AFTER *TAHOE SIERRA*, ONE THING IS CLEARER: THERE IS STILL A FUNDAMENTAL LACK OF CLARITY

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I. INTRODUCTION

This Note begins with what I will term a "Bierstadt dilemma." Albert Bierstadt, the nineteenth century landscape painter whose works hang in museums of world renown, is often criticized for producing overly grandiose and over-exaggerated scenes.[1] Some charge that his paintings depict skies that are just *too* romantic, mountains *too* jagged, and waters *too* serene to be real.[2] What these critics ignore, however, is the context in which these paintings were created.

Bierstadt explored the American West during the second half of the nineteenth century, encountering then such places we now have registered as national parks[3]—yet before they were decorated with paved walkways and faux rustic lodges. Imagine the difficulty of conveying the magnificence of such scenes with paints on a simple canvas. Anything less than Bierstadt's grandiloquent style would simply not have done the landscapes justice.

I understand Bierstadt's dilemma. I could not begin to convey the magnificence of many of the American West's landscapes without sounding like a greeting card. Landscapes so awesome seen in person cannot be effectively depicted two-dimensionally without excessive embellishment. The written word thus seems prohibitively confining when I set about trying to describe the splendor of one of our nation's natural treasures—Lake Tahoe. Fortunately, I do not have to rely on my own flowery language to describe Lake Tahoe, but can quote from someone considerably more adept with words. According to Mark Twain, that lake is "a noble sheet of blue water lifted six thousand three hundred feet above the

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1. *See, e.g.*, Holly Myers, *'Lure of the West' is Far From Pioneering; Though it Contains Some Excellent Works, a Smithsonian Survey Offers a Standard Look Back at America's Expansion*, L.A. TIMES, Nov. 24, 2001, at F1.

2. *See id.*

3. *Id.*

level of the sea. . . . [W]ith the shadows of the mountains brilliantly photographed upon its still surface . . . it must be the fairest picture the whole earth affords."[4]

Yet Lake Tahoe's "unsurpassed beauty . . . is [also] the wellspring of its undoing."[5] It is so loved, it just might be loved to death. Lake Tahoe's growing popularity has created the danger that its "'not *merely* transparent, but dazzlingly, brilliantly'"[6] transparent waters will become clouded. Permanently.[7]

As land in the Lake Tahoe basin is developed, the ground that had formerly been able to absorb rain and spring snowmelt becomes impervious.[8] As a result, instead of filtering through fields, meadows, and the forest floor, water flows quickly over paved surfaces.[9] It flows into the lake, carrying with it pollutants, sediments, and nutrients from fertilized lawns, golf courses, and roadways.[10] Once in the lake, these pollutants diminish Tahoe's amazing clarity.[11] The added nutrients increase algal growth and cause the Lake's eutrophication, "a process which, if unabated, will cause levels of algae to continue to increase until the Lake's characteristic color turns 'from clear blue to turbid brown.'"[12]

Recognizing that the increasing popularity and corresponding development of Lake Tahoe were threatening the lake's water quality, in 1968 the Nevada and California legislatures created a plan attempting to manage the area's growth.[13] The plan established the Tahoe Regional Planning Agency ("TRPA") and charged the agency with developing and implementing regulations necessary to protect the area.[14] However, when it subsequently became apparent that the TRPA's first attempt at planning would not sufficiently safeguard the area's ecological integrity, frustration rose with the agency's failure to control the rising threats to the lake.[15]

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4. MARK TWAIN, ROUGHING IT 169 (Am. Pub. Co. 1872).

5. Tahoe Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency, 535 U.S. 302, 307 (2002). For clarity, I will refer to the District Court's opinion, 34 F. Supp. 2d 1226 (D. Nev. 1999) in this case as *Tahoe Sierra I;* the Ninth Circuit's opinion, 216 F.3d 764 (9th Cir. 2000) as *Tahoe Sierra II*; and the Supreme Court's opinion as *Tahoe Sierra III.*

6. *Tahoe Sierra III*, 535 U.S. at 307 (quoting MARK TWAIN, ROUGHING IT 174–75 (1872)).

7. Brief for Respondents at 7, *Tahoe Sierra III*, 535 U.S. 302 (No. 00-1167).

> [U]nlike most lakes, which can self-purify as fresh water flows in and contaminated water flows out, the amount of water entering and leaving Lake Tahoe is minuscule compared to the total volume of water in the Lake. If the Lake were drained, it would take approximately 650–700 years to be refilled—compared to, for example, 2.6 years for Lake Erie. Thus, if allowed to continue, the eutrophication of the lake would be irremediable.

Id. (citation omitted).

8. *Id.* at 6.

9. *Id.*

10. *Id.*

11. *Id.*

12. *Id.* (quoting *Tahoe Sierra II*, 259 Cal. Rptr. at 135).

13. *See Tahoe Sierra III*, 535 U.S. at 308–09.

14. *See id.*

15. *Id.* at 309.

To repair the TRPA, California and Nevada created the 1980 Tahoe Regional Planning Compact ("Compact").[16] The Compact amended the TRPA's structure and established guidelines for the TRPA to follow in setting its new "standards for air quality, water quality, soil conservation, vegetation preservation and noise."[17] The Compact further directed the TRPA to adopt a new regional land-use plan to ensure compliance with those standards.[18] Under the Compact, the TRPA had eighteen months to develop the standards, and an additional year to create the regional plan.[19]

Moreover, "'in order to make effective the regional plan as revised by [TRPA],'" the California and Nevada legislatures found it "'necessary to halt temporarily works of development in the region which might otherwise absorb the entire capability of the region for further development or direct it out of harmony with the ultimate plan.'"[20] Thus, to prevent further damage to the Basin's ecosystem during this standard-setting and plan-developing time, the Compact "prohibited the development of new subdivisions, condominiums, and apartment buildings."[21] The Compact also "prohibited each city and county in the Basin from granting any more [development] permits in 1981, 1982, or 1983 than had been granted in 1978."[22] These prohibitions were to be in effect until adoption of the final plan, or until May 1, 1983, whichever date came sooner.[23]

It soon became apparent that, even though the TPRA was "perform[ing its] obligations in 'good faith and to the best of its ability,'"[24] the agency would be unable to meet the deadlines imposed by the Compact.[25] In June 1981 the TRPA enacted Ordinance 81-5 as a stopgap measure based on this prediction.[26] This Ordinance, effective from August 25, 1981 until the TRPA could enact a final, permanent plan, "essentially bann[ed] any construction or other activity that involved the removal of vegetation or the creation of land coverage"[27] on certain areas of the Tahoe Basin that were determined to be especially vulnerable or sensitive to the impact of development.[28]

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16. *Id.* For the 1980 Tahoe Reg'l Planning Compact, see Pub. L. 96-551, 94 Stat. 3233 [hereinafter *Compact*]. The state law counterparts in California and Nevada are, respectively, CAL. GOV'T. CODE ANN. § 66801 (West Supp. 2002), and NEV. REV. STAT. § 277.200 (1980).

17. *Compact*, *supra* note 16, at 3239.

18. *Tahoe Sierra III*, 535 U.S. at 310.

19. *Id.*

20. *Id.* (quoting *Compact*, *supra* note 16, at 3243).

21. *Id.*

22. *Id.*

23. *Id.*

24. *Id.* at 311 (citing *Tahoe Sierra I*, 34 F. Supp. 2d 1226, 1233 (D. Nev. 1999)).

25. *Id.*

26. *Id.*

27. *Id.*

28. The ordinance affected activities on Stream Environment Zones ("SEZ"s) and lands in California that had been placed in "land capability district" numbers 1, 2 and 3. *Id.* at 309. Because the SEZs are important "filters for much of the debris that runoff carries," damage to those areas can significantly affect the lake's water quality. *Id.* at 308. Similarly, because the lands in districts 1, 2, and 3 also have been found to generate a

While the TRPA managed to adopt new threshold standards by late August of 1982, two months after the Compact's original deadline, the agency could not adopt a new regional plan by August of 1983.[29] Again, in order to prevent the ultimate goals of the plan from being thwarted by development before the plan's enactment, the TRPA adopted Resolution 83-21. This resolution implemented a more comprehensive moratorium on development than Ordinance 81-5 had, prohibiting all construction on "high hazard lands"[30] in both California and Nevada.[31] Resolution 83-21's moratorium remained in effect until April 26, 1984, the date of the new regional plan's adoption.[32]

Tahoe Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency involved a challenge to the validity of these moratoria.[33] The Tahoe Sierra Preservation Council, representing roughly 2,000 owners of improved and unimproved parcels of real estate in the Tahoe Basin, together with some 400 individual owners of vacant lots located on "high hazard lands," brought suit against the TPRA claiming that Ordinance 81-5, Resolution 83-21, and the 1984 regional plan effected unconstitutional takings of their property.[34]

After over a decade of litigation,[35] the case reached the Supreme Court in 2002. In a 6-3 ruling the high Court determined that there had been no taking of petitioners' property.[36] This decision has two related, major ramifications for regulatory takings jurisprudence. First, the decision limits the situations that will trigger the narrow *per se* rule the Court developed in an earlier case for "total takings."[37] Second, the decision reaffirms the role the *Penn Central* balancing test[38] is to play in deciding those cases in which a regulation has not permanently

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significant amount of runoff, protection of those lands is crucial to protection of the lake. *Id.* By segmenting the lands into these districts, the TRPA can focus its conservation efforts on areas that have the most effect on the lake. *Id.* at 308–09. For example, in the TRPA's 1972 Ordinance, the agency determined nearly a third of the land in some districts could be covered by impervious surfaces, but that only one percent of land in high sensitivity districts such as districts 1 and 2 could be covered by impervious surfaces. *Id.* at 309.

29. The district court, when reviewing this case, found the TRPA's failure to meet the deadline "[u]nfortunate[], but . . . not surprising[]" given all that was required to enact such a plan. *Tahoe Sierra I*, 34 F. Supp. 2d at 1235.

30. "High hazard lands" are those in land capability districts 1, 2, and 3. *See supra* note 28 and accompanying text.

31. *Tahoe Sierra III*, 535 U.S. at 312.

32. *Id.*

33. *Id.* at 312.

34. *See id.* at 313. The Supreme Court did not grant certiorari to decide whether enactment of the 1984 plan effected a taking. *But see id.* at 343–46 (Rehnquist, J., dissenting) (arguing that the 1984 plan was before the Court).

35. *Id.* "Petitioners' complaints gave rise to protracted litigation that has produced four opinions by the Court of Appeals for the Ninth Circuit and several published District Court opinions." *Id. See generally* 911 F.2d 1331 (9th Cir. 1990); 938 F.2d 153 (9th Cir. 1991); 34 F.3d 753 (9th Cir. 1994); 216 F.3d 764 (9th Cir. 2000); 611 F. Supp. 110 (D. Nev. 1985); 808 F. Supp. 1474 (D. Nev. 1992); 808 F. Supp. 1484 (D. Nev. 1992).

36. *Tahoe Sierra III*, 535 U.S. at 343 (upholding the judgment of the Court of Appeals for the Ninth Circuit that there had been no categorical taking).

37. *See* Lucas v. S.C. Coastal Council, 505 U.S. 1003 (1992); *infra* Part II.

38. *See* Penn Cent. Transp. Co. v. City of New York, 438 U.S. 104 (1978).

stripped the property of all value.[39] These changes are important because they will affect the outcome in all future regulatory takings challenges.

After a brief introduction into the development of the regulatory takings doctrine,[40] this Note examines the two aforementioned effects of the *Tahoe Sierra* decision and illustrates how they have already manifested themselves in cases decided since the Supreme Court announced its decision. More significantly, this Note then critiques one prong of the *Penn Central* balancing test—the "investment-backed expectations" factor[41]—and illustrates some of the critical flaws inherent in both the rationale behind, and the application of, that factor by the courts. The critique challenges both the general utility and the desirability of the Court's *Penn Central* balancing approach. This Note concludes by suggesting an alternative approach for analyzing future regulatory takings claims.

Throughout this Note's subsequent analysis of the *Tahoe Sierra* decision and its implications, keep in mind the story behind *Tahoe Sierra*. The preceding description aims to give context to the case, and to illustrate the competing interests and values that gave rise to the litigation. More generally, the description provides us all with a reminder of the tangible, often fragile realm to which courts apply the abstract legal rules and principles currently at play in regulatory takings cases.[42]

II. A BRIEF OVERVIEW OF THE REGULATORY TAKINGS PICTURE

In 1922 the Supreme Court expanded the scope of the Fifth Amendment's Takings Clause protections, giving "birth to our regulatory takings jurisprudence."[43] While the Takings Clause had previously protected private property from *physical* appropriation by the federal government,[44] the

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39. *Tahoe Sierra III*, 535 U.S. at 331; *see Lucas*, 505 U.S. at 1019–20 n.8; *infra* Part III.

40. This Note limits its discussion of regulatory takings to examining the doctrine as it has been applied to claims of real property takings.

41. *See infra* Part IV.

42. Myrl L. Duncan, *Reconceiving the Bundle of Sticks: Land as a Community-Based Resource*, 32 ENVTL. L. 773, 774 (2002) (discussing the idea that, when thinking about property, it is important to recognize that property is "intensely contextual.")

> [T]he [bundle of sticks] metaphor treats a landowner's collection of rights only in the abstract. By considering the bundle complete in and of itself, the metaphor ignores the fact that landowners, and thus bundles, interact not only with neighboring landowners but with the public at large in ways that affect society's desire and need for a healthy environment. The metaphor also fails to account for the fact that parcels of land interact with each other in the nonhuman world.

Id. at 775.

43. *Tahoe Sierra III*, 535 U.S. at 325 (discussing Pa. Coal Co. v. Mahon, 260 U.S. 393 (1922)).

44. *See, e.g.*, ROBERT MELTZ ET AL., THE TAKINGS ISSUE: CONSTITUTIONAL LIMITS ON LAND USE CONTROL AND ENVIRONMENTAL REGULATION 129–30 (Island Press 1999); J. Peter Byrne, *Ten Arguments for the Abolition of the Regulatory Takings Doctrine*, 22 ECOLOGY L.Q. 89, 91–96 (1995); Joseph Sax, *Takings and the Police Power*, 74 YALE L.J. 36, 58–60 (1964); William M. Treanor, *The Original Understanding of the Takings*

Pennsylvania Coal v. Mahon[45] decision broadened the Fifth Amendment's guarantees to protect property owners from overly burdensome and onerous regulations.[46] Justice Holmes, writing for the Court, stated that "if regulation goes too far it will be recognized as a taking."[47] Holmes did not define when a regulation would be deemed to have gone "too far," but noted that the inquiry would be a "question of degree," which could not be "disposed of [simply] by general propositions."[48]

From *Pennsylvania Coal*'s inception of the regulatory takings doctrine, through eighty years of application and modification of that doctrine, the rules and their application have been a bountiful source of perplexity.[49] For several decades, the Supreme Court "'generally eschewed' any set formula for determining how far is too far, choosing instead to engage in 'essentially ad hoc, factual inquiries.'"[50]

Eventually, however, certain tests began to emerge. To determine whether a regulation impermissibly sought to "improve the public condition . . . by a shorter cut than the constitutional way of paying for the change,"[51] the Supreme Court created several different approaches to be used in various permutations of regulatory takings cases.[52] Rather than producing clarity, the various tests have "'engulfed [the regulatory takings field] in confusion,'"[53] leaving "observers bewildered when attempting to access, understand, and apply the law."[54]

Currently, the courts use a three-factor test,[55] a two-pronged inquiry[56] and a *per se* rule[57] when analyzing regulatory takings cases.[58] The first test, articulated

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Clause and the Political Process, 95 COLUM. L. REV. 782 (1995); William M. Treanor, *The Origins and Original Significance of the Just Compensation Clause of the Fifth Amendment*, 94 YALE L.J. 694 (1985).

45. 260 U.S. 393 (1922).

46. *See generally id.*

47. *Id.* at 415.

48. *Id.* at 416.

49. *See* MELTZ ET AL., *supra* note 44; Tyrone T. Bongard, *Does* Palazzolo v. Rhode Island*'s Upholding of the Transferability of Takings Claims Require a Rethinking of Takings Jurisprudence?*, 81 N.C. L. REV. 392, 392–93 (2002); Zach Whitney, Comment, *Regulatory Takings: Distinguishing Between the Privilege of Use and Duty*, 86 MARQ. L. REV. 617, 617–18 (2002).

50. *Tahoe Sierra III*, 535 U.S. 302, 236 (2002) (citing Lucas v. S.C. Coastal Council, 505 U.S. 1003, 1015 (1992) (internal quotation marks omitted)).

51. *Pa. Coal*, 260 U.S. at 416.

52. *See generally* David L. Callies, *After* Lucas *and* Dolan*: An Introductory Essay*, *in* TAKINGS: LAND-DEVELOPMENT CONDITIONS AND REGULATORY TAKINGS AFTER DOLAN AND LUCAS (David L. Callies ed., 1996).

53. Whitney, *supra* note 49, at 618 (quoting Jed Rubenfeld, *Usings*, 102 YALE L.J. 1077, 1078 (1993)).

54. *Id.* at 617–18.

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

56. *See, e.g.*, Dolan v. City of Tigard, 512 U.S. 374 (1994); Nollan v. Cal. Coastal Comm'n, 483 U.S. 825 (1987).

57. Lucas v. S.C. Coastal Council, 505 U.S. 1003, 1026–27 (1992).

58. The Supreme Court also enunciated another test in *Agins v. City of Tiburon*, 447 U.S. 255 (1980). In *Agins*, the Court said that the challenged zoning law would effect a

by the Court in *Penn Central Transportation Co. v. City of New York,*[59] is a three-factor balancing test. To determine whether a given regulation has worked a taking under the *Penn Central* test, the court looks at the "economic impact of the regulation," the "extent to which the regulation has interfered with distinct investment-backed expectations," and the "character of the governmental action."[60]

Several years after *Penn Central*, the Court developed a framework to govern a specific breed of regulatory takings cases—those in which legislatures or agencies sought to condition a particular use or development of land on the property owner's grant of some concession or dedication of some parcel.[61] Such a case might arise, for example, when the local zoning board denies a landowner a permit to construct a new residence on her property, unless she agrees to allow the public an easement across her land.[62] The rule governing these "development exaction" cases requires that the government demonstrate two things before the court will uphold the condition:[63] (1) there is an essential nexus between a legitimate state interest and the conditions imposed by the government,[64] and (2) there is rough proportionality between the exaction and the projected impact of the development.[65]

The Court proclaimed the third rule in *Lucas v. South Carolina Coastal Commission*,[66] declaring that any time a regulation denies a landowner "*all*

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taking if it did "not substantially advance legitimate state interests," or "denie[d] an owner economically viable use of his land." *Agins*, 447 U.S. at 260. The "economically viable use" prong of *Agins* served as the basis upon which the Court crafted the *Lucas* per se rule. *Lucas*, 505 U.S. at 1015–16. The second *Agins* prong was the foundation for the *Nollan* test, applied in development exaction cases. *Nollan*, 483 U.S. at 834–35. As the Court has noted, however, it has yet to give a "thorough explanation of the nature or applicability of the requirement that a regulation substantially advance legitimate public interests outside the context of required dedications or exactions [governed by *Nollan* and *Dolan*]." City of Monterey v. Del Monte Dunes, 526 U.S. 687, 704 (1999). Thus, the viability, relevance, and reach of the *Agins* requirement that land-use regulations "substantially advance legitimate state interests" is currently unclear. In *Tahoe Sierra III*, however, the Court did briefly mention that *Agins* rule. *Tahoe Sierra III*, 535 U.S. 302, 334 (2002). Specifically, the Court stated that "petitioners might have argued that the moratoria did not substantially advance a legitimate state interest" under *Agins*, but then concluded that "recovery on . . . a theory that the state interests were insubstantial [was] foreclosed by the District Court's unchallenged findings of fact." *Id.*

59. 438 U.S. 104 (1978).

60. *Id.* at 124.

61. *See, e.g.*, *Dolan*, 512 U.S. 374; *Nollan*, 483 U.S. 825.

62. *See*, *e.g.*, *Nollan*, 483 U.S. at 828–29.

63. MELTZ ET AL., *supra* note 44, at 143.

64. This portion of the test was pronounced in *Nollan*, 483 U.S. at 836–37.

65. This portion of the test was pronounced in *Dolan*, 512 U.S. at 391. It clarified the holding in *Nollan* by specifying that the burdens imposed by the exactions and the predicted impact of the development must be roughly proportional. *Id.*

66. 505 U.S. 1003 (1992).

economically beneficial uses"[67] of his land, that regulation effects a "*per se* taking"[68] of the landowner's property.

Of the three tests the Court has articulated, the *Lucas per se* rule applies solely to those "relatively rare situations where the government . . . deprive[s] a landowner of all economically beneficial uses"[69] of his land. The two-part development exaction test is applied only when an agency or legislative body imposes a condition upon the grant of a landowner's development or use permit.[70] By implication then, the *Penn Central* balancing test applies to all other scenarios where a government regulation works less than a total taking of a landowner's property.[71]

Yet, the seeming coherence of that general framework is deceptive. As this Note explains, litigants and courts have repeatedly struggled to distinguish between *Lucas* and *Penn Central* claims.[72] *Tahoe Sierra* illustrates just such a struggle. The District Court that first heard the case decided that the moratoria enacted by the TPRA affected a total, *per se* taking under *Lucas*.[73] The Court of Appeals overruled the District Court, determining that the *Lucas* test did not apply,[74] and that the *Penn Central* balancing test would have been the "appropriate framework for analysis" had the landowner's pressed that claim.[75] The Supreme Court, in an opinion authored by Justice Stevens, affirmed the Court of Appeals' decision.[76]

The Supreme Court's *Tahoe Sierra* decision provides some much needed clarification as to when courts should apply the *Lucas per se* test, and when to apply the *Penn Central* balancing test in analyzing regulatory takings claims. The next section looks at some of the reasons the *Lucas* v. *Penn Central* conundrum led courts to create so much confusion in the regulatory takings field prior to *Tahoe Sierra*.

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67. *Id.* at 1019.

68. *See generally id.* (stating that there is an exception to this *per se* rule). The exception does not apply if the limitation imposed on the property owner's use of his land "inhere[s] in the title itself, in the restrictions that background principles of the State's law of property and nuisance already place upon land ownership." *Id.* at 1029. The many complex issues raised by that exception are outside the scope of this Note.

69. *Id.* at 1018.

70. In *City of Monterey v. Del Monte Dunes*, 526 U.S. 687, 702 (1999), the Supreme Court concluded, "Although in a general sense concerns for proportionality animate the Takings Clause . . . we have not extended the rough-proportionality test of *Dolan* beyond the special context of exactions—land-use decisions conditioning approval of development on the dedication of property to public use." (internal citations omitted).

71. *See Lucas*, 505 U.S. at 1019 n.8.

72. *See* MELTZ ET AL., *supra* note 44, at 144–45; Loveladies Harbor, Inc. v. United States, 28 F.3d 1171 (1994) (discussing whether the regulation effected a total or partial taking).

73. *Tahoe Sierra I*, 34 F. Supp. 2d 1226, 1245 (D. Nev. 1999).

74. *Tahoe Sierra II*, 216 F.3d 764, 782 (9th Cir. 2000).

75. *Tahoe Sierra III*, 535 U.S. 302, 319 (2002) (discussing *Tahoe Sierra II*, 216 F.3d at 773, 782).

76. *Id.* at 320.

III. *TAHOE SIERRA* WEAKENS *LUCAS*

A. Lucas *pre-*Tahoe Sierra*: A Story of Inconsistent Application and Uncertain Reach*

When the Supreme Court proclaimed the *per se* takings rule in *Lucas*, dissenting Justice Blackmun charged that the majority was "launch[ing] a missile to kill a mouse."[77] Just why *Lucas* could be seen as a "missile" and why the Court decided to launch it requires some explanation.

Lucas can be viewed as the Court's attempt to remedy the "lack of definition and rigor in its regulatory-takings doctrine"[78] by moving that doctrine toward "resolution [through] a series of categorical 'either-ors.'"[79] Five years before the *Lucas* decision, Professor Frank Michelman examined a series of regulatory takings cases decided by the Supreme Court in its 1986–1987 Term.[80] Professor Michelman concluded that those cases reflected the Court's unease about the highly informal nature of its regulatory takings jurisprudence.[81] Michelman predicted that the Court would seek to minimize the use of ad hoc inquiries—inquiries which rarely resulted in favor of the party alleging the taking—by pronouncing new *per se* rules that would categorically identify when takings had occurred.[82] Specifically, Michelman suggested that the Court might adopt a categorical rule finding a taking occurred whenever a regulation "totally eliminate[d] the property's economic value or 'viability' to its nominal owner."[83]

The *Lucas* decision confirmed the accuracy of Michelman's prediction. By carving out a category of cases to which *Penn Central*'s multifarious balancing approach would not apply, the new rule allowed some landowners to "avoid the unpredictability of an ad hoc case."[84] Under the *Lucas* approach, all that a court needs to examine is whether the regulation deprived a landowner of "all economically beneficial or productive use of land."[85] If so, the regulation effected an unconstitutional taking of the owner's property.

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77. Lucas v. S.C. Coastal Council, 505 U.S. 1003, 1036 (1992) (Blackmun, J., dissenting).

78. Frank Michelman, *The Jurisprudence of Takings*, 88 COLUM. L. REV. 1600, 1622 (1987).

79. *Id.* Michelman discusses the Court's moves toward reformulating its takings jurisprudence through four takings decisions it pronounced in its 1986–1987 Term. *Id.*

80. Those decisions were *Nollan v. California Coastal Comm'n*, 483 U.S. 825 (1987); *First English Evangelical Lutheran Church v. County of Los Angeles*, 482 U.S. 304 (1987); *Keystone Bituminous Coal Ass'n v. DeBenedictis*, 480 U.S. 470 (1987); and *Hodel v. Irving*, 481 U.S. 704 (1987).

81. Michelman, *supra* note 78, at 1622. *See also* Margaret Jane Radin, *The Liberal Conception of Property: Cross Currents in the Jurisprudence of Takings*, 88 COLUM. L. REV. 1667, 1680–81 (1988) (explaining that resort to ad hoc inquiries might give rise to a "fear of arbitrariness.").

82. Michelman, *supra* note 78, at 1622.

83. *Id.*

84. MELTZ ET AL., *supra* note 44, at 105.

85. Lucas v. S.C. Coastal Council, 505 U.S. 1003, 1016 (1992).

The Court's discomfort with the nebulous, *Penn Central* multi-factor balancing test and the heavily pro-regulation results it created when applied explains *why* the Court formulated a new *per se* rule in *Lucas.* It is also important to understand *how* that holding could and did affect the outcomes of regulatory takings claims after it was announced. On one hand, *Lucas*'s *per se* rule appeared quite narrow, applying only to those rare situations where a regulation prohibited all productive or economically beneficial use of land.[86] A rule with such limited application, however, would not warrant Justice Blackmun's ominous warning about the missile that was sent to kill the mere mouse.

On the other hand, because language in the decision's footnotes potentially expanded the *per se* rule's scope, the missile analogy was possibly apt.[87] In footnote seven Justice Scalia, author of the *Lucas* Court's majority opinion, explained that in determining whether land was stripped of all economically viable use, the answer depends on what property interest is involved in the calculation:

> Regrettably, the rhetorical force of our "deprivation of all economically feasible use" rule is greater than its precision, since the rule does not make clear the "property interest" against which the loss of value is to be measured. When, for example, a regulation requires a developer to leave 90% of a rural tract in its natural state, it is unclear whether we would analyze the situation as one in which the owner has been deprived of all economically beneficial use of the burdened portion of the tract, or as one in which the owner has suffered a mere diminution in value of the tract as a whole.[88]

Justice Scalia thus suggested that, in determining whether a given piece of property has been taken in its entirety, the court should first sever the regulated property interests from the unaffected property interests. Then, the court should examine the effects of the regulation only with respect to the regulated interests. In effect, this "conceptual severance" would allow the property owner to claim a total *per se* taking for the regulated property interests, regardless of the value of his or her remaining property interests not subject to the regulations.[89] This approach would dramatically increase both the number of scenarios to which the *Lucas per se* rule would apply and the "rate of judicial invalidation of land-use regulations."[90]

However, this expansive interpretation of the Court's *Lucas* holding conflicts with Supreme Court precedent in other regulatory takings cases.[91] In contrast to Justice Scalia's suggestion that courts might apply conceptual

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86. *Id.*

87. *Id.* at 1016 n.7.

88. *Id.*

89. Michelman, *supra* note 78, at 1614–16 (describing how conceptual severance can be used to frame the takings claim).

90. *Id.* at 1615 (discussing the implications of conceptual severance).

91. *See, e.g.*, Keystone Bituminous Coal Ass'n v. DeBenedictis, 480 U.S. 470, 496–97 (1987); Penn Cent. Transp. Co. v. City of New York, 438 U.S. 104, 130 (1978); Duncan, *supra* note 42, at 774.

severance in analyzing takings claims, the *Penn Central* Court made it clear that in regulatory takings cases, the Court will not:

> divide a single parcel into discrete segments and attempt to determine whether rights in a particular segment [had] been entirely abrogated. In deciding whether a particular governmental action [had] effected a taking, th[e] Court focuses rather both on the character of the action and the nature and extent of the interference with rights in the parcel as a whole. . . .[92]

The Court subsequently reaffirmed the "parcel as a whole" rule in *Keystone Bituminous Coal Ass'n v. DeBenedictis*.[93] In *Keystone*, an association of coal mine operators and four corporations involved in coal mining claimed a regulation effected a taking by preventing them from mining about two percent of all the coal to which they had title.[94] The regulation required the coal miners to leave that coal in the ground in order to prevent subsidence of the mine.[95]

The petitioners advanced two conceptual severance arguments in support of their takings claim.[96] With respect to each argument, the petitioners suggested that the only property interest relevant to the Court's takings analysis was the interest directly affected by the regulation.[97] Thus, petitioners first argued that the state had taken the twenty-seven million tons of coal they were unable to mine as a result of the regulation.[98] Second, they contended that the state had taken "their separate legal interest in property—the 'support estate'"[99] represented by the coal the regulation required they leave in the ground.

Citing *Penn Central*'s "parcel as a whole rule" the Court rejected both arguments,[100] refusing the petitioner's invitation to define the relevant property interests so narrowly.[101] Rather, in a holding "amount[ing] to a clear rejection of conceptual severance," the Court declared that the impact of the regulation should be judged against the value of the "entire 'mining operation.'"[102] Because the twenty-seven million tons of coal affected by the regulation constituted merely two per cent of the coal owned, the Court found that the regulatory prohibition on mining those twenty-seven million tons did not constitute a taking.[103]

Yet, irrespective of the Court's clear disapproval of "conceptual severance" in both *Penn Central* and *Keystone*, Justice Scalia spoke to the issue as

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92. *Penn Cent.*, 438 U.S. at 130–31.
93. 480 U.S. 470 (1987).
94. *Id.* at 471.
95. *Id.*
96. *Id.* at 496–97.
97. *Id.*
98. *Id.*
99. *Id.* at 497.
100. *Id.*
101. *Id.*
102. Michelman, *supra* note 78, at 1615–16.
103. *Keystone*, 480 U.S. at 497.

if it were one the Court had yet to resolve.[104] In so doing, Justice Scalia found "uncertainty where none existed" when, in direct contravention of the Court's precedent, he "held out the possibility that a parcel [could] be segmented."[105]

Lower court decisions subsequent to the Court's *Lucas* holding reflected the uncertainty introduced by Justice Scalia's ill-advised footnote. While several courts strictly applied the parcel as a whole rule in evaluating *Lucas* claims, others were more willing to engage in conceptual severance analysis. The Tenth Circuit's decision in *Clajon Production Corp. v. Petera*[106] is an example of the former approach.

In *Clajon*, plaintiffs who owned hunting ranches in Wyoming claimed that state regulations limiting their right to hunt affected a taking of their property.[107] In conducting its analysis, the court assumed *arguendo* that Wyoming's state law provided the plaintiffs "at least a limited property interest to hunt surplus game on their land that [was] impacted by the regulations."[108] Plaintiffs made a conceptual severance argument, claiming "complete evisceration of a single stick in the bundle of property rights—i.e., the right to hunt on one's property—can constitute [a categorical] taking."[109]

Citing *Penn Central* and *Keystone*, the Tenth Circuit declined to analyze the hunting regulation's effect on solely the right to hunt. Instead, the Court chose to examine the regulation's impact on the "parcel as a whole."[110] Finding that plaintiffs still could "use their property for ranching, farming, and other livestock operations," the court held that no *Lucas* taking occurred.[111] The plaintiffs had not been deprived of "all economically beneficial use" of their land.[112]

The analysis and resulting outcome reached by the Tenth Circuit in *Clajon* differed dramatically from the approach taken by the Federal Circuit in *Loveladies Harbor, Inc. v. United States*.[113] *Loveladies* illustrates how a court can use conceptual severance to conclude that a regulation worked a total, *per se* taking of a landowner's property.[114]

In *Loveladies*, plaintiffs purchased a 250-acre tract of land in 1958.[115] Before 1972, the year in which section 404 of the Clean Water Act was enacted,[116]

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104. Lucas v. S.C. Coastal Council, 505 U.S. 1003, 1016 n.7 (1992). *But see* Radin, *supra* note 81, at 1676–78 (arguing that the Supreme Court seemingly adopted conceptual severance in several takings cases and asking whether, in the future, the Court would be even more accepting of conceptual severance).

105. Duncan, *supra* note 42, at 777.

106. 70 F.3d 1566 (10th Cir. 1995).

107. *Id.*

108. *Id.* at 1576.

109. *Id.* at 1577.

110. *Id.*

111. *Id.* (quoting Clajon Prod. Corp. v. Petera, 854 F. Supp. 843, 851 n.14 (D. Wyo. 1994)).

112. *Id.* at 1574.

113. 28 F.3d 1171 (1994).

114. *Id.*

115. *Id.* at 1174.

they developed 199 of those acres. To develop the remaining acres, the new regulations required that the plaintiffs obtain permits to fill their wetlands from both federal and state agencies.[117] In 1977 the New Jersey Department of Environmental Protection issued a permit allowing the plaintiffs to develop 12.5 of the fifty-one acres.[118] Based on section 404 of the Clean Water Act, however, the Army Corps of Engineers denied the plaintiffs' application for a development permit for those same lands.[119] Plaintiffs sued, claiming that the denial effected an unconstitutional taking of their property.[120]

To assess the effect the permit denials had on the plaintiffs' property rights, the government argued that the court should compare the economic impact of the prohibited development of 12.5 acres against the total value of the original 250-acre tract.[121] According to this argument, the resulting percentage, a relatively small number, represented what was actually taken by the government as a result of the regulation.

On the other hand, the plaintiffs argued that application of the regulation effected a complete taking of the 12.5-acre tract they sought permission to develop.[122] Thus, plaintiffs argued that 12.5 acres was the correct number to use in both the numerator and denominator of the takings fraction, yielding a 100% taking of their property.[123] The court adopted the plaintiffs' approach, finding that the permit denial deprived the plaintiffs of all economically feasible use of their 12.5 acre parcel—a total, *per se* taking of the entire tract.[124]

In *Bass Enterprises Production Co. v. United States*,[125] the United States Court of Federal Claims employed similar reasoning to find a total taking of plaintiffs' property. In 1952, the *Bass* plaintiffs began leasing the right to extract oil and gas from federal lands.[126] In 1994, however, their applications to drill new wells on some of those lands were denied by the Bureau of Land Management ("BLM") because it was unclear whether the drilling would affect lands used for nuclear waste disposal.[127] Then, in May 1998, after the EPA concluded that the site complied with its standards for nuclear waste disposal, the BLM began accepting and processing Bass' drilling applications.[128]

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116. Federal Water Pollution Control Act Amendments of 1972, Pub. L. No. 92-500, 86 Stat. 816 (codified as amended in scattered sections of 33 U.S.C. (1994)).

117. *Loveladies*, 28 F. 3d at 1174.

118. *Id.*

119. *Id.*

120. *Id.*

121. *Id.* at 1180. In other words, the value of the 250-acre tract would furnish the denominator of the takings fraction, while the regulation's effect on the 12.5-acre parcel would furnish the numerator. *Id.*

122. *Id.* at 1181.

123. *Id.*

124. *Id.* at 1181–82.

125. 45 Fed. Cl. 120 (1999) [hereinafter *Bass I*].

126. Bass Enters. Prod. Co. v. United States, 54 Fed. Cl. 400, 401 (2002) [hereinafter *Bass II*].

127. *Id.*

128. *Bass I*, 45 Fed. Cl. at 123.

The claims court found a total, *per se* taking of the plaintiffs' property interests occurred from August 1994 to May 1998, because the delay on regulatory action during those years denied the plaintiffs "all economically beneficial use" of their leases.[129] The court, holding that the plaintiffs' "loss during that period was absolute,"[130] examined the effects of the delay solely on a specific, *temporal* segment of the plaintiffs' property, rather than on the overall value of the leases in their entirety. The *Bass* decision, like *Loveladies*, illustrates how conceptual severance can affect both the number of cases to which the *Lucas* rule applies and whether there has been a *per se* taking of an individual's property.

Comparing those two cases with *Clajon*, it is clear that courts apply the *Lucas* rule inconsistently. While some, such as *Clajon*, analyze a particular regulation's effects on the parcel as a whole, comparing the regulated portion against *all* the sticks in the bundle, others look solely at the regulation's effect on the regulated property interest, whether that interest be a particular use,[131] a specific geographic segment,[132] or a certain temporal slice.[133] So whether *Lucas* is a broad range missile, or a narrow and benign *per se* rule adding some rare clarity to the regulatory takings doctrine, will depend on the analysis employed by the court applying the *Lucas* rule.

In 2001, the Supreme Court exacerbated the uncertainty regarding how to apply *Lucas* when the Court decided to briefly address the "parcel as a whole" issue in *Palazzolo v. Rhode Island*.[134] Petitioner Anthony Palazzolo alleged that state regulations prohibiting him from developing his coastal property affected a total taking of his property under *Lucas*.[135] Based on uncontested evidence that a portion of Palazzolo's land unaffected by the regulations was worth $200,000, the Supreme Court first denied Palazzolo's claim that the regulation deprived him of "all economically beneficial use" of his property.[136]

The Court then addressed an issue Palazzolo raised for the first time in his brief to the Supreme Court.[137] Palazzolo argued that he should be able to reframe his claim, excluding from the takings analysis the parcel valued at $200,000.[138] By severing his land in that manner, Palazzolo would presumably have a successful claim that his remaining, regulated lands were stripped of all economic value. Because this issue had neither been pressed in the state court proceeding, nor

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129. *Id.*
130. *Id.*
131. *See, e.g.*, Hodel v. Irving, 481 U.S. 704 (1987) (finding a violation of the Takings Clause because the challenged measure defeated the right to dispose of property through intestacy or devise).
132. Loveladies Harbor, Inc. v. United States, 28 F.3d 1171, 1181–82 (1994).
133. *Bass I*, 45 Fed. Cl. at 122.
134. 533 U.S. 606 (2001).
135. *Id.* at 615–16.
136. *Id.* at 630–33.
137. *Id.* at 631.
138. *Id.*

presented in Palazzolo's petition for certiorari, the Court stated that, irrespective of the claim's merits, it would "not explore the point."[139]

Contrary to its bold assertion of judicial restraint, the Court nevertheless did "explore" the point to some degree—a degree sufficient to indicate the Court might be willing to engage in conceptual severance in future cases. In a key passage, Justice Kennedy stated:

> [Petitioner] argues . . . that the upland parcel is distinct from the wetlands portions, so he should be permitted to assert a deprivation limited to the latter. This contention asks us to examine the difficult, persisting question of what is the proper denominator in the takings fraction. Some of our cases indicate that the extent of deprivation effected by a regulatory action is measured against the value of the parcel as a whole; but we have at times expressed discomfort with the logic of this rule, a sentiment echoed by some commentators.[140]

Like the Court's troublesome footnote seven in the *Lucas* opinion, undoubtedly this passage raised questions among legal practitioners about the continuing, exclusive viability of the parcel as a whole rule. Further, because any weakening of that rule would have the effect of increasing the number of scenarios to which the *Lucas per se* rule would apply,[141] the *Palazzolo* decision suggested that the future of regulatory takings jurisprudence might hold an expanded role for the *per se* rule.

Curiously, *Palazzolo* also contained language reemphasizing the Court's reliance on multi-factor balancing. Discussing the importance of factual inquiries and the utility of the *Penn Central* test, the Court cautioned that "[t]he temptation to adopt what amount to *per se* rules in either direction must be resisted. The Takings Clause requires careful examination and weighing of all the relevant circumstances. . . ."[142]

Palazzolo, therefore, hinted at two very inconsistent approaches. On one hand, it suggested a weakening of the parcel as a whole rule with a corresponding expanded role for the *Lucas per se* rule. On the other hand, the *Palazzolo* Court indicated that *per se* rules were to play only limited roles in regulatory takings cases; balancing was to be the default approach.

Palazzolo's ambiguity illustrates both the uncertainty created by *Lucas*'s footnote seven, and the confusion evidenced by lower courts attempting to apply the *Lucas* rule. At some point, it would seem, the Court would have to choose a direction—whether to expand its *per se* takings rule, or reemphasize ad hoc analysis. In *Tahoe Sierra*, the Court chose the latter approach.

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139. *Id.*
140. *Id.* (citations omitted).
141. *See* Michelman, *supra* note 78, at 1615–16.
142. *Palazzolo*, 533 U.S. at 636.

B. Tahoe Sierra *Weakened* Lucas *by Placing a Renewed Emphasis on the Parcel as a Whole Rule*

With the *Tahoe Sierra* decision, the Court reaffirmed the parcel as a whole rule, expressly refuting the notion that conceptual severance was an appropriate analytical tool for regulatory takings cases.[143] The petitioners argued that the development moratoria effected a total taking for the thirty-two months they were in effect.[144] Thus, like the claimants in *Bass*, petitioners wanted the Court to sever the temporal segment subjected to the regulation, and analyze whether the land-use prohibitions affected a taking on solely that segment. The Court rejected the petitioners' suggestion, stating that:

> [d]efining the property interest taken in terms of the very regulation being challenged is circular. With property so divided, every delay would become a total ban. . . . Petitioners' "conceptual severance" argument is unavailing because it ignores *Penn Central*'s admonition that in regulatory takings cases we must focus on "the parcel as a whole." We have consistently rejected such an approach to the "denominator" question.[145]

Examining the entire parcel, the landowners' full "bundle" of property rights, the Court found that the temporary prohibition on use did not render the petitioners' fee simple estate economically valueless.[146] Hence, *Lucas* was inapposite.[147] The Court stated that the *Penn Central* balancing test was the appropriate test to apply given the petitioners' circumstances.[148] The Court made clear that the *Penn Central* balancing test, with its fact-specific inquiry, is the regulatory takings "default rule."[149] Further clarifying *Penn Central*'s role, the Court repeated several times its warning for courts to avoid the temptation toward *per se* rules in takings cases.[150]

That *Tahoe Sierra* diminished the *Lucas* rule's application in regulatory takings cases is apparent in post-*Tahoe Sierra* lower court decisions.[151] In one case, the court that decided *Bass* reconsidered its earlier ruling in light of the Supreme Court's *Tahoe Sierra* decision.[152] Based on *Tahoe Sierra*'s dismissal of conceptual severance, the federal claims court held that its prior holding, which focused solely on how the delay affected the value of a specific temporal segment of the petitioners' mineral lease, was erroneous.[153] After looking at the effect of the delay on the parcel as a whole, the Court concluded that *Lucas* did not govern, and

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143. *Tahoe Sierra III*, 535 U.S. 302, 331 (2002).
144. *Id.*
145. *Id.* (citations omitted).
146. *Id.* at 332.
147. *Id.*
148. *Id.*
149. *Id.*
150. *Id.* at 321, 326, 342.
151. *See, e.g.*, *Bass II*, 54 Fed. Cl. 400, 401 (2002); Walcek v. United States, 303 F.3d 1349 (Fed. Cir. 2002); Cane Tenn., Inc. v. United States, 54 Fed. Cl. 100 (2002); Appolo Fuels, Inc. v. United States, 54 Fed. Cl. 717 (2002).
152. *Bass II*, 54 Ct. Fed. Cl. 400, 401 (2002).
153. *Id.* at 401–02.

that the proper framework for analyzing the petitioners' takings claim was the *Penn Central* balancing test.[154]

IV. *TAHOE SIERRA* LEAVES SEVERAL MAJOR PROBLEMS UNRESOLVED

Accepting that *Tahoe Sierra* limits the use of the *Lucas* rule and will increase reliance on the *Penn Central* balancing test in regulatory takings cases, it is important to ask just what ramifications such an increased reliance will have. Unfortunately, based on an examination of prior efforts by the courts to adjudicate takings claims using the *Penn Central* balancing test, it appears that any ambiguity the high Court resolved by clarifying when courts should use the *Lucas* rule versus the *Penn Central* balancing approach, will be offset by the amount of confusion arising from application of the *Penn Central* test. By examining one factor of that three-prong test—the property owner's reasonable investment-backed expectations—I will illustrate why the Court's expanded reliance on *Penn Central* is troublesome.

A. Fundamental Problems with the Investment-Backed Expectations Factor

A critique of the investment-backed expectations factor is best broken down into two sections. The first section examines the rationale for including the investment-backed expectations of the property owner in regulatory takings analysis. The second section explores how courts have defined reasonable investment-backed expectations.

1. Why the Courts Look at a Landowner's Investment-Backed Expectations

The Takings Clause of the Fifth Amendment specifies that the government may not appropriate private property "for public use, without paying just compensation."[155] A taking, therefore, theoretically consists of two discrete events: (1) the government appropriates property for public use; and (2) the government compensates the owner for the property interests taken. If the government physically takes title to a piece of private land, the owner of that land is compensated for the value of the parcel that has been appropriated. But when a government regulation is enacted, and compliance therewith results in some manner of interference with a landowner's use, enjoyment, or possession of his property, the issues of whether there has been a taking, and what compensation is due as a result, become considerably more complex.

When the government condemns or physically appropriates property, no analysis of a property owner's expectations is necessary in order to determine whether a physical taking has occurred.[156] In regulatory takings cases, however, a

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154. *Id.*

155. U.S. CONST. amend. V.

156. *Tahoe Sierra III*, 535 U.S. 302, 323–24 (2002) (discussing the differences between regulatory and physical takings).

property owner's investment-backed expectations are one of the three factors the courts examine to determine whether a challenged regulation has effected a taking.[157] One reason given by the Supreme Court for the different analytical approaches used in regulatory versus physical takings cases is that regulatory takings, unlike physical takings, are not self-evident;[158] judging whether a regulatory taking has occurred requires more complex analysis.[159] As the Supreme Court explained:

> Land-use regulations are ubiquitous and most of them impact property values in some tangential way—often in completely unanticipated ways. Treating them all as *per se* takings [as in physical takings cases] would transform government regulation into a luxury few governments could afford.[160]

To address the problem that land-use regulations are omnipresent, but unlike physical appropriations cannot be readily identified as unconstitutional, the Supreme Court declared that courts should look, in part, to a property owner's investment-backed expectations to determine whether compliance with a given regulation amounts to a taking of an owner's property interests.[161]

One explanation for the Court's use of a property owner's investment-backed expectations is that examination of that factor is based on and promotes a utilitarian theory of property ownership.[162] Professor Michelman described this theory in his influential article on just compensation.[163] According to this theory, property:

> is most aptly regarded as the collection of rules which are presently accepted as governing the exploitation and enjoyment of resources. So regarded, property becomes a 'a basis of expectations' founded on existing rules; that is to say, property is the institutionally established understanding that extant rules governing the relationships among men with respect to resources will continue in existence. The justification . . . for adherence to such an understanding is that only through such adherence can we hope for a

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157. *See* Palazzolo v. Rhode Island, 533 U.S. 606, 634 (2001) (holding that the investment-backed expectations plays an important, though not dispositive role in determining whether a particular regulation has gone too far. The *Palazzolo* Court instructed, "Investment-backed expectations, though important, are not talismanic under *Penn Central.* Evaluation of the degree of interference with investment-backed expectations instead is *one* factor that points toward the answer to the question whether the application of a particular regulation to particular property 'goes too far.'" (citing Pa. Coal Co. v. Mahon, 260 U.S. 393, 415 (1922))).

158. *Tahoe Sierra III*, 535 U.S. at 322 n.17.

159. *Id.*

160. *Id.* at 324.

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

162. *See* MELTZ ET AL., *supra* note 44, at 134 (noting that the investment-backed expectations phrase "derives from an early and influential law review article on inverse condemnation law" written by Frank Michelman).

163. Frank I. Michelman, *Property, Utility, and Fairness: Comments on the Ethical Foundations of "Just Compensation" Law*, 80 HARV. L. REV. 1165, 1211–13 (1967).

> minimally acceptable level of productivity. . . . It is supposed that men will not labor diligently or invest freely unless they know they can depend on rules which assure them that they will indeed be permitted to enjoy a substantial share of the product as the price of their labor or their risk of savings.[164]

The utilitarian theory's role in takings jurisprudence enables the courts to employ "a species of substantive due process analysis that [was] firmly rejected decades ago."[165] By looking at a landowner's investment-backed expectations, courts judge the validity of laws and regulations through the prism of a particular economic philosophy. One consequence of allowing the utilitarian theory to permeate takings analysis is that land-use and environmental regulations may be sacrificed in favor promoting productivity.[166] The investment-backed expectations factor thus provides a means for judicial notions of sagacity and fairness to usurp legislative and local land-use planning decisions.[167]

Of course, protecting *all* landowner expectations would not promote productivity.[168] It is natural, therefore, that not *all* expectations warrant protection under this utilitarian theory. Takings jurisprudence, however, has thus far made it exceedingly difficult to separate those expectations which merit the judicial shield from those which do not.

2. How Investment-Backed Expectations Are Defined

"Mere unilateral" expectations generally do not deserve protection under the Fifth Amendment.[169] To be protected from governmental takings, investment-backed expectations must be based upon historical, socially defined, and recognized notions of the rights and limitations associated with property ownership.[170] Courts differ, however, in just how historic, how well defined, and how well-recognized these notions must be before a landowner's expectations regarding enjoyment of his property are considered reasonable.[171] These diverse notions of "reasonableness" are extremely problematic in that they produce

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164. *Id.* at 1211–12 (discussing Bentham's theory of property).

165. Dolan v. City of Tigard, 512 U.S. 374, 405 (1994) (Stevens, J., dissenting) (discussing the implications of *Dolan*); *see also* John A. Humbach, *Economic Due Process and the Takings Clause*, 4 PACE ENVTL. L. REV. 311, 311 (1987).

166. *See, e.g.*, Loveladies Harbor, Inc. v. United States, 28 F.3d 1171, 1174 (1994); Fla. Rock Indus., Inc. v. United States, 45 Fed. Cl. 21 (1999).

167. *See Dolan*, 512 U.S. at 405–07 (Stevens, J., dissenting). Justice Stevens critiqued the regulatory takings doctrine, arguing that is a "potentially open-ended source[] of judicial power to invalidate state economic regulations that Members of this Court view as unwise or unfair." *Id.* at 407.

168. Michelman, *supra* note 163, at 1236–43.

169. *See, e.g.*, Preseault v. United States, 100 F.3d 1525 (Fed. Cir. 1996); Applegate v. United States, 25 F.3d 1579 (Fed. Cir. 1994); Maine Beer & Wine Wholesalers Ass'n v. Maine, 619 A.2d 94 (1993); Preble Aggregate Inc. v. Town of Preble, 694 N.Y.S.2d 788 (App. Div. 1999).

170. *See*, *e.g.*, *Preseault*, 100 F.3d 1525; Karuk Tribe of Cal. v. United States, 41 Fed. Cl. 468 (1998); Washlefske v. Winston, 234 F.3d 179 (4th Cir. 2000).

171. MELTZ ET AL., *supra* note 44, at 558.

inconsistent outcomes in regulatory takings cases. Decisions employing a narrow interpretation of "reasonable" expectations make it extremely difficult for property owners to successfully challenge government regulations,[172] whereas decisions interpreting "reasonable" expectations broadly threaten the viability of many important land-use and environmental laws and regulations.[173]

Among the decisions employing a broad construction of "reasonable" expectations is *Loveladies*.[174] In that case, the court determined it was important to protect a property owner's reliance on the regulatory state of affairs at the time he purchased his property.[175] In considering whether the Army Corps of Engineers' prohibition against construction on a 12.5-acre parcel of a developer's land was a taking,[176] the court emphasized that "Loveladies purchased the property with the intent to develop it long before these particular state and federal regulatory programs came into effect."[177] The court paid particular attention to the developer's reliance on the regulations in effect at the time the developer acquired the land.[178]

The *Loveladies* court also discussed the state's ability to alter that regulatory picture, agreeing with the trial court that the state lacked the power under its common law nuisance doctrine to deny the development permit.[179] *Loveladies* therefore advances the proposition that a landowner can expect to use his property in the manner he intended at the time of acquisition, unless the state's limited common law of nuisance empowers the enactment of new regulations preventing that use.[180]

In contrast to *Loveladies*, another line of case law applying the *Penn Central* balancing test interprets "reasonable" expectations more narrowly. These cases charge a landowner with constructive notice that his property rights are subject to express or implied limitations.[181] In other words, rather than having a

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172. Bongard, *supra* note 49, at 419.

173. Justice Kennedy expressed similar concerns when discussing the interpretation of "reasonable" expectations in his concurring opinion in *Lucas*. Lucas v. S.C. Coastal Council, 505 U.S. 1003, 1032–1036 (1992).

174. Loveladies Harbor, Inc. v. United States, 28 F.3d 1171(1994); *see also supra* notes 116–127.

175. *See, e.g.*, *Loveladies*, 28 F.3d at 1174–75, 1179; Fla. Rock Indus., Inc. v. United States, 45 Fed. Cl. 21, 39–40 (1999) (finding that plaintiff's reasonable investment-backed expectations were frustrated because "Florida Rock had no reason when it purchased its property to expect that its rights to mine or develop the land were open to question."); Palm Beach Isles Assocs. v. United States, 231 F.3d 1354, 1363 (Fed. Cir. 2000) (explaining as a rationale behind the investment-backed expectations inquiry that "[t]he purchaser who buys a parcel with a known and valid regulatory restriction on certain uses cannot complain that she thereafter sustains an economic loss when the restriction is enforced."); Bowles v. United States, 31 Fed. Cl. 37, 51 (1994).

176. *Loveladies*, 28 F.3d at 1183.

177. *Id.* at 1182.

178. *Id.*

179. *Id.* at 1182–83.

180. *Id.*

181. *See* MELTZ ET AL., *supra* note 44, at 135.

reasonable expectation that the regulatory status quo will persist, the courts find that reasonable landowners should expect change. These cases illustrate how the investment-backed expectations prong of *Penn Central* can be applied in defense of expansion of a regulatory regime.[182]

One example of such a case is *Good v. United States*.[183] In 1974, Good purchased a forty-acre tract of undeveloped land in Florida.[184] Thirty-two of those acres were wetlands; eight acres were uplands.[185] Good struggled for roughly ten years to obtain state and county approval to develop his wetlands.[186] During that time, two animal species inhabiting the area were listed as endangered species.[187] Based on findings that Good's proposed plans for his property would jeopardize the existence of the two endangered species, the Army Corps of Engineers denied Good a federal permit to develop his lands.[188] Good sued, claiming that the permit denial constituted an unconstitutional taking of his property.[189]

The Federal Circuit Court of Appeals found that the investment-backed expectations factor of the *Penn Central* test mandated denial of Good's claim.[190] Good argued that because he bought his property prior to enactment of the Endangered Species Act, "he could not have expected to be denied a permit based on [that act's] provisions."[191] In rejecting Good's argument, the court found that although Good could not expect the specific effects the Endangered Species Act might have on his property, he should have expected his land might be affected by environmental regulations in general.[192] At the time Good purchased his land, he knew that he needed regulatory approval before developing his property, and that the 1970s and 1980s were periods of "greater general concern for environmental

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> [E]ven where acquisition of private property predates a new regulatory restriction, expectations, to be reasonable, must 'take into account the power of the state to regulate in the public interest,' including recognition of 'the legitimate interest of municipalities in being able to modify land-use planning rules when they perceive the need for change.'

Id. (citations omitted).

182. *See, e.g.*, Good v. United States, 189 F.3d 1355, 1363 (Fed. Cir. 1999) (finding that the landowner did not have reasonable investment-backed expectations because he "was aware at the time of purchase of the need for regulatory approval to develop his land [and] must also be presumed to have been aware of the greater general concern for environmental matters. . . ."); Deltona Corp. v. United States, 657 F.2d 1184, 1193 (Ct. Cl. 1981) (noting that although "Deltona had every reason to believe that [its development] permits would be forthcoming when it subsequently sought them, it must also have been aware that the standards and conditions governing the issuance of permits could change.").

183. 189 F.3d 1355.

184. *Id.* at 1357.

185. *Id.*

186. *Id.* at 1357–60.

187. *Id.* at 1359.

188. *Id.*

189. *Id.*

190. *Id.* at 1360–63.

191. *Id.* at 1361.

192. *Id.* at 1361–63.

matters. . . ."[193] In the court's opinion, those two factors prevented him from forming any reasonable expectation that he would be able to develop his wetlands.[194]

The Supreme Court's decision in *Palazzolo* likely prevents "notice" rules such as that applied in *Good* from being dispositive in future regulatory takings cases.[195] In *Palazzolo*, the landowner who brought the takings claim acquired his land after the challenged regulatory scheme was already in place.[196] The Supreme Court of Rhode Island had held that the fact that Palazzolo acquired his land *after* enactment of the challenged regulatory scheme automatically defeated the takings claim.[197] Specifically, that court found that because the regulations predated Palazzolo's ownership of his land, he could not have formed any reasonable investment-backed expectations.[198] The U.S. Supreme Court overruled the Rhode Island court, holding that Palazzolo's takings claim was not barred simply by the fact that the challenged regulations predated his acquisition of the property.[199] Nevertheless, Justice O'Connor's concurring opinion emphasized that whether the regulatory scheme was in place at the time of acquisition would still be relevant to a determination of whether the landowner possessed reasonable investment-backed expectations.[200]

Palazzolo indicates that even though the regulatory situation at the time of acquisition will not, by itself, answer the question of whether a taking has occurred, it can influence a court's determination of the reasonableness of a landowner's investment-backed expectations. And, as the *Loveladies* and *Good* decisions demonstrate, how a court elects to define "reasonable investment-backed expectations" can produce dramatically different results. Decisions such as *Loveladies* seem to reflect a federalist natural law tradition holding "that property rights generate firm expectations entitled to judicial protection from excessive government regulation."[201] In line with that tradition, new and changing land-use laws are often found to improperly impinge upon the landowner's property rights.[202] Decisions such as *Good* promote a different view of property, that of the "republican positivist tradition stress[ing] the relationship between the individual and the civil community and holds that all claims to property are subject to an implied public interest limitation."[203]

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193. *Id.* at 1363.
194. *Id.*
195. Palazzolo v. Rhode Island, 533 U.S. 606 (2001).
196. *Id.* at 626.
197. *Id.* at 616.
198. *Id.*
199. *Id.* at 626–28.
200. *Id.* at 632–35.
201. Daniel R. Mandelker, *Investment-Backed Expectations in Takings Law, in* TAKINGS: LAND-DEVELOPMENT CONDITIONS AND REGULATORY TAKINGS AFTER DOLAN AND LUCAS 119, 128 (David L. Callies ed., 1996) (citing A. Dan Tarlock, *Local Government Protection of Biodiversity: What Is Its Niche?* 60 U. CHI. L. REV. 555, 588 (1993)).
202. *See* Loveladies Harbor, Inc. v. United States, 28 F.3d 1171, 1183 (1994).
203. Mandelker, *supra* note 201, at 128 (citing Tarlock, *supra* note 201, at 588).

Collectively, the cases illustrate that safeguarding a landowner's expectations can mean anything from protecting his reliance on the regulatory picture existing at the time he purchased his property, to expecting the landowner to foresee the future development of various regulatory schemes. While the latter approach might force landowners to bear inequitable and unfair burdens,[204] the former is equally problematic. By protecting a landowner's reliance on a specific regulatory state of affairs at a given point in time, courts may be effectively freezing future development of laws and regulations governing real property ownership.[205]

More importantly, how a given court elects to define "reasonable investment-backed expectations" may well influence the result it reaches. The divergent outcomes of *Loveladies* and *Good* illustrate that the investment-backed expectations factor's utility as an objective analytical tool is minimal. Rather, it is unacceptably open to subjective manipulation.

Thus, the investment-backed expectations factor is problematic in two important respects. First, it is based upon and advances a particular theory of property ownership—one that seeks to promote security and protect expectations as a means of enhancing productivity and encouraging investment. Second, it allows courts excessive leeway in determining which expectations are "reasonable." It is therefore neither an objective nor clear basis for analyzing whether a given regulation has effected a taking. The resulting situation is rather ironic: The investment-backed expectations factor was conceived as means of promoting certainty; yet, as applied, its malleability has made takings jurisprudence extremely unpredictable.

B. What Problems with Penn Central Mean for Regulatory Takings Jurisprudence

Unfortunately, the faults inherent in the investment-backed expectations factor will become more pronounced and prevalent due to the Supreme Court's recent re-affirmance of the *Penn Central* balancing test as the default rule for analyzing regulatory takings claims. Although this factor is just one part of the three-prong *Penn Central* inquiry, it is illustrative of a larger, more pervasive problem. In deciding whether a regulation has gone "too far," effectively depriving a property owner of some or all of her interests in her property, courts are clothing their subjective opinions of fairness and justice in a seemingly objective analytical shell. *Penn Central* provides factors for courts to analyze, yet because those factors lack rigor in their definition, they are presently too unclear to serve as a source of consistent decision making.

V. A PROPOSED SOLUTION

Tahoe Sierra highlights the difficulties of trying to balance all the legitimate interests and desires affected by land-use regulations. Public and private

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204. MELTZ ET AL., *supra* note 44, at 386.

205. *See* Lucas v. S.C. Coastal Council, 505 U.S. 1003, 1061–76 (1992) (Stevens, J., dissenting).

interests, long-term and short-term effects, harms, and benefits are all part of the equation. The complexities of these issues are great, and their consequences real and tangible. Consequently, any methodology for evaluating the fairness of such regulations should be delicate and fine-tuned. The current regulatory takings doctrine—though clearer now than it was pre-*Tahoe Sierra*—is unable to objectively balance the interests at stake. Its criteria are too inchoate to serve as useful analytical aids.

The difficulties courts have applying the *Penn Central* balancing test are evidence of the larger problem inherent in the regulatory takings doctrine itself. Regulatory takings, unlike physical takings, are difficult to identify. The *Tahoe Sierra* Court recognized as much.[206] Nevertheless, rather than asking whether the difficulty in separating constitutional from unconstitutional regulations is symptomatic of a fundamental problem with the regulatory takings doctrine itself, the Court simply attempted to resolve the ambiguities by clarifying a few parts of the doctrine.

Although *Tahoe Sierra* did make some things clearer, namely the separation between *Lucas* and *Penn Central*-type claims, it also perpetuated reliance on a doctrine of doubtful analytical value and questionable objectivity. Although *Tahoe Sierra* helped identify those takings claims to which the *Penn Central* balancing test applies, the opinion did nothing to resolve the difficulties courts have with using *Penn Central*'s three-prong test. History illustrates the difficulties courts have in distinguishing regulations that go "too far," from those that permissibly "adjust[] the benefits and burdens of economic life to promote the common good."[207] The Court's reaffirmation of multi-factor balancing, with its resultant ad hoc inquiry, is a sign that the judiciary is uncomfortable with the task of drawing a bright line between regulations that effect takings and those that do not. Moving away from the *Lucas per se* rule leaves courts free to apply the *Penn Central* factors in a manner that comports with their particular notions of "fairness and justice."[208] Yet, basing judicial outcomes on nebulous tests and conceptions of fairness is an undesirable and unpredictable approach.

To avoid this problem, rather than looking to courts to decide when a regulation has gone too far, I propose crafting an approach that gives more deference to the decisions of legislatures and zoning boards—bodies that are more accountable and responsive to the competing public interests involved.[209] This

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206. *Tahoe Sierra III*, 535 U.S. 302, 321–23 (2002).

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

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

209. *See* Nollan v. Cal. Coastal Comm'n, 483 U.S. 825, 846 (1987) (Brennan, J., dissenting).

> As this Court long ago declared with regard to various forms of restriction on the use of property: ". . . State legislatures and city councils, who deal with the situation from a practical standpoint, are better qualified than the courts to determine the necessity, character, and degree of regulation which these new and perplexing conditions require; and their conclusions should not be disturbed by the courts unless clearly arbitrary and unreasonable."

approach changes the way a regulation's constitutionality is analyzed. Instead of examining a regulation to determine whether it works an unjust taking of property under the Fifth Amendment, courts should assess whether the regulation comports with due process. This is the traditional standard by which the Court purports to judge the validity of economic regulation. As set forth in *United States v. Carolene Products Co.*, under the due process standard, an economic regulation is not unconstitutional unless those challenging the regulation can prove that, "in the light of the facts made known or generally assumed[, the regulation] is of such character as to preclude the assumption that it rests upon some rational basis within the knowledge and experience of the legislators."[210] Economic legislation or regulation passes the due process test if it serves a legitimate legislative purpose and is furthered by rational means.[211] Furthermore, substantive due process challenges to economic regulation do not require "mathematical precision in the fit between justification and means."[212]

Assessing the validity of land-use regulations according to this standard of review would ameliorate the judicial line-drawing problem currently exacerbated by the *Penn Central* inquiry. Moreover, it would doctrinally merge cases concerning regulatory impacts on real property rights with similar cases involving regulatory effects on other forms of economic liberties. The time for a reevaluation of the respective roles of the Due Process and Takings Clauses is especially ripe given the Supreme Court's decision in *Eastern Enterprises v. Apfel*.[213] There, the Court split 5-4 on the issue of whether the constitutionality of an act that required former coal mine operators to fund health benefits for their retired miners should be evaluated using Takings Clause or Due Process Clause analysis.[214] The four-member plurality viewed the claim as a regulatory takings claim under the Fifth Amendment.[215] In dissent, Justices Breyer, Stevens, Souter, and Ginsberg, joined by Justice Kennedy who concurred in the judgment though dissenting in part, believed that the proper analytical framework for deciding the case was to apply the Court's due process standards.[216] *Eastern Enterprises* thus lends powerful support to the argument that, with respect to regulatory takings claims, litigants and the courts may be asking the Takings Clause to do too much. Such claims of regulatory overstepping fit more squarely within the Due Process clause.

Id. (citing Gorieb v. Fox, 274 U.S. 603, 608 (1927)); *see also* MELTZ ET AL., *supra* note 44, at 513–54.

210. 304 U.S. 144, 152 (1938).

211. Pension Benefit Guar. Corp. v. R.A. Gray & Co., 467 U.S. 717, 730 (1984).

212. Concrete Pipe & Prods. of Cal., Inc. v. Constr. Laborers Pension Trust for So. Cal., 508 U.S. 602, 639 (1993).

213. 524 U.S. 498 (1998).

214. *Id.*

215. *Id.* at 538.

216. *Id.* at 545, 553.

VI. CONCLUSION

As one commentator has noted, the "Court has let the regulatory taking genie out of the bottle, and it cannot now refuse to discipline it."[217] Unfortunately, such discipline does not appear to be forthcoming. The current lack of clarity in how to analyze and adjudicate regulatory takings cases[218] will persist, despite the clarifications presented in *Tahoe Sierra*. While that decision answered some important questions regarding conceptual severance, and the difference between *Lucas* and *Penn Central* claims, it also reaffirmed the role that the *Penn Central* balancing test, with all its attendant uncertainties, will play in future takings cases.

Regardless of how courts ultimately decide to resolve the issue, some step must be taken to address the ever-present confusion inspired by our current regulatory takings jurisprudence. This next step needs to move far beyond the piecemeal approach taken by the *Tahoe Sierra* Court to remedying the problems. Perhaps the next time the Supreme Court examines the doctrine of regulatory takings, that honored Court will address all the fundamental, underlying problems plaguing that doctrine and limiting its usefulness.

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217. MELTZ ET AL., *supra* note 44, at 557.
218. *Id.* at 556–60.