Penn Central for Tomorrow: Making Regulatory Takings Predictable

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In 1978, after more than 50 years of silence on regulatory takings, the U.S. Supreme Court decided *Penn Central Transportation Co. v. City of New York*.[1] *Penn Central* has since been referred to as the "polestar" of regulatory takings jurisprudence;[2] however, no clear method of applying the multi-part ad hoc factual analysis of *Penn Central* has emerged. The *Penn Central* analysis has instead created confusion in the field with case law being anything but "unified."[3]

In the years following *Penn Central*, the Supreme Court adopted a number of per se rules and bright-line tests in an attempt to clarify the field of regulatory takings.[4] Toward the end of the era of Chief Justice William H. Rehnquist, however, the Supreme Court began to stray from these rules, abrogating and confusing some and entirely doing away with others.[5] Confusion became so marked that commentators described regulatory takings as "muddled,"[6] and "one of the most doctrinally confused areas of constitutional law."[7]

In 2005, the Supreme Court decided *Lingle v. Chevron U.S.A., Inc*.[8] The decision clarified which per se rules the Court recognized, and reiterated that the *Penn Central* ad hoc factual inquiry was the controlling test for regulatory takings.[9] Although *Lingle* shed light on regulatory takings' per se rules, the case did not clarify the basic *Penn Central* test. Thus, although *Lingle* clarified which test applies, the actual application remains clouded.

Under the traditional *Penn Central* analysis, the inquiry focuses particularly on three prongs: (1) the economic impact on the claimant; (2) the interference with distinct investment-backed expectation; and (3) the character of the governmental action.[10] This three-prong formula, although recently reaffirmed as the governing standard for regulatory takings, [11] is unhelpful to practitioners; it does not aid in their ability to anticipate how courts will decide regulatory takings cases. Adherence to the three-prong approach is one of the primary reasons regulatory takings have traditionally been confused.

This Article proposes that a modified approach—a two-prong approach—is a better method for anticipating how courts will decide regulatory takings cases. The two-prong approach identifies which factors courts are likely to find most relevant and illustrates how those factors interact with each other better than the traditional three-prong approach. The two-prong approach, however, is not meant to be a new standard for courts to apply, but is rather offered as a framework to anticipate how courts will decide regulatory takings cases. It is meant to aid in the preparation of cases by offering a means of prediction.

The two-prong approach focuses on (1) the character of the government action, and (2) the economic impact on the property owner. The character of the government action prong contains two internal sub-factors: (a) the generality/reciprocity factor, exemplified by the *Armstrong* principle[12]; and (b) the type of right affected. The economic impact prong is composed of (a) the diminution in value of the property, and (b) the interference with reasonable investment-backed expectations. In most situations, only one of the two economic sub-factors will apply. For instance, where the prop-

1. 438 U.S. 104, 8 ELR 20528 (1978).
2. Tahoe-Sierra Pres. Council v. Tahoe Reg'l Planning Agency, 535 U.S. 302, 326 n.23, 32 ELR 20627 (2002) (quoting Palazzolo v. Rhode Island, 533 U.S. 606, 633, 32 ELR 20516 (2001) (O'Connor, J., concurring)).
3. Lingle v. Chevron U.S.A., Inc., 544 U.S. 528, 539, 35 ELR 20106 (2005).
4. *See, e.g.*, Dolan v. City of Tigard, 512 U.S. 374, 24 ELR 21083 (1994); Lucas v. S.C. Coastal Council, 505 U.S. 1003, 22 ELR 21104 (1992); First English Evangelical Lutheran Church v. County of Los Angeles, 482 U.S. 304, 19 ELR 21329 (1987); Nollan v. Cal. Coastal Comm'n, 483 U.S. 825, 17 ELR 20918 (1987); Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419 (1982); Agins v. City of Tiburon, 447 U.S. 255, 10 ELR 20361 (1980).
5. *See Lingle*, 544 U.S. 528; *Tahoe-Sierra*, 535 U.S. 302; *Palazzolo*, 533 U.S. 606. *See also* R.S. Radford, *Instead of a Doctrine:* Penn Central *as the Supreme Court's Retreat From the Rule of Law*, SM040 ALI-ABA 815, 819 (2007).
6. Carol M. Rose, *Mahon Reconstructed: Why the Takings Issue Is Still a Muddle*, 57 S. Cal. L. Rev. 561 (1984).
7. D. Benjamin Barros, *At Last, Some Clarity: The Potential Long-Term Impact of* Lingle v. Chevron *and the Separation of Takings and Substantive Due Process*, 69 Alb. L. Rev. 343, 343 (2005-06).
8. 544 U.S. 528 (2005).
9. *Id.* at 538.
10. Penn Cent. Transp. Co. v. City of New York, 438 U.S. 104, 124, 8 ELR 20528 (1978).
11. *Lingle*, 544 U.S. at 538.
12. The Armstrong Principle provides "[t]he Fifth Amendment's guarantee that private property shall not be taken for a public use without just compensation was 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." Armstrong v. United States, 364 U.S. 40, 49 (1960).

erty owner did not purchase the property for investment purposes, the diminution in value is the only relevant factor for the economic impact prong; the investment-backed expectation factor is completely removed from the analysis. Where, however, the property was purchased as an investment, the property owner may argue both diminution in value and interference with reasonable investment-backed expectation.

Where both prongs are met, i.e., where there is a large adverse economic impact on a property owner as well as an extreme governmental action, a taking is likely to be found. Where only one prong favors the property owner, the two prongs are weighed against each other; where the value of one prong increases, the value of the other prong can decrease. Thus, the greater the economic harm shown, the less adverse the governmental action need be. Likewise, where the character of the governmental action is extreme, the economic harm need not be great. Thus, in order to find a taking, where the character of the government action strongly favors the property owner, the economic impact on the property owner need not be severe, and vice versa. Understanding the weighing analysis and the relevant sub-factors will allow practitioners to better anticipate how courts will rule, and thus better allow them to prepare regulatory takings claims.

The remainder of this Article addresses modern regulatory takings jurisprudence and proposes a method for analyzing future cases. Part II addresses the promulgation of, and retreat from, per se rules and bright-line tests in the regulatory takings field. Part III sets forth the modified two-prong *Penn Central* analysis and discusses the relevant factors under that approach. Part IV analyzes various cases according to the suggested two-prong approach and illustrates how existing cases fit into the two-prong framework. Part V concludes with a brief discussion about how the Supreme Court might decide regulatory taking cases in the future.

I. *Penn Central* and Its Progeny

A. Penn Central

Penn Central dealt with unused air rights above Grand Central Terminal in New York City, which was owned by the Penn Central Transportation Company.[13] New York enacted a Landmarks Preservation Law in order to protect historic landmarks and neighborhoods.[14] The Landmarks Preservation Commission had the authority to designate buildings as "landmarks" and the owners of such landmarks were required to keep the buildings in good repair, and to secure permission before altering the exterior.[15]

Grand Central Terminal was designated a landmark and the block it occupied a landmark site.[16] After the designation, Penn Central sought permission to construct a multi-story office building above the terminal.[17] When the Commission rejected the plans for the office building, Penn Central sued alleging, inter alia, that under the Landmark Law their property had been taken without just compensation in violation of the Fifth Amendment.[18] The New York Court of Appeals reversed the New York trial court's grant of relief, and the Supreme Court granted certiorari review. The Supreme Court held that a regulatory taking had not occurred, and set forth the three-prong *Penn Central* test for determining when regulatory takings occur.[19]

B. The Promulgation of Per Se Rules and Bright-Line Tests

Following the decision in *Penn Central*, the Court began to refine its regulatory takings jurisprudence, formulating bright-line tests and per se rules. Many rules emerged, and although not all of them exist today, several are still in force. By formulating per se rules, the Supreme Court attempted to clarify regulatory takings law and offer guidance above and beyond the ad hoc factual inquiry set forth in *Penn Central*.

1. *Agins v. City of Tiburon*[20]

The first instance of the Court handing down a per se rule occurred two years after *Penn Central* in *Agins v. City of Tiburon*. In *Agins*, The appellants acquired five acres of unimproved land for residential development.[21] Thereafter, in compliance with California state law, the city of Tiburon adopted general zoning ordinances placing appellants' property in a zone with density restrictions permitting up to only five single-family residences.[22] The appellants sought $2 million in damages for inverse condemnation and a declaration that the California zoning ordinances at issue were facially unconstitutional.[23]

The Supreme Court identified the only issue before it as whether the enactment of the zoning ordinance constituted a taking.[24] Citing *Nectow v. City of Cambridge*,[25] the Court held, "application of a general zoning law to particular property effects a taking if the ordinance does not substantially advance legitimate state interests . . . ."[26] The Court further held that the California zoning ordinances at issue did "substantially advance legitimate governmental goals,"[27] and that no taking had occurred.[28]

The Court in *Agins* did not conduct a *Penn Central* analysis. Instead, the Court conducted a substantive due process

13. *Penn Central*, 438 U.S. at 115.
14. *Id.* at 109.
15. *Id.* at 111-12.
16. *Id.* at 115-16.
17. *Id.* at 116.
18. *Id.* at 119.
19. *Id.* at 124.
20. 447 U.S. 255, 10 ELR 20361 (1980).
21. *Id.* at 257.
22. *Id.*
23. *Id.* at 258.
24. *Id.* at 260.
25. 277 U.S. 183 (1928).
26. *Agins*, 447 U.S. at 260 (citing Nectow v. City of Cambridge, 277 U.S. 183, 188 (1928)).
27. *Id.* at 263.
28. *Id.*

inquiry and then mingled it with a takings analysis.[29] The commingling is apparent by the Court's reliance on *Nectow* and *Euclid v. Ambler Co.*,[30] both substantive due process cases. The *Agins* Court only briefly discussed *Penn Central* and did not analyze the case in depth. The Court instead used these due process cases to establish a new bright-line rule: if the government regulation substantially advances a legitimate governmental goal, a taking will not occur.[31] Although the analysis is properly a due process inquiry, as the court finally concluded in *Lingle*,[32] *Agins* demonstrated that the Supreme Court was attempting to clarify the field of regulatory takings.

2. *Loretto v. Teleprompter Manhattan CATV Corp.*[33]

After *Agins*, the Supreme Court continued in its attempt to clarify regulatory takings. In 1982, the Supreme Court decided *Loretto v. Teleprompter Manhattan CATV Corp*. *Loretto* held that a permanent physical occupation constituted a per se taking "without regard to whether the action achieves an important public benefit or has only minimal economic impact on the owner."[34] In *Loretto*, a New York statute required that "a landlord may not 'interfere with the installation of cable television facilities upon his property or premises,' and may not demand payment from any . . . CATV company."[35] After purchasing a five-story apartment building, Loretto sued the CATV companies alleging, inter alia, that installation of the cable facilities constituted a taking. The Supreme Court agreed, holding that the regulation had enacted a taking and set forth a second per se rule: A regulatory taking occurs "when the 'character of the governmental action' is a permanent physical occupation of property."[36]

3. *Ruckelshaus v. Monsanto Co.*[37]

In 1984, the Supreme Court introduced the notice requirement to regulatory takings with its decision in *Ruckelshaus v. Monsanto Co.* Monsanto was an inventor, seller, and producer of pesticides.[38] In 1978, the Federal Insecticide Fungicide, and Rodenticide Act[39] was amended to require, in general, public disclosure of all health, safety, and environmental data to the U.S. Environmental Protection Agency (EPA), even though the requirement could result in disclosure of trade secrets.[40] Monsanto brought suit in federal court alleging, inter alia, that the data disclosure provision effected a taking in violation of the Fifth Amendment.[41] The Supreme Court held that Monsanto "could not have had a reasonable, investment-backed expectation that EPA would keep the data confidential beyond the limits prescribed in the amended statute itself. Monsanto was on notice of the manner in which EPA was authorized to use and disclose [its] data."[42]

Ruckelshaus provided that the reasonableness of the investment-backed expectation was in large part dependent on whether the individual had notice of the relevant regulation.[43] The court indicated that the "force" of the investment-backed expectation (or lack thereof) was dispositive on the issue of a regulatory taking.[44] Because Monsanto had notice of the regulation, Monsanto could not have a reasonable investment-backed expectation that its trade secrets would not be disclosed. Lack of such investment-backed expectation may have been dispositive on the regulatory taking issue.[45]

4. *First English Evangelical Lutheran Church of Glendale v. County of Los Angeles*[46]

In 1987, the Supreme Court decided *First English Evangelical Lutheran Church of Glendale v. County of Los Angeles*. First English owned and ran a campground along the banks of a creek that was a natural drainage channel.[47] In 1979, Los Angeles County adopted an interim ordinance prohibiting the construction of any building or structure in an interim flood protection area.[48] After the ordinance was enacted, First English filed suit alleging that the ordinance temporarily denied the church all use of the campground and constituted a Fifth Amendment taking.[49] The Supreme Court held that temporary takings are no different in kind from permanent takings, and where a taking has already been found, no subsequent action can relieve the government of its duty to pay just compensation.[50]

First English stands only for the "unexceptional proposition that the valuation of property which has been taken must be calculated as of the time of the taking."[51] *First English* does, however, import temporary taking concepts into regulatory taking jurisprudence: Where the government has taken all use of land via regulation and then subsequently abandons the regulation, the government must pay for the temporary taking; mere abandonment of the regulation is insufficient.[52] The rule, however, is remedial in nature and does not implicate the actual fact of a taking.

29. *See*, *e.g.*, Barros, *supra* note 7, at 345-46; Richard A. Epstein, *From* Penn Central *to* Lingle*: The Long Backwards Road*, 40 J. Marshall L. Rev. 593, 594-95 (2007).
30. 272 U.S. 365 (1936).
31. *Agins*, 447 U.S. at 260.
32. Lingle v. Chevron U.S.A., Inc., 544 U.S. 528, 540, 35 ELR 20106 (2005).
33. 458 U.S. 419 (1982).
34. *Id.* at 434-35.
35. *Id.* at 423.
36. *Id.* at 434 (quoting Penn Cent. Transp. Co. v. City of New York, 438 U.S. 104, 124 (1978)).
37. 467 U.S. 986 (1984).
38. *Id.* at 997.
39. 7 U.S.C. §§136-136y (2007), ELR Stat. FIFRA §§2-34.
40. 467 U.S. at 995-96.
41. *Id.* at 998-99.
42. *Id.* at 1006.
43. *Id.*
44. *Id.* at 1005. *See* J. David Breemer, *Playing the Expectations Game: When Are Investment-Backed Land Use Expectations (Un)Reasonable in State Courts?*, 38 Urb. Law. 81, 86-87 (2006).
45. *See Ruckelshaus*, 467 U.S at 1010-11.
46. 482 U.S. 304 (1987).
47. *Id.* at 307.
48. *Id.*
49. *Id.* at 308.
50. *Id.* at 320.
51. *Id.*
52. *Id.* at 319.

5. *Nollan v. California Coastal Commission*[53] and *Dolan v. City of Tigard*[54]

In 1987, the Court also decided *Nollan v. California Coastal Commission*. Several years later, in 1994, the Court refined the *Nollan* decision in *Dolan v. City of Tigard*. The two cases together created what has been referred to as the freestanding "*Nollan* and *Dolan* test."[55]

Nollan held that the imposition of a condition on the grant of a building permit constituted a taking if no essential nexus existed between the imposed condition and the stated purpose of the building restriction.[56] Specifically, the Nollans had requested a building permit to construct a three-story beachfront home where only a one-story bungalow stood.[57] The California Coastal Commission found that the construction of such a three-story dwelling would interfere with the viewplane and would create a psychological barrier to people from using the beach.[58] The Commission then imposed a condition on the building of the three-story dwelling; however, the condition was for a lateral easement across the beach, not a horizontal view-plane easement from the interior to the coast.[59] The Supreme Court held, "unless the permit condition serves the same governmental purpose as the development ban, the building restriction is not a valid regulation of land use"[60] and compensation must be paid for the lateral easement.

The *Nollan* Court found that a permit condition must have an essential nexus to the anticipated harm; however, it did not explicate the term "essential nexus." Instead, the Court found that the relationship between the permit condition and the regulation's stated purpose did not meet even the loosest standard.[61] In *Dolan v. City of Tigard*, the Court addressed the makeup of an essential nexus.

In *Dolan*, the City Planning Commission of the city of Tigard imposed two conditions on petitioner Dolan's application to expand her store and pave its parking lot.[62] The conditions were that Dolan dedicate land: (1) for a public greenway along an adjoining river to minimize flooding; and (2) for a pedestrian/bicycle pathway in order to relieve traffic congestion.[63] The Supreme Court eventually held that, although the city had a legitimate interest in both minimizing flooding and relieving traffic congestion, the permit conditions were not reasonably related to the anticipated harm of the construction.[64]

Dolan clarified the essential nexus requirement by adopting the concept of "rough proportionality."[65] Under rough proportionality, in order to avoid a regulatory taking, the permit issuer must demonstrate that there exists a rough proportionality between the purpose of the condition and the anticipated harm of the construction. While the court held that "no precise mathematical calculation is required . . . the city must make some effort to quantify its findings in support of the [condition]."[66] The Court continued by holding that a finding that a condition *could* offset some of the ills created by the development is a far cry from a finding that a condition *will* or *is likely* to offset such ills.[67]

Nollan and *Dolan* together created a freestanding test that is in reality an offshoot of the unconstitutional condition doctrine.[68] The freestanding test holds that a condition imposed on a building permit will constitute a taking if (1) there is no essential nexus between the permit condition and the governmental purpose, or (2) if an essential nexus does exist, where the permit condition is not roughly proportional, or reasonably related, to the stated governmental purpose.[69]

6. *Lucas v. South Carolina Coastal Council*[70]

The Supreme Court continued handing down per se rules when, in 1992, it decided *Lucas v. South Carolina Coastal Council*, easily the best-known regulatory taking case. The per se rule that emerged was simple: A taking occurs where all economically beneficial use of land is regulated away.[71] *Lucas* arose out of South Carolina's enactment of its Beachfront Management Act, which barred an individual property owner—David Lucas—from erecting any permanent habitable structure on his two parcels of land.[72] At the time Lucas purchased the parcels, they were not subject to the Beachfront Management Act, and he and others had previously begun extensive development on the island where the lots were located.[73]

Lucas held that where a regulation restricts all economically beneficial use of land, a taking occurs unless the landowner never possessed such rights to begin with.[74] The caveat regarding property interests possessed by the landowner was made specifically in reference to nuisance and background principles of state law.[75] Thus, a regulation preventing an individual from using his property for a nuisance, even if it deprived the owner of all economic use, would not constitute a taking because the landowner never possessed the right to create a nuisance in the first place.

C. The Retreat From Per Se Rules and the Move Toward Penn Central's *Ad Hoc Factual Inquiry*

In the years following *Penn Central*, the Supreme Court created several bright-line tests and per se rules. Around the turn

53. 483 U.S. 825 (1987).
54. 512 U.S. 374 (1994).
55. David L. Callies & Christopher T. Goodin, *The Status of* Nollan v. California Coastal Commission *and* Dolan v. City of Tigard *After* Lingle v. Chevron U.S.A., Inc., 40 J. Marshall L. Rev. 539, 540 (2007).
56. *Nollan*, 483 U.S. at 837.
57. *Id.* at 827-28.
58. *Id.* at 828-29.
59. *Id.*
60. *Id.* at 837.
61. *Id.* at 838.
62. Dolan v. City of Tigard, 512 U.S. 374, 380 (1994).
63. *Id.*
64. *Id.* at 394-95.
65. *Id.* at 391.
66. *Id.* at 395-96.
67. *Id.*
68. Callies & Goodin, *supra* note 55, at 558.
69. *Dolan*, 512 U.S. at 391 (1994).
70. 505 U.S. 1003 (1992).
71. *Id.* at 1019.
72. *Id.* at 1017.
73. *Id.* at 1008.
74. *Id.* at 1027.
75. *Id.* at 1029-30.

of the century, however, the Supreme Court began to modify its approach to regulatory takings. Instead of continuing to create bright-line rules, the Court retreated to the ad hoc factual inquiry of *Penn Central*, "eschew[ing] any set formula"[76] for determining how far a regulation must go before becoming a compensable taking. While the Court did not invalidate or confuse all of its previous per se rules, enough confusion arose to create serious uncertainty in the field. The Supreme Court in *Palazzolo v. Rhode Island*[77] retreated from a categorical rule regarding the notice issue in favor of a case-by-case factual approach.[78] *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency*[79] confused the *Lucas* rule by its use of "value" language;[80] and *Lingle* completely overturned the *Agins* rule that a regulation will not constitute a taking unless it fails to substantially advance a legitimate governmental purpose.[81]

1. *Palazzolo v. Rhode Island* and the Notice Rule

In 2001, the Supreme Court decided *Palazzolo v. Rhode Island*. In 1978, petitioner Palazzolo acquired title to several acres of land located in a marshland subject to tidal flooding.[82] In 1971, the state of Rhode Island created the Rhode Island Coastal Resources Management Council, which enacted the Rhode Island Coastal Resources Management Program (CRMP). The CRMP designated salt marshes, like those owned by Palazzolo, as protected coastal wetlands and greatly limited development thereon.[83] The petitioner applied several times to the Council for permission to fill his marshland area for various constructions, all of which were rejected.[84] Although the Supreme Court remanded the case, it also held that a purchaser or successive titleholder having notice of a regulation is not dispositive on the issue of a regulatory taking. Instead, notice is just one factor that a court must look at when addressing regulatory takings cases.

Palazzolo retreated from the *Ruckelshaus* rule that notice of a regulation may be dispositive on the regulatory taking issue.[85] While the majority opinion did not say that notice has no bearing on the regulatory taking issue, Justice Antonin Scalia, in his concurring opinion, did.[86] Justice Sandra Day O'Connor, on the other hand, indicated in a separate concurring opinion that she believed the notice issue, while not dispositive, was a relevant factor to consider in a *Penn Central* analysis.[87] Justice O'Connor indicated that the Rhode Island Supreme Court erred by "elevating [petitioner's] lack of reasonable investment-backed expectations to dispositive status."[88] Instead, Justice O'Connor stated that "[t]he temptation to adopt what amount to per se rules in either direction must be resisted."[89] Although Justice O'Connor's opinion in *Palazzolo* was a concurrence and did not control, her opinion was cited favorably by the majority in *Tahoe-Sierra*. Because of *Tahoe-Sierra*, Justice O'Connor's *Palazzolo* concurrence is generally accepted as controlling.[90] Thus, the Court in *Palazzolo* and *Tahoe-Sierra* together retreated from the *Ruckelshaus* rule.[91]

2. *Tahoe-Sierra* and the "Use" Versus "Value" Distinction

In *Tahoe-Sierra*, the Tahoe Regional Planning Agency imposed two moratoria totaling 32 months restricting all development in the Lake Tahoe Basin. Real estate owners in the Basin area and an association representing such real estate owners filed suit, alleging that the moratoria deprived them all economic use of their property and constituted a taking.[92] The Supreme Court held that no taking had occurred and refused to adopt a per se rule.[93]

The Supreme Court's holding in *Tahoe-Sierra* was very narrow. The Court simply held that a moratorium that temporarily deprived a property of all economically beneficial use was not a per se taking.[94] Instead, the Court held that such a temporary taking is appropriately analyzed under the *Penn Central* framework, and no categorical rule would be adopted.[95] Although the holding was narrow, the *Tahoe-Sierra* majority arguably confused *Lucas* by emphasizing that a per se taking occurs where the loss of "value" is total, instead of the loss of beneficial "use."[96]

Justice John Paul Stevens' *Tahoe-Sierra* majority used the value language frequently when reiterating the holding in *Lucas*.[97] Justice Stevens stated: "[Lucas'] lots were rendered valueless by a statute . . ." and that "[u]nder [the *Lucas* rule], a statute that wholly eliminated the value of Lucas' fee simple title clearly qualified as a taking."[98] The opinion continued, "[a]nything less than a complete elimination of value, or a total loss . . . would require the kind of analysis applied in Penn Central" and that "the permanent obliteration of the value of a fee simple estate constitutes a categorical taking . . . ."[99]

Justice Stevens' attempt to change the *Lucas* rule from a "use" analysis to a "value" analysis is unsurprising given his

76. Tahoe-Sierra Pres. Council v. Tahoe Reg'l Planning Agency, 535 U.S. 302, 326 (2002).
77. 533 U.S. 606 (2001).
78. Palazzolo v. Rhode Island, 533 U.S. 606, 630 (2001).
79. 535 U.S. 302, 321-22, 326 n.23, 335-36 (2002).
80. *Tahoe-Sierra*, 535 U.S. 302.
81. Lingle v. Chevron U.S.A., Inc., 544 U.S. 528 (2005).
82. *Id.* at 614.
83. *Id.*
84. *Id.* at 614-15.
85. Ruckelshaus v. Monsanto Co., 467 U.S. 986, 1005, 14 ELR 20539 (1984).
86. *Palazzolo*, 533 U.S. at 636-37 (Scalia, J., concurring).
87. *Id.* at 633 (O'Connor, J., concurring).
88. *Id.* at 634 (internal quotations omitted).
89. *Id.* at 636.
90. Breemer, *supra* note 44, at 92-93.
91. Notwithstanding the general acceptance that notice is not dispositive on the regulatory takings issue, in most cases where notice was an issue, the landowner was unable to succeed on a regulatory taking claim. *See, e.g.*, Rith Energy v. United States, 247 F.3d 1355, 1366, 32 ELR 20253 (Fed. Cir. 2001) (because plaintiffs had notice of the regulation, they could have no reasonable investment-backed expectation, and no taking occurred); John D. Echeverria, *Making Sense of* Penn Central, 23 UCLA J. Envtl. L. & Pol'y 171, 184 (2005).
92. *Tahoe-Sierra*, 535 U.S. at 312.
93. *Id.* at 334.
94. *Id.* at 321.
95. *Id.*
96. *Id.* at 329-30.
97. *Id.* at 302, 321, 322, 326 n.23, 335-36.
98. *Id.* at 329-30.
99. *Id.* at 330.

sharp dissent in *Lucas*.[100] In *Lucas*, Justice Stevens stated, "the Court's new rule is unsupported by prior decisions, arbitrary and unsound in practice and theoretically unjustified."[101] Notwithstanding Justice Stevens' dissent, *Lucas* unambiguously held the focus of the per se rule was on the *use* David Lucas could make of his land, not the intrinsic value left in it;[102] a holding reiterated in *Lingle*.[103] Thus, although *Tahoe-Sierra*'s holding did not specifically alter a per se rule, the change in the majority's language regarding value arguably confused the *Lucas* rule.

3. *Lingle* and the *Agins* "Failure to Substantially Advance Test"

In 2005, *Lingle* [104] finally and completely divorced the *Agins* "substantially advances test" from regulatory takings law.[105] In doing so, the Court discarded a per se rule that had lasted for a quarter of a century.[106] *Lingle* also clearly identified which per se rules the Court recognized. Justice O'Connor, writing for a unanimous court, indicated that only two per se rules exist in the field of regulatory takings: (1) the rule in *Loretto* where a taking will occur when "the government requires an owner to suffer a permanent physical invasion;" and (2) the *Lucas* rule where a regulation that deprives an owner of "all economically beneficial use" of property will constitute a taking.[107] In either case, a regulatory taking per se occurs.

The Court continued by stating that *Lingle* did nothing to upset any prior holding, making specific reference to the decisions in *Nollan* and *Dolan*.[108] The *Lingle* decision thus adopts "only" the per se rules of *Loretto* and *Lucas*, but also specifically upholds the *Nollan* and *Dolan* rule and *sotto voce* allows the *First English* rule. It specifically overturns only the rule in *Agins*. Beyond these categories, the Court held in no uncertain terms that the controlling law for determining whether a regulation constitutes a taking is the multi-part ad hoc factual inquiry of *Penn Central*.[109]

Through *Lingle*, the Supreme Court provided some clarity to the field of regulatory takings. The decision, however, did not address the *Penn Central* analysis in any detail, and only briefly identified the three prongs that are particularly significant in a *Penn Central* analysis.[110] Although the Court did clarify some aspects of regulatory takings laws—which per se rules exist and which do not—the decision did not help to clarify how the *Penn Central* analysis should work.

Thus, we are left to deal with the crux of the issue: How will *Penn Central*'s ad hoc factual analysis apply to future regulatory takings cases? The inquiry appropriately begins with what the Supreme Court has held in the past regarding the *Penn Central* test. Although many such cases are tainted by the Courts commingling of the substantive due process inquiry and the Fifth Amendment takings issue,[111] prior holdings do offer some guidance regarding what the Court will likely decide in the future.

II. The *Penn Central* Analysis as a Two-Prong Test

The Supreme Court has reiterated that *Penn Central* was and is the polestar of regulatory takings jurisprudence.[112] While the case was remarkable insofar as it was the first case to deal with the issue of regulatory takings in over 50 years,[113] it is unlikely that the Court thought the decision would be as long-lasting or have as much influence as it currently does. *Lingle* makes clear that regulatory takings jurisprudence, except for a few very narrow categorical rules, is governed by the multi-part ad hoc factual inquiry set forth in *Penn Central*.[114]

Penn Central stressed several factors as being particularly important in the ad hoc factual analysis. Those factors are "the economic impact of the regulation on the claimant,[ ] particularly the extent to which the regulation has interfered with distinct investment-backed expectations;" and "the character of the governmental action," where a taking would be more likely to occur "when the interference with property can be characterized as a physical invasion by the government."[115] Commentators and courts, including the Supreme Court, have suggested that the relevant factors are threefold, consisting of (1) the economic impact, (2) the reasonable investment-backed expectation, and (3) the character of the government action. The three-prong approach, however, is inconsistent with the language of *Penn Central*[116] and is not an effective method of analysis for predicting how courts will decide *Penn Central* cases.

An alternative analytical framework by which to analyze regulatory takings cases is under a two-prong, rather than a three-prong approach. The prongs under the two-prong approach are (1) the economic impact of the regulation on the property owner, and (2) the character of the government action. The character of the government action prong consists of two internal factors: (a) the generality/reciprocity factor, exemplified by the oft-quoted *Armstrong* principle,[117] and (b) the type of right affected by the governmental action. The two internal sub-factors are weighed together to determine

100. Lucas v. S.C. Coastal Council, 505 U.S. 1003, 1061 (1992) (Stevens, J., dissenting).
101. *Id.* at 1067.
102. *Id.* at 1019 (majority opinion) ("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"). *See also* David L. Callies & Calvert G. Chipchase, *Moratoria and Musings on Regulatory Takings:* Tahoe-Sierra Preservation Council v. Tahoe Regional Planning Agency, 25 U. Haw. L. Rev. 279 (2003).
103. Lingle v. Chevron U.S.A., Inc., 544 U.S. 528, 538 (2005).
104. 544 U.S. 528 (2005).
105. *Id.* at 540.
106. *Id.* at 545.
107. *Id.* at 538.
108. *Id.* at 545-46.
109. *Id.*
110. *Id.* at 538-39.
111. Barros, *supra* note 7, at 350-51.
112. *Lingle*, 544 U.S. at 538-39; Tahoe-Sierra Pres. Council v. Tahoe Reg'l Planning Agency, 535 U.S. 302, 336 (2002); Radford, *supra* note 5, at 819.
113. Radford, *supra* note 5, at 817.
114. *Lingle*, 544 U.S. at 538.
115. Penn Cent. Transp. Co. v. City of New York, 438 U.S. 104, 124 (1978).
116. *Id.*
117. *See supra* note 12.

whether the character prong favors the property owner or the government.

The economic impact prong is composed of (a) diminution in value and (b) interference with reasonable investment-backed expectations. The interference with investment-backed expectations factor does not apply where a property owner acquired the property for purposes other than investment. In such a situation, the only relevant economic factor is the diminution in value, and investment-backed expectation is removed from the equation. On the other hand, where the property owner acquired the property specifically or primarily as an investment, the investor can utilize both the diminution in value and the interference with reasonable investment-backed expectations to determine the economic impact prong.

A. The Economic Impact Prong

Under the suggested two-prong approach, investment-backed expectation does not stand alone as a separate prong. Instead, it is incorporated into the economic impact prong as one of the two internal sub-factors and applies only to investment properties. The two sub-factors taken together create the economic impact prong.

The investment-backed expectation factor will only apply where property is acquired primarily or exclusively for investment purposes. Where non-investment property is affected, generally the only relevant factor is diminution in value. The prong can reasonably be perceived as an either/or prong. Where a non-investment property is affected, the diminution in value factor determines the economic impact prong. Where, however, an investment property is affected, the investment-backed expectation factor will determine the economic impact prong. Analyzing regulatory takings cases this way does justice to the language of *Penn Central* and creates a simpler, and more effective way of anticipating how regulatory takings cases will be decided.

1. Diminution in Value

Diminution in value classically has been referred to as the economic impact prong and is probably "the least problematic of the Penn Central factors."[118] Simply stated, the greater the diminution of the property's value, the greater the adverse economic impact on the individual. Diminution in value is generally determined by calculating the difference in the value of the property with the regulation enforced and without the regulation enforced. The greater the diminishment, the more heavily the factor weighs in favor of the property owner. Adverse economic impact, however, must be exceptionally high, or even absolute, before it alone will trigger a taking.[119] Although *Lucas* was not analyzed under the *Penn Central* factors, the decision in *Lucas* is a logical extension of the economic impact prong and illustrates what happens when the negative economic impact becomes total.[120] Where the negative economic impact is not total, however, the Supreme Court has been unwilling to find a taking based on reduction of value alone.[121]

Under the two-prong approach, the diminution in value factor remains unchanged. It is important, however, to determine how much value reduction is required before the factor will lean toward a property owner. Because courts have found takings where very little economic impact occurs,[122] and have found no takings where massive economic impact has occurred,[123] it is difficult to draw a line where the diminution of value begins to favor a property owner. It does seem clear, however, that unless at least 50% of the value of property has been regulated away, the diminution factor will not favor the property owner. When 50% of the value has been regulated away, the factor begins to favor the property owner. As more value is lost, the factor increasingly favors the property owner. Thus, while a 50% value loss will only slightly favor the property owner, a 90% loss will greatly favor the property owner and a 100% loss will constitute a taking per se.[124]

2. Reasonable Investment-Backed Expectations

Where an individual has purchased land primarily or exclusively for investment purposes, the value left in the land after the regulation is not the only appropriate inquiry. Courts have utilized various methods for ascertaining how and when a person's reasonable investment-backed expectation has been affected. While the Supreme Court has not embraced any method as exclusive, the various methods do illustrate enough of a pattern to aid analysis.

One approach that courts have taken is a strict dichotomy between "profitable" and "unprofitable." The profitability approach is illustrated by the Supreme Court's decision in *Keystone Bituminous Coal Association v. DeBenedictis*.[125] In *Keystone*, a regulation limited the amount of coal a coal company could mine to 50% of the owned coal.[126] The Supreme Court found no evidence that mining only 50% of the coal in any given area would be unprofitable,[127] and implied that the existence of profit was the key factor, distinguishing that situation from the one in *Pennsylvania Coal Co. v. Mahon*.[128] In *Mahon*, the Court found a taking because Pennsylvania

118. Echeverria, *supra* note 91, at 178.

119. *See, e.g.*, Concrete Pipe & Prods. of Cal., Inc. v. Constr. Laborers Pension Trust for S. Cal., 508 U.S. 602, 646 (1993) ("mere diminution in the value of property, however serious, is insufficient to demonstrate a taking"); Hadacheck v. Sebastian, 239 U.S. 394, 405 (1915) (no taking with 87.5% value reduction). *See also* Michael B. Kent Jr., *Construing the Canon: An Exegesis of Regulatory Takings Jurisprudence After* Lingle v. Chevron, 16 N.Y.U. Envtl. L.J. 63, 97 (2008); Steven J. Eagle, *The Roberts Court and Property Rights: A Look Into the Crystal Ball*, SM040 ALI-ABA 111, Part II.G.3 (2007) ("courts [are] highly unlikely to fund [sic] a regulatory taking under Penn Central unless there was at least an 85% diminution in value") (citing Walcek v. United States, 49 Fed. Cl. 248, 271-72, 33 ELR 20045 (Ct. Fed. Cl. 2001)).

120. Lucas v. S.C. Coastal Council, 505 U.S. 1003 (1992); Echeverria, *supra* note 91, at 178.

121. *See supra* note 119.

122. *See, e.g.*, Hodel v. Irving, 481 U.S. 704 (1987); Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419 (1982).

123. *See, e.g.*, *Concrete Pipe*, 508 U.S. 602; *Hadacheck*, 239 U.S. 394.

124. *Lucas*, 505 U.S. at 1019.

125. 480 U.S. 470 (1987).

126. *Id.* at 477.

127. *Id.* at 496.

128. *See* Pa. Coal Co. v. Mahon, 260 U.S. 393, 414-15 (1922).

Coal Company could no longer garner any profit, while in *Keystone* a profit could still be made.[129] The implication in *Keystone* was that because some profit could still be obtained from mining coal, even after imposition of the regulation, the investment-backed expectation was not thwarted.

Other courts, instead of looking to the mere fact of profitability, have focused on whether the property owner was able to obtain a reasonable return on the investment. In *Florida Rock Industries, Inc. v. United States*,[130] the Court of Federal Claims, relying on language from *Penn Central*, held that the ability to obtain a "reasonable return" on the owner's investment was an important factor in determining whether a taking had occurred.[131] The language used in *Florida Rock* suggests that more than a simple profit is required in order to find no interference with investment-backed expectations. In *Florida Rock*, however, the Court not only found that the plaintiff was unable to obtain a reasonable return, but that it was unable even "to recoup its investment due to the regulation of its property."[132] The inability to recoup its investment aided the court's determination that the investment-backed expectation had been thwarted.[133]

Although *Florida Rock* utilized language suggesting that the strict dichotomy between profitable and unprofitable was an incorrect standard, the fact that the plaintiff was unable to recoup its investment suggests that the regulation had rendered the investment unprofitable. While the Court found that the diminution in value to the property was only 73.1%,[134] the diminution in value coupled with the inability to recoup its investment made the Court lean heavily in favor of finding a taking. The Court's *Florida Rock* decision and its acknowledgment of the reasonable return language in *Penn Central*[135] paved the way for the U.S. Court of Appeals for the Federal Circuit's decision in *Cienega Gardens v. United States*.[136]

Cienega Gardens expanded on the "reasonable return" language and found a taking had occurred even though a small profit was being made. The court in *Cienega Gardens* found that the rate of return on the model plaintiffs' investment was .3% after imposition of the regulation and accepted testimony by plaintiffs' expert that the rate of return in a low-risk Fannie Mae bond would be 8.5%.[137] The court reasoned, "the [plaintiffs] would have received, by exiting the programs and reinvesting their money, on average, *at least*, 28 times greater return than they did have by being forced to stay in the programs" and that the regulation reduced the rate of return on the investments by 96%.[138] *Cienega Gardens* did not utilize a "profitability" approach; instead, it utilized what can only be referred to as a "reasonable return" approach.

Although no one set formula has emerged, and scholars are still debating what the appropriate test is,[139] a baseline has emerged. The Supreme Court has implicated that a reasonable investment-backed expectation has been thwarted when the investment produces no profit.[140] While the Supreme Court has not adopted *Cienega Gardens*' approach, it has not affirmatively discounted that approach either.

B. The Character of the Government Action Prong

The second of the two prongs is the character of the government action. The character prong has traditionally dealt with numerous issues, although no single case has dealt with all of them. Scholars have attempted to synthesize the character factor into components,[141] some utilizing as many as nine alternate definitions.[142] The traditional character of the government action prong is thus amorphous, not consistent from case-to-case, and difficult to apply.

Under the suggested two-prong approach, the character prong breaks down into two sub-factors: the generality/reciprocity principle and the type of right affected. The generality/reciprocity sub-factor is best summarized by the *Armstrong* principle and stands for the proposition that an individual or a small group of people should not be forced to bear a burden that, in all fairness and justice, should be borne by society as a whole.[143] The second sub-factor—the type of right—examines how essential or fundamental is the right affected by the governmental action.

1. The Generality/Reciprocity Factor

The generality/reciprocity factor deals with whether the regulation affects only one or a small number of people as opposed to a regulation that affects the population as a whole. As summarized by *Armstrong*, "[t]he Fifth Amendment's guarantee that private property shall not be taken for a public use without just compensation was 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."[144] The generality/reciprocity factor deals with general principles of "fairness and justice" and the requirement that "economic injuries caused by public action be compensated by the government, rather than remain dis-

129. *Keystone*, 480 U.S. at 498-99.
130. 45 Fed. Cl. 21 (Ct. Fed. Cl. 1999).
131. *Id.* at 39 (citing Penn Cent. Transp. Co. v. City of New York, 438 U.S. 104, 136 (1978)).
132. *Florida Rock*, 45 Fed. Cl. at 39.
133. *Id.* at 43.
134. *Id.* at 36.
135. *Id.* at 39 (citing *Penn Central*, 438 U.S. at 136).
136. 331 F.3d 1319 (Fed. Cir. 2003). The 2003 *Cienega Gardens* decision was limited to the four model plaintiffs and did not apply to the other parties to that action. Although the 2007 case did not find a taking with regard to the other plaintiffs, the decision did not overturn the 2003 decision regarding the four model plaintiffs. Cienega Gardens v. United States, 503 F.3d 1266, 1275-76, 33 ELR 20221 (Fed. Cir. 2007)
137. *Cienega Gardens*, 331 F.3d at 1342-43.
138. *Id.* at 1343.
139. *See* William W. Wade, *"Sophistical and Abstruse Formulas" Made Simple: Advances in Measurement of* Penn Central*'s Economic Prongs and Estimation of Economic Damages in Federal Claims and Federal Circuit Courts*, 38 Urb. Law. 337 (2006).
140. Keystone Bituminous Coal Association v. DeBenedictis, 480 U.S. 470, 498-99 (1987).
141. *See, e.g.*, Christopher T. Goodin, *The Role and Content of the Character of the Governmental Action Factor in a Partial Regulatory Takings Analysis*, 29 U. Haw. L. Rev. 437 (2007); Echeverria, *supra* note 91 at, 186-99.
142. *See* Echeverria, *supra* note 91.
143. Armstrong v. United States. 364 U.S. 40, 49 (1960).
144. *Id.*

proportionately concentrated on a few persons."[145] Where the character of the action puts greater burdens on fewer people for the benefit of society as a whole, the greater the generality factor favors the property owner.

2. The Type of Right Affected

The bundle of rights relevant to a *Penn Central* analysis consists of (a) essential property rights, (b) non-essential property rights, and (c) essential non-property rights. Where the government action infringes essential property or non-property rights, this factor leans heavily in favor of the property owner. Infringement of non-essential rights, however, does not weigh so heavily. Essential property rights include the right to exclude[146] and the right to devise.[147] Some non-essential rights include means of disposing of property,[148] abrogation of contract terms,[149] and unutilized transferable air rights.[150] Essential non-property rights include the right not to be subject to retroactive liability[151] and the right not to be extorted by one's government.[152]

a. Essential or Fundamental Property Rights

In *Kaiser Aetna v. United States*,[153] the Supreme Court referred to the right to exclude others from private property as "one of the most essential sticks in the bundle of rights that are commonly characterized as property . . . ."[154] *Kaiser Aetna* determined that "the 'right to exclude' [is] so universally held to be a fundamental element of the property right, [it] falls within [the] category of interests that the Government cannot take without compensation."[155] The right to devise, like the right to exclude, is another essential property right.[156]

In *Hodel v. Irving*,[157] the Supreme Court determined that a taking had occurred based primarily on the type of right affected.[158] The contested regulation required that small percentage property interests in real property escheat to an Indian tribe, thus taking from some individuals the ability to convey property by devise.[159] In finding that a taking had occurred, the Court indicated that the "character of the government regulation here is extraordinary"[160] and that the right to devise, like the right to exclude, is one of the most essential sticks in the bundle.[161] The Court held that the right to devise was essential because it has been part of the legal system since feudal times,[162] and continued, "[e]ven the [Appellee] concedes that total abrogation of the right to pass property is unprecedented and likely unconstitutional."[163]

Other essential rights are reflected in existing per se rules. In *Loretto*, the Court held, "when the physical intrusion reaches the extreme form of a permanent physical occupation, a taking has occurred[;] in such a case, the character of the government action . . . is determinative."[164] When a government regulation affects an essential right, the character factor may be dispositive, as it was in *Loretto*. In other cases, such as *Hodel*, it will simply lean heavily in favor of the property owner, but fall short of being dispositive.

b. Non-Essential Property Rights

In *Andrus*, the Supreme Court found no taking had occurred where a regulation prohibited the sale of certain artifacts that contained migratory bird and bald eagle parts.[165] The Court acknowledged, "a significant restriction has been imposed on one means of disposing of the artifacts. But the denial of one traditional property right does not always amount to a taking."[166] In *Andrus*, although a traditional property right had been taken, the Court did not find the right to be an essential right on par with the right to exclude or the right to devise. Because only one method of disposing the property was taken, and other methods remained available, the right taken was not an essential one.

In *Connolly v. Pension Benefit Guaranty Corp.*,[167] and again in *Concrete Pipe and Products of California v. Construction Laborers Pension Trust for Southern California*,[168] the Supreme Court dealt with the issue of mandatory modifications to contract rights. In both *Connolly* and *Concrete Pipe*, the Court addressed whether the Multiemployer Pension Plan Amendments Act (MPPAA) of 1980 took property rights where MPPAA mandated modifications to private contracts. MPPAA modified the *Employee Retirement Income Security Act* (*ERISA*) by requiring a withdrawing employer to pay a fixed and certain debt to the plan.[169] As the Court in *Concrete Pipe* noted, even though the regulation may "ignore[ ] express and bargained-for conditions on [its contractual promises][ ], legislation readjusting rights and burdens is not unlawful solely because it upsets otherwise settled expectations . . . ."[170] As the Court in *Connolly* noted, "[t]hose who do business in the regulated field cannot object if the legislative scheme is buttressed by subsequent amendments to achieve the legislative end."[171] In *Connolly*, and again in *Concrete Pipe*, the Court implied

145. Penn Cent. Transp. Co. v. City of New York, 438 U.S. 104, 124, 8 ELR 20528 (1978).
146. Kaiser Aetna v. United States, 444 U.S. 164, 10 ELR 20042 (1979).
147. Babbitt v. Youpee, 519 U.S. 234 (1997); Hodel v. Irving, 481 U.S. 704 (1987).
148. Andrus v. Allard, 444 U.S. 51, 9 ELR 20791 (1979).
149. Concrete Pipe & Prods. of Cal., Inc. v. Constr. Laborers Pension Trust for S. Cal., 508 U.S. 602 (1993); Connolly v. Pension Benefit Guar. Corp., 475 U.S. 211 (1986).
150. *Penn Central*, 438 U.S. 104.
151. Eastern Enters. v. Apfel, 524 U.S. 498, 532 (1998).
152. Nollan v. Cal. Coastal Comm'n, 483 U.S. 825, 837 (1987).
153. 444 U.S. 164 (1979).
154. *Id.* at 176.
155. *Id.* at 179-80.
156. *See* Babbitt v. Youpee, 519 U.S. 234 (1997); Hodel v. Irving, 481 U.S. 704 (1987).
157. 481 U.S. 704 (1987).
158. *Id.* at 716, 718.
159. *Id.* at 718.
160. *Id.* at 716.
161. *Id. See* Kaiser Aetna v. United States, 444 U.S. 164, 176 (1979).
162. *Hodel*, 481 U.S. at 718.
163. *Id.* at 716.
164. Loretto v. Teleprompter Manhattan CATV Corp, 458 U.S. 419, 426 (1982).
165. Andrus v. Allard, 444 U.S. 51, 53 n.1 (1979).
166. *Id.* at 65.
167. 475 U.S. 211 (1986).
168. 508 U.S. 602 (1993).
169. *Connolly*, 475 U.S. at 217.
170. *Concrete Pipe*, 508 U.S. at 646 (internal quotations omitted).
171. *Connolly*, 475 U.S. at 227 (internal quotations omitted).

that modifications to contracts do not impair essential rights on par with a physical invasion or a permanent physical presence, and that regulations affecting such rights do not weigh heavily in favor of the property owner.

Penn Central also illustrates non-essential property rights. Much of the *Penn Central* discussion dealt with reciprocal advantage, undue burden on an individual, and the arbitrary selection of landmarks.[172] The court did specifically address the type of right affected; however, the Court noted, "the submission that appellants may establish a 'taking' simply by showing that they have been denied the ability to exploit a property interest that they heretofore had believed was available for development is quite simply untenable."[173] Additionally, the air rights affected were transferable from Grand Central Station to several proximate lots.[174] Although the air rights in question could not be utilized in the fashion the terminal owner wanted, the rights were still useable. A logical inference of *Penn Central* is that unused, transferable property rights are non-essential.

c. Other Essential Rights

Some non-property rights are also essential and have been found relevant by courts under a *Penn Central* analysis. The plurality in *Eastern Enterprises v. Apfel*[175] concluded that a taking had occurred in large part based on the retroactive imposition of liability via regulation. Although the only property affected in *Eastern Enterprises* was money, the severe retroactive nature of the governmental action aided the Court in finding a taking had occurred. The majority found, "[r]etroactivity is generally disfavored in the law, in accordance with fundamental notions of justice that have been recognized throughout history."[176] Quoting Justice Joseph Story, the Court continued "[r]etrospective laws are, indeed, generally unjust; and, as has been forcibly said, neither accord with sound legislation nor with the fundamental principles of the social compact."[177] Because of the fundamental nature of the right against retroactive regulation, when the character of a government action retroactively imposes liability on a property owner, the character factor leans heavily in favor of the property owner.

The Court's decision in *Nollan* [178] illustrates another essential non-property right. In *Nollan*, the Court held that a condition imposed on a construction permit must bear some essential nexus to the perceived harm that the construction will cause.[179] Where the character of the regulation allows a condition to be imposed without such an essential nexus, the action would be closer to "an out-and-out plan of extortion,"[180] something the law does not permit. The right not to be extorted by one's government is as fundamental as rights come, and, where the government action amounts to such an extortion, the character of the government action leans heavily in favor of the property owner.

III. Application of the Two-Prong Approach

The Supreme Court, along with many commentators, has determined that the ad hoc *Penn Central* inquiry looks at three relevant prongs to aid in the factual determination: (1) the adverse economic impact; (2) the reasonable investment-backed expectation; and (3) the character of the government action. Although the Supreme Court has reiterated that the three-prong approach of *Penn Central* controls in regulatory taking cases, the modified two-prong approach may serve as a better method for predicting future outcomes. This Part will apply the two-prong approach to various *Penn Central* cases and illustrate why the two-prong approach is a better method.

Economic analyses are "not offered as a new legal standard; [they are] intended not to force analysis into a quantitative straitjacket but to assist analysis by presenting succinctly the factors that the court must consider in making its decision and by articulating the relationship among the factors."[181] Although the suggested two-prong approach is not truly an economic analysis, the statement is still apt. The two-prong approach is offered as a conceptual tool to analyze future cases. It is meant to aid in prediction and give some certainty to what has classically been an uncertain field. Although regulatory takings jurisprudence "cannot be characterized as unified,"[182] themes and patterns can be discerned that may assist in prediction.

The two-prong approach is a trade off between the economic impact prong and the character of the government action prong. Where one prong increases in weight, the other prong can decrease. Thus, the greater the economic impact on the property owner, the less deleterious the character of the action must be in order to find a taking. The reverse is also true, where the economic impact on the property owner is not so substantial but the character of the government action is extreme, a taking can be found. Where the adverse economic impact on the property owner nears 100%, the government action need not be shown in order to find a taking. Likewise, where the government action is extreme, adverse economic impact can be very small.

A. Existing Per Se Rules Are Consistent With the Two-Prong Approach

The existing per se rules all fit into the two-prong analysis, and are illustrations of what occurs when one prong is weighted 100%. In *Lucas*, the negative economic impact on

172. Penn Cent. Transp. Co. v. City of New York, 438 U.S. 104, 130-35, (1978).
173. *Id.* at 130.
174. *Id.* at 122.
175. 524 U.S. 498 (1998). The decision in *Eastern Enterprises* was 4-1-4 with Justice Kennedy concurring in the result under a due process theory, not a takings theory. However, Justice Kennedy also found that the retroactive nature of the action was largely determinative of the outcome. *Id.* at 547 (Kennedy, J., concurring).
176. *Id.* at 532 (majority opinion) (internal citations omitted). *See id.* at 547 (Kennedy, J., concurring).
177. *Id.* at 533 (majority opinion) (quoting 2 Joseph Story, Commentaries on the Constitution §1398 (5th ed. 1891)).
178. 483 U.S. 825 (1987).
179. *Id.* at 837.
180. *Id.* (internal quotations omitted).
181. Am. Hosp. Supply Corp. v. Hosp. Prods. Ltd., 780 F.2d 589, 593 (7th Cir. 1986). *See* Ramsey Sgegadeg & Mary B. Stewart, *An Economic Approach to Weighing Preliminary Injunction Motions in Patent Cases: Abstract*, SD20 ALI-ABA 269, 271 (1998).
182. Lingle v. Chevron U.S.A., Inc., 544 U.S. 528, 539 (2005).

the property owner was 100%, as he suffered a 100% loss of all economically beneficial use.[183] Because the taking was absolute, the character of the government action was of no consequence and a taking per se occurred. The fact that the character of the action was legitimate and favored the government was irrelevant.

The per se rule of *Loretto* also fits into the two-prong analysis. Loretto held that where a property owner is forced to suffer a permanent physical presence a per se taking occurs.[184] In *Loretto* an essential property right was taken such that the character prong weighed 100% in favor of the property owner. Because the prong weighed 100% in favor of the property owner, how much or little adverse economic impact existed was of no consequence.

The freestanding *Nollan* and *Dolan* test also fits into the two-prong approach. Where a regulation lacks an essential nexus to a permit condition, the character of the government action leans 100% in favor of the property owner because such a regulation would be akin to extortion.[185] Where the character prong favors the property owner 100%, the economic impact prong cannot offset.

The existing per se rules demonstrate the application of the two-prong test where one prong favors a party 100%. When dealing with other cases, however, the application becomes more complicated. Although the application is not as easily illustrated, cases that have applied the *Penn Central* test have generally fit into the two-prong analysis. The following Part addresses three sets of cases that have applied the *Penn Central* analysis. The application demonstrates the effectiveness of the two-prong approach in both identifying the factors courts deem most relevant and illustrating how those factors interact.

B. Penn Central *Cases Have Been Decided Consistently With the Two-Prong Approach*

1. *Eastern Enterprises v. Apfel*[186]

In *Eastern Enterprises v. Apfel*, a plurality of the Supreme Court found that a regulatory taking occurred.[187] In 1947, the National Bituminous Coal Wage Agreement (NBCWA) set up various trusts to provide benefits for coal workers and their dependents.[188] The trusts were funded using proceeds of a royalty on coal production.[189] Modified NBCWAs were created in 1950 and 1974 and were funded substantially the same way as the 1947 Act.[190] In 1992, Congress passed the Coal Industry Retiree Health Benefit Act (Coal Act).[191] The Coal Act merged the 1950 benefit plan and the 1974 benefit plan into one new fund that was funded by previous signatories to the 1950 or 1974 benefit plans.[192] The Commissioner of Social Security was responsible for assigning retirees to signatory coal companies according to a specific formula.[193] Eastern Enterprises was a signatory to every NBCWA between 1947 and 1964, however, while "active" for purposes of the Coal Act, Eastern had not been involved in the coal mining industry since 1966.[194] Nonetheless, under the Coal Act, Eastern was assigned over 1,000 retired miners who had worked for the company before 1966.[195] Eastern sued the Commissioner alleging, inter alia, that the Coal Act constituted a regulatory taking in violation of the Fifth Amendment.[196]

a. The Economic Impact Prong

Eastern Enterprises is an example of what happens when an extreme character prong substantially outweighs the economic impact prong. In *Eastern Enterprises*, the economic impact prong favored the government, as the diminution in value sub-factor weighed toward the government and the investment-backed expectation sub-factor did not apply. The character prong, however, weighed strongly toward Eastern as both the reciprocity sub-factor, and the type of right sub-factor favored Eastern.

Regarding the diminution in value sub-factor the Court stated, "there is no doubt that the Coal Act has forced a considerable financial burden upon Eastern[,]"[197] however, no calculation was made regarding the percentage the value of the company diminished. Although "[t]he parties estimate that Eastern's cumulative payments under the [Coal] Act will be on the order of $50 to $100 million[,]"[198] there was no evidence that payment would decrease the value of the property by a significant amount, let alone 50%. Thus, although the amount that Eastern would be forced to pay under the regulation was substantial, there was no evidence to suggest that the majority of the value would be lost and thus no way to prevail under the first sub-factor. Because of the failure to show even a 50% loss, under the two-prong approach, the diminution of value factor does not lean in favor of the property owner.

The investment-backed expectation factor did not apply in this case. Although the Court indicated that Eastern's investment-backed expectation was affected, the reasoning the Court utilized is appropriately addressed in the character of the government action prong. The Court held, "the Coal Act substantially interferes with Eastern's reasonable investment-backed expectations. "The [Coal] Act's beneficiary allocation scheme reaches back 30 to 50 years to impose liability against Eastern based on the company's activities between 1946 and 1965."[199] Although the retroactive imposition of liability is

183. Lucas v. S.C. Coastal Council, 505 U.S. 1003, 1020 (1992).
184. Loretto v. Teleprompter Manhattan CATV Corp, 458 U.S. 419, 426 (1982).
185. Nollan v. Cal. Coastal Comm'n, 483 U.S. 825, 827 (1987).
186. 524 U.S. 498 (1998).
187. For purposes of this Article's analysis under the proposed two-prong approach, I will assume that a taking did occur as such an assumption does not substantially affect the analysis.
188. *Eastern Enters.* 524 U.S. at 505.
189. *Id.* at 505-06.
190. *Id.* at 509.
191. *Id.* at 514.
192. *Id.*
193. *Id.* at 514-15.
194. *Id.* at 516.
195. *Id.* at 517.
196. *Id.*
197. *Id.* at 529.
198. *Id.*
199. *Id.* at 532.

a relevant factor, it is not appropriately addressed under the investment-backed expectation factor. Under the suggested two-prong approach, the investment-backed expectation factor is a non-factor. Because the investment-backed expectation is a non-factor, and because the diminution in value factor weighs toward the government, the economic impact prong as a whole favors the government.

b. The Character of the Government Action Prong

The character of the government action prong favored Eastern as both the generality/reciprocity factor and the type of right factor favored Eastern. Although the Coal Act was an industrywide regulation, the manner in which it consolidated the prior NBCWAs created a scheme whereby companies who had been in the coal mining industry longer were forced to pay more. Companies like Eastern, who had been signatories to every NBCWA since 1947 were thus forced to pay more into the Coal Act than other companies. Although the benefit that accrued from the regulation was dispersed amongst the entire industry work force, some companies, like Eastern, were forced to pay significantly more than others. Because some companies were forced to bear a disproportionate share of the costs for the benefit of the industry as a whole, the regulation did not comport with the *Armstrong* principle, and the generality factor thus weighed in favor of Eastern, if only marginally.

The property interest at stake in *Eastern Enterprises* was simple money and is in no way an essential or fundamental property right as the government customarily takes it. In this case, however, money was not the only right at stake. The right to be free from gross retroactive liability was the crucial element in *Eastern Enterprises*. The Court emphasized: "[r]etroactivity is generally disfavored in the law;"[200] "that a statute . . . is not to have a retrospective effect;"[201] that "[r]etrospective laws . . . neither accord with sound legislation nor with the fundamental principles of the social compact;"[202] and that "[r]etroactive legislation presents problems of unfairness . . . because it can deprive citizens of legitimate expectations and upset settled transactions."[203] Because imposition of retroactive liability is an extreme governmental action, where the government attempts to impose such liability, the character of the action weighs heavily in favor of the property owner.

c. Eastern Distinguished

Eastern Enterprises fits into the two-prong analysis and illustrates that, where one prong weighs heavily in favor of the property owner, the other prong need not weigh so heavily in order for a taking to occur. Under the two-prong approach, if the character of the action was not so extreme and all the other factors were substantially the same, a taking would not occur. Two cases with substantially similar facts to *Eastern Enterprises* illustrate this point. In *Connolly*,[204] and again in *Concrete*,[205] the Supreme Court found, on similar facts, that a regulatory taking had not occurred.

In *Connolly*, the Supreme Court found a regulatory taking had not occurred when Congress enacted the MPPAA, which amended ERISA to require employers to pay a withdrawal fee upon leaving some pension plans.[206] Under the original trust agreement, the employer's sole obligation was to pay the required contributions under the collective-bargaining agreement.[207] The amendment required that any employer withdrawing from a multiemployer pension plan pay a fixed and certain debt to the plan notwithstanding the private contracts that the employers had previously entered into.[208] While the facts of *Connolly* are similar to the facts of *Eastern Enterprises*, the Supreme Court found that no taking occurred in *Connolly*. Analyzing *Connolly* under the two-prong approach illustrates where in the weighing analysis the key differences exist.

In *Connolly*, the economic impact prong comes out the same way as it did in *Eastern Enterprises*. The diminution of value was not extreme enough to make the factor lean in favor of the property owner. The Court noted that an arbitrator assessed the damage to one plaintiff at $200,000, or about 25% of the firm's net worth.[209] Like in *Eastern Enterprises*, while the amount is substantial, it did not diminish the value of the property by even 50%. Thus, the diminution in value factor does not weigh in favor of the property owner.

Like *Eastern Enterprises*, the investment-backed expectation factor did not apply in *Connolly*. The property interest at stake was money, not investment property. Connolly was a company going about business when the government enacted a regulation that arguably took some of its money; it was not an investor purchasing investment property. Because *Connolly* was not an investor, the investment-backed expectation factor does not apply, and instead, like in *Eastern Enterprises*, is a non-factor. Because neither the diminution in value factor nor the investment-backed expectation factor favors Connolly, the economic impact prong does not weigh toward Connolly.

The true difference between *Connolly* and *Eastern Enterprises* is in the character of the government action prong. Unlike *Eastern Enterprises*, the reciprocity factor in *Connolly* favored the government as the regulation affected all industry employers for the benefit of the industry as a whole and no employer was forced to bear a disproportionate share of the costs. Indeed, the Court explained that "[t]he assessment of withdrawal liability . . . directly depends on the relationship between the employer and the plan to which it had made contributions."[210] Further, the Court held that "a significant number of provisions in the Act . . . moderate and mitigate the economic impact," and that "[t]here is nothing to show

200. *Id.* at 532.
201. *Id.* at 533 (quoting Dash v. Van Kleeck, 7 Johns. 477, 503 (N.Y. 1811)).
202. *Id.* (quoting 2 J. Story, Commentaries on the Constitution §1398 (5th ed. 1891)).
203. *Id.* (quoting General Motors Corp. v. Romein, 503 U.S. 181, 191 (1992)).
204. 475 U.S. 211 (1986).
205. 508 U.S. 602 (1993).
206. *Connolly*, 475 U.S. at 217.
207. *Id.*
208. *Id.*
209. *Id.* at 222.
210. *Id.* at 225.

that the withdrawal liability actually imposed . . . will . . . be out of proportion to [the employer's] experience with the plan."[211] Because all employers were subject to the withdrawal fee for the benefit of all those involved, the regulation accorded with the *Armstrong* principle. Thus, the generality/reciprocity factor favored the government in *Connolly*.

The type of right affected in *Connolly* is the most important distinguishing factor from *Eastern Enterprises*. While the actual property affected in both cases was money, the regulation in *Connolly* did not affect the fundamental right not to be subject to severe retroactive liability. Instead, the right affected in *Connolly* was the right to privately contract free from government-imposed alterations. While, arguably, the same type of retroactive liability occurred in *Connolly* as did in *Eastern Enterprises*, the crucial difference is the fact that the employers in *Connolly* voluntarily chose to contract within the strictures of a highly regulated field, while Eastern did not volunteer or take place in the negotiations regarding the Coal Act. In *Eastern Enterprises*, the government action was not a modification of a preexisting contract but was rather an extreme retroactive imposition of a theretofore nonexistent regulation. In *Connolly,* on the other hand, the regulation modified an existing contract in a highly regulated field, something Congress frequently does.

In *Eastern Enterprises* the economic impact prong favored the government but was outweighed by the character of the government action prong and thus, a taking was found. Conversely, in *Connolly*, the economic impact prong favored the government, but the character of the government action prong did not offset the economic impact prong. Thus, in *Connolly*, both prongs favored the government and no taking occurred.

2. *Hodel v. Irving*[212]

The 1987 case of *Hodel v. Irving*, and its sister case *Babbitt v. Youpee*[213] both applied the *Penn Central* test, and both Courts found that a regulatory taking had occurred. The cases dealt with a federal regulation that prevented individuals from passing small percentage property interests in real property through devise. In *Hodel*, the case dealt with §207 of the Indian Consolidation Act (ICA) of 1983, which provided that undivided fractional interests shall escheat to the tribe if the interest represented 2% or less of the total acreage of the tract and earned the owner less than $100 in the preceding year.[214] *Babbitt* also dealt with §207, however, in *Babbit* §207 was amended to look back five years instead of one regarding profitability, permitted devise of otherwise escheatable interests to persons who already owned an interest in the same parcel, and authorized tribes to develop their own codes governing the disposition of fractional interests.[215] *Hodel* held that the mandatory escheat provision of the ICA violated the Fifth Amendment;[216] *Babbitt* held that the amendments to §207 did not cure the constitutional defects.[217] The cases are instructive regarding the two-prong analysis as the holding, as well as dicta in *Hodel*, illustrate the give and take nature of the two-prong analysis.

a. The Economic Impact Prong

In *Hodel*, the economic impact prong favored the government because the diminution in value factor favored the government and the investment-backed expectation factor did not apply. The Court acknowledged that "the relative economic impact of [the regulation] upon the owners of [the] property rights can be substantial."[218] The Court determined that the right to pass property on to one's heirs is a valuable right, and that by age 65 approximately 32% of the value of real property is in the remainder interest.[219] Diminishing the value of the property by 32%, however, is not enough to make the diminution factor favor the property owner.

The investment-backed expectation was a non-factor in this case. The Court held, "[t]he extent to which any of appellees' decedents had 'investment-backed expectations' in passing on the property is dubious"[220] and continued "[n]one of the appellees here can point to any specific investment-backed expectation."[221] Because the diminution in value factor leaned toward the government and the investment-backed expectation factor did not apply, the economic impact prong favored the government.

b. The Character of the Government Action Prong

The generality/reciprocity factor favored the government because the majority of the owners of the escheatable interests maintained a nexus to the tribe.[222] While the Court acknowledged that not all members of the tribe owned escheatable interests and that not all interest owners were members of the tribe, there was "substantial overlap between the two groups."[223] The substantial overlap, coupled with the Court's conclusion that consolidated land was more beneficial to members of the tribe than was fractured land, suggests the regulation accorded with the *Armstrong* principle. Because the scheme accorded with the *Armstrong* principle, the generality factor favored the government.

With the economic impact prong and the generality factor all favoring the government, the Court noted, "[i]f we were to stop our analysis at this point, we might well find [the regulation] constitutional."[224] Under the two-prong approach, such would be the case as the economic impact prong favored the government and the character prong did not offset the economic impact prong. In order for the one remaining factor to outweigh both the economic impact prong and the general-

211. *Id.* at 226.
212. 481 U.S. 704 (1987).
213. 519 U.S. 234 (1997).
214. *Hodel*, 481 U.S. at 709.
215. *Babbitt*, 519 U.S. at 240-41.
216. *Hodel*, 481 U.S. at 718.
217. *Babbitt*, 519 U.S. at 242, 245.
218. *Hodel*, 481 U.S. at 714.
219. *Id.* at 716.
220. *Id.* at 715.
221. *Id.*
222. *Id.*
223. *Id.*
224. *Id.* at 716.

ity factor, it must hugely favor the property owner. Such was the Court's conclusion when it held, "the character of the government regulation here is extraordinary."[225]

The Court concluded that the right affected in *Hodel* was an essential right akin to the right to exclude as noted in *Kaiser Aetna v. United States*.[226] The Court held, "the right to pass on property—to one's family in particular—has been part of the Anglo-American legal system since feudal times,"[227] and that "the regulation here amounts to virtually the abrogation of the right to pass on a certain type of property . . . to one's heirs."[228] Because of the essential nature of the right affected, the character of the government action prong leaned far enough in favor of the property-own to offset both the generality factor and the economic impact prong. Had the type of right affected been less essential, it is likely that the regulation would not have amounted to a taking.[229]

3. *Loveladies Harbor, Inc. v. United States*[230]

In 1994, the Federal Circuit decided *Loveladies Harbor, Inc. v. United States*. In *Loveladies*, a developer sought a fill permit from the U.S. Army Corp of Engineers (the Corps) to fill 11.5 acres of a 12.5-acre lot as required by §404 of the Clean Water Act (CWA).[231] The Corp denied the fill permit and Loveladies brought suit in the Court of Federal Claims alleging that its property had been taken in violation of the Fifth Amendment.[232] The Court of Federal Claims ruled in favor of Loveladies and the government appealed.[233]

Loveladies did not correctly analyze the *Penn Central* factors. The Court confused *Lucas* with *Penn Central* and incorrectly substituted a common-law nuisance inquiry for the character prong.[234] The result of the case, however, is consistent with the two-prong approach and illustrates what happens where the economic impact prong strongly favors the property owner and the character of the government action prong favors the government.

Loveladies purchased the property prior to the enactment of the CWA[235] and did so for development and investment purposes.[236] The notice issue thus favored Loveladies and, although a profitability inquiry was not conducted, the diminution in value factor strongly favors Loveladies. The Court accepted the trial court's determination that the permit denial reduced the value of the property from $2,600,000 to $12,500, or by 99%.[237] The economic impact prong, under the suggested two-prong approach, thus, strongly favors Loveladies.

The character prong, however, does not favor Loveladies. The generality factor does favor the property owner; however, the type of right factor strongly favors the government. The regulation at issue required that individuals seeking to fill in protected wetlands obtain a permit prior to doing so. The cost of the regulation was thus borne by all individual property owners who owned protected wetlands. The regulation is in contravention of the *Armstrong* principle as a relatively small group of people was required to bear the cost of a regulation, the conservation and environmental aspects of which, benefited society as a whole.

The type of right affected factor favors the government because the right to develop environmentally protected lands is not a fundamental or essential right. On the contrary, it is the exception to the rule where an individual is allowed to fill protected wetlands or develop on environmentally protected lands. The type of right affected thus strongly favors the government; however, because of the overwhelming economic impact, as well as the violation of the generality factor, a taking would still occur under the two-prong approach.

V. Conclusion

Regulatory takings jurisprudence has long been fraught with uncertainty. For more than 50 years, the Supreme Court was silent regarding regulatory takings, and then *Penn Central* emerged. In the years just after *Penn Central*, the Supreme Court attempted to refine the jurisprudence, creating per se rules and bright-line tests to aid the *Penn Central* ad hoc factual inquiry. After laying down several per se rules, however, the Supreme Court began to back away from bright-line rules and retreated to the amorphous *Penn Central* test.[238]

Although it is clear the Supreme Court is hesitant to create bright-line legal formulas to bind its regulatory takings jurisprudence, the past 30 years of case law have illustrated patterns to regulatory takings cases. Under the modified two-prong approach, the emerging patterns can be analyzed more usefully than under the traditional three-prong approach. While it is unlikely that the Supreme Court will decide regulatory cases any differently than it has in the past, by analyzing factual situations under the suggested two-prong approach, those in the legal field may be better able to predict how regulatory takings cases will be decided in the future.

225. *Id.*
226. *Id.* (citing Kaiser Aetna v. United States, 444 U.S. 164, 176 (1979)).
227. *Id.*
228. *Id.*
229. *Id.*
230. 28 F.3d 1171 (Fed. Cir. 1994) (abrogated by Bass Enters. Prod. Co. v. United States, 381 F.3d 1360, 34 ELR 20088 (Fed. Cir. 2004)).
231. *Id.* at 1173-74. A substantial portion of the opinion was devoted to the "denominator" issue. In short, the denominator issue deals with how to determine the relevant parcel of land that is subject to the regulatory taking inquiry. This Article will not discuss the denominator issue and instead will adopt the Court's findings. For an in depth discussion of the denominator issue, see John E. Fee, *Unearthing the Denominator in Regulatory Taking Claims*, 61 U. Chi. L. Rev. 1535 (1994).
232. *Loveladies*, 28 F.3d at 1174.
233. *Id.* at 1175.
234. *Id.* at 1182-83.
235. *Id.* at 1174.
236. *Id.* at 1179.
237. *Id.* at 1174-75.
238. Lingle v. Chevron U.S.A., Inc., 544 U.S. 528, 538 (2005).