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Substantially Advancing Penn Central: Sharpening the Remaining Arrow in the Property Advocate's Quiver for the New Age of Regulatory Takings

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SUBSTANTIALLY ADVANCING *PENN CENTRAL*: SHARPENING THE REMAINING ARROW IN THE PROPERTY ADVOCATE'S QUIVER FOR THE NEW AGE OF REGULATORY TAKINGS

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I. INTRODUCTION

Throughout the nation, America's private property and business owners are losing many of the property rights the founders of this great country felt were of utmost importance.[1] Consider the plight of the Mach family of Hollywood, Florida.[2] After chasing the American dream, the Machs had finally

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1. *See* U.S. CONST. amend. V.

2. *See* Shannon O'Boye, *Widow Promises to Fight Developer Seeking Her Property*, S. FLA. SUN-SENTINEL, June 21, 2005, at B1.

obtained it in the form of a four-unit retail building in downtown Hollywood.[3] For thirty-four years, the Mach family has owned and operated this building.[4] Throughout this period, the property has provided the Machs with a substantial income and allowed them to work in the city for twenty-five of those years.[5] Katalin Mach, the widowed immigrant who now owns the property, does not want to sell.[6] David Mach, Katalin's son, said that his father "always wanted to buy because he figured in America, they couldn't take it."[7] Nonetheless, after all of these years of work, during which the Machs paid taxes and apparently met all other responsibilities of ownership, the City of Hollywood is threatening to take the property through eminent domain.[8]

Eminent domain refers to "[t]he inherent power of a governmental entity to take privately owned property, [especially] land, and convert it to public use, subject to reasonable compensation for the taking."[9] This threat is being made in order to make way for yet another South Florida condominium development.[10] In July 2004, the city commission approved a development plan with the builder, Charles "Chip" Abele, in which they agreed to use their eminent domain powers if necessary to take the Mach's property.[11] The City turned down a plan from Mr. Abele which would have left the Mach's property intact due to concerns about parking.[12]

One must consider whether the city has its values right when it shows greater concern for individuals who may have to walk a block, than to a family who has been a part of the city for over three decades. Further, Mr. Abele claimed that the Machs were "very emotional" and demanded exorbitant prices for their property.[13] Will he face the same criticism when his 750-square-foot, one bedroom condos are being sold for $400,000? Just as the Mach family saw their relatives lose property and businesses in Nazi Germany, the family is now destined to lose their business in the United States

3. *Id.*
4. *Id.*
5. *Id.*
6. *Id.*
7. Michael Mayo, Commentary, *A Fight for a Father's Spirit and the American Dream*, S. FLA. SUN-SENTINEL, July 3, 2005, at B1 (internal quotations omitted).
8. O'Boye, *supra* note 2.
9. BLACK'S LAW DICTIONARY 562 (8th ed. 2004).
10. O'Boye, *supra* note 2.
11. *Id.*
12. *Id.*
13. *Id.*

of America.[14] The Mach's tragic story is just one example of how the United States Constitution is being manipulated to crush the American dream.

The problem with a taking claim is that challenging a regulatory taking, or determining if one has occurred, has been, and continues to be, confusing for both practitioners and courts alike. Private property and business owners are at the mercy of the courts and attorneys. While the City of Hollywood has the power to physically occupy and take the property, the Machs also face the possibility that their property will be taken through regulation. Land-use regulations come in many forms including building codes, zoning ordinances, and growth control statutes.[15] Additionally, such regulations impose restrictions on landowners regardless of their wishes.[16] Such regulations may, by going "too far,"[17] effect a taking for which just compensation is due.[18] This article focuses on the aforementioned regulations, which often significantly diminish property values and rights, but rarely result in just compensation.

While the recent United States Supreme Court decision of *Lingle v. Chevron U.S.A., Inc.*[19] helped define certain narrow categories of regulatory takings,[20] the Court has left open the interpretation of the test set forth in *Penn Central Transportation Co. v. New York City*,[21] which considers certain facts and circumstances that are used to adjudicate a case without consideration of wider application.[22] Among the facts and circumstances set forth in *Penn Central* 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."[23] Therefore, the courts have indicated that they are "unable to develop any 'set formula' for determining" whether a regulatory taking has occurred.[24] Instead, the *Penn Central* test focuses on the magnitude "of the burden that [the] government imposes upon private

14. Mayo, *supra* note 7.

15. WILLIAM B. STOEBUCK & DALE A. WHITMAN, THE LAW OF PROPERTY 518 (3d ed. 2000).

16. *See id.*

17. Pa. Coal Co. v. Mahon, 260 U.S. 393, 415 (1922).

18. *See* BLACK'S LAW DICTIONARY 301 (8th ed. 2004). Just compensation is defined as, "a payment by the government for property it has taken under eminent domain—[usually] the property's fair market value, so that the owner is theoretically no worse off after the taking." *Id.*

19. 125 S. Ct. 2074 (2005).

20. *Id.* at 2081–82.

21. 438 U.S. 104 (1978).

22. *See id.* at 124.

23. *Id.*

24. *Id.*

property rights."[25] The problem is determining when the government has exceeded its power by taking private property through regulation.[26]

In light of last year's three takings decisions,[27] which have come down from the United States Supreme Court, American property owners now face a greater risk of losing their homes and businesses to government regulation than ever before.[28] These decisions may be read to indicate that the Court feels property rights have gone as far as they should. The destruction of certain regulatory takings tests which favored property owners, coupled with the decision in *Kelo v. City of New London*, in which the United States Supreme Court held that private property may be taken for private development,[29] has resulted in a severe blow to property rights. Finally, with the massive real estate development occurring in Florida and throughout major urban centers, the rights of property owners need to be clearly established. It is for these reasons that the *Penn Central* test needs to be reexamined in order to provide property owners the protections to which they are constitutionally entitled.[30] This article will provide an analysis of regulatory takings jurisprudence and recommendations to fix the broken balancing test in *Penn Central*.

There are few, if any, subjects that conjure a more heated debate than that of regulatory takings.[31] This debate is due in part to the numerous, and often conflicting, holdings of the United States Supreme Court[32] which have led to "ad hoc, factual inquiries,"[33] balancing tests,[34] nuisance exceptions,[35]

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25. *Lingle*, 125 S. Ct. at 2082.

26. *Id.* at 2081; Pa. Coal Co. v. Mahon, 260 U.S. 393, 415 (1922).

27. *Lingle*, 125 S. Ct. 2074; San Remo Hotel v. City of San Francisco, 125 S. Ct. 2491 (2005); Kelo v. City of New London, 125 S. Ct. 2655 (2005).

28. *See generally Kelo*, 125 S. Ct. 2655 (upholding decision allowing private property to be taken for private development).

29. *Id.* at 2668.

30. *See* U.S. CONST. amend. V.

31. *See generally* James E. Krier, Book Review, *Takings from Freund to Fischel*, 84 GEO. L.J. 1895 (1996); Frank I. Michelman, *Property, Utility, and Fairness: Comments on the Ethical Foundations of "Just Compensation" Law*, 80 HARV. L. REV. 1165 (1967); Joseph L. Sax, *Takings and the Police Power*, 74 YALE L.J. 36 (1964); Molly L. Dillon, Comment, *Legislative Expansion of Fifth Amendment "Takings"? A Discussion of the Regulatory Takings Law and Proposed Compensation Legislation*, 15 UCLA J. ENVTL. L. & POL'Y 243 (1997).

32. Jerome M. Organ, *Understanding State and Federal Property Rights Legislation*, 48 OKLA. L. REV. 191 (1995). Organ notes that:

> The Supreme Court has been much less clear and consistent, however, in deciding when the Fifth Amendment requires the state to compensate a property owner whose land the state has not physically taken, but merely has regulated to such an extent that the property owner has lost the opportunity to enjoy much of the "economic value" associated with her property.

Id. at 191.

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

and per se rules[36]—which all seem to conflict in varying degrees. Such conflict has left lawyers and courts with little guidance in deciding takings issues on a case-by-case basis. As Justice Stevens once stated, "[e]ven the wisest lawyers would have to acknowledge great uncertainty about the scope of this Court's takings jurisprudence."[37]

In order to work through this great uncertainty and provide a proper background for a clear understanding of this article, Part II will give an overview of American regulatory takings jurisprudence, which will include a discussion of some of the major cases in the development of regulatory takings. Part III will discuss *Lingle* and what implications it may have for the future of the *Penn Central* test. Part IV will analyze *Penn Central* and recommend ways to turn the test in favor of private property owners. In Part V, a conclusion will reinforce the suggestions set forth in Part IV, and encourage Americans to defend against the governmental taking of their private property.

II. AMERICAN REGULATORY TAKINGS JURISPRUDENCE

"The threshold issue in any regulatory takings case is whether the claimant can point to some property interest she held as of the date of the alleged taking that was affected by the challenged government action."[38] Also, the property interest must be one "that the claimant can claim a protected right to exploit."[39] A regulatory taking occurs when government regulation or action goes so far as to constitute a taking, even though no property or title to such property is actually taken.[40]

The threat that a government may exercise its power to take property or frustrate the owner's expectations, so long as just compensation is paid, is undoubtedly a significant invasion of the rights of private property owners.[41]

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34. Agins v. City of Tiburon, 447 U.S. 255, 261 (1980); *Penn Cent. Transp. Co.*, 438 U.S. at 124.

35. Lucas v. S.C. Coastal Council, 505 U.S. 1003, 1022–23 (1992).

36. *Id.* at 1027 (setting forth the total diminution in value test); Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419, 426 (1982) (setting forth the permanent physical invasion test).

37. Nollan v. Cal. Coastal Comm'n, 483 U.S. 825, 866 (1987) (Stevens, J., dissenting).

38. John D. Echeverria, Friedenburg v. DEC: *A Troubling Regulatory Takings Ruling*, 15 ENVTL. L. IN N.Y., 47, 47 (2004), *available at* http://www.law.georgetown.edu/gelpi/papers/friedenburg.pdf.

39. *Id.* at 48.

40. *See* Pa. Coal Co. v. Mahon, 260 U.S. 393, 415 (1922).

41. *See* Guido Calabresi & A. Douglas Melamed, *Property Rules, Liability Rules, and Inalienability: One View of the Cathedral*, 85 HARV. L. REV. 1089, 1092 n.7, 1092–93 (1972) (noting the role of property rules in transactions involving real property).

While the protections set forth in the Constitution should ensure individuals who have their property taken will not suffer financially, such an exchange does not leave everyone feeling satisfied with the transaction.[42] The Mach family example, set forth in the Introduction, is a concrete representation of such a situation.[43] For the Mach family, no amount of money can make up for the sentimental ties which flow from the generational ownership of their building.[44] To suggest that an exchange of money for property is "fair" or "just" overlooks the fact that property is not fungible, which means, "each parcel of land is 'unique' and therefore money damages cannot be an accurate substitute."[45] Anthony Kronman's article on specific performance addressed this issue by stating:

> In asserting that the subject matter of a particular contract is unique and has no established market value, a court is really saying that it cannot obtain, at reasonable cost, enough information about substitutes to permit it to calculate an award of money damages without imposing an unacceptably high risk of undercompensation on the injured promisee. Conceived in this way, the uniqueness test seems economically sound.[46]

However, government regulation is necessary to a certain degree.[47] In fact, the United States Supreme Court has held that regulation is necessary for the proper performance of our government.[48] Nevertheless, the Takings Clause must be read literally in order to enforce private property owners' constitutional rights.[49]

A. *The United States Constitution*

The guarantee against taking without just compensation is among the many fundamental rights set forth in the United States Constitution.[50] The Fifth Amendment's Takings Clause provides that private property shall not

42. See *id.*
43. *See* JESSE DUKEMINIER & JAMES E. KRIER, PROPERTY 589 (5th ed. 2002).
44. O'Boye, *supra* note 2.
45. DUKEMINIER & KRIER, *supra* note 43, at 589.
46. Anthony T. Kronman, *Specific Performance*, 45 U. CHI. L. REV. 351, 362 (1978).
47. *See* Georgia v. City of Chattanooga, 264 U.S. 472, 480 (1924).
48. *See id.* (stating that "[t]he taking of private property for public use upon just compensation is so often necessary for the proper performance of governmental functions that the power is deemed to be essential to the life of the State").
49. *See* U.S. CONST. amend. V.
50. *See id.*

"be taken for public use, without just compensation."[51] The Takings Clause is made applicable to the states through the Fourteenth Amendment which states, in pertinent part: "nor shall any [s]tate deprive any person of life, liberty, or property, without due process of law."[52] These amendments are meant to provide a safeguard against governmental abuses of power.[53] While an initial reading may seem straightforward, these words have caused confusion for well over a century.[54]

B. *The Constitutional Interpretation*

1. *Pennsylvania Coal Co. v. Mahon*

Pennsylvania Coal Co. v. Mahon is considered to mark the birth of the idea that a government action or regulation may result in a taking which requires just compensation.[55] In fact, until the Court's decision in *Mahon*, "it was generally thought that the Takings Clause reached only a 'direct appropriation' of property . . . or the functional equivalent of a 'practical ouster of [the owner's] possession.'"[56]

In *Mahon*, the plaintiffs owned the surface of the land, but the deed reserved the right to remove the coal under the Mahons' land to Pennsylvania Coal.[57] At issue was the Kohler Act, which prevented the mining of coal in ways that would cause the disturbance, or sinking, of "any structure used as a human habitation."[58] Ultimately, the Court held the statute had resulted in an unconstitutional taking of Pennsylvania Coal's property.[59] This was in part

51. *Id.*

52. U.S. CONST. amend. XIV, § 1; *see also* Chi., Burlington, & Quincy R.R. Co. v. Chicago, 166 U.S. 226, 236 (1897) (stating that although the state "legislature may prescribe a form of procedure to be observed in the taking of private property for public use, but it is not due process of law if provision be not made for compensation").

53. *See* Armstrong v. United States, 364 U.S. 40, 49 (1960) (Harlan, J., dissenting).

54. *See* Nollan v. Cal. Coastal Comm'n, 483 U.S. 825, 866 (1987) (Stevens, J., dissenting).

55. *See* Janet McClafferty Dunlap, *This Land Is My Land: The Clash Between Private Property and the Public Interest in* Lucas v. South Carolina Coastal Council, 33 B.C. L. REV. 797, 808 (1992) (indicating that prior to the year in which *Mahon* was decided, the United States Supreme Court found no taking if the government had a legitimate public purpose for the challenged regulation and no trespass had occurred on the land).

56. Lucas v. S.C. Coastal Council, 505 U.S. 1003, 1014 (1992) (alteration in original) (citations omitted).

57. Pa. Coal Co. v. Mahon, 260 U.S. 393, 412 (1922).

58. *Id.* at 412–13.

59. *Id.* at 414.

due to the fact that "[w]hat makes the right to mine coal valuable is that it can be exercised with profit. To make it commercially impracticable to mine certain coal has very nearly the same effect for constitutional purposes as appropriating or destroying it."[60]

Justice Holmes highlighted the eternal struggle between individual property rights and governmental power in the following quote:

> Government hardly could go on if to some extent values incident to property could not be diminished without paying for every such change in the general law. As long recognized, some values are enjoyed under an implied limitation and must yield to the police power. But obviously the implied limitation must have its limits, or the contract and due process clauses are gone. One 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 to sustain the act. So the question depends upon the particular facts.[61]

The preceding language clearly indicates the power that the Constitution provides to both private property owners and governments.[62] This language also marks the birth of the "diminution in value" test[63] and the consideration of the economic impact of regulations on property owners.[64] While disagreement abounds as to the proper interpretation of *Mahon*, it "is *uniformly* held to stand for the proposition that the judiciary should closely scrutinize economic legislation for potential unconstitutionality"[65] in order to ensure that the government is not abusing its power.[66]

In one of the most famous lines in regulatory takings jurisprudence, Justice Holmes stated, "[t]he general rule at least is, that while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking."[67] The problem with this often quoted phrase is that it fails to clarify how to determine what is too far.[68] The diminution in value test is one way that Justice Holmes attempted to define how far is too far.[69] A more

60. *Id.*
61. *Id.* at 413.
62. *See Mahon*, 260 U.S. at 413.
63. *See id.* at 413.
64. *Id.* at 413–14.
65. William Michael Treanor, *Jam for Justice Holmes: Reassessing the Significance of* Mahon, 86 GEO. L.J. 813, 816 (1998).
66. *Id.*
67. *Mahon*, 260 U.S. at 415.
68. Lingle v. Chevron U.S.A. Inc., 125 S. Ct. 2074, 2081 (2005).
69. *Mahon*, 260 U.S. at 415.

recent example of the consideration of economic factors, or diminution in value test, is set forth in *Williamson County Regional Planning Commission v. Hamilton Bank.*[70] In *Williamson*, the Court held that its task was "to distinguish the point at which regulation becomes so onerous that it has the same effect as an appropriation of the property through eminent domain or physical possession."[71] While many questions were left unanswered in *Mahon*, regulatory takings, a balancing test, and economic considerations complicated the previously straightforward analysis of the Fifth Amendment.[72]

2. *Penn Central Transportation Co. v. New York City*

After leaving so many critical questions unanswered in *Mahon*, many commentators expected that the floodgates of regulatory takings litigation would open.[73] However, it was not until fifty-five years later, in *Penn Central* that the United States Supreme Court made a significant effort to clarify these unanswered questions.[74]

In *Penn Central*, the Court admitted that it was "unable to develop 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."[75] Instead, the Court indicated that it will engage in "ad hoc, factual inquiries" which balance the important factors of each particular case.[76] These factors will be highlighted and discussed in Part IV of this article.

3. *Agins v. City of Tiburon*

One of the reasons that this article is placing a new emphasis on the *Penn Central* test is due to the recent destruction of the regulatory takings test set forth in *Agins v. City of Tiburon.*[77] In *Agins*, the landowners filed suit claiming that the city had unconstitutionally taken their property in violation of the Fifth and Fourteenth Amendments.[78] The landowners' claim arose out of zoning ordinances which were enacted after the purchase of the land and

70. 473 U.S. 172 (1985).
71. *Id.* at 199.
72. *See* Lucas v. S.C. Coastal Council, 505 U.S. 1003, 1014 (1992).
73. STOEBUCK & WHITMAN, *supra* note 15, at 530.
74. *Id.*
75. Penn Cent. Transp. Co. v. New York City, 438 U.S. 104, 124 (1978).
76. *Id.*
77. 447 U.S. 255 (1980).
78. *Id.* at 258.

prevented the claimants from building on their property as originally expected.[79]

The United States Supreme Court held that the regulation of a "particular property effects a taking if the ordinance does not substantially advance legitimate state interests or denies an owner economically viable use of his land."[80] The State of California felt that the maintenance of open spaces was an important state interest and that the zoning ordinance substantially advanced that interest.[81] Therefore, the Court held that the ordinance passed constitutional muster.[82]

Since *Agins* was decided, the "substantial advancement test" has been favored by property rights advocates.[83] This favoritism was shown because the *Agins* test allowed claimants to challenge the effectiveness of a government regulation.[84] If the claimant can show that the governmental action or regulation does not substantially advance a legitimate state interest, the claimant will prevail regardless of economic impact, or other considerations.[85]

4. Those Other Takings Tests

In the interest of clarity, this section will briefly look at some other tests the *Lingle* decision helped set forth. While these tests are not the focus of this paper, they should be analyzed and distinguished.

First, there are instances when the government has interfered in such a way that the owner has suffered "a permanent physical occupation" of their property.[86] In these situations, the permanent invasion, no matter how minor, demands that just compensation be made.[87] This type of takings test was first set forth in *Loretto v. Teleprompter Manhattan CATV Corp.*[88]

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79. *Id.* at 257.

80. *Id.* at 260 (citations omitted).

81. *Id.* at 261.

82. *Agins*, 447 U.S. at 261.

83. Marcia Coyle, *Takings Tussle*, DAILY BUS. REV., June 3, 2005, at A10; *see also* Lingle v. Chevron U.S.A., Inc., 125 S. Ct. 2074, 2077–79 (2005) (indicating that Chevron used the *Agins* test to move forward with its claim).

84. *See Lingle*, 125 S. Ct. at 2079.

85. *See id.*

86. Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419, 426 (1982) (finding a taking where a state law requires landlord to allow cable companies to install their facilities on or in the buildings).

87. *Id.* at 425; *Lingle*, 125 S. Ct. at 2081.

88. 458 U.S. at 426.

Next, there may be a total regulatory taking as defined in *Lucas v. South Carolina Coastal Council.*[89] In *Lucas*, the Court held that if the government, through a regulation, denied a property owner all economically viable use of his or her property, then a taking must be found and just compensation must be paid.[90] However, the Court noted that when such a regulation is designed to prohibit a use that is or could be a nuisance, an exception to the *Lucas* test will be found.[91]

Finally, the Court held that takings claims which flow from land-use exactions must be examined through the tests set fort in *Nollan v. California Coastal Commission*[92] and *Dolan v. City of Tigard.*[93] Land use exactions "include dedications of land to the public, installation of public improvements, and exactions of money for public purposes that are imposed by governmental entities upon developers of land as conditions of development permission."[94] This duo of cases sets forth two important points. In *Nollan*, the Court stated that there must be a nexus between the condition sought and the problem to be alleviated.[95] In other words, the exaction must be calculated to advance the interest that is used to justify the exaction.[96] *Dolan* went a step further by indicating that when a nexus exists, there must be some "rough proportionality" between the thing exacted and the development permitted in exchange.[97] Here again, courts and practitioners are left with a test that does not clarify the meaning of its terms.[98]

Outside of these narrow categories, regulatory takings cases fall under the *Penn Central* test.[99] The preceding tests are relatively easy to work with in comparison to *Penn Central.*[100] For example, when a property owner has suffered a "permanent physical invasion," or has lost all value associated with his or her property, it is nearly impossible to argue that just compensation should not be paid.[101] However, as this article will show, not all of these tests have survived subsequent interpretations of the United States Supreme Court.

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89. 505 U.S. 1003 (1992).
90. *Id.* at 1027.
91. *Id.* at 1022–23.
92. 483 U.S. 825 (1987).
93. 512 U.S. 374 (1994).
94. STOEBUCK & WHITMAN, *supra* note 15, at 675.
95. *Nollan*, 483 U.S. at 837.
96. *Id.*
97. *Dolan*, 512 U.S. at 391.
98. STOEBUCK & WHITMAN, *supra* note 15, at 684.
99. Lingle v. Chevron U.S.A., Inc., 125 S. Ct. 2074, 2081 (2005).
100. *See id.* (stating that *Loretto* and *Lucas* are "per se" or "categorical" takings).
101. *Id.*

III. DISCUSSION OF *LINGLE V. CHEVRON U.S.A., INC.*

While property rights advocates have favored the *Agins* "substantial advancement test" for twenty-five years, the recent United States Supreme Court decision of *Lingle v. Chevron U.S.A, Inc.* effectively destroyed the *Agins* test.[102] Due to this rare, unanimous decision from the Court, scholars have indicated that the next "turn of the wheel" will be a case which helps define the meaning of the *Penn Central* test.[103]

A. *A Statement of the Case*

Showing apparent concern for the public welfare in relation to the arguably oligopolistic concentration in the gasoline market, the Hawaii Legislature passed Act 257 in 1997.[104] The key effect of Act 257 involved a rent ceiling that oil companies could charge dealers who lease their service stations from the company.[105] This ceiling limited rent to fifteen percent of the

102. *Id.* at 2087.

103. Coyle, *supra* note 83.

104. HAW. REV. STAT. § 486H-10.4 (Supp. 2004); *Lingle*, 125 S. Ct. at 2078.

105. § 486H-10.4. Section 486H-10.4 states:

> (a) Beginning August 1, 1997, no manufacturer or jobber shall convert an existing dealer retail station to a company retail station; provided that nothing in this section shall limit a manufacturer or jobber from:
>
> (1) Continuing to operate any company operated retail service stations legally in existence on July 31, 1997;
>
> (2) Constructing and operating any new retail service stations as company retail stations constructed after August 1, 1997, subject to subsection (b); or
>
> (3) Operating a former dealer retail station for up to twenty-four months until a replacement dealer can be found if the former dealer vacates the service station, cancels the franchise, or is properly terminated or not renewed.
>
> (b) No new company retail station shall be located within one-eighth mile of a dealer retail station in an urban area, and within one-quarter mile in other areas.
>
> (c) All leases as part of a franchise as defined in section 486H-1, existing on August 1, 1997, or entered into thereafter, shall be construed in conformity with the following:
>
> (1) Such renewal shall not be scheduled more frequently than once every three years; and
>
> (2) Upon renewal, the lease rent payable shall not exceed fifteen per cent of the gross sales, except for gasoline, which shall not exceed fifteen per cent of the gross profit of product, excluding all related taxes by the dealer operated retail service station as defined in section 486H-1 and 486H-10.4 plus, in the case of a retail service station at a location where the manufacturer or jobber is the lessee and not the owner of the ground lease, a percentage increase equal to any increase which the manufacturer or jobber is required to pay the lessor under the ground lease for the service station. For the purposes of this subsection, "gross amount" means all monetary earnings of the dealer from a dealer operated retail service station after all applicable taxes, excluding income taxes, are paid.
>
> The provisions of this subsection shall not apply to any existing contracts that may be in conflict with its provisions.

dealer's gross profits from gasoline sales plus fifteen percent of gross sales of products other than gasoline.[106]

At the time of the case, Chevron dominated the Hawaii market by controlling roughly "60 percent of the market for gasoline produced or refined in-state and 30 percent of the wholesale market on the State's most populous island, Oahu."[107] This market share was accomplished through "64 independent lessee-dealer stations."[108] Through this relationship, Chevron purchases the land, erects the station, and then leases the station to independent dealers at a rent determined by a percentage of the dealer's sales, which allows Chevron to unilaterally set the price for gasoline.[109]

Within a month of Act 257 being enacted, Chevron filed suit in the United States District Court for the District of Hawaii.[110] Chevron's main claim was that the rent cap constituted an unconstitutional regulatory taking, thereby violating the Fifth and Fourteenth Amendments.[111] Shortly thereafter, Chevron moved for summary judgment claiming "that the rent cap [did] not substantially advance any legitimate government interest."[112] The District Court agreed with Chevron's analysis and granted the summary judgment.[113] The District Court made the following findings: 1) the statute would not reduce the lessee-dealers' rents or retail prices; 2) dealers who were selling their stations could "charge the incoming lessee a premium" so the new lessee's would not obtain the benefits from the rent cap; 3) oil companies would gain back their lost rents by unilaterally increasing fuel price; and 4) the Act would decrease the number of lessee-dealer stations because the rent cap would discourage companies, such as Chevron, from investing in such stations.[114] On appeal, the Ninth Circuit Court of Appeals held that the District Court had applied the correct legal standard but vacated the summary judgment stating that there was a "genuine issue of material fact . . . as to whether the Act would [actually] benefit consumers."[115] Finally, on remand,

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(d) Nothing in this section shall prohibit a dealer from selling a retail service station in any manner.

Id.

106. *Id.*

107. *Lingle*, 125 S. Ct. at 2078.

108. *Id.*

109. *Id.*

110. *Id.* at 2078–79.

111. *Id.* at 2079.

112. *Lingle*, 125 S. Ct. at 2079.

113. *Id.* (citing Chevron U.S.A., Inc. v. Cayetano (*Chevron I*), 57 F. Supp. 2d 1003, 1014 (D. Haw. 1998)).

114. *Id.*; *Chevron I*, 57 F. Supp. 2d at 1010–14.

115. *Lingle*, 125 S. Ct. at 2079 (citing Chevron U.S.A., Inc. v. Cayetano (*Chevron II*), 224 F.3d 1030, 1037–42 (9th Cir. 2000)).

the District Court upheld the previous findings that the statute would not substantially advance a legitimate state interest.[116] This holding was reached after hearing competing expert economists' opinions of the effects of the statute.[117] The State of Hawaii's further attempts to challenge the ruling were rejected, and the United States Supreme Court granted certiorari.[118] The aforementioned procedural history shows the confusion this subject has caused the courts.

B. *Why the Divergence? The United States Supreme Court's Reasoning*

Faced with numerous splits among the courts and confusion throughout the field, the United States Supreme Court hoped to bring some clarity to regulatory takings tests.[119] The Ninth Circuit, where *Lingle* took place, and the First Circuit, consistently applied the "substantially advance test."[120] "Other federal courts hadn't rejected it, but didn't know what to do with it. A number of state courts had applied it as well."[121] In other words, the confusion was apparent and pervasive.[122]

Clarifying the confusion, Justice O'Connor, in the telling opening statement of *Lingle* wrote:

> On occasion, a would-be doctrinal rule or test finds its way into our case law through simple repetition of a phrase—however fortuitously coined. A quarter century ago, in *Agins v. City of Tiburon*, the Court declared that government regulation of private property "effects a taking if [such regulation] does not substantially advance legitimate state interests . . . ." Through reiteration in a half dozen or so decisions since *Agins*, this language has been ensconced in our Fifth Amendment takings jurisprudence.[123]

Next, Justice O'Connor gave a brief overview of takings jurisprudence before getting into the heart of the majority's analysis.[124] The majority was exceptionally clear in laying out the distinct categories of takings claims.[125]

116. *Id.* at 2080 (citing Chevron U.S.A., Inc. v. Cayetano (*Chevron III*), 198 F. Supp. 2d 1182, 1193 (D. Haw. 2002)).
117. *Lingle*, 125 S. Ct. at 2080 (citing *Chevron III*, 198 F. Supp. 2d at 1188).
118. *Id.*
119. *See id.* at 2081 (highlighting the categories of regulatory takings tests).
120. Coyle, *supra* note 83.
121. *Id.* (quoting Georgetown's John D. Echeverria).
122. *See id.*
123. *Lingle*, 125 S. Ct. at 2077–78 (citations omitted) (alterations in original).
124. *See id.* at 2080–81.
125. *Id.* at 2081.

These claims, which were discussed earlier, include: 1) permanent physical invasions of property; 2) deprivation of all economically beneficial use of his or her property; 3) exactions; and 4) claims falling under the *Penn Central* test.[126] The Court acknowledged that the categories falling outside the *Penn Central* test are "relatively narrow."[127] Emphasis was placed on the fact that regulatory takings tests aim to determine the severity of the burden that such regulations impose upon private property owners,[128] which was an indication of where the opinion was headed.

The Court dealt the final blow to the *Agins* "substantially advance test" when it disapproved of the fact that the test has been read to be a stand alone test, "wholly independent of *Penn Central* or any other test."[129] The Court determined that the *Agins* test focused on due process and not takings jurisprudence.[130] Showing further approval for the focus of the more deferential *Penn Central* test, the Court stated:

> In stark contrast to the three regulatory takings tests discussed above, the "substantially advances" inquiry reveals nothing about the *magnitude or character of the burden* a particular regulation imposes upon private property rights. Nor does it provide any information about how any regulatory burden is *distributed* among property owners. In consequence, this test does not help to identify those regulations whose effects are functionally comparable to government appropriation or invasion of private property; it 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.[131]

As the preceding quote indicates, the Court highlighted the fact that the *Agins* "substantially advances" test was a "means-ends test."[132] The *Agins* test asks "whether a regulation of private property is *effective* in achieving some legitimate public purpose" instead of determining the magnitude or character of the regulation.[133] Following this determination, the Court held

126. *Id.*; *see also* Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419, 426 (1982) (state law requiring landlords to permit cable companies to install cable facilities in apartment buildings effected a taking); Lucas v. S.C. Coastal Council, 505 U.S. 1003 (1992) (economically beneficial use test); Penn Cent. Transp. Co. v. New York City, 438 U.S. 104 (1978).

127. *Lingle*, 125 S. Ct. at 2081.

128. *Id.* at 2082.

129. *Id.*

130. *Id.* at 2083.

131. *Id.* at 2084.

132. *Lingle*, 125 S. Ct. at 2083.

133. *Id.*

that the *Agins* test is flawed as a takings test because the Takings Clause of the Fifth Amendment presupposes that the regulation serves a legitimate, beneficial effect to the public.[134] Therefore, the Takings Clause is not concerned with whether a regulation is valid on its face, but whether the regulation has such a severe impact on the property owner that just compensation is required.[135] Consequently, the *Agins* test is "logically prior to and distinct from the question [of] whether a regulation effects a taking."[136]

In simplistic form, the Court established how a proper takings test would analyze Chevron's claims by looking at the burden and value loss associated with Act 257.[137] The Court highlighted that there is no clear indication that Chevron suffered any severe burden or lost revenue which requires just compensation.[138] Chevron expected to regain its losses by raising the price of the gasoline it sells to the independent lessee-dealer's.[139] However, the Court does note that Chevron could have brought its claim under the *Penn Central* test.[140] The foregoing analysis suggests that if Chevron would have brought suit under *Penn Central*, its claim would have failed.[141]

C. *A Look to the Future*

While the *Lingle* decision clarified the question of whether the *Agins* substantially advances test is proper for regulatory takings, the opinion did not indicate a proper interpretation of the *Penn Central* test or attempt to define its terms.[142] The *Penn Central* test is vitally important to takings jurisprudence because nearly all regulatory takings actions fall under it.[143] The destruction of the *Agins* test,[144] coupled with the recent decisions of *Kelo* and *San Remo Hotel*, demands the test be reexamined in order to provide what little protection is left to property owners.[145] As John Adams once stated, "[t]he moment . . . the idea is admitted into society that property is not as sacred as the laws of God, and that there is not a force of law and public jus-

134. *See id.* at 2084–85.
135. *Id.*
136. *Id.* at 2084.
137. *Lingle*, 125 S. Ct. at 2084–86.
138. *Id.* at 2084–85.
139. *Id.* at 2085.
140. *See id.* at 2087.
141. *See id.* at 2084–86.
142. *Lingle*, 125 S. Ct. at 2081–82.
143. Coyle, *supra* note 83.
144. *Lingle*, 125 S. Ct. at 2078.
145. *See generally id.*; Kelo v. City of New London, 125 S. Ct. 2655, 2668 (2005) (both cases upheld the government's regulatory takings).

tice to protect it, anarchy and tyranny commence."[146] The force of law and public justice Adams spoke of is fading with each subsequent interpretation by the United States Supreme Court.[147]

IV. SUBSTANTIALLY ADVANCING *PENN CENTRAL*?

Penn Central has been defined as the "polestar" of American regulatory takings jurisprudence.[148] Being classified as the polestar indicates that the *Penn Central* test has always been the most widely used takings test.[149] In fact, "98 percent of regulatory takings cases fall under the Penn Central wing."[150] However, following the decision in *Lingle*, the *Penn Central* test has been substantially advanced and is now the most important takings case which the United States Supreme Court needs to interpret.[151]

Interpreting *Penn Central* has proven to be extremely difficult and confusing, and has even been described as "inscrutable."[152] This difficulty is due to Justice Brennan's introduction of a new balancing test which considers multiple factors.[153] As mentioned earlier, Justice Brennan indicated that the Court was unable to develop a "set formula" for regulatory takings cases, but instead held that the Court would engage in "essentially ad hoc, factual inquiries."[154] Justice Brennan identified the important factors in these inquiries when he stated:

> In engaging in these essentially ad hoc, factual inquiries, the Court's 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

146. Union Pac. R.R. v. United States, 99 U.S. 700, 767 (1878) (quoting John Adams) (internal quotations omitted).
147. *See Lingle*, 125 S. Ct. 2074; *Kelo*, 125 S. Ct. 2655.
148. Palazzolo v. Rhode Island, 533 U.S. 606, 633 (2001) (O'Connor, J., concurring).
149. *See* Coyle, *supra* note 83.
150. *Id.*
151. *Id.*
152. *See id.*
153. *See* Penn Cent. Transp. Co. v. New York City, 438 U.S. 104, 124 (1978).
154. *Id.*

> public program adjusting the benefits and burdens of economic life to promote the common good.[155]

In *Penn Central*, these factors were applied in order to determine whether a historic landmark law, which prevented the owners of Grand Central Station from building an office high-rise, resulted in a taking for which just compensation was due.[156] The proposal set forth for the high-rise complied with all zoning and development regulations that were in place at the time.[157] However, because the City of New York felt that the "special historic, cultural, or architectural significance [would] enhance the quality of life for all,"[158] the owner of a designated landmark was required to maintain, at their own expense, the exterior of the building.[159] Further, before the owner of a landmark could alter the exterior or construct any improvements to the landmark, they were required to seek approval from a regulatory body known as the Landmark Preservation Commission.[160] Penn Central sought the necessary approval from the Landmark Preservation Commission by submitting two separate plans.[161] Both plans submitted to the Commission were denied.[162] Penn Central then sought declaratory judgment and injunctive relief to prevent the City of New York from applying the Landmarks Preservation Law to prevent the construction of the office building.[163] After making its way through the courts, the case wound up in the United States Supreme Court.[164] The Court held, over strong dissent, that a taking had not occurred.[165] The Court noted that the regulation had a significant impact on the use of the property, but did not go too far.[166] The scales of justice tipped in favor of the government, and the notion that property provides security,

155. *Id.* (citations omitted).
156. *Id.* at 107.
157. *Id.* at 116.
158. *Penn Cent. Transp. Co.*, 438 U.S. at 108.
159. *Id.* at 111–12.
160. *Id.* at 110, 112.
161. *Id.* at 116.
162. *Id.* at 117.
163. *Penn Cent. Transp. Co.*, 438 U.S. at 119. Penn Central also sought damages for a "temporary taking," and a determination as to whether "transferable development rights" would equate "just compensation" if a taking was found. *Id.* at 119, 122.
164. *Id.* at 119–22.
165. *Id.* at 138.
166. *Id.* at 137.

which was set forth in *Mahon*, was replaced with the notion that property should provide efficiency for society at large.[167]

However, Justice Rehnquist fired back with a powerful dissent.[168] He first attacked the decision because the landmark designation singled out Penn Central.[169] Penn Central suffered a significant financial burden and received no meaningful benefit in return.[170] Singling out individual property owners violates the fundamental notion that a government should not impose burdens upon individuals which should be carried by society at large.[171] Further, there was no "reciprocity of advantage"[172] present to Penn Central because they received no benefit from the landmark designation.[173] While zoning ordinances may at times reduce property values, such a burden is shared between many individuals, thereby leaving some benefit to those affected by the zoning ordinance.[174] In contrast, Penn Central received no such benefit, but instead faced a multi-million dollar burden.[175] Had this burden been placed upon the population of the City of New York, the cost "per person would be in cents per year."[176]

Therefore, Justice Rehnquist's dissent shows that the case should have been decided in favor of Penn Central.[177] Penn Central suffered a significant economic impact, which exceeded several million dollars a year.[178] A reasonable investment-backed expectation was lost due to the preclusion of an office high-rise.[179] Prior to the landmark designation, Penn Central obvi-

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167. *See* Pa. Coal Co. v. Mahon, 260 U.S. 393, 416 (1922); Basil H. Mattingly, *Forum Over Substance: The Empty Ritual of Balancing in Regulatory Takings Jurisprudence*, 36 WILLAMETTE L. REV. 695, 701 (2000). Mattingly defined these terms by stating:

> This article use the phrase "property as security" to describe a regulatory regime that maximizes the landowner's rights in property and protects the property owner against governmental interference, allowing, to the greatest extent feasible, the rights of the landowner to utilize her property as she chooses. By contrast, the phrase "efficiency of property" refers to an environment in which much greater deference is given to the government's ability to regulate and restrict private property without compensation.

Id. at 700 n.33.

168. *Penn Cent. Transp. Co.*, 438 U.S. at 138 (Rehnquist, J., dissenting).
169. *See id.* at 139.
170. *Id.*
171. Armstrong v. United States, 364 U.S. 40, 49 (1960).
172. *Mahon*, 260 U.S. at 415.
173. *Penn Cent. Transp. Co.*, 438 U.S. at 139.
174. *Id.* at 147 (Rehnquist, J., dissenting).
175. *Id.* at 149.
176. *Id.* at 148.
177. *See id.* at 138–53.
178. *Penn Cent. Transp. Co.*, 438 U.S. at 149 (Rehnquist, J., dissenting).
179. *Id.* at 142.

ously had an expectation to build an office in their air space.[180] Finally, because there was no "reciprocity of advantage"[181] and the regulation imposed a burden upon an individual, "which, in all fairness and justice, should be borne by the public as a whole,"[182] the character of the regulation does not pass the third prong of the *Penn Central* test.[183]

A. *The Destructible Landmarks of* Penn Central

Justice Rehnquist's dissent shows that the *Penn Central* test can be interpreted in a way that favors property rights.[184] However, a number of landmark factors coming out of *Penn Central* stand in the way of reaching the "justice and fairness" for which this test strives.[185]

The first element which stands in the way of justice and fairness is known as the "whole property" rule.[186] The whole property rule commands that a court may only consider the effects of a government action or regulation on the whole parcel, as opposed to a specific portion of that parcel.[187] This rule was set forth in *Penn Central* when Justice Brennan wrote that takings "jurisprudence does not divide a single parcel into discrete segments and attempt to determine whether rights in a particular segment have been entirely abrogated."[188]

Since the decision in *Mahon*, courts recognize that a regulation may result in a taking if it "goes too far."[189] However, since *Penn Central*, determining if a regulation has gone "too far" depends upon "ad hoc, factual inquiries," or the facts of the case at hand.[190] The problem is that the courts must determine what property, or part of the property, is being affected to determine whether the regulation goes "too far."[191] If only the whole parcel

180. *Id.*; *see also* United States v. Causby, 328 U.S. 256 (1946) (holding that air rights may be taken).

181. Pa. Coal Co. v. Mahon, 260 U.S. 393, 415 (1922).

182. Armstrong v. United States, 364 U.S. 40, 49 (1960).

183. *Penn Cent. Transp. Co.*, 438 U.S. at 124.

184. *Id.* at 138–53 (Rehnquist, J., dissenting).

185. *Id.* at 124 (majority opinion).

186. *Id.* at 130; Daniel R. Mandelker, *Investment-Backed Expectations in Taking Law*, 27 URB. LAW. 215, 217 (1995).

187. STOEBUCK & WHITMAN, *supra* note 15, at 536 (citing *Penn Cent. Transp. Co.*, 438 U.S. at 104).

188. *Penn Cent. Transp. Co.*, 438 U.S. at 130.

189. Pa. Coal Co. v. Mahon, 260 U.S. 393, 415 (1922).

190. *Penn Cent. Transp. Co.*, 438 U.S. at 124; *Mahon*, 260 U.S. at 415.

191. John E. Fee, Comment, *Unearthing the Denominator in Regulatory Taking Claims*, 61 U. CHI. L. REV. 1535, 1536 (1994); *Mahon*, 260 U.S. at 415.

can be considered in the analysis, a regulatory taking will rarely be found.[192] Consider the following example of the unfairness of the whole parcel rule among property owners of land of varying size or values.

> [I]f we have an owner of 100 acres of land and also an owner of 10 acres of the same quality of land, then, if piecemealing is not allowed, the owner of the 100 acres would receive no compensation if 10 (or probably even more) acres were put into an unusable land reserve, but the owner of the 10 acres would be compensated if his 10 acres were similarly restricted.[193]

The preceding example represents an unfair use of the "deep pocket" doctrine.[194] Further, the decision in *Mahon* may be read to indicate that courts should focus on the loss in value to the affected parcel of property.[195] In *Mahon*, Justice Holmes focused on how the Kohler Act diminished the value of the part of the coal company's rights that were affected, not the entire parcel.[196] While this issue remains to be resolved, this article suggests abolishing the whole parcel rule in order to get closer to the fairness for which the *Penn Central* test currently strives.[197] In fact, the Federal Circuit Court of Appeals and the Ninth Circuit Court of Appeals have already embraced this interpretation.[198]

Next, the Court in *Penn Central* rejected "the proposition that diminution in property value, standing alone, can establish a 'taking.'"[199] Holding that diminution in value is not enough to establish a taking contradicts what the Court previously held in its opinion by stating that one important factor in the *Penn Central* test is the "economic impact of the regulation on the claimant."[200] While the Court did not clarify how much of an economic impact would result in a taking,[201] one may deduce that the greater the adverse

192. *Id.*

193. STOEBUCK & WHITMAN, *supra* note 15, at 537.

194. *See* Carol M. Rose, Mahon *Reconstructed: Why the Takings Issue Is Still a Muddle*, 57 S. CAL. L. REV. 561, 566–69 (1984).

195. Treanor, *supra* note 65, at 824.

196. *Id.*

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

198. *See* Loveladies Harbor, Inc. v. United States, 28 F.3d 1171, 1181 (Fed. Cir. 1994) (finding a taking by considering only twelve and a half out of fifty acres for the purposes of a regulatory taking); Del Monte Dunes at Monterey, Ltd. v. City of Monterey, 95 F.3d 1422, 1433–34 (9th Cir. 1996).

199. *Penn Cent. Transp. Co.*, 438 U.S. at 131.

200. *Id.* at 124.

201. *Id.*

effects on the claimant, the greater the likelihood of a taking.[202] However, this interpretation cannot be squared with subsequent decisions by the United States Supreme Court.[203] For example, in *Lucas*, the Court held that a taking will often occur "[w]here the State seeks to sustain regulation that deprives land of all economically beneficial use."[204] Consideration of the statement in *Lucas* indicates that the Court feels that a negative economic impact can lead to a taking, so long as there is a total loss of value.[205]

While the Court in *Penn Central* never expressly held that the three prongs of the test should be considered together or alone, analysis of the "economic impact of the regulation" on the claimant prong of the *Penn Central* test shows that the three prongs of the test are to be considered together.[206] Such an analysis means property owners who have suffered a ninety-five percent loss of their property value will not be compensated, while an owner suffering a 100 percent diminution of value will recover the full value of the land.[207] As Judge Smith said in *Florida Rock Industries, Inc. v. United States (Florida Rock V)*,[208] "[t]he notion that the government can take two thirds of your property and not compensate you but must compensate you if it takes 100% has a ring of irrationality, if not unfairness, about it."[209]

A better approach is set forth in *Florida Rock V*, where the Federal Claims Court found that a ninety-five percent diminution in value was substantial enough to constitute a taking under the Fifth Amendment.[210] In *Florida Rock Industries, Inc. v. United States (Florida Rock IV)*, the Federal Circuit Court of Appeals held that the Fifth Amendment does not limit guarantees against uncompensable takings to only categorical or complete regulatory takings.[211] Therefore, in cases falling under the *Penn Central* test which deal with less than total takings, the question remains as to "when a partial loss of economic use of the property has crossed the line from a noncom-

202. John D. Echeverria, *Is the* Penn Central *Three-Factor Test Ready for History's Dustbin?*, 52 LAND USE L. & ZONING DIG. 3, 3 (2000) [hereinafter Echeverria II].

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

204. *Id.* at 1027.

205. *See id.*

206. *See* Hodel v. Irving, 481 U.S. 704, 714 (1987); Kaiser Aetna v. United States, 444 U.S. 164, 175 (1979).

207. *Lucas*, 505 U.S. at 1064 (Stevens, J., dissenting).

208. 45 Fed. Cl. 21 (1999).

209. *Id.* at 23.

210. *Id.*

211. Fla. Rock Indus., Inc. v. United States (*Fla. Rock IV*), 18 F.3d 1560, 1570 (Fed. Cir. 1994).

pensable 'mere diminution' to a compensable 'partial taking.'"[212] In *Florida Rock V,* Judge Loren Smith set forth the conditions under which a substantial, but not complete loss of economically viable use becomes a compensable taking under the *Penn Central* test.[213] This analysis asks the parties to answer the following economic questions:

> 1. Has the value of the relevant parcel been significantly diminished?
> 2. Can investment in the relevant parcel be recouped? Recouped at opportunity cost?
> 3. Does the return on investment in the relevant parcel before and after the permit denial reasonably exceed the opportunity cost of money, i.e., is the return to the entire investment economically viable before and after permit denial? Or, does the permit denial frustrate investment-backed expectations?[214]

The answers to these questions will determine when a partial regulatory taking has occurred and just compensation is due.[215] The analysis set forth in *Florida Rock V* attempts to get past the broken balancing test of *Penn Central* and sets forth a stable framework for when "a severe, but not total, loss of the economically viable use of plaintiff's property" demands just compensation.[216]

However, assuming the Court maintains its position that mere diminution in value is not enough to constitute a taking, courts across the nation must interpret another muddled economic prong of the *Penn Central* test labeled as interference with the claimant's "distinct investment-backed expectations."[217] The United States Supreme Court has left the meaning of "investment-backed expectations" undefined.[218] One of the problems is classifying property by using the phrase "investment-backed" because "[a]ll expectations in privately held property are investment-backed by purchase or acquisition."[219] Another problem is that both parties to the suit, the property

212. *Id.* at 1570.
213. *Fla. Rock V,* 45 Fed. Cl. at 23; William W. Wade, *Economic Backbone of the* Penn Central *Test After* Florida Rock V, K&K, *and* Palazzolo, 32 ENVTL. L. REP. 11221, 11226 (2002).
214. Wade, *supra* note 213, at 11226.
215. *See generally Fla. Rock V,* 45 Fed. Cl. 21.
216. *Id.* at 23.
217. Penn Cent. Transp. Co. v. New York City, 438 U.S. 104, 124 (1978).
218. *See* Mandelker, *supra* note 186, at 225.
219. *Id.* at 226.

owner(s) and the government, "can legitimately claim expectations entitled to protection."[220]

One way to avoid the problems with "investment-backed expectations" is known as the "entitlement-to-property theory," which recognizes that protecting landowners' rights is paramount to other considerations in takings law.[221] By accepting a unitary theory such as the entitlement theory, only one side of the battle can claim expectations.[222]

A more thorough approach to the problem relates back to the founder of the phrase "investment-backed expectations."[223] The United States Supreme Court did not formulate "investment-backed expectations" on its own, but instead borrowed the phrase from the influential work of Frank I. Michelman.[224] In his article, Michelman wrote that a proper test asks, "whether or not the measure in question can easily be seen to have practically deprived the claimant of some distinctly perceived, sharply crystallized, investment-backed expectation."[225] Unfortunately, the Court did not adopt the analysis of Michelman, which would have avoided the years of ensuing confusion.[226]

Michelman suggests weighing "[d]emoralization costs" against "[s]ettlement costs."[227] Michelman defines demoralization costs by looking to the amount of compensation which would be necessary to satisfy those who have suffered through regulation, combined with the amount of lost value caused by the regulation.[228] An example of lost value is a decrease in investment and development due to fears that such a regulation may result in similar effects on those similarly situated.[229]

These demoralization costs must then be weighed against the settlement costs, which are defined as "the dollar value of the time, effort, and resources which would be required in order to reach compensation settlements adequate to avoid demoralization costs."[230] If the demoralization costs are greater than the settlement costs, then compensation is due.[231] This analysis

220. *Id.* at 227.
221. *Id.* at 227–28.
222. *See id.*
223. Michelman, *supra* note 31, at 1213.
224. *See id.*
225. *Id.* at 1233.
226. *See* Penn Cent. Transp. Co. v. New York City, 438 U.S. 104, 124 (1978) (failing to mention the demoralization and settlement costs highlighted by Michelman).
227. Michelman, *supra* note 31, at 1214–15.
228. *Id.* at 1214.
229. *Id.*
230. *Id.*
231. *Id.* at 1215.

conforms with the rules discussed throughout this article.[232] For example, in the case of a *Loretto*-type physical occupation, "settlement costs are likely to be low and demoralization costs (absent compensation) to be high."[233] Therefore, compensation would be due.[234] In a *Penn Central* analysis, the "ad hoc, factual inquir[y]"[235] could remain intact, and Michelman's analysis would set forth a balancing test with defined terms.[236] The fact that no takings claimant has ever prevailed under the *Penn Central* test suggests that it is time for a change.[237]

One of the problems with suggesting a replacement balancing test is that some of the same problems will arise.[238] While the Michelman test does define the terms used in its analysis, any balancing test will allow "bias, prejudice, and incompetence" to be brought into the analysis.[239] Even though judges are supposed to be insulated from political pressures, they may have their own political or ideological desires to push upon the public.[240] For these reasons, another suggestion may be discarding the *Penn Central* test in exchange for bright line rules which provide greater protection to property owners.[241] Examples of these rules are set forth in legislative proposals.[242] Such proposals call for compensation when diminution in value is as low as twenty percent.[243] Legislative proposals show that many lawmakers believe that when an individual has lost a portion of their property rights, just compensation should be paid.[244] While bright line rules must have exceptions, such rules may be the only answer to protecting property rights.[245]

While the economic factors of the *Penn Central* test are usually the deciding factor, courts must also consider the "character of the governmental action."[246] The character prong of the *Penn Central* test focuses on whether

232. *See* DUKEMINIER & KRIER, *supra* note 43, at 1234.
233. *Id.*
234. *See* Michelman, *supra* note 31, at 1215.
235. Penn Cent. Transp. Co. v. New York City, 438 U.S. 104, 124 (1978).
236. *See generally id.* at 1165.
237. *See* Echeverria II, *supra* note 202.
238. *See* Mattingly, *supra* note 167, at 716.
239. *Id.*
240. *Id.*
241. *See generally* Dillon, *supra* note 31, at 243–50.
242. *See id.* at 246–50.
243. *See id.* at 246.
244. *See id.*
245. *See* Echeverria II, *supra* note 202 at 4 (indicating that no regulatory takings claimant has ever prevailed under the *Penn Central* analysis).
246. Penn Cent. Transp. Co. v. New York City, 438 U.S. 104, 124 (1978).

a government action promotes the common good.[247] One problem with the character prong of the *Penn Central* test is the deference that courts show economic and social regulations.[248] Such deference means that all regulations that meet "a very low threshold" of public benefit are given substantial weight in the analysis.[249]

In order to balance this deference towards government regulation, the courts should scrutinize the actions of the regulators in the same manner they scrutinize takings claims.[250] To reach the fairness the *Penn Central* test strives for, "the motivation and circumstances of the regulator" should be analyzed as well.[251] Applying the same standard to government regulators as to private property owners helps make the character prong symmetrical and moves toward a fair balance.[252] The character prong of the *Penn Central* test must mesh with the idea that a government should not force "some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole."[253]

Whatever approach property advocates pursue, they must get back to the notion "that the state's rights against its citizens are no greater than the sum of the rights of the individuals whom it benefits in any given transaction."[254] The answer to the question of how much power the government should have to take property is the government should only have the power to force exchanges of property when it can leave the property owners with rights more valuable than those which are lost.[255]

VI. CONCLUSION

The efforts of the United States Supreme Court have failed to attain a true balancing test which meets even the most liberal standard of justice and fairness. This failure is highlighted by the fact that since the *Penn Central* test was set forth in 1978, the Court has rarely found that a regulatory taking

247. *See* Steven J. Eagle, *"Character" as "Worthiness:" A New Meaning for* Penn Central's *Third Test?*, ZONING & PLAN. L. REP., June 2004, at 2, *available at* http://mason.gmu.edu/~seagle/pubs/2004_Character_as_Worthiness_ZPLR.pdf.

248. *Id.*

249. *Id.*

250. *See id.*

251. *Id.* at 6.

252. Eagle, *supra* note 247, at 7.

253. Armstrong v. United States, 364 U.S. 40, 49 (1960).

254. RICHARD A. EPSTEIN, TAKINGS: PRIVATE PROPERTY AND THE POWER OF EMINENT DOMAIN 331 (1985).

255. *Id.* at 332.

had occurred.[256] In fact, the few cases that have been decided in favor of a takings claimant have been decided as a categorical or per se taking as defined in *Lucas* and *Loretto*.[257] This leads to the conclusion that a takings claimant has never prevailed under the *Penn Central* test. Such a conclusion is not reached through a true balancing test.

As takings opinions continue to come down from the United States Supreme Court, the balance remains tilted in favor of government regulation.[258] This article has shown how the constitutional interpretation has moved from a notion of property as security towards the notion of property as social efficiency. While the recent cases from the United States Supreme Court may have broken many of the arrows in the property advocate's quiver, and the *Penn Central* test as it stands heavily armors the government, the changes suggested in this article may sharpen this remaining arrow and provide a chink in the government's mail.

Getting back to the roots of regulatory takings, in which private property was viewed with the notion that it was secure, is essential to the maintenance of our society. In foreshadowing the pressures which rest on the takings issue today, Justice Holmes warned that courts were "in danger of forgetting that a strong public desire to improve the public condition is not enough to warrant achieving the desire by a shorter cut than the constitutional way of paying for the change."[259] This article takes the position that the courts have crossed that line, have gone too far, and need to consider revising the interpretation of the *Penn Central* test in order to provide private property and business owners the protections to which they are constitutionally entitled.

256. *See* Mattingly, *supra* note 167, at 699.

257. *See id.*; Lucas v. S.C. Coastal Council, 505 U.S. 1003, 1027 (1992); Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419, 426 (1982).

258. *See* Lingle v. Chevron U.S.A., Inc, 125 S. Ct. 2074 (2005); San Remo Hotel v. City of San Francisco, 125 S. Ct. 2491 (2005); Kelo v. City of New London, 125 S. Ct. 2655 (2005).

259. Pa. Coal Co. v. Mahon, 260 U.S. 393, 416 (1922).