


5-1-2008

## Returning to Principles of "Fairness and Justice": The Role of Investment-Backed Expectations in Total Regulatory Taking Claims

John A. Kupiec

Follow this and additional works at: <http://lawdigitalcommons.bc.edu/bclr>

 Part of the [Constitutional Law Commons](#), and the [Property Law and Real Estate Commons](#)

---

### Recommended Citation

John A. Kupiec, *Returning to Principles of "Fairness and Justice": The Role of Investment-Backed Expectations in Total Regulatory Taking Claims*, 49 B.C.L. Rev. 865 (2008), <http://lawdigitalcommons.bc.edu/bclr/vol49/iss3/5>

This Notes is brought to you for free and open access by the Law Journals at Digital Commons @ Boston College Law School. It has been accepted for inclusion in Boston College Law Review by an authorized editor of Digital Commons @ Boston College Law School. For more information, please contact [nick.szydowski@bc.edu](mailto:nick.szydowski@bc.edu).

# RETURNING TO PRINCIPLES OF “FAIRNESS AND JUSTICE”: THE ROLE OF INVESTMENT-BACKED EXPECTATIONS IN TOTAL REGULATORY TAKING CLAIMS

**Abstract:** The U.S. Supreme Court has difficulty determining when a regulation is so excessive as to amount to an unconstitutional taking under the Fifth Amendment. In making that determination, the Court has failed to deploy an investment-backed expectations analysis as a normative guide, even though the concept is part of at least one constitutional test. Nevertheless, the Court's focus on principles of "fairness and justice" suggests that the original, conceptual formulation of investment-backed expectations comports with the Court's normative takings philosophy. Using the extreme situation where a regulation completely eliminates a property's value as an analytical example, this Note argues that the Court should expressly adopt an efficiency-fairness, demoralization cost approach to its investment-backed expectations analysis in such a situation. In so doing, the Court should draw upon public choice theory to supply administrable factors that indicate unconstitutional government regulation because it already takes a similar, but implicit, approach to takings claims.

## INTRODUCTION

The Fifth Amendment provides that private property shall not be "taken for public use without just compensation."<sup>1</sup> That verb "taken" has often been an amorphous puzzle.<sup>2</sup> The prohibition on "taking" has always been understood to reach uncompensated physical appropriations,<sup>3</sup> but the U.S. Supreme Court extended it to regulatory burdens in 1922, in *Pennsylvania Coal Co. v. Mahon*.<sup>4</sup> Because most civil regulations are imposed to counteract or supplant marketplace decisions, all regulations to some extent reduce, or "take," some value from private properties.<sup>5</sup> The operative question is how to define when a regulatory taking amounts to an *unconstitutional* regulatory taking.<sup>6</sup>

---

<sup>1</sup> U.S. CONST. amend. V (emphasis added).

<sup>2</sup> See *Lingle v. Chevron U.S.A., Inc.*, 544 U.S. 528, 537-39 (2005).

<sup>3</sup> See *id.* at 537.

<sup>4</sup> See *id.* at 537-39; *Pa. Coal Co. v. Mahon*, 260 U.S. 393, 415 (1922).

<sup>5</sup> See RICHARD A. EPSTEIN, *TAKINGS: PRIVATE PROPERTY AND THE POWER OF EMINENT DOMAIN* 3-5 (1985). But see Abraham Bell & Gideon Parchomovsky, *Givings*, 111 YALE L.J. 547, 554-56, 563-64 (2001) (arguing that although regulations "take" some property

After the Court declared that a regulation that goes "too far" can constitute a "taking,"<sup>7</sup> it proliferated a myriad of tests to determine when regulations are unconstitutionally excessive.<sup>8</sup> The "polestar" remains the analysis the Court announced in 1978, in *Penn Central Transportation Co. v. New York City*, which focused on three factors: the extent to which the regulation diminishes the property's value, the regulation's interference with the claimant's investment-backed expectations, and the character of the government action.<sup>9</sup> These three factors were not clearly defined, but, after an interval of judicial uncertainty following the Court's 1992 decision in *Lucas v. South Carolina Coastal Council*,<sup>10</sup> they have evolved to dominate a judicial weighing of constitutional fairness.<sup>11</sup>

The Court's 2005 decision in *Lingle v. Chevron U.S.A., Inc.* rejected a means-end substantive due process analysis as an inappropriate Takings Clause litmus test.<sup>12</sup> In the wake of *Lingle*, commentators continue to grapple with the ramifications of this latest regulatory takings pronouncement.<sup>13</sup> *Lingle* reaffirmed the Court's tests announced in *Penn*

value, they also can give value-enhancing property entitlements for which the government should extract payment from the grantee because all state-created externalities should be taken into account).

<sup>6</sup> See *Lingle*, 544 U.S. at 536–37 (quoting First English Evangelical Lutheran Church v. County of L.A., 482 U.S. 304, 314–15 (1987)) (stating that the Constitution does not prohibit the government from taking private property but merely secures compensation in the event of an otherwise proper interference amounting to a taking).

<sup>7</sup> See *Pa. Coal*, 260 U.S. at 415.

<sup>8</sup> See *Lingle*, 544 U.S. at 537–39.

<sup>9</sup> 438 U.S. 104, 124 (1978); see *Palazzolo v. Rhode Island*, 533 U.S. 606, 633 (2001) (O'Connor, J., concurring).

<sup>10</sup> 505 U.S. 1003, 1017–19, 1026–32 (1992). In *Lucas*, the Court announced that compensation will generally be awarded in the "extraordinary" case where a regulation deprives the claimant of "all economically beneficial use[]" of the property, except to the extent that "background principles" of state law independently restrict its use. *Id.* For years, courts struggled to understand whether *Lucas* created a new broadly applicable standard, but, ultimately, *Lucas* has been relegated to those exceedingly rare cases where regulations cause a total wipeout in value. See *Lingle*, 544 U.S. at 538; *Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency*, 535 U.S. 302, 330, 332 (2002); *Palazzolo*, 533 U.S. at 617, 626–29, 631.

<sup>11</sup> See *Lingle*, 544 U.S. at 536–39.

<sup>12</sup> *Id.* at 542–43. The Court noted that an inquiry into whether the regulation "substantially advances" a legitimate state interest is an appropriate avenue to challenge the validity of the regulation under the Due Process Clause. *Id.* at 542–43; *id.* at 548–49 (Kennedy, J., concurring) (stating that *Lingle* does not eliminate substantive due process challenges under the reasoning of *Eastern Enterprises v. Apfel*, 524 U.S. 498, 539 (1998) (Kennedy, J., concurring in the judgment and dissenting in part)).

<sup>13</sup> See, e.g., Jane B. Baron, *Winding Toward the Heart of the Takings Muddle*: Kelo, *Lingle*, and Public Discourse About Private Property, 34 FORDHAM URB. L.J. 613, 634–52 (2007) (contending that *Lingle* clarified Takings Clause doctrine and may signal a reconnection with "constitutional culture"); Steven J. Eagle, *Property Tests, Due Process Tests and Regulatory Tak-*

*Central* and *Lucas*.<sup>14</sup> Its focus on the reasons *why* compensation is granted under the Takings Clause holds the most promise to clarify the intricacies of takings challenges and ground them in constitutional principle.<sup>15</sup> Nevertheless, many intricacies of takings jurisprudence remain unresolved.<sup>16</sup>

One of the areas most in need of clarity is the “investment-backed expectations” concept, which is now ensconced as the second prong of the *Penn Central* analysis.<sup>17</sup> That analysis has created “vexing subsidiary questions.”<sup>18</sup> Not only has the Court been unable to apply a uniform way of measuring investment-backed expectations,<sup>19</sup> but it has also failed to articulate a normative principle behind the analysis employed.<sup>20</sup> Moreover, there is disagreement about whether investment-backed expectations are an element of the analysis in the rare situation, identified in *Lucas*, where the property’s value is completely eliminated by regulation.<sup>21</sup>

This Note focuses on the intriguing question of how investment-backed expectations operate to aid courts in determining—normatively—when it is unfair not to compensate a property owner challeng-

*ings Jurisprudence*, 2007 BYU L. REV. 899, 899–902 (arguing that regulatory takings law is inherently a substantive due process matter); Mark Fenster, *The Takings Clause, Version 2005: The Legal Process of Constitutional Property Rights*, 9 U. PA. J. CONST. L. 667, 734–36 (2007) (stating that the Court in *Lingle* embraced a legal process approach to takings law).

<sup>14</sup> See *Lingle*, 544 U.S. at 538–39; *Lucas*, 505 U.S. at 1019; *Penn Cent.*, 438 U.S. at 124.

<sup>15</sup> See *Lingle*, 544 U.S. at 542 (reasoning that the magnitude, distribution, and character of private burdens are paramount considerations under the Takings Clause).

<sup>16</sup> See Baron, *supra* note 13, at 646.

<sup>17</sup> See 438 U.S. at 124.

<sup>18</sup> See *Lingle*, 544 U.S. at 539. Such questions include, for instance, how to define the denominator in the diminution in value fraction. See *Tahoe-Sierra*, 535 U.S. at 331–32, 335–36 (affirming that the “denominator” question is analyzed by reference to the “parcel as a whole,” including geographic and temporal elements, in an inherently factual manner); *Pa. Coal*, 260 U.S. at 419 (Brandeis, J., dissenting); *Cane Tenn., Inc. v. United States*, 60 Fed. Cl. 694, 700 (Fed. Cl. 2004) (stating that the denominator question is factual). Another question is how notice of a regulatory scheme that reduces the property owner’s expectations of future economic gain affects a takings claim. See *Palazzolo*, 533 U.S. at 632–33 (O’Connor, J., concurring).

<sup>19</sup> See, e.g., *Palazzolo*, 533 U.S. at 617–18; *id.* at 634 (O’Connor, J., concurring); *id.* at 637 (Scalia, J., concurring); *Penn Cent.*, 438 U.S. at 124, 132–35.

<sup>20</sup> See *Lingle*, 544 U.S. at 538–39; *Penn Cent.*, 438 U.S. at 124.

<sup>21</sup> See 505 U.S. at 1017 (stating that a regulation that completely eliminates the property’s value is an “extraordinary circumstance”). Compare *Palm Beach Isles Assocs. v. United States (Palm Beach I)*, 231 F.3d 1354, 1364 (Fed. Cir. 2000) (stating that investment-backed expectations are not a part of the total taking analysis), with *Good v. United States*, 189 F.3d 1355, 1361 (Fed. Cir. 1999) (stating that investment-backed expectations are part of every regulatory takings case).

ing a regulation.<sup>22</sup> The Note's analysis takes on a particularly extreme set of conditions—the rare situation identified in *Lucas* where a regulation completely eliminates a property's value—as a diagnostic example for examining the application of investment-backed expectations.<sup>23</sup> This analysis is thus limited to the narrow, if unlikely, situation where a claimant alleges that a regulation has completely eliminated the property's value because that situation provides the clearest example of the principles involved in the normative analysis.<sup>24</sup>

This Note argues that the text of the *Lingle* decision embraces the original philosophy underlying the sometimes maligned, mostly misunderstood concept and analysis of “investment-backed expectations.”<sup>25</sup> *Lingle* tethers takings claims to their underlying antimajoritarian foundations and focuses on the effects of regulation as applied to the property owner, like the investment-backed expectations analysis as originally conceived by Professor Frank Michelman.<sup>26</sup> In such an analysis, compensation is due when a claimant demonstrates that a failed political process left him or her shouldering an undue burden for the public because the lost future productivity from the unfair imposition of the burden is less efficient than simply compensating the claimant.<sup>27</sup> Although this inquiry facially appears to require some mathematical value calculations, public choice theory, which applies economic principles to the policymaking realm, suggests helpful analytical tools courts can use to detect those regulatory effects that indicate a need for compensation.<sup>28</sup>

<sup>22</sup> See *infra* notes 110–119, 150–169 and accompanying text. This Note outlines some of the disputes about defining what constitutes investment-backed expectations, but it leaves that question aside as beyond its scope. See *infra* notes 134–149 and accompanying text.

<sup>23</sup> See *infra* notes 235–239 and accompanying text.

<sup>24</sup> See *Lucas*, 505 U.S. at 1019; *infra* notes 207–212 and accompanying text.

<sup>25</sup> See *Lingle*, 544 U.S. at 542–43; Frank Michelman, *Property, Utility, and Fairness: Comments on the Ethical Foundations of “Just Compensation” Law*, 80 HARV. L. REV. 1165, 1213–15 (1967) (introducing the concept and analysis of investment-backed expectations in takings law). Although the Court referenced Michelman's article in formulating its *Penn Central* takings analysis, the article was not necessarily intending to supply a black letter constitutional test. See 438 U.S. at 128; Michelman, *supra*, at 1250–52. Instead, Michelman was exploring theoretical ways to think about the normative aspects of regulatory takings analysis. See Michelman, *supra*, at 1213–18, 1248–52.

<sup>26</sup> See *Lingle*, 544 U.S. at 537–38, 542–43; Michelman, *supra* note 25, at 1213–18.

<sup>27</sup> See *Lingle*, 544 U.S. at 537–39; Michelman, *supra* note 25, at 1213–18; cf. John D. Echeverria, *Making Sense of Penn Central*, 23 UCLA J. ENVTL. L. & POL'Y 171, 199–200 (2005) (stating that the government should compensate those property owners who have been singled out to bear “severe, disproportionate economic burdens”).

<sup>28</sup> See, e.g., Henry A. Span, *Public Choice Theory and the Political Utility of the Takings Clause*, 40 IDAHO L. REV. 11, 13 (2003).

Given *Lingle's* philosophical alignment with Michelman's normative principles and the potential for public choice theory to supply administrable data for courts, the Supreme Court has the tools to analyze investment-backed expectations as originally articulated.<sup>29</sup> Consequently, the Court should clarify the role of investment-backed expectations by adopting an analysis consistent with the original principles behind them where the relevant considerations are most obvious: a case where a regulation causes a total wipeout in value.<sup>30</sup>

Part I outlines the major Supreme Court regulatory takings jurisprudence, the policy behind the Takings Clause, and the conflict within the U.S. Court of Appeals for the Federal Circuit over the role of investment-backed expectations in a total taking claim.<sup>31</sup> Part II returns to the first principles behind investment-backed expectations, demonstrates how the Court has not applied those principles in its takings cases, and outlines public choice theory as a way to bridge the gap between the Court and principle in this area.<sup>32</sup> Part III uncovers that the Court, in prior cases, has implicitly analyzed takings challenges by applying an approach mirroring Michelman's investment-backed expectations philosophy and argues that the Court should now explicitly adopt an investment-backed expectations analysis that comports with its foundational principles.<sup>33</sup>

### I. THE LANDSCAPE OF REGULATORY TAKINGS DECISIONS AND THE CONFLICT OVER THE ROLE OF INVESTMENT-BACKED EXPECTATIONS IN A TOTAL TAKING CLAIM

Until the U.S. Supreme Court's 1922 decision in *Pennsylvania Coal Co. v. Mahon*, landowners could not be compensated for a taking unless their property was physically appropriated by the government.<sup>34</sup> In *Pennsylvania Coal*, the Court extended the scope of compensable takings by holding that an unconstitutional taking occurs when a regulation has

<sup>29</sup> See *Lingle*, 544 U.S. at 537–39, 542–43; Michelman, *supra* note 25, at 1214.

<sup>30</sup> See *Lingle*, 544 U.S. at 539, 542–43; *Lucas*, 505 U.S. at 1017–19; *Penn Cent.*, 438 U.S. at 124; Michelman, *supra* note 25, at 1213–18, 1234.

<sup>31</sup> See *infra* notes 34–92 and accompanying text.

<sup>32</sup> See *infra* notes 93–206 and accompanying text.

<sup>33</sup> See *infra* notes 207–313 and accompanying text.

<sup>34</sup> See 260 U.S. 393, 415–16 (1922); see also *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1014 (1992); *The Legal Tender Cases*, 79 U.S. 457, 551–52 (1871); *The Supreme Court—Leading Cases*, 116 HARV. L. REV. 321, 321–22 (2002) [hereinafter *Leading Cases*]. The physical appropriation rule retains vitality today: in cases where the government regulation results in a physical invasion of property, compensation is categorically granted. See *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 441 (1982).

gone "too far" in restricting the use of the property because, among other things, the regulation impermissibly diminishes its value.<sup>35</sup> Although the Court has decided many regulatory takings cases since *Pennsylvania Coal*, it has yet to articulate a clear rule for how far is "too far."<sup>36</sup>

### A. *Regulatory Takings Jurisprudence from Penn Central to Lingle*

The modern regulatory takings test emerged in 1978, when the Supreme Court, in *Penn Central Transportation Co. v. New York City*, articulated a three-factor analysis for regulatory takings claims.<sup>37</sup> The Court stated that the relevant inquiry is an "ad hoc, factual" one, focusing on: (1) the extent of diminution in the property's market value, (2) the extent to which the regulation interferes with "distinct, investment-backed expectations," and (3) the character of the government action.<sup>38</sup> In that case, the Court ruled that a historic preservation ordinance that prevented the plaintiff from developing air rights over Grand Central Station in New York did not constitute a compensable taking because the law allowed the established uses to continue, and the restricted air rights were transferable to eight lots adjacent to Grand Central Station.<sup>39</sup> The Court, however, neither applied the test it announced nor explained the factors, thus leaving takings law adrift.<sup>40</sup>

---

<sup>35</sup> 260 U.S. at 415-16. In *Pennsylvania Coal*, Justice Holmes focused exclusively on the extent of the diminution in value of the property as the barometer to distinguish regulations that go "too far" from those that do not. *Id.* at 415. Holmes did not, however, limit the scope of the inherently factual inquiry to diminution in value; indeed, diminution is merely "[o]ne fact for consideration" in determining whether the government breached the limits of its regulatory power. *Id.*

<sup>36</sup> *See id.*; see also Eric R. Claeys, *Takings, Regulations, and Natural Property Rights*, 88 CORNELL L. REV. 1549, 1669 (2003) (stating that the Court "admits that its takings doctrines operate without unifying standards or principles").

<sup>37</sup> 438 U.S. 104, 124 (1978).

<sup>38</sup> *Id.*; see Michelman, *supra* note 25, at 1213. The Court cited Michelman's piece in formulating its test, and it remains the cornerstone of investment-backed expectations as a legal concept. *See Penn Cent.*, 438 U.S. at 127-28. Later, the Court changed the test, without explanation, to the property owner's "reasonable" investment-backed expectations. *See Kaiser Aetna v. United States*, 444 U.S. 164, 175 (1979); *Penn Cent.*, 438 U.S. at 124.

<sup>39</sup> *Penn Cent.*, 438 U.S. at 107, 134-38. The obvious inference from these facts was that the Court did not appear to think that the legislature placed a particularly heavy private burden on the plaintiffs. *See id.*; see also *infra* notes 287-290 and accompanying text (discussing this issue in more depth).

<sup>40</sup> *See Penn Cent.*, 438 U.S. at 134-38; Holly Doremus, *Takings and Transitions*, 19 J. LAND USE & ENVTL. L. 1, 7-8 (2003); see also *Lucas*, 505 U.S. at 1019. Indeed, in 1980, in *Agins v. City of Tiburon*, the Court stated an alternative, due process analysis of takings claims, where compensation would be granted if the regulation did not substantially advance a legitimate state interest. 447 U.S. 255, 260 (1980). The Court has expressly rejected the *Agins* test. *Lingle v. Chevron U.S.A., Inc.*, 544 U.S. 528, 545 (2005). Until *Lingle*

The Court complicated the mechanics of takings law in 1992, with its decision in *Lucas v. South Carolina Coastal Council*, which created an alternative regulatory takings analysis to *Penn Central*'s.<sup>41</sup> In *Lucas*, the Court decided that David Lucas, a landowner with plans to develop vacant property he had purchased in a developed, beachfront community, was entitled to compensation after South Carolina passed a law prohibiting construction of habitable structures on lots located within a "critical area" for erosion control purposes.<sup>42</sup> The law rendered his property "valueless."<sup>43</sup> The Court held that where a regulation eliminates all economically beneficial use, the property owner is entitled to compensation without inquiring "into the public interest advanced in support" of the regulation.<sup>44</sup> Thus, the Court expressly rejected the third prong of the *Penn Central* analysis—the character of the government action—and in so doing rejected a balance between the economic impact on the individual and the public benefit conferred.<sup>45</sup> It remains unclear, however, whether, as Justice Kennedy suggested in his *Lucas* concurrence, a claimant who alleges complete value elimination still must demonstrate that the regulation frustrated his or her investment-backed expectations.<sup>46</sup> Moreover, although *Lucas* suggests that

---

*v. Chevron U.S.A., Inc.*, however, the Court was remiss in clarifying this area of constitutional law. See *id.* at 537–38; Fenster, *supra* note 13, at 674–75.

<sup>41</sup> 505 U.S. at 1019.

<sup>42</sup> *Id.* at 1006–09.

<sup>43</sup> *Id.* at 1007.

<sup>44</sup> *Id.* at 1015.

<sup>45</sup> See *id.* at 1015; *id.* at 1034 (Kennedy, J., concurring in the judgment); *Penn Cent.*, 438 U.S. at 124; *Palm Beach Isles Assocs. v. United States (Palm Beach II)*, 231 F.3d 1365, 1368–69 (Fed. Cir. 2000) (Gajarsa, J., dissenting).

<sup>46</sup> See 505 U.S. at 1034 (Kennedy, J., concurring in the judgment) ("The finding of no value must be considered under the Takings Clause by reference to the owner's reasonable, investment-backed expectations."); *Palm Beach II*, 231 F.3d at 1368–69 (Gajarsa, J., dissenting); *Good v. United States*, 189 F.3d 1355, 1361 (Fed. Cir. 1999) (stating that *Lucas* "did not hold that the denial of all economically beneficial or productive use of land eliminates the requirement that the landowner have reasonable, investment-backed expectations"); *McQueen v. S.C. Coastal Council*, 580 S.E.2d 116, 119 n.5 (S.C. 2003) (stating that "*Lucas* left much confusion . . . about whether . . . 'investment-backed expectations[]' survived"); see also Giulianianna Ruiz, Comment, *Informing Expectations Through Visual Cues: Creating the Assurance of Justice in Regulatory Takings Jurisprudence*, 36 SETON HALL L. REV. 1309, 1324, 1339 (2006) (arguing that investment-backed expectations should be incorporated into a *Lucas* analysis because of the importance of visual cues in creating human expectations). But see *Palm Beach Isles Assocs. v. United States (Palm Beach I)*, 231 F.3d 1354, 1364 (Fed. Cir. 2000) (stating that, in a *Lucas* analysis, the "property owner is entitled to a recovery without regard to consideration of investment-backed expectations"); Calvert Chipchase, Comment, *Lucas Takings: Why Investment-Backed Expectations Are Irrelevant When Applying the Categorical Rule*, 24 U. HAW. L. REV. 147, 162 (2001) (arguing that cases sug-



complete eliminations in value receive categorical treatment, the decision leaves a largely undefined exception to the rule: the state may avoid paying compensation by showing that the proscribed use never inhered in the claimant's title because it was prohibited by "background principles of the State's law of property and nuisance."<sup>47</sup> Thus, *Lucas* presents an alternative test to *Penn Central* in complete elimination cases, but, for all of its definitive language, its contours are undefined.<sup>48</sup>

Attempting to eliminate residual inconsistencies in regulatory takings law and to clarify the applicable legal tests for regulatory takings claims, the Supreme Court, in 2005, decided *Lingle v. Chevron U.S.A., Inc.*<sup>49</sup> In *Lingle*, the Court rejected an award of compensation granted because a state law capped the rent oil companies could charge to their service station lessees on the basis that the regulation did not "substantially advance[]" a legitimate government interest and, thus, was a taking of the claimant's property.<sup>50</sup> The statute reduced the total potential income Chevron could receive from renting its service stations but still allowed it to earn a constitutionally permissible return on its investment.<sup>51</sup> *Lingle* rejected the "substantially advances" test in takings cases, even though the Court previously suggested that the test could determine compensation under the Takings Clause, because it was a means-

---

gesting that investment-backed expectations are part of a *Lucas* analysis misinterpret the decision).

<sup>47</sup> See 505 U.S. at 1029. Commentators have struggled to determine what constitutes a "background principle" of state law and have suggested that the exception is too open-ended to be valuable. See Lynn E. Blais, *Takings, Statutes, and the Common Law: Considering Inherent Limitations on Title*, 70 S. CAL. L. REV. 1, 3-6 (1996). Indeed, framing property protection in terms of limits based only on a historical baseline of state property law suggests to some that the Court introduced—improperly—natural law protection of property rights, which is inconsistent with a modern, legal positivist society. See Frank Michelman, *Property, Federalism, and Jurisprudence: A Comment on Lucas and Judicial Conservatism*, 35 WM. & MARY L. REV. 301, 307, 311-14, 325-25 (1993).

<sup>48</sup> *Lucas*, 505 U.S. at 1019; see, e.g., Blais, *supra* note 47, at 3-6; Joseph Sax, *Takings and the Police Power*, 74 YALE L.J. 36, 49 n.75 (1964) ("[I]t is highly dangerous to try to give any qualitative evaluation of what are called nuisances. The category is an open and ever changing one.")

<sup>49</sup> See 544 U.S. at 540, 542.

<sup>50</sup> *Id.* at 533-35. The claimed purpose of the statute was to protect independent gasoline dealers and promote competition, but the district court concluded that the statute would not advance this state interest because the effect of the law would not result in lower operating costs (thereby not lowering prices) and would induce oil companies to increase the wholesale price of gasoline in Hawaii to recoup lost rental revenue. *Id.*

<sup>51</sup> *Id.* at 534.

end analysis of the regulation's effects, not a measure of the burden placed on the property owner.<sup>52</sup>

*Lingle* clarified takings law by making it clear that the Court views regulatory takings claims through only three avenues of analysis: the standard *Penn Central* takings analysis, and two per se rules, which apply either when there is a permanent physical invasion of property or when there is a complete elimination in value, as in *Lucas*.<sup>53</sup> Although *Lingle*'s holding is not directly relevant to the doctrinal question presented in this Note, the Court indicated that takings policy under the accepted *Lucas* and *Penn Central* tests focuses on two major themes: the magnitude of the burden and the distribution of the burden among property owners.<sup>54</sup> These two themes unify the different takings tests because the focus of all three takings inquiries is deciding when justice requires that the state bear a burden that was unfairly placed on an individual.<sup>55</sup> The Court's affirmation of these policy themes aligns it with commentary regarding the purpose of the Takings Clause.<sup>56</sup>

### B. The Policy Rationale for Regulatory Takings Compensation

The *Penn Central* Court substantiated the policy animating takings law: the "Fifth Amendment's 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."<sup>57</sup> Although there is woefully little in the way of originalist evidence for the Takings Clause,<sup>58</sup> most commentators accept the premise that its purpose is to prevent majoritarian exploitation of individual

---

<sup>52</sup> *Id.* at 542–43. The substantially advances formulation arose from another takings case, *Agins v. City of Tiburon*, involving a municipal zoning ordinance. 447 U.S. at 260. The *Lingle* Court rejected the due process analysis in *Agins* because its inquiry was directed at whether the regulation is effective at achieving whatever its purpose is. *Lingle*, 544 U.S. at 542. This is not the function of the Takings Clause, which is aimed at requiring the public to pay for property it takes from individuals in an unfairly burdensome way, even though the regulation comports with constitutional due process. *See id.*

<sup>53</sup> *Lingle*, 544 U.S. at 538–39; *Lucas*, 505 U.S. at 1019; *Penn Cent.*, 438 U.S. at 124.

<sup>54</sup> *Lingle*, 544 U.S. at 542.

<sup>55</sup> *Id.* at 542–44.

<sup>56</sup> *See id.*; *see also infra* notes 58–63 and accompanying text.

<sup>57</sup> *See* 438 U.S. at 123–24 (quoting *Armstrong v. United States*, 364 U.S. 40, 49 (1960)).

<sup>58</sup> *See* Jeffrey M. Gaba, *Taking "Justice and Fairness" Seriously: Distributive Justice and the Takings Clause*, 40 CREIGHTON L. REV. 569, 571–72 (2006); Sax, *supra* note 48, at 58 (stating that "contemporaneous commentary upon the meaning of the compensation clause is in very short supply").

property owners.<sup>59</sup> Similar protections from deprivation of property date from the Magna Carta: government's taking of private property is unlawful unless it is by "lawful judgment of [the landowner's] peers."<sup>60</sup> Thus, what original evidence there is indicates that the constitutional protection of property rights is cast in terms of fairness.<sup>61</sup> Yet, it is unclear whether the Court has employed an originalist interpretation of the Takings Clause in the regulatory takings context, even though the *Penn Central* policy rhetoric appears to echo the policy concerns about majoritarian exploitation, because it is not clear whether the Framers intended that the Takings Clause extend to nonphysical appropriations.<sup>62</sup>

Of the limited originalist evidence available, James Madison's *Federalist No. 10* is the most apt statement regarding the reasons for including the protections afforded by the Takings Clause: "[R]elief [from majoritarian exploitation] is only to be sought in the means of controlling its effects."<sup>63</sup> Madison, however, did not advocate that the Takings Clause should provide broad protection to property rights because the republican system of government itself—particularly at the federal level—offers sufficient protection against factionalism and majoritarian ex-

---

<sup>59</sup> See EPSTEIN, *supra* note 5, at 4–6, 273, 281, 333–34; Blais, *supra* note 47, at 24 (stating that "[t]he Takings Clause has long been understood to act as a shield between private property owners and attempts by the majority to impose the burdens of public benefits on a few individuals"); Claeys, *supra* note 36, at 1670; Gaba, *supra* note 58, at 570; Michelman, *supra* note 25, at 1214–18, 1250; Carol M. Rose, Mahon *Reconstructed: Why the Takings Issue Is Still a Muddle*, 57 S. CAL. L. REV. 561, 598 (1984); Sax, *supra* note 48, at 57, 60 ("[T]he protection afforded [by the Takings Clause] is most properly viewed as a guarantee against unfair or arbitrary government."); Span, *supra* note 28, at 78–79, 81; Kraig Odabashian, Comment, *Investment-Backed Expectations and the Politics of Judicial Articulation: The Reintegration of History and the Lockean Mind in Contemporary American Jurisprudence*, 50 UCLA L. REV. 641, 670, 672–73 (2002); William Michael Treanor, Note, *The Origins and Original Significance of the Just Compensation Clause of the Fifth Amendment*, 94 YALE L.J. 694, 710 (1985); see also THE FEDERALIST NO. 10, at 58 (James Madison) (Cooke ed., 1961).

<sup>60</sup> See Sax, *supra* note 48, at 59 (quoting Magna Carta, 1225, 9 Hen. 3, c. 29).

<sup>61</sup> See *id.* at 59–60.

<sup>62</sup> See *Penn Cent.*, 438 U.S. at 123–24; William Michael Treanor, *The Original Understanding of the Takings Clause and the Political Process*, 95 COLUM. L. REV. 782, 803–05 (1995) (stating that the Court has not adopted an originalist understanding of the Takings Clause). The Court seems to agree. See *Palazzolo v. Rhode Island*, 533 U.S. 606, 633 (2001) (O'Connor, J., concurring) ("The concepts of 'fairness and justice' that underlie the Takings Clause, of course, are less than fully determinate.")

<sup>63</sup> THE FEDERALIST NO. 10, *supra* note 59, at 60; see Rose, *supra* note 59, at 588–89 (arguing that Madison desired property protections to increase productivity from a utilitarian viewpoint); Span, *supra* note 28, at 70–75; Treanor, *supra* note 62, at 836–54; cf. *Lucas*, 505 U.S. at 1035 (Kennedy, J., concurring in the judgment); Michelman, *supra* note 25, at 1212.

ploitation.<sup>64</sup> Indeed, he recognized that a natural consequence of governmental exercise of power is an unequal distribution of benefits and burdens among winners and losers in the political process; to provide compensation whenever a decision changed a citizen's economic position would be untenable.<sup>65</sup> Consequently, Madison viewed the Takings Clause as serving two functions: (1) providing narrow protection to real property owners who suffered disproportionately from a failure of the political process, and (2) affirming to the public the principle that the nation is committed to avoiding arbitrary redistributions of wealth.<sup>66</sup> In short, the major rationale behind including the Takings Clause within the Bill of Rights was a concern with addressing potential failures in the political process, either by establishing an actual remedy or by expressing a philosophical commitment against arbitrary wealth redistributions.<sup>67</sup>

Some commentators have embraced this process-remedy rationale for a contemporary regulatory takings jurisprudence.<sup>68</sup> Indeed, the Supreme Court itself has impliedly accepted the same policy goal in total wipeout cases, stating that "it is less realistic to indulge our usual assumption that the legislature is simply 'adjusting the benefits and burdens of economic life'" when the legislature forces someone to "sacrifice

---

<sup>64</sup> See THE FEDERALIST NO. 10, *supra* note 59, at 60, 63-64; Treanor, *supra* note 62, at 841, 843-44; see also *Lingle*, 544 U.S. at 543 ("[The Takings Clause] does not bar government from interfering with property rights, but rather requires compensation 'in the event of otherwise proper interference amounting to a taking.'" (quoting *First English Evangelical Lutheran Church v. County of L.A.*, 482 U.S. 304, 315 (1987))); *Pa. Coal*, 260 U.S. at 413 ("Government hardly could go on if to some extent values incident to property could not be diminished without paying for every such change in the general law."). Even early English commentators viewed property protection in the form of just compensation as a "bulwark against unfairness" or against the "imposition of loss by unjust means." See Sax, *supra* note 48, at 56-57. Madison's *Federalist No. 10* responded to concerns about factions—a majority or minority with interests adverse to the remainder—unfairly imposing their will on others. See THE FEDERALIST NO. 10, *supra* note 59, at 57-60. Madison's argument is that a republican form of government is better than a pure democracy at controlling the effects of factionalism through structural, representative voting mechanisms. See *id.* at 60-64. But it is not perfect, see *id.* at 62-63, and that is why the Constitution offers additional protection, see Treanor, *supra* note 62, at 838-40, 854.

<sup>65</sup> See THE FEDERALIST NO. 10, *supra* note 59, at 58; Treanor, *supra* note 62, at 843; see also Michelman, *supra* note 25, at 1178 (discussing practical inability of government to pay compensation for every change in welfare because doing so would eliminate efficiency gains of collective action).

<sup>66</sup> See Treanor, *supra* note 62, at 838-40, 854.

<sup>67</sup> *Id.* at 855.

<sup>68</sup> See WILLIAM A. FISCHER, *REGULATORY TAKINGS: LAW, ECONOMICS, AND POLITICS* 289-324 (1995); Treanor, *supra* note 62, at 856, 863-64, 866-67.

all economically beneficial uses in the name of the common good.<sup>69</sup> Thus, Justice Holmes's cryptic statement in *Pennsylvania Coal* 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" is given some substance: the majority cannot benefit itself by arbitrarily placing a disproportionately severe burden on a few.<sup>70</sup> Nevertheless, even if commentators (and the Court) agree on *why* there is a Takings Clause, there is continual and fundamental tension about *how* the Takings Clause should operate to grant compensation in practical terms.<sup>71</sup> The issue is how best to connect this antifactionalism, anti-arbitrary government policy to a justiciable legal construct that supports Madison's policy goals for the Takings Clause.<sup>72</sup>

### C. *The Federal Circuit Conflict over the Role of Investment-Backed Expectations*

In *Lucas*, the Supreme Court explicitly rejected a balancing of the "public interest advanced" with the private burden of a regulation when that regulation results in the complete elimination of the property's value.<sup>73</sup> Thus, when the first prong of the *Penn Central* test is proven to be one hundred percent diminution in value, courts disregard the "character of the governmental action."<sup>74</sup> As Justice Kennedy in *Lucas* noted, however, *Lucas* did not expressly repudiate the investment-backed expectations prong of the *Penn Central* test.<sup>75</sup>

<sup>69</sup> *Lucas*, 505 U.S. at 1017-19; see also *Lingle*, 544 U.S. at 542-43.

<sup>70</sup> See 260 U.S. at 416; see also Cass R. Sunstein, *Naked Preferences and the Constitution*, 84 COLUM. L. REV. 1689, 1690 (1984) (arguing that the Takings Clause is designed to prohibit "naked preferences" of the majority).

<sup>71</sup> See *Rose*, *supra* note 59, at 588-94 (noting that the fundamental tension is between those who would protect the primacy of individual rights absolutely versus those who would protect rights in light of civic-republican values and that, seemingly, the two cannot be reconciled); see also Eric R. Claeys, *The Penn Central Test and Tensions in Liberal Property Theory*, 30 HARV. ENVTL. L. REV. 339, 349 (2006). Compare Michelman, *supra* note 25, at 1212-23 (espousing a civic-republican view protecting utilitarian rights), with ERSTEIN, *supra* note 5, at 5-6, 331-50 (espousing a natural law view protecting individual rights).

<sup>72</sup> See THE FEDERALIST NO. 10, *supra* note 59, at 60-64; Michelman, *supra* note 25, at 1213-18.

<sup>73</sup> See 505 U.S. at 1015 ("[A]t least two discrete categories of regulatory action [are] compensable without case-specific inquiry into the public interest advanced in support of the restraint.").

<sup>74</sup> See *id.*; *Penn Cent.*, 438 U.S. at 124-25; *Palm Beach II*, 231 F.3d at 1368 (Gajarsa, J., dissenting).

<sup>75</sup> See *Lucas*, 505 U.S. at 1034 (Kennedy, J., concurring in the judgment); *Penn Cent.*, 438 U.S. at 124. Indeed, there is little debate that the petitioner in *Lucas* had a protected expectation, meaning that he satisfied the threshold inquiry into investment-backed ex-

In 1999, the U.S. Court of Appeals for the Federal Circuit, in *Good v. United States*, denied compensation to a property owner who, after receiving several permits to fill wetlands on his property, was denied a renewal of a wetlands fill permit on Endangered Species Act grounds because the Fish and Wildlife Service determined that the project would jeopardize certain endangered species on the property.<sup>76</sup> The claimant alleged that the denial of the permit rendered his property valueless.<sup>77</sup> The court determined that because the property owner had notice over a nearly twenty-year period of an existing regulatory scheme that made the proposed project potentially difficult or impossible to complete, the owner had not demonstrated that he held reasonable investment-backed expectations.<sup>78</sup> Thus, the *Good* court applied the threshold inquiry into investment-backed expectations and determined, essentially, that the claimant was a speculator seeking a windfall.<sup>79</sup> In the course of its analysis, the court stated that "investment-backed expectations are an element of every regulatory takings case."<sup>80</sup>

A different Federal Circuit panel, in a 2000 decision denying a rehearing in *Palm Beach Isles Associates v. United States*, disagreed with *Good's* interpretation of the role of investment-backed expectations in a total takings claim.<sup>81</sup> There, too, the claimant alleged that the denial of a wetlands fill permit constituted a complete elimination of its property value.<sup>82</sup> In affirming its original decision in the case, the panel reconsidered the role of investment-backed expectations in a *Lucas* takings claim and determined that, contrary to the *Good* panel's opinion,<sup>83</sup> they are "simply not part of the analysis."<sup>84</sup> This panel stated that the *Good* panel was speaking generally about expectations in regulatory takings law, but that its above-quoted language is dictum.<sup>85</sup> The *Palm Beach* panel interpreted *Lucas* as absolutely categorical in its prescription for compensation in total wipeout cases, without

---

pectations. See 505 U.S. at 1006-07; *Good*, 189 F.3d at 1361. The *Lucas* Court later implicitly relied on the primary demoralization cost inquiry of investment-backed expectations to support its categorical rule. See *infra* notes 265-285 and accompanying text.

<sup>76</sup> 189 F.3d at 1357-60.

<sup>77</sup> *Id.*

<sup>78</sup> *Id.* at 1361-62.

<sup>79</sup> See *id.* at 1361.

<sup>80</sup> *Id.*

<sup>81</sup> *Palm Beach I*, 231 F.3d at 1364.

<sup>82</sup> *Palm Beach Isles Assocs. v. United States*, 208 F.3d 1374, 1377-79 (Fed. Cir. 2000) *aff'd on reh'g*, 231 F.3d 1354 (Fed. Cir. 2000).

<sup>83</sup> See *Palm Beach II*, 231 F.3d at 1365 (Gajarsa, J., dissenting).

<sup>84</sup> *Palm Beach I*, 231 F.3d at 1357.

<sup>85</sup> *Id.* at 1361; *Good*, 189 F.3d at 1361.

reference to investment-backed expectations.<sup>86</sup> Dissenting from an order denying a rehearing of *Palm Beach* en banc, Judge Gajarsa disagreed with the panel's reasoning and wrote that investment-backed expectations should be considered in a *Lucas* analysis.<sup>87</sup>

Thus, it is unclear whether the Federal Circuit has interpreted *Lucas* as prescribing an absolutely categorical rule, without reference to investment-backed expectations in complete elimination claims,<sup>88</sup> or as altering the *Penn Central* analysis but preserving a role for investment-backed expectations.<sup>89</sup> Moreover, the Supreme Court has stated that *Lucas*-type situations "generally" receive categorical treatment, but it noted the exception to *Lucas* that a state's common law of property can independently limit uses of property without compensation.<sup>90</sup> Although the Court uses the term "categorical" to describe the *Lucas* decision, it is cognizant of the exceptions to *Lucas* that in fact make it not categorical, and the Court has simply not addressed the role of investment-backed expectations in the *Lucas* context.<sup>91</sup> Indeed, *Lucas* itself explicitly rejected only part of the *Penn Central* analysis and was silent as to the role of investment-backed expectations in its analysis.<sup>92</sup>

## II. A MISSED OPPORTUNITY: THE INTELLECTUAL FOUNDATIONS OF INVESTMENT-BACKED EXPECTATIONS AND THE POTENTIAL FOR CONSISTENCY

### A. *Returning to First Principles: The Origins of Investment-Backed Expectations and Utilitarian Efficiency Justifications for Compensation*

Employing investment-backed expectations is one approach to connecting the antimajoritarian fairness goals of the Takings Clause to a justiciable legal construct that is also normatively superior.<sup>93</sup> Professor Frank Michelman's analysis of the takings issue remains the theoretical

<sup>86</sup> *Palm Beach I*, 231 F.3d at 1364. *But see Lucas*, 505 U.S. at 1034 (Kennedy, J., concurring in the judgment); *Palm Beach II*, 231 F.3d at 1367 (Gajarsa, J., dissenting).

<sup>87</sup> *Palm Beach II*, 231 F.3d at 1367 (Gajarsa, J., dissenting).

<sup>88</sup> *See Palm Beach I*, 231 F.3d at 1364.

<sup>89</sup> *See id.* at 1360-61, 1364; *see also Penn Cent.*, 438 U.S. at 124.

<sup>90</sup> *See Lingle*, 544 U.S. at 538; *Lucas*, 505 U.S. at 1029.

<sup>91</sup> *See Lingle*, 544 U.S. at 538; *Lucas*, 505 U.S. at 1017-19, 1029.

<sup>92</sup> *See* 505 U.S. at 1015. Moreover, the Supreme Court of South Carolina, when considering a different challenge to the same regulation creating the same total taking effect that was at issue in *Lucas*, stated that neither *Lucas* nor *Palazzolo* clarified whether the investment-backed expectations factor plays a role in total takings cases. *McQueen*, 580 S.E.2d at 119 n.5.

<sup>93</sup> *See infra* notes 107-127 and accompanying text.

framework and intellectual foundation underlying the concept of investment-backed expectations.<sup>94</sup> Indeed, Michelman coined the term and the fairness-efficiency philosophy behind it.<sup>95</sup> The Supreme Court, however, has neither explicitly adopted Michelman's analysis, nor has it explained specifically the role of "investment-backed expectations" beyond merely incorporating the term as one factor in the ad hoc balancing test developed in 1978, in *Penn Central Transportation Co. v. New York City*.<sup>96</sup>

Although Michelman approaches the analysis from a utilitarian/welfare economics vantage, he acknowledges that because takings involve a deliberate choice to inflict loss on a member of society, fairness is the only relevant "test" for whether compensation should be granted.<sup>97</sup> Thus, Michelman's work is intimately linked with the fairness policy informing the Takings Clause.<sup>98</sup> In its course, Michelman's work connects efficient social choices (i.e., those that result in a net social gain) to ethical rightness.<sup>99</sup> This subtle move is central to understanding the proper role investment-backed expectations should play in a Takings Clause analysis because this association is how Michelman connects takings law to the antimajoritarian policy behind it.<sup>100</sup>

### 1. The Utilitarian Principles Behind Investment-Backed Expectations

Michelman posits that government must regulate in the market at times to promote efficiency because information asymmetry, transaction costs, and collective action problems inhibit free market efficiency.<sup>101</sup>

---

<sup>94</sup> Michelman, *supra* note 25, *passim*; see *Penn Cent. Transp. Co. v. New York City*, 438 U.S. 104, 127-28 (1978); FISCHER, *supra* note 68, at 141-42 (stating that Michelman's article "has dominated the academic discussion of the takings issue" and that "[n]o other area of constitutional law has such a durable leading article"); Blais, *supra* note 47, at 26 (citing Michelman's "seminal exploration of the utilitarian issues" in takings law); Fred R. Shapiro, *The Most-Cited Law Review Articles Revisited*, 71 CHI.-KENT L. REV. 751, 767 (1996) (listing Michelman's article as the twelfth most-cited law review article of all time).

<sup>95</sup> See Michelman, *supra* note 25, at 1213.

<sup>96</sup> See 438 U.S. at 124, 127-28 (quoting Michelman's article in discussing the factors involved in the balancing test).

<sup>97</sup> See Michelman, *supra* note 25, at 1169 n.5, 1170-72. Michelman is joined by other fundamental commentators, such as Joseph Sax, in this view. See Sax, *supra* note 48, at 60 (stating that the Takings Clause is a "guarantee against unfair or arbitrary government").

<sup>98</sup> See Michelman, *supra* note 25, at 1170-71.

<sup>99</sup> See *id.* at 1177-78, 1223.

<sup>100</sup> See *id.*

<sup>101</sup> See *id.* at 1174-77; see also EPSTEIN, *supra* note 5, at 5.



When government intervenes, it plays two roles: welfare-maximizer and wealth-redistributor.<sup>102</sup>

Government regulation of property touches the basis of wealth in society because such wealth is generated from the social rules that secure owners' expectations in reaping the benefits from their property.<sup>103</sup> Security is not absolute, however, because property owners understand the necessity for welfare-maximizing government regulation so long as it is not arbitrary.<sup>104</sup> When the government regulates property in a manner that diminishes its value without compensating the regulated owner, the rules securing expectations change, and a redistribution of wealth results.<sup>105</sup> The legal inquiry is directed at determining when compensation must be granted.<sup>106</sup>

According to Michelman, a necessary predicate to government action that creates uncompensated losers is that the regulation be efficient: it must generate a net welfare gain or else the regulation should not be adopted.<sup>107</sup> The sufficient condition for noncompensated regulation is that the inherent redistribution in such a case be fair in the sense that it is an "accidental consequence" of an efficient decision, rather than a deliberate choice to allocate loss to a narrow group of individuals.<sup>108</sup> In short, to regulate without paying losers (the creation of which is an unavoidable effect of regulation), the government must act not only as a welfare-enhancer, but also as a fair redistributer.<sup>109</sup>

<sup>102</sup> See Michelman, *supra* note 25, at 1174–83.

<sup>103</sup> See *id.* at 1211–12. The concept is that individuals realize that mutual respect of property rights is required to accumulate wealth, so the law protects property rights to allow those who have property to reap the "fruits of [their] investment." See *id.* Otherwise, the inherent self-interest in individuals would induce outright theft of others' wealth to maximize personal gains; in effect, the strongest would win. See *id.* This utilitarian view of the nature of property is the subject of extensive academic discussion with no clear resolution. See Bell & Parchomovsky, *supra* note 5, at 579–80 ("[T]here is no scholarly or judicial consensus regarding the definition of property."); Rose, *supra* note 59, at 588–89. Many commentators, however, accept that the Court evinces a utilitarian view of property. See Claeys, *supra* note 36, at 1641–43; cf. Sax, *supra* note 48, at 61 (stating that "[p]roperty is the end result of a process of competition" for economic resources).

<sup>104</sup> See Michelman, *supra* note 25, at 1211–13 (stating that individual property security is "subordinate . . . to [wealth] maximizing"); Sax, *supra* note 48, at 60. Not everyone agrees. See, e.g., EPSTEIN, *supra* note 5, at 57–62, 281 (stating that the Takings Clause is absolutely antiredistributive); Treanor, *supra* note 62, at 815–16 (discussing Epstein's view).

<sup>105</sup> See Michelman, *supra* note 25, at 1183, 1212–13.

<sup>106</sup> See *Lingle v. Chevron U.S.A., Inc.*, 544 U.S. 533, 539 (2005).

<sup>107</sup> See Michelman, *supra* note 25, at 1215.

<sup>108</sup> See *id.* at 1183, 1212–13.

<sup>109</sup> See *id.*

For Michelman, the investment-backed expectations inquiry involves determining when the government is acting fairly by analyzing three variables: efficiency gains, settlement costs, and demoralization costs.<sup>110</sup> Efficiency gains are measured by a simple cost-benefit calculation applied to the regulation at issue.<sup>111</sup> Demoralization costs are the costs that arise specifically and only from the psychological realization on the part of a loser in a redistributive choice that he or she will not be paid as a result of that choice.<sup>112</sup> This realization results in a decrease in future investment and innovation because expected returns from capital are less secure.<sup>113</sup> Settlement costs are the value the loser would demand to avoid incurring demoralization costs.<sup>114</sup>

If both settlement costs and demoralization costs exceed the efficiency gains, the regulation is inefficient and should be not be adopted.<sup>115</sup> If the regulation is not inefficient and is implemented, government must incur one of these two costs, as they cannot both be "paid," by definition.<sup>116</sup> Compensation should be required when, and only when, "demoralization costs exceed settlement costs" because an optimal utilitarian calculus would have society incur the lower of the two costs.<sup>117</sup> Over time, social decisions made in this way should accord benefits to participants on a roughly equal basis, and the political system ensures that those elected will distribute such benefits equally or they will be ousted from office.<sup>118</sup> This compensation rule is the theoretical basis for the concept of "investment-backed expectations," but the Supreme Court did not discuss how it viewed or defined invest-

---

<sup>110</sup> *Id.* at 1214.

<sup>111</sup> *See id.* An efficient policy choice simply results in more net gain than loss to society. *See id.* These gains and losses, however, need not be monetary; economists may assign monetary prices to intangible gains or losses. *See id.* Indeed, efficiency in Michelman's formula is merely a balance of *willingness to pay* on the part of prospective policy winners as against the *insistence* of prospective losers on a certain amount of compensation. *Id.* An efficient choice would be, then, dictated by market-based principles: those who support the change are willing to pay more than those opposed insist upon, and the change goes forward. *See id.* Underlying the claim that such an outcome is efficient is that actors are rational wealth maximizers and would only be willing to pay more for an outcome whose benefits exceed its costs to those who propose it. *See id.* at 1213; *see also* FISCHER, *supra* note 68, at 142-44.

<sup>112</sup> *See* Michelman, *supra* note 25, at 1214.

<sup>113</sup> *See id.*

<sup>114</sup> *See id.*

<sup>115</sup> *See id.* at 1215.

<sup>116</sup> *See id.*

<sup>117</sup> *See* Michelman, *supra* note 25, at 1215; *see also* FISCHER, *supra* note 68, at 146-47.

<sup>118</sup> *See* Michelman, *supra* note 25, at 1179; *see also* THE FEDERALIST NO. 10, *supra* note 59, at 62-63.

ment-backed expectations upon incorporating the concept in the legal test in *Penn Central*.<sup>119</sup>

## 2. Utilitarian Principles Connected with Fairness

Michelman does not stop with merely suggesting a utilitarian compensation rule criterion because that alone does not determine whether a result is fair; he argues that the utilitarian rule is equivalent to a Rawlsian fairness test.<sup>120</sup> Rawlsian fairness is the idea that if the process used to make decisions would be unanimously supported, and if rational people would be comfortable being the recipients of the worst outcome, the principles used are fair.<sup>121</sup>

Two principles follow: first, society should not accord preferential treatment to anyone; but, second, if preferential treatment exists, everyone should be able to be preferred at some point so long as, in the long run, being preferred works out to be in everyone's advantage.<sup>122</sup> Because welfare maximization requires collective regulation, which results in unequal distributions, the first principle is not possible in society.<sup>123</sup> The second principle, however, is equivalent to a compensation rule that allows for losers and winners who will be roughly in parity over the long-term, just as in the efficiency situation.<sup>124</sup> A rule that allows for losers and winners is acceptable when it minimizes the occurrence of demoralization costs by the payment of settlement costs when settlement costs are lower than demoralization costs because losers can "appreciate how such decisions might fit into a consistent practice which holds forth a lesser long-run risk" of frustrated expectations.<sup>125</sup> Moreover, this Rawlsian framework dovetails with the necessary efficiency condition in the utilitarian analysis because it requires that the proposed project have demonstrable welfare benefits in that compensation would be required where the worst-off position would be unacceptable to anyone.<sup>126</sup> Thus, because no one would be ready to accept a position

---

<sup>119</sup> See *Penn Cent.*, 438 U.S. at 124-28; Gaba, *supra* note 58, at 589.

<sup>120</sup> See William A. Fischel & Perry Shapiro, *Takings, Insurance, and Michelman: Comments on the Economic Interpretations of "Just Compensation" Law*, 17 J. LEGAL STUD. 269, 277 (1988) ("[Michelman] . . . suggests, however, that the fairness and utilitarian criteria usually yield the same rules for compensation."); Michelman, *supra* note 25, at 1219-24.

<sup>121</sup> See Michelman, *supra* note 25, at 1219; see also JOHN RAWLS, *A THEORY OF JUSTICE*, 136-42 (1971).

<sup>122</sup> See Michelman, *supra* note 25, at 1220.

<sup>123</sup> See *id.* at 1174.

<sup>124</sup> See *id.* at 1222.

<sup>125</sup> See *id.* at 1223.

<sup>126</sup> See *id.*

where high demoralization costs are present, the Rawlsian test is functionally equivalent to the utilitarian test.<sup>127</sup>

Although it has been argued that investment-backed expectations have no place in a takings analysis,<sup>128</sup> the fact that a utilitarian analysis of regulatory takings comports so well with the fairness policy behind the Takings Clause suggests otherwise.<sup>129</sup> Indeed, Justice Kennedy has been a mindful and continuous supporter of investment-backed expectations in his opinions on the takings issue.<sup>130</sup> Even in *Lucas v. South Carolina Coastal Council*, decided in 1992, the Supreme Court generally assumed that the claimant had so obviously demonstrated that he had investment-backed expectations that it did not need to address them.<sup>131</sup> Moreover, the Court has explicitly affirmed that the *Penn Central* factors—including investment-backed expectations—are the “polestar” in a regulatory takings analysis.<sup>132</sup> Yet, for all these indications of their significance, the Court has neither expressly stated what it considers to be the purpose of investment-backed expectations, nor has it defined the concept.<sup>133</sup>

### B. The Incomplete Judicial Application of Investment-Backed Expectations

#### 1. The Court Rightly Attempts to Determine Whether a Protected Expectation Exists

In applying investment-backed expectations in takings claims, the Supreme Court has concerned itself with determining *whether* an expectation exists rather than with using the test as a way to distinguish compensable from noncompensable takings claims by means of a de-

---

<sup>127</sup> See Michelman, *supra* note 25, at 1223; see also Gaba, *supra* note 58, at 591.

<sup>128</sup> See *Leading Cases*, *supra* note 34, at 329–30.

<sup>129</sup> See Gaba, *supra* note 58, at 589–91.

<sup>130</sup> See *Palazzolo v. Rhode Island*, 533 U.S. 606, 626 (2001); *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1034 (1992) (Kennedy, J., concurring in the judgment).

<sup>131</sup> See 505 U.S. at 1006–08; *Penn Cent.*, 438 U.S. at 124; *Good v. United States*, 189 F.3d 1355, 1361 (Fed. Cir. 1999).

<sup>132</sup> See *Palazzolo*, 533 U.S. at 633 (O'Connor, J., concurring); see also *Lingle*, 544 U.S. at 538–39.

<sup>133</sup> See *Lingle*, 544 U.S. at 538–39; *Palazzolo*, 533 U.S. at 617; *Penn Cent.*, 438 U.S. at 124; Abraham Bell, *Legal Transitions: Is There an Ideal Way to Deal with the Non-Ideal World of Legal Change?*, 13 J. CONTEMP. LEGAL ISSUES 29, 61 (2003) (“[T]he cases cannot be said to grant any guidance on how to use the investment-backed expectation prong.”); Doremus, *supra* note 40, at 7–8; see also R.S. Radford & J. David Breemer, *Great Expectations: Will Palazzolo v. Rhode Island Clarify the Murky Doctrine of Investment-Backed Expectations in Regulatory Takings Law?*, 9 N.Y.U. ENVTL. L.J. 449, 449 n.3, 453–59 (2001).

moralization cost analysis.<sup>134</sup> As the Court has employed the test, the function of investment-backed expectations is largely evidentiary: it is a standard a plaintiff must meet to show what was taken, in dollar terms, so that the Court may consider whether a takings claim exists.<sup>135</sup> Logically, the Court must require the plaintiff to make an objective showing as to his or her expectations because value is inherently subjective, and it is that value that is purportedly the subject of constitutional protection.<sup>136</sup> Thus, the problem that has snarled commentary on investment-backed expectations is that an expectations requirement is inherently circular because expectations are formed by the law, but the law protects expectations.<sup>137</sup>

---

<sup>134</sup> See *Palazzolo*, 533 U.S. at 626–30, 634 (O'Connor, J., concurring); Daniel R. Mandelker, *Investment-Backed Expectations in Taking Law*, 27 URB. LAW. 215, 225 (1995); cf. Janet Dunlap, Note, *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, 802–07 (1992) (discussing, generally, different approaches to determining whether a protected right exists for Takings Clause purposes). Indeed, as of March 31, 2008, a search for the term “demoralization costs” in the LexisNexis “Federal & State Cases, Combined” database reveals that no federal court decisions have even employed the term, which is crucial to Michelman’s analysis, in a reported opinion. Exactly one court, in California, has employed the phrase—properly—in its analysis. See *Comty. Redevelopment Agency v. Abrams*, 543 P.2d 905, 916–17 & n.12, 918 n.15 (Cal. 1975).

<sup>135</sup> See *Palazzolo*, 533 U.S. at 626–30; *Penn Cent.*, 438 U.S. at 136–38; Jeremy Paul, *The Hidden Structure of Takings Law*, 64 S. CAL. L. REV. 1393, 1505 (1991).

<sup>136</sup> See *Penn Cent.*, 438 U.S. at 124–25 (citing precedent where takings cases were dismissed because the owner’s lack of reasonable economic expectations meant that the owner had no property for purposes of the Fifth Amendment); FISCHER, *supra* note 68, at 50, 217 (stating that “all values are deemed by economic theory to be subjective”); Lynda J. Oswald, *Cornering the Quark: Investment-Backed Expectations and Economically Viable Uses in Takings Analysis*, 70 WASH. L. REV. 91, 108 (1995) (“[T]he Court has also used the word ‘expectations’ to refer to protected property interests.”). The view that the Constitution protects expectancy interests is the subject of a vast academic debate about the nature, scope, and existence of property rights. See Bell & Parchomovsky, *supra* note 5, at 579–80. For a brief overview of the two sides in that debate, see Rose, *supra* note 59, at 588–97. Compare EPSTEIN, *supra* note 5, at 3–6, 57–62 (advocating strong natural law property rights), and Claeys, *supra* note 36, at 1670–71 (same), with Michelman, *supra* note 25, at 1211–12 (advocating utilitarian property protection norms). This Note does not attempt to resolve the issue of the source of property rights in American law. Because this Note looks only at investment-backed expectations, it assumes that for the purposes of investment-backed expectations alone, the constitutionally protected “property” is the owner’s reasonable, investment-backed expectation. See Michelman, *supra* note 25, at 1209–13.

<sup>137</sup> See *Lucas*, 505 U.S. at 1034 (Kennedy, J., concurring in the judgment) (“There is an inherent tendency towards circularity in this synthesis, of course; for if the owner’s reasonable expectations are shaped by what courts allow as a proper exercise of governmental authority, property tends to become what courts say it is.”); Mandelker, *supra* note 134, at 227; Paul, *supra* note 135, at 1505 (“[T]he more the Court’s own pronouncements tend to shape public expectations, the more the Court’s reliance on these expectations threatens to deteriorate into a blatant case of self-fulfilling prophecy.”).

The requirement that expectations be "investment-backed" does little to clarify this circularity, although the terminology used suggests that requiring expectations to be investment-backed serves a vital limiting function.<sup>138</sup> Were it not for this requirement, there would be no upper bound on the potential value destroyed by a regulation because any landowner would be able to assert that he or she expected to be able to build an Empire State Building on every parcel, thereby frustrating a reasonable, market-based valuation of "just compensation" that may be required; the value claimed to be lost would be simply disconnected from reality.<sup>139</sup> Requiring that expectations be investment-backed avoids the problem of holdouts, which are economically inefficient,<sup>140</sup> and grounds society's duty to compensate in utilitarian principles because such a requirement protects only those expectations that are the basis for the value of the property, not wistful, unilateral values.<sup>141</sup> Thus, investment-backed expectations act as an upper bound on potential compensation.<sup>142</sup>

Moreover, the "investment-backed" requirement ideally would avoid allowing speculators with notice to gain a windfall unfairly.<sup>143</sup> The basic idea is the inverse to the upper evidentiary bound investment-backed expectations put on potential compensable values: a speculator

---

<sup>138</sup> See *Lingle*, 544 U.S. at 538 ("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 . . . .") (quoting *Pa. Coal Co. v. Mahon*, 260 U.S. 393, 413 (1922)); Michelman, *supra* note 25, at 1178 (stating that it is not possible to compensate for every change in value because doing so would eliminate efficiency gains from collective action); Paul, *supra* note 135, at 1505.

<sup>139</sup> See FISCHER, *supra* note 68, at 50, 67-68, 211-12 (arguing that property rule protection, which gives the owner an absolute right to turn down compensation offered, is reasonable in the private market context where one cannot be forced to sell, but liability rule protection, which does require a sale but only compensates for fair market value, is appropriate in the government/ eminent domain context because liability rule protection avoids holdout problems); see also Mandelker, *supra* note 134, at 232-36 (discussing different approaches courts have used to avoid the subjective valuation problem).

<sup>140</sup> See FISCHER, *supra* note 68, at 68-70.

<sup>141</sup> See *Webb's Fabulous Pharmacies, Inc. v. Beckwith*, 449 U.S. 155, 161 (1980) ("[A] mere unilateral expectation . . . is not a property interest entitled to protection."); *Penn Cent.*, 438 U.S. at 136-37 (stating that the regulation at issue was not a taking because it did not interfere with the claimant's "primary expectation" for the use of its property and may still allow the desired use, albeit to a lesser extent than the claimant may have initially wanted); Michelman, *supra* note 25, at 1211-12, 1244; Oswald, *supra* note 136, at 115-16.

<sup>142</sup> See *Webb's Fabulous*, 449 U.S. at 161 (disallowing a unilateral, subjective determination of property protection).

<sup>143</sup> See Oswald, *supra* note 136, at 109-15 (summarizing and criticizing Michelman's land speculator hypothetical); see also Michelman, *supra* note 25, at 1237-40 (introducing the speculator problem).

who buys land with notice of a potential regulation will pay a reduced value for the land because the market has priced the regulation's effects into the sale value; thus, if the regulation comes to fruition, no value is being unfairly redistributed from that speculative purchaser.<sup>144</sup> Although some courts adhered to a strict "notice rule," where a purchaser with notice of a regulation is per se denied compensation, to prevent this scenario,<sup>145</sup> the Supreme Court, in its 2002 decision in *Palazzolo v. Rhode Island*, rejected the idea that notice of a regulation can alone defeat a takings claim.<sup>146</sup> Justice O'Connor's concurring opinion in *Palazzolo* suggests that although the Court will not deny compensation based solely on notice, it will not ignore the existence of a regulation either.<sup>147</sup> That is, the Court will conduct a factual inquiry into the inherent fairness of the regulation to determine whether a protected expectation exists.<sup>148</sup> Such an inquiry into the extent of the owner's expectations surely adds fairness to the threshold question of whether a protected expectation exists, but it does not complete the charge Justice O'Connor gave the Court: that investment-backed expectations be used to determine whether compensation is due.<sup>149</sup>

---

<sup>144</sup> See Michelman, *supra* note 25, at 1237-40; see also Mandelker, *supra* note 134, at 243-44 (supporting a regulatory risk regime for takings whereby owners with notice of regulations assume the risk of regulation upon purchase).

<sup>145</sup> See, e.g., *Loveladies Harbor, Inc. v. United States*, 28 F.3d 1171, 1177 (Fed. Cir. 1994); see also Mandelker, *supra* note 70, at 243 n.111, 246 n.124 (discussing courts employing this rule).

<sup>146</sup> See 533 U.S. at 627-28 ("Were we to accept the State's rule [that notice defeats a takings claim], the postenactment transfer of title would . . . put an expiration date on the Takings Clause. . . . A blanket rule that purchasers with notice have no compensation right when a claim becomes ripe is too blunt an instrument to accord with the duty to compensate for what is taken.").

<sup>147</sup> See *id.* at 635-36 (O'Connor, J., concurring).

<sup>148</sup> See *id.* (stating that if notice does "nothing to inform the analysis, then some property owners may reap windfalls and an important indicium of fairness is lost"); cf. Fischel & Shapiro, *supra* note 120, at 290 (stating that accepted practices and "unspoken understanding" may transfer property rights to government without the need for compensation even when there is notice); Michelman, *supra* note 25, at 1237-40 ("[S]ocial action which merely corrects prior, unilaterally determined redistributions, or brings a deliberate gamble to its dénouement, raises no question of compensability."). Such an analysis, however, is inherently subtle and fact-intensive. See Oswald, *supra* note 136, at 110.

<sup>149</sup> See *Palazzolo*, 533 U.S. at 634-36 (O'Connor, J., concurring); *Penn Cent.*, 438 U.S. at 130 (stating that merely showing that a regulation prevents exploitation of an expected property use is alone insufficient to justify compensation). Justice Scalia would not allow notice of a regulation to have any bearing on the existence of the owner's investment-backed expectations. See *Palazzolo*, 533 U.S. at 637 (Scalia, J., concurring). Instead, he would require compensation when the government impermissibly burdens property, regardless of whether the claimant was on notice of the challenged regulation, because the prevention of windfalls to savvy speculators betting on the unconstitutionality of a regula-

## 2. The Court Fails to Apply Normative Analysis

Despite these, and other,<sup>150</sup> difficulties with determining whether a legitimate expectation exists,<sup>151</sup> courts must nevertheless make that determination if they are to engage in an investment-backed expectations inquiry that is true to Michelman's analysis.<sup>152</sup> Quite rightly, courts are concerned with making this initial determination to prevent speculators from securing a windfall, for example.<sup>153</sup> Nevertheless, the prevention of windfalls to speculators, among other difficulties, is a preliminary or side issue that, although important from a policy perspective, is not the central thrust of Michelman's investment-backed expectations analysis.<sup>154</sup>

Indeed, the preceding discussion and its subsidiary issues are logically antecedent to the question of whether a takings claimant *should* be compensated because the prior discussion merely answers the question of whether the claimant *can* be compensated (i.e., was there anything the government could have taken?).<sup>155</sup> In *Penn Central*, the Court never

tion is no less unfair than stock market speculation because the only "harmed" party is the government. See *id.* at 636-37. Although Justice Scalia is correct that the purpose of windfall prevention is not to condone unconstitutional government regulation by giving the government a free pass when an owner has notice, the problem with his argument is that if an investment-backed expectation analysis is to determine *whether* compensation should be granted, the fairness inquiry behind the analysis turns on whether the claimant incurred sufficient demoralization costs so as to necessitate compensation. See *id.*; see also *supra* notes 110-119 and accompanying text. It is hard to see how a speculator would be demoralized by the failure of his or her gamble; the timing of the purchase, then, must have some import in the analysis. See Michelman, *supra* note 25, at 1237-40.

<sup>150</sup> See, e.g., *Tahoe-Sierra Pres. Council v. Tahoe Reg'l Planning Agency*, 535 U.S. 302, 331-32, 335-36 (2002) (dealing with "'denominator' question" in determining diminution in value); *Palazzolo*, 533 U.S. at 632-33 (O'Connor, J., concurring) (dealing with the impact of notice on expectations). This Note does not suggest a resolution to these questions. See *infra* notes 154-155 and accompanying text.

<sup>151</sup> See Paul, *supra* note 135, at 1518 (stating that the Court must expressly indicate the type of expectations it is going to protect, but it refuses to do so); Dunlap, *supra* note 134, at 807. This is largely due to the fact that the nature of what is "property" is an unresolved question. See Richard A. Epstein, *Lucas v. South Carolina Coastal Council: A Tangled Web of Expectations*, 45 STAN. L. REV. 1369, 1392 (1993) (stating that problems with the Takings Clause exist because of "muddled conceptual foundations").

<sup>152</sup> See Michelman, *supra* note 25, at 1211-18; Paul, *supra* note 135, at 1506 (stating that asking whether an expectation exists or is reasonable restates the question and does not determine whether compensation is due).

<sup>153</sup> See, e.g., *Palazzolo*, 533 U.S. at 635-36 (O'Connor, J., concurring); *Good*, 189 F.3d at 1361.

<sup>154</sup> See Michelman, *supra* note 25, at 1238-39; cf. *Palazzolo*, 533 U.S. at 626-28.

<sup>155</sup> See FISCHEL, *supra* note 68, at 185 ("The question in takings is normative."). But Fischel acknowledges that "expectations are an important part of a normative theory of property" because, if property is defined as a "basis of expectation," an expectation must



reached the *should* question with respect to whether the regulation frustrated the claimant's investment-backed expectations, but it held that the claimant retained its primary expected use (as a train station) and that the regulation did not foreclose all possibility of air rights development.<sup>156</sup> Therefore, the claimant demonstrated that it was potentially due compensation because it had expectations to build above the station, but the Court simply did not engage in the next step of the investment-backed expectations analysis; it merely stated that the claimant retains a "reasonable beneficial use."<sup>157</sup>

In failing to discuss investment-backed expectations explicitly, the *Penn Central* Court left the contours of investment-backed expectations undefined.<sup>158</sup> That said, *Penn Central* suggested that another step logically follows, even though the Court did not take it, when the Court held that property owners may not establish a taking by merely showing that they cannot "exploit a property interest that they heretofore had believed was available for development."<sup>159</sup> Even the recent *Palazzolo* opinion, which dealt squarely with the issue of investment-backed expectations, did not state the normative inquiry the Court undertakes within an investment-backed expectations analysis.<sup>160</sup> Rather, it clarified the notice rule issue, ruling that the claimant indeed had a potentially compensable claim even if he had notice of the regulatory burden on his property, and remanded the case to the Rhode Island Supreme Court.<sup>161</sup> As it stands, the Court has never explicitly delved into a de-

---

exist before it can be taken. *See id.*; *see also* Michelman, *supra* note 25, at 1211-12, 1239 (stating that legal protection for property is important in the utilitarian view because property is merely the law governing the interrelationships in society between people and resources as to who has access to what "fruits"). Clearly, a natural rights view of property rights is diametrically opposed. *See* FISCHER, *supra* note 68, at 171-74. One perspicacious judge on the Court of Federal Claims recognized the antecedent nature of the existence of a property interest to the question of whether that interest has been taken, even though he thinks that expectations play no role in determining whether an interest exists. *See* *Store Safe Redlands Assoc. v. United States*, 35 Fed. Cl. 726, 734 (Fed. Cl. 1996), *quoted in* Steven J. Eagle, *The Rise and Rise of "Investment-Backed Expectations"*, 32 *URB. LAW.* 437, 443 (2000). Indeed, Justice O'Connor recognized that the investment-backed expectations test is designed to determine when the government should compensate for an otherwise valid regulation, even though she did not address the question of the nature of what the right taken exactly is. *See Palazzolo*, 533 U.S. at 635 n.\* (O'Connor, J., concurring); *see also* Lingle, 544 U.S. at 543 (O'Connor, J.).

<sup>156</sup> *See* 438 U.S. at 136-38 & n.36.

<sup>157</sup> *See id.*

<sup>158</sup> *See id.* at 124; Radford & Breemer, *supra* note 133, at 455-59.

<sup>159</sup> *See* 438 U.S. at 130.

<sup>160</sup> *See* 533 U.S. at 626-29, 632.

<sup>161</sup> *Id.*

moralization cost analysis, which is the key normative component of Michelman's thesis, and which connects it to the ultimate policy behind takings: fairness.<sup>162</sup>

The Court, then, has suggested a two-step inquiry by using an academic term of art, investment-backed expectations, in its legal test.<sup>163</sup> The Court, however, has been unable to move beyond the preliminary issue of whether an expectation exists to the normative issue at play in the concept of investment-backed expectations: whether the demoralization costs of the regulation demonstrate that the claimant should be compensated.<sup>164</sup>

With this picture of the landscape, it should not be surprising that the Court has failed to mention demoralization costs; to measure such costs, it is necessary to have a firm concept of the nature of the rights whose loss requires compensation.<sup>165</sup> The Court may be forgiven in its omission because even economists have "no obvious metric" to measure such psychological impacts on uncompensated parties.<sup>166</sup> For all of the theoretical appeal and rhetorical vitality of Michelman's takings test, its dubious administrability inhibits its direct application in a litigation context.<sup>167</sup> Nevertheless, such an inquiry is empirically supported by public choice theory and welfare economics because requiring compensation under a demoralization cost rubric is efficient.<sup>168</sup> That it is

<sup>162</sup> See Michelman, *supra* note 25, at 1250; see also *supra* notes 57-72 and accompanying text.

<sup>163</sup> See *Penn Cent.*, 438 U.S. at 124; *Good*, 189 F.3d at 1360-61. The two part inquiry is as follows: (1) does the claimant have an expectation entitled to constitutional protection?, and (2) is this claimant deserving of compensation because the regulation has excessively appropriated his or her property (i.e., the regulation has gone "too far")? See *Lingle*, 544 U.S. at 539, 542; *Lucas*, 505 U.S. at 1016 n.7; *Penn Cent.*, 438 U.S. at 124, 127-28; *Pa. Coal*, 260 U.S. at 415-16; *Store Safe Redlands*, 35 Fed. Cl. at 734; Michelman, *supra* note 25, at 1213-18. It is the *second* prong of the above inquiry that is truly the focus of investment-backed expectations, as evaluated using Michelman's demoralization cost framework. See Michelman, *supra* note 25, at 1213-18.

<sup>164</sup> See Mandelker, *supra* note 134, at 225-26; Michelman, *supra* note 25, at 1213-14; cf. Fischel & Shapiro, *supra* note 120, at 278 (taking the position that commentators have misinterpreted Michelman's analysis).

<sup>165</sup> See Paul, *supra* note 135, at 1538-39.

<sup>166</sup> See FISCHEL, *supra* note 68, at 217.

<sup>167</sup> See Fenster, *supra* note 13, at 695, 712 (stating that the Court has "failed to develop analytical or operational tools" to inquire into fairness in a takings analysis and speculating that the Court "may have determined that a utilitarian approach is too indeterminate to adopt"). Michelman himself implicitly recognizes this problem. See Michelman, *supra* note 25, at 1248-50; see also FISCHEL, *supra* note 68, at 142 ("Michelman wanted to explore philosophical ways of thinking about the taking issue.").

<sup>168</sup> See Fischel & Shapiro, *supra* note 120, at 269, 292 ("Michelman's utilitarian standard offers a method for evaluating compensation questions that is consistent with princi-

also fair makes demoralization cost analysis a vital tool for courts in making compensation determinations.<sup>169</sup>

*C. Public Choice Theory, Legal Process Approaches, and Overcoming the Administrability Hurdle of Demoralization Costs in the Normative Analysis*

The key to accessing the core demoralization cost inquiry in an investment-backed expectations analysis lies in finding a sufficient, litigation-ready proxy for demoralization costs because they are otherwise difficult, if not impossible, to determine.<sup>170</sup> A legal process inquiry, viewed through the policy lens of James Madison's admonitions against majoritarian exploitation, provides a necessary proxy for the Supreme Court to articulate a realistic approach to the actual fairness question involved in investment-backed expectations.<sup>171</sup> Additionally, certain aspects of public choice theory significantly inform a process inquiry that comports with the thrust of the utilitarian approach and with the policy behind the Takings Clause.<sup>172</sup>

Public choice theory is the application of economic supply and demand welfare maximization principles to the political/collective action context, where government supplies "goods" in the form of certain

---

ples of economic efficiency."); *see also supra* note 111 (discussing efficiency as an outcome with more benefit than detriment, in general terms).

<sup>169</sup> *See* FISCHER, *supra* note 68, at 216-17 (stating that economics alone cannot be the basis for normative legal rules in the takings analysis because "the issue involves fairness as well as efficiency"); Michelman, *supra* note 25, at 1219-23, 1250.

<sup>170</sup> *See* FISCHER, *supra* note 68, at 148-49, 164-65, 180-82.

<sup>171</sup> *See id.* at 148-49 ("The source of the demoralization cost for Michelman was the risk of 'majoritarian exploitation.'"); *see also* Baron, *supra* note 13, at 646-48 (stating that demoralization costs flowing from unfair regulatory decisions are the heart of the Takings Clause); Fenster, *supra* note 13, at 694 ("[T]he Takings Clause's fairness rationale serves to protect the victim of a failed political process that has left her vulnerable to exploitation by a majoritarian decision."); Span, *supra* note 28, at 13 (stating that "the primary rationale for the constitutional protection of property rights is the existence of flaws in the decision-making processes" of a democracy).

<sup>172</sup> *See* FISCHER, *supra* note 68, at 216-27; Baron, *supra* note 13, at 646-48; Rose, *supra* note 59, at 598; Treanor, *supra* note 62, at 866-72. Not all commentators agree that public choice theory should play a role in takings issues. *See, e.g.*, Daryl J. Levinson, *Making Government Pay: Markets, Politics, and the Allocation of Constitutional Costs*, 67 U. CHI. L. REV. 345, 345-48, 374-77 (2000) (arguing that the application of public choice theory to takings may create "perverse" effects in terms of deterring inefficient policy because governments do not respond to market incentives like private actors); Span, *supra* note 28, at 58 (stating that public choice theory has laudable goals but cannot do what it sets out to accomplish because the political process will never be perfectly optimal).

policy outcomes to the consuming "market" of voters.<sup>173</sup> The obvious corollary to this model is that representative governments can fail when majorities control policy demand because minority groups are unable to provide sufficient demand for their preferences to induce a policy supply.<sup>174</sup> Public choice theory posits that this situation can occur in several ways, the most relevant of which are interest group politics and majoritarianism.<sup>175</sup> Although public choice theory merely presents an analytical framework, not a legal rule, these two situations are potential sources of demoralization costs that a court may heed in undertaking a process review.<sup>176</sup>

### 1. Interest Groups as Sources of Demoralization Costs

Interest group politics occurs when groups with similar policy demands band together to lobby government for a certain policy outcome.<sup>177</sup> The rub is the free rider problem: a rational wealth-maximizing individual will not pay for the provision of a good unless he or she is forced to do so to procure it, so that individual counts on the efforts of others in the group to carry the burden of providing the good for the benefit of everyone, including members who do not pay (i.e., free riders).<sup>178</sup> The free rider problem causes larger groups of policy consumers to be at a competitive disadvantage in the market for policy goods relative to small groups because a small group's players have a stronger individual interest in the outcome and reduced transactional costs to organize, thereby minimizing the potential for free riding.<sup>179</sup>

Commentators have identified two process failure risks created by interest group politics as it relates to takings compensation.<sup>180</sup> First, an interest group may be able to lobby government for compensation to

---

<sup>173</sup> See Span, *supra* note 28, at 13; see also Daniel A. Farber & Philip P. Frickey, *Public Choice Revisited*, 96 MICH. L. REV. 1715, 1715, 1717 (1998). The field is far from unified, and academic debates about the way and extent to which public choice theory applies to real world situations continue. See Farber & Frickey, *supra*, at 1717 (providing a brief overview of the field).

<sup>174</sup> See Span, *supra* note 28, at 22-27, 40-41, 50-51; Treanor, *supra* note 62, at 856, 866-67; cf. Jonathan H. Adler, *Money or Nothing: The Adverse Environmental Consequences of Uncompensated Land Used Controls*, 49 B.C. L. REV. 301, 337-38 (2008) (stating that governments are economic actors and respond to supply/demand incentives).

<sup>175</sup> See Span, *supra* note 28, at 22-27, 40-41, 50-51.

<sup>176</sup> See *id.* at 13-14. This Note does not attempt to provide a comprehensive review of the public choice field.

<sup>177</sup> See *id.* at 24-26.

<sup>178</sup> See *id.*; see also Farber & Frickey, *supra* note 173, at 1717-18.

<sup>179</sup> See Span, *supra* note 28, at 24-26; see also Farber & Frickey, *supra* note 173, at 1717-18.

<sup>180</sup> See Span, *supra* note 28, at 27-28.

itself when it should not actually be provided—that is, when it would be more efficient for the government to incur demoralization costs.<sup>181</sup> Second, an interest group, even though it can organize, is not a repeat player, so it has insufficient influence on the policy market because policy suppliers are simply unresponsive to demand from one-time players.<sup>182</sup>

That said, interest group participants may not suffer from a lack of political voice, meaning that they do not suffer demoralization costs because the psychological impact of a regulation passed over their heard objections is less severe.<sup>183</sup> Moreover, any special interest-backed policy result that effects a taking from majority outsiders will be, by definition, widely dispersed.<sup>184</sup> Therefore, the interest group problem may not be a major issue in investment-backed expectations jurisprudence because it avoids one major constitutional concern—ensuring that regulatory burdens are not overly concentrated<sup>185</sup>—and, at worst, results in negligible demoralization costs.<sup>186</sup>

## 2. Majoritarianism: The Gold-Standard for Demoralization Costs

Majoritarianism is a potentially relevant concern in an investment-backed expectations analysis because it can result in singling out individuals to bear a burden for the benefit of the whole.<sup>187</sup> This situation arises where the majority is relatively homogeneous, such that majority individuals' policy demand preferences align (to the exclusion and detriment of minorities), and where the majority exercises control over immobile property, such that the economic threat of exit is not leveragable in the economic policy contest.<sup>188</sup> Thus, minority demand for policy is not a relevant consideration in a decision-making process be-

---

<sup>181</sup> See *id.*; see also Adler, *supra* note 174, at 350–51.

<sup>182</sup> See Span, *supra* note 28, at 27–32; see also Adler, *supra* note 174, at 350–51.

<sup>183</sup> See FISCHEL, *supra* note 68, at 139, 157, 316–17 (stating that losers in special interest politics do not suffer from particularly severe demoralization costs because they have a voice and that special interest politics has virtue in allowing participants to self-protect).

<sup>184</sup> See *id.*

<sup>185</sup> See *Lingle*, 544 U.S. at 544 (stating that plaintiff should show that it is being “singled out” to shoulder a severe regulatory burden); Span, *supra* note 28, at 32–33.

<sup>186</sup> See FISCHEL, *supra* note 68, at 157.

<sup>187</sup> See Span, *supra* note 28, at 41; cf. *Lucas*, 505 U.S. at 1019 (stating that a taking occurs when a property owner “sacrifice[s]” all property value “in the name of the common good”).

<sup>188</sup> See FISCHEL, *supra* note 68, at 182; Treanor, *supra* note 62, at 866–67; cf. Clive Crook, *Housebound*, ATLANTIC MONTHLY, Dec. 2007, at 22 (discussing studies suggesting that homeowners “tend to act as cartels” when voting for and implementing regulations in their communities).

cause that demand has no ability to attract policy supply through either votes or economic threats.<sup>189</sup>

Typically, larger units of government present a lower risk of majoritarian exploitation for two reasons.<sup>190</sup> First, interest group politics works to allocate preferences fairly when competition for policy demand is broad enough because that demand makes the policy "market" responsive.<sup>191</sup> Second, demoralization costs are unlikely to result from higher-level legislative actions because of the inherent protections Madison envisioned in a republican system where policy decisions are likely to be felt by a widely dispersed group of constituents.<sup>192</sup> Therefore, local government poses a greater majoritarian risk: efficient choices (in the case of takings, to compensate to avoid demoralization costs) are eschewed in favor of majority preferences because the majority suffers no repercussions for doing so.<sup>193</sup> This risk presents the potential for uncompensated demoralization costs that exceed settlement costs, and courts have a role to play in avoiding this circumstance by way of the investment-backed expectations inquiry.<sup>194</sup>

Public choice theory, therefore, suggests helpful analytical frameworks for courts to determine when demoralization costs are likely to exceed settlement costs, and when they are also likely being improperly ignored by policymaking bodies.<sup>195</sup> Thus, viewed in light of Michelman's philosophy behind investment-backed expectations, these sources of high demoralization costs offer themselves as an administrable way to fashion an investment-backed expectations test that would determine whether the process singles out individuals to bear a disproportionate share of society's burdens.<sup>196</sup>

---

<sup>189</sup> See FISCHER, *supra* note 68, at 131–32, 139–40; Adler, *supra* note 174, at 337–38.

<sup>190</sup> See FISCHER, *supra* note 68, at 131–32, 139–40; see also Rose, *supra* note 59, at 598.

<sup>191</sup> See FISCHER, *supra* note 68, at 316–17; Span, *supra* note 28, at 41–42.

<sup>192</sup> See Rose, *supra* note 59, at 598.

<sup>193</sup> See Span, *supra* note 28, at 42–44; Treanor, *supra* note 62, at 867. This is true *a fortiori* with real property because minorities have no political voice and no threat of economic exit: they cannot move their property elsewhere. See FISCHER, *supra* note 68, at 324. Neither Span nor Treanor, however, agree that this situation should be the touchstone for situations where compensation is required. See Span, *supra* note 28, at 44–48 (disagreeing because even if majoritarian risk exists, a separate "normative principle" must be employed to determine whether to compensate); Treanor, *supra* note 62, at 868 (disagreeing because local decisions can be reviewed at the state level).

<sup>194</sup> See FISCHER, *supra* note 68, at 139, 182.

<sup>195</sup> See *id.* at 217.

<sup>196</sup> See *id.* at 139.

### 3. Public Choice Theory, Process Review, and the Takings Clause

Some recent commentary suggests, however, that the Supreme Court has adopted a legal process approach to takings jurisprudence but that such an approach is at odds with public choice models.<sup>197</sup> It is clear that there is a distinction between a legal process approach (in the sense that John Hart Ely uses the term)<sup>198</sup> advocated by some theorists<sup>199</sup> and a "substantially advances" due process or equal protection inquiry, which the Court, in its 2005 decision in *Lingle v. Chevron U.S.A., Inc.*, explicitly rejected as antecedent to a takings analysis.<sup>200</sup> *Lingle*, however, does not prohibit an inquiry into failed processes as they relate to magnitude and distribution of the burden, as opposed to the validity of the regulation itself.<sup>201</sup> Although *Lingle* admittedly focuses on the effects of a regulatory burden, it does so because of the nature of a takings inquiry in a regulation as-applied situation: a court must review the effects of the regulatory scheme because there is nothing else it can logically do.<sup>202</sup> The relevant question, then, is whether the magnitude

---

<sup>197</sup> See Fenster, *supra* note 13, at 700-01, 713, 738-39 (stating that the "process itself is not the subject of takings claims").

<sup>198</sup> See generally JOHN HART ELY, *DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW* (1980).

<sup>199</sup> See, e.g., FISCHEL, *supra* note 68, at 324; Fenster, *supra* note 13, at 739-44. Such a legal process approach focuses on court oversight of the procedures used by the government body to arrive at its decision. See FISCHEL, *supra* note 68, at 139-40; Fenster, *supra* note 13, at 733-34, 738-40.

<sup>200</sup> See 544 U.S. at 543; Fenster, *supra* note 13, at 735-36. Indeed, a regulation that fails a due process challenge is simply invalid because "[n]o amount of compensation can authorize such action." *Lingle*, 544 U.S. at 543. The *Lingle* Court made it clear that a "substantially advances" due process inquiry is unrelated to the takings question because it is a "means-end" test to determine whether a regulation achieves a proper public purpose; a test to determine when a taking is unconstitutional inquires as to when the public should bear the burden for regulations that impose a concentrated and intense burden that is functionally equivalent to a physical appropriation. See *id.* at 542-43.

<sup>201</sup> See 544 U.S. at 542-44. Indeed, Justice Stevens, in 1985, in *Williamson County Regional Planning Commission v. Hamilton Bank of Johnson City*, suggested as much in the temporary takings context: "Even though these controversies [over regulatory limits on property uses] are costly and temporarily harmful to the private citizen, as long as fair procedures are followed, I do not believe there is any basis in the Constitution for characterizing the inevitable by-product of every such dispute as a 'taking' of private property." 473 U.S. 172, 205 (1985) (Stevens, J., concurring in the judgment).

<sup>202</sup> See 544 U.S. at 542-44; Baron, *supra* note 13, at 646-48 (stating that *Lingle* identified factors that indicate demoralization costs, which "underlie[] Americans' concerns about the Takings Clause" (i.e., the "why me" question)); Sunstein, *supra* note 70, at 1690 (stating that the Takings Clause is directed at protecting against government actions motivated by an improper purpose, but that effects may be relevant to show such a purpose); cf. Eagle, *supra* note 13, at 899, 910-16 (arguing that *Penn Central* is itself a substantive due process analysis in reviewing regulatory effects).

and distribution of the effects of a regulatory burden are sufficient indications of a failed political process, which resulted in high demoralization costs that *should have been* compensated ex ante because the burden that the process imposed is unfair.<sup>203</sup> Public choice theory suggests that those effects can indicate a process failure.<sup>204</sup> Thus, a legal process approach can and should be coextensive with a public choice theory proxy for demoralization costs.<sup>205</sup>

Properly understood as favoring compensation when demoralization costs exceed settlement costs, the investment-backed expectations analysis is the vehicle the Court can use to undertake a normative legal process evaluation to determine fair and efficient compensation results under the Takings Clause.<sup>206</sup>

### III. EMBRACING ECONOMIC NUANCE WITHOUT NUMBERS: HOW THE COURT CAN—AND SHOULD—APPLY INVESTMENT-BACKED EXPECTATIONS ANALYSIS IN TOTAL TAKINGS CLAIMS

Prior to the 2001 *Palazzolo v. Rhode Island* case, the U.S. Supreme Court's takings decisions were notoriously unclear as to what investment-backed expectations are.<sup>207</sup> Although *Palazzolo* did much to clarify how courts should determine whether a claimant has proven that an expectation exists so as to avoid rewarding speculators,<sup>208</sup> it did little to shed light on the normative aspects of the doctrine.<sup>209</sup> The Court's 2005 decision in *Lingle v. Chevron U.S.A., Inc.* went beyond deciding the narrow question before it and significantly clarified both the purpose and normative principles underlying Fifth Amendment takings jurisprudence.<sup>210</sup> Neither *Lingle* nor *Palazzolo*, however, resolves the controversy about whether investment-backed expectations are part of every regulatory takings decision, particularly in the context of a total taking

<sup>203</sup> See *Lingle*, 544 U.S. at 542–44; cf. Michelman, *supra* note 25, at 1245–50.

<sup>204</sup> See *supra* notes 170–196 and accompanying text.

<sup>205</sup> See FISCHER, *supra* note 68, at 216–17; Michelman, *supra* note 25, at 1219–23; Sunstein, *supra* note 70, at 1690, 1692–93; cf. Eagle, *supra* note 13, at 947–50 (arguing for a substantive due process review of takings claims to promote property rights). The central analytical point is that if one accepts the contention that economics can provide courts with empirical evidence of efficiency in decision-making processes, see FISCHER, *supra* note 68, at 216–17, then a court's application of a demoralization framework to those instances generally will result in fair outcomes, see Michelman, *supra* note 25, at 1219–23.

<sup>206</sup> See Michelman, *supra* note 25, at 1213–23; see also Baron, *supra* note 13, at 646–47.

<sup>207</sup> See 533 U.S. 606, 617 (2001); Mandelker, *supra* note 134, at 225.

<sup>208</sup> See 533 U.S. at 626–30; see also *supra* notes 134–154 and accompanying text (discussing the Court's analysis of the threshold inquiry into whether a protected expectation exists).

<sup>209</sup> See *Palazzolo*, 533 U.S. at 626–30; cf. Fenster, *supra* note 13, at 669.

<sup>210</sup> See 544 U.S. 533, 538–39, 542 (2005); Fenster, *supra* note 13, at 737–38.



claim, as was the case in 1992 in *Lucas v. South Carolina Coastal Council*.<sup>211</sup> Based on the principles and language in *Lucas*, *Palazzolo*, and *Lingle*, the Court now has the rhetorical tools to refine takings law without disrupting precedent and to resolve some interbench disputes about the role and substance of investment-backed expectations by affirming the centrality of investment-backed expectations in the straightforward *Lucas* context.<sup>212</sup>

#### A. *Lingle* Properly Focused the Court on Demoralization Cost-Creating Factors as Determinative

In distinguishing and rejecting in the Fifth Amendment compensation context a substantive, means-end due process analysis from a takings analysis, the unanimous *Lingle* Court distilled both the practical touchstone and theoretical basis for Takings Clause compensation.<sup>213</sup> The practical touchstone of the different takings tests is an attempt to identify those regulations that are tantamount to a physical appropriation of property.<sup>214</sup> The theoretical basis for compensation is that a citizen should not be forced by the public to shoulder a burden of particularly acute magnitude, of narrow distribution, or of an especially severe character.<sup>215</sup> Although *Lingle* is addressed to takings law generally rather than to a specific "vexing subsidiary question[]" within it, these normative reasons for granting compensation have much significance in shaping the Court's investment-backed expectations jurisprudence

---

<sup>211</sup> See *Lingle*, 544 U.S. at 538–39; *Palazzolo*, 533 U.S. at 617; see also *supra* note 46 and accompanying text. Compare *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1034 (1992) (Kennedy, J., concurring in the judgment), and *Good v. United States*, 189 F.3d 1355, 1361 (Fed. Cir. 1999), with *Palm Beach Isles Assocs. v. United States (Palm Beach I)*, 231 F.3d 1354, 1363–64 (Fed. Cir. 2000).

<sup>212</sup> See *Lingle*, 544 U.S. at 542–43; *Palazzolo*, 533 U.S. at 626–30; *id.* at 632–36 (O'Connor, J., concurring); *Lucas*, 505 U.S. at 1017–19; see also *infra* notes 265–285 and accompanying text.

<sup>213</sup> See 544 U.S. at 539, 542. Clearly, a due process analysis is proper to test a regulation's validity; it is simply improper as a litmus test for Fifth Amendment compensation. See *id.* at 543. Compensation cannot validate a regulation that fails a due process inquiry. See *id.*

<sup>214</sup> See *id.* at 539. From a legal history viewpoint, regulatory takings are the direct descendants of physical appropriations. See *id.*

<sup>215</sup> See *id.* at 542. These factors are, perhaps unsurprisingly, good analogues for the *Penn Central Transportation Co. v. New York City* analysis: diminution in value (magnitude), interference with investment-backed expectations (magnitude and distribution), and character of the government action (character of the burden). *Penn. Cent. Transp. Co. v. New York City*, 438 U.S. 104, 124 (1978); see Baron, *supra* note 13, at 650–51 (stating that the Court could decide that the three *Lingle* factors are "subsumed in the *Penn Central* factors").

in a way that comports with the initial principles behind investment-backed expectations.<sup>216</sup>

The magnitude, distribution, and character of the burden imposed by regulations are, in effect, descriptions for the paradigm sources of demoralization costs.<sup>217</sup> Citizens whose property is substantially burdened by regulations that appear to be (or worse, are in fact) directed specifically at their unique situation are rightly indignant and ask, "Why me?"<sup>218</sup> Compensating those negatively affected by a regulatory scheme can assure citizens that the government is not acting deliberately to single out holders of wealth for redistribution, or it can relieve the psychological pain caused by the imposition of a severe burden.<sup>219</sup> Absent compensation, a reallocational choice that imposes a severe or not widely shared burden necessarily creates relatively high demoralization costs.<sup>220</sup> For courts that need administrable standards, public choice models serve as important proxies for demoralization costs engendered by the theoretical concepts embodied in the general terms magnitude, distribution, and character of the burden.<sup>221</sup> Although Madison's belief

---

<sup>216</sup> See 544 U.S. at 539.

<sup>217</sup> See Michelman, *supra* note 25, at 1216-18; see also *Lucas*, 505 U.S. at 1017 (suggesting that burdens of intensive magnitude are unlikely to be followed with a reciprocal benefit, thus undergirding the categorical rule).

<sup>218</sup> See Baron, *supra* note 13, at 647. Although a burden of substantial magnitude is required to generate sufficiently high demoralization costs to warrant compensation, see *Lingle*, 544 U.S. at 539-40, Michelman, *supra* note 25, at 1214-18, the primary focus of a demoralization analysis is on the distribution of the burden—the "why me?" question, see Baron, *supra* note 13, at 647; Michelman, *supra* note 25, at 1215-18 (stating that uncertainty about potential loss is insufficient to generate demoralization costs because insurance is sufficient to calm expectations; rather, the focus is on imputing to the majority systematic exploitation of the claimant). The distribution analysis is not mathematical because demoralization costs are psychological, but courts can root out majoritarian exploitation by looking to whether benefits of the regulation are reciprocal, or by reference to special interest politics or exit and voice frameworks suggested by public choice theory. See FISCHEL, *supra* note 68, at 139, 182, 217; Michelman, *supra* note 25, at 1215-18. Obviously, the narrower the distribution, the less difficult it would be for governments to achieve settlements, making compensation questions all the more relevant to regulations that impose a unique burden. See Michelman, *supra* note 25, at 1217.

<sup>219</sup> See Michelman, *supra* note 25, at 1216 (stating that there is a difference, as it relates to the genesis of demoralization, between losses (which necessarily result in redistributions) due to the random chance of, say, a natural disaster, as opposed to a deliberate choice to reallocate wealth by those in society with governmental power).

<sup>220</sup> See *id.* at 1214-18; see also *supra* note 112 and accompanying text.

<sup>221</sup> See *Lingle*, 544 U.S. at 542-43; *supra* notes 177-205 and accompanying text. Specifically, a claimant may demonstrate that majoritarian decision-making processes resulted in an unfair distribution of regulatory effects or an unequal allocation of a particularly severe burden with no concomitant benefit accruing to those affected. See *supra* notes 177-205 and accompanying text. Or courts can be attuned to the hazards of special interest groups skewing the distribution of regulatory effects. See *supra* notes 177-205 and accompanying text.

in the ability of the federal structure to ward off the evils of majoritarianism warrants deference,<sup>222</sup> courts should be attuned to the specific hazards public choice theory identifies: interest group politics and local majoritarianism.<sup>223</sup> Both of these process failures result in either burdens of a severe magnitude or narrow distribution.<sup>224</sup>

Contrary to the opinions of some commentators, by engaging in an effects-of-the-regulation review directed at uncovering failed political processes (and informed by public choice theory), the Court would not be conducting a means-end process-based review.<sup>225</sup> Instead, a focus on regulatory effects as applied to the claimant is a useful means to uncover those regulations that public choice theory empirically suggests are indicative of failed political processes, which are the normative heart of the takings compensation decision.<sup>226</sup> Indeed, the Court's rejection of a means-end "substantially advances" test was meant to distinguish substantive due process review under the Fifth and Fourteenth Amendments from Takings Clause compensation review, which is informed by different theoretical and legal principles.<sup>227</sup>

<sup>222</sup> See *supra* notes 63–67 and accompanying text.

<sup>223</sup> See *supra* notes 177–205 and accompanying text.

<sup>224</sup> See *Lingle*, 544 U.S. at 542–43; see also *supra* notes 177–205 and accompanying text. Intuitively, burdens of significant magnitude and narrow distribution must go hand in hand to generate demoralization costs that exceed settlement costs: if the burden is not severe, it is too costly to compensate for "every such change in the general law." *Pa. Coal Co. v. Mahon*, 260 U.S. 393, 413 (1922). If the burden is severe, but also shared by thousands, it is also too costly to compensate because of transaction costs. Michelman, *supra* note 25, at 1176; see *Lucas*, 505 U.S. at 1072 (Stevens, J., dissenting) (arguing that the "generality" of the regulation is determinative of the compensation question). Thus, only a combination of magnitude and distribution of the burden unite to create sufficient demoralization costs such that it is "cheaper" for society to simply compensate an affected property owner. See Michelman, *supra* note 25, at 1215–18; cf. Echeverria, *supra* note 27, at 199–200. Additionally, a claimant who fails the threshold inquiry into whether he or she actually has a protected expectation (for example, because of notice of a regulation that reduced the purchase price of the property) will not be demoralized because, in effect, such a claimant assumes the risk of devaluation due to the regulation. See *supra* notes 143–148 and accompanying text; see also *Palm Beach Isles Assocs. v. United States (Palm Beach II)*, 231 F.3d 1365, 1369–70 (Fed. Cir. 2000) (Gajarsa, J., dissenting). Identifying the lack of demoralization costs accruing to speculators who lose a gamble is a key safety-valve in the analysis, but the inquiry is inherently subtle and fact-intensive. See *Palazzolo*, 533 U.S. at 635–36 (O'Connor, J., concurring); Michelman, *supra* note 25, at 1238–40 & n.124 (stating that this inquiry requires "gingerly handling").

<sup>225</sup> See, e.g., Fenster, *supra* note 13, at 700. The Court is clear that takings law is not designed to evaluate the process directly, but the purpose of the Takings Clause is to remedy failed political processes through constitutional protection. See *Lingle*, 544 U.S. at 542–43.

<sup>226</sup> See *supra* notes 173–196 and accompanying text; see also FISCHER, *supra* note 68, at 139–40, 185; Sunstein, *supra* note 70, at 1690.

<sup>227</sup> See *Lingle*, 544 U.S. at 542.

Nothing about a demoralization cost takings jurisprudence informed by public choice theory suggests that it is equivalent to substantive due process review because such a method of review is properly focused on the constitutional text, informed by the policies underlying the Takings Clause, and comports with what limited originalist evidence is available.<sup>228</sup> Even though the distinction between substantive due process and a demoralization analysis may facially appear to be minimal, the two are analytically distinct because public choice theory merely provides administrable tools to govern the normative, text-based constitutional question of whether to grant compensation in the face of a valid regulatory action, while a means-end substantive due process review is improperly focused on the constitutionality of the regulation itself.<sup>229</sup>

Lingle indicates that the Court is unifying the themes of different takings tests around the principle articulated in the Court's 1960 decision in *Armstrong v. United States*: that the Takings Clause is meant to alleviate unjust allocations of burdens placed on property because the public should bear the burdens it imposes on individuals for its own benefit.<sup>230</sup> In other words, the issue is fairness.<sup>231</sup> At the same time, the Court did not develop a legal standard for determining fairness beyond those articulated in *Lucas*, its 1978 decision in *Penn Central Transportation Co. v. New York City*, and its 1982 decision in *Loretto v. Teleprompter Manhattan CATV Corp.*; the Court was concerned with a broader inquiry into the purpose of the Takings Clause in the context finding the proper approach to deciding takings claims.<sup>232</sup> Although Lingle is no

---

<sup>228</sup> See *id.* at 542-44; see also *supra* notes 57-72 and accompanying text.

<sup>229</sup> See Lingle, 544 U.S. at 542-44; *id.* at 548-49 (Kennedy, J., concurring) (affirming that substantive due process review, although distinct from Takings Clause review, survives); cf. Michelman, *supra* note 25, at 1215-18 (stating that a demoralization analysis is directed at finding a practical way to decide whether certain regulations require compensation and that a purely subjective interview with property owners is obviously insufficient). The blurriness of the distinction between substantive due process and takings review is likely due to the fact that there is no bright line method to make the normative decision about whether to grant compensation, see *Penn Cent.*, 438 U.S. at 124, outside of Professor Epstein's strong property rights protection view; see EPSTEIN, *supra* note 59, at 332-33. Because "[g]overnment 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," *Pa. Coal*, 260 U.S. at 413, we are left, necessarily, with an "ad hoc, factual inquir[y]," *Penn Cent.*, 438 U.S. at 124.

<sup>230</sup> See Lingle, 544 U.S. at 542-43 (quoting *Armstrong v. United States*, 364 U.S. 40, 49 (1960)).

<sup>231</sup> See *id.*; Fenster, *supra* note 13, at 695, 699-700.

<sup>232</sup> See Lingle, 544 U.S. at 538-39, 542-44; *Lucas*, 505 U.S. at 1017; *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 433-37 (1982); *Penn Cent.*, 438 U.S. at 124; Fenster, *supra* note 13, at 695, 699-700.

panacea, at minimum it clarifies the law and reconnects takings discourse with the public's conception of the role of fairness and justice embodied in constitutional principles.<sup>235</sup> Importantly, *Lingle* signals that the Court may be finally ready to allow investment-backed expectations to develop into the richly textured inquiry into fairness and efficiency Michelman intended it to be.<sup>234</sup>

### B. *Reading the Court's Takings Opinions Consistently with Demoralization Cost Analysis Results in Doctrinal Coherence*

Since *Penn Central*, the Court has proliferated different takings tests for different factual situations.<sup>235</sup> *Lingle* distilled legal principles that apply equally across those different tests, thereby clarifying the law.<sup>236</sup> The Court can move a step closer to doctrinal clarity by applying those decisional principles to the dispute about whether investment-backed expectations are an element of a total wipeout analysis.<sup>237</sup> In light of *Lingle* and a full understanding of investment-backed expectations' fundamental principles,<sup>238</sup> the dispute over including investment-backed expectations in a total taking claim analysis should be resolved in favor of including the test because its inclusion would result in greater intellectual consistency and doctrinal coherence in takings law.<sup>239</sup>

<sup>235</sup> See *Lingle*, 544 U.S. at 538-39; Baron, *supra* note 13, at 646-48, 651-54.

<sup>234</sup> See *Lingle*, 544 U.S. at 539, 542; Baron, *supra* note 13, at 647-48. The preceding discussion does not presuppose that burdens must impact an existing use: an expectation may be protected. See *Lucas*, 505 U.S. at 1017-19; *Penn Cent.*, 438 U.S. at 124-25; Michelman, *supra* note 25, at 1213, 1244 (analogizing the protection of property expectations to the celebrated *Pierson v. Post*, 3 Cai. 175 (N.Y. 1805), decision because the legal wrong is a deliberate interference with another's crystallized expectations). Although deciding such questions may be intuitively straightforward to one individual, the lack of clear rules and shared norms about property expectations makes the application of the first step in the analysis, defining what a protectable expectation is, a difficult task for courts. See Mandelker, *supra* note 134, at 225-26. The Court's *Palazzolo* decision, and specifically Justice O'Connor's concurrence, added some clarity to defining an expectation, but by no means has the Court conclusively decided upon a legal formula. See 533 U.S. at 632-36 (O'Connor, J., concurring).

<sup>235</sup> See *Lingle*, 544 U.S. at 538-39.

<sup>236</sup> See *id.* at 539, 542-43; see also *supra* notes 213-216 and accompanying text.

<sup>237</sup> See *Lucas*, 505 U.S. at 1015, 1019.

<sup>238</sup> See *Lingle*, 544 U.S. at 542-43; see also *supra* notes 213-234 and accompanying text (discussing the foundational principles behind Michelman's investment-backed expectations analysis).

<sup>239</sup> See *infra* notes 261-294 and accompanying text.

## 1. The Federal Circuit's Strong Rhetoric Lacks Intellectual Foundations

The dissent from the U.S. Court of Appeals for the Federal Circuit's 2000 denial of a petition for rehearing en banc in *Palm Beach Isles Associates v. United States* was correct in stating that investment-backed expectations are an integral part of a *Lucas*-type case, but for the wrong—or at least incomplete—reasons.<sup>240</sup> By the same token, the *Palm Beach* panel's reading of *Lucas* as rejecting an inquiry into investment-backed expectations is theoretically flawed on its face because a legal test that looks only at the magnitude of the burden is alone an insufficient—albeit important—indicator of a failed process for which the Constitution requires compensation.<sup>241</sup> Moreover, the panel's reading of the investment-backed expectations requirement overlooks its purpose: the opinion suggests that including investment-backed expectations will affect the amount of compensation awarded, when, in fact, that is a wholly distinct question to which the test is simply not directed.<sup>242</sup> Instead, it is directed at determining *whether* to grant compensation by way of a demoralization cost analysis, not how much is to be granted.<sup>243</sup>

Structurally, as the judge dissenting from the denial of a rehearing of *Palm Beach* en banc correctly noted, *Lucas* only precluded a balancing of the government interest and the private burden when the magnitude of such a burden results in the denial of all economically beneficial use.<sup>244</sup> The *Palm Beach* dissent, however, only partially articulates the affirmative reasons why investment-backed expectations should be included in every regulatory takings case.<sup>245</sup> The dissent's focus is on

---

<sup>240</sup> See *Palm Beach II*, 231 F.3d at 1367–69; *infra* notes 244–249 and accompanying text.

<sup>241</sup> See *Palm Beach I*, 231 F.3d at 1364; Michelman, *supra* note 25, at 1218. Obviously, the magnitude of the burden is a very important part of either the utilitarian or the fairness calculation. See Michelman, *supra* note 25, at 1191. In fact, magnitude is so important that it has its own prong in the *Penn Central* analysis: the first one. See 438 U.S. at 124. But if the proposition is accepted that the Constitution requires compensation based on antimajoritarian policies, not mere adjustment of benefits and burdens, then factors beyond magnitude are also relevant. See *supra* notes 57–71 and accompanying text. Of particular relevance may be the ability of property owners to exit the market or influence the process, thereby lowering demoralization costs of government regulation. See FISCHER, *supra* note 68, at 324; Michelman, *supra* note 25, at 1218; see also *supra* notes 170–205 and accompanying text (discussing public choice theory's application to this thorny area).

<sup>242</sup> See *Palm Beach I*, 231 F.3d at 1363.

<sup>243</sup> See *Pa. Coal*, 260 U.S. at 413–15; Michelman, *supra* note 25, at 1213–18; see also *Lingle*, 544 U.S. at 537–39, 542.

<sup>244</sup> See *Palm Beach II*, 231 F.3d at 1368 (Gajarsa, J., dissenting) (“*Lucas* never removed or modified the necessary *second* criterion—investment-backed expectations.”).

<sup>245</sup> See *id.* at 1369–70 (discussing only the notice function of the threshold analysis, which can militate against a reliance argument in favor of demonstrating high demoraliza-

the threshold question in investment-backed expectations analysis: is there an expectation that should be protected?<sup>246</sup> Although that question has befuddled courts, the investment-backed expectations analysis is deeper and more textured than that single question.<sup>247</sup> The dissenting judge never discussed the normative core of the Takings Clause analysis inherent in investment-backed expectations: whether the regulation imposed sufficient demoralization costs to warrant compensation.<sup>248</sup> Thus, although the dissenting judge's argument to include investment-backed expectations is facially and structurally valid, it is unsupported by compelling reasoning *to* include the test.<sup>249</sup>

## 2. Rereading *Lucas* After *Lingle*'s Elaboration

Fortunately, a close reading of *Lucas* with an understanding of the foundations underneath the investment-backed expectations analysis fills this analytical gap in the *Palm Beach* dispute.<sup>250</sup> Moreover, in light of *Lingle*'s conceptual marshalling, *Lucas* stands on firmer ground itself because its reasoning is, implicitly, consistent with a demoralization cost compensation rule.<sup>251</sup>

The *Lucas* Court focuses much of its rhetorical energy on a discussion of the threshold expectations analysis.<sup>252</sup> Justice Scalia's majority opinion in *Lucas* deals at length with the "background principles" exception to the categorical rule advanced in the case.<sup>253</sup> This discussion draws a bright line in the definition of what expectations are not pro-

---

tion costs); cf. *Palazzolo*, 533 U.S. at 634-36 (O'Connor, J., concurring); *supra* notes 143-154 and accompanying text. Although Judge Gajarsa references Justice Kennedy's *Lucas* concurrence to support his point, Justice Kennedy's opinion suffers from precisely the same fault: it discusses only the threshold analysis which defines the protected expectation, not the deeper, normative demoralization analysis. See *Lucas*, 505 U.S. at 1032-36 (Kennedy, J., concurring in the judgment); *infra* notes 258-260 and accompanying text.

<sup>246</sup> See *Palm Beach II*, 231 F.3d at 1369-70 (Gajarsa, J., dissenting). The primary function of this step is to weed out those claims from speculators seeking a windfall. See *supra* notes 143-154 and accompanying text.

<sup>247</sup> See *supra* notes 150-162 and accompanying text.

<sup>248</sup> See *Palm Beach II*, 231 F.3d at 1369-70 (Gajarsa, J., dissenting). It is difficult to fault the opinion for failing to do so; the Supreme Court, too, has failed in this endeavor. See, e.g., *Penn Cent.*, 438 U.S. at 124; see also *supra* notes 158-169 and accompanying text.

<sup>249</sup> See *Palm Beach II*, 231 F.3d at 1369-70 (Gajarsa, J., dissenting).

<sup>250</sup> See *infra* notes 251-313 and accompanying text.

<sup>251</sup> See *Lingle*, 544 U.S. at 542-44 (discussing magnitude and distribution as determinative conceptual factors); *Lucas*, 505 U.S. at 1014-19; Michelman, *supra* note 25, at 1214-18.

<sup>252</sup> See 505 U.S. at 1027-32; cf. *supra* notes 150-157 and accompanying text.

<sup>253</sup> See 505 U.S. at 1027-32.

tected: inherent limitations on the title to property, based on the state's traditional common law of property and nuisance.<sup>254</sup>

Thus, if a government regulation completely eliminates the value of property, but if that regulation merely prohibits a use that was otherwise illegal, no compensation is due under *Lucas* because the government did not "take" anything the owner could have reasonably relied upon.<sup>255</sup> Indeed, Justice Scalia elaborated on the scope of his view of what expectations are constitutionally protected in his *Palazzolo* concurrence.<sup>256</sup> There, he indicated that notice of a regulation is, in his view, an immaterial consideration when considering a takings claim because the only relevant factor in shaping protected expectations is the state's background law of property and nuisance.<sup>257</sup>

Justice Kennedy, in his concurring opinion in *Lucas*, agreed with Justice Scalia on the general principle that the Constitution does not provide absolute protection to all property rights, but Kennedy's view of the scope of the limitations on (or exceptions to) constitutional property protection is somewhat wider.<sup>258</sup> Justice Kennedy's opinion referenced investment-backed expectations as the relevant defining test to determine those property interests for which the Fifth Amendment guarantees compensation in the event of a taking.<sup>259</sup> This use of investment-backed expectations is only partially correct because it fails to move beyond the threshold definitional question of what rights are protected and into the normative demoralization cost analysis.<sup>260</sup>

---

<sup>254</sup> See *id.* at 1029.

<sup>255</sup> See *id.*

<sup>256</sup> See 533 U.S. at 637 (Scalia, J., concurring).

<sup>257</sup> See *id.*

<sup>258</sup> See 505 U.S. at 1034-35 (Kennedy, J., concurring in the judgment). Justice O'Connor agreed that the scope of Fifth Amendment property protection is defined through a factual inquiry into the owner's expectations. See *Palazzolo*, 533 U.S. at 635-36 (O'Connor, J., concurring).

<sup>259</sup> See *Lucas*, 505 U.S. at 1034-35 (Kennedy, J., concurring in the judgment). Justice Scalia's stricter protection of property rights is nonetheless factually based because he would grant the government greater latitude to regulate personal property than real property. See *id.* at 1027-28 (majority opinion). This view is rooted in making determinations about property based on tradition or history, rather than, as Michelman would rather it be, based on economic expectations. Compare *id.* (grounding concept of property in traditional state law principles), with Michelman, *supra* note 25, at 1211-12 (grounding property as utilitarian concept).

<sup>260</sup> See *supra* notes 134-148 and accompanying text.



Although the determination about what rights are protected is necessary to a well-developed demoralization cost analysis,<sup>261</sup> no particular resolution is necessary to engage in the more important, normative component of the investment-backed expectations analysis.<sup>262</sup> All that matters is that courts make a determination about where constitutional protection stops (so as to avoid windfalls to speculators, for example), and do so consistently.<sup>263</sup>

Nevertheless, even as the *Lucas* Court was sidetracked with determining the scope of constitutional protection, it implicitly recognized the normative components of a demoralization cost analysis in formulating its "categorical" rule.<sup>264</sup> Although the explicit language of the decision focused purely on the diminution in value component of a takings claim, the *reasoning* of the opinion did not rely on diminution in value as per se constitutionally compensable.<sup>265</sup> Instead, Justice Scalia drew upon James Madison's antimajoritarianism goal<sup>266</sup> to support the *Lucas* compensation rule.<sup>267</sup> In the complete elimination of value context, there is a "heightened risk that private property is being pressed into some form of public service."<sup>268</sup>

Avoiding that abuse of governmental power is the goal of the *Lucas* test, and the decision employs a demoralization cost-type test to con-

<sup>261</sup> See *supra* notes 150–157 and accompanying text; cf. *Lucas*, 505 U.S. at 1017 ("For what is the land but the profits thereof?" (quoting 1 E. COKE, INSTITUTES ch. 1, § 1 (1st Am. ed. 1812))).

<sup>262</sup> See *supra* notes 150–157 and accompanying text.

<sup>263</sup> See *Palazzolo*, 533 U.S. at 635–36 (O'Connor, J., concurring). In the sense that *Lucas* pushed the definition of protected property further than it previously had been, commentators have called the decision a victory for private landowners. See Laura S. Underkuffler, *Tahoe's Requiem: The Death of the Scalian View of Property and Justice*, 21 CONST. COMMENT. 727, 727, 730 (2004). Although the gravity of this issue is not to be understated because it has important practical ramifications, the analytical importance of that increased protection is nil: as this Note argues, *Lucas* may now be seen as more important for properly basing its reasoning on a demoralization framework that *Lingle* also accepts. See *infra* notes 269–281 and accompanying text.

<sup>264</sup> See 505 U.S. at 1017, 1019 n.8.

<sup>265</sup> See *id.* at 1017–19. Justice Scalia rightly did not solely rely on the magnitudinal issue because that alone is an insufficient normative reason to grant compensation. See Michelman, *supra* note 25, at 1218. The important analytical point is that although a complete diminution in value is "determinative" in a *Lucas* case, the reason *why* it is determinative has not been so clearly laid out by the Court. See *Lingle*, 544 U.S. at 539; *Lucas*, 505 U.S. at 1017–19.

<sup>266</sup> See *supra* notes 63–67 and accompanying text.

<sup>267</sup> See 505 U.S. at 1018.

<sup>268</sup> *Id.*

nect its reasoning with that underlying policy goal.<sup>269</sup> *Lucas* states first that when a regulation eliminates a piece of property's value, courts will not simply assume that the legislature is acting evenhandedly such that property owners can reasonably expect to receive as much value as they lost, postregulation.<sup>270</sup> This risk of disproportionate, inherently redistributive burdens being placed on property owners with no reciprocal advantage is precisely the evil that property law seeks to mitigate in order to encourage investment.<sup>271</sup> Indeed, an important component of Michelman's normative rule is that demoralization costs are likely to be high when systematic redistributive choices can be imputed to majority decision makers.<sup>272</sup> One way that such a choice is easily, or at least intuitively, apparent is through a regulation that severely diminishes the subject property's value.<sup>273</sup> On a broader scale, public choice theory empirically and theoretically identifies those situations where courts should be most probing because of the risks of such redistributive choices.<sup>274</sup> Thus, one reading of *Lucas* indicates that it merely applied an intuitive utilitarian approach when formulating its categorical test to make the compensation decision by determining that complete eliminations of value result in high demoralization costs.<sup>275</sup>

*Lucas's* reasoning comports with a demoralization analysis on another ground: it relies on avoiding demoralization costs imposed through "singling out" as the primary reason to grant compensation in total wipeout cases.<sup>276</sup> The psychological effect of being singled out by the state to bear a burden personally for the benefit of the rest of society is the essence of demoralization costs.<sup>277</sup> This analytical step is the

---

<sup>269</sup> See *id.* at 1017–19; Michelman, *supra* note 25, at 1213–16. The issue of how to connect a real-world test to the underlying policy goals of the Takings Clause has bedeviled commentators for over a generation. Compare Sax, *supra* note 48, at 61–62 (suggesting, in 1964, that compensation is due when the government acts as an enterprise), with Rose, *supra* note 59, at 562 n.6 (listing, in 1984, different approaches, none of which is determinative).

<sup>270</sup> See 505 U.S. at 1017–18.

<sup>271</sup> See *id.* at 1035 (Kennedy, J., concurring in the judgment) (stating that the law protects "private expectations to ensure private investment"); Michelman, *supra* note 25, at 1212–13.

<sup>272</sup> See Michelman, *supra* note 25, at 1217.

<sup>273</sup> See *id.* at 1230–31.

<sup>274</sup> See *supra* notes 176–194 and accompanying text.

<sup>275</sup> See 505 U.S. at 1017–18; Michelman, *supra* note 25, at 1229–35.

<sup>276</sup> See 505 U.S. at 1019 ("[W]hen the owner of real property has been called upon to sacrifice all economically beneficial uses in the name of the common good . . . he has suffered a taking." (second emphasis added)).

<sup>277</sup> See Michelman, *supra* note 25, at 1216–17 ("[T]here must be at work a tacit assumption that losses which seem the proximate results of deliberate collective decision have a spe-

core of *Lucas's* categorical rule and is the link between it, Michelman, and the antimajoritarian policy underlying the Takings Clause.<sup>278</sup> Moreover, the particular process failures identified empirically by public choice theory suggest that *Lucas* was right in searching for effects that indicate the existence of the evils meant to be avoided by the Takings Clause's protection.<sup>279</sup> The analytical shortfall of *Lucas* is merely that it took a logical shortcut in not explicitly laying out the foundational reasoning behind its categorical treatment.<sup>280</sup> That lack of an explicit logical foundation is the source of the intellectual inconsistency that has marred the Court's takings jurisprudence.<sup>281</sup>

In essence, the reasoning behind *Lucas's* categorical rule lies in two key statements: (1) "[w]hen no productive or economically beneficial use of land is permitted, it is less realistic to indulge our usual assumption that the legislature is simply 'adjusting the benefits and burdens of economic life,'" and (2) "there are good reasons for our frequently expressed belief that when the owner of real property has been called upon to sacrifice all economically beneficial uses in the name of the common good . . . he has suffered a taking."<sup>282</sup> Those two statements suggest that the Court simply views such severe regulations as

---

cial counterproductive potency beyond any which may be contained in other kinds of losses.").

<sup>278</sup> See *id.*; see also *Lucas*, 505 U.S. at 1019; THE FEDERALIST NO. 10, *supra* note 59, at 60; *supra* notes 63–67 and accompanying text.

<sup>279</sup> See *supra* notes 176–194 and accompanying text; cf. Gaba, *supra* note 58, at 589–90 (suggesting that distributive justice concerns militate against allowing the government to single out property owners, but that the Court has not adopted a clear distributive justice approach).

<sup>280</sup> See 505 U.S. at 1017–19.

<sup>281</sup> See *Lingle*, 544 U.S. at 539 ("[O]ur regulatory takings jurisprudence cannot be characterized as unified"). *Lucas* contended that it was not inventing a new legal rule but merely applying past precedent. 505 U.S. at 1016 n.6. If the *Lucas* majority is faithful to its statement, the above analysis may give some consistency to a historically incoherent area of constitutional law. See Gaba, *supra* note 58, at 569.

<sup>282</sup> See 505 U.S. at 1017–19. The fact that *Lucas* focuses exclusively on real property provides further evidence that the Court made a judgment that regulations depriving land of all economic value are simply a very good proxy for demoralization costs. See *id.* at 1027–28. First of all, real property is immobile, so demoralization costs cannot be limited by exit from a jurisdiction. See FISCHER, *supra* note 68, at 324. Moreover, real estate investments tend to be substantial and typically account for the largest portion of an individual's net worth. See WILLIAM A. FISCHER, THE HOMEVOTER HYPOTHESIS 4 (2001). Traditionally, the law accorded more freedom to use and enjoy real property than personalty, so a court may see impinging on that traditional freedom as more egregious. See *Lucas*, 505 U.S. at 1027–28. There is also something different in kind about real estate, given that it is tangible, that may make the intuitive judgment that some process went awry more reasonable because people—or at least the Court—attach(es) more psychological value to being able to employ real estate as they see fit. Cf. Ruiz, *supra* note 46, at 1331–39.

easily identifiable situations where the legislature improperly ignored the high demoralization costs that accompany a complete wipeout of a tangible and extensive investment in real estate and should have instead compensated the regulatory victim.<sup>283</sup> Although it did not state its reasoning explicitly, the Court relies on a demoralization cost analysis to reach its result, but, in doing so implicitly, it suggests—improperly—that magnitude of the burden alone is sufficient to identify high demoralization costs situations.<sup>284</sup> Although magnitude is important, and probably determinative, there are other factors at play in the analysis.<sup>285</sup>

### 3. Glossing the Past: *Penn Central* as Consistent with Michelman

In light of *Lingle's* thematic distillation, even *Penn Central* appears to have focused, rhetorically at least, on a demoralization analysis as the normative basis for making a decision.<sup>286</sup> The *Penn Central* majority contrasted the regulation at issue, which the majority characterized as a broad, comprehensive measure affecting hundreds of parcels, with spot zoning, a scheme in which certain parcels of property are singled out by lawmakers.<sup>287</sup> Indeed, the Court noted that the regulation supplies a reciprocal benefit—economically to the property and aesthetically to the citizens—and defers to legislative judgment.<sup>288</sup> Although the Court acknowledged that the impact of the regulation was not completely uniform and that the law likely had a more severe impact on the claimant than others, it did not view the effects of the regulation as indicative of a flawed process.<sup>289</sup> Therefore, given that the Court viewed the burden as shared and the severity of it minimal, it did not see the requisite demoralization costs to grant compensation.<sup>290</sup>

Justice Rehnquist's dissent exposed an analytical flaw in this reasoning: the determination that the regulatory effects are not severe

---

<sup>283</sup> See Michelman, *supra* note 25, at 1191, 1213–18, 1234.

<sup>284</sup> See *id.*; see also *Lucas*, 505 U.S. at 1017–19.

<sup>285</sup> See *Lingle*, 544 U.S. at 542–43 (magnitude, distribution, and character of the burden as the relevant factors in Takings Clause analysis); Michelman, *supra* note 25, at 1191, 1213–18, 1234; see also FISCHER, *supra* note 68, at 324 (discussing exit and voice as other considerations); cf. *Palm Beach I*, 231 F.3d at 1364 n.4.

<sup>286</sup> See *Penn Cent.*, 438 U.S. 132–34.

<sup>287</sup> See *id.* at 132.

<sup>288</sup> See *id.* at 134–35.

<sup>289</sup> See *id.* at 133–35. The *Penn Central* Court's focus on the determination made by the city council is worth noting because it connects the determination it makes as to regulatory effects with its deference to the political process. See *id.* This nexus between effects and process is what public choice theorists have suggested is the key to unlocking the takings puzzle. See *supra* notes 170–206 and accompanying text.

<sup>290</sup> See *Penn Cent.*, 438 U.S. at 132–35.

enough to warrant judicial interference (because there is no indication of high demoralization costs) is somewhat arbitrary.<sup>291</sup> To the dissent, the regulation *did* single out these property owners and inflict demoralization costs for which compensation should be paid because a significant amount of value was destroyed, and the owners now have an affirmative duty to keep their property in good repair.<sup>292</sup> The dissent recognized that regulations that do not single out property owners and inflict a severe burden do not require compensation because they do not impose inefficiencies through demoralization costs.<sup>293</sup> In short, the majority and dissent simply disagreed about the extent and distribution of the burden, or, put another way, about the extent to which the regulation interferes with investment-backed expectations, properly understood.<sup>294</sup>

#### 4. Possibilities for a Coherent Approach

Faced with this disagreement, it is reasonable to ask whether a demoralization analysis can be administrable in court.<sup>295</sup> *Lucas* can be applauded for attempting to bring predictability and bright line rules to this gray area of law.<sup>296</sup> In doing so, however, the Supreme Court retreated from doctrinal coherence and muddied the waters of its jurisprudence by compounding the number and nature of expressed legal tests when, in fact, the normative principles remain the same across regulatory takings tests.<sup>297</sup> If the Court were to explicitly adopt an investment-backed expectations analysis that actually comported with the foundational principles behind the doctrine, it would not be departing from precedent or principle.<sup>298</sup> Moreover, public choice theory supplies the necessary intellectual tools to properly engage in a demoralization

---

<sup>291</sup> See *id.* at 138–40 (Rehnquist, J., dissenting).

<sup>292</sup> See *id.* at 138–40, 146.

<sup>293</sup> See *id.* at 147.

<sup>294</sup> See *id.* at 133–35 (majority opinion); *id.* at 138–40 (Rehnquist, J., dissenting).

<sup>295</sup> See *supra* notes 166–167 and accompanying text.

<sup>296</sup> See 505 U.S. at 1019.

<sup>297</sup> See *Lingle*, 544 U.S. at 539, 542.

<sup>298</sup> See *id.*; *supra* notes 93–133 and accompanying text. Indeed, the Court already embarks on a similar analysis in equal protection cases. See, e.g., *Vill. of Willowbrook v. Olech*, 528 U.S. 562, 563–65 (2000) (stating that plaintiffs, who were denied municipal water service because of alleged ill-will from city officials following an unrelated lawsuit, could challenge the city's actions as a "class of one" under the Equal Protection Clause on the ground that they were intentionally treated differently from others).

zation cost analysis without complicated valuation issues because the overarching focus is on fairness principles.<sup>299</sup>

Because takings law has spawned numerous, alternative legal tests given its complexity, adopting investment-backed expectations as the decisional fulcrum can bring much-needed doctrinal consistency to Fifth Amendment takings law.<sup>300</sup> More importantly, embracing a demoralization cost investment-backed expectations analysis would be normatively superior because it would support efficient outcomes that are also fair.<sup>301</sup>

Therefore, the Court should adopt an investment-backed expectations analysis, with its variables informed by public choice princi-

---

<sup>299</sup> See FISCHEL, *supra* note 68, at 216–17.

<sup>300</sup> See *Lingle*, 544 U.S. at 538–40; *Palazzolo*, 533 U.S. at 617. Although adopting an investment-backed expectations test would enhance doctrinal consistency, it does not avoid the issue raised by Justice Rehnquist's dissent in *Penn Central*: the test still requires judges to decide whether the political process improperly ignored demoralization costs to escape the constitutional duty to compensate. See *supra* notes 291–294 and accompanying text. One possible answer is that judges are good at making these determinations, and the law should allow them to do so as a matter of institutional competency. See Michelman, *supra* note 25, at 1248–53; see also Fenster, *supra* note 13, at 730, 739. But this judgment should not be left to courts alone; all branches should exercise their power faithfully to the constitutional charge. See Michelman, *supra* note 25, at 1248–53. Some commentators suggest, through public choice theory, helpful analytical tools to limit judicial activism. See *supra* notes 170–196 and accompanying text. Others see the Court's role as an extremely limited, legal process review, which is antithetical to making judgments about demoralization because it is deferential to the political process. See Fenster, *supra* note 13, at 734–39. *But cf.* Eagle, *supra* note 13, at 947–50 (arguing for substantive due process review of takings). But if the point of takings compensation is to safeguard against failed processes, see *supra* notes 57–71 and accompanying text, the Constitution would appear to mandate a role for the judiciary, see *infra* note 308; cf. Eagle, *supra* note 13, at 947–50.

<sup>301</sup> See *supra* notes 103–127 and accompanying text; see also Fischel & Shapiro, *supra* note 120, at 277, 292 (stating that the utilitarian criterion is “consistent with principles of economic efficiency,” but noting that such a result is also fair). Whether the Court does so using the sometimes-maligned term “investment-backed expectations” or the trilogy employed in *Lingle* is immaterial because each set of factors evaluates similar, if not the same, set of issues; what is important is achieving the best possible normative law. See *Lingle*, 544 U.S. at 538–39, 542–43; Fischel & Shapiro, *supra* note 120, at 292. “Investment-backed expectations” may be a better choice, however, because the terminology itself does not lend itself to oversimplification in practical application, as might be the case with straightforward terms like magnitude and distribution. See Michelman, *supra* note 25, at 1248–53. The inquiry is factually textured and subtle. See *Palazzolo*, 533 U.S. at 634–36 (O'Connor, J., concurring) (regarding the first prong of the investment-backed expectations analysis); Michelman, *supra* note 25, at 1213–18 (regarding the more difficult demoralization prong). Therefore, a balance must be struck between educating the bar about the nature of the substantive legal inquiry and using terminology that, due to its simplicity, lends itself to intellectual abuse and distortion over time. See Michelman, *supra* note 25, at 1248–50.

ples, in cases where the claim is a complete elimination of value.<sup>302</sup> Such an approach may allow governments to show that noncompensation is, in fact, the preferred outcome when a regulation, although imposing a total wipeout, does not cause demoralization costs in excess of settlement costs.<sup>303</sup> This could occur, for example, in Justice Brandeis's example where compensation would not be due to a coal operation that is shuttered because its operation releases poisonous gases.<sup>304</sup> Such a regulation would impose high settlement costs in terms of the property's market value but low demoralization costs in terms of lost future productivity and innovation due to the fact that it is not an arbitrary exercise of raw power over a minority interest.<sup>305</sup>

The doctrinal problem in takings law is that no mathematical formula can be applied to assess fairness.<sup>306</sup> The issues are complicated, and a proper judicial review of the facts will be intensive, subtle, and, admittedly, difficult.<sup>307</sup> But the truism that fairness is not mathematical does not mean that courts should abdicate their role in making fairness determinations in takings cases.<sup>308</sup> What is important is to agree on clear judicial principles so that claimants and governments can better predict results, litigate effectively, and plan accordingly.<sup>309</sup> *Lingle's* clari-

<sup>302</sup> See *Lucas*, 505 U.S. at 1017-19; FISCHER, *supra* note 68, at 216-17; Michelman, *supra* note 25, at 1213-18, 1248-50. Of course, acknowledging the role of investment-backed expectations in a total taking claim softens the "categorical" nature of the *Lucas* decision. See *Lingle*, 544 U.S. at 538; *Lucas*, 505 U.S. at 1019. But *Lucas* was never absolutely categorical to begin with: it always excepted regulations that prohibited uses that never inhered in the title—an exception with an unclear scope. See 505 U.S. at 1029; Blais, *supra* note 47, at 3-6.

<sup>303</sup> See Michelman, *supra* note 25, at 1214.

<sup>304</sup> See *Pa. Coal*, 260 U.S. at 418 (Brandeis, J., dissenting).

<sup>305</sup> See Michelman, *supra* note 25, at 1214-18.

<sup>306</sup> See *id.* at 1250.

<sup>307</sup> See *Palazzolo*, 533 U.S. at 634-36 (O'Connor, J., concurring); Michelman, *supra* note 25, at 1250.

<sup>308</sup> See Michelman, *supra* note 25, at 1248-50. Indeed, in many ways, courts are particularly suited for the nuanced, factual inquiries required to properly undertake the demoralization analysis and should therefore do so as a matter of institutional competency. See *id.*; cf. Fenster, *supra* note 13, at 729. Such a role for courts comports with the checks and balances inherent in our system because judicial review of majoritarian processes may be the only safety valve to protect minority interests. See Michelman, *supra* note 25, at 1248-50. That said, deference to majoritarian decision-making processes is probably a more prudent course of action unless regulatory effects fairly clearly indicate a process failure as suggested by public choice theorists. See FISCHER, *supra* note 68, at 42-44; cf. Fenster, *supra* note 13, at 734-36; Sunstein, *supra* note 70, at 1690. There are legitimate disagreements about the level of judicial activism that is desirable. See Fenster, *supra* note 13, at 730 n.307; Michelman, *supra* note 25, at 1250. What is beyond dispute, and what is supported by constitutional text, is that there is a role for courts in requiring compensation for property owners who have their property excessively appropriated for public use. See U.S. CONST. amend. V.

<sup>309</sup> See Fenster, *supra* note 13, at 727-28, 730-32.

fication is a step in the right direction.<sup>310</sup> The Court can go one step further by affirming the centrality of investment-backed expectations in a clear cut, easy case: a total wipeout.<sup>311</sup> The same reasons why *Lucas* intuitively reached its compensation result are those suggested by the fundamental commentary that generated the term.<sup>312</sup> And, for those interested in outcomes, the application of investment-backed expectations in a *Lucas* situation is unlikely to alter the results that would otherwise be achieved through the application of the categorical rule.<sup>313</sup>

### CONCLUSION

Investment-backed expectations analysis has been defined by obfuscation. The Supreme Court has not articulated a normative principle behind investment-backed expectations, although it has dealt with the question of what expectations are constitutionally protected.

The Court's 2005 decision in *Lingle v. Chevron U.S.A., Inc.* made significant strides in clarifying the doctrinal law of the Takings Clause and the policy supporting it. Specifically, *Lingle* indicates that the Takings Clause is designed to compensate those individuals who are forced to shoulder a burden of disproportionate magnitude and narrow distribution for the benefit of the public as a whole. This magnitude and distribution of the burden formulation is similar to the principles underlying Professor Frank Michelman's articulation of "investment-backed expectations" because it, in effect, focuses on demoralization cost-creating policies. Demoralization costs arise specifically from the decision by the government *not* to compensate a property owner who is faced with a regulation that diminishes his or her property value. Just as Michelman would compensate when demoralization costs exceed the costs of simply compensating a burdened property owner for his or her loss because it is more efficient for society to incur the lowest cost of a policy choice, the *Lingle* Court indicates that the Takings Clause mandates a similar result on "fairness and justice" grounds. In addition, a demoralization cost approach to investment-backed expectations is

---

<sup>310</sup> 544 U.S. at 536-43; see Fenster, *supra* note 13, at 737; see also Baron, *supra* note 13, at 646, 650.

<sup>311</sup> See *Lucas*, 505 U.S. at 1019. Applying the demoralization analysis explicitly is difficult, but introducing the concept in a straightforward, extreme case would alleviate some of the practical difficulties in introducing such a nuanced analysis explicitly. See Michelman, *supra* note 25, at 1250-51.

<sup>312</sup> See 505 U.S. at 1017-19; Michelman, *supra* note 25, at 1234.

<sup>313</sup> See *Palm Beach I*, 231 F.3d at 1364 n.4.



demonstrably fair as well as economically efficient. Thus, such an approach is normatively superior.

Given the general hesitation to approach fairness problems mathematically, the Court's reluctance to engage in an investment-backed expectation analysis, as defined by the words on their face, is understandable. Nevertheless, the actual principles behind the test belie the superficial meaning of the phrase. Moreover, public choice theory provides the Court with analytical tools to determine those situations deserving of compensation from those not under investment-backed expectations analysis.

In light of *Lingle's* philosophical clarification, the Court's previous takings decisions appear to comport with the principles behind Michelman's efficiency-fairness formulation of investment-backed expectations. Because the Court has the tools to engage in such an analysis, it should do so in a case where the variables are clear: a total wipeout. Affirming the role of investment-backed expectations in a total taking claim analysis would further *Lingle's* clarification of takings law without departing from precedent or constitutional text. The Court ought to take advantage of *Lingle* to further settle a historically convoluted area of constitutional law.

JOHN A. KUPIEC