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The Stubborn Incoherence of Regulatory Takings

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Mark Fenster*

I. INTRODUCTION........................................................................................................... 526
II. LINGLE AND “TAKINGS JURISPRUDENCE” .......................................................... 530
III. LINGLE’S CLARIFICATION AND DISENTANGLEMENT ................................. 535
    A. Lingle’s Clarification .......................................................................................... 536
    B. Lingle’s Disentanglement: Takings, Substantive Due Process, and the Ninth Circuit................................................................. 536
       1. Pre-Lingle: Where Substantive Due Process Had Gone............................................. 537
       2. Disentanglement After Lingle: The Ninth Circuit Responds........................................ 540
IV. PENN CENTRAL, AFTER LINGLE ............................................................................. 544
    A. The “Character” Test in Penn Central ...................................................................... 546
    B. Confusing Signals After Penn Central ...................................................................... 548
    C. Lingle and the Character Factor ............................................................................. 553
V. THE CHARACTER FACTOR, AFTER LINGLE ......................................................... 560
    A. Post-Lingle Character Factor Decisions ..................................................................... 561
       1. The Character Factor in the Federal Circuit ............................................................... 561
       2. Georgia and the Mann Decisions ........................................................................... 567
    B. The Character Factor After Lingle ........................................................................... 571
VI. CONCLUSION ............................................................................................................. 576

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I. INTRODUCTION

Upon its quiet issuance in the face of the Sturm und Drang caused by *Kelo v. City of New London* and its application of the Public Use Clause to an eminent domain action undertaken for the purpose of economic development,\(^1\) the Supreme Court's unanimous decision in *Lingle v. Chevron U.S.A., Inc.*\(^2\) was met with more restrained but largely appreciative notice by commentators.\(^3\) Finally, the Court had simultaneously clarified the normative justification of the regulatory takings doctrine and restated—even if it failed to simplify—the doctrine comprehensively both by narrowing the focus of regulatory takings analysis and by disentangling it from other constitutional doctrines. *Lingle* declared that the Takings Clause affirmatively protects property owners by awarding them compensation for regulations that impose the functional equivalent of a condemnation of their property.\(^4\) The regulatory takings doctrine thus differs from the substantive due process doctrine, which instead reviews the validity of a regulation and offers as its remedy the invalidation of an offending government action.\(^5\) Clearing the underbrush that had grown in nearly a century of Supreme Court precedent, the Court appeared to have made the path forward clear.

Viewed four years later, *Lingle*’s narrow project of separating regulatory takings from substantive due process has been largely successful. Courts no longer apply stray language from an earlier decision that *Lingle* struck from the overstuffed box of key phrases that compose the takings canon, and they now seem to understand

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5. *Id.* at 540-42.
INCOHERENCE OF REGULATORY TAKINGS

the distinction between takings and substantive due process claims. Those circuits and jurisdictions that found their precedent out of compliance with *Lingle* have performed their own housekeeping under the Supreme Court's guidance. Even when faced with issues other than the narrow one that *Lingle* resolved, lower courts have assiduously quoted *Lingle*'s explanation of regulatory takings. This is no small accomplishment. Regulatory takings has frequently vexed and perplexed courts, while commentators and even a Supreme Court justice have accused lower courts of willfully disregarding the Court's efforts to protect property owners. By stabilizing doctrine and limiting judicial confusion, *Lingle* appears to have offered a longed-for peace, an end to the pitched legal, political, and philosophical battles that the "takings revolution" and Richard Epstein's landmark book *Takings* initiated.

Stability does not equal universal acceptance, of course, and some commentators have argued that *Lingle* is unjust, unwise, and haphazard, and that the decision fails to clarify either regulatory

6. See infra Part III.
7. See infra Part III-B.
8. See infra Part III-A.
takings or substantive due process satisfactorily. Moreover, Lingle's stability is built upon indeterminacy—specifically, the ad hoc, multi-factor balancing test enshrined in the first contemporary regulatory takings decision, Penn Central Transportation Co. v. City of New York, a decision that has come to serve as what Justice O'Connor, Lingle's author, had earlier called the "polestar" of takings jurisprudence. Thus, although stability might bring peace, it does not establish a mechanical or even predictable doctrine, given Penn Central's inherent messiness as well as the (admittedly lesser) indeterminacy of the compartmentalized takings tests that are exempt from the Penn Central approach. But political and philosophical conflicts as well as doctrinal indeterminacy have always driven regulatory takings litigation and theory. Given the open-ended, indeterminate constitutional text on which the doctrine is based, which is silent as to the definition of "taken" and makes no mention of regulation, as well as the fraught terrains of property rights and land use and environmental regulation in whose terms opposing parties state their respective positions, it seems inevitable that any effort to resolve the issue and stabilize the doctrine will generate disputes. Any effort will also result in an entangled, complex doctrine, one unlikely to please those who long for clear analytical distinctions and bright-line rules.

Buried in Lingle, however, is a loose thread that not only threatens this stability but also could clutter the conceptual neatness the Court seemed so confidently to have achieved in the decision. Penn Central required courts to consider a number of fuzzy factors in weighing the merits of a regulatory takings claim, overturned in the future).


14. The indeterminacies here both concern whether a particular claim falls within one of the special categories of takings cases that receive higher scrutiny and, especially in the Lucas category, whether a traditional common law nuisance exception exists.

15. See U.S. CONST. amend. V ("[n]or shall private property be taken for public use, without just compensation").
INCOHERENCE OF REGULATORY TAKINGS

among which is the "character of the government action." Always listed, only occasionally deployed, and left largely undefined, the "character" factor could look suspiciously like a substantive due process test. On one hand, it appears to allow a property owner to challenge the government action's legitimacy; while on the other, it appears to allow the government to defend itself from a compensation award by promoting its regulatory action's necessity and legitimacy. As a result, the very concerns that the Court attempted to expunge from regulatory takings analysis in *Lingle* could slip back into that analysis via the *Penn Central* balancing test. Pull hard enough on the "character" factor and the threads of substantive due process that the Court in *Lingle* hoped to disentangle from takings could again become snarled.

Although the conventional trope in takings scholarship requires the analyst to lament such potential confusion and to offer a prescriptive solution, I want to suggest that the complex muddle of takings and its entanglement with other doctrines are neither bad nor avoidable things. I intend in this Article neither to condemn conceptual fuzziness nor to lament its inevitability, nor even to celebrate indeterminacy and imprecision. Case-by-case adjudication is inevitable in an area where bright lines are impossible and courts are forced to review an infinite variety of state regulatory actions. Analytical purity and abstract doctrinal coherence are likely impossible to achieve in difficult cases, as courts engage in the imprecise balancing they must perform when they consider the complex impacts of a regulation on property rights, as well as the complex political and policy decisions a government agency made in imposing that regulation. To invoke

17. See infra Part IV.
18. In this regard, this Article attempts to carry forward Carol Rose's perspective on and approach to takings to a post-*Lingle* world. See, e.g., Carol M. Rose, *A Dozen Propositions on Private Property, Public Rights, and the New Takings Legislation*, 53 WASH. & LEE L. REV. 265, 285 (1996) (characterizing takings cases as "messy and fraught with intellectual and even practical imperfections, but as in most other areas of life, the adjustment of property relations has a considerable element of 'muddling through'"); Carol M. Rose, Mahon Reconstructed: Why the Takings Doctrine is Still a Muddle, 57 S. CAL. L. REV. 561, 596 (1984) (identifying an essential, unresolvable tension at the heart of takings law, and property law generally, between a prepolitical, acquisitive notion of property and a social, other-oriented conception). For a more recent, thoroughgoing version of this insight, see Marc R. Poirier, *The Virtue of Vagueness in Takings Doctrine*, 24 CARDOZO L. REV. 95 (2002).
the jargon of software design, this messiness is neither a bug nor a feature in regulatory takings doctrine but part of its operating instructions, as those instructions have been shaped by the political and jurisprudential changes wrought by the New Deal and legal realism. The *Penn Central* test in a post-*Lingle* world, I argue, offers an explicitly realist solution to the multi-tiered field of land use and environmental regulation, a tool that grants courts discretion to make their way through the fact-intensive conflicts that hard cases present.

II. *LINGLE* AND "TAKINGS JURISPRUDENCE"

A relatively brief, straightforward, and unanimous decision, *Lingle v. Chevron U.S.A., Inc.* sought to clarify whether courts should continue to apply a "would-be doctrinal rule or test" that had been repeated, though never directly applied, in earlier Supreme Court decisions. Under review in *Lingle* was a rent control statute that Hawaii enacted to limit the amount of rent that gasoline station owners could be charged when the oil companies from whom they purchased their gasoline were also their landlords. The state's ultimate purpose in regulating this particular landlord-tenant relationship was to address concerns that excessive market concentration in retail gasoline sales in the state resulted in inflated gas prices for consumers. Among other claims, Chevron alleged that the legislation effected a facial taking of its property for which compensation was due. This claim rested on a single statement in *Agins v. City of Tiburon*: a legislative act


21. See infra Part V.

22. *Lingle v. Chevron U.S.A., Inc.*, 544 U.S. 528, 531-32 (2005); *see also* id. at 545-46 (citing instances in which the Court had "arguably applied" the *Agins* "substantially advances" inquiry, including *Keystone Bituminous Coal Ass'n v. DeBenedictis*, 480 U.S. 470, 485-92 (1987), *Nollan v. California Coastal Comm'n*, 483 U.S. 825, 834 (1987), and *Dolan v. City of Tigard*, 512 U.S. 374, 384 (1994), as well as five decisions in which the Court "merely assumed its validity when referring to it in dicta").


24. *Id.* at 533-34.
effects a taking, Justice Powell wrote for a unanimous Court, if it “does not substantially advance legitimate state interests, . . . or [it] denies an owner economically viable use of his land.” The second part of this disjunctive test would later become the basis for the Court’s decision in Lucas v. South Carolina Coastal Council, which held that an owner whose land was left devoid of value after the application of a regulation could establish a per se taking. The disjunctive test’s first part, which suggests that a property owner could rest a takings claim on the relative validity and effectiveness of a regulation, would become the basis for Chevron’s victory in the Ninth Circuit and the Court’s focus in Lingle.

The Ninth Circuit had built a small body of precedent on the so-called Agins “substantially advance” test in a series of decisions that had invalidated rent control statutes and ordinances that various appellate panels viewed as ineffective in advancing their stated goal. In Richardson v. City and County of Honolulu, the circuit affirmed the district court’s decision that a Honolulu rent control ordinance constituted an unconstitutional taking. At the time, Hawaiian landowners routinely leased their land to developers who built condominiums on the property. The developers in turn sold the condominiums subject to the ground lease. In enacting the rent control ordinance, the city sought to curtail increases in home prices by limiting the rent that owners of the underlying land could charge to developers. The court held

27. Other lower federal and state courts had also applied the Agins test as a stand-alone basis for takings liability, but not as frequently and stringently as the Ninth Circuit. See, e.g., Clajon Prod. Corp. v. Petera, 70 F.3d 1566, 1579 (10th Cir. 1995) (applying Agins test to conclude that restriction on issuance of hunting licenses to out-of-state hunters substantially advanced Wyoming’s legitimate interest in conserving game animals for its residents); Smith v. Town of Mendon, 822 N.E.2d 1214, 1221 (N.Y. 2004) (applying Agins test to conclude that restriction on development in conservation areas substantially advanced the town’s legitimate interest in preserving environmentally sensitive areas); Sheffield Dev. Co. v. City of Glenn Heights, 140 S.W.3d 660, 677 (Tex. 2004) (holding that Agins test remained authoritative and, as such, city’s downzoning and moratorium on development of landowner’s parcel substantially advanced city’s interest in avoiding ill effects of urbanization).
28. 124 F.3d 1150 (9th Cir. 1997).
29. Id. at 1166.
30. Id. at 1154.
31. Id. at 1163.
that the city's efforts failed to promote affordable housing because the ordinance did not limit developers' ability to include a premium when pricing their condominiums to the market.\textsuperscript{32} Thus, the purchasers would not necessarily enjoy the benefits of rent control. Applying the \textit{Agins} test, the circuit held that the ordinance failed to substantially advance its stated goal and declared it unconstitutional.\textsuperscript{33}

Likewise, in \textit{Cashman v. City of Cotati},\textsuperscript{34} the Ninth Circuit evaluated whether Cotati's rent control ordinance advanced the government's interest in easing rent increases in mobile homes.\textsuperscript{35} The plaintiffs-appellants, two mobile home park owners, claimed that the ordinance constituted a facially unconstitutional regulatory taking.\textsuperscript{36} As in \textit{Richardson}, the circuit noted that the actual occupants of the mobile homes would not enjoy the benefit of the rent restriction because an intermediary, the owners of the mobile homes, could charge them a premium.\textsuperscript{37} Once again, the circuit struck down the ordinance.\textsuperscript{38}

A circuit panel had twice reviewed the litigation that would result in the Supreme Court's \textit{Lingle} decision. In \textit{Chevron v. Cayetano},\textsuperscript{39} the panel vacated the district court's award of summary judgment to the plaintiff, finding a genuine issue of material fact as to whether the ordinance substantially advanced a legitimate government interest, but sustaining the trial court's embrace of the \textit{Agins} test and reaffirming the circuit's use of the \textit{Agins} test.\textsuperscript{40} On remand, the trial court, sitting as trier of fact, heard the testimony of competing expert witnesses on the legislation's practical effects and accepted the view of Chevron's economist that

\begin{itemize}
\item \textsuperscript{32} The court in \textit{Richardson} further found that this same "premium" effect may occur in the reconveyance of condominiums that had already been sold by developers. Incumbent owners could resell the condos for the natural market price and capture the benefit of the ordinance for themselves. \textit{Id.} at 1165-66.
\item \textsuperscript{33} \textit{Id.} at 1166.
\item \textsuperscript{34} 374 F.3d 887 (9th Cir. 2004).
\item \textsuperscript{35} \textit{Id.} at 897-99.
\item \textsuperscript{36} \textit{Id.} at 891.
\item \textsuperscript{37} \textit{Id.} at 897.
\item \textsuperscript{38} \textit{Id.} at 899.
\item \textsuperscript{39} 224 F.3d 1030 (9th Cir. 2000).
\item \textsuperscript{40} \textit{Id.} at 1042-44.
\end{itemize}
the rent cap provision would in fact result in a price increase.\textsuperscript{41} Hearing the case once more on appeal, the same Ninth Circuit panel again affirmed the district court’s application of \textit{Agins} to Chevron’s facial taking claim, and this time affirmed the trial court’s finding that a taking had occurred.\textsuperscript{42}

The Supreme Court reversed, overruling the judgment and repudiating the Ninth Circuit’s application of the disjunctive language in \textit{Agins} as a stand-alone taking test.\textsuperscript{43} The phrase “substantially advances a legitimate state interest” was a mistake, the Court declared in \textit{Lingle}, merely stray language that had no bearing on the decision in \textit{Agins}—the classic instance of dicta.\textsuperscript{44} Much more significantly than its status as dicta, however, the language was \textit{wrong}. It inappropriately and incorrectly suggested that the Takings Clause requires that a regulation “substantially advance legitimate state interests,” without reference to whether the act had any economic effect on the use of his land.\textsuperscript{45} The Takings Clause requires a Court to inquire only into “the magnitude or character of the burden a particular regulation imposes upon property owners” and how such burden “is distributed among property owners.”\textsuperscript{46} Because the language in \textit{Agins} enabled judicial review of a government act’s purpose and the relationship between its function and that purpose, and therefore invited courts “to substitute their predictive judgments for those of elected legislatures and expert agencies,” it belonged within a substantive due process test rather than a takings test.\textsuperscript{47} As the Court bluntly

\textsuperscript{41} Chevron U.S.A., Inc. v. Cayetano, 198 F. Supp. 2d 1182, 1192 (D. Haw. 2002). The expert reasoned that oil companies would most likely raise wholesale gasoline prices to offset losses resulting from the rental cap. \textit{See id.} The case had been remanded to the district from the Ninth Circuit following an appeal of the district court’s earlier grant of summary judgment to Chevron. \textit{See Chevron U.S.A., Inc. v. Cayetano, 57 F. Supp. 2d 1003 (D. Haw. 1998).} The remand required the court to settle a genuine issue of material fact as to whether the state’s rent cap legislation would benefit consumers. \textit{See Chevron U.S.A., Inc. v. Cayetano, 224 F.3d 1030, 1037-42 (9th Cir. 2000).}

\textsuperscript{42} Chevron U.S.A., Inc. v. Bronster, 363 F.3d 846 (9th Cir. 2004).


\textsuperscript{44} \textit{Id.}

\textsuperscript{45} \textit{Id.} at 540-41.

\textsuperscript{46} \textit{Id.} at 542.

\textsuperscript{47} \textit{Id.} at 541-44. This confusion, the Court conceded, extended beyond \textit{Agins}, and the Court only began to correct it in \textit{Williamson County Regional Planning Commission v. Hamilton Bank of Johnson City}, 473 U.S. 172 (1985), when it declared the origins of regulatory takings to be in the Takings Clause rather than in the substantive due process
declared, the Agins test "has no proper place in our takings jurisprudence."48

By removing all but the focus on how a regulation affects a property owner, the Court thus revealed the logic of the regulatory takings doctrine and the existence of a heretofore elusive "takings jurisprudence" that, to put it charitably, has only emerged from a messily evolutionary process. The logic works like this. A finite, easily identifiable set of relatively rare types of regulatory effects receive heightened judicial scrutiny because these types of effects most clearly constitute the "functional equivalen[ce]" to the "paradigmatic taking" of eminent domain.49 These categorical types include regulations that entirely remove the value in property (a category established in Lucas v. South Carolina Coastal Council60) and those that impose permanent physical invasions (a category established in Loretto v. Teleprompter CATV,51 and extended to individualized development conditions that require dedication of land that fail a nexus and proportionality test in Nollan v. California Coastal Commission52 and Dolan v. City of Tigard53). When a plaintiff can demonstrate that her claim falls within one of these categories, she is likely—and in some cases assured—to be awarded compensation. But such regulatory acts occur fairly rarely. Outside of these narrow categories, courts are to apply Penn Central's far more deferential, multi-factor balancing test to the challenged regulation.54 This balancing test, too, attempts to identify instances when a regulation's application constructively confiscates property—that is, when the various factors, weighed together, demonstrate that the owner has suffered the functional equivalence of a taking.

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48. Lingle, 544 U.S. at 548.
49. Id. at 537.
54. Id. at 538-39. Although this conclusion was foreshadowed in both Palazolo v. Rhode Island, 533 U.S. 606 (2001), and Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency, 535 U.S. 302 (2002), the unanimous decision in Lingle appears to provide a stronger affirmation of its broad acceptance by the Court.
Thus, the regulatory takings review, in which *Penn Central* serves as the “polestar,” proceeds in two steps. First, courts sort cases based on the factual circumstances of the regulation’s application. If the regulation causes certain types of effects (total diminution, physical invasion), the court applies the applicable higher-scrutiny test. If not, the court concludes that the challenge is a “partial taking,” and a lower scrutiny and more complex test applies. This latter process constitutes a second step for the majority of takings challenges: *Penn Central’s* multi-factor, ad hoc balancing test. Above all, *Lingle* clarifies that in all cases, courts considering a regulatory takings claim may consider only the challenged regulation’s effects on property and the rights of ownership, and not the validity of the regulation and regulatory program itself.

III. *Lingle’s* Clarification and Disentanglement

*Lingle* narrowly decided a single case that emerged out of an errant circuit court, which had wrongly adopted stray dicta as a stand-alone constitutional test. But *Lingle* now stands as the most recent regulatory takings decision the Court has issued, with a broad, authoritative restatement of the full range of the Court’s approach. Thus, its influence has overshadowed its seemingly modest holding. Lower federal and state courts have cited extensively to the doctrinal map that *Lingle* offers, and they seem to understand and are following the decision’s jurisprudential logic. *Lingle* has also forced a number of courts both to abandon their use of the *Agins* test and to rethink their approaches to the relationship between substantive due process and regulatory takings. Part III briefly surveys the broad acceptance *Lingle* has enjoyed, as well as its effect in disentangling the earlier confusion.

55. See *Lingle v. Chevron U.S.A., Inc.*, 544 U.S. 528, 538 (2005). *Lingle* characterizes this process as one of categorical sorting; as a practical matter, however, it is also a two-step process in which a court first must sort by category.

56. In a brief solo concurrence, Justice Kennedy left open the possibility that a regulation like that challenged in *Lingle* might be “so arbitrary or irrational as to violate due process” rather than the Takings Clause. *Lingle*, 544 U.S. at 548-49 (Kennedy, J., concurring) (citing *Eastern Enterprises v. Apfel*, 524 U.S. 498, 539 (1998) (Kennedy, J., concurring in part and dissenting in part)).
about the regulatory takings doctrine and especially its relationship to substantive due process.

A. Lingle’s Clarification

Lower federal and state courts have understood and implemented the Court’s effort to clarify regulatory takings law in *Lingle*. They now quickly dispense with takings claims that challenge the wisdom and means-ends fit of regulatory acts. Equally significant, they now view *Lingle* as the leading regulatory takings precedent and rely on its restatement of the two-step sorting process to evaluate takings claims. Lower courts should of course follow Supreme Court precedent regarding federal constitutional issues as a matter of law. The apparently banal observation that they are doing so after *Lingle*, however, is worthy of attention, given the longstanding muddle of regulatory takings law and the tendency of lower courts to either willfully or negligently fail to grasp Supreme Court precedent.

B. Lingle’s Disentanglement: Takings, Substantive Due Process, and the Ninth Circuit

Although state courts that adopted the *Agins* “substantially advance” test under their state constitutions need not follow


59. For a collection of complaints about the takings doctrine’s muddle and vagueness, see Poirier, supra note 18, at 97 n.2.

60. *See* supra note 9, and accompanying text.
Lingle's command,\(^6\) courts that applied the test under the federal Constitution must do so, and indeed have done so.\(^6\) More than any other federal or lower state court, the Ninth Circuit has been affected by Lingle, and not merely because the Supreme Court overturned a decision from that circuit. For nearly ten years prior to Lingle, the Ninth Circuit had taken what in retrospect appears to have been a curious approach to the relationship between takings and substantive due process. At the same time that it relied upon the "substantially advances" test in Agins to perform a somewhat rigorous review of a regulation's purpose and effect under the Takings Clause, especially in evaluating claims against rent control legislation, the Ninth Circuit barred substantive due process claims that would perform virtually the same review. Following Lingle's logic, this makes little sense; but at the time, the circuit's approach was merely the most prominent and well-developed example of the judiciary's confusion about takings. It therefore serves as the best means to understand the unintended consequences of that confusion. Lingle's direct effects on the Ninth Circuit thus reveal how Lingle's disentanglement of the doctrine has worked.

1. Pre-Lingle: Where substantive due process had gone.

As discussed previously, the Ninth Circuit had incorporated, via Agins, a stand-alone, substantive-due-process-like test in its regulatory takings doctrine.\(^6\) This approach was logical in light of the circuit's en banc decision in Armendariz v. Penman, which held that substantive due process claims were not available to plaintiffs who either also raised takings claims or whose substantive due process claims looked like takings claims.\(^6\) The plaintiffs in

\(^6\)See, e.g., Sheffield Dev. Co., Inc. v. City of Glenn Heights, 140 S.W.3d 660, 674 (Tex. 2004); see also Texas Bay Cherry Hill, L.P. v. City of Fort Worth, 257 S.W.3d 379, 395 n.5 (Tex. App. 2008) (noting that the Texas Supreme Court has not yet responded to Lingle by reconsidering its earlier adoption of the "substantially advance" test as a test under the Texas constitution).


\(^6\)See text accompanying supra notes 27-42.

\(^6\)Armendariz v. Penman, 75 F.3d 1311, 1325-26 (9th Cir. 1996) (en banc).
Armendariz were owners and former owners of low-income housing units in San Bernardino, California. Their Section 1983 claim alleged, among other things, that city officials' aggressive efforts to enforce local housing codes against purported gang activity and blighted property violated their federal constitutional substantive due process rights under the Fifth and Fourteenth Amendments. In its decision in Graham v. Connor, the Supreme Court had held that the broader protection of substantive due process should not extend to situations where explicit constitutional provisions, such as those in the Fourth and Eighth Amendments, protect individual rights. Relying on Graham, the Ninth Circuit evaluated the plaintiffs' claims under the specific constitutional amendments that covered their factual claims rather than the broad substantive due process doctrine.

In doing so, the court in Armendariz effectively rewrote the plaintiffs' complaint. It viewed their property-based allegations—they asserted that the city officials' actual motive in its aggressive enforcement was to assist a private developer who coveted plaintiffs' property—as constituting a claim that the government sought to take property on behalf of a private interest. Viewed this way, the plaintiffs were alleging a "private taking" and a violation of their right to compensation for the loss of their property rather than a substantive due process violation. Similarly, their claim that the government's overly aggressive enforcement of the housing codes unconstitutionally interfered with their property rights in fact alleged unreasonable seizures that violated the Fourth Amendment. By applying Graham broadly, the Ninth Circuit thus shrunk the universe of possible substantive due process claims. This approach would prove fatal to claims that

67. When Armendariz was still good law in the Ninth Circuit, Nicole Garnett argued that it had the effect of removing from judicial review claims against land-use-like actions that concerned the authority of the state to pursue other motives, for example, crime control, via land use regulation in housing code enforcement sweeps—under the guise that such claims actually concerned a loss of property values. This translation that Armendariz required in fact did violence to property owners' claims. See Nicole Stelle Garnett, Relocating Disorder, 91 VA. L. REV. 1075, 1090-91 (2005).
68. See Armendariz, 75 F.3d at 1314-15, 1320-21.
69. Id. at 1320.
government land use and environmental regulations violated substantive due process rights; such claims, under Armendariz, were subsumed within takings claims.70 Worse still for plaintiffs, their takings claims typically proved unavailing unless they could persuade a court that either their claim fell within one of the categories of claims eligible for higher scrutiny or the court should apply the "substantially advances" test from Agins.

Other courts did not embrace the Ninth Circuit's absolutist approach towards property-based substantive due process claims.71 The D.C. and Eleventh Circuits refused to hold that substantive due process claims regarding property were subsumed within takings claims.72 The First and Fifth Circuits suggested that while the two doctrines overlap, a substantive due process claim could nevertheless be made and adjudicated along with a takings claim depending upon the facts of an individual case and the quality of a plaintiff's claims.73 The Seventh Circuit had independently precluded substantive due process claims against land use regulations because of the deference owed to economic regulations, not because of Graham.74 Commentators were no kinder to Armendariz than other federal circuits, whether because the Ninth Circuit's application of Graham or Graham itself eviscerated and misunderstood the substantive due process doctrine,75 or because it was overbroad and incoherent in its characterization of how one constitutional right could subsume another.76 This reception proved irrelevant to the Ninth Circuit,
which held fast in its determination to sweep substantive due
process claims from the federal courts within its jurisdiction.\textsuperscript{77}


\textit{Lingle} explicitly held that takings claims and substantive due
process claims were doctrinally and analytically distinct. The
former is focused on the regulation's effects and its remedy is
compensation, while the latter is focused on the regulation's
validity and its remedy is invalidation. Therefore, the \textit{Armendariz}
Court's conclusion that the Takings Clause subsumes property-
based claims for invalidation under the substantive due process
doctrine is no longer viable. Nevertheless, the Ninth Circuit did
not initially seem to recognize that fact. Only a few weeks after the
Supreme Court issued \textit{Lingle}, a panel of the Ninth Circuit had the
opportunity to reconsider its stance on substantive due process in
\textit{Spoklie v. Montana}.\textsuperscript{78} In \textit{Spoklie}, owners of an "alternative livestock" ranch in Montana made both takings and substantive due process
claims in their challenge to a state law that would severely limit the
use of their ranch.\textsuperscript{79} After affirming the dismissal of the takings
claim because it depended on the 'substantially advances' test that the
Court wrote out of the canon of takings tests in \textit{Lingle}, the
court also affirmed the dismissal of the substantive due process
claim.\textsuperscript{80} In the latter aspect of its decision, the court summarily
affirmed the district court's dismissal of the plaintiffs' claims on
the grounds that the law was not "irrational and arbitrary."\textsuperscript{81}
Although it made no difference for Spoklie and his co-plaintiffs,
the court at least entertained the merits of their substantive due
process claim, as it gave consideration to a type of claim that it had
refused to review just two years previously in \textit{Squaw Valley}, the
circuit's most recent affirmation of \textit{Armendariz}.\textsuperscript{82} Without explicitly
mentioning either \textit{Armendariz} or \textit{Lingle}, however, the court in

\textsuperscript{77} See, e.g., \textit{Squaw Valley Dev. Co. v. Goldberg}, 375 F.3d 936, 949 (9th Cir. 2004).
\textsuperscript{78} 411 F.3d 1051, 1057-58 (9th Cir. 2005).
\textsuperscript{79} \textit{Id.} at 1054.
\textsuperscript{80} \textit{Id.} at 1057-59.
\textsuperscript{81} \textit{Id.} at 1059.
\textsuperscript{82} See, e.g., \textit{Squaw Valley}, 375 F.3d at 950.
Spoklie did not explain its reasons for reaching the due process claim, nor did it explicitly overturn the circuit’s precedent suggesting it should not have done so.

In two separate challenges to mobile home rent control ordinances, the chief judge of the Northern District of California more explicitly recognized that Lingle might have some effect on Armendariz. In reaching the merits of the due process claims in both decisions, Judge Vaughn Walker asserted both that the Court sought to “revitalize[] the due process clause in the takings context” in Lingle, and that after Lingle, a due process claim was the only means to challenge “the means-ends relationship of a statute” and to question “whether a regulation is effective in achieving a legitimate public purpose.” In one case, he granted the defendant city’s motion to dismiss on the grounds that the plaintiff’s effort to seek an unfair return on its investment did not state a proper due process claim, and in the other he allowed a due process challenge to a rent control ordinance to proceed.

Neither Spoklie nor Judge Vaughn’s decisions established a trend, however, either in the circuit’s district courts or in the Ninth Circuit itself. Some courts were able to avoid the issue by deciding substantive due process claims on other grounds. Other circuit court panels and district courts simply chose to ignore the Lingle decision while continuing to uphold Armendariz as precedent or follow its logic throughout much of 2007. Indeed, two Ninth
Circuit panels explicitly applied Armendariz in unpublished decisions in 2007. Nor has the Ninth Circuit been the only court to make this mistake. A federal district court in Utah continued to presume that the Graham doctrine applies after Lingle by suggesting that the ripeness requirements applied to a regulatory takings claim “subsume” the ripeness analysis of a substantive due process claim. The court’s misapplication of Graham led to the correct result for the wrong reason. As the Tenth Circuit has correctly held, a plaintiff’s substantive due process claim challenging a government agency’s land use decision must wait until the plaintiff has utilized all of the procedures the government provides, because the due process claim is parallel to, but not subsumed by, a takings claim.

After more than two years following the Lingle ruling, the Ninth Circuit finally began to more formally and explicitly reincorporate substantive due process into the takings context. First, in Equity Lifestyles Property v. County of San Luis Obispo, a panel conceded that Lingle had clarified the distinction between takings and due

89. Jones v. City of McMinnville, 244 F. App’x 755, 761 (9th Cir. 2007) (“We have broadly applied Armendariz in actions involving takings.”); Hays v. Hallberg, 247 F. App’x 865, 866 (9th Cir. 2007) (“In the Ninth Circuit, it is well settled that substantive due process claims pursuant to the Fourteenth Amendment are precluded when the interest at stake is real property.”).


91. See Signature Prop. Int’l Ltd. P’ship v. City of Edmond, 310 F.3d 1258, 1265-66 (10th Cir. 2002). The ripeness requirement for takings claims against land use decisions, as well as for substantive due process claims against land use decisions, was articulated by the Supreme Court in Williamson County Reg’l Planning Comm’n v. Hamilton Bank of Johnson City, 473 U.S. 172, 186-97 (1985).
process and thereby rendered the Takings Clause unable to remedy due process violations. Then, in *Crown Point Development, Inc. v. City of Sun Valley*, a circuit panel for the first time explicitly recognized that *Lingle* restricted *Armendariz*, noting that the Supreme Court had “pull[ed] the rug out” from under the rationale for the circuit’s preclusion of substantive due process claims in the takings context. Without an explicit textual source of constitutional protection to pre-empt a substantive due process claim, the court concluded, it would be required to consider a due process claim separately—unless, however, a property owner’s complaint falls within one of the established “categories” for takings claims (i.e., complete deprivation of economically beneficial uses, permanent physical invasions, or a victorious claim under the *Penn Central* factors). This, too, seems quite confused, suggesting that a winning regulatory takings claim could not also be part of a complaint alleging a successful substantive due process claim. Nothing in *Lingle* supports this conclusion. The *Crown Point* panel’s confusion carried over to the panel in *Action Apartment Association v. Santa Monica Rent Control Board*, which expanded on *Crown Point Development’s* suggestion that the takings/due process relationship was one of relative, not complete independence. “An arbitrary deprivation of [the right to use property],” the court held, “may give rise to a viable substantive due process claim in any case in which the Takings Clause does not provide a preclusive cause of action.” The circuit had finally recognized the changes *Lingle* had made to the relationship between regulatory takings and substantive due process, even if it remained somewhat confused as to the full extent of *Lingle’s* effects.

92. See *Equity Lifestyles Prop., Inc. v. County of San Luis Obispo*, 505 F.3d 860, 870 n.16 (9th Cir. 2007). Although the court reached plaintiffs’ due process claim, it characterized the standard review of that claim as quite deferential and found that because both the Supreme Court and the Ninth Circuit had upheld rent control laws as rationally related to the legitimate public purpose of protecting consumers, the challenged law could pass constitutional muster. *Id.* at 870-71.

93. 506 F.3d 851, 854-56 (9th Cir. 2007).

94. *Id.* at 855-56 (citing *County of Sacramento v. Lewis*, 523 U.S. 833 (1998) and *Graham v. Connor*, 490 U.S. 386 (1989)).

95. *Action Apartment Ass'n v. Santa Monica Rent Control Bd.*, 509 F.3d 1020, 1025-26 (9th Cir. 2007).

96. *Id.*
To say that a substantive due process claim is available as a complement to a separate and distinct takings claim is not to say that it will prove victorious, of course. In fact, recent Ninth Circuit decisions suggest that the distinction Lingle made between takings and due process claims constitutes a formal rather than substantive triumph for property owners. In Shanks v. Dressel,\textsuperscript{97} for example, after holding that the property owners' Section 1983 action against the city of Spokane for its alleged failure to adequately enforce its zoning regulations could include a substantive due process claim, a Ninth Circuit panel found that the plaintiffs had failed to state a substantive due process claim against actions that fell short of being "constitutionally arbitrary."\textsuperscript{98} Other decisions have followed this pattern.\textsuperscript{99}

As a matter of constitutional doctrine, however, the analytical distinction between regulatory takings and substantive due process has taken hold, and academics, judges, and perhaps even attorneys can rest more easily now that they better understand the respective doctrines. For a doctrine that had previously been plagued by indeterminacy and that a decade earlier had seemed an instrument of political arguments between anti-regulatory property rights advocates and pro-regulatory environmentalists and planners, Lingle's settlement and clarification seems to have delivered a sense of at least a temporary ending.

IV. PENN CENTRAL, AFTER LINGLE

At the same time, however, Lingle itself seems a bit confused. Its clarification and disentanglement left at the center of the regulatory takings doctrine the first contemporary regulatory takings decision, Penn Central Transportation Co. v. City of New

\textsuperscript{97} 540 F.3d 1082 (9th Cir. 2008).
\textsuperscript{98} Id. at 1088-89.
\textsuperscript{99} See, e.g., N. Pacifica LLC v. City of Pacifica, 526 F.3d 478, 485-86 (9th Cir. 2008); Equity Lifestyles Prop., Inc. v. County of San Luis Obispo, 505 F.3d 860, 871 (9th Cir. 2007). Cf. Action Apartment Ass'n, 509 F.3d at 1026-27 (explaining that substantive due process claims time barred); Crown Point Dev., Inc. v. City of Sun Valley, 506 F.3d 851, 856 (9th Cir. 2007) (overruling District Court's dismissal of plaintiff's substantive due process claim under Armendariz, and remanding the case for the claim to be considered in a summary judgment motion).
York. That decision articulated a multi-factor, ad hoc balancing test that represents the core inquiry for the judicial review of government regulations under the Takings Clause. And that balancing test, in turn, forces courts to consider, among other things, the “character” of the government’s regulatory act. This seems odd, if not contradictory. If the Penn Central balancing test survives Lingle, as the decision declared that it does, then the Court may have kept intact a small, narrow form of substantive due process analysis in the “character of the government action” factor. Perhaps the Court failed to notice that Penn Central appears to require courts to consider how the government acted, or perhaps Lingle fibbed when it declared that the regulatory takings doctrine focused solely on a regulation’s effects. Either alternative undercuts Lingle’s claim to discover a unified, logical takings jurisprudence.

Part IV and Part V attempt to make sense of Lingle in light of this conflict. They suggest that Lingle’s focus on a regulation’s effects did not, and should not, sweep Penn Central’s “character” factor entirely away. The argument proceeds as follows. I begin in this Part by reviewing Penn Central, especially its introduction and discussion of the “character of the government action” factor, and then explain how the Court had confusingly deployed that term in the years prior to Lingle. I then describe Lingle’s discussion of Penn Central and the “character” factor, and argue that Lingle offers an open-ended understanding of “character” for future courts to utilize, though as a secondary consideration in relation to the challenged regulation’s effects on the subject property, which is the Takings Clause’s primary concern. Then, in Part V, I elaborate on the current state of the character factor and locate the source of this approach in the Court’s current approach to regulatory takings. With that in mind, I discuss recent state and lower federal court decisions since Lingle that illustrate the problems courts face.


102. Id.
in applying the *Penn Central* factors after *Lingle*, and thereby suggest why the “character of the government action,” as a limited source of judicial discretion in complex factual circumstances, is likely to remain a relatively broad inquiry.

A. The “Character” Test in *Penn Central*

Despite a cavalcade of complaints about *Penn Central*—it's too indeterminate and muddled, most agree,¹⁰³ and for that reason too lenient towards regulators, some argue¹⁰⁴—it has remained the core precedent for regulatory takings. Later decisions of consequence have either identified instances when *Penn Central*'s deferential balancing test should not apply or have resolved ancillary issues. The *Penn Central* plaintiffs, owners of Grand Central Terminal in Manhattan, had attempted to construct an office building on top of the railway station.¹⁰⁵ The terminal had recently been designated a historical landmark by the New York City Landmark Commission, however, and as a result the plaintiffs needed approval from the Commission before they could construct their proposed tower.¹⁰⁶ After the Commission rejected their proposals for the building, they filed suit, claiming that they were due compensation from the city under the Takings Clause for the Commission's refusal to allow them to build.¹⁰⁷

Reviewing its first regulatory takings challenge in more than a generation, the Court identified “several factors that have particular significance” in the “essentially ad hoc, factual inquiries” a court makes when considering a takings claim: the “economic impact of the regulation on the claimant and, particularly, the extent to which the regulation has interfered with distinct investment-backed expectations,” and “the character of the governmental action.”¹⁰⁸ The Court held that the city owed no

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¹⁰³. See Poirier, supra note 18, at 97 n.2.
¹⁰⁶. Id. at 110-12.
¹⁰⁷. Id. at 115-19.
¹⁰⁸. Id. at 124. The discussion that follows—and, indeed, the entirety of this Part of
compensation, because the regulation did not interfere with the plaintiff's continued operation of the terminal, and the Commission could still approve a scaled-down proposal for an office building.\textsuperscript{109} Therefore, the Commission's actions did not affect the terminal's value or frustrate the plaintiffs' financial expectations.\textsuperscript{110} In addition, the regulation was imposed by broadly applicable legislation that was intended to preserve historically significant property. As such, it was a permissible exercise of the city's police power, and its legislative legitimacy weighed in the City's favor.\textsuperscript{111}

In its discussion of the three factors that composed \textit{Penn Central}'s ad hoc balancing test, the Court explained the character factor this way:

\begin{quote}
A "taking" may more readily be found when the interference with property can be characterized as a physical invasion by government, \textit{see, e.g., United States v. Causby . . .}, than when interference arises from some public program adjusting the benefits and burdens of economic life to promote the common good.\textsuperscript{112}
\end{quote}

This sentence points in two directions at once. Its first half, which cites to the Court's 1946 \textit{Causby} decision that found compensation was due for the occupation by military airplanes of the airspace over the plaintiff's farm,\textsuperscript{113} suggests that "character" refers to the effect that the specific type of government action has on the

\begin{flushright}
\textsuperscript{109} \textit{Penn Central}, 438 U.S. at 136-38.
\textsuperscript{110} \textit{Id.}
\textsuperscript{111} \textit{Id.} at 132-34.
\textsuperscript{112} \textit{Id.} at 124 (citation omitted).
\textsuperscript{113} United States v. Causby, 328 U.S. 256 (1946).
\end{flushright}
plaintiff's property. Its second half, however, suggests a far broader inquiry into how a regulation affects all property subject to the government action, and into the aims the regulation seeks to further. This is not a single, unified test, then, but a judicial license to look broadly at a plaintiff's description of what she experienced from the regulation's effects and at the government's description of what it was attempting to accomplish. The sentence's first half advises a court to scrutinize more closely the atypical, significantly disruptive regulation than the legislative effort that applies broadly to property owners and achieves an important goal. In adjudicating the dispute, then, the court should consider whether the defining "character" of the government action is its extensive disruption of the owner's expectations and use of her property. But the sentence's second half advises that a court should give some deference to the government if it can show that the "character" of its action is a broadly applicable regulation that adjusts burdens and benefits to promote the common good.

"Character," in sum, concerns the characteristics of a regulation's effects and of the regulation itself. Later discussions in Penn Central failed to clarify this dual meaning any further, but instead merely reiterated the importance of looking at all of the factors the Court had identified. It did not matter, the Court said, that the Landmarks Commission was not keeping the property owners from engaging in nuisance-like uses. The city's effort to preserve valuable historical properties was consistent with other governmental efforts to curb noxious uses and spread collective benefits that survived takings challenges.

B. Confusing Signals After Penn Central

In the decades since Penn Central, the "character" factor has become no less ambiguous. At times, the Court has applied

115. Id. at 134 n.30 (citing Hadacheck v. Sebastian, 239 U.S. 394 (1915); Miller v. Schoene, 276 U.S. 272 (1928); Goldblatt v. Hempstead, 369 U.S. 590 (1962)).
116. In the description that follows, I provide a more impressionistic description of post-Penn Central discussions of the character factor than John Echeverria, who heroically identifies nine different meanings in the Court's decisions. John Echeverria, Making Sense of Penn Central, 23 UCLA J. ENVTL. L. & POL'Y 171, 183-99 (2005). Christopher Goodin has likewise proposed a schema to describe how courts and commentators have
"character" as though its focus is on a regulation's effects. This approach has distinguished two types of regulations that, the Court has concluded, infringe on two traditional aspects of ownership rights. In *Kaiser Aetna v. United States*\(^{117}\) and *Loretto v. Teleprompter Manhattan CATV*,\(^{118}\) both decided soon after *Penn Central*, the Court held that excessive physical invasions of private property constituted a type of government action that necessarily effected a taking. An invasion, the Court explained in *Kaiser Aetna*, confiscates "one of the most essential sticks in the bundle of rights that are commonly characterized as property—the right to exclude others."\(^{119}\) The character of the government action proved so egregious in these cases that the other *Penn Central* factors carried no weight in the balance, even when the economic impact on the property owner was minimal, as was clear in *Loretto*.\(^{120}\) By the time it decided *Lingle*, the Court had incorporated this understanding of character into step-one of its regulatory takings test.\(^{121}\)

The Court has deployed the same language and reasoning when faced with claims that government action forced owners to forfeit their right to devise their property. In *Hodel v. Irving*, owners of Indian lands challenged federal legislation that barred those with small, fractional interest in land from passing that interest by inheritance. Instead, in order to consolidate Indian holdings and enable more efficient use of the land, the legislation required the land to escheat to the specific tribe on whose reservation or in

understood the character factor. See Christopher Goodin, *The Role and Content of the Character of the Governmental Action Factor in a Partial Regulatory Takings Analysis*, 29 U. HAW. L. REV. 437, 441-57 (2007) (distinguishing approaches to the character factor that view it as "promoting the common good" and those that view it as "adjusting the burdens and benefits of economic life").

117. 444 U.S. 164, 180 (1979) (explaining that imposition of a navigational servitude constitutes "an actual physical invasion of [a] privately owned marina").

118. 458 U.S. 419, 426, 438 (1982) (explaining that installations of cable equipment on property owner's apartment building constitutes a "permanent physical invasion").


120. See Robert C. Ellickson & Vicki L. Been, *Land Use Controls: Cases and Materials* 168 (3d ed. 2005) (noting that on remand, the victorious plaintiff was awarded only $1 in compensation, and even lost in her claim for attorney fees as the prevailing party in constitutional litigation).

121. See *Lingle v. Chevron U.S.A.*, Inc. 544 U.S. 528, 538 (2005) (characterizing the physical invasion and total deprivation categories as per se takings not subject to *Penn Central* analysis).
whose jurisdiction the land fell. The value of the interests taken, the Court found, could be "substantial," although in many instances it was not. It was "dubious" that owners had investment-backed expectations in that interest, and the legislation offered significant reciprocity of advantage insofar as consolidation of the interests would undoubtedly benefit tribes whose land had suffered under the weight of increasingly fractionated interests.

This side of the Penn Central balance—the economic impact on the owner—weighed against compensation. But the status of the right to devise fell into the same category of "essential" private rights as the right to exclude, and accordingly the character of the government action in taking that right required compensation.

This holding, reiterated a decade later in Babbitt v. Youpee, again suggests that the character test focuses narrowly on the effect that the type of action the government engages in has on a particular aspect of the property owner’s interest.

Other decisions have taken the opposite approach. Most prominently, in performing the Penn Central balancing test the Court in Keystone Bituminous Coal Association v. DeBenedictis emphasized the importance of the regulation’s aims and general effects rather than its specific effects on the individual. Under review in Keystone Bituminous was state legislation that required coal companies to leave in place fifty percent of the coal beneath

123. Id. at 714-16.
124. Id. at 716-17.
126. The Court has also suggested additional types of government action whose character might warrant compensation to an affected property owner. A four-justice plurality of the Court stated that a statute imposing retroactive liability can effect a taking because of the unjust and disfavored nature of such a government action. See Eastern Enterprises v. Apfel, 524 U.S. 498, 532-33 (1998). Justice Kennedy’s lone concurrence and the four dissenting justices would instead have analyzed a claim against retroactivity as one sounding in substantive due process. See id. at 538-39 (Kennedy, J., concurring) (disagreeing with plurality’s takings analysis, while asserting that government’s actions violated substantive due process rights); id. at 553-54 (Breyer, J., dissenting) (disagreeing with plurality’s takings and substantive due process analyses). Dicta in Tahoe-Sierra suggested that when a government acts in bad faith, it may be liable for compensation. See Tahoe-Sierra Preservation Council v. Tahoe Reg’l Planning Agency, 535 U.S. 302, 333 (2002). See generally Echeverria, supra note 116, at 198-99 (summarizing the Court’s "good faith/bad faith" statements in its post-Penn Central discussions).
certain enumerated structures. When the state legislature sought to protect against the subsidence of surface land areas, the Court found, it was "acting to protect the public interest in health, the environment, and the fiscal integrity of the area."\(^{128}\) Citing *Pennsylvania Coal Co. v. Mahon*,\(^ {129}\) the 1922 decision that *Lingle* characterized as the "[b]eginning" of the modern regulatory takings doctrine,\(^ {130}\) the Court in *Keystone Bituminous* asserted that "the nature of the State's interest in the regulation is a critical factor in determining whether a taking has occurred, and thus whether compensation is required."\(^ {131}\)

If *Keystone Bituminous* represents an especially government-friendly regulatory takings decision, *Lucas v. South Carolina Coastal Council*,\(^ {132}\) one of the high-water marks for strong property rights protection, also suggests that courts can consider the significance of the government's challenged regulatory program. *Lucas* exempted from the *Penn Central* balancing test instances in which a regulation resulted in land with no economic value,\(^ {133}\) but also allowed the government to defend its actions from constitutional liability for compensation if it could demonstrate that its regulation sought to enforce "background principles of the State's law of property and nuisance already place upon land ownership."\(^ {134}\) Justice Scalia's decision in *Lucas* also restricted this defense by circumscribing the background principles that composed the state's defense to the peculiarities of the particular relevant state's law, and by implying that the "background" ended sometime in the late nineteenth century, when the common law of private and public nuisance began to give way to local, state, and federal legislation enacted under the relevant legislature's police power authority.\(^ {135}\)

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128. *Keystone Bituminous*, 480 U.S. at 485-86 (citing both *Penn Central* and *Agins* to identify the source of the Court's emphasis on the legislation's "public purpose").
129. 260 U.S. 393 (1922).
133. Id. at 1017-18.
134. Id. at 1029.
135. Id. at 1029-31.
compensation for the owner's right to engage in non-nuisance activities, with "nuisance" defined as narrowly as possible. Viewed one way, then, *Lucas* appeared to offer the state an escape from liability by referring to the character of its action as nuisance abatement, but it made the hatch so small as to be nearly impossible to use.

But the gesture itself is significant. Even in the most exploitative circumstance, when the state has stripped the owner's property of all value, compensation is not due if the state can identify a common law principle of nuisance under which the owner's use of her property was prohibited. Treading a difficult course between a recognition of the state's traditional police power authority and the *Lucas* majority's vision of supple, well-protected property rights, *Lucas* cast doubt on the judiciary's ability to distinguish regulations that address harm from those that spread benefits. If allowed to consider nuisance broadly, *Lucas* suggested, the state and solicitous courts would allow unlimited expansion of the doctrine, and thereby enable a boundless regulatory state to avoid paying compensation in all cases. In less fraught circumstances—that is, when the diminution of value is less than total—the state should be able to address a broader set of concerns, and should also be able to identify the *increased* property value the owner enjoys as a result of a regulatory program that also restricts her neighbors' property. *Lucas* implies that in evaluating all government action, courts should inquire into the regulation's intent and basis, but suggests that this inquiry should shift based on the amount of value remaining in the subject property. When that value is greater than zero, which is to say when *Penn Central* applies, that inquiry may extend beyond the constrained "traditional background principles" of common law that *Lucas* prescribes.

The plurality opinion in *Eastern Enterprises v. Apfel*, with Justice O'Connor writing for four justices in finding that Congress's effort to protect the health benefits of coal miners effected a taking,

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utilized both senses of character from *Penn Central*. The government’s “legislative remedy for what it perceived to be a grave problem” was “understandable,” one worthy of a legislative solution, the plurality wrote. But the character of that solution, the government’s unfair singling out of the plaintiff coal companies through a substantial, retroactive burden unrelated to any commitment they had made or injury they had caused, “implicate[d] fundamental principles of fairness underlying the Takings Clause.”

Viewed comprehensively as the *Eastern Enterprises* plurality did in requiring compensation, the character test encompasses all of *Penn Central*’s factors and appears to include some consideration of the government’s aims and efforts to meet those aims. Prior to *Lingle*, then, one could certainly complain that the Court had failed in its original iteration of the *Penn Central* factors and in its subsequent application of them to provide a coherent, unified definition of the “character of the governmental action.” Alternatively, one could also take the Court at its word and by its subsequent actions and conclude that the character test broadly considers both regulatory effects and regulatory aims. The question with which I approach *Lingle* in Part IV.C is whether *Lingle* expunges or limits the character factor from the *Penn Central* test as part of, or as a consequence of, its decision to eliminate the “substantially advances” test in *Agins*.

C. *Lingle* and the Character Factor

As it performed its useful project of banishing the *Agins* test and focusing the takings inquiry on a regulation’s effects on the property owner, the Court could have taken the opportunity to develop a more analytically precise and coherent approach to partial takings. The “economic impact” and “investment-backed expectations” factors, which focus on the regulation’s effects on the subject property, are consistent with *Lingle*’s narrow focus. If the “character” factor broadens the judicial inquiry into the government’s regulatory purpose, it is incompatible with *Lingle*’s

138. Id. at 537.
139. Id.
logic and, if the Court sought analytical purity, it could have discarded the "character" test from *Penn Central* altogether.\textsuperscript{140}

*Lingle* did not in fact do this, however. In proclaiming *Penn Central*'s canonical position at the core of regulatory takings analysis, *Lingle* explicitly retained all of the components of *Penn Central*'s multi-factor balancing test. Indeed, it even quoted the language that the original decision used in establishing the factors.\textsuperscript{141} The Court indicated a subtle shift in the balancing test's application, as it characterized the "economic impact" and "investment-backed expectations" factors as "[p]rimary among [*Penn Central's*] factors."\textsuperscript{142} But it also stated that the "character of the governmental action" factor "may be relevant in discerning whether a taking has occurred."\textsuperscript{143} And although the verb "may" suggests that the character factor is less significant than those that concern the economic impacts on the property owner, *Lingle* reaffirmed the factor's existence. Relative to the other factors, "character" has diminished in importance, but it has survived *Lingle*.\textsuperscript{144}

But what does the "character" factor consider? *Lingle* does not explicitly or even directly resolve this issue. Its explanation that a regulatory takings inquiry should focus on the "magnitude or character of the burden" placed on the property owner appears consistent with the notion that the character factor focuses on the character of the regulation's effect on the particular individual—that is, as a means to consider the extent to which the regulation approximates those functional equivalences of a physical taking that *Loretto* and *Lucas* had identified.\textsuperscript{145} By limiting "character"


\textsuperscript{142.} Id. at 538-39.

\textsuperscript{143.} Id. at 539; see also id. at 540 (stating that "the *Penn Central* inquiry turns in large part, albeit not exclusively, upon the magnitude of a regulation's economic impact and the degree to which it interferes with legitimate property interests") (emphasis added).

\textsuperscript{144.} See also Eagle, *supra* note 12, at 916 (finding that the language of *Lingle* makes plain the character test's continuing viability).

narrowly in this manner, *Lingle* would allow the *Penn Central* test to focus solely on the severity of the regulation’s impact on a property owner. If it did not entirely dispense with the “character” factor, then surely *Lingle* limited its scope.

But such a narrow understanding of “character” faces three problems. First, the Court never explicitly stated that *Lingle* was intended to limit *Penn Central’s* balancing test. Instead, it reiterated the dual, open-ended, and ambiguous explanation from *Penn Central*. To be sure, *Lingle* privileged the two other factors that focused on the regulation’s effects over that the “character” factor. But by retaining the “character” factor, the Court suggested that its inquiry is distinct from those factors that focus only on a regulation’s localized effects on the property owner. Moreover, if all three of the factors merely consider the regulation’s effects on the property owner, as a narrow understanding of “character” would hold, then what exactly is the ad hoc balancing test supposed to balance? Viewed as a narrow test of regulatory effect, the character factor provides no balance; rather, the ad hoc balancing test offers three slightly different ways to consider the same thing.

Second, a narrow “character” test would duplicate the inquiry that courts make during step-one of the regulatory takings review. Recall that *Penn Central’s* first explanation of the test was that “[a] ‘taking’ may more readily be found when the interference with property can be characterized as a physical encompassing only an inquiry into whether the regulation constitutes a physical invasion); *Mansaldo v. New Jersey*, 898 A.2d 1018, 1024 (N.J. 2006) (concluding that *Lingle* had barred “considerations of ‘legitimate state interests’” from takings claims).

146. Barros, supra note 3, at 354 n.55.

147. Cf. Goodin, supra note 116, at 445-46 (describing as “simply absurd” the idea that the “character” factor would even consider the government’s purpose).


149. Gary Lawson and his co-authors argue that the end of the three-part balancing test is precisely what *Lingle* achieved, an argument that also includes the assertion that the Court really did not mean to establish a three-part test at the center of its regulatory takings doctrine in *Penn Central* in the first place. See Lawson et al., supra note 108, at 46, 50. Because I do not agree with that assumption—and because in later decisions, including *Lingle*, the Court does not seem to have agreed with it either—I do not think that a three-part balancing test with one part and no balance is what the Court intended to leave standing in *Lingle*. See generally supra note 108 (explaining my disagreement with Lawson).

150. On the two-step process of regulatory takings review, see text accompanying supra note 55; *Lingle*, 544 U.S. at 538.
invasion by government." 151 Now remember that at step-one, a court sorts the plaintiff’s takings claim according to the impact of the regulation: Is it a permanent physical invasion, is it a diminution of all economic value, or is it merely a partial taking of a non-fundamental property interest? 152 If a court applies the limited version as the sole element of the “character” factor at Penn Central’s step-two, it would utilize the same test that it had already performed at step-one, when it decided whether the various high-scrutiny categories applied. 153 If none of those categories apply, then Penn Central’s balancing test does. It is possible that the Court intended for this factor to consider the proximity of the regulation’s effects to the invasion/total diminution categories—a related but distinct question from the one applied at step-one. But if that’s the case, then the first problem returns: how is this “factor” distinct from the others? Furthermore, how can a court balance these redundant factors, and what is the point of doing so?

Third, as I discussed earlier, the Lucas test, which applies only in the rare and extreme circumstance where a property is left with no value following a regulation’s application, explicitly allows a court to consider whether the “character” of the government’s action is similar to that allowed under traditional common law principles—or, put another way, whether the owner’s use of her property could be abated under private and public nuisance. 154 A strictly limited conception of the “character” factor under Penn Central would not allow this inquiry. But it makes little sense for the Court to allow an exception for nuisance abatement where the government’s action has the most extreme effect on a property owner and is the most functionally equivalent to an eminent domain action, but not allow a similar inquiry when a regulation’s application leaves some value in the property. Indeed, as Christine Klein has explained, the history of how courts have understood and utilized an expansive “new nuisance” doctrine in the years since Lucas demonstrates that a limited vision of the character

152. Id.
153. See supra note 121 and accompanying text.
154. See generally text accompanying supra notes 132-136 (discussing Lucas’s limited nuisance exception).
factor not only makes little sense, but is not one that courts have embraced.\textsuperscript{155}

There remains the possibility that the Court narrowed the “character” test implicitly by virtue of banishing the \textit{Agins} test and clarifying the logic of its regulatory takings jurisprudence through a “functional equivalence” test. This possibility assumes that the only possible meaning for “character” after \textit{Lingle}, besides as another means for considering regulatory effect, is as some version of \textit{Lucas}’s very narrow common law nuisance test, which seems to be constrained both in concept (only harm-abatement) and time (only very longstanding, state common law doctrine that traditionally limited an owner’s title).\textsuperscript{156} But this assertion is not thoroughly supported by \textit{Lingle}, which dispensed only with the “means-ends” test of \textit{Agins} which “asks, in essence,” the Court wrote, “whether a regulation of private property is effective in achieving some legitimate public purpose.”\textsuperscript{157} \textit{Lingle} does not directly address the type and extent of the government’s concern in regulating—the character of the government’s intent rather than the tightness of its means-ends fit. It does, however, quote \textit{Penn Central}’s dual sense of the “governmental character,” which allows courts to look both at the regulation’s effects on the plaintiff’s property and whether the action serves the broader “common good.”\textsuperscript{158} The Ninth Circuit was mistaken in its line of rent control cases that applied the disjunctive \textit{Agins} test not because of its willingness to consider the government’s regulatory aim, but because of its decision to apply “heightened scrutiny” to the state’s effort to meet that aim.\textsuperscript{159} The “common good,” as \textit{Penn Central} had originally explained and as \textit{Agins} reiterated, is surely

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\textsuperscript{156} See Barros, supra note 3, at 354 n.54; Goodin, supra note 116, at 454-55. It seems as though these authors would not limit the nuisance exception to \textit{Lucas}’s common law limits; Goodin in particular is quite unclear on this point.
\textsuperscript{157} \textit{Lingle}, 544 U.S. at 542; see also id. at 543 (noting that “[t]he owner of a property subject to a regulation that \textit{effectively} serves a legitimate state interest may be just as singled out and just as burdened as the owner of a property subject to an \textit{ineffective} regulation,” and accordingly is equally due compensation).
\textsuperscript{159} Id. at 545.
\end{flushright}
broader than Lucas's extremely constrained understanding of a nuisance exception.

Accordingly, Lingle did not eliminate or truncate either Penn Central or the components of its test. Thus, its broad inquiry remains available to courts. Before discussing the implications of that insight in Part V, I want to address one possibility for what that inquiry might entail. John Echeverria and Nestor Davidson have each separately suggested that the concept of "reciprocity of advantage," a longstanding, free-floating inquiry that Justice Holmes first identified in Pennsylvania Coal v. Mahon as evidence of a legitimate exercise of the police power, constitutes a legitimate post-Lingle inquiry into the character of the government's action. If a regulation affects a broad swathe of the population, or if it is part of a general regulatory program that spreads harms and benefits so that an owner whose property is adversely affected at one time will later enjoy limits placed on others' property, then, in Justice Rehnquist's words from his Penn Central dissent, the regulation works "not only for the benefit of the municipality as a whole but also for the common benefit of [all property owners]." Significantly, the Penn Central majority also embraced the concept, disagreeing with the dissent only regarding whether New York's historic preservation ordinance provided reciprocal benefits, while the Court explicitly considered the reciprocity of Pennsylvania's legislation in Keystone Bituminous. Although Lingle did not mention the concept, it declared that the Agins "substantially burdens test" failed in part because it concerned neither the magnitude of a regulation's effects nor "how any regulatory burden is distributed among property owners"—itself suggesting an equality norm that parallels the reciprocity concept.

160. See Davidson, supra note 145, at 35-37; Echeverria, supra note 116, at 204-07.
163. Id. at 132.
The reciprocity concept assumes that the Takings Clause represents a constitutional commitment to fairness, and that judicial review will intervene to protect those property owners who are subject to unjust treatment.\textsuperscript{166} It enforces the so-called \textit{Armstrong} principle, which the Court almost mechanically invokes when it discusses the regulatory takings doctrine. It holds that the Takings Clause was "designed to bar Government from forcing some people alone to bear burdens which, in all fairness and justice, should be borne by the public as a whole."\textsuperscript{167} Accordingly, the reciprocity concept offers two advantages to a post-\textit{Lingle} meaning of the "character" factor. One, it furthers the underlying normative rationale for the doctrine itself. Two, it offers a relatively clear-cut means for courts to identify instances when a regulation is illegitimate: when it singles out the property owner for a burden and will fail to offer her future benefits through its application to other owners.\textsuperscript{168}

But reciprocity seems an unlikely candidate to serve as the substantive test for the "character" factor, and would constitute a difficult foundation for a legal standard. As I have argued elsewhere, while the Supreme Court ritualistically cites the abstract ideals of "fairness" and "justice" as rationales for its regulatory takings doctrine, it applies them unevenly and imprecisely.\textsuperscript{169} Although \textit{Keystone Bituminous} cites and in part relies on the concept to justify its result, the Court has never used it as an outcome-determinative test. Furthermore, reciprocity is a concept with no means to draw lines, besides the basic distinction between two stylized archetypes: the broadly applicable, legislatively-imposed regulation, for which reciprocity would presumably be available, and the individualized, adjudicated decision, for which reciprocity would presumably be unavailable. legislated

\textsuperscript{166} Echeverria, supra note 116, at 204.

\textsuperscript{167} Armstrong v. United States, 364 U.S. 40, 49 (1960).

\textsuperscript{168} This was one of the justifications Justice Scalia cited for imposing higher scrutiny when an owner loses all economic value in her property. See Lucas v. S. C. Coastal Council, 505 U.S. 1003, 1017-18 (1992) ("Surely, at least, in the extraordinary circumstance when 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 in a manner that secures an average reciprocity of advantage to everyone concerned.") (internal citations and quotations omitted).

\textsuperscript{169} See Fenster, supra note 20, at 697-98.
regulations are frequently characterized as un-reciprocal—the regulation for which Justice Holmes required compensation in *Mahon*, for example, was imposed by state statute, while Justice Rehnquist argued in his *Penn Central* dissent that New York's historic preservation ordinance offered only limited benefits to the owners of Grand Central Station. Reciprocity is certainly relevant to regulatory takings. Although *Lingle* makes plain that an illegitimate regulation that singles out an individual for harm sounds in due process rather than the Takings Clause, the more burdensome a regulation and the less likely that a property owner will receive benefit, the more likely it is that the property owner should be compensated under *Penn Central*'s balancing test. But this suggests that reciprocity plays a role in all of the *Penn Central* factors, rather serving as the unique province of the "character" factor.

V. THE CHARACTER FACTOR, AFTER *LINGLE*

*Lingle* left in place the "character of the governmental action" factor. It reiterated *Penn Central*'s somewhat confusing dual definition of "character." It eradicated the Ninth Circuit's heightened scrutiny of Hawaii's regulation as a substantial due process test, but it did not explicitly remove from review under the Takings Clause either the kind of effects the regulation has on the plaintiff's property or the government's aims in regulating. The character factor thus allows courts to account for the significance of the government's regulatory program—for the extent to which the program advances the "common good," as *Penn Central* stated—even if in most cases courts will not need to consider it. Because *Lingle* characterized the character factor as a secondary concern, courts should only make that inquiry in difficult cases, when the government has attempted to address an exceptionally important concern and when the consequences of a compensation award under the Takings Clause for present and future regulatory interventions into market failures and dangerous externalities are grave. In this way, the character factor accommodates the state's need to intervene to protect the public's health, safety, and welfare.

from nuisance and nuisance-like threats. Part V attempts first to illustrate, and then to explain and to an extent justify the Court's approach as one that makes sense in difficult cases as a means to allow courts flexibility in performing the Penn Central balance fairly and effectively.

A. Post-Lingle Character Factor Decisions

Two courts have faced cases that required them to apply the Penn Central test thoroughly and carefully, both just before and soon after the Supreme Court issued Lingle. Their efforts to articulate and apply a workable concept of governmental character illustrate why the character factor remains both relevant and necessary, and they offer models for how courts should perform the Penn Central balancing test with the government's purpose in mind.

1. The character factor in the Federal Circuit.

The year before the Supreme Court decided Lingle, the Federal Circuit, which has exclusive jurisdiction under the Tucker Act to hear regulatory takings claims for compensation from the United States, offered an extensive and effective interpretation of Penn Central's character factor. In Bass Enterprises v. United States, the court overruled a set of earlier decisions whose expansive, anti-regulatory approach to the regulatory takings doctrine had suggested that the government must identify the background principles of common law nuisance—that is, the Lucas nuisance exception—in order to avoid paying compensation to an affected property owner. Instead, following the Supreme Court's then
most recent takings decisions, *Palazzolo v. Rhode Island* and *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency*, the court adopted what it characterized as a properly "gestalt" approach to takings claims under *Penn Central* that considered, among other things, the necessity and substantiality of the government's regulatory purpose." Quoting Justice O'Connor's concurrence in *Palazzolo*, the circuit panel proclaimed that, "'[t]he purposes served, as well as the effects produced, by a particular regulation inform the takings analysis.'" This remains the circuit's approach to the character factor, even after *Lingle*. In its most recent decision in the complex and protracted *Cienega Gardens* litigation over federal affordable housing legislation administered by the U.S. Department of Housing and Urban Development, the D.C. Circuit described the *Penn Central* test as one that requires a court to perform an extensive balancing of the "practical realities of the [factual] situation" and to consider, under the character factor, "the precise action that the government has taken and the strength of the governmental interest in taking that action." Judicial review in the Federal

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176. *Bass Enterprises*, 381 F.3d at 1370 (citing *Tahoe-Sierra*, 535 U.S. at 323, and *Palazzolo*, 533 U.S. at 633-34 (O'Connor, J., concurring)). See also *Maritrans Inc. v. United States*, 342 F.3d 1344, 1356 (Fed. Cir. 2003) (stating that in performing a *Penn Central* analysis, a court should "consider the purpose and importance of the public interest underlying a regulatory imposition").
177. Id. at 1369-70 (quoting *Palazzolo*, 533 U.S. at 633-34 (O'Connor, J., concurring)).
178. *Cienega Gardens v. United States* (*Cienega X*), 503 F.3d 1266, 1279 (D.C. Cir. 2007). This restatement upholds the Court of Claims' discussion of the character factor which, following *Lingle*, it described in this way:

Assessing the character of the governmental action requires an analysis both of the purpose of the statute and of the actions taken by the government to serve that purpose... This inquiry concerns not only the societal benefit sought to be achieved by the governmental action but also whether the burdens imposed by the action were spread broadly over a large portion of the population or placed particularly on a relatively few property owners.

Circuit of partial takings under *Penn Central*, then, is an intensively fact-specific inquiry that considers as relevant but not dispositive the regulation’s purpose.

Given this general approach, the ongoing *Rose Acre Farms v. United States* litigation, which has been bouncing around the federal courts for decades, demonstrates how courts struggle to employ the character factor.\(^{179}\) Regulations issued by the U.S. Department of Agriculture (USDA) intended to prevent the spread of salmonella through eggs require testing of a poultry flock if it is identified as a source of a salmonella outbreak. After a positive salmonella test, a farm’s eggs must be pasteurized and cannot be sold interstate without special permitting.\(^ {180}\) Government authorities traced three outbreaks of salmonella poisoning in the Midwest to products sold by Rose Acre Farms, a major egg producer based in Indiana. In response to the outbreak, the USDA tested Rose Acre’s flocks, appropriated 6741 hens for testing, and restricted operations at all of Rose Acre’s three farms.\(^{181}\) To minimize its losses, Rose Acre built one new plant and expanded an existing one, diverting almost 60 million eggs to the less profitable intrastate market.\(^ {182}\)

In October 1992, Rose Acre filed a regulatory takings complaint seeking over $21 million in damages for the restricted sales, losses from hens destroyed during testing, reduced production, cleaning and disinfection costs, and other ancillary costs.\(^{183}\) Applying the *Penn Central* balancing test to Rose Acre’s claims that the confiscation of its eggs by the USDA required compensation, the Court of Federal Claims found that the government’s actions caused the plaintiff to suffer severe, adverse regulatory action under the character factor).

182. *Id.* at 511.
183. *Id.* at 512.
financial distress and frustrated its reasonable investment-backed expectations. The court also found that the government’s regulatory program was “misguided” and “ineffective” because it failed to test Rose Acre’s eggs, and because it could not identify the source in the majority of the country’s salmonella outbreaks during that same period. Therefore, the court concluded, the character of the government’s action also weighed in Rose Acre’s favor. With all three Penn Central factors favoring the plaintiff, the court awarded Rose Acre more than $6 million in compensation for the taking of its eggs and hens, plus costs and attorney’s fees.

The Federal Circuit Court of Appeals reversed and remanded the trial court’s judgment in 2004, ordering the Court of Claims to re-analyze the economic impact of the alleged taking and to reconsider the public benefit and private burdens of the regulation within the Penn Central framework. Specifically, the circuit panel held that in awarding compensation to Rose Acre Farms, the trial court had failed to apply Penn Central’s character factor correctly and had wrongly performed the Penn Central balancing test. With respect to the character factor, the panel identified two errors that the Court of Claims made. First, the claims court’s assertion that the USDA could have used less restrictive alternatives in its regulatory program was irrelevant under the Takings Clause; rather the key issue for the court to consider was “whether there is a nexus between the regulation and its underlying public purpose.” The panel’s statement is clearly wrong after Lingle, which rejected nexus as a test under the Takings Clause except in a narrowly defined set of cases. But the

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184. Id. at 516-18.
185. Id. at 519.
187. Rose Acre Farms, Inc. v. United States (Rose Acre Farms III), 373 F.3d 1177 at 1198 (Fed. Cir. 2004).
188. Id. at 1191-95.
189. Id. at 1194 (citing Nollan v. Cal. Coastal Comm’n, 483 U.S. 825, 837 (1987)).
190. The nexus test applies only to regulatory takings claims against land use regulations that impose conditions on a property owner in exchange for the grant of an entitlement to intensify development; such “exactions” are subject to both a nexus and a proportionality test, which do not apply outside of the exactions context. See Lingle v.
INCOHERENCE OF REGULATORY TAKINGS

claims court's requirement of a less restrictive alternative under the Takings Clause was also incorrect, while the circuit court's rejection of that approach—on the grounds that a court reviewing a regulatory takings claim does not consider a regulatory program's invalidity or lack of wisdom—is entirely consistent with Lingle.

Second, Rose Acre Farms had persuaded the claims court that it had been unfairly targeted by USDA because its eggs, unlike those of other egg producers, could be traced to salmonella poisoning, and therefore its business suffered a disproportionate amount of the burden from the government's regulatory program. The circuit panel was unpersuaded that this constituted evidence that tilted the Penn Central balance in Rose Acre's favor. Rather, it held that the government had employed the best available scientific evidence to respond to a health crisis caused by unsafe food produced and distributed by one of the largest egg producers in the United States. The government's generally applicable regulation represented an important intervention by the government under its police power authority. If the character factor has any meaning at all, the panel suggested, the claims court was surely wrong in concluding that the USDA's efforts in this case constituted bad character.

On remand, the Court of Claims again found a taking. It held fast to its conclusions that Rose Acre suffered exceptionally adverse, albeit temporary, economic impacts and frustrated expectations from the regulation—conclusions that the Federal Circuit had largely supported in Rose Acre III. As to the appellate court's rejection of its application of the character factor, the Court of Claims suggested that by abrogating the "substantially


191. Rose Acre Farms II, 55 Fed. Cl. at 647.
192. Rose Acre Farms III, 373 F.3d at 1191, 1194.
194. Rose Acre Farms III, 373 F.3d at 1191.
advances test” in a takings analysis, the Lingle Court required courts to focus only on the distribution of the regulation’s burden. As a result, the claims court asserted, the federal circuit had itself incorrectly focused on the regulation’s ends and its means to achieve it.\textsuperscript{195} Nevertheless, conceding that the appellate court’s declaration that the character factor favored the government constituted law of the case, the Court of Claims made no further effort to press its deep skepticism about the regulation’s misguided and ineffective efforts.\textsuperscript{196} This was irrelevant to the judgment, however, as on the basis of the other \textit{Penn Central} factors the claims court again found in favor of Rose Acre and awarded over $5 million in damages and over $3 million in fees and expenses.\textsuperscript{197}

As this article went to press, the Federal Circuit again reversed the Court of Claims, this time by affirmatively holding that the government’s regulatory efforts did not effect a taking.\textsuperscript{198} Although it agreed with the claims court that \textit{Lingle} has “changed the landscape” in regulatory takings law, the circuit panel concluded that the Supreme Court had neither excised the character factor from the \textit{Penn Central} test nor fully eviscerated it.\textsuperscript{199} The panel then used two distinct means of applying the factor. First, it recognized the severe burden that Rose Acre suffered as a result of the regulations, but held that the egg producer had failed to demonstrate that the government had singled out its operations. To the extent that Rose Acre claimed the regulations were insufficiently broad to be effective, its argument sought to challenge the regulations’ wisdom and effectiveness—a challenge that \textit{Lingle} barred from a takings analysis.\textsuperscript{200} Second, and more significantly, the court also considered the government’s regulatory rationale. Because the regulations attempted to protect the public’s health and safety against a known, proven threat, they deserved greater deference in a takings analysis than those “intended to modify the distribution of wealth,” like Hawaii’s

\textsuperscript{195} Rose Acre Farms IV, 2007 WL 5177409, at *8.
\textsuperscript{196} Id.
\textsuperscript{197} Id. at *13.
\textsuperscript{198} Rose Acre Farms v. United States (Rose Acre Farms V), 2009 WL 615449, (D.C. Cir. Mar. 12, 2009).
\textsuperscript{199} Id. at *15.
\textsuperscript{200} Id. at *17-18.
economic regulations that Chevron had challenged in Lingle.\textsuperscript{201} Reviewing the long history of legislative efforts to regulate food safety that sought to provide stronger, systematic protections than common law protections available via tort and contract liability, the court held that government efforts to protect public health and safety are "the type of regulation in which the private interest has traditionally been most confined and governments are given the greatest leeway to act without the need to compensate those affected by their actions."\textsuperscript{202} The court characterized this judicial deference to the government as one that courts apply on an individualized basis in light of the threat the government is addressing, rather than as a per se rule that immunizes the government from liability for all health and safety regulations.\textsuperscript{203} In this instance, the government's actions were necessary to curb an existing threat and thus weighed strongly in the government's favor under a Penn Central analysis—leading, ultimately, to the court's decision to find that the Penn Central balance weighed in favor of the government.\textsuperscript{204} Consistent with both the spirit and letter of Penn Central's deferential, ad hoc balancing test, the Federal Circuit has articulated a flexible, pragmatic approach to the character test, one that weighs heavily only in particular circumstances, when the government's actions are most necessary.

2. Georgia and the Mann decisions.

In a series of decisions challenging the effects of residency restrictions on registered sex offenders, the Georgia Supreme Court has also considered the important character of the government's actions in deciding to require compensation.\textsuperscript{205} Anthony Mann's status as a registered sex offender in Georgia subjected him to state statutory restrictions that required him to live and work more than one thousand feet away from any childcare facility, church, school, or area where minors congregate

\textsuperscript{201} Id. at *18.
\textsuperscript{202} Id. at *20.
\textsuperscript{203} Id.
\textsuperscript{204} Id. at *21-22.
\textsuperscript{205} Mann v. Georgia Dept. of Corrections (Mann II), 653 S.E.2d 740 (Ga. 2007); Mann v. State (Mann I), 603 S.E.2d 283 (Ga. 2004).
or face felony prosecution.\textsuperscript{206} The Georgia Supreme Court in 2004 had rejected Mann's earlier takings challenge to the constitutionality of the statute, when he was forced to vacate his parents' home where he had been living rent-free.\textsuperscript{207} In \textit{Mann I}, the court had characterized the plaintiff's interest in his residence as minimal. Mann had no investment-backed expectations in retaining whatever small property interest he had in his agreement with his parents that he could remain so long as he performed work around the house and shared living expenses.\textsuperscript{208} During the years between his first and second challenge to the statute, Mann had purchased a home with his wife and obtained half-ownership of a barbecue restaurant; neither the home or the business, at the time of purchase, was within one thousand feet of any facility covered by the sex offender statute. After childcare facilities located themselves within the prohibited proximity of both his residence and his restaurant, Mann was required by his probation officer to move from his home and quit the premises of his business.

In \textit{Mann II}, the Georgia Supreme Court awarded Mann compensation under the Takings Clause for the effects of the regulation on his residence, but not for those on his business. Applying the \textit{Penn Central} factors, the court distinguished between the "significant" interest Mann had accrued in the house he purchased and shared with his wife, which the statute forced him to sell,\textsuperscript{209} with the business that he co-owned, over which he could retain ownership even if he could no longer work or visit there.\textsuperscript{210} Applying \textit{Lingle}, the court concluded that forcing Mann to vacate his home constituted the functional equivalent of an immediate ouster. Furthermore, even if he and his wife retained ownership in the house, he would be unable to return for at least the ten years of his probation and would face the financial burden of procuring and maintaining another residence.\textsuperscript{211} The statute requires a

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\item \textsuperscript{206} \textsc{Ga. Code. Ann.} § 42-1-15 (Westlaw 2009).
\item \textsuperscript{207} \textit{Mann I}, 603 S.E.2d at 443-44.
\item \textsuperscript{208} \textit{Id.} at 285.
\item \textsuperscript{209} \textit{Mann II}, 653 S.E.2d at 743.
\item \textsuperscript{210} \textit{Id} at 746.
\item \textsuperscript{211} \textit{Id.} at 743.
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registered offender to live in a constant state of uncertainty that a new entrant to the neighborhood might force him to sell his home. Any facility protected from nearby registered sex offenders, by contrast, could take advantage of the notice the state provides of an offender's residence and choose a location accordingly.212 The combination of the plaintiff's loss of his home and the economic impact from a forced sale—which the court assumes would exist but never even attempts to support—outweighs the government's interest in its residency requirement.213

The government's interest in the residency statute was not insignificant, however, and, like the Federal Circuit, the Georgia Supreme Court was willing to consider that interest as an important, but not dispositive, part of its Penn Central analysis.214 In Mann I, the court had characterized the government's interest in protecting against allowing "those offenders inclined toward recidivism to have contact with, and possibly victimize, the youngest members of society" as quite "considerable."215 Mann II

212. Id. at 742-45.
213. Id. at 745. The court never explained why Mann could not get full value for his home, or why he would not be able to purchase another house for market value. To be sure, as the court asserts, he would be forced to pay the transaction costs of broker commissions, closing costs, and moving expenses, see id at 744, but those dead-weight losses would surely not have approached the degree of economic impact presumptively required under Penn Central. The court also emphasizes that the statute "effectively places the State's police power into the hands of private third parties" by enabling facility-owners to force the ouster of a registered sex offender by locating their operations near his home. Id. at 745. Of course this is no different from any public nuisance action in which new residents moved near an existing use, which is generally not deemed a nuisance. See, e.g., Hadacheck v. Sebastian, 239 U.S. 394 (1915) (explaining that there was no takings liability for government regulation that forbade the operation of a brickyard within defined areas of a city). Nor does it explain why the results differ when the facility owner moves near a house that a registered offender owns, as opposed either to a house that he rents or a business that he owns or that employs him.

214. I am making no assertions regarding other constitutional claims that Mann might have against Georgia's residency restrictions, nor am I suggesting that I consider these restrictions to be either effective in protecting children or politically or morally defensible. In this Article, I am concerned only with the government's interest in protecting children, and how that interest should be considered in the adjudication of a challenge under the Takings Clause to a law that seeks to advance that purpose. For a more normative and evaluative discussion of these laws, see Wayne A. Logan, Constitutional Collectivism and Ex-Offender Residence Exclusion Laws, 92 IOWA L. REV. 1 (2006); Corey Rayburn Yung, Banishment by a Thousand Laws: Residency Restrictions on Sex Offenders, 85 WASH. U. L. REV. 101 (2007); Bret R. Hobson, Note, Banishing Acts: How Far May States Go to Keep Convicted Sex Offenders Away from Children? 40 GA. L. REV. 961 (2006).

215. Mann v. Georgia Dept. of Correction (Mann I), 603 S.E.2d 283, 286 (Ga. 2004).
did not stray from that determination, and the court refused to award compensation for the burden on Mann's interest in the business he co-owned. He could continue to own the barbecue restaurant notwithstanding his inability to work there or visit it, and he failed to show that the restriction would cause significant economic damage to the business.\(^{216}\)

Although the court in Mann II continued to acknowledge the state's interest in protecting children, it also appeared uncertain as to how or whether it should defer to that interest in evaluating Mann's takings claim. It had decided Mann I before Lingle, and in 2004 read the Penn Central test as requiring it to consider the state's interest as part of the "character" test. Applying the multi-factor balancing test, the court in Mann I wrote:

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\text{In contrast to [Mann's] slight [interests in his residence at his parents' home], the State's interests underlying the Residency Statute are considerable. . . . While not every convicted sex offender will be a recidivist, the statute aims to lessen the potential for those offenders inclined toward recidivism to have contact with, and possibly victimize, the youngest members of society. As such, the State's interests underlying the Residency Statute are entitled to substantial weight.}^{217}\]

Three years later, the court was far more hesitant to weight the state's interest so strongly: "However, even assuming, arguendo, that the substantiality of the public purpose advanced by a regulation is still pertinent to a takings challenge, but see Lingle, we cannot overlook the significant adverse economic impact of [the restriction] on appellant."\(^{218}\) Ruling in favor of the state on Mann's claim that his business had also been taken as a result of the residency statute, the court ultimately did not ignore the state's interest.

The two decisions in Mann demonstrate that Lingle has curbed, but not banished, consideration of the government's purpose in a Penn Central analysis. Before Lingle, the court in Mann I

\(216.\) Mann II, 653 S.E.2d at 746.
\(217.\) Mann I, 603 S.E.2d at 286.
\(218.\) Mann II, 653 S.E.2d at 745. See also id. at 745 n.7 (summarizing Lingle's command that courts reviewing takings claims focus on the regulation's effects on property owners).
unabashedly explored the significance of the governmental interest as a factor in its ad hoc balancing. After *Lingle*, the court appeared more hesitant to emphasize the state’s purpose, even suggesting (incorrectly, as I have argued) that it might be barred from doing so. It is unclear whether this shift caused the different outcomes between the two decisions. Mann’s forced vacation of his co-owned house unquestionably gave him a stronger claim in the second case. So did the fact that he was forced to move from his parents’ home because of the statute’s enactment, while in *Mann II* the unanticipated entrance of a new home into his immediate neighborhood one year after he purchased his own home forced him to move.219 *Mann II* appeared to eschew explicit and substantial consideration of the state’s purpose, but it did not seem to ignore it entirely. This is the correct response to *Lingle*, and a model for future courts that are forced to consider a *Penn Central* claim in which the government’s interest appears especially strong, such as emergency health and safety regulations (as in *Rose Acre Farms*) and efforts to protect vulnerable populations from potentially predatory recidivists (as in the *Mann* cases).

**B. The Character Factor After Lingle**

The character factor thus gives courts the discretion to consider the significance of the government’s regulatory purpose in cases in which that purpose might justify exceptional economic harm to the property owner. This is consistent with, although not identical to, the longstanding doctrine that exempts nuisance abatement from takings liability.220 In the cases described above, courts did not assume that the government’s attempts to control the threats caused by poisoned eggs and registered sex offenders immunized their regulatory actions from takings liability. Instead, they weighed the government’s purpose as one factor in their

219. See *Mann I*, 603 S.E.2d at 442; *Mann II*, 653 S.E.2d at 742.

analysis. Nor did the courts require the challenged state actions to constitute nuisance abatement in the traditional common law sense that \textit{Lucas} requires.\footnote{See generally text accompanying \textit{supra} notes 132-136 (discussing \textit{Lucas}'s limited nuisance exception). Indeed, besides the Federal Circuit, which has since corrected itself, courts have rarely required common law nuisance abatement outside of the \textit{Lucas} context. See Stewart Sterk, \textit{The Inevitable Failure of Nuisance-Based Theories of the Takings Clause: A Reply to Professor Claes}, 99 NW. U. L. REV. 231, 232 (2004).} Following \textit{Penn Central}, which holds that the government's purpose can extend to spreading the benefits of historic preservation and to modern conceptions of harm,\footnote{See Klein, \textit{supra} note 155. This was true even in the traditional common law context, as Louise Halper demonstrated in her response to Justice Scalia's effort in \textit{Lucas} to limit nuisance as a governmental defense in total takings cases. See Louise A. Halper, \textit{Why the Nuisance Knot Can't Undo the Takings Muddle}, 28 IND. L. REV. 329 (1995).} these cases suggest that courts can defer to governmental efforts to control a dangerous harm, and weigh those efforts in the \textit{Penn Central} balance.

This is not new. Throughout the twentieth century, regulatory efforts to address exceptional crises like national emergencies and domestic shortages during wartime have survived takings challenges.\footnote{See, e.g., United States v. Cent. Eureka Mining Co., 357 U.S. 155, 168 (1958) (upholding against a takings challenge a temporary shutdown of gold mining operations because "[w]ar... demands the strict regulation of nearly all resources."); Block v. Hirsh, 256 U.S. 135, 157 (1920) (upholding against a takings challenge a temporary rent control ordinance instituted during wartime).} But it does undercut \textit{Lingle}'s apparent promise to deliver internal coherence and conceptual purity to what has long been viewed as a doctrinal and conceptual muddle through a focus on the functional equivalence of a regulation's impact to a physical taking.\footnote{Property rights advocates who hope to invigorate the substantive due process and regulatory takings doctrines have argued that \textit{Lingle} failed to resolve either doctrine, in large part because of the Court's commitment to fairness in its regulatory takings decisions. See Eagle, \textit{supra} note 12, at 922 (arguing that the \textit{Armstrong} principle lends itself to a substantive due process analysis); Radford, \textit{supra} note 11, at 445, 449-50 (arguing that fairness and reciprocity concerns allow the \textit{Agins} test to remain relevant to regulatory takings, and suggests that the Court will inevitably overrule \textit{Lingle}).} The character factor does not eliminate the emphasis \textit{Lingle} places on a regulation's effects, but it does allow governments to show and courts to consider regulatory purpose.

The character factor's superficial inconsistency with \textit{Lingle}'s holding obscures a deeper consistency between the character factor and the Court's comprehensive institutional approach to
the Takings Clause. A broad understanding of "character" allows courts to balance the judicial protection of constitutional property rights—enabling courts to intervene in cases in which the impact on property values and reasonable investment-backed expectations is great—against judicial deference to the regulatory interventions of the state. Courts may require compensation in those instances when a regulation's effects are greatest while they remain respectful of the roles that federal, state, and local governments play in a modern, complex economy and society. The Court's embrace of *Penn Central*, in a unanimous decision written by the moderate conservative Justice O'Connor, rather than one of the more vocal advocates of constitutional property rights like Chief Justice Rehnquist or Justice Scalia, has ended the grand historical moment of the Takings Clause that had delivered the high drama of *Lucas* and other decisions suggesting that a rollback of the regulatory state was imminent. Instead, the Court has chosen to preserve its political capital through small-step decisions that narrowly review regulatory actions, in the process balancing all of the relevant interests and respecting all of the relevant institutions involved. By allowing courts the discretion to consider the government's regulatory purpose, the character factor serves a key role in the Court's canonization of *Penn Central* and in the broader modern commitment to the regulatory state.

In addition to undermining the unified "takings jurisprudence" that the Court claimed to have achieved, the character factor also undercuts the small corrective *Lingle* might have offered to the indeterminacy of the regulatory takings doctrine. If the doctrine focused exclusively on regulatory effects, then courts might have been able to develop some rules or clear standard with which to adjudicate disputes—perhaps a certain

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225. I develop this argument more thoroughly in Fenster, *supra* note 20, at 733-39.

percent diminution in value would guarantee or at least make more likely a compensation award, for example. \(^{227}\) If courts consider regulatory purpose as well as regulatory effects, however, they will engage in more case-by-case adjudication of takings claims, because even when the impacts are significant, the government can still identify the exceptional harm that would occur but for its necessary regulatory program. Once again, however, such fact-specific judicial inquiries are quite consistent with the late Rehnquist Court’s approach to regulatory takings, which before *Lingle* had already embraced *Penn Central’s* indeterminate balancing test as the “polestar” of its regulatory takings jurisprudence. \(^{228}\) The application of open-ended standards and balancing tests that the *Penn Central* test allows is entirely consistent with Justice O’Connor’s jurisprudential approach to difficult constitutional issues, which preferred standards and balancing tests to clear, mechanical rules. \(^{229}\) Indeed, this

\(^{227}\) On the desire for clear rules in takings doctrine, see Mark Fenster, *Takings Formalism and Regulatory Formulas: Exactions and the Consequences of Clarity*, 92 CAL. L. REV. 609, 619-21 (2004).


\(^{229}\) See, e.g., *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 852 (1995) (O’Connor, J., concurring) (declaring, in a case in which free speech and establishment claims were in conflict, that “[w]hen bedrock principles collide, they test the limits of categorical obstinacy and expose the flaws and dangers of a Grand Unified Theory that may turn out to be neither grand nor unified”); *County of Allegheny v. ACLU, Greater Pittsburgh Chapter*, 492 U.S. 573, 629 (1989) (O’Connor, J., concurring in part and concurring in the judgment) (conceding that the test that she developed under the Establishment Clause for religious displays “depends on a sensitivity to the unique circumstances and context of a particular challenged practice and, like any test that is sensitive to context, it may not always yield results with unanimous agreement at the margins,” while arguing that such “is true of many standards in constitutional law”); see generally Kathleen M. Sullivan, *The Justices of Rules and Standards*, 106 HARV. L. REV. 22, 115-21 (1992) (grouping Justice O’Connor with other justices as ascribing to the belief in “the rule of law as the law of standards”). Sullivan’s account is largely descriptive; for academic evaluations of this characteristic, see, for example, Richard A. Epstein, *The Federalism Decisions of Justices Rehnquist and O’Connor: Is Half a Loaf Enough?*, 58 STAN. L. REV. 1793, 1797-98 (mixing criticism and praise for O’Connor’s incremental and centrist embrace of balancing tests in her federalism decisions); Eric J. Segall, *Justice O’Connor and the Rule of Law*, 17 U. FLA. J. L. & PUB. POL’Y 107, 108 (2006) (criticizing Justice O’Connor for “[h]er reluctance to articulate principles governing cases, as well as her inconsistent treatment of
evolutionary path back to individualized adjudication within the framework of an indeterminate balancing test is both logical and preferable for the regulatory takings doctrine. Formally precise constitutional rules articulated by courts under the open-ended language of the Takings Clause provide neither the stability nor the efficiencies their advocates claim.\textsuperscript{230} When faced with complex, heavily contested political and environmental issues, localized, individualized, and negotiated dispute mechanisms are more likely to achieve acceptable results than rules produced by nine life-tenured justices.\textsuperscript{231}

Ultimately, the character factor serves as a judicial escape hatch. In its absence, a court that might otherwise be forced to find another means not to award compensation—for instance, in a \textit{Rose Acre}-type case where a government agency is attempting to respond to a significant health concern—can at least state explicitly its reason for denying a takings claim. One of legal realism's most important lessons is that judges respond, above all, to fact situations. A properly functionalist judge should assess the conflicting human values at stake in the litigation, appraise the social importance of existing precedent, consider all of the relevant evidence that would bring light to the conflict, and reject the use of abstract legal concepts that would direct the decision away from the particular dispute and the prevalent norms of social and commercial behavior in the relevant field.\textsuperscript{232} In adjudicating takings disputes, a defendant government agency will inevitably attempt to persuade the trier of fact of the great significance and necessity of its challenged regulation. To the extent that the character factor allows a judge to make this consideration explicit,

\bibliography{takings}
it will enable her to more candidly decide the issue—a better alternative than a judge's effort to surreptitiously manipulate facts in order to reach a result that she thinks will better achieve a preferred normative or policy end.  

VI. CONCLUSION

_Lingle_ clarified the regulatory takings inquiry and disentangled the most obvious confusion between the Takings Clause and substantive due process. It failed to present a fully unified doctrine, however, as it reconstructed the doctrine at the close of the takings revolution on the chaotic foundation of _Penn Central_, with its indeterminate, inclusive balancing test. For those who long for coherence and unification, this appears to be a mistake or a failure of will. But if regulatory takings is viewed instead as a post-realist and post-New Deal compromise between the judicial protection of property rights and judicial deference to the administrative state, then the doctrine's stubborn incoherence—the morass that fails to satisfy those who long for a purer constitutional order that rests on strong property rights protections—appears understandable and perhaps inevitable.