

## Character Counts: The “Character of the Government Action” in Regulatory Takings Actions

*Michael Lewyn*\*

### I. INTRODUCTION

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

But what if the government regulates property in a way that merely reduces, rather than eliminates, the property’s economic value? Between 1978 and 1980, the Supreme Court of the United States twice addressed this “partial regulatory takings”<sup>5</sup> issue and took a different approach in each case. In 1978, the Court wrote in *Penn Cen-*

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\* 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 Peter Appel and Jerry Anderson for their valuable comments. Any errors of fact, law, or logic are mine alone.

<sup>1</sup> U.S. CONST. amend. V.

<sup>2</sup> *Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528, 537 (2005) (using term “regulatory takings”); DAVID L. CALLIES, ROBERT H. FREILICH & THOMAS E. ROBERTS, *CASES AND MATERIALS ON LAND USE* 320 (5th ed. 2008) (“[R]egulatory 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. S.C. Coastal Council*, 505 U.S. 1003, 1018 (1992). Note, however, that the 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 Pres. Council, Inc. v. Tahoe Reg’l Planning Agency*, 535 U.S. 302, 326 (2002) (using the term “partial regulatory takings”). 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.

*tral Transportation Co. v. City of New York* 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>6</sup> But two years later in *Agins v. City of Tiburon*, the Court seemingly abandoned this three-pronged approach and ruled that non-confiscatory zoning creates a taking "if the ordinance does not substantially advance legitimate state interests."<sup>7</sup>

Until 2005, lower courts often resolved this apparent conflict by balancing the public interest favoring government regulation against the losses a takings plaintiff incurred because of the regulation.<sup>8</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 an assessment of the 'purpose and importance of the public interest,' which then must be weighed against the [property owner's] loss."<sup>9</sup> But the Supreme Court's 2005 decision in *Lingle v. Chevron U.S.A. Inc.*<sup>10</sup> called this "private harm/public interest" balancing test into question. In *Lingle*, the Supreme Court overruled *Agins* and rejected the application of the "substantially advance" test in regulatory takings cases. The Court held that takings cases may not turn solely on whether government regulation substantially advances a legitimate state interest because such a "formula prescribes an inquiry in the nature of a due process, not a takings, test, and . . . has no proper place in our takings jurisprudence."<sup>11</sup>

Some commentators claim that by overruling *Agins*, *Lingle* also reinterpreted *Penn Central* as prohibiting lower courts from consider-

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<sup>6</sup> 438 U.S. 104, 124 (1978).

<sup>7</sup> 447 U.S. 255, 260 (1980).

<sup>8</sup> See JULIAN CONRAD JUERGENSMEYER & THOMAS E. ROBERTS, LAND USE PLANNING AND DEVELOPMENT REGULATION LAW § 10.6, at 430 (2d ed. 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 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 49–51 and accompanying text.

<sup>9</sup> JUERGENSMEYER & ROBERTS, *supra* note 8, § 10.6, at 430; see, e.g., *Bass Enters. Prod. Co. v. United States*, 381 F.3d 1360 (Fed. Cir. 2004) (using such a standard); see also *infra* note 76 (citing examples).

<sup>10</sup> 544 U.S. 528 (2005).

<sup>11</sup> *Id.* at 540.

ing the public benefits of regulation.<sup>12</sup> For example, a land use hornbook reasons that pre-*Lingle* precedent required an “injection of due process considerations into the takings equation” by considering the appropriate ends of government action.<sup>13</sup> By resisting such an “injection,” *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>14</sup> Some commentators argue that *Lingle* actually eliminated the “character of the government action” factor established in *Penn Central*,<sup>15</sup> while others merely contend that the “character” factor no longer allows lower courts to weigh the public interest favoring government regulation.<sup>16</sup>

This Article disagrees with the assertion that lower courts cannot consider the public benefits of regulation and argues that, even after *Lingle*, courts can and should balance the harm land use regulation imposes on a takings plaintiff against the weight of the public interest supporting such regulation. This is so for two reasons. First, the *Lingle* decision *can* be harmonized with a “private harm / public interest” balancing test. *Lingle* holds that the existence of a valid public purpose *standing alone* may not justify an otherwise problematic regulation. This rule is perfectly consistent with the proposition that courts may balance a public purpose against the harm to a takings 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 the balancing test assert that the “character” factor should be limited to analysis of whether a regulation resembles a physical invasion of property and/or the extent to which a takings plaintiff is singled out for regulation.<sup>17</sup> This Article suggests that these interpretations are more difficult to apply than the “private harm / public interest” balancing test.<sup>18</sup> To be sure, the *Penn Central* test gives judges little guidance regardless of how it is interpreted and should perhaps be overruled.<sup>19</sup> But as long as *Penn*

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<sup>12</sup> See *infra* Part IV.

<sup>13</sup> JUERGENSMEYER & ROBERTS, *supra* note 8, § 10.4, at 420.

<sup>14</sup> See *id.* § 10.6, at 430.

<sup>15</sup> See *infra* Part IV.A.

<sup>16</sup> See *infra* Part IV.B.

<sup>17</sup> See *infra* Part V.

<sup>18</sup> *Id.*

<sup>19</sup> Cf. 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 the diversity of scholarly opinions as to the proper scope of the Tak-

*Central* continues to be good law, balancing public interests and private harms is less incomprehensible and more consistent with Supreme Court precedent than the most popular alternatives. Accordingly, courts should treat the public interest favoring regulation as part of the “character” factor.

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

## II. 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 seemingly balanced the economic effects of government regulation against the public interest favoring it.<sup>20</sup> In *Penn Central*, the Court likewise required courts to consider the economic harm caused by government regulation and the “character” of that regulation, without making it clear what “character” meant.<sup>21</sup> Some lower court decisions (as well as some language in the Court’s own opinions), however, suggest that this factor refers to the weight of the public interest supporting government regulation, apparently requiring courts to balance the public interests favoring regulation against a property owner’s economic harm and investment-backed expectations.<sup>22</sup> Most recently, the Court decided *Lingle*, which created confusion among lower courts and placed the law in flux.<sup>23</sup>

### A. *In the Beginning* . . .

Until the early twentieth century, courts generally applied the Takings Clause exclusively to physical seizures of private property, as

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ings Clause; the most pro-regulation commentators argue that only physical appropriation of property by the government is a “taking,” while some libertarian-minded commentators claim that all government regulations are “takings”); James W. Ely, Jr., “*Poor Relation*” *Once More: The Supreme Court and the Vanishing Rights of Property Owners*, 2005 CATO SUP. CT. REV. 39, 45 (arguing that the *Penn Central* test’s “indeterminate factors provide little guidance to individuals”).

<sup>20</sup> See *Pa. Coal Co. v. Mahon*, 260 U.S. 393 (1922); *infra* Part II.A.

<sup>21</sup> See *Penn Cent. Transp. Co. v. City of N.Y.*, 438 U.S. 104 (1978); *infra* notes 34–42 and accompanying text.

<sup>22</sup> See *infra* notes 62–87 and accompanying text.

<sup>23</sup> See *infra* Part II.C.

opposed to regulations that merely limited the use of a person's property.<sup>24</sup> The first time the Supreme Court applied the Takings Clause to a regulatory taking was the 1922 case of *Pennsylvania Coal Co. v. Mahon*.<sup>25</sup> In *Pennsylvania Coal*, a coal company challenged the constitutionality of a statute that restricted coal mining beneath private residences in order to prevent subsidence (i.e., a cave-in) of the residence.<sup>26</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>27</sup>

In applying the "too far" test, the *Pennsylvania Coal* Court addressed both the degree of harm to the coal company and the public interest justifying the regulation at issue. As to the private harm factor, 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>28</sup>

The Court added 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>29</sup> In other words, the anti-subsidence statute went "too far" because it virtually destroyed the value of the coal company's property interest.

The Court proceeded to hold that the public interest justifying the statute was not "sufficient to warrant so extensive a destruction of the [coal company's] constitutionally protected rights."<sup>30</sup> The Court offered two reasons for its conclusion. First, the government sought to protect a single private house, which "in ordinary private affairs the public interest does not warrant much [government] interference. A

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<sup>24</sup> See CALLIES, FREILICH & ROBERTS, *supra* note 2, at 320 (noting that *Pennsylvania Coal* "generally is viewed as the origin of the regulatory takings doctrine").

<sup>25</sup> 260 U.S. 393 (1922); see CALLIES, FREILICH & ROBERTS, *supra* note 2, at 320.

<sup>26</sup> *Pa. Coal Co.*, 260 U.S. at 412–13. The coal company owned the mineral rights to land beneath a house and sought to exercise those rights to dig out coal. *Id.* at 412.

<sup>27</sup> *Id.* at 415 (emphasis added).

<sup>28</sup> *Id.* at 413.

<sup>29</sup> *Id.* at 414–15.

<sup>30</sup> *Id.* at 414.

source of damage to such a house is not a public nuisance. . . . The damage is not common or public.”<sup>31</sup> Second, the statute “is not justified as a protection of personal safety”<sup>32</sup> because the coal company gave homeowners timely notice of its intent to mine under their homes, allowing the homeowners to avoid physical harm from subsidence.<sup>33</sup>

Thus, *Pennsylvania Coal* suggested that, in determining whether a taking goes “too far,” courts may consider the extent to which a government regulation harms a property owner and the extent to which it protects the public interest.

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

The Supreme Court paid little attention to regulatory takings<sup>34</sup> until its 1978 decision in *Penn Central*.<sup>35</sup> In that case, a landowner sought to build an office building above a railroad terminal.<sup>36</sup> The city prohibited construction because the terminal was a historic landmark.<sup>37</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>38</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 governmental 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 burdens of economic life to promote the common good.<sup>39</sup>

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<sup>31</sup> *Id.* at 413.

<sup>32</sup> *Pa. Coal Co.*, 260 U.S. at 414.

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

<sup>34</sup> See JUERGENSEMEYER & ROBERTS, *supra* note 8, § 10.4, at 417 (describing *Penn Central* as “[t]he next important regulatory takings decision”).

<sup>35</sup> *Penn Cent. Transp. Co. v. City of N.Y.*, 438 U.S. 104 (1978).

<sup>36</sup> *Id.* at 116.

<sup>37</sup> *Id.* at 117.

<sup>38</sup> *Id.* at 119, 130.

<sup>39</sup> *Id.* at 124 (citations omitted).

Thus, the Court seemingly required lower courts to consider (1) the economic impact of a regulation upon a property owner, (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; the city did not interfere with the landowner's current use of its property and did not prevent the landowner from obtaining a reasonable return on its investment.<sup>40</sup> Furthermore, because the courts had generally upheld regulations relating to air rights above buildings, the Court found that the ordinance did not disrupt the landowner's investment-backed expectations.<sup>41</sup> The Court further found that the city's regulations were "substantially related to the promotion of the general welfare."<sup>42</sup>

The Supreme Court applied all three *Penn Central* factors in the 1987 case of *Keystone Bituminous Coal Ass'n v. DeBenedictis*.<sup>43</sup> In *Keystone*, a group of coal mine operators<sup>44</sup> challenged the Pennsylvania Subsidence Act, which required fifty percent of the coal beneath residences, public buildings, and cemeteries to be kept in place as a means of providing surface support to those structures.<sup>45</sup> The act also authorized the state government to revoke mining permits whenever coal mining damaged such structures.<sup>46</sup> The basic purpose of the statute was to prevent the collapse of buildings above coal mines.<sup>47</sup>

The Supreme Court upheld the Pennsylvania statute, holding that each of the three *Penn Central* factors supported the statute.<sup>48</sup> As

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<sup>40</sup> *Id.* at 136 (finding that the "[s]everity of the impact of the law" did not support takings claim because the law "does not interfere in any way with the present uses of the Terminal" and allowed the landowner "not only to profit from the Terminal but also to obtain a 'reasonable return' on its investment").

<sup>41</sup> *Penn Cent. Transp. Co.*, 438 U.S. at 130 n.27 (discussing case law that required the Court to reject the 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") (emphasis added). 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>42</sup> *Id.* at 138.

<sup>43</sup> 480 U.S. 470.

<sup>44</sup> *Id.* at 478.

<sup>45</sup> *Id.* at 476-77.

<sup>46</sup> *Id.* at 477.

<sup>47</sup> *See id.* at 476-77 n.6.

<sup>48</sup> *Id.* at 481, 485.

to the “economic impact” and “investment-backed expectations” factors, the Court noted that the statute affected less than two percent of plaintiffs’ coal, much of which could not be extracted for reasons unrelated to the statute.<sup>49</sup> Thus, the regulation burdened “only a small fraction of the property that is subjected to regulation”<sup>50</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>51</sup> Considering that the minimal economic impact of the Pennsylvania law affected both the Court’s “reasonable investment-backed expectations” discussion and 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.

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 Pennsylvania has acted to arrest what it perceives to be a significant threat to the common welfare.”<sup>52</sup> In particular, the “character” factor supported the state’s defense because there was no indication that the “statute [was] enacted solely for the benefit of private parties”<sup>53</sup> or that the state was “exercising its police power to abate activity akin to a public nuisance.”<sup>54</sup> The Court’s suggestion that a legitimate state interest supported the statute implies that the “character” factor “requires a weighing of public and private interests.”<sup>55</sup>

Two Supreme Court decisions in 1980 and 1992 appeared to call *Penn Central* into question.<sup>56</sup> 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>57</sup> The Court held that the ordin-

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<sup>49</sup> *Keystone Bituminous Coal Ass’n*, 480 U.S. at 496.

<sup>50</sup> *Id.* at 499–500 n.27.

<sup>51</sup> *Id.* at 499.

<sup>52</sup> *Id.* at 485.

<sup>53</sup> *Id.* at 486.

<sup>54</sup> *Id.* at 488.

<sup>55</sup> *Keystone Bituminous Coal Ass’n*, 480 U.S. at 492 (citing *Agins v. City of Tiburon*, 447 U.S. 255, 260–61 (1980)). Note, however, that the Court’s direct statement to this effect is of questionable precedential value, because the Court cited the now-overruled *Agins* decision. See *infra* notes 91–99 and accompanying text (discussing the *Lingle* Court’s rejection of *Agins*).

<sup>56</sup> See *Lucas v. S.C. Coastal Council*, 505 U.S. 1003 (1992); *Agins*, 447 U.S. 255.

<sup>57</sup> *Agins*, 447 U.S. at 257.

ance “substantially advance[d] legitimate governmental goals”<sup>58</sup> such as preventing the conversion of open space to urban use<sup>59</sup> and avoiding the negative results of such urbanization.<sup>60</sup> The Court subsequently reformulated *Agins* to mean that a zoning ordinance is not a compensable taking as long as it substantially advances a legitimate government interest.<sup>61</sup>

The Court’s 1992 decision in *Lucas v. South Carolina Coastal Council* upheld a landowner’s takings claim challenging environmental legislation that allegedly prevented the landowner from erecting any permanent habitable structures on his land.<sup>62</sup> The Court held that the legislation constituted a taking because the plaintiff was “called upon to sacrifice *all* economically beneficial uses in the name of the common good.”<sup>63</sup> The Court added, however, that even confiscatory regulation could avoid classification as a taking if it arose from background principles of property law, such as nuisance regulation.<sup>64</sup>

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<sup>58</sup> *Id.* at 261.

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

<sup>60</sup> *Id.* at 261 n.8 (citing the city council’s findings that 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”) (quoting TIBURON, CAL., ORDINANCE NO. 124 N.S. § 1(c) (1973)).

<sup>61</sup> See *Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528, 540 (2005) (suggesting that *Agins* has been interpreted as a “stand-alone regulatory takings test that is wholly independent of *Penn Central*”). 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” and that the plaintiffs “are free to pursue their reasonable investment expectations by submitting a development plan to local officials.” *Agins*, 447 U.S. at 262. Because *Agins* referred to the “harm to plaintiff” *Penn Central* factors (economic impact on landowners and investment-backed expectations) at various points in its decision, see *id.* at 262–63, it appears that the *Agins* Court might have actually intended to apply *Penn Central*, rather than to create a stand-alone regulatory takings test.

<sup>62</sup> 505 U.S. 1003, 1006–07, 1031–32.

<sup>63</sup> *Id.* at 1019 (emphasis in original).

<sup>64</sup> *Id.* at 1029. The Court explained that, even if regulation prohibits all economically beneficial use of land, it is not a taking if the 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 affect the public generally . . . .

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>65</sup> and that, after *Lucas*, any regulation of property value was a compensable taking unless the government “could articulate background principles [of property law] that prohibit the uses [proposed by the landowner].”<sup>66</sup>

But in 2001, the Court reaffirmed its commitment to the three-part *Penn Central* test in *Palazzolo v. Rhode Island*.<sup>67</sup> The Court there held that *Lucas* applied only where a regulation eliminated all economically beneficial use of a landowner’s property, and that partial regulatory takings were still subject to the *Penn Central* three-part test.<sup>68</sup> This three-part test required 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>69</sup> The Court’s plurality opinion did not explain the meaning of the “character” factor. But Justice O’Connor’s concurrence, which supplied the crucial fifth vote in *Palazzolo*,<sup>70</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 entai[1] complex factual assessments of the purposes and economic effects of government actions.’”<sup>71</sup>

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*Id.*

<sup>65</sup> *Bass Enters. Prod. Co. v. United States*, 381 F.3d 1360, 1369 (Fed. Cir. 2004) (citing *Loveladies Harbor, Inc. v. United States*, 28 F.3d 1171, 1179 (Fed. Cir. 1994)).

<sup>66</sup> *Id.* 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>67</sup> 533 U.S. 606.

<sup>68</sup> *Id.* at 617.

<sup>69</sup> *Id.*

<sup>70</sup> Four Justices dissented, but both the plurality opinion and O’Connor’s concurrence reached their decision on grounds unrelated to the “character” factor. Compare *id.* at 630 (plurality opinion) (remanding the case because the “claim [was] not barred by the mere fact that title was acquired after the effective date of the state-imposed restriction”) with *id.* at 634 (O’Connor, J., concurring) (rejecting the view that state of title at the time plaintiff acquired property barred claim under “investment-backed expectations” factor). Thus, even if Justice O’Connor’s opinion is treated as the opinion of the Court, her discussion of the “character” factor might be viewed as dictum.

<sup>71</sup> *Id.* at 634 (O’Connor, J., concurring) (quoting *Yee v. Escondido*, 503 U.S. 519, 523 (1992)).

By mentioning the purposes and effects of government action, Justice O'Connor's concurrence suggested that courts should continue to consider the importance of the purpose animating that action, as well as 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>72</sup> the majority of the Court seemingly endorsed the *Keystone* Court and Justice O'Connor's view of the "character" factor. The *Tahoe-Sierra* Court held that the three-part *Penn Central* test, and not the *Lucas* test, governed a temporary moratorium on real estate development.<sup>73</sup> In the course of its decision, the Court briefly explained that the *Penn Central* test "entails complex factual assessments of the purposes and economic effects of government actions."<sup>74</sup> The *Tahoe-Sierra* Court's reference to "purposes" implies that the purposes justifying a government action are relevant when assessing that action's constitutionality under *Penn Central*.<sup>75</sup>

Between 2002 (when *Tahoe-Sierra* was decided) and 2005 (when *Lingle* was decided), lower courts generally agreed that the *Penn Central* "character" factor required them to balance the public interest favoring regulation against the impact regulation had on property owners.<sup>76</sup> For example, in *Bass Enterprises Production Co. v. United*

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<sup>72</sup> 535 U.S. 302 (2002).

<sup>73</sup> See *id.* at 320–21. The Court rejected 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 held that such regulations are "best analyzed within the *Penn Central* framework." *Id.*

<sup>74</sup> *Id.* at 323 (emphasis added).

<sup>75</sup> *Id.* The Court, however 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 (noting that the appropriate outcome under *Penn Central* was not at issue before the Court, because the plaintiffs had disavowed reliance on *Penn Central*); *id.* at 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 interpretation of *Penn Central* is arguably dicta.

<sup>76</sup> See *infra* notes 77–87 and accompanying text (discussing *Bass Enterprises*); see also *Appolo Fuels, Inc. v. United States*, 381 F.3d 1338, 1351 (Fed. Cir. 2004) (denying takings claim in part because the government action was "designed to protect health and safety," thus leaning the "character" factor in favor of the government); *Leon County v. Gluesenkamp*, 873 So. 2d 460, 468 (Fla. Dist. Ct. App. 2004) ("In determining the character of the government action, courts must . . . balance appellees'

*States*, the plaintiffs had leased land from the federal government and sought permits to drill oil and gas wells on that land.<sup>77</sup> The federal Bureau of Land Management (BLM) denied the permits in 1994<sup>78</sup> 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>79</sup> After the EPA decided not to acquire the lease, BLM issued the permits.<sup>80</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>81</sup>

The plaintiffs alleged that the *Penn Central* "character of the government action" factor supported their claim unless the government's action "was designed to proscribe a nuisance."<sup>82</sup> Overruling its own precedent,<sup>83</sup> the U.S. Court of Appeals for the Federal Circuit rejected this argument, quoting Justice O'Connor's concurrence and *Tahoe-Sierra*.<sup>84</sup> 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>85</sup> Applying this standard, the court rejected the plaintiffs' takings claim, based partially on "the potential impact on the public [from] . . . drilling near a nuclear waste site."<sup>86</sup> Thus, *Bass Enterprises*,

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interests against the County's needs to protect the public."). *But see* K & K Constr., Inc. v. Dep't of Env'tl. Quality, 705 N.W.2d 365, 384 (Mich. Ct. App. 2005) (focusing on "whether the governmental regulation singles plaintiffs out to bear the burden for the public good and whether the regulatory act being challenged here is a comprehensive, broadly based regulatory scheme that benefits and burdens all citizens relatively equally").

<sup>77</sup> 381 F.3d 1360, 1361–62 (Fed. Cir. 2004).

<sup>78</sup> *Id.* at 1363.

<sup>79</sup> *Id.* at 1366–68 (describing possible dangers from drilling in more detail).

<sup>80</sup> *Id.* at 1363–64.

<sup>81</sup> *Id.* at 1364.

<sup>82</sup> *Id.* at 1369.

<sup>83</sup> *Bass Enters. Prod. Co.*, 381 F.3d at 1369–70 (rejecting pre-*Palazzolo* Federal Circuit precedent that did not treat *Penn Central* as good law and explaining that *Palazzolo* "returned the temporary takings pendulum back to the familiar *Penn Central* analysis that existed prior to *Lucas*").

<sup>84</sup> *Id.* at 1370.

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

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

like numerous other courts in the mid-2000s,<sup>87</sup> held that partial regulatory takings claims generally required courts to balance a regulation's harm to the plaintiff (the "economic impact" and "investment-backed expectations" factors) against the public interest supporting the regulation (the "character" factor).

C. *Lingle and Its Aftermath*

In 2005, the Supreme Court readdressed partial regulatory takings. In *Lingle v. Chevron U.S.A. Inc.*, an oil company challenged a Hawaii law that limited the rent the company could charge gasoline dealers who leased service stations from oil companies.<sup>88</sup> The trial court held that the rent control statute failed to "substantially advance a legitimate state interest,"<sup>89</sup> and thus constituted an unconstitutional taking based on the *Agin*s "substantially advance" test.<sup>90</sup>

The Supreme Court reversed.<sup>91</sup> The Court reiterated its view that, except under certain narrow circumstances,<sup>92</sup> the *Penn Central* test governs partial regulatory takings actions.<sup>93</sup> The Court proceeded to state that the *Agin*s "substantially advance" test was more like the test governing substantive due process actions than the *Penn Central* test.<sup>94</sup> Just as the *Agin*s test requires courts to uphold any regulation that is "effective in achieving some legitimate public purpose,"<sup>95</sup> the Court's substantive due process precedent requires a court to uphold a regulation unless it is "clearly arbitrary and unreasonable, having no substantial relation to the public health, safety, morals, or general welfare."<sup>96</sup> By contrast, *Penn Central* requires the Court to consider

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<sup>87</sup> See *supra* note 76.

<sup>88</sup> 544 U.S. 528, 532–33 (2005).

<sup>89</sup> *Id.* at 534 (citation omitted).

<sup>90</sup> *Id.* at 531–32 (citations omitted).

<sup>91</sup> *Id.* at 548.

<sup>92</sup> These circumstances include government regulations that create a permanent physical invasion of a landowner's property, regulations that render property economically useless, and exactions (government attempts to force a landowner to dedicate property to the public as a condition for obtaining a building permit). *Id.* at 538, 546–47.

<sup>93</sup> *Id.* at 538.

<sup>94</sup> *Lingle*, 544 U.S. at 540–41.

<sup>95</sup> *Id.* at 542 (emphasis omitted).

<sup>96</sup> *Id.* at 541.

not only the reasonableness of government action, but also the impact of such action on a property owner.<sup>97</sup>

After pointing out this inconsistency between *Agins* and *Penn Central*, the Court proceeded to overrule *Agins*. The Court reasoned that a standard that fails to address the burden government regulation imposes on 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>98</sup> Because lower courts’ applications of the *Agins* test “revealed its imprecisions,” the Court remanded the case for further proceedings under the *Penn Central* standard.<sup>99</sup>

In addition to reaffirming its commitment to the *Penn Central* test generally, the Court apparently reaffirmed its commitment to the “character” factor specifically, stating: “[T]he ‘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>100</sup>

Post-*Lingle* cases generally agree that lower courts must apply *Penn Central* to partial regulatory takings cases, but are divided as to the application of the *Penn Central* “character” factor. 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>101</sup>

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<sup>97</sup> *Id.* at 538–39 (recognizing “the economic impact of the regulation on the claimant and, particularly, the extent to which the regulation has interfered with distinct investment-backed expectations” as relevant factors under the *Penn Central* analysis (quoting *Penn Cent. Transp. Co. v. City of N.Y.*, 438 U.S. 104, 124 (1978))).

<sup>98</sup> *Id.* at 542.

<sup>99</sup> *Id.* at 548.

<sup>100</sup> *Id.* at 539.

<sup>101</sup> See *Giovenella v. Conservation Comm’n of Ashland*, 857 N.E.2d 451, 462 (Mass. 2006) (noting that some courts have focused on whether a regulation unfairly singles out a particular landowner while others have looked at whether a government action resembles a physical invasion or whether the purpose of the regulation was to mitigate harm to the public, and declining to resolve the issue because, under any of these tests, no taking occurred).

At least one post-*Lingle* decision reaffirmed the view that courts may balance the public interest furthered by a regulation against its impact on takings plaintiffs. In *Adams v. Village of Wesley Chapel*, landowners challenged a zoning ordinance that limited the number of lots into which their property could be subdivided.<sup>102</sup> The U.S. District Court for the Western District of North Carolina rejected the landowners' takings claim based on *Penn Central*.<sup>103</sup> As to the "character" factor, the court explained:

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>104</sup>

In other words, the court held that the "character" factor favored the government because its regulation effectively served a legitimate public purpose—limiting density in order to prevent overcrowding.

On the other hand, some decisions suggest that the "character" factor is primarily relevant to cases involving physical invasion of property.<sup>105</sup> For example, in *RAR Development Associates v. New Jersey School Construction Corp. (RAR)*, 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>106</sup> Eventually, the state decided not to acquire the property, causing the landowner to be stuck with the land but no tenant.<sup>107</sup> The landowner claimed that the inducements

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<sup>102</sup> No. 3:03cv411, 2006 WL 2689376, at \*1 (W.D.N.C. Sept. 18, 2006); *see also* *Ramsey Winch, Inc. v. Henry*, 555 F.3d 1199, 1210 (10th Cir. 2009) (finding that the "character" factor supported a statute requiring landowners to allow visitors to store firearms in their vehicles, because regulation was designed to prevent "[crimes] of general applicability 'concern[ing] protection of the community as a whole rather than individual citizens'").

<sup>103</sup> *Adams*, 2006 WL 2689376, at \*3.

<sup>104</sup> *Id.* (emphasis added) (citations omitted).

<sup>105</sup> *See Allegretti & Co. v. County of Imperial*, 42 Cal. Rptr. 3d 122, 134 (Cal. Ct. App. 2006) ("County's action did not physically invade or appropriate [plaintiff's] property or groundwater. Accordingly, that factor does not support a taking."); *Kafka v. Mont. Dep't of Fish, Wildlife & Parks*, 201 P.3d 8, 28 (Mont. 2008) ("[U]nder the 'character of the governmental action' prong courts should inquire concerning the magnitude or character of the burden imposed by the regulation, and determine whether it is functionally comparable to government appropriation or invasion of private property."); *RAR Dev. Assocs. v. N.J. Sch. Constr. Corp.*, No. L-9424-05, 2008 WL 2663403, at \*11 (N.J. Super. Ct. App. Div. July 9, 2008).

<sup>106</sup> 2008 WL 2663403, at \*1–2.

<sup>107</sup> *Id.* at \*2.

the government gave to the tenant to vacate the property constituted a taking because they effectively deprived the landowner of a tenant.<sup>108</sup>

The Superior Court of New Jersey, Appellate Division, noted that the “character” factor “focuses primarily on whether the conduct ‘amounts to a physical invasion.’”<sup>109</sup> The court upheld the government’s action because its relocation assistance “did not cause a substantial destruction of the property’s beneficial use.”<sup>110</sup> The state merely tried to acquire property for school construction in an orderly manner by providing affected persons with relocation assistance as early as possible.<sup>111</sup> Because the infringement was so minor, the court never actually applied the “character” factor. Thus, the *RAR* decision implies that the “character” factor might be relevant only to takings actions involving a physical invasion of property by the government.<sup>112</sup>

A third group of cases focuses on whether “the burden of the regulation falls disproportionately on relatively few property owners.”<sup>113</sup> For example, in *Wensmann Realty v. City of Eagan*, a landowner sought to build houses on property zoned for a golf course and filed

<sup>108</sup> *Id.*

<sup>109</sup> *Id.* at \*11. Note that the court presumably referred to temporary physical occupations, because a permanent physical occupation of property by government is always a taking, and courts therefore need not apply the *Penn Central* test in such situations. *See id.*

<sup>110</sup> *Id.* at \*13.

<sup>111</sup> *Id.* at \*13. The court explained,

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 [the tenant’s] relocation, and the orderly process of the intended acquisition of plaintiff’s improved property necessitated its early provision of relocation assistance.

*Id.*

<sup>112</sup> Because no reported cases have cited *RAR*, the precise scope of the New Jersey court’s holding remains unclear. *Cf. infra* Parts III.B.1, IV.B.1 (critiquing “physical invasion” theory).

<sup>113</sup> *Wensmann Realty, Inc. v. City of Eagan*, 734 N.W.2d 623, 639 (Minn. 2007); *see also* *Small Prop. Owners of S.F. v. City & County of S.F.*, 47 Cal. Rptr. 3d 121, 136 (Cal. Ct. App. 2006) (upholding ordinance as “part of a broader scheme of allocating economic benefits and burdens between landlords and tenants for the public good,” but without directly addressing impact of *Lingle* on the “character” factor); *cf. Tapps Brewing Inc. v. City of Sumner*, 482 F. Supp. 2d 1218, 1230 (W.D. Wash. 2007) (where landowners challenged a city regulation forcing them to pay fees to fund an upgrade to the city’s pipe system, “character” factor supported city because “[p]laintiffs fail[ed] to provide any evidence showing that the City has not required any other land owner to upgrade the pipe system”).

a lawsuit after the city rejected its application for rezoning.<sup>114</sup> The court interpreted the *Lingle* Court's statement that takings jurisprudence should consider "how that burden is allocated"<sup>115</sup> to mean that courts should not balance the 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>116</sup> Therefore, the court asserted that "an important consideration involves whether the regulation is general in application or whether the burden of the regulation falls disproportionately on relatively few property owners."<sup>117</sup> In other words, *Wensmann* suggests that, in some circumstances, the "character" factor favors compensation when only a few owners are harmed by government regulation and disfavors compensation when the burden of regulation is widely distributed across society.<sup>118</sup>

Applying this standard, 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>119</sup> Second, the city allowed other land near the golf course to be used for residential development.<sup>120</sup> Thus, the costs of regulation disproportionately affected the plaintiff rather than being allocated broadly across society.<sup>121</sup>

### III. WHY PRECEDENT FAVORS A "PRIVATE HARM/PUBLIC INTEREST" BALANCING TEST

As explained above, the weight of pre-*Lingle* precedent interprets the *Penn Central* "character of the government action" factor to support consideration of the public interest favoring regulation. Justice O'Connor's concurrence in *Palazzolo* endorsed this view, as did the Court's opinion in *Tahoe-Sierra*.

Moreover, *Lingle* itself may reaffirm the "private harm/public interest" test. As noted above, the *Lingle* Court stated that "the 'charac-

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<sup>114</sup> 734 N.W.2d at 628–29.

<sup>115</sup> *Id.* at 639 (citing *Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528, 543 (2005)).

<sup>116</sup> *Id.* (citations omitted).

<sup>117</sup> *Id.* at 639.

<sup>118</sup> See *infra* Parts III.B.2, IV.B.2 (critiquing this theory).

<sup>119</sup> *Wensmann Realty, Inc.*, 734 N.W.2d at 640.

<sup>120</sup> *Id.*

<sup>121</sup> *Id.*

ter 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>122</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.

Yet several commentators argue that *Lingle* bars any inquiry into the broader public interests supporting regulation. Some contend that *Lingle* implicitly eliminates the “character of the government action” factor altogether,<sup>123</sup> while others suggest that *Lingle* radically redefined the “character” factor.<sup>124</sup>

#### A. Does Character Count at All?

The *Lingle* Court noted that its rejection of *Agins* “[did] not require [the Court] to disturb any of [its] prior holdings”<sup>125</sup> (other than, presumably, *Agins* itself). Nevertheless, Professor Dale Whitman argues that “if *Lingle* is taken seriously, it appears to destroy the ‘character of the governmental action’ prong of the *Penn Central* takings test.”<sup>126</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>127</sup> According to Whitman, this statement excludes inquiry into “the government’s reasons or motivations for taking regulatory action.”<sup>128</sup>

But the *Lingle* Court’s statement that *Penn Central* “focuses directly upon the severity of the burden”<sup>129</sup> need not necessarily bar consideration of other factors, such as the character of the government action. Considering that two of the three *Penn Central* factors address the burden of government regulation on the plaintiff,<sup>130</sup> the *Penn Cen-*

<sup>122</sup> *Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528, 539 (2005) (emphasis added).

<sup>123</sup> See *infra* Part III.A.

<sup>124</sup> See *infra* Part III.B.

<sup>125</sup> *Lingle*, 544 U.S. at 545.

<sup>126</sup> Dale A. Whitman, *Deconstructing Lingle, Implications for Takings Doctrine*, 40 J. MARSHALL L. REV. 573, 574 (2007).

<sup>127</sup> *Id.* at 581 (citing *Lingle*, 544 U.S. at 539).

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

<sup>129</sup> *Lingle*, 544 U.S. at 539.

<sup>130</sup> These factors are the “economic impact of the regulation on the claimant and, particularly, the extent to which the regulation has interfered with distinct invest-

*tral* Court most likely intended to focus on that burden. But emphasizing the burden on takings plaintiffs does not require courts to focus *solely* on that burden. Both the *Penn Central* and *Lingle* Courts' explicit references to "the character of the government action"<sup>131</sup> suggest otherwise.

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>132</sup> According to Whitman, this "language omits any reference to the third prong of *Penn Central*, the 'character' test, and it inserts the ["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>133</sup> In other words, Whitman argues that when the Court said liability does "not exclusively" turn on the two "harm to plaintiff" factors (economic impact and interference with investment-backed expectations), then it must have meant that liability *does* exclusively turn on those factors. But the Court said that takings cases do "*not exclusively*" depend on the two "harm to plaintiff" factors, thus it must have intended another factor to be relevant; and by reiterating its commitment to the "character" factor,<sup>134</sup> the Court seemingly held that the character of the government action is the third factor.

Professor Eric Pearson, by contrast, concedes that *Lingle* explicitly reaffirmed the *Penn Central* "character" factor,<sup>135</sup> but nevertheless argues that *Lingle* "effectively eviscerates the 'character of the government action' factor of *Penn Central*."<sup>136</sup> Pearson reasons that the character factor and the *Agins* "substantially advance" test "inquire of the behavior of government rather than of the harm to property that behavior might produce."<sup>137</sup> Thus, both tests "reside in the universe of substantive due process. . . . Given that identity of purpose and ef-

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ment-backed expectations." *Penn Cent. Transp. Co. v. City of N.Y.*, 438 U.S. 104, 124 (1978).

<sup>131</sup> *Lingle*, 544 U.S. at 539; *Penn Cent. Transp. Co.*, 438 U.S. at 124.

<sup>132</sup> Whitman, *supra* note 126, at 582 (quoting *Lingle*, 544 U.S. at 540).

<sup>133</sup> *Id.*

<sup>134</sup> See *supra* notes 98–100 and accompanying text.

<sup>135</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>136</sup> *Id.*

<sup>137</sup> *Id.*

fect, *Lingle's* condemnation of the *Agins* test *per force* condemns the *Penn Central* character factor as well."<sup>138</sup>

But there is a difference between the *Penn Central* and *Agins* tests. The *Lingle* Court suggested that under the *Agins* "substantially advance" test, the constitutionality of a government regulation rests *solely* on its rationality, regardless of its impact on private property owners.<sup>139</sup> By contrast, the *Penn Central* test considers the character of government action as just one factor among several.<sup>140</sup> Thus, the balancing test is no more identical to substantive due process than is any of the other balancing tests within constitutional jurisprudence.<sup>141</sup> If *Penn Central* is identical to substantive due process, so are balancing tests in (for example) the First Amendment context.

To understand the difference between substantive due process and a true balancing test, imagine the following hypothetical: suppose the government has an excellent reason to enact a regulation that reduces the value of a landowner's property by ninety percent. Under the "substantially advance" test, the landowner's takings claim fails; the government prevails because it had a substantial basis for its decision. By contrast, under a "private harm / public interest" balancing test, the government's excellent reason would be balanced against the burden it imposes on the plaintiff, which means that the government might actually lose the case. Thus, the substantive due process / "substantially advance" test rejected in *Lingle* is quite different from the balancing test that Pearson criticizes. Moreover, *Lingle* does not preclude the latter test.

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

<sup>139</sup> See *Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528, 540–42 (2005).

<sup>140</sup> See Pearson, *supra* note 135, at 25. Pearson contends that *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 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.

*Id.*

<sup>141</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) (requiring a balancing of the parties' interests where a public employer terminated an employee for engaging in speech and the employee brought a First Amendment action).

Professor Gary Lawson, Katharine Ferguson, and Guillermo Montero argue that even if substantive due process could be distinguished in theory from the “private harm/public interest” balancing test, the *Lingle* Court itself equated the two standards.<sup>142</sup> The authors rely on the following language from *Lingle*:

[W]hether a regulation 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>143</sup>

But a look at the full context of the quoted language yields a more nuanced conclusion. Starting from the beginning of the first quoted sentence, 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. But such a test is not a valid method of discerning whether private property has been “taken” for purposes of the Fifth Amendment.<sup>144</sup>

The quoted language undeniably rejects the idea that *any* regulation satisfying due process (i.e. any non-arbitrary regulation) is also permissible under the Takings Clause. But *Lingle* did not reject the balancing test proposed by Justice O’Connor in *Palazzolo*, which treats the regulation’s effectiveness in achieving a public purpose as just one of numerous factors to be considered in ascertaining the validity

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<sup>142</sup> Gary Lawson, Katharine Ferguson & Guillermo 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) (arguing that *Lingle* forecloses “consideration of the *extent* to which a challenged regulation actually serves the government interests sought to be advanced”).

<sup>143</sup> *Id.* (quoting *Lingle*, 544 U.S. at 542). Unlike Pearson, Lawson and his colleagues seek to redefine the “character” factor rather than eliminate it. See *infra* Part IV.B.1 (describing and critiquing their proposed test). This Part addresses Lawson and his colleagues’ critique of the balancing test because their argument is similar to Pearson’s.

<sup>144</sup> *Lingle*, 544 U.S. at 542 (citation omitted).

of the regulation.<sup>145</sup> Under the “substantially advances” formula, any truly legitimate purpose that in fact supports a regulation automatically safeguards the government against takings claims. But under the “private harm/public interest” balancing test, a regulation’s legitimate purpose 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 it allow lower courts to consider the legitimacy of state interests as part of the “character of the government action” assessment? There are two reasons to believe that it does.

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’” may be a relevant consideration in the “character” analysis.<sup>146</sup> This language implies that a regulation’s effectiveness in facilitating the “common good” may be relevant when assessing its “character.” Second, Justice O’Connor, the same Justice who most vigorously affirmed the “private harm/public interest” balancing test in *Palazzolo*,<sup>147</sup> wrote the majority opinion in *Lingle*.<sup>148</sup> If Justice O’Connor intended an about-face, she probably would have been more explicit about her choice.

Nevertheless, numerous commentators argue that the *Lingle* Court repudiated the test balancing the public interest against the plaintiff’s regulation-related harm in takings actions. Some argue that *Lingle* limited the “character” factor to physical occupations of property by government,<sup>149</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>150</sup> The following analysis will address each of these theories.

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<sup>145</sup> See *Palazzolo v. Rhode Island*, 533 U.S. 606, 634 (2001) (O’Connor, J., concurring); *supra* notes 70–71 and accompanying text.

<sup>146</sup> *Lingle*, 544 U.S. at 539 (quoting *Penn Cent. Transp. Co. v. City of N.Y.*, 438 U.S. 104, 124 (1978)). The Court noted that the issue “may be relevant in discerning whether a taking has occurred.” *Id.*

<sup>147</sup> See *Palazzolo*, 533 U.S. at 634–36 (O’Connor, J., concurring); *supra* notes 70–71 and accompanying text.

<sup>148</sup> *Lingle*, 544 U.S. at 530.

<sup>149</sup> See *infra* Part III.B.1.

<sup>150</sup> See *infra* Part III.B.2.

1. Does *Lingle* Limit the “Character” Factor to “Physical Invasions”?

In their hornbook on land use, Juergensmeyer and Roberts state,

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>151</sup>

Similarly, the New Jersey Superior Court, Appellate Division, stated that the “character” factor “focuses primarily on whether the conduct ‘amounts to a physical invasion.’”<sup>152</sup> Such references appear to emanate from the following passage in *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>153</sup>

If the *Lingle* Court 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 presumably occurred if government action amounts to a physical invasion, but is irrelevant if no physical invasion occurred.” Instead, the Court created a dichotomy between regulations amounting to a physical invasion, which are more likely to be considered takings,<sup>154</sup> and public programs “adjusting the benefits and burdens of economic life to promote the common good.”<sup>155</sup> It follows that even after *Lingle*, courts may weigh a regulation’s effect on the “common good” against the economic harm it causes.

2. Does *Lingle* Redefine “Character” as an Unfair Burden?

The *Lingle* Court noted that one reason it rejected the “substantially advance” test was because the “inquiry reveals nothing about the

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<sup>151</sup> JUERGENSMEYER & ROBERTS, *supra* note 8, § 10.6, at 430 (citing *Lingle*, 544 U.S. at 539).

<sup>152</sup> RAR Dev. Assocs. v. N.J. Sch. Constr. Corp., No. L-9424-05, 2008 WL 2663403, at \*11 (N.J. Super. Ct. App. Div. July 9, 2008) (citing *Lingle*, 544 U.S. at 539).

<sup>153</sup> *Lingle*, 544 U.S. at 539 (quoting *Penn Cent. Transp. Co. v. City of N.Y.*, 438 U.S. 104, 124 (1978)) (emphasis added).

<sup>154</sup> *Id.*

<sup>155</sup> *Id.*

*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>156</sup> According to Christopher Goodin, this language means that because the effectiveness of a regulation in achieving a legitimate public purpose “does not reveal either the burdens imposed or the benefits conferred by a regulation . . . inquiry into effectiveness of a regulation is invalid in the context of takings challenges.”<sup>157</sup> Goodin points out the *Lingle* Court’s statement that “[t]he owner of a property subject to a regulation that *effectively* serves a legitimate state interest may be just as singled out and just as burdened as the owner of a property subject to an *ineffective* regulation.”<sup>158</sup>

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

Premise 1: In regulatory takings actions, courts may consider the question of whether government regulation singles out a property owner for an unfair burden—a principle violated by the “substantially advance” test.

Premise 2: A “private harm/public interest” balancing test fails to adequately address the question of whether a regulation singles out a property owner for an unfair burden. Thus, it is 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 *Penn Central* Court’s statement 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>159</sup> and therefore a taking occurs “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>160</sup> Thus, the Takings Clause does not bar consideration of whether a property owner was singled out for regulation.<sup>161</sup>

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<sup>156</sup> *Id.* at 542.

<sup>157</sup> Christopher T. Goodin, *The Role and Content of the Character of the Governmental Action Factor in a Partial Regulatory Takings Analysis*, 29 U. HAW. L. REV. 437, 444 (2007); see also cases cited *supra* note 105.

<sup>158</sup> Goodin, *supra* note 157, at 444 (quoting *Lingle*, 544 U.S. at 543).

<sup>159</sup> *Penn Cent.*, 438 U.S. at 123.

<sup>160</sup> *Id.* at 124.

<sup>161</sup> Cf. Nestor M. Davidson, *The Problem of Equality in Takings*, 102 NW. U. L. REV. 1, 20–28 (2008) (articulating theoretical justifications for considering this factor).

But Premise 2 is flawed. Even a balancing test that considers the public purpose supporting a government regulation can consider the fairness of burdening a small group of property owners to further that public purpose. As Justice O'Connor wrote in her *Palazzolo* concurrence:

[T]his constitutional guarantee 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 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.<sup>162</sup>

In the first few sentences of the above passage, Justice O'Connor emphasizes that the Takings Clause is designed to prevent “forcing some people alone to bear burdens which, in all fairness and justice, should be borne by the public as a whole.”<sup>163</sup> But she then proceeds to cite to sources which state that in deciding what fairness requires, courts may consider “the purposes and economic effects of government actions.”<sup>164</sup> Thus, Justice O'Connor saw 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. Even if courts do not address the existence of unfair burdens when addressing the “character” factor, such unfairness may be relevant when analyzing the “economic harm to the property owner” element of *Penn Central*.<sup>165</sup> If a

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<sup>162</sup> *Palazzolo v. Rhode Island*, 533 U.S. 606, 633–34 (2001) (O'Connor, J., concurring) (internal citations omitted).

<sup>163</sup> *Id.* at 633 (quoting *Penn Cent.*, 438 U.S. at 123–24).

<sup>164</sup> *Id.* at 634 (quoting *Yee v. Escondido*, 503 U.S. 519, 523 (1992)).

<sup>165</sup> Alternatively, courts could interpret the “character” factor to require consideration of both the public interest underlying the regulation and the extent to which plaintiffs are disproportionately burdened by regulation. But given the vagueness of

land use regulation reduces a plaintiff's property value by ninety percent, the plaintiff has likely been disproportionately burdened—unless every nearby owner of similar property has also suffered a ninety percent loss due to government regulation, a result that is likely to occur only when the plaintiff seeks to use his land in the same way as all owners of similar property.<sup>166</sup>

Two hypothetical situations illustrate 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, landowner A lost fifty percent of her property's resale value due to a government regulation restricting development. But nearby landowners suffered similar losses. In this situation, A's land may be less marketable than before in comparison to property in other cities, but her land is no less marketable in relation to her neighbors' property.

In case B, landowner B's land lost fifty percent of its long-term resale value, but unlike landowner A in the first hypothetical, B is the only property owner in her town who cannot develop her land. Thus, "the burden of the regulation falls disproportionately"<sup>167</sup> on B. In this case, landowner B is worse off not only in absolute terms, but also in relation to other nearby landowners. Someone looking to buy land in B's town will prefer other landowners' land to B's, because the former is not restricted by government regulation. It logically follows that landowner B suffered a greater economic harm than landowner A *precisely because* a land use regulation singled out B.

This illustration demonstrates how, contrary to Premise 2 above, a "singled out" plaintiff such as B has an unusually strong case under the "economic harm" prong of *Penn Central*—even if the Court continues to focus the "character" prong on the public interest justifying regulation. If courts indirectly consider B's interest in avoiding being singled out under the "economic harm" prong of *Penn Central*, it is

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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 IV.B.2 (explaining why the "unfair burden" concept is so confusing that it should generally not be the primary focus of judicial inquiry).

<sup>166</sup> In fact, zoning often increases, rather than decreases, 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) ("[T]he 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>167</sup> *Wensmann Realty, Inc. v. City of Eagan*, 734 N.W.2d 623, 639 (Minn. 2007).

essentially double counting to consider the same interest under the “character” prong. Accordingly, the “private harm/public interest” balancing test is consistent with protecting singled out property owners.

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

Given the apparent ambiguity of *Lingle*, lower courts may have discretion to consider public policy in interpreting the “character” factor. As explained above, pre-*Lingle* courts often balanced the economic harm government regulation imposed on a property owner, the disruption to the property owner’s investment-backed expectations, and the extent to which the regulation effectively promoted the public interest.<sup>168</sup>

The affirmative case for continuing to follow this “private harm/public interest” balancing test is simple: as long as courts are required to implement the inherently vague *Penn Central* balancing test,<sup>169</sup> they should also consider the public interest because it is something courts know how to do. In a wide variety of contexts, courts use balancing tests to determine whether the broader public interest favors a plaintiff’s claim or a defendant’s defense.<sup>170</sup> The fact that

<sup>168</sup> See *supra* notes 8, 76–87 and accompanying text.

<sup>169</sup> See JUERGENSMEYER & ROBERTS, *supra* note 8, § 10.6, at 429 (*Penn Central*’s “indeterminate factors provide little guidance to individuals”); *id.* § 10.7, at 431 (“The Court has not defined ‘investment-backed expectations.’”); *id.* at 433 (“[T]here is no readily identifiable pattern to state court investment-backed expectations decisions.” (quoting J. David Breemer, *Playing the Expectations Game: When Are Investment-Backed Land Use Expectations (Un)Reasonable in State Courts?*, 38 URB. LAW. 81, 110 (2006))).

<sup>170</sup> See, e.g., *Winter v. Natural Res. Def. Council, Inc.*, 129 S. Ct. 365, 378 (2008) (requiring courts to consider “the balance of equities and the public interest,” among other factors, when deciding whether to grant a preliminary injunction); *Nat’l Archives & Records Admin. v. Favish*, 541 U.S. 157, 171 (2004) (requiring courts to “balance the family’s privacy interest against the public interest in disclosure” when interpreting a Freedom of Information Act provision prohibiting the government from disclosing law enforcement records that would constitute “an unwarranted invasion of personal privacy”); *Wyoming v. Houghton*, 526 U.S. 295, 299–300 (1999) (requiring courts to “evaluate [a] 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” when historical analysis does not dictate whether a particular government action violates the Fourth Amendment); *Matthews v. Eldridge*, 424 U.S. 319, 335 (1976) (requiring courts to 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

courts are accustomed to such balancing favors treating 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 the “private harm/public interest” balancing test should be rejected on other grounds or that alternative tests are just as practical. The following analysis will address each of these contentions.

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; specifically, he argues that if the public need does not immunize government from its duty to compensate in an eminent domain action, there is no compelling reason to treat regulatory takings actions differently.<sup>171</sup>

In fact, regulatory takings and eminent domain takings are quite different and should be governed by different rules. In an eminent domain action, a landowner loses the physical use of his property. The landowner’s loss is so complete that 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 courts hold that reductions in value, or all reductions above a

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recipient] would entail” when deciding whether the termination of government benefits violates due process).

<sup>171</sup> See Goodin, *supra* note 158, at 446 (contending that any Takings Clause test that considers the 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”). John Echeverria rejects relying directly on the purpose of government regulation because

[i]t would make no sense in a condemnation case, for example, to suggest that the government should be excused from its obligation to pay for a school site because the school will serve a vital educational need. Likewise, . . . it makes no sense to suggest that the government’s liability to pay compensation on account of its regulatory actions should vary with the importance of the public purpose served by the regulation.

John D. Echeverria, *Making Sense of Penn Central*, 23 UCLA J. ENVTL. L. & POL’Y 171, 206 (2005).

certain level,<sup>172</sup> are always compensable,<sup>173</sup> they must adopt some kind of test to determine which landowner losses are compensable takings and which are not. This means that courts must treat partial regulatory takings differently from eminent domain takings. The Supreme Court apparently agrees; *Lingle* and its predecessors held that litigation involving a less-than-total loss is governed by the three-factor *Penn Central* test, rather than by rules governing eminent domain actions.<sup>174</sup>

*B. Are the Alternatives Any Better?*

Commentators who assert that *Lingle* rejects the “private harm/public interest” balancing test generally propose defining the “character of the government action” prong as an analysis of (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 action singled out a small number of property owners for regulation.<sup>175</sup> The following analysis argues that these proposed standards are either less practical than the “private harm/public interest” test or harder to square with Supreme Court precedent.

<sup>172</sup> This would be the case if the Court held that all losses above a certain percentage (e.g., ninety percent of resale value) were compensable. The Court, however, appears to have rejected this view in *Palazzolo*. See *Palazzolo v. Rhode Island*, 533 U.S. 606, 616 (requiring application of the *Penn Central* balancing test, even though the plaintiff lost ninety-three percent of his property’s 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>173</sup> Indeed, some theorists argue that any reduction in property value is a compensable “taking.” See, e.g., Richard A. Epstein, *The Next Generation of Legal Scholarship?*, 30 STAN. L. REV. 635, 640 (1978) (reviewing BRUCE A. ACKERMAN, *PRIVATE PROPERTY AND THE CONSTITUTION* (1977)) (“Any diminution of rights in the bundle of any holder . . . amounts to a taking under the law.”). But for the purposes of this Article, I assume that the Supreme Court will continue to follow its current precedent rather than adopt such theories. Whether such precedent correctly interprets the Takings Clause is beyond the scope of this Article.

<sup>174</sup> See *supra* Parts II.B, II.C.

<sup>175</sup> See *infra* Parts IV.B.1, IV.B.2. In addition, Whitman proposes that courts consider public purpose by considering the “necessity” of a regulation as a defense to a taking claim. See Whitman, *supra* note 132, at 589–90. Whitman reasons that existing precedent allows “background principles of nuisance and property law [to provide] a defense to a takings claim,” *id.* at 582, and that public necessity is such a “background principle.” *Id.* at 589–90. This test, however, as Professor 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 *id.* at 581–82.

### 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>176</sup> They contend 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 actions at the other end, such as routine land use regulations, almost certainly would not effect a taking.<sup>177</sup>

Under this approach, 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 the government temporarily occupies property.<sup>178</sup> In that situation, a court can define the “character” factor as the length of the occupation and then balance it against the economic loss to the plaintiff: high economic loss<sup>179</sup> plus long occupation equals a taking; low economic loss plus short occupation equals no taking; high economic loss plus short occupation, or low economic loss plus long occupation, equals a close case.

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

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<sup>176</sup> Lawson, Ferguson & Montero, *supra* note 142, at 46.

<sup>177</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) (endorsing this test).

<sup>178</sup> If the government permanently occupies 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>179</sup> This not only includes the direct decrease in the plaintiff’s property value, but also the effect, if any, on her reasonable investment-backed expectations.

For example, courts could hold that if the landowner's losses exceed a certain threshold amount,<sup>180</sup> a taking exists, even though the "character" factor is irrelevant. But in *Palazzolo*, the Court indicated that compensation may not be necessary even when the regulation caused a ninety-three percent loss in property value.<sup>181</sup> Thus, such a test might be difficult to square with Supreme Court precedent. Alternatively, courts could hold that there is presumptively no taking if a landowner suffers a less-than-total loss in value from "routine" regulation, because the "character" factor is irrelevant and the landowner's interests are not strong enough to support his takings claim.<sup>182</sup> This rule would certainly be easy to apply, but it would be inconsistent with the *Penn Central* Court's intent to base regulatory takings decisions on "essentially ad hoc, factual inquiries."<sup>183</sup> The *Lingle* Court indicated that it agreed with *Penn Central*'s assertion that it was "unable to develop any 'set formula for evaluating regulatory takings claims.'"<sup>184</sup> Thus, *Lingle* also seems to prefer ad hoc balancing to "bright line" tests. Accordingly, any attempt to draw a line between physical occupations and "routine" regulations might be inconsistent with both *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 across the population. This test has the advantage of being at least somewhat consistent with precedent; the Court has repeatedly

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<sup>180</sup> Another option is multiple thresholds: one in cases where 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>181</sup> *Palazzolo v. Rhode Island*, 533 U.S. 606, 616 (2001); see also *Hadacheck v. Sebastian*, 239 U.S. 394 (1915) (diminution in value at 87.5 percent but not compensable).

<sup>182</sup> Professor Lawson and his colleagues suggest that "routine land use regulations . . . almost certainly would not effect a taking." Lawson, Ferguson & Montero, *supra* note 142, at 46.

<sup>183</sup> *Palazzolo*, 533 U.S. at 633 (O'Connor, J., concurring) (reaffirming commitment to ad hoc balancing); *Penn Cent. Transp. Co. v. City of N.Y.*, 438 U.S. 104, 124 (1978).

<sup>184</sup> *Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528, 538 (2005) (quoting *Penn Cent.*, 438 U.S. at 124).

referred to reciprocity in its Takings Clause decisions.<sup>185</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 value to the simpler balancing test proposed above. Goodin and John Echeverria proposed the most detailed reciprocity-based tests.

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

(1) Reciprocity of advantage. That is, whether a takings plaintiff benefits from other regulations,<sup>186</sup> or "has been unfairly singled out to shoulder a disproportionate share of public burdens without corresponding benefits."<sup>187</sup>

(2) Whether a regulation abrogates a basic property right, such as the rights of "exclusive possession, use, and disposition."<sup>188</sup>

(3) Whether a plaintiff voluntarily assumes a regulatory burden.<sup>189</sup>

(4) Whether a plaintiff's proposed land use constitutes a nuisance.<sup>190</sup>

(5) The existence of "rational retroactivity." That is, to the extent regulation is retroactive, whether past benefits implicitly compensate a takings plaintiff for any harm done by regulation.<sup>191</sup>

In other words, Goodin proposes five factors for the final prong of the three-part *Penn Central* test, thereby 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 benefitted by the restrictions that the ordinance places upon his neighbors."<sup>192</sup> But how broadly should one

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<sup>185</sup> See 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).

<sup>186</sup> Goodin, *supra* note 158, at 447.

<sup>187</sup> *Id.* at 449.

<sup>188</sup> *Id.* at 450.

<sup>189</sup> *Id.* at 452–53.

<sup>190</sup> *Id.* at 454.

<sup>191</sup> *Id.* at 456. *But see* Echeverria, *supra* note 171, at 201–02 (asserting that retroactivity is irrelevant after *Lingle*, because *Lingle* held that "a legitimate governmental action is a precondition for a valid taking claim" and retroactivity, as an issue related to the "legitimacy" of government action, is only relevant to due process claims).

<sup>192</sup> Goodin, *supra* note 158, at 447–48.

define these restrictions? Does reciprocity exist whenever a burdened landowner's neighbors are covered by some sort of zoning regulation?<sup>193</sup> Does it exist only when the landowner's neighbors are subject to the identical zoning classification?<sup>194</sup> Or does it exist only when the plaintiff's neighbors suffer just as much from the zoning classification as the plaintiff? And which landowners should be included in the group "burdened" by the zoning regulation—all landowners covered by the regulation, only those who have lost some value, or only those who have lost the most value?<sup>195</sup>

And when is government regulation "voluntarily assumed" by a plaintiff? The only relevant land-use regulation case cited by Goodin,<sup>196</sup> *Yee v. City of Escondido*, upheld a rent control ordinance and noted that the landlords "voluntarily rented their land to [tenants]."<sup>197</sup> Goodin notes that the landlords "implicitly accepted the restrictions imposed upon them by . . . failing to seek a zoning change."<sup>198</sup> Does this mean that a landowner automatically accepts the regulatory status quo if he or she fails to seek a rezoning? And if so, does this mean that the "character" factor will normally favor a takings plaintiff who unsuccessfully seeks a rezoning?

Echeverria proposes a seemingly less complex two-part "reciprocity plus" test, arguing that, except in certain unusual circumstances,<sup>199</sup> the "character" element of *Penn Central* requires courts to examine (a) reciprocity (i.e., "whether the regulation targets one or a

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<sup>193</sup> See Romero, *supra* note 185, 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 177, at 354 n.56 (criticizing such arguments as unrealistic; for example, if only wetland-property owners 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>194</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 158, at 448.

<sup>195</sup> Cf. Davidson, *supra* note 161, at 39–40 ("[T]he class of 'differentially burdened property holders' is entirely malleable.").

<sup>196</sup> Goodin, *supra* note 158, at 452–53.

<sup>197</sup> 503 U.S. 519, 527 (1992).

<sup>198</sup> Goodin, *supra* note 158, at 453.

<sup>199</sup> Echeverria points out that where government physically occupies private property or 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 171, at 203–04.

few owners or is more general in application”)<sup>200</sup> and (b) “whether a regulation is benefit-conferring or harm-preventing.”<sup>201</sup>

As to the first factor, Echeverria provides a simple example: if a community creates an agricultural zone to limit development, but the zone encompasses only one farm, the “character” factor supports the farmer’s takings claim.<sup>202</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 property. One of the homeowners wishes to build a slightly higher density residence—for example, by adding an extra room to be used as a rental unit. The zoning regulation precludes this renovation, which reduces the potential resale value of the homeowner’s property by ten percent. A second homeowner wants to demolish her house and build a factory. The zoning regulation prohibits this project, which reduces the potential resale value of the property by ninety percent.

Even if the two homeowners are the only people burdened by the low-density zoning regulation,<sup>203</sup> the proper fate of their possible takings claims is unclear. Were both homeowners equally burdened? Or is the more ambitious homeowner—the one who wanted to build a factory—more heavily burdened? If the former is correct, then two different situations are being treated the same. If the latter is correct, then the homeowner who seeks to radically change the neighborhood is in a stronger litigating position than the one who wishes to make a small improvement—hardly a desirable result.<sup>204</sup> In sum,

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<sup>200</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, Inc. v. City of Eagan*, 734 N.W.2d 623, 639 (Minn. 2007) (requiring similar considerations of “whether the regulation is general in application or whether the burden of the regulation falls disproportionately on relatively few property owners”).

<sup>201</sup> Echeverria, *supra* note 171, at 207.

<sup>202</sup> *Id.* at 204–05; see also *Wensmann Realty*, 734 N.W.2d at 640 (finding that the reciprocity element favored the plaintiff who was one of “only a few private property owners subject to the . . . land use designation” at issue).

<sup>203</sup> *Wensmann Realty*, 734 N.W.2d at 640 (holding that the plaintiff was disproportionately burdened by zoning because it was “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”). The Court’s reasoning implies that there would not have been a disproportionate burden if numerous owners were bound by, and satisfied with, the regulatory status quo.

<sup>204</sup> It could be argued that the same result occurs if unfair burdens on landowners are considered to be a part of *Penn Central*’s “economic impact” factor, but this is not the case. Under my interpretation of *Penn Central*, the factory-builder might have a

there will often be no easy way to determine if a regulation evenly distributes burdens.<sup>205</sup>

A second weakness of focusing on benefits and burdens is the difficulty of deciding whether a regulation both benefited and burdened an individual takings plaintiff. In particular, Echeverria argues that the “reciprocity of advantage cannot logically be confined to examining the countervailing benefits produced by the specific regulation under challenge,”<sup>206</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>207</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>208</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 explains 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>209</sup>

Thus, Echeverria asks judges to consider the benefits that a particular regulation provided a property owner but acknowledges that the only way to do so is by determining the strength of the public interest

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stronger case under the “economic impact” prong of *Penn Central*, but would have a much weaker case under the “character” factor due to the city’s strong interest in keeping factories away from residential neighborhoods. *Cf. Euclid v. Ambler Realty*, 272 U.S. 365, 388–89 (1926) (noting the public interest in such exclusion). But under a reciprocity-based test, the factory builder might win under both prongs of *Penn Central*: she prevails under the “economic impact” prong because the value of her property was reduced by ninety percent, and she might prevail under the “character” prong because, as the neighborhood’s only would-be factory builder, she was singled out for regulation. Given the *Euclid* Court’s apparent view that the public interest favors separating industry from housing, *see id.*, this result makes little sense.

<sup>205</sup> See Davidson, *supra* note 161, at 44–45 (“Equally challenging is finding a neutral metric to evaluate an acceptable distribution of burdens.”).

<sup>206</sup> Echeverria, *supra* note 171, at 205.

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

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

<sup>209</sup> *Id.* at 207.

supporting the regulation—essentially adding an extra step to an already complex Takings Clause inquiry.

The other element of Echeverria's reciprocity-based test is whether a regulation is designed to confer benefits or prevent harm to the public. Echeverria contends that this distinction is 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>210</sup> Echeverria essentially makes a public-interest argument: "harm-preventing" regulations are supported by a stronger public interest than "benefit-conferring" ones.

Few courts, however, are likely to adopt the "harm/benefit" distinction that Echeverria proposes. 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>211</sup> Echeverria correctly notes that this language does not completely foreclose his theory, because *Lucas* was not decided under the *Penn Central* balancing test.<sup>212</sup> Nevertheless, it seems unlikely that the Supreme Court would adopt a distinction in the *Penn Central* context that it criticized in *Lucas*.

Ultimately, Echeverria's two-factor test requires courts to focus on the weight of the public interest supporting regulation. Thus, in most situations, his test will likely render the same results as the "private harm/public interest" balancing test, and it has the added drawbacks of being more complex and requiring the courts to go through some extra steps.

## V. 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 alone does not give courts much guidance. Given that the courts should weigh the public interest supporting a regulation, how precisely should they do it? And should considera-

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<sup>210</sup> *Id.* at 208.

<sup>211</sup> *Id.* at 207.

<sup>212</sup> Echeverria, *supra* note 171, at 177 ("[T]he 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.").

tion 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*

The recent case of *Resource Investments, Inc. v. United States*<sup>213</sup> provides a helpful illustration of how to properly weigh the nature of the public interest. 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>214</sup> The plaintiffs asserted that certain procedural steps imposed by the federal government constituted a compensable taking.<sup>215</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” factor weighed in favor of the plaintiffs or the government.<sup>216</sup> The court began by noting that courts must “weigh the benefits, burdens, and distribution 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>217</sup>

Applying this test, the court found that the government’s regulations advanced a “valid public interest”<sup>218</sup> because they were designed to protect wetlands and nearby navigable waters from pollution.<sup>219</sup> In particular, the government needed to regulate landfills because land-

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<sup>213</sup> 85 Fed. Cl. 447 (Fed. Cl. 2009).

<sup>214</sup> *Id.* at 457–62 (describing the permit process in detail, noting in particular that the plaintiffs’ first permit application was in 1989 and that they were unable to begin construction of landfill until 1998).

<sup>215</sup> *Id.* at 457. The plaintiffs claimed that the “character” factor favored their takings claim because the federal government unreasonably required them to change their project’s statement of purpose from creating “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.” *Id.* at 516.

<sup>216</sup> *Id.* at 519.

<sup>217</sup> *Id.* at 517–18 (quoting *Creppel v. United States*, 41 F.3d 627, 631 (Fed. Cir. 1994)).

<sup>218</sup> *Id.* at 519.

<sup>219</sup> *Res. Invs., Inc.*, 85 Fed. Cl. at 518 (stating that the regulation meant to “protect navigable waters by preserving wetlands hydrologically linked to those navigable waters”).

fills sometimes contaminate nearby groundwater.<sup>220</sup> On the other hand, the court found that the risk of such contamination was “vanishingly small,”<sup>221</sup> and the plaintiffs produced evidence “strongly suggesting that the [government] treated them differently than other similarly-situated applicants.”<sup>222</sup> These competing interests created a dispute of material fact sufficient to bar summary judgment.<sup>223</sup>

The court’s “character” analysis in *Resource Investments* focused not only 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 the stated public purpose. The court found that the general purpose of landfill regulation (preventing water pollution) favored the government’s permit delays,<sup>224</sup> but also found that the low likelihood of actual pollution and the apparent arbitrariness of government decision making favored the plaintiffs’ claim.<sup>225</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 support both regulation in general and its specific 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 consider additional factors raised by lower courts in the past—most notably, whether the regulation is similar to a physical invasion, and the extent to which the plaintiff was “singled out” for regulation.

The *Lingle* Court resolved the first issue when it stated 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 re-

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<sup>220</sup> *Id.* (noting “serious potential for public health problems should the landfill leach into the groundwater”).

<sup>221</sup> *Id.*

<sup>222</sup> *Id.* at 519.

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

<sup>224</sup> *Id.* at 518–19.

<sup>225</sup> *Res. Invs., Inc.*, 85 Fed. Cl. at 519.

levant in discerning whether a taking has occurred.”<sup>226</sup> This language clearly indicates that the “character” factor requires courts to decide whether government conduct “amounts to a physical invasion.”<sup>227</sup> If so, the government’s conduct is more likely to be a taking.<sup>228</sup> If not, the plaintiff’s takings claim is more likely to fail.

The second issue is more complex. As noted above,<sup>229</sup> it is difficult to know whether a regulation singles out a property owner or whether it distributes 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>230</sup> Thus, the extent to which a property owner is “singled out” for an unfair burden cannot be completely irrelevant in 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,<sup>231</sup> 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 suffered a minimal economic loss is not as likely to have been singled out for excessive regulation. So even if a property owner can credibly claim to have been singled out, to consider this fact under the “character” prong of *Penn Central* may lead to double-counting, that is, considering the same fact—the property owner’s economic harm from being singled out for overregulation—under both the “character” prong and the “economic harm” prong.

Admittedly, disproportionate economic burden is not the only way to determine whether a property owner has been “singled out” for unfair regulation. For example, in *Resource Investments*, the plaintiffs claimed that the government “treated them differently than other similarly-situated applicants.”<sup>232</sup> In theory, such unfair treatment could exist even if the government’s unfairness did not massively re-

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<sup>226</sup> *Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528, 539 (2005) (quoting *Penn Cent. Transp. Co. v. City of N.Y.*, 438 U.S. 104, 124 (1978)).

<sup>227</sup> *Id.*

<sup>228</sup> *Id.*

<sup>229</sup> See *supra* Part IV.B.2.

<sup>230</sup> *Lingle*, 544 U.S. at 542 (citations omitted).

<sup>231</sup> See *supra* Part III.B.2.

<sup>232</sup> *Res. Invs., Inc. v. United States*, 85 Fed. Cl. 447, 519 (Fed. Cl. 2009).

duce the plaintiff's property values. But in that a situation, the court could follow *Resource Investments* and do what the Court of Federal Claims did: treat the defendant's unfair burden as part of the "public interest" discussion, because a government action that is preposterously overinclusive or underinclusive is obviously not going to be particularly effective in promoting the public interest.

For example, suppose 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.

A regulation that singles out a small number of property owners for excessive regulation is likely to create great economic harm to those property owners, which supports finding liability under the "economic harm" prong of *Penn Central*. Such a regulation may also be so inordinately underinclusive or overinclusive that it might not be truly effective in promoting the public interest, which supports finding liability under the "character" prong of *Penn Central*. Thus, a "public interest/private harm" balancing test does not preclude consideration of whether a landowner has been unfairly burdened by regulation.

In sum, courts' "character" factor analysis should proceed as follows:

(1) If a regulation amounts to a physical invasion, then the "character" factor most likely supports a taking.

(2) Otherwise, courts should focus on the public interest at stake—not just whether the government has a legitimate purpose for its conduct, but the extent to which the specific regulation effectively promotes that purpose. The government will want to show that its actions created a high level of public benefit and/or prevented a significant public harm. By contrast, a takings plaintiff will want to show that the regulation produces minimal benefits.

## VI. CONCLUSION

Under *Penn Central*, courts must resolve regulatory takings actions by weighing the economic impact the regulation imposes on the claimant, the regulation's interference with the claimant's investment-backed expectations, and the character of the government action.<sup>233</sup> Before *Lingle*, many courts considered the weight of the gov-

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<sup>233</sup> *Penn Cent. Transp. Co. v. City of N.Y.*, 438 U.S. 104, 124 (1978).

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ernment purpose supporting regulation and the regulation's usefulness in achieving that purpose under the "character" prong of *Penn Central*.

The *Lingle* Court stated that in evaluating the "character" factor, courts should focus on whether governmental action "amounts to a physical invasion" or "adjusts the benefits and burdens of economic life to promote the common good."<sup>234</sup> Thus, it appears that when government action involves a physical invasion, the "character" factor clearly favors a takings claimant. But the Court's reference to government regulation 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 it be reinterpreted to focus on the extent to which government has unfairly burdened a takings plaintiff. But, given the language quoted above, there is no reason to believe that *Lingle* mandates such results. 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 includes the public interest supporting the government action at issue.

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<sup>234</sup> *Lingle*, 544 U.S. at 539 (citation omitted).