INVESTMENT-BACKED EXPECTATIONS AND THE POLITICS OF JUDICIAL ARTICULATION: THE REINTEGRATION OF HISTORY AND THE LOCKEAN MIND IN CONTEMPORARY AMERICAN JURISPRUDENCE

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The Fifth Amendment's Just Compensation Clause is a revealing reflection of the Framers' vigilance in preserving property rights and maintaining a balance of power between citizen and state, especially in the specific context of eminent domain. The principle that the state should be generally forbidden from taking private property for public use without just compensation is a leading motif in the definition of a political culture that underpins the emergence and maintenance of a prosperous capitalist society.

In this Comment, Kraig Odabashian critiques the U.S. Supreme Court's use of the landowner's investment-backed expectations as the primary standard under which the Court has evaluated cases of government takings requiring just compensation. The author posits that the concept of "expectation," whether subjective or objective in perspective, is not the proper tool with which to analyze constitutional questions of this sort. Rather, this is a role more properly assigned to objective hermeneutics in the process of judicial epistemology.

In his central thesis, the author contends that the Just Compensation Clause ought to be reattached to its philosophical and historical origins, more specifically, that the Supreme Court ought to adopt a historical baseline test for regulatory takings in order to pursue this more abstract goal. En route to establishing this thesis, he also examines the methodological failures which have led to the intellectually weak formulation currently applied by the Court to most just compensation claims.

The author concludes by assessing the overall value of a historical baseline test in terms of its ability to generate a specific jurisprudence which is both cogent and practically operative. He approaches this task by both applying the historical baseline test to the Court's major just compensation cases and considering it in view of the specific language of the clause and the central themes of

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the Constitution as they are textually presented in the document itself, as well as in the Constitution's historical and philosophical animation.

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INTRODUCTION

Fresh expectation troubled not the land/With any long'd-for change, or better state.

—Shakespeare, *The Life and Death of King John* (1596)[1]

The concept of expectation is basic to the evolution of political life. This is true whether the context is the English monarchy at the inception of Magna Carta, the late Elizabethan state of Shakespeare's England, or the American Republic in the age of industry. Indeed, in terms of both political theory and cultural anthropology, expectations provide the political community with moral and ethical standards that comprise the bedrock of civilization and state.[2] At a more empirical level, they form the basis of procedural and substantive guarantees that give rise to more sophisticated concepts, such as *justice*, *rights*, *due process*, and *property*, to name just a few common to the American political lexicon. Yet while it plays a major role in the evolution of society, the concept of expectation is flawed in one critical

1. WILLIAM SHAKESPEARE, THE LIFE AND DEATH OF KING JOHN act 4, sc. 2; *see also* William Michael Treanor, Note, *The Origins and Original Significance of the Just Compensation Clause of the Fifth Amendment*, 94 YALE L.J. 694, 698 n.16 (1985) (quoting MAGNA CARTA art. 39). The relevant language of the Magna Carta states: "No free man shall be . . . disseised . . . except by the lawful judgement of his peers or by the law of the land." *Id.* This language well illustrates the tension between expectation and the rule of law in the early English state.

2. *See generally* ARISTOTLE, NICOMACHEAN ETHICS (Roger Crisp ed., Cambridge Univ. Press 2000) (1894).

respect, warranting its qualified exclusion from our institutions of government. This Achilles' heel, as it were, is expectation's inseverable fusion with the notion of the community as opposed to the individual citizen. Indeed, as revealed by Pembroke's speech from *King John* noted above, expectation is invariably linked to the standards of the community and the majority's view of ethics at any given point in space and time. If expectation is left to stand unimproved, then the transient will of the majority is a citizen's only substantial political check on the sovereign. Thus, used as a standard by which justice is distributed, expectation can never fully rid itself of the tyranny of the majority.[3]

To solve this problem, the technology of the Madisonian republic enters the political system. Madison's often celebrated formalism emphasizes that the Bill of Rights is not merely an expandable, malleable, and redefinable set of political norms. To the contrary, it is an aggressive set of restraints on the federal government, which harnesses the power of linguistics, logic, and history in order to secure those liberties thought to be most indispensable to any civilized people. For Madison, the technology of a written constitution overcomes the uncertainty of an evolving political life and the vices of hyper-pluralism and demagoguery.[4] The U.S. Constitution insulates the citizen from the changing expectations of society. It empowers him to assert an indestructible baseline of power and autonomy as just consideration for his obligations under the social contract. In contrast with the more primitive society from which he emerges, it gives him more than the norms of the community as a foundation for a justifiable cause of action against a potentially oppressive, overly aggressive, or hyper-pluralistic state. Consistent with Locke, Madison's approach entitles the citizen to the maximum security of those rights, which ontologically inhere in the individual under natural law.[5]

The success of the system Madison envisions, however, depends largely on the triumph of objective hermeneutics over expansive readings of the Constitution. The latter, when carried to their full logical implications, mischievously render such provisions as the Just Compensation Clause of the Fifth Amendment to be a dead letter.[6] Unfortunately, since at least the

3. *See* THE FEDERALIST NO. 10, at 42–49 (James Madison) (George W. Carey & James McClellan eds., 2001).

4. *See* JAMES MADISON, Speech Proposing the Bill of Rights (June 8, 1789), *in* 12 THE PAPERS OF JAMES MADISON 204–05 (C. Hobson & R. Rutland eds., 1979).

5. *See infra* notes 111, 119 and accompanying text.

6. The Fifth Amendment to the Constitution of the United States states, in pertinent part: "Nor shall private property be taken for public use, without just compensation." U.S. CONST. amend. V. This provision was doctrinally incorporated into the Fourteenth Amendment and therefore made binding against the states in 1878. *See* Transp. Co. v. Chicago, 99 U.S. 635, 642 (1878). This provision has also been identified as "The Takings Clause." However, in this Com-

dawn of the New Deal and, arguably, as a product of the U.S. Supreme Court's methodological difficulties in its *Lochner*-era jurisprudence,[7] objective hermeneutics has been the exception in constitutional interpretation rather than the rule.[8] Thus, in many areas of jurisprudence over the last century, we have witnessed a reversion of our republic to a system of government that can only be recognized as a pre-constitutional, common law system.

Nowhere has the application of this mode of jurisprudence been more profound than in its relaxation of the Fifth Amendment's requirement of just compensation. In *Penn Central Transportation Co. v. New York City*,[9] perhaps the most significant case on regulatory takings decided in the twentieth century, the Court adopted a novel jurisprudential position. That position essentially abandoned the view that citizens enjoy a particularly heavy presumption that their property is inalienable under the Just Compensation Clause as well as under other provisions of the federal Constitution. In place of the constitutional text, the Court adopted a vague analysis of social interests that incorporated the notion of investment-backed expectations,[10]

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ment I will use the term "Just Compensation Clause" in order to stress that the text itself uses the word "taken" to predicate the requirement of "just compensation," not vice versa as the term "Takings Clause" implies.

7. *See* Lochner v. New York, 198 U.S. 45, 53 (1905) (holding that "[t]he general right to make a contract in relation to his business is part of the liberty of the individual protected by the Fourteenth Amendment of the Federal Constitution"). In that case, Justice Rufus Peckham interpreted the liberty prong of the Due Process Clause to include the freedom of contract. That provision, stated in both the Fifth and Fourteenth Amendments, disallows the federal or state governments from depriving any person of "life, liberty, or property, without due process of law." U.S. CONST. amend. V; U.S. CONST. amend XIV. The primary weakness of his argument is that while his conclusion may well represent a correct interpretation of the constitutional text, it fails to identify a methodology by which that result is obtained. Perhaps the opinion would have been less susceptible to repudiation if it had explicitly acknowledged the common law tradition that it embraces, namely the broad right to economic liberty. This problem is made visible by *Lochner*'s repudiation in *West Coast Hotel Co. v. Parrish*, 300 U.S. 379, 391 (1937), which held that "[t]he Constitution does not speak of freedom of contract. It speaks of liberty and prohibits the deprivation of liberty without due process of law."

8. *See, e.g.*, Roe v. Wade, 410 U.S. 113, 164–66 (1973) (holding that constitutional protections for privacy extend to protect the right to abortion); Griswold v. Connecticut 381 U.S. 479, 486 (1965) (holding that the U.S. Constitution protects the right to personal privacy); NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1, 43 (1937) (holding that the National Labor Relations Act did not fall outside the scope of the Commerce Clause). These cases, which were mostly decided by the New Deal and Warren Courts, tend not to emphasize the role of history and common law in animating the text of the Constitution.

9. 438 U.S. 104 (1978). In *Penn Central*, the appellant sought to invalidate New York's Landmarks Preservation Act, under which the city forbade use of Penn Central's air rights to build a skyscraper over Grand Central Terminal. *Id.* at 119. In an opinion by Justice William Brennan, the Court reasoned that since Penn Central did not anticipate using its air rights to construct a skyscraper when it acquired title, it could not be correctly said to have disappointed, compensable "investment-backed expectations." *Id.* at 124.

10. *Id.* at 136–37.

a standard that came to mean primarily the expectations that the legislature of a state will allow citizens to have with respect to their property at any given time.

This new standard was the logical result of a political agenda that had given birth to the welfare state of the New Deal and the Great Society. In perspective, those eras in our political history were largely about refuting the maxim that man's inalienable political rights may not be sacrificed upon the altar of public benefit. Nevertheless, the application of welfare state norms to the Just Compensation Clause was met by a strong reaction in the wake of *Penn Central*, led primarily by Chief Justice William Rehnquist and Justice Antonin Scalia.[11] However, the traditional deference the Court has accorded to the doctrine of stare decisis and the uncertainty surrounding the Court's current composition with regard to this issue have prevented a complete abandonment of the investment-backed expectations standard. Instead, since *Penn Central*, the Court has engaged in an ad hoc process of making factual analyses and carving out exceptions, rather than confronting the issue head-on and establishing a consistent and reliable rule.[12] This phenomenon has resulted in an epistemological crisis of interpretation, epitomized by the Court's uncertainty and division in the recent case of *Palazzolo v. Rhode Island*.[13] In that case, a landowner was denied the right to build on a portion of his property protected by wetlands regulations enacted by the Rhode Island Department of Natural Resources.[14]

11. *See* Dolan v. City of Tigard, 512 U.S. 374, 386 (1994) (Rehnquist, C.J.) (reaffirming the requirement in *Nollan v. California Costal Commission*, 483 U.S. 825 (1987), that there must be an "essential nexus" between a legitimate state interest and the condition of a permit); Lucas v. S.C. Coastal Council, 505 U.S. 1003, 1031 (1992) (Scalia, J.) (holding that when property is deprived of all viable economic use, the burden shifts to the state to identify a background principle of the state's law of property or nuisance in order to justify the taking); *see also Nollan*, 483 U.S. at 837 (Scalia, J.) (holding that the government may only condition the granting of a land use permit on the surrendering of another property right from the owner when the condition serves public purposes related to the same permit requirement); First English Evangelical Lutheran Church v. County of Los Angeles, 482 U.S. 304, 319 (1987) (Rehnquist, C.J.) (holding that a landowner may recover damages for a taking that deprived him of his constitutional rights for a limited duration); Keystone Bituminous Coal Ass'n v. DeBenedictis, 480 U.S. 470, 506 (1986) (Rehnquist, C.J., dissenting); *Penn Central*, 438 U.S. at 138. (Rehnquist, J., dissenting); Alfred P. Levitt, Comment, *Taking on a New Direction: The Rehnquist-Scalia Approach to Regulatory Takings*, 66 TEMP. L. REV. 197, 213–19 (1993).

12. *See, e.g.*, Kaiser Aetna v. United States, 444 U.S. 164 (1979); *Keystone Bituminous Coal Ass'n*, 480 U.S. 470. In both these cases, the Court had an opportunity to reformulate the rule, but declined to do so.

13. 533 U.S. 606 (2001).

14. *Id.* at 615. The relevant administrative law held that a landowner could receive a "special exception" to the regulation. However, such an exception would require the proposed activity to serve "a compelling public purpose which provides benefits to the public as a whole as opposed to individual or private interests." *Id.* (citations omitted).

In what follows, I use *Palazzolo* as a point of departure for my discussion of the current crisis the Court faces in articulating the meaning of "investment-backed expectations" in its jurisprudence. In Part I, I discuss the different meanings that the Court attempts to impute to the word "expectation" in *Palazzolo*. In Part II, I discuss the origins and development of investment-backed expectations. In Part III, I analyze Justice Scalia's attempts to utilize linguistics and judicial politics in order to transform the investment-backed expectations standard into one that relies on a constitutional baseline of history for articulating the concept of private property.[15] In Part IV, I contend that a historical baseline is the best mechanism to ensure the proliferation of property rights in the American republic and that the Court must redefine investment-backed expectations to refer to a constitutional baseline of rights.

I. *PALAZZOLO V. RHODE ISLAND*: DISJUNCTION AND CRISIS

In *Palazzolo*, the Court finally realizes the epistemological crisis that *Lucas v. South Carolina Coastal Council*[16] brings to the Court's just compensation jurisprudence. This is not particularly surprising. The Court has a long history of being inconsistent in its jurisprudence, applying different theories of interpretation to different portions of the Constitution and even to clauses that would appear to share the same history and theoretical ontology.[17]

Justice Anthony Kennedy's majority opinion in *Palazzolo* continues to indulge this pragmatism, ultimately restating the conventional viewpoint that *Lucas* establishes two distinct strands of jurisprudence pertaining to regulatory takings, those which deprive the owner of "all economically viable use of the land" and those which do not. It is perplexing from an objective

15. *See, e.g.*, *Lucas*, 505 U.S. at 1003. In that case, the petitioner bought two residential lots on a South Carolina barrier island in 1986. *Id.* at 1006–07. In 1988, the state legislature enacted the Beachfront Management Act, which prohibited any permanent structures on Lucas's parcels. *Id.* at 1007. The Supreme Court, in a decision by Justice Antonin Scalia, held that since the ban deprived Lucas of "all economically productive or beneficial use[ ]" of his property, the Fifth and Fourteenth Amendments required just compensation for the taking. *Id.* at 1030. The Court further held that any limitation so severe cannot be newly enacted, but must "inhere in the title itself" and be vindicated by "background principles of the State's law of property and nuisance." *Id.* at 1029.

16. *Lucas*, 505 U.S. 1003.

17. *See* Richard E. Levy, *Escaping* Lochner's *Shadow: Towards a Coherent Jurisprudence of Economic Rights*, 73 N.C. L. REV. 329, 408–10 (1995). Within the field of economic rights alone, one commentator has opined that the Court applies no baseline for substantive due process challenges to regulation of traditional economic interests, common law baselines for challenges based on regulatory measures that completely destroy all economically viable use of property, and an expectations baseline for partial regulatory takings, challenges falling under the Contracts Clause, and procedural due process analysis.

point of view that the Court is able to distinguish the two strands of regulatory takings only by this theoretically valueless characteristic. To add to this confusion, the Court is not united on the exact factual paradigm that distinguishes these two categories of regulatory takings. The scope of *Lucas*, a decision nearly ten years old, remains unclear. The consequence of this is that different members of the Court use the term "investment-backed expectations" to refer to different standards in regulatory takings.

Justice Kennedy's decision, which seems in itself to be strangely inconsistent, epitomizes the doctrinal crisis presented by *Palazzolo*. Justice Kennedy begins to weigh the merits of Palazzolo's Fifth Amendment claim by asserting that "[a] blanket rule that purchasers with notice have no compensation right when a claim becomes ripe is too blunt an instrument to accord with the duty to compensate for what is taken."[18] However, after a brief departure into a broader discussion, Kennedy returns to this point and appears to endorse the very rule he condemns by remanding the case to the Rhode Island Supreme Court for analysis under the *Penn Central* regime.[19] Nevertheless, Kennedy's discussion, which Justice John Paul Stevens seems to dismiss as dicta,[20] is fascinating, because it is highly probative of the Court's inability to determine a uniform definition of investment-backed expectations. Although a superficial reading of the case suggests that Kennedy reverts to a definition of the term that includes a rational basis test and notice, his discussion seems to blur the line between the categorical exception in *Lucas* and the balancing rule in *Penn Central*. Referring to *Nollan v. California Coastal Commission*,[21] Kennedy notes:

> The principal dissenting opinion observed it was a policy of the California Coastal Commission to require the condition, and that the Nollans, who purchased their home after the policy went into effect, were "on notice that new developments would be approved only if provisions were made for lateral beach access." A majority of the Court rejected this proposition. "So long as the Commission could not have deprived the prior owners of the easement without compensating them," the Court reasoned, "the prior owners must be understood to have transferred their full property right in conveying the lot."[22]

In *Nollan*, the petitioner-landowner complained that it was a violation of the Just Compensation Clause for the California Coastal Commission to require him to grant an easement for beach access in exchange for a permit

18. *Palazzolo*, 533 U.S. at 628.
19. *Id.* at 632.
20. *Id.* at 645 (Stevens, J., concurring in part and dissenting in part).
21. 483 U.S. 825 (1987).
22. *Palazzolo*, 533 U.S. at 629 (quoting *Nollan*, 483 U.S. at 834 n.2, 860).

to build a dry sand wall.[23] Because Nollan alleged only a partial taking, he would clearly not have been deprived of all "economically viable use of his land."[24] Therefore, it would seem clear that the *Lucas* standard, requiring the state to identify a nuisance principle or some other background principle of law, would not apply in that set of facts. Given this, the correct option would be to apply the more vague *Penn Central* analysis, which would nominally consider several factors, one of which is investment-backed expectations. Yet the investment-backed expectations standard, if it is to be distinguished from the *Lucas* analysis, must rely on a definition of expectation that stresses notice by the state or depends on the economic extent of the impact as the determinative factor, and these were clearly not determinative factors in *Nollan*. Hence, Justice Kennedy opens up the term investment-backed expectations to a broader spectrum of meaning. He does this by recalling past jurisprudence, such as *Nollan*, where investment-backed expectations took on a broader meaning.

Logically then, one would expect Kennedy's opinion to continue on this basis, formulating a new rule which would reintegrate the wayward strands of just compensation jurisprudence and settle Palazzolo's claim on that basis. This is not what happens. Instead, Kennedy quickly abandons this insight, dismisses *Lucas* as irrelevant, and reverts to doctrinal language, suggesting that Palazzolo might have a claim under *Penn Central* despite the fact that he had actual notice of the regulatory scheme when he took title:

> For reasons we discuss next, the state court will not find it necessary to explore these matters [related to *Lucas*] on remand in connection with the claim that all economic use was deprived; it must address however, the merits of petitioner's claim under *Penn Central*. That claim is not barred by the mere fact that title was acquired after the effective date of the state-imposed restriction.[25]

Justice Kennedy's doctrinal stance is indicative not only of his tenacious position regarding expansion of the *Lucas* standard, but more broadly of the crisis of epistemology and articulation facing the Court and the political stalemate driving that crisis at a more fundamental level.

Justice Kennedy's comments make more sense when viewed in light of his concurrence in *Lucas*, where he clearly expresses the opinion that "[t]he common law of nuisance is too narrow a confine for the exercise of regulatory power in a complex and interdependent society."[26] Kennedy further manifests his viewpoint in *Lucas* as follows:

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23. *Nollan*, 483 U.S. at 829.

24. Lucas v. S.C. Coastal Council 505 U.S. 1003, 1016 (1992) (citing Agins v. City of Tiburon, 477 U.S. 255, 260 (1980)).

25. *Palazzolo*, 533 U.S. at 630.

26. *Lucas*, 505 U.S. at 1035.

> In my view, reasonable expectations must be understood in light of the whole of our legal tradition. . . . The Takings Clause does not require a static body of state property law; it protects *private expectations to insure private investment*. I agree with the Court that nuisance prevention accords with the most common expectations of property owners who face regulation, but I do not believe this can be the sole source of state authority to impose severe restrictions. Coastal property may present such unique concerns for a fragile land system that the State can go further in regulating its development and use than the common law of nuisance might otherwise permit.[27]

The trouble with Kennedy's view is that while it articulates an intermediate position between the highly restrictive standard of the common law of nuisance and the notice principle with impressive interpretive agility, it fails to stake out a clear set of rules that might be used to judge future cases. Most notably, it remains extremely vague what factors Kennedy would consider in deciding whether to invalidate a state statute placing new limitations on property. In the final analysis, he seems more concerned with maintaining the integrity of the Court's doctrine than with coping with its inconsistencies. Thus, while Justice Kennedy succeeds in comprehending the complexities of the Just Compensation Clause in the abstract, he fails in executing his constitutionally assigned task. That is, Kennedy makes no attempt to craft a constitutional rule that is consistent with his own normative supposition, but instead ultimately applies a test that logically contradicts his own dictum.[28]

Justice Scalia's viewpoint, in comparison, appears to be more precise, less doctrinal, and more blunt about the Court's fundamental disagreement over the meaning of investment-backed expectations. In *Palazzolo*, Justice Scalia has no qualms about revealing the deeply divided nature of the Court and the vague nature of the term investment-backed expectations:

> In my view, the fact that a restriction existed at the time the purchaser took title (other than a restriction forming part of the "back-

27. *Id.*

28. *See id.* This approach to just compensation jurisprudence is the very source of the confusion that surrounds it. Individuals living in a constitutional society have the right to at least some measure of consistency in their judiciary. A court which insists on applying its own vague notions of justice and fairness instead of applying a constitutional rule, in my view, fails to meet its commission. Unfortunately, the Court has shown no signs since *Palazzolo* of taking a more consistently rule-based approach. In *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency*, 122 S. Ct. 1465 (2002), for example, the Court stated: "We conclude, therefore, that the interest in 'fairness and justice' will be best served by relying on the familiar *Penn Central* approach when deciding cases like this, rather than by attempting to craft a new categorical rule." *Id.* at 1489 (holding that a temporary moratorium on building, depending on the length of time for which the moratorium is enacted and the circumstances under which it is approved, may be constitutional under the Just Compensation Clause).

> ground principles of the State's law of property and nuisance"), should have no bearing upon the determination of whether the restriction is so substantial as to constitute a taking. The "investment-backed expectations" that the law will take into account do not include the assumed validity of a restriction that in fact deprives property of so much of its value as to be unconstitutional. Which is to say that a *Penn Central* taking, no less than a total taking, is not absolved by the transfer of title.[29]

However, as Justice Sandra Day O'Connor correctly notes in her concurring opinion, "Justice Scalia's approach . . . would seem to require a revision of *Penn Central* analysis that this Court has not undertaken."[30] Like Justice Kennedy, Justice O'Connor also seems unsatisfied with a rule that stresses notice as the dominant factor, but, like Justice Kennedy, would not go as far as Justice Scalia in deeming that factor irrelevant:

> If *investment-backed expectations* are given exclusive significance in the *Penn Central* analysis and existing regulations dictate the reasonableness of those expectations in every instance, then the State wields far too much power to redefine property rights upon passage of title. On the other hand, if existing regulations do nothing to inform the analysis, then some property owners may reap windfalls and an important indicium of fairness is lost.[31]

Observe here that in laying out the essential difficulty the Court faces, Justice O'Connor appears to define investment-backed expectations simply as notice. Neither Justice Scalia nor Justice Kennedy completely embraces this notion. The most significant aspect of Justice O'Connor's concurrence, however, is its consistency with Justice Kennedy's opinion in failing to reach a definitive conclusion. Like Kennedy, O'Connor is vague about the priorities to be considered under *Penn Central* and, further, the relationship of the *Penn Central* test to the categorical rule in *Lucas*. Although both Justice O'Connor and Justice Kennedy warn that a purely notice-based rule places an "expiration date" on the Just Compensation Clause, neither explains how this expiration could be avoided. Their inability to do this leaves open the possibility noted by Justice Stephen Breyer in his dissent, that "[o]rdinarily, such expectations will diminish in force and significance—rapidly and dramatically—as property continues to change hands over time."[32] If that view prevails, the Just Compensation Clause's days certainly seem numbered, at least with regard to regulatory takings. However, it appears that both Justices Kennedy and O'Connor would prefer to circumvent the issue of notice,

29. *Palazzolo*, 533 U.S. at 637 (Scalia, J., concurring) (citations omitted).
30. *Id.* at 635 (O'Connor, J., concurring).
31. *Id.* (emphasis added).
32. *Id.* at 655 (Breyer, J., dissenting).

marginalizing it as merely one factor in a larger calculus. Kennedy and O'Connor either fail to perceive or choose to ignore the potential of this factor to wipe out compensation for nearly all regulatory takings at some future point in time.

Moreover, neither Kennedy nor O'Connor offers a justification for so blatant a discrepancy in methodology between the *Lucas* and *Penn Central* analyses. Both urge remanding the case to the Rhode Island Supreme Court in order to assess the facts of the case in view of a larger, multifaceted calculus under *Penn Central*.[33]

Unlike Justice Kennedy in his opinion for the Court, the dissenters seem entirely unprepared to entertain the notion that the line between the rules that govern a total regulatory taking and a partial regulatory taking is uncertain. Rather, Justice Ruth Bader Ginsburg's opinion aggressively argues in favor of containing the scope of *Lucas*:

> But the ruling below does not change the reality essential here: Palazzolo litigated his takings claim, and it was incumbent on the State to defend against that claim, only under *Lucas* . . . [A] floor value was all the State needed to defeat Palazzolo's simple *Lucas* claim.[34]

Justice Ginsburg's use of the adjective "simple" here is interesting. The context implies that Ginsburg means "discrete" rather than "not analytically complex," although the latter is by far the more conventional usage. But by any definition, *Lucas* is anything but "simple." Contrary to what Ginsburg would like to believe, *Lucas* does much more than carve out an exception to the application of *Penn Central*. Rather, it establishes a competing methodological strategy, which could be easily applied to all regulatory takings. The only real obstacles to this usurpation of *Penn Central* are the political composition of the Court and the principle of stare decisis. Yet because of these obstacles, the Court currently stands in disjunction and epistemological crisis with respect to regulatory takings. This is true with regard to the former obstacle because all of the members of the Court recognize the political implications if one side eventually captures a consistent majority. It is true with regard to the latter because they are unable to agree even on the terms of the debate. As I have implied above, the greatest difficulty the Court has in applying investment-backed expectations is arriving at a consistent definition for that term. This difficulty is indeed indicative of a larger political struggle with both ideological and methodological implications. In order to better understand this struggle, it is necessary to explore the context, origins, and usage of the term investment-backed expectations in the judicial lexicon. It is to this discussion that I now turn in Part II.

33. *Id.* at 632, 633.

34. *Id.* at 650, 652 (Ginsburg, J., dissenting).

II. A JURISPRUDENCE DIVIDED: INVESTMENT-BACKED EXPECTATIONS AND THE NUISANCE PRINCIPLE

A. The Functionalist Interpretation of the Just Compensation Clause Is Conceived

Until 1920, the Court approached regulatory takings by assessing the *character of the invasion* made by the government. The rule was originally formulated by Justice John Marshall Harlan II in *Mugler v. Kansas*.[35] In *Mugler*, the petitioner challenged a statute that prohibited the "manufacture and sale of intoxicating liquors," arguing that it invaded the real property interest of the landowner in his liquor plant.[36] In a decision for the Court, Justice Harlan disagreed on the grounds that the liquor plant constituted a "public nuisance."[37] Harlan stated, "[T]he States have [the power] of prohibiting such use by individuals of their property as will be prejudicial to the health, the morals, or the safety of the public."[38] The logic Harlan employs demands that one be able to differentiate between a *noxious use* of property and one that simply withholds a *public benefit*. For as Harlan states, when a "noxious use" of property is regulated by the state, "a nuisance only is abated," but "in the other, unoffending property is taken away from an innocent owner."[39]

Though criticized in the mid-twentieth century as vague and indefinable, this standard was widely recognized for a substantial period in American jurisprudence as a useful tool for identifying when a regulatory taking had occurred. However, it became less prevalent with the advent of new jurisprudential innovations as the century progressed. As several commentators have noted, the concept of "noxious use" or "nuisance" can prove to be quite elastic. Professor Joseph Sax remarked in 1964, for example, that "[d]estruction of recognized economic interests, on the ground that there is no property interest, is so widespread and pervasive that the policy of preventing individual economic loss as such, can hardly be said to have been given significant recognition by the courts."[40]

The elastic propensity of nuisance analysis must have been precisely the problem that Justice Oliver Wendell Holmes was contemplating when he

35. 123 U.S. 623 (1887).
36. *Id.* at 655.
37. *Id.* at 672–73.
38. *Id.* at 669.
39. *Id.*
40. Joseph L. Sax, *Takings and the Police Power*, 74 YALE L.J. 36, 53 (1964); *see also* Ronald H. Coase, *The Problem of Social Cost*, 3 J.L. & ECON. 1 (1960); Frank I. Michelman, *Property, Utility, and Fairness: Comments on the Ethical Foundations of "Just Compensation" Law*, 80 HARV. L. REV. 1165, 1190–93 (1967).

wrote the Court's opinion in *Pennsylvania Coal Co. v. Mahon*,[41] which is still widely considered to be the leading case in regulatory takings.[42] The case is particularly interesting because it is the fundamental point of origin for the crisis revealed in 2001 by *Palazzolo*. Justice Holmes begins addressing the merits of the case by stating that the mining of coal, in violation of the Kohler Act,[43] is not a nuisance: "A source of damage to such a house is not a public nuisance even if similar damage is inflicted on others in different places. The damage is not common or public. . . . Furthermore, it is not justified as a protection of personal safety. That could be provided for by notice."[44]

If Holmes had chosen to follow the Court's jurisprudence at this point, his inquiry would have been finished here. The Court had previously held that "it is the *character of the invasion*, not the amount of damage resulting from it, so long as the damage is substantial, that determines the question whether it is a taking."[45]

Yet Holmes is unsatisfied with this formulation, which is so closely linked to a textual interpretation of the Constitution, to the common law, and to formalism in general. He therefore crafts a new lens of analysis with which to read the Just Compensation Clause. In doing so, Holmes achieves a nearly diabolical level of subtlety, tacitly overturning an entire era of Just Compensation jurisprudence with just a few poignant sentences:

> The general rule at least is, that while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking. . . . We are in danger of forgetting that a strong *public desire to improve the public condition* is not enough to warrant achieving the desire by a shorter cut than the constitutional way of paying for the change. As we already have said, this is a *question of degree*—and therefore cannot be disposed of by general propositions.[46]

Holmes's dissatisfaction with the nuisance doctrine in the Court's jurisprudence, it seems, is a result of its rather broad and easily expandable application at the expense of property rights. Justice Louis Brandeis's dissenting opinion in the same case indeed vindicates this fear. Brandeis uses the nuisance exception as a justification for upholding the Kohler Act without

41. 260 U.S. 393 (1922).

42. *Id.* at 414–16 (holding that a Pennsylvania statute destroying the mining rights of the Pennsylvania Coal Company violated the Just Compensation Clause). The statute in question in *Pennsylvania Coal* was the Kohler Act, which prohibited the mining of coal so as to cause a subsidence of the surface. *Id.* at 412–13. Justice Holmes held for the Court that the act was too sweeping. *Id.* at 416.

43. 1921 Pa. Laws 1198.

44. *Id.* at 413–14 (citations omitted).

45. United States v. Cress, 243 U.S. 316, 328 (1917) (emphasis added).

46. *Pennsylvania Coal*, 260 U.S. at 415–16 (emphasis added).

compensation, writing, "And why may not the State, likewise, without paying compensation, prohibit one from digging so deep or excavating so near the surface, as to expose the community to like dangers? In the latter case, as in the former, carrying on the business would be a public nuisance."[47]

It is exactly this sort of expansive reading of the public nuisance doctrine around which Holmes attempts to navigate when he establishes the diminution-in-value test in *Pennsylvania Coal*. This test, which later evolves into the investment-backed expectations standard, is enticing because it establishes a source of federal judicial power in just compensation jurisprudence independent of a state's law of property. When the Court uses nuisance as the standard to determine whether or not a taking has occurred, it inevitably becomes entangled in difficult questions about the scope of its own power to interpret the laws of a particular state. While this very well may be a debate that a federal republic cannot evade and that ought to be directly addressed, Holmes aptly avoids the problem by discovering an independent standard of evaluation, one over which the Court, unbridled by state law, can exert its unrestrained discretion.

B. Diminution in Value: Problems and Alternatives

Hence, just as Athena sprang forth from the head of Zeus, so the investment-backed expectations standard, albeit in its infant form of diminution in value, was born of one thunderous decree by an American jurist of Olympic stature. Nevertheless, the Court continued to collaterally apply the nuisance principle to many just compensation cases alongside the diminution-in-value test. In many cases, the Court "wanted" to find a noncompensable regulation but was unable to do so when adhering strictly to the diminution-in-value test. It therefore used the premise of nuisance to justify the conclusion that, because no property right exists in a nuisance, a regulation could stand without compensation because no property was taken according to the state's definition of property.[48] Thus, the new test did very little at first to overcome the difficulty that Holmes intended to remedy in *Pennsylvania Coal*. Nuisance was still used to eliminate just compensation claims. Diminution in value simply gave plaintiffs a new tool with which to approach the regulatory takings issue.[49]

47. *Id.* at 418–19 (Brandeis, J., dissenting).

48. *See, e.g.*, Queenside Realty Co. v. Sax, 328 U.S. 80, 82–84 (1946); Champlain Ref. Co. v. Corp. Comm'n, 286 U.S. 210, 233–34 (1932); Village of Euclid v. Ambler Realty Co., 272 U.S. 365, 384 (1926).

49. *See* Sax, *supra* note 40, at 42–46.

For example, in *Village of Euclid v. Ambler Realty*,[50] the Court never reached the issue of diminution in value because it determined the property interest at stake to be nonexistent.[51] In that case, a zoning law enacted by the Village of Euclid, Ohio was held to be constitutional because it advanced legitimate state interests related to the public health, safety, morals, or general welfare.[52] This line of reasoning is reflective of the Court's pre–*Pennsylvania Coal* emphasis on the character of the action rather than the extent of diminution. However, under the Court's new doctrine, the latter would be considered even if the invasive action was found to usurp the real property interest. Thus, in operation, the diminution-in-value test made it easier for the Court to find a noncompensable taking by providing multiple access points to that end. This was made particularly clear by the modern cases.[53] In contrast, when the government's invasion was found to abate a nuisance, the degree of diminution did not seem to matter much to the Court. This was surely the case in *Euclid*, where the zoning restriction in question destroyed 75 percent of the land's value.[54]

In addition to its coexistence with the nuisance or noxious use theory, a second problem with diminution in value was that it did not establish a clear denominator of real property by which diminution was to be judged. Holmes did, however, suggest that a high degree of severability would be tolerated. For example, in *Pennsylvania Coal*, he deemed the mining rights to the coal to be a distinct estate in land, severable from the rest of the property.[55] But, unlike the facts of *Pennsylvania Coal*, property rights are not always so easily divisible. For example, in cases involving the regulation of wetlands, such as *Lucas* and *Palazzolo*, the diminution-in-value test is particularly problematic. It remains unclear, for example, whether the unregulated, upland portion of Palazzolo's property is discrete from the regulated, wetland portion.[56]

50. *Euclid*, 272 U.S. 365.
51. *Id.* at 385.
52. *Id.* at 395.
53. *See, e.g.*, Keystone Bituminous Coal Ass'n v. DeBenedictis, 480 U.S. 470 (1987); Penn Cent. Transp. Co. v. New York City, 438 U.S. 104 (1978).
54. *Euclid*, 272 U.S. at 385, 389; *see also* Goldblatt v. Town of Hempstead, 369 U.S. 590, 594 (1962) (holding that "[a]lthough a comparison of values before and after is relevant, it is by no means conclusive" (citation omitted)); Sax, *supra* note 40, at 42–43.
55. Pa. Coal Co. v. Mahon, 260 U.S. 393, 414 (1922).
56. *See* Palazzolo v. Rhode Island, 533 U.S. 606, 622 (2001).

C. The Inception of Investment-Backed Expectations into the American Polity

In the period leading up to *Penn Central*, critics of both the nuisance and diminution-in-value standards for assessing just compensation cases argued that both these tests were fundamentally erroneous. This view was premised on the belief that property should be defined in terms of efficiency rather than in terms of history and legal tradition.[57] Instead of viewing property as a fee simple absolute subject to certain limitations by the state,[58] these critics asked, why not define property as a delegated group of rights originating with the sovereign? For example, in *Pennsylvania Coal*, one could reason that property consists of two things, mining rights and surface rights, and nothing else.[59] This, they argued, was a more operative solution and would yield more predictable results than the assumption that property exists in all possible uses of the land. Under this theory, it would seem that even the right of exclusion, basic to the traditional concept of property, would be reassessed based on cost-benefit and Coase analysis.[60] These ideas are indeed derivative of the Holmesian diminution-in-value test. In his formulation of that test, Holmes deemphasized the central importance of assessing whether or not an actual property right was infringed and instead looked with more concern to the magnitude of the possible infringement.

Based on this general viewpoint, the term investment-backed expectations was coined by Frank Michelman in 1967 as a purely utilitarian concept.[61] As distinct from the many different ways that the Court uses the term today, however, Michelman qualified the use of this standard by stating that it is not always necessary to satisfy one's investment-backed expectations.[62] Rather, such expectations are simply one relevant factor that should be entered into the equation when determining the most efficient outcome. Michelman argued that we should identify compensable takings by considering three quantities: efficiency gains, demoralization costs, and settlement costs (similar to Coase's term "transactional costs").[63] Michelman identified

57. *See generally* Michelman, *supra* note 40; Sax, *supra* note 40, at 61–64. For a contemporary analysis consistent with these views, see Note, *Taking Back Takings: A Coasean Approach to Regulation*, 106 HARV. L. REV. 914 (1993).

58. These limitations could be limits imposed by the state's property regime or regulations not crossing the threshold of Holmes's diminution-in-value test.

59. *See* Michelman, *supra* note 40, at 1193.

60. *See generally* Coase, *supra* note 40. For a direct application of the Coase Theorem to regulatory takings, see generally Note, *supra* note 57.

61. *See* Michelman, *supra* note 40, at 1233 ("[T]he test . . . asks . . . whether or not the measure in question can easily be seen to have practically deprived the claimant of some *distinctly perceived, sharply crystallized, investment-backed expectation*." (emphasis added)).

62. *Id.* at 1213.

63. *Id.* at 1214–18.

the investment-backed expectations of the property owner as the central criteria for determining the cost of human demoralization.[64] He would determine when a taking should be deemed compensable by subtracting the settlement costs and the demoralization costs from the efficiency gains of a taking.[65] If the efficiency gains were still positive after these subtractions, then presumably under Michelman's theory a taking could be made without compensation. For example, if a property owner expected to make a $100,000 profit on an investment but after regulation would make only a $50,000 profit, then his investment-backed expectations would be significantly disappointed. The property owner might then modify his behavior in the future, making fewer investments than he might otherwise have made and detracting from efficiency gains. Michelman would simply compute this as a demoralization cost, of which a certain number might be permissible before the government's regulation would be deemed compensable in order to avert this cost and promote overall economic efficiency.

Clearly, this view seems incompatible with an analysis of the character of the action (the *Mugler* test). Nevertheless, in the *Penn Central* majority opinion, Justice Brennan reasserts that the nuisance test (although more broadly construed) is a factor which must be balanced with investment-backed expectations:

> In engaging in these essentially ad hoc, factual inquiries, the Court's decisions have identified several factors that have particular significance. The economic impact of the regulation on the claimant and, particularly, the extent to which the regulation has interfered with distinct investment-backed expectations are, of course, relevant considerations. . . . So too, is the character of the governmental action.[66]

Hence, Michelman's formulation of investment-backed expectations came to be the primary basis for assessing when the government has taken too much. In Brennan's articulation of the rule, "distinct investment-backed expectations," a product of functionalism and pragmatism, is strangely wedded to the nuisance concept, which is clearly the product of an entirely distinct line of jurisprudence,[67] and moreover, an entirely distinct system of metaphysics and ethics, traceable to Aristotle.[68] In asserting the nuisance

64. *Id.* at 1215–16.

65. *Id.* at 1215.

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

67. *See* Mugler v. Kansas, 123 U.S. 623 (1887); *see also* Levitt, *supra* note 11, at 207–09.

68. *See* ARISTOTLE, THE POLITICS bk. 7, ch. 8, lines 34–36 (Stephen Everson ed., Cambridge Univ. Press 1988) ("And so states require property, but property, even though living beings are included in it, is no part of a state; for a state is a community of equals, aiming at the best life possible."). Aristotle refers to a political equality that stresses the individual's ownership of himself and his property as a right reserved to the individual when he enters the polis. Michelman explic-

concept as a factor, Justice Brennan hopes to redefine nuisance as any activity, the cessation of which would bestow a public benefit. This is different than its more universal definition as an activity that creates a distinctive harm.[69] The dichotomy between investment-backed expectations and nuisance proves fatal in the Court's later jurisprudence, but for the moment, I return to assessing the meaning of distinct investment-backed expectations, so that its operation in the judicial lexicon can be better understood.

Determining what constitutes distinct investment-backed expectations is clearly a subjective inquiry. It asks the question: What return did the property owner expect to make on his investment? Brennan's central contention is that the Court should focus, not on the objective diminution in value of the property, a test which Brennan and Michelman discredit, but rather on the demoralization of the property owner, a test which Brennan and Michelman favor. The application of the investment-backed expectation standard to the facts of *Penn Central* supports the above analysis of Brennan's opinion:

> [T]he New York City law does not interfere in any way with the present uses of the Terminal. Its designation as a landmark not only permits but contemplates that appellants may continue to use the property precisely as it has been used for the past 65 years: as a railroad terminal containing office space and concessions. So the law does not interfere with what must be regarded as Penn Central's primary expectation concerning the use of the parcel. More importantly, on this record, we must regard the New York City law as permitting Penn Central not only to profit from the Terminal but also to obtain a "reasonable return" on its investment.[70]

The language suggests that Brennan is specifically concerned with not disappointing Penn Central's expectations for its use of the terminal. He is not interested, as then-Justice Rehnquist is, with a mechanical, textually attentive analysis of the Just Compensation Clause.[71] Especially relevant is the fact that Justice Brennan refers to "Penn Central's primary expectation."[72] Therefore, the inquiry is definitively subjective in nature. It seems irrelevant to Brennan what Penn Central's objective rights are with regard to the

itly rejects Aristotle's theory in Book II of *Politics*, expressed in Michelman's words as the idea that "only an owner—an identified person with a clear power and responsibility—will be moved, whether by obligation or pride, to bestow on resources the attention they require in the interest of fruitful production." Michelman, *supra* note 40, at 1206.

69. *See* Michelman, *supra* note 40, at 1196–1201; Sax, *supra* note 40, at 38–42. *But see* RICHARD A. EPSTEIN, TAKINGS: PRIVATE PROPERTY AND THE POWER OF EMINENT DOMAIN 120 (1985) ("The nuisance language may be often misunderstood and misused, but the conception has no inherent weakness that makes misuse inescapable.").

70. *Penn Central*, 438 U.S. at 136.

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

72. *Id.* at 136.

terminal. Consistent with Michelman, he is nearly exclusively concerned about the economic cost of Penn Central's demoralization, based on its subjective, distinct investment-backed expectations. In both *Penn Central* and in a subsequent just compensation case the same year,[73] Brennan shifted the Court's position from one which emphasized the diminution of severable property rights to one which assessed the diminution of an aggregate quantity so as not to overly disappoint a party's expectations. In the latter case, Brennan held that "where an owner possesses a full 'bundle' of property rights, the destruction of one 'strand' of the bundle is not a taking, because the aggregate must be viewed in the entirety."[74]

One should note, however, that the Court, in a third just compensation opinion by Justice Rehnquist the following year,[75] seemed to back away slightly from the dominant position of investment-backed expectations in its balancing test. The grammatical structure of Justice Brennan's statement of the test in *Penn Central* strongly implies that the Court will assess the "economic impact of the regulation on the claimant" by looking to the property owner's "distinct investment-backed expectations."[76] The word "particularly"[77] in Brennan's statement of the test suggests that investment-backed expectations are not an autonomous factor, but rather modify or create a mode of analysis for deciphering "the economic impact of the regulation on the claimant."[78] In contrast, Rehnquist rearticulates the test to separate these two factors, clarifying the rule as a three-prong balancing test: "[The Court] has examined the 'taking' question by engaging in essentially ad hoc, factual inquiries that have identified several factors—such as the economic impact of the regulation, its interference with reasonable investment backed expectations, and the character of the governmental action—that have particular significance."[79]

73. *See* Andrus v. Allard, 444 U.S. 51 (1979).

74. *Id.* at 65–66 (1979). In that case, the Eagle Protection Act, 16 U.S.C. §§ 668–668d, prohibited the sale of bird parts. The statute was upheld on grounds that it destroyed only one property interest in the bundle of property rights. *Id.*

75. Kaiser Aetna v. United States, 444 U.S. 164, 175 (1979).

76. *Penn Central*, 438 U.S. at 124.

77. *Id.*

78. *Id.* at 124.

79. *Kaiser Aetna*, 444 U.S. at 175 (citations omitted). In *Kaiser Aetna*, the Court held that the federal government could not require petitioner to allow the public free access to Kuapa Pond in Hawaii. *Id.* at 180. The federal government had claimed a "navigational servitude" to the pond after it allowed Kaiser Aetna special permission to circumvent permit requirements to improve the pond. *Id.* at 165–69. Compare this language with Brennan's majority opinion in *Penn Central Transportation Co. v. New York City*, 438 U.S. 104, 124 (1978) ("The economic impact of the regulation on the claimant and, particularly, the extent to which the regulation has interfered with distinct investment-backed expectations are, of course, relevant considerations . . . . So, too, is the character of the governmental action.").

In this new formulation of the rule, Rehnquist redefines the term as "*reasonable* investment backed expectations." Generally, the usage of the word "reasonable" in the legal lexicon implies objectivity, which would move the standard away from the subjective expectations of the Brennan/Michelman view. To illustrate this difference, consider it as applied to *Penn Central*. If reasonable investment-backed expectations were applied, then the Court would have to give Penn Central the benefit of all possible uses, because when it gained title to the property, the landmark statute did not exist. There seems to be no way to objectively define reasonable expectations other than as "all those uses which fall within the prerogatives of the current law." In contrast with the objective test, if the Court were to determine, as it did in *Penn Central*, that the actual intentions of Penn Central over a long period of time were probative of their investment-backed expectations, then it would clearly be applying a subjective standard. Therefore, if Rehnquist's interpretation of the balancing test had been applied in *Penn Central*, then the result would be reversed at least with regard to the investment-backed expectations prong of the analysis. Thus, in *Kaiser*, it seems likely that Rehnquist is quietly trying to manipulate the standard in order to bring it in line with the largely objective inquiry of Holmes's diminution-in-value test. The politics here, however, are so subtle that only under careful scrutiny can the difference be perceived. Rehnquist even disguises this movement of the standard as a mere restatement of the Court's *Penn Central* holding. One might be skeptical about whether Rehnquist indeed intended the change in language to have this effect. I would answer that lawyers, and especially those who become Supreme Court Justices, tend to scrutinize language meticulously, particularly as it pertains to the precise holding of a case. Further, in his later dissent in *Keystone Bituminous Coal Ass'n v. DeBenedictis*,[80] Rehnquist again formulated the rule from *Penn Central* so as to avoid the link between the first two prongs of the test. He did this by omitting the word "particularly" in his restatement of the rule.[81]

In both cases, Rehnquist reconstructed the rule in order to make it more objective, pressing the holding of *Penn Central* in order to preserve

80. 480 U.S. 470, 506 (1987) (holding that Pennsylvania's Subsidence Act, PA. STATE ANN. tit. 52, §§ 1406.1–1406.21, restricting the mining of coal in order to minimize subsidence and regulate its consequences, was constitutional). Though the facts of this case are nearly identical to those of *Pennsylvania Coal*, the Court nonetheless reached the opposite result.

81. *Id.* at 516. Rehnquist writes:

> This characteristic of regulations frequently makes unclear the breadth of their impact on identifiable segments of property, and has required that we evaluate the effects in light of the "several factors" enumerated in *Penn Central Transportation Co.*: "The economic impact of the regulation on the claimant, . . . the extent to which the regulation has interfered with investment-backed expectations, [and] the character of the government action."

Id. (alteration in original).

latent expectations. By latent expectations, I refer to those expectations that might not have existed in fact when a landowner acquired title but that existed as a matter of right at that time. These latent expectations would not be relevant from Michelman's perspective, because they would not affect demoralization costs.

In sum, I make two important points in this discussion. First, the language of the Court's jurisprudence shifted from a subjective view of "distinct investment-backed expectations" to an objective view of "reasonable investment-backed expectations." This restated standard stretched investment-backed expectations to mean all legal uses of the land at the time that title is acquired. Second, Supreme Court Justices, as seen here, can use subtle manipulation of language as a means of changing a holding. Such manipulation can only be understood if it is scrutinized with careful attention to concepts such as grammar, usage, and syntax, which subtly change the meaning of language. The Justices can further import different meanings into the same essential language by changing the surrounding text of their opinions. Therefore, it is not always immediately obvious when such a change has occurred. My second point is not a commentary on the investment-backed expectations standard per se, but rather a statement about the judicial process as a latent political process in which incremental changes are made in order to advance political values. Because the concept of property and its distribution are so fundamental to the character and goals of the polity, this debate has been particularly contentious in just compensation jurisprudence.

Thus far, I have identified the sources of confusion regarding the definition of investment-backed expectations. In Part I, I discussed the current Court's disagreement and disjunction with regard to this basic issue of definition in *Palazzolo*. Subsequently, in Part II, I analyzed the origins of the term "investment-backed expectations," its historical manifestations in several different tests, and its relation to and confusion with the older standard of public nuisance. In course, I examined the processes by which judicial standards are articulated in general. The question that remains unanswered is what, if any, movement the Court has made in reconciling the various standards I have discussed. This is exactly the issue I turn to in Part III.

III. *LUCAS V. SOUTH CAROLINA COASTAL COUNCIL*: A CRISIS OF "EXCEPTION"

In *Lucas v. South Carolina Coastal Council*,[82] Justice Scalia uses both the words "expectation" and "nuisance" in developing his categorical rule for

82. See *supra* note 15 for the facts in *Lucas*.

regulatory takings that deprive the claimant of "all economically viable use of the land."[83] At first glance, the case suggests the simple reemergence of a dichotomy between standards that have been competing in the just compensation cases since *Pennsylvania Coal*. Indeed, at central points in the opinion, Scalia seems to rely solely on the nuisance language. Most notably, the Court requires any law that deprives an owner of "all economically viable use"[84] to fall within a restrictive subset of the state's substantive law: "Any limitation so severe cannot be newly legislated or decreed (without compensation), but must inhere in the title itself, in the restriction that background principles of the state's law of property and nuisance already place upon land ownership."[85]

The subsequent language is even more indicative of Scalia's emphasis on the nuisance principle:

> A law or decree with such an effect must . . . do no more than duplicate the result . . . under the State's law of private nuisance, or by the State under its complementary power to abate nuisances that affect the public generally, or otherwise.[86]

Scalia's definition of "nuisance," however, is critical to understanding the full meaning of *Lucas*. Scalia does not attempt, as one might expect, to simply reassert the Court's ancient just compensation standard of harmful or noxious use and to confine it to cases where all economically viable use is taken from the land. Rather, Scalia discredits this standard as inoperative, stating that "the distinction between 'harm-preventing' and 'benefit-conferring' regulation is often in the eye of the beholder."[87] Such an approach would indeed do little more than fully reinstate the *Mugler* line of cases, which proved ineffective in guarding property rights against state aggression.[88] In those cases, it became clear that courts could simply characterize any activity as harmful and noxious when they desired to allow the regulation of property. In *Lucas*, Scalia attempts to avoid this difficulty, which disfavors property rights, and at the same time establish a new criterion for understanding the investment-backed expectations framework of the *Penn Central* test.

In *Lucas*, Scalia does not abandon the *Penn Central* analysis. Instead, he uses it as an opportunity to reintegrate the component factors of that analysis into a logically cohesive test that does not require arbitrary "weigh-

83. Lucas v. S.C. Coastal Council, 505 U.S. 1003, 1016 (1992). This rule is derivative of the Court's statement in *Agins v. City of Tiburon*, 447 U.S. 255, 260 (1980).

84. *Lucas*, 505 U.S. at 1016.

85. *Id.* at 1029.

86. *Id.*

87. *Id.* at 1024.

88. *See* Sax, *supra* note 40, at 38–42.

ing." If one follows Justice Scalia's logic completely, he effectively dissolves the balancing test approach to *Penn Central* and uses the language of that decision to carve out a new standard that he believes better conforms with the Constitution. In so doing, he is able to tacitly overturn the values animating Brennan's decision in *Penn Central* while leaving the language itself intact and paying nominal respect to stare decisis.

Scalia's interpretation of *Penn Central* curiously resembles the theoretical character of Justice Brennan's opinion. In contrast, the more discrete weighing of factors present in Justice Stevens's decision in *Keystone*[89] is far removed from Scalia's integral approach to the analytical tools available to him through the Court's jurisprudence. In *Penn Central*, Brennan's opinion is thematically anchored by a social cost theory of government. This theory is supported by Brennan's statement that there is a heavy burden on the plaintiff when "interference arises from some public program adjusting the benefits and burdens of economic life to promote the common good."[90] Scalia's analysis is entirely congruent with Brennan's to the extent that it forsakes the distinction of harm prevention as opposed to benefit conferral in determining the character of the action.[91] The only difference between their approaches is that Scalia copes with the harmful or noxious use principle as a historical manifestation of "the Court's early attempt to describe in theoretical terms why government may . . . affect property values by regulation without incurring an obligation to compensate."[92] He then dismisses that principle as not directly useful to the analysis.[93] Brennan, on the other hand, melds the factor directly into the Holmesian diminution test, regarding "character" as a question of extent.[94]

At this stage in the analysis, both Scalia and Brennan appeal to *Pennsylvania Coal* to discover the question that embodies the remaining two factors of the alleged balancing test. Both Brennan and Scalia agree with the principle that "[i]f regulation goes too far it will be recognized as a taking."[95] In both Brennan's and Scalia's views, the question cannot really be answered by balancing, but rests solely on the definition of "goes too far" in Holmes's language. Both agree then, that the investment-backed expectations inquiry

89. Keystone Bituminous Coal Ass'n v. DeBenedictis, 480 U.S. 470, 470–506 (1986). *See supra* note 80. Stevens's majority opinion gives weight to both the character of the government action and the landowner's economic expectations and loss, but simply does not address the essential inquiry into what the appropriate criteria should be and which factors are dispositive. *See id.* at 485, 493.

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

91. *See Lucas*, 505 U.S. at 1024.

92. *Id.* at 1022–23.

93. *Id.* at 1023–24.

94. *See Penn Central*, 438 U.S. at 130.

95. *Lucas*, 505 U.S. at 1014 (citations omitted).

is really a tool to answer this larger question, rather than an independent factor as the Court has attempted to describe it in other cases. They further agree that the answer to this question will be dispositive.

Justice Brennan identifies investment-backed expectations as the subjective intentions of the property owner when he gained title.[96] This differs significantly from other ways the Court has interpreted the standard.[97] Yet based even on this extreme position, Justice Scalia's logic succeeds. If all economic value in a plot of land is destroyed by a restriction, Scalia asks, how could that result conform with anyone's investment-backed expectation? Would anyone buy a plot of land expecting that it would be deprived of all value? Because Scalia determines that the answer to this question is obviously no, he reasons that in at least those cases in which all economically viable use of the land is destroyed, the Court need not look at investment-backed expectations at all. In those cases, by default, expectations would be fully disappointed, and regulation would therefore clearly pass the illusive Holmesian threshold for the diminution-in-value test. Because no rational actor would purchase land with a value of less than or equal to zero, it would be impossible in those cases to prove that investment-backed expectations, by any definition of that term, were satisfied. The only thing that could revive the state's defense would be the identification of some restriction inhering in the title of the land itself. That is, according to Scalia, the state must identify some background principle of its substantive law of property or nuisance that inherently alienates the land from the landowner's desired use.[98]

Thus, in *Lucas*, Scalia develops a categorical exception consistent with the logic of *Penn Central*. However, its more profound impact on the Court's jurisprudence is that this decision offers an alternative standard for determining when the diminution in value of property is so great that it constitutes a taking. In the wake of *Lucas*, the Court could just as easily apply the background principle standard to all just compensation determinations, regardless of whether they are total or partial. This logic is hindered only by the Court's usage of the word "expectation" in the judicial lexicon. In cases where the land is only partially deprived of economic use, the point at which the investment-backed expectations of the owner are disappointed is much harder to gauge. To do so requires the Court to apply a conceptually cogent and cohesive definition of investment-backed expectations that amounts to more than an ad hoc, factual inquiry.

96. *Penn Central*, 438 U.S. at 136.
97. *See supra* notes 70–81 and accompanying text.
98. *Lucas*, 505 U.S. at 1029.

Justice Scalia's concurrence in *Palazzolo* reveals an eagerness to push the word "expectation" towards redefinition, differentiating "the investment-backed expectations that the law will take into account" from other definitions of this term.[99] Justice Scalia has expressed this eagerness elsewhere. In one noteworthy dissent for example, he chastised the Court for refusing to hear *Stevens v. City of Cannon Beach*,[100] a case in which Oregon denied a landowner permission to construct a seawall on the dry-sand portion of their property.[101] Because the state simply deprived the petitioner of a fraction of his aggregate property interests, this case clearly dealt with a taking that was only partial.[102] Yet Scalia's opinion in *Cannon Beach* reflects his eagerness to apply the *Lucas* background principle test in this partial takings case:

> Our opinion in *Lucas*, for example, would be a nullity if anything that a state court chooses to denominate "background law"—regardless of whether it is really such—could eliminate property rights. . . . [I]f it cannot fairly be said that an Oregon doctrine of custom deprived Cannon Beach property owners of their rights to exclude others from the dry sand, then the decision now before us has effected an uncompensated taking.[103]

Scalia's opinion in *Stevens* is indeed indicative of Scalia's desire to expand the scope of *Lucas* beyond the categorical rule. The key to dissolving the Court's two-pronged analysis of regulatory takings, as Scalia realizes, lies in the uncertain future of investment-backed expectations. Justice O'Connor has also expressed interest in this redefinition, joining Scalia's dissenting opinion above. She does stop short, however, of joining Justice Scalia's characterization of the standard in *Palazzolo*. In her concurring opinion to *Palazzolo*, O'Connor expresses reservations about Scalia's complete lack of regard for the issue of whether or not the petitioner gains title before or after the regulation takes effect.[104]

Scalia's use of judicial politics in *Lucas* demonstrates the inability of investment-backed expectations to remain stable in the Court's jurisprudence. Clearly, the standard remains open to various ideological trajectories. While its ultimate disposition will depend at least somewhat on the ideological composition of the Court, the standard will also depend on the

99. *See* Palazzolo v. Rhode Island, 533 U.S. 606, 637 (2001) (Scalia, J., concurring).

100. 510 U.S. 1207 (1994).

101. *See Cannon Beach*, 510 U.S. at 1211–14 (1994) (Scalia, J., dissenting) (denying rehearing of a case where Oregon contended that pursuant to the English doctrine of custom allowing public access to beaches, petitioners never possessed the right to obstruct public access to the dry-sand portion of the property), *denying cert. to* 854 P.2d 449 (1993).

102. *See id.*

103. *Id.* at 1211–12.

104. *Palazzolo*, 533 U.S. at 635 (O' Connor, J., concurring).

Justices' ability to create an operative rule that will generate consistent and predictable outcomes.

Because it is fortified by history and attention to the constitutional text, the position that Justice Scalia sets forth in *Lucas* appears largely to accomplish these goals. In the remainder of this Comment, I will first compare, in light of the overarching goals of the Just Compensation Clause, the prospective Scalian baseline definition of investment-backed expectations with the other standards that the Court has thus far articulated in its jurisprudence. I will then turn to a more careful analysis of the application of a background-principles-of-law test to various taking paradigms and discuss both the strengths and weaknesses of this approach. I conclude that for reasons of constitutional integrity, historical accuracy, and political feasibility, the Scalian definition of investment-backed expectations should be adopted as the standard for review in all regulatory takings cases. Such a definition would require the state to identify one of its own background principles of law in order to defeat a just compensation challenge once the petitioner has proven a prima facie taking, whether total or partial.

IV. RECONSTRUCTING REGULATORY TAKINGS: BANISHING THE "HOBBESIAN STICK" FROM THE "LOCKEAN BUNDLE"

In his concurrence in *Palazzolo*, Justice Kennedy clearly condemns a definition of property rights that provides no constitutional baseline. He states: "The State may not put so potent a Hobbesian stick into the Lockean bundle."[105] This comment reveals a willingness, at least by one of the critical swing votes on the Court, to undertake a conceptual reformulation of the investment-backed expectations rule.

A. Investment-Backed Expectations and Constitutional Baselines

Thus far, I have identified three possible definitions of investment-backed expectations. The first, distinct investment-backed expectations, was the meaning originally intended by Brennan in *Penn Central*, and focuses on the property owner's subjective intentions at the time he acquires title and over the course of ownership.[106] The second, reasonable investment-backed expectations, is objective and therefore requires actual notice of an existing rule of law or, arguably, constructive notice of a prospective rule of law.[107] A third approach was introduced by Justice Scalia in *Lucas*

105. *Id.* at 27.
106. *See supra* note 9 and accompanying text.
107. *See supra* note 31 and accompanying text.

and employs a historical baseline test, requiring the state to prove the existence of a formulaic background principle of the state's law of property and nuisance in order for a taking to survive constitutional scrutiny.[108]

I should also note a fourth alternative: completely overturn *Penn Central* and revert to the Court's pre-1920 jurisprudence, requiring the state to identify a harmful or noxious use of the land in order to overcome a claim for just compensation.[109] This standard differs from the Scalian approach because it is derived exclusively from the common law of nuisance and establishes an invariable federal standard to apply to all just compensation challenges. Richard Epstein has been one of the most vehement proponents of this view, resting his conclusions on the theoretical premise that "[t]wo-party transactions are the atoms from which the complex structure of the state is constructed."[110] The state can do no more than identify the same nuisance that an individual claimant could bring in a private nuisance action. In this assertion, Epstein follows John Locke's logic:

> [Sovereignty] can be no more than those persons had in a state of nature before they entered into society, and gave it up to the community. For nobody can transfer to another more power than he has in himself; and nobody has an absolute arbitrary power . . . to take away the life or property of another.[111]

Epstein has been highly critical of Justice Scalia's "flawed methodology."[112] He argues that Scalia's emphasis on *Lucas* overemphasizes the question of diminution while leaving unanswered the larger theoretical question of what powers the state empirically possesses.[113]

Professor Epstein's criticism is valid, yet he ignores the possible use of the historical baseline test in partial takings cases. Epstein's own approach is indeed sound in theory and well grounded in Lockean philosophy. Its application to the American polity, however, would create several problems.

First, Epstein's approach assumes that the United States is a pure Lockean state. This presumption is contentious.[114] While liberalism, especially economic liberalism, was indeed a strong sentiment espoused by the Framers, republican tendencies might also be a consideration in discovering the

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108. *See supra* note 15 and accompanying text.

109. *See, e.g.*, Hadacheck v. Sebastion, 239 U.S. 394 (1915); Mugler v. Kansas, 123 U.S. 623, 669–70 (1887).

110. *See* EPSTEIN, *supra* note 69, at ix.

111. *Id.* at 12 (citation omitted).

112. *See* Richard A. Epstein, Lucas v. South Carolina Coastal Council: A *Tangled Web of Expectations*, 45 STAN. L. REV. 1369, 1376 (1993).

113. *Id.* at 1376–77.

114. *See* Treanor, *supra* note 1, at 698. *See generally* BERNARD BAILYN, THE IDEOLOGICAL ORIGINS OF THE AMERICAN REVOLUTION 34–93 (1967); GORDON S. WOOD, THE CREATION OF THE AMERICAN REPUBLIC: 1776–1787, at 46–90 (1969).

meaning of the constitutional text. Furthermore, even if one were to proceed on the assumption that the Constitution generally embodies Lockean principles, the problem of constitutional federalism still looms like the phoenix. State laws date as far back as their colonial origins, prior to Locke's birth.[115] While it is true that such laws did undergo substantial change, especially in the period leading up to and just beyond the American Revolution, it would be fictitious to suppose that they conformed perfectly with Locke's theory of property. One still might argue that a uniform liberal theory of property was made binding against the states by the Fourteenth Amendment, but to do so would largely eclipse a state's rights to define its own substantive law of property, a result that seems abhorrent to federalist ideals.

Furthermore, given the Rehnquist Court's consistent deference to the notion of dual federalism, it would seem imprudent to argue that a single theory of property controls the law of every state. Even if it is an empirically correct interpretation of the Constitution, Professor Epstein's theory, at least for the foreseeable future, is not viable as a political matter. Even Justice Kennedy, who has otherwise been supportive of property rights, specifically denounces this approach in his concurrence to *Lucas*, preferring to judge the definition of property protected by the Constitution "in light of the whole of our legal tradition," not just with respect to the common law of nuisance.[116]

Further, and perhaps more importantly, a historical baseline could be more easily integrated into the Court's jurisprudence, as I've already discussed in Part II, by defining investment-backed expectations as those expectations rooted in the historical moment at which the Just Compensation Clause was conceived. The same cannot be done with the restrictive view taken by Epstein. The parameters of the standard Epstein imagines exist solely on a theoretical basis and are not supported by the principles that comprise the legal backdrop for modern property regimes.

It is important to note that a historical baseline could be applied to the Just Compensation Clause without the medium of investment-backed expectations. In fact, investment-backed expectations complicate the matter. One could more simply state that the Just Compensation Clause entitles citizens to the full protection of their property rights as defined by the background laws of property and nuisance in each state.

This would indeed be the methodologically correct way to interpret the Just Compensation Clause, as binding the law to the dictates of a historical moment is the central purpose of a constitution. Yet judicial strategy re-

115. Locke was born in 1632. JOHN LOCKE, THE SECOND TREATISE OF CIVIL GOVERNMENT, at viii (Peter Laslett ed., 1988).

116. 505 U.S. 1003, 1035 (1992) (Kennedy, J., concurring).

quires a slightly more elaborate scheme. By applying the historical baseline through the medium of investment-backed expectations, it is possible to obtain the same standard without repudiating a long-standing precedent.

B. The Historical Baseline and Distributive Justice

In this part I will first explain why, from a methodological perspective, history should be a dispositive factor in constitutional interpretation as a general rule. I will then discuss theories of distributive justice as they might pertain to the Just Compensation Clause in light of this conclusion.

The judicial process of hermeneutics, or the science of textual interpretation, must begin at an epistemological level. Therefore, jurisprudence faces the same challenges that surround the crisis of linguistics in general.

The Constitution is, at a basic level, an ordered selection of words. These words constitute "the supreme Law of the Land."[117] Because the Constitution is a selection of words comprising the supreme law of the land, language is logically dispositive in constitutional interpretation. When one contemplates the nature of language, he finds meaningful definition necessarily linked to the past uses of the words he wishes to expound. Etymology, the process of deciphering a word's meaning through its origins, is fused with and embedded in our social and political history. Therefore, by virtue of the inferences drawn above, history is probative of language. In other words, history illuminates for us the substantive meaning that cannot be confined to the reductive models of thought that are words. By following this approach to hermeneutics, the jurist safely anchors the rights envisioned by the Framers to language and history and therefore fortifies them against the whims of the political moment. Indeed, the judiciary acts as the institutional "guardian" of those rights given special or implied protection by the Bill of Rights or any other portion of the Constitution. James Madison pressed this point with the first Congress: "Independent tribunals of justice will consider themselves *in a peculiar manner* the guardians of those rights . . . [T]hey will be naturally led to resist every encroachment upon rights expressly stipulated for in the Constitution by the declaration of rights."[118] This view is consistent with natural law. The Constitution provides an absolute barrier to the creeping hand of the state, and it is the distinctive role of the judiciary to guard against an invasion of political rights, especially those defining the very character of a state. Though the exact definition of those rights is in some quarters uncertain, this is not the

117. U.S. CONST. art VI, cl. 2.

118. 12 THE PAPERS OF JAMES MADISON 266–68 (Charles F. Hobson & Robert A Rutland eds., 1979) (emphasis added), *quoted in* JAMES W. ELY, JR., THE GUARDIAN OF EVERY OTHER RIGHT: A CONSTITUTIONAL HISTORY OF PROPERTY RIGHTS 56 (1998).

case with those pertaining to property. Rather, the protection of private property is the first objective of government under the Constitution. Therefore, property should enjoy the most liberal protections. Indeed, as I have noted and again emphasize, the metaphysical foundations supporting this premise were erected by John Locke in the Anglo-Saxon political space. Speaking of the beginning of political societies, Locke writes:

> Men being, as has been said, by nature all free, equal, and independent, no one can be put out of this estate, and subjected to the political power of another, without his own consent. The only way whereby any one divests himself of his natural liberty and puts on the bonds of civil society is by agreeing with other men to join and unite into a community for their comfortable, safe, and peaceable living one amongst another, in a secure enjoyment of their properties, and a greater security against any that are not of it.[119]

Madison's particular genius was his ability to put these principles into a constitution that could serve as the charter of the individualist civilization imagined by Locke. Madison was vehemently supportive of the sanctity of private property. Although the issue of regulatory takings was never prevalent in his day, his remarks about the security of real property are informative of the definition of private property that finds its home in the Constitution. In 1787, Madison said to the Federal Convention:

> [O]ur government ought to secure *the permanent interests of the country against innovation*. Landholders ought to have a share in the government, to support these invaluable interests, and to balance and check the other. They ought to be so constituted as to protect the minority of the opulent against the majority.[120]

The opinions of one man are not dispositive. But surely the intentions of the Just Compensation Clause's author is probative of the meaning of the constitutional text, especially when he is discussing the specific term that the Constitution uses—in its specific legal context no less.[121]

Madison's opinion here reflects his view both of the function of the Constitution in the political system and the high priority accorded to the security of private property against the will of the majority.[122] This contrasts profoundly with the more malleable view of property taken by Justice Brennan in *Penn Central*. Justice Brennan's goal was clearly social efficiency. To

119. LOCKE, *supra* note 115, § 95.

120. James Madison, The Propertied Minority Ought to Be Protected, *in* THE COMPLETE MADISON 45 (Saul K. Padover ed., 1953) (emphasis added).

121. James Madison, Speech to the House of Representatives Presenting the Proposed Bill of Rights (June 8, 1789), *reprinted in* DANIEL A. FARBER ET AL., CONSTITUTIONAL LAW: THEMES FOR THE CONSTITUTION'S THIRD CENTURY app. 3, at 33 (2d ed. 1998).

122. Madison, *supra* note 120.

achieve this goal, Brennan adopted a more relaxed view of the Just Compensation Clause that focused on the degree of economic impact. Under the Brennan view, the Constitution would tolerate a certain amount of private property being employed for public use, regardless of the character of the right being seized. This seems irreconcilable with Madison's understanding of property, as he lays out per se in the March 29, 1792, edition of the *National Gazette*:

> This term in its particular application means "that domination which one man claims and exercises over the external things of the world, in exclusion of every other individual."
>
> In its larger and juster meaning, it embraces every thing to which a man may attach a value and have a right . . . .[123]

This idea is more consistent with the indestructible bundle theory expounded by Rehnquist in his *Penn Central* dissent than with the subjective criterion of distinct investment-backed expectations established by Brennan for the Court. Though Brennan offers no serious theoretical justification for this approach, Michelman does make such an effort.[124]

In place of the Lockean premises on which Madison's conclusions are based, Michelman appeals to the rival theory of John Rawls,[125] which questions the metaphysical premise that "all men are born free."[126] Rawls's disagreement with Locke's contention is based on Rawls's view that the assignment of talents, intellectual strengths, and social advantages in society is a product of evolution and luck and is therefore arbitrary.[127] Contrary to Locke, Rawls views the inequitable assignment of property and rights at the inception of the social contract as dispositive.[128]

To cope with this problem, Rawls imagines a "veil of ignorance," an original position in which parties to the social contract will not know their eventual place in society.[129] Behind the veil of ignorance, parties can determine what would be the most efficient distribution of resources in society without reference to their particular position within it. Rawls writes:

> The difficulty is this: we must specify a point of view from which a fair agreement between free and equal persons can be reached; but this point of view must be removed from and not distorted by the

123. James Madison, *Property and Liberty*, NAT'L GAZETTE, Mar. 29, 1792, *reprinted in* THE COMPLETE MADISON, *supra* note 120, at 267.

124. *See* Michelman, *supra* note 40, at 1218–34.

125. JOHN RAWLS, JUSTICE AS FAIRNESS: A RESTATEMENT 15 (Erin Kelley ed., 2001).

126. *See* LOCKE, *supra* note 115, § 87; *accord* James Madison, *Who Are the Best Keepers of the People's Liberties?*, NAT'L GAZETTE, Dec. 20, 1792, *reprinted in* THE COMPLETE MADISON, *supra* note 120, at 43.

127. RAWLS, *supra* note 125, at 16.

128. *Id.* at 16–17.

129. *Id.* at 15.

> particular features and circumstances of the existing basic structure. . . . In the original position, the parties are not allowed to know the social position or the particular comprehensive doctrines of the persons they represent. They also do not know persons' race and ethnic group, sex, or various native endowments such as strength and intelligence . . . .[130]

Rawls's interpretation of distributive justice poses a fascinating metaphysical problem. However, it is easily discernable that a Rawlsian distribution of property, grounded in these underpinning premises, is at odds with those philosophical premises that breathe life into the Constitution. Hence, although Michelman may have succeeded in offering a reasonable theory of justice that would support his position, that theory is at odds with the Just Compensation Clause fundamentally. In a direct affront to Rawls's theory, Madison writes in *Federalist No. 10*[131] that the right of property is derived from "diversity in the faculties of men" and states that the "protection of these faculties, is the first object of government."[132]

Because there is such compelling evidence that the theory Rawls espouses has no role in the metaphysical backdrop of the Constitution, it is not necessary to explore this difficulty any further. Regardless of whether Rawls's assertions are valid, they are alien to the Constitution, and that is the information relevant to a proper constitutional inquiry. The system of distributive justice that the Constitution endorses is based on a Lockean metaphysical premise. Therefore, Michelman's attempts to use Rawls's arguments as a means of advancing his contentions are as logical as fitting a square block into a round hole. In contrast, the use of a historical baseline to interpret the Just Compensation Clause integrates that provision directly into the central themes of the federal Constitution, which are natural law, economic liberty, and federalism.[133]

C. A Historical Baseline as Consistent with the Purposes of the Just Compensation Clause

In the course of this Comment, I have noted essentially three possible standards that the Court might apply to the Just Compensation Clause in its regulatory takings jurisprudence. These are the early nuisance or noxious

130. *Id.*; *see also* JOHN RAWLS, POLITICAL LIBERALISM (1993); JOHN RAWLS, A THEORY OF JUSTICE (1971).

131. THE FEDERALIST NO. 10, *supra* note 3.

132. *Id.* at 43.

133. *See, e.g.*, U.S. CONST. art. I, § 10 ("No state shall . . . pass any . . . law impairing the Obligation of Contracts . . . ."); U.S. CONST. amend. V ("No person shall . . . be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.").

use test, the modern diminution-in-value test, and the historical baseline test imagined by Justice Scalia in *Lucas*. That case aside, the Court has essentially used investment-backed expectations up to this point in its jurisprudence as a means of implementing a version of the diminution-in-value test. That test determines when the Just Compensation Clause has been offended by looking either to the subjective intentions of the landowner (Michelman's and Brennan's formulation) or to the possible uses of the property under the laws of the state at the time that title was transferred (Rehnquist's formulation). In concert with this test, the Court has also looked to the "character of the action" as a collateral means of finding uncompensable takings. This has given the Court alternative mechanisms in order to deem particular regulations constitutional without compensation.

A principled view of the Constitution as a truly basic law will not allow such a flexible interpretation of one of its most important checks on government power. A meaningful interpretation of the Just Compensation Clause requires that jurists assess regulatory takings with a view to the entire legal framework upon which the law of property was constructed in the United States. That will require an acute attention to history and the development of a set of juridical rules that will animate the application of a constitutional baseline.

To test the validity of the historical baseline test, there are three important inquiries that must be addressed. First, is that standard clear enough to produce consistent and administrable results in the Court's jurisprudence? Second, does the standard leave the state with a substantial police power consistent with principled federalism? Third, and perhaps most important, does the standard protect property rights? I now turn to address these questions empirically and to contextualize the conclusions I draw to those inquiries by illustrating them with the facts of the major regulatory takings cases I have discussed in this Comment.

With regard to the first question, the test requires that the Court develop a clear rule defining "background principles of the state's law of property and nuisance."[134] Recent appellate case law has suggested that this language could be interpreted in various ways.[135] The primary difficulty, as

134. Lucas v. S.C. Coastal Council, 505 U.S. 1003, 1029 (1992).

135. *See* City of Virginia Beach v. Bell, 498 S.E.2d 414, 415–19 (Va. 1998) (holding that because a regulatory ordinance predated the Bells' acquisition of a property, it was therefore a background principle of property law according to the *Lucas* standard); *see also* M & J Coal Co. v. United States, 47 F.3d 1148, 1152–55 (Fed. Cir. 1995); Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency, 34 F. Supp. 2d 1226, 1238–55 (D. Nev. 1999), *rev'd*, 216 F.3d 764 (9th Cir. 2000), *aff'd*, 122 S. Ct. 1465 (2002); Hunziker v. State, 519 N.W.2d 367, 368–71 (Iowa 1994); Anello v. Zoning Bd. of Appeals, 678 N.E.2d 870, 871 (N.Y. 1997). These cases suggest that *Lucas* has been interpreted as primarily importing a "notice" rule. *But see* Stevens v. City of Cannon Beach, 510 U.S. 1207, 1211 (1994) (discussed *supra* Part III). *See also* Brittany Adams,

many critics have noted, is that Scalia's historical baseline does not clearly state when a particular law is part of the background principles of the state's laws.[136] Most state and federal courts have held that any new statute, once enacted, becomes part of the state's background principles of law.[137] One conceivable justification for this view is that it is contrary to the doctrine of separation of powers to accord more weight to the common law than to statutory law. Yet considering Scalia's remarks in *Lucas*, it seems to me that the distinction is one of the character of the law rather than of its institutional origin. The confusion most likely flows from Scalia's language, which seems to restrain the legislature in particular:

> We emphasize that to win its case South Carolina must do more than proffer the legislature's declaration that the uses Lucas desires are inconsistent with the public interest, or the conclusory assertion that they violate a common-law maxim such as *sic utere tuo ut alienum non laedas*.[138]

Scalia clarifies this in *Stevens v. City of Cannon Beach*.[139] There he emphasizes that the rule shows no preference for the common law per se, arguing, "No more by *judicial* decree than by *legislative* fiat may a state transform private property into public property without compensation."[140]

The fact that Scalia's language in *Lucas* implicates the common law is more correctly understood as a function of American legal history. Stemming from the English common law system, the background principles of the states' substantive law were conceived at common law. Yet it is their character as background principles rather than their origin in the common law that makes them part of the legal baseline that gives definition and constitutional force to the concept of property as the Framers understood it. This is consistent with the central objective of the historical baseline, and indeed, the Just Compensation Clause itself. That objective, embodied by the intent of the Fifth and Fourteenth Amendments, is to preserve the revolutionary concept of private property for future generations and to enforce it against the states and the federal government alike. The confusion that has emerged regarding the definition and scope of the historical baseline test in *Lucas* is unconvincing evidence that the standard is inherently dysfunctional. The need to articulate further the parameters of a rule after its initial

Note, *From* Lucas *to* Palazzolo*: A Case Study of Title Limitations*, 16 J. LAND USE & ENVTL. L. 225, 233–53 (2001).

136. *See, e.g.*, John A. Humbach, *Evolving Thresholds of Nuisance and the Takings Clause*, 18 COLUM. J. ENVTL. L. 1, 16 (1993).

137. *See supra* note 135.

138. *Lucas*, 505 U.S. at 1031.

139. *See Cannon Beach*, 510 U.S. at 1211–12.

140. *Id.* at 1212 (citing Webb's Fabulous Pharmacies, Inc. v. Beckwith, 449 U.S. 155, 164 (1980)) (emphasis added).

induction into jurisprudence is a normal phenomenon and is indicative of one of the most basic limitations on language as a tool of human knowledge and social progress. To be certain, many questions remain unanswered about the *Lucas* standard. Foremost, of course, is whether it will gain acceptance in the realm of partial as well as total regulatory takings. But beyond that, the Court has yet to identify the dimensions of property law that are actually formulaic and structural in nature. Further, its future jurisprudence might address such specific issues as which genres of statutory provisions comport with background principles and to what extent the Court would tolerate variance in the background principles of different states. It might further carve out various levels of scrutiny for assessing the compliance of different aspects of a state's law of property with the Just Compensation Clause. These inquiries would not only lead to sound constitutional analysis but would inevitably generate a conceptual crystallization of the discrete realms in which the federal and state governments are sovereign. The Court would be forced to cope with the details of the federal system and thereby bring them into the public eye. This mode of jurisprudence could play an important role in emphasizing the federal character of American political life.

A second issue that must be addressed is whether a historical baseline test affords the state an adequate police power that is consistent with our system of federalism. To be sure, the historical baseline test intrinsically respects state law by making it the starting point for any just compensation inquiry. For instance, every state recognizes the concept of nuisance in one form or another. Therefore, even under Epstein's more extreme approach, the Court would look to the state's law of property in determining whether for example, the deprivation of lateral support would constitute a nuisance.[141] Further, the historical baseline test would be less arbitrary than the simple diminution-in-value test set forth by Justice Holmes.[142] Indeed, Holmes's incomplete analysis leaves the scope of the police power dangling unresolved. For if the question is only "one of degree," where can the state expect to draw the line defining the limit of its police power? Just as that simple test would allow an activist judiciary to expand the police power by finding that substantial yet partial takings are constitutional, it would likewise allow the dwarfing of the police power by an ideologically inapposite judiciary. The latter might find under a strict diminution-in-value test that any deprivation of value greater than 10 percent constitutes a taking regardless of the character of the action. This is obviously not consistent with the command of the Just Compensation Clause.

141. *See* Brief of the Institute for Justice as Amicus Curiae Brief in Support of Petitioner, *Lucas*, 505 U.S. 1003 (No. 91-435), *reprinted in* 25 LOY. L.A. L. REV. 1233, 1241–50 (1992).

142. *See supra* note 46 and accompanying text.

History provides a stable point of reference. The Court correctly realizes this in *Lucas* when it emphasizes that state regulations must be consistent "with the historical compact recorded in the Takings Clause that has become part of our constitutional culture."[143] History will admittedly focus on the "character of the action" more than the magnitude of the taking, yet this is entirely consistent with the way that rights ought to be defined in the metaphysical universe envisioned by the Framers. In the liberal view, rights are not the product of careful social balancing, but rather inalienable reservations of power designed to preserve the dignity and individuality of each citizen.

The third question I pose in my examination of the historical baseline test is whether it in fact preserves property rights, which is, after all, the fundamental goal of the Just Compensation Clause. As I have already stated, a historical baseline test would remedy the theoretical void that descended from Holmes's pragmatism in *Pennsylvania Coal*. Therefore, it would be a powerful tool of analysis when applied to cases that otherwise seem indeterminate. The historical baseline accomplishes this in two ways. First, once the devaluation of property is proven prima facie by the petitioner, the burden would automatically fall on the state to prove the existence of a background principle that supports its regulation. This is consistent with the grammatical structure of the constitutional text, which imposes an affirmative duty on the state to compensate when property has been taken for public use.[144] This by-product of the historical baseline approach gives the aggrieved landowner a sizeable procedural advantage, and therefore should be understood as an advantage of this test. Second, the standard safely anchors the Just Compensation Clause in history. Regardless of what direction the Court attempts to push its jurisprudence, a historical baseline reserves the right for jurists to appeal to the former character and structure of society as a conceptual model for the future. I now turn to illustrate a reconstructed regulatory takings scheme with examples from various periods in the Court's jurisprudence.

In *Mugler v. Kansas*, the state statute in question required that "all rooms, taverns, eating-houses, bazaars, restaurants, groceries, coffee-houses, cellars, or other places of public resort where intoxicating liquors were sold, in violation of law, should be abated as public nuisances."[145] This law indeed placed novel restrictions on the use of property that the law had not previously acknowledged. These restrictions condemned businesses that had operated in Kansas for a long period of time and upon which liquor manufac-

143. *Lucas*, 505 U.S. at 1028.

144. *See supra* note 6.

145. Mugler v. Kansas, 123 U.S. 623, 655 (1887).

turers in that state had justly depended.[146] In essence, the new statute caused property that had for a long time been a legal source of someone's livelihood to be practically useless.

The trouble with Harlan's test[147] is that while the statute could be justified as a restriction of a noxious use, history has proven that there are no reliable parameters for what constitutes such a use. This strikes at a more fundamental question that has haunted the Supreme Court ever since it adopted the character of the invasion as a factor for consideration in regulatory takings. Does the Just Compensation Clause allow a public nuisance to be whatever the Court says it is? If property rights are to enjoy any degree of stable protection, in my opinion, the answer must certainly be no. Yet a problem that my answer might pose is this: If the state is not allowed to define its own law of property, then have we not moved away from the critical balance of power between the state and federal governments inherent in principled federalism?

The historical baseline test provides the most equitable and practical solution to this problem. Under the approach taken by Scalia in *Lucas*, the opinion of the legislature on what constitutes a public nuisance would not be enough to allow an uncompensable taking. Such a method would not protect the stability of property rights and would not provide citizens with long-standing norms on which they could depend, because it is much too malleable to the whims of the majority faction. Rather, under Scalia's approach, the state would be burdened to demonstrate a "background principle of [its] law of property or nuisance" in order to justify the taking without compensation.[148] The word "background" as used by Scalia implies both the character of the law and its age. So at the very least, Kansas would need to show some long-standing principle of its law on which citizens have relied, that prohibits the sale or manufacture of liquor in the way proscribed by the statute in question. Because there is no evidence that such a statute ever existed before 1881 when the one in question took effect, Kansas would most likely fail in satisfying this burden. To be sure, the historical baseline test would protect private property at the expense of preventing the majority political faction of the state from advancing its vision of social progress. However, this is a prioritization of political goals that the Just Compensation Clause commands.

Euclid is another early case that illustrates this tension between property and "progress." Although it was decided after the inception of the diminution-in-value test, the Court never reached that level of analysis. Instead,

146. *Id.* at 654.

147. *See supra* notes 35–39 and accompanying text.

148. *Lucas*, 505 U.S. at 1029.

it found that no property right exists at all where the state acts to promote the public health, safety, morals, or general welfare of society.[149] The trouble with this logic is that the law the state chooses to enact is not necessarily narrowly tailored to its goals.[150] If the state can confiscate private property any time it acts to promote the health, safety, morals, or general welfare, then the state enjoys a virtually unlimited right to do so. In contrast, a historical baseline test would provide an approach that respects both the state's police power and the federal rights at stake. Under a historical analysis, the Court would begin by inquiring what sorts of relevant actions, over the course of time, have constituted nuisances in Euclid under both local laws and those of the state of Ohio. It would then determine whether new circumstances (that is, mass urbanization) required new restrictions in order to promote the same balance of rights that already existed. If it decided in the affirmative, then the Court would still need to look to whether the statute in question was narrowly tailored in order to meet those legitimate state goals. Because it is possible that Euclid could have met these goals with less restrictive regulations, the ordinance would likely not pass constitutional muster. The historical baseline would animate the Court's jurisprudence in this manner by compelling it to shape the world of the future with the values that have shaped our past.

Next, consider the way the historical baseline might resolve the disagreement between Justice Holmes and Justice Brandeis in *Pennsylvania Coal*. There, Justice Holmes began his opinion by noting that no nuisance had occurred; Justice Brandeis dissented, emphatically stressing that Pennsylvania Coal's actions could be considered a nuisance. Without importing history to define the contours of the relevant law of property, the question of whether or not a particular use constitutes a nuisance is a fine theoretical point. The principle of public nuisance can be construed broadly or narrowly, depending upon the scope and definition utilized. However, Holmes offers one insight that approaches a solution to this issue. He states: "[T]he extent of the taking is great. It purports to abolish what is recognized in Pennsylvania as an estate in land."[151] The second half of this statement hints at the importance of Pennsylvania law in determining whether a taking has occurred. The only problem is that Holmes wrongly links this idea to the "extent of the taking" rather than to the character of the action, which should be the more relevant constitutional inquiry. Holmes correctly notes that mining rights are recognized under Pennsylvania law as a distinct estate in land. So, under a historical baseline approach, the Court would place the burden on Mahon to identify some background principle of Penn-

149. Village of Euclid v. Amber Realty Co., 272 U.S. 365, 395–96 (1926).
150. *See* EPSTEIN, *supra* note 69, at 132.
151. Pa. Coal Co. v. Mahon, 260 U.S. 393, 414 (1922).

sylvania law that would invalidate the recognition of this separate estate in land. If Mahon were unable to do this, then Pennsylvania Coal would prevail.

Though this methodology would have been likely to reach the same result as the Court actually did in *Pennsylvania Coal*, the historical baseline would not have divided the Court's jurisprudence into the two strands of nuisance and diminution in value. Rather, it would have enhanced the character-of-the-action test in order to give it a meaning that focused on the history of the states' law of property and nuisance.

Indeed, the Court made a critical error in dividing its just compensation jurisprudence in this manner. The Court has contended that by assessing regulatory takings in view of these various factors, it engages in an "ad hoc factual inquiry" that weighs the several factors.[152] What the Court operatively accomplishes, however, is the creation of multiple methods of finding a regulatory taking, and this strategy almost always has worked to the detriment of the landowner.

For instance, in *Penn Central*, the Court is able to sidestep the character-of-the-action prong of the test by emphasizing the minimal impact that the Landmarks Preservation Act has on the property interest at stake with respect to distinct investment-backed expectations.[153] The opinion seems disjointed because Brennan never answers the question of whether the character of an action should be judged only by the amount of property that it takes, regardless of whether or not that action is contrary to any previously recognized principle of law. But this is exactly the type of analysis that a multifaceted balancing approach invites. In contrast, a historical baseline test would force the jurist to look to the character of the action with respect to the state's background principles of law. This would not permit the unprincipled "gaming" of the inquiry that Brennan's test promotes. More specifically, Brennan notes that while Penn Central does own the air rights to the space above Grand Central Terminal, it cannot declare those rights as a discrete segment of property. Therefore, when the air rights were taken by the Landmark Preservation Act, they were not considered to be a significant property interest. A historical analysis would respond to Brennan's inquiry in two ways. First, it would denounce Brennan's diminution argument outright, contending that in order to justify the taking, the city must prove not that it does not take a significant property interest, but that it does not take *any* property interest contrary to the background principles of New York's property laws. Second, under a historical analysis, even if diminution in value were a relevant consideration, the common law "right of severance,"

152. Penn Cent. Transp. Co. v. New York City, 438 U.S. 104, 124 (1978).
153. *Id.* at 124.

long recognized in the Anglo-American tradition, would allow Penn Central to define its air rights as a separate segment of property.[154]

In *Keystone*, the Court seems to abandon history altogether as a relevant consideration, nearly overturning *Pennsylvania Coal* in spite of specific language to the contrary. In following the ad hoc factual analysis of *Penn Central*, Justice Stevens examines both the character of the action and the investment-backed expectations of Keystone. Stevens contends with regard to the latter that Holmes's acknowledgment that Pennsylvania recognizes a separate estate in mining rights is irrelevant.[155] But rather than use this as the sole basis for deeming the taking constitutional, Stevens also relies on the observation that the action was intended to abate a public nuisance. Stevens reconciles this with Justice Holmes's specific rejection of that contention: "The Subsidence Act is a prime example that 'circumstances may so change in time . . . as to clothe with such a [public] interest what at other times . . . would be a matter of purely private concern.'"[156]

Stevens is correct that "circumstances" might change so as to warrant a change in the law. But the circumstances in *Keystone* nearly match those in *Pennsylvania Coal*. What had really changed in *Keystone* were not the facts of the case but the Court's attitude towards property rights. Justice Stevens's opinion does more to conform with new social priorities than with new facts. If history is dispositive, then the Just Compensation Clause will not oblige this mode of politics in the judiciary. Under a historical analysis, the key fact to solving the case would be Pennsylvania's recognition of a separate estate in mining rights. That fact would set an extremely high burden for the state to overcome in identifying some other aspect of Pennsylvania law that supersedes it. The precedent established in *Pennsylvania Coal* would further heighten that burden because the Court previously recognized the importance of this aspect of Pennsylvania's law in Holmes's opinion.

Note that if one applied Professor Epstein's test, which is essentially a stricter view of Justice Harlan's theory of noxious use, then the result is less clear in both *Pennsylvania Coal* and *Keystone*. If one examines only whether the use of the land was harmful or noxious, while blinded to the other aspects of the state's law of property, there would appear to be a substantial chance that the state could muster sufficient evidence to show a harm caused by mining. In contrast, if one examines the whole of the state's legal tradition, and more specifically its background principles of property law, then that argument is decisively defeated by reference to collateral aspects of

154. *See* John E. Fee, Comment, *Unearthing the Denominator in Regulatory Taking Claims*, 61 U. CHI. L. REV. 1535, 1538–45 (1994).

155. Keystone Bituminous Coal Ass'n v. DeBenedictis, 480 U.S. 470, 501 (1986).

156. *Id.* at 488 (quoting Block v. Hirsh, 256 U.S. 135, 155 (1921)).

the state's law of property that contextualize and gauge the relative importance of nuisance.

Further consider the application of a historical baseline to *Palazzolo v. Rhode Island*. There, Palazzolo's petition to develop the wetland segment of his property was denied based on the judgment of the Rhode Island Department of Natural Resources that "the proposed activities will have significant impacts upon the waters and wetlands of Winnapaug Pond" and that "the proposed alteration . . . will conflict with the Coastal Resources Management Plan presently in effect."[157] In the wetlands context, the critical inquiry under the historical baseline test should be whether the type of use the landowner contemplates is consistent with uses permitted under similar circumstances in the past. Thus, if the restriction in question is nothing more than a reaction to heightened environmental awareness, it may not be enacted consistent with the Just Compensation Clause. Further, the burden must fall on the state to provide some evidence of actual public harm stemming from a public nuisance. Consistent with the rule formulated by Scalia in *Lucas*, the legislature must do more than proffer its reasons for enacting the restrictions. In order to meet the high bar set by the just compensation requirement, the legislature must prove that the restrictions it proffers are narrowly tailored to uphold a background principle of the state's law of property. Suggesting, for instance, that a balanced ecosystem is in the best interest of the state does not come close to meeting this burden. If the state could prove, in contrast, that Palazzolo's use of his land would cause widespread erosion of the surrounding land that could not be remedied through private lawsuits, or that the impact on the ecosystem would be so great that it would nearly destroy the supply of a particular species of fish harvested in the region, then it would have a better case that the land use qualifies as a public nuisance under Rhode Island law. However, the very fact that Rhode Island allowed exceptions to the land use restrictions it imposed on Palazzolo cast doubt on such a possibility. The underlying premise that motivated the state in *Palazzolo* was more likely the proposition that the public has an interest in controlling the uses of Palazzolo's land for the common good, and this is in clear violation of the basic right to exclusion fundamental to the law of property in any state. A historical analysis would bring this point to the forefront more than any other. Therefore, use of this constitutional baseline would be highly effective in protecting property rights.

Short of meeting the historical baseline requirement, Rhode Island would face a calculated choice. Either it would be required to use its power of eminent domain to implement its coastal management plan *with compensation* or it could opt to leave the consequences of wetlands development

157. Palazzolo v. Rhode Island, 533 U.S. 606, 614–15 (2001) (citation omitted).

without remedy. If it chose the former option, it would expend its own resources to pursue a legitimate state interest. This might leave it unable to fund other government enterprises. Yet this is just the sort of constraint that the Constitution imagines in its essential structure. By leaving the bundle of rights associated with private property in the hands of the people, the Just Compensation Clause creates an informal check on the democratic processes of government. The state's police power, a potential source of arbitrary government, is kept in check by its alienation from an indivisible bundle of rights which inheres in the property owner's title under natural law and remains exclusively in his custody as he enters the Lockean state. Brennan's opinion in *Penn Central* directly affronts this fundamental vision of natural law. Instead, he relies on a Rawlsian interpretation of distributive justice that is foreign to the metaphysical universe upon which the political technologies of the Constitution were constructed and integrated by the Framers.

Attention to the historical value premises underpinning the Just Compensation Clause will do a great deal to clarify the ambiguous state of the law. Applying a historical baseline will provide a conclusive and quick answer to most cases involving regulatory takings. Furthermore, such a test would discourage the state from making advances against property rights by imposing a heavy burden of proof upon it every time the state takes such an action.

The lack of such a burden has indeed been the source of creative restrictions on land use such as those in *Palazzolo* or, even more recently, those imposed on the owners of residential housing units in San Francisco.[158] There, the California Court of Appeal based its decision on a lack of evidence that the means of implementing what it deemed to be legitimate state interests were effective and well tailored in meeting those ends.[159] This criterion accords with the broad, ad hoc regime that developed after *Penn Central* and is epitomized even more profoundly by *Keystone*. Focusing on the character-of-the-action prong of the test, the California court in *Cwynar v. City of San Francisco*[160] implies that the relevant factors for consideration are first, whether the state interests have a rational basis, and second, whether they substantially advance those interests. Yet with regard to the first prong of analysis, it would seem indefensible to say that the goals proffered by the

158. *See* Cwynar v. City of San Francisco, 109 Cal. Rptr. 2d 233, 255 (Ct. App. 2001). In *Cwynar*, San Francisco enacted Ordinance G, which restricted a property owner's ability to evict a tenant from a residential unit so that the unit could be used as a residence by the owner or close family member of the owner of the unit. After the Superior Court sustained the city's demurrer, Cwynar appealed to the court of appeal, which reversed. *Id.* at 256.

159. The city identified three government interests: "(1) maintaining a 'reasonable balance' of owner-occupied and rental housing; (2) preserving 'affordable housing'; and (3) avoiding displacement of low-income, elderly and disabled tenants from their homes." *Id.* at 251.

160. *Cwynar*, 109 Cal. Rptr. 2d 233.

city comport with the background principles of the state's laws. Rather, they are novel innovations meant to advance a particular social agenda. Hence, a historical baseline test would bring a quick and decisive conclusion to cases such as *Cwynar*, in which government entities come up with new, creative restrictions on property. Under the historical baseline test I have advocated, any time the state takes property, it would be immediately responsible for identifying a historical basis for its action, firmly rooted in the state's background principles of law. Otherwise, the restriction would be subject to compensation pursuant to the requirement of the Fifth and Fourteenth Amendments.

CONCLUSION: TOWARDS THE LOCKEAN STATE

The fundamental problem that the Court faces in its just compensation jurisprudence remains unaltered by *Palazzolo*. The investment-backed expectations standard articulated by Justice Brennan some twenty-four years ago has not succeeded in providing a workable standard for the Court's jurisprudence. Further, the original interpretation of investment-backed expectations lacks constitutional authority because it corrupts the basic notion of property native to the American political mind. Because it attacks principled federalism by pushing aside the substantive law of the states in favor of either a hopelessly vague diminution-in-value test or an arbitrary weighing of relevant factors, the standard clearly requires revision.

The Court appears ready to undertake this task at some level. The historical baseline test applied to total takings by Justice Scalia in *Lucas* could be easily expanded to include partial takings as well. More importantly, however, the standard seems politically viable. It would not require a complete renunciation of *Penn Central*, only a redefinition of investment-backed expectations to mean those expectations stemming from the structural principles of law that were recognized by the Just Compensation Clause.[161] Hence, a historical baseline test could be adopted without offending the principle of stare decisis. It would clearly command the support of the conservative wing of the Court and, if construed broadly enough to embody principles outside the common law of nuisance, would be likely to capture the critical votes of Justices Kennedy and O'Connor. Justice Kennedy in particular seems willing to adopt a standard that defines expectations "in light of the whole of our legal tradition."[162] Justice O'Connor seems slightly

161. Such a definition of this term would be more consistent with the intent of the Framers to "secure credit and investment capital [and] . . . to shape an intellectual climate receptive to the defense of property rights." ELY, *supra* note 118, at 57.

162. Lucas v. S.C. Coastal Council, 505 U.S. 1003, 1035 (1992); *see also* Palazzolo v. Rhode Island, 533 U.S. 606, 630 (2001) (Kennedy, J.).

more reluctant, expressing reservations about possible windfalls to petitioners when the initial market value of the property reflects unconstitutional restrictions.[163] Yet she does not discount a fundamental revision of *Penn Central* and would be likely to appreciate a standard that delineates a constitutional baseline. Also, the probable retirement of Justice Stevens within the tenure of President George W. Bush makes it likely that another Justice supportive of property rights and an originalist interpretation of the Constitution will be added to the Court in the near future.

A historical baseline test that recognizes "background principles of the state's law of property and nuisance"[164] safely anchors the Just Compensation Clause in the predominantly Lockean framework of the early republic. This approach is more practical than the Court's current approach and will yield more just and consistent results. Further, it protects property rights and encourages the perpetuation of federalism, goals that are central to the Just Compensation Clause and, moreover, to the thematic essence of the Constitution at large.

163. *Palazzolo*, 533 U.S. at 635 (O'Connor, J., concurring).
164. *Id.* at 619.