</sup>*Id.* at 449.

<sup>202</sup>*Id.* at 450.

<sup>203</sup>*Id.* at 452-3.

<sup>204</sup>*Id.* at 454.

<sup>205</sup>*Id.* at 456. *Cf.* Echeverria, *supra* note 184, at 201-02 (asserting that retroactivity irrelevant after Lingle; because Lingle held that "a legitimate governmental action is a precondition for a takings claim" and retroactivity, as an issue related to "legitimacy" of action, is thus relevant only to due process claims).

benefitted by the restrictions that the ordinance places upon his neighbors.”<sup>206</sup> But how broadly does one define the “ordinance”? Does reciprocity exist whenever a burdened landowner’s neighbors are covered by some sort of zoning?<sup>207</sup> Does it exist only when the landowner’s neighbors are subject to the identical zoning classification?<sup>208</sup> Or does it exist only when plaintiff’s neighbors suffer as much from the zoning classification as does the plaintiff? And how does one define the group “burdened” by the zoning - as all landowners covered by the regulation, or those who have lost some value, or only the landowners who have lost the most value?<sup>209</sup>

And when is a regulation “voluntarily assumed” by a plaintiff? The only land use regulation case cited by Goodin on this point,<sup>210</sup> *Yee v. City of Escondido*,<sup>211</sup> upheld a rent control ordinance, and noted that the landlords “voluntarily rented their land to [tenants].”<sup>212</sup> Goodin points out that the landlords “implicitly accepted the restrictions

---

<sup>206</sup>Goodin, *supra* note 171, at 447-48.

<sup>207</sup>*See* Romero, *supra* note 199, at 369 (“Some have argued that even if a particular regulation does not directly benefit the burdened owner by restraining others, every rational land use regulation makes a better community and thus benefits every citizen and every property in the community, including the regulated owners and their property.”) *But see* Barros, *supra* note 190 at 354 n. 56 (criticizing such arguments as unrealistic; for example, if only property owners with wetlands on their property are affected by wetlands regulation, those “property owners bear all the burdens of the regulation while obtaining only a fraction of the public benefit.”)

<sup>208</sup>Goodin seems to adopt this view, by suggesting that the landmark preservation law in Penn Central “secured an average reciprocity of advantage for the railroad owner, because the law effected the designation of over four-hundred landmarks, many of which were located nearby the terminal”. Goodin, *supra* note 171, at 448

<sup>209</sup>*Cf.* Davidson, *supra* note 174, at 39-40 (the class of ‘differentially burdened property holders’ is entirely malleable.”)

<sup>210</sup>Goodin, *supra* note 171, at 453 (citing *Yee*, *infra*. and cases involving other types of property and/or regulation).

<sup>211</sup>503 U.S. 519 (1992).

<sup>212</sup>*Id.* at 527.

imposed upon them by ... failing to seek a zoning change.”<sup>213</sup> Does this mean that if a landowner fails to seek a rezoning, the landowner has automatically accepted the regulatory status quo? And if so, does this mean that the “character” factor will normally favor a takings plaintiff who unsuccessfully seeks a rezoning?

John Echeverria proposes a seemingly less complex two-part “reciprocity plus” test, suggesting that, except in certain unusual circumstances,<sup>214</sup> the “character” element of Penn Central requires courts to examine (a) reciprocity (that is, “whether the regulation targets one or a few owners or is more general in application”)<sup>215</sup> and (b) “whether a regulation is benefit-conferring or harm-preventing.”<sup>216</sup>

As to the first factor, Echeverria supplies readers with a simple example: if a community creates an agricultural zone to limit development, but the zone applies to only one farm in the community, the “character” factor supports the farmer’s takings claim.<sup>217</sup> But the extent to which a landowner is disproportionately burdened may not always be so clear. Suppose, for example, that there are ten homeowners on a block zoned for low-density residential. One of the homeowners wishes to build at slightly higher density- for example, by adding an extra room to be used as a rental unit; the city’s refusal to allow

---

<sup>213</sup>Goodin, *supra* note 171, at 453.

<sup>214</sup>Echeverria points out that where government (1) physically occupies private property or (2) limits the right to devise property to heirs, the “character” factor favors recovery under the Takings Clause even if the factors discussed below are irrelevant. *See* Echeverria, *supra* note 184, at 203-04.

<sup>215</sup>*Id.* at 204. The Minnesota Supreme Court seems to have adopted a test similar to that proposed by Echeverria, at least insofar as it relates to the burden of the regulation. *See* Wensmann Realty v. City of Eagan, 734 N.W. 2d 623, 639 (Minn. 2007) (similarly requiring consideration of “whether the regulation is general in application or whether the burden of the regulation falls disproportionately on relatively few property owners” ).

<sup>216</sup>Echeverria, *supra* note 184, at 207.

<sup>217</sup>*Id.* at 205. *See also* Wensmann Realty, 734 N.W. 2d at 640 (reciprocity element favored plaintiff who was one of “only a few private property owners subject to the ... land use designation” at issue).

this change reduces his property's potential resale value by 10 percent. A second homeowner wants to demolish her house and build a factory; the city's refusal to allow that change reduces her property's potential resale value by 90 percent. Arguably, only the two who wish to rezone have been burdened by the single-family zoning.<sup>218</sup>

Assuming only the latter two have been burdened, are they both equally burdened? Or is the more ambitious homeowner more heavily burdened? If the former is the case, two very different situations are being treated as identical. If the latter is the case, the homeowner who seeks to radically change the neighborhood is in a stronger litigation position than the one who wishes to make a small improvement- hardly a desirable result.<sup>219</sup> In sum, there will often be no easy way to determine when a regulation has evenly distributed burdens.<sup>220</sup>

---

<sup>218</sup>Wensmann Realty, 734 N.W. 2d at 640 (court holds that plaintiff disproportionately burdened by zoning because “[t]his is not a situation where numerous property owners are subject to the same kind of land use restrictions, and a single property owner is asking the city to allow a new, different use” - thus implying that if numerous owners were bound by, and satisfied with, regulatory status quo, no disproportionate burden).

<sup>219</sup>It could be argued that if, as I have suggested above, unfair burdens upon landowners are considered as part of the “economic impact” Penn Central factor, the same result occurs. *See supra* notes 178-79 and accompanying text (landowner who has been disproportionately singled out for regulation is more likely than other landowners to suffer great economic harm). But this is not the case. Under my version of Penn Central, the factory-builder might have a stronger case under the “economic impact” prong of Penn Central- but, due to the city's strong interest in keeping factories away from residential neighborhoods, might have a much weaker case under the “character” factor. *Cf. Euclid v. Ambler Realty*, 272 U.S. 365, 388-89 (1926) (noting public interest in such exclusion). But under a reciprocity-based test, the factory-builder might win under both prongs of Penn Central: she wins under the “economic impact” prong of Penn Central because her property's value has been reduced by 90 percent, while she might win under the “character” prong because, as the neighborhood's only factory-builder, she has been singled out for regulation. Given that Court's apparent view that the public interest favors separating industry from housing, this result makes little sense. *Id.*

<sup>220</sup>*See Davidson, supra* note 174, at 44-45 (“Equally challenging is finding a neutral metric to evaluate an acceptable distribution of burdens.”)

A second weakness of such a focus on benefits and burdens is the difficulty of defining the benefits of regulation, and thus of deciding whether a takings plaintiff has received benefits from regulation as well as burdens. In particular, Echeverria writes that the “reciprocity of advantage cannot logically be confined to examining the countervailing benefits produced by the specific regulation under challenge”,<sup>221</sup> because a plaintiff may also benefit from other regulations. For example, a landowner burdened by wetlands regulation may benefit from historic preservation laws, or vice versa.<sup>222</sup> Thus, “considering all the countervailing benefits of different regulatory programs may make it virtually impossible to determine whether a regulated party is suffering a net loss from all of society’s regulated programs.”<sup>223</sup>

So how does Echeverria resolve this problem? By asking courts to consider the public interest favoring regulation- not directly, but as a means of determining the reciprocal benefit that regulation provides to a property owner. He writes that “[t]he magnitude of these reciprocal benefits will depend in substantial part on the public importance and value of the objective served by the regulations. So long as a regulation applies broadly across the community, the value or importance of what the government is seeking to accomplish should weigh against the takings claim.”<sup>224</sup> In other words, Echeverria asks judges to consider the benefits provided to a property owner by a regulation, but acknowledges that the only way to do so is to determine the strength of the public interest supporting regulation- essentially adding an extra step to an already confusing Takings Clause inquiry.

---

<sup>221</sup>Echeverria, *supra* note 184, at 205.

<sup>222</sup>*Id.*

<sup>223</sup>*Id.*

<sup>224</sup>*Id.* at 207.

The second element of Echeverria’s test is whether a regulation is designed to confer benefits or prevent harm to the public. Echeverria asserts that this distinction should be important because “while it will sometimes make sense to require those who benefit from regulation to redistribute the gains to those burdened by the regulations, it will generally make less sense to require those protected from harm to pay those who have been restrained from harming others and the community.”<sup>225</sup> This argument is essentially a public interest argument - that is, a claim that “harm-preventing” regulations are supported by a stronger public interest than “benefit-conferring” ones. So to place this distinction in a multifactor test, rather than treating it as part of the traditional “public interest” interpretation of the “character” factor, makes the law unnecessarily complex.

Moreover, few courts are likely to adopt the “harm/benefit” distinction proposed by Echeverria. As Echeverria concedes, the Supreme Court’s majority opinion in *Lucas* “disparaged the entire notion that benefit-conferring regulations could be distinguished, ‘on an objective, value-free-basis,’ from harm-preventing regulations.”<sup>226</sup> Echeverria correctly points out that this language does not completely foreclose his theory, because *Lucas* was not decided under the *Penn Central* balancing test.<sup>227</sup> Nevertheless, it seems unlikely that a court trying to avoid reversal would gamble that the Supreme Court would adopt a distinction in the *Penn Central* context that it has criticized in *Lucas*.

In sum, Echeverria’s two-factor test ultimately requires courts to focus on the weight of the public interest supporting regulation; it is thus likely to reach the same

---

<sup>225</sup>*Id.* at 208.

<sup>226</sup>*Id.* at 207.

<sup>227</sup>*Id.* at 177 (“the statement was made in the context of a case involving regulation that rendered property valueless, and the decision cannot necessarily be read as repudiating the harm-benefit distinction outside that context, that is, in a *Penn Central* case.”)

results in most situations as the “private harm/public interest” balancing test, but is somewhat more complex and requires the courts to go through some extra steps.

#### IV. HOW TO CONSIDER THE PUBLIC INTEREST

For the reasons stated above, courts analyzing the “character” factor should consider the public interest supporting the alleged taking. But this principle in itself does not give courts very much guidance. Given that the courts should weigh the public interest supporting a regulation, how precisely should they do so? And should consideration of the public interest bar courts from using other criteria discussed above as part of the “character” analysis?

##### A. How to Weigh The Public Interest

As to the nature of the public interest to be weighed, the recent case of *Resource Investments v. United States*<sup>228</sup> is highly relevant. In *Resource Investments*, two landowners built a landfill on a site containing wetlands, but only after spending nearly a decade trying to obtain state and federal permits.<sup>229</sup> The plaintiffs asserted that certain procedural steps imposed by the federal government constituted a compensable taking.<sup>230</sup>

The Court of Federal Claims denied the parties’ cross-motions for summary judgment, holding that there was a genuine factual dispute about whether the “character”

---

<sup>228</sup>2009 WL 188044 (Fed. Cl. Jan. 23, 2009).

<sup>229</sup>*Id.* at \*3-8 (describing permit process in detail, and in particular noting that plaintiffs’ first permit application was in 1989, and that they were unable to begin construction of landfill until 1998).

<sup>230</sup>*Id.* at \*65 (the plaintiffs claimed that “character” factor favored their takings claim because federal government unreasonably required them to restate statement of project purpose from creation of “a municipal solid waste landfill” to “a viable, affordable, environmentally sound solid waste project” and that this “involuntary revision converted their private enterprise into a *de facto* public project, thus forcing them alone to shoulder what should be the public burden of protecting a private good”) (emphasis in original), \*7 (explaining that plaintiffs needed to draft statement of purpose in order to obtain a permit from Army Corps of Engineers).

factor weighed in favor of the plaintiffs or the government.<sup>231</sup> The court began by noting that the courts must “weigh the benefits, burdens and distributions of a regulatory burden as part of this prong. This requires an inquir[y] into the degree of harm created by the claimant’s proposed activity, its social value and location, and the ease with which any harm stemming from it could be prevented.”<sup>232</sup>

Applying this test, the court noted that the government’s regulations “advanced a valid public interest”<sup>233</sup> because they were designed to protect wetlands and nearby navigable waters from pollution.<sup>234</sup> In particular, the government needed to regulate landfills because landfills sometimes contaminate nearby groundwater.<sup>235</sup> On the other hand, the risk of such contamination was “vanishingly small”<sup>236</sup> and plaintiffs produced evidence “strongly suggesting that the [government] treated them differently than other similarly-situated applicants.”<sup>237</sup> These competing interests created a dispute of material fact sufficient to bar summary judgment.<sup>238</sup>

In *Resource Investments*, the court’s “character” analysis focused not just on the importance of the public purpose supporting the type of regulation at issue, but also on the effectiveness of the regulation- that is, the extent to which the precise action taken by the government furthered that public purpose. The court found that the general purpose of landfill regulation (i.e. preventing water pollution) favored the government’s permit

---

<sup>231</sup> *Id.* at \*69.

<sup>232</sup> *Id.* at \*67.

<sup>233</sup> *Id.* at \*69.

<sup>234</sup> *Id.* at \*68 (purpose of regulations is to “protect navigable waters by preserving wetlands hydrologically linked to those navigable waters.”)

<sup>235</sup> *Id.* (noting “serious potential for public health problems should the landfill leach into the groundwater.”)

<sup>236</sup> *Id.*

<sup>237</sup> *Id.*

<sup>238</sup> *Id.*

delays<sup>239</sup> but also found that the low likelihood of actual pollution, and the apparent arbitrariness of government decisionmaking, favored the plaintiffs' claim.<sup>240</sup> Thus, the government cannot avoid liability merely by showing that the public interest favored some sort of regulation; instead, it must show that the policies supporting regulation support its conduct in the case at issue.

B. What About Physical Invasions And Singled-Out Plaintiffs?

The analysis above seeks to show that in takings actions, courts should focus their “character” analysis on whether the public interest supported the government regulation at issue. But this conclusion leaves open the question of whether the courts should focus exclusively on this factor, or whether courts should also discuss other factors raised by lower courts in the past- most notably the regulation’s similarity to a physical invasion and the extent to which the plaintiff was “singled out” for regulation.<sup>241</sup>

The first issue was resolved by the *Lingle* Court’s statement that “‘the character of the government action’ - for instance whether it amounts to a physical invasion or instead merely affects property interests through ‘some public program adjusting the benefits and burdens of economic life to promote the common good’ - may be relevant in discerning whether a taking has occurred.”<sup>242</sup> This language clearly indicates that the “character” factor requires courts to decide whether government conduct “amounts to a physical

---

<sup>239</sup> See *supra* notes 233-35 and accompanying text.

<sup>240</sup> See *supra* notes 236-37 and accompanying text.

<sup>241</sup> See *supra* notes 111-28 and accompanying text (describing post-*Lingle* lower court decisions holding that these factors were relevant to the “character” factor); Part III (rejecting arguments that these factors should be the only elements considered by courts, exclusive of public interest favoring regulation).

<sup>242</sup> *Lingle*, 544 U.S. at 539.

invasion.”<sup>243</sup> If so, the government’s conduct is more likely to be a taking.<sup>244</sup> If not, the plaintiff’s takings claim is, other factors being equal, likely to fail.

The second issue is more difficult. As noted above,<sup>245</sup> it is extremely difficult to know whether a regulation singles out a property owner for excessive regulation, rather than distributing a burden fairly and evenly among property owners. On the other hand, it is well settled that the Takings Clause is meant ‘to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole.’<sup>246</sup> Thus, the extent to which a property owner is “singled out” for an unfair burden cannot be completely irrelevant to Takings Clause jurisprudence.

But this does not mean that the existence (or lack thereof) of an unfair burden needs to be a fourth element of a *Penn Central*-based balancing test, nor does it mean that the “character” factor will generally require analysis of such unfairness. As explained above, a property owner who has been unfairly burdened by government regulation is likely to have suffered a large economic loss, while a property owner who has suffered a minimal economic loss is not as likely to have been singled out for excessive regulation.<sup>247</sup> So even if a property owner can credibly claim to have been singled out, to count this fact under the “character” factor of *Penn Central* may be to double-count: that is, to count the same fact (the property owner’s economic harm from being singled out for overregulation) as part of both the “character” factor and the “economic harm” factor.

---

<sup>243</sup>*Id.*

<sup>244</sup>*Id.* (“physical takings require compensation because of the unique burden they impose”)

<sup>245</sup>*See supra* Part III-B-2.

<sup>246</sup>*Lingle*, 544 U.S. at 542 (citations omitted).

<sup>247</sup>*See supra* notes 178-80 and accompanying text.

Admittedly, disproportionate economic burden is not the only way of defining whether a property owner has been “singled out” for unfair regulation. For example, in *Resource Industries*, the plaintiffs claimed that the government “treated them differently than other similarly-situated applicants.”<sup>248</sup> In theory, such unfair treatment could exist even if the government’s unfairness did not massively reduce the plaintiff’s property values. But in such a situation, the court can treat the defendant’s unfair burden as part of the “public interest” discussion outlined above, because a regulatory process that is unfairly overinclusive or underinclusive obviously is not going to be particularly effective in promoting the public interest. For example, suppose that a real estate developer claims that the government allows development firms with brown-haired executives to fill in wetlands, but denies similar permits to firms with black-haired executives. Such an arbitrary regulatory scheme is unlikely to be an effective means of protecting wetlands.

Because a regulation which singles out a small number of property owners for excessive regulation will often either (1) create great economic harm to those property owners (thus supporting liability under the “economic harm” prong of *Penn Central*) or (2) be inordinately underinclusive or overinclusive (thus suggesting that the regulation is not truly effective in promoting the public interest, and supporting liability under the “character” prong) it will rarely be necessary to treat the question of “singling out” as an independent prong in the *Penn Central* balancing test.

In sum, the courts’ “character” factor analysis should proceed as follows:

---

<sup>248</sup>Resource Industries, 2009 WL 188044 at \*68.

1. If a regulation amounts to a physical invasion, then the “character” factor probably supports a taking.
2. Otherwise, courts should focus on the public interest at stake- not just whether government has a legitimate purpose for its conduct, but the strength of that purpose, and the extent to which regulation effectively promotes that public purpose in that particular case. The government will want to show that the regulation at issue creates a high level of public benefit – not just generally, but in the case at issue. By contrast, a takings plaintiff will want to show that the benefits of regulation are minimal.

## V. CONCLUSION

Under *Penn Central*, courts must resolve regulatory takings actions by weighing the economic impact of the regulation upon the claimant, the regulation’s interference with the claimant’s investment-backed expectations, and the character of the government action.<sup>249</sup> Before *Lingle*, many courts held that the “character” factor of *Penn Central* required courts to consider the weight of the government purpose supporting regulation and the regulation’s usefulness in achieving that purpose.<sup>250</sup>

The *Lingle* Court wrote that in evaluating the “character” factor, courts should focus on whether governmental action “amounts to a physical invasion”<sup>251</sup> or “adjusts the benefits and burdens of economic life to promote the common good.”<sup>252</sup> Thus, it appears that where governmental action involves a physical invasion, the “character” factor clearly favors a takings claimant. But the Court’s reference to government regulation

---

<sup>249</sup>*Penn Central*, 438 U.S. at 124.

<sup>250</sup>*See supra* notes 80-91 and accompanying text.

<sup>251</sup>*Lingle*, 544 U.S. at 539 (citation omitted).

<sup>252</sup>*Id.*

that “promote[s] the common good” suggests that courts should also continue to consider the extent to which the challenged program in fact supports the common good.

Numerous post-*Lingle* courts and commentators assert that *Lingle* either eliminates the “character” factor, or requires that this factor be reinterpreted to focus on the extent to which government has unfairly burdened a takings plaintiff or the similarity of a regulation to a physical occupation, as opposed to the strength of the public policy underlying the government’s action. But, given the language quoted above, there is no reason to believe that such results are mandated by *Lingle*. Nor is there any reason to believe that these alternative frameworks would make Takings Clause litigation less confusing. Accordingly, courts should continue to follow pre-*Lingle* precedent holding that the “character” factor requires courts to consider the public interest supporting the government action challenged by the plaintiff.

