Deciphering and Extrapolating: Searching for Sense in *Penn Central*

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*The Supreme Court has labeled* Penn Central Transportation Co. v. City of New York *the "polestar" of its regulatory takings doctrine. Yet* Penn Central’s three-part balancing test has been widely criticized as offering nothing more than an amorphous, ad hoc framework that provides little guidance for litigants or courts reviewing takings claims. In the absence of a well defined and predictable takings doctrine, the lower courts are left grasping to make sense of *Penn Central*, and to extrapolate an intelligible standard from its framework. In this article, we examine the origins and interpretations of *Penn Central*, and identify some of the difficulties raised in its application. We explore some of the latest issues the lower courts have been struggling with in fleshing out the doctrine, which may warrant a grant of certiorari if the Roberts Court is willing to bring clarity and cohesion to regulatory takings law.

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INTRODUCTION

The notion that individual landowners hold rights against the State that are entitled to enforcement at law is a very recent one. Recognition of the importance of secure property rights to human flourishing arguably reached its peak in the years preceding and immediately following the American Revolution. Since that time, the competing and historically dominant notion that private property is created by and held at the sufferance of the State has waged a strong and steady resurgence.

For the past century or more, the battle between private and collective control of property in this country has focused on the Takings Clause of the Fifth Amendment and its interpretation in the courts. Except in the extreme circumstances of a permanent governmental invasion of property or the complete prohibition of economically beneficial use of land, most takings challenges to property regulations must be brought under the doctrinal framework of *Penn Central Transportation Co. v. City of New York*. Yet *Penn Central* enunciates at best a tenuous, ad hoc approach to assessing takings liability, which commentators have routinely denounced as an unworkable, if not incomprehensible, standard.

Because *Penn Central* gives no reliable guidance to lower courts engaged in reviewing regulatory takings claims, a veritable cottage industry has developed among scholars and commentators, who regularly attempt to invest the decision’s gauzy rhetoric with meaning. This often amounts to little more

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than an exercise in imagination, given the lack of anchoring from the opinion itself. Nevertheless, these efforts must continue if landowners and regulators hope eventually to arrive at a consensus on the parameters of constitutionality in the regulation of property.

I. THE RISE AND DECLINE OF REGULATORY TAKINGS DOCTRINE

Land-use regulations that effectively dispossessed the owners of private property were challenged as violations of due process throughout the nineteenth-century expansion of the regulatory state. By 1922, the Supreme Court recognized that excessive regulation could also be characterized as running afoul of the Takings Clause. In Pennsylvania Coal Co. v. Mahon, the Court struggled for the first time to enunciate a principled distinction between run-of-the-mill economic interventions and compensable regulatory takings. The normally highly articulate Justice Holmes could do no better than to coin a tautology: “[I]f regulation goes too far it will be recognized as a taking.” Rather than immediately seeking to refine or elaborate upon that standard, however, the Court generally avoided takings cases for the next half-century.

Neither the Supreme Court nor contemporary observers regarded Penn Central as a likely vehicle for elaborating a reasoned doctrine of regulatory takings when probable jurisdiction was noted in 1977. The most plausible reason for granting the plaintiff’s appeal was simply to allow the Court to expunge the bizarre ruling of the New York Court of Appeals in the proceedings below, which had incorporated the economic theories of Henry Ely.

9. See ELY, supra note 1, at 78–81.
10. 260 U.S. 393 (1922).
11. Id. at 415.
12. See Joseph L. Sax, The Property Rights Sweepstakes Has Anyone Held the Winning Ticket?, 34 VT. L. REV. 157, 157 (2009) (“For nearly 50 years . . . regulatory takings litigation was quiescent almost to the point of disregard.”). Those cases that reached the Court contributed little to a general legal paradigm of takings, focusing instead on the unique factual details of each dispute. The only noteworthy exception was Armstrong v. United States, 364 U.S. 40 (1960), which anchored the takings inquiry, like an equal protection claim, in generalized considerations of fairness.

George into that state’s interpretation of the Fifth Amendment. Faced with a complete absence of precedent, Justice Brennan’s majority opinion in Penn Central relied heavily on the analytical structure of a Harvard Law Review article by Professor Frank Michelman. Professor Michelman’s influence was particularly conspicuous in the Court’s recitation of the vaguely-specified factors that should be considered in an evaluation of takings liability: “[t]he 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 subsequent years, the Court took occasional, halting steps to infuse its takings jurisprudence with greater clarity and precision than the foregoing passage. Agins v. City of Tiburon refined Penn Central’s focus on the character and economic impact of challenged regulations, restating the inquiry as whether the restrictions failed to substantially advance legitimate state interests or deprived property of economically viable use. Loretto v. Teleprompter Manhattan CATV Corp. established that a permanent physical invasion of property is always compensable, while Lucas v. South Carolina Coastal Council did the same for land-use restrictions that deprive property of all economically beneficial use. Nollan v. California Coastal Commission imposed heightened judicial scrutiny of at least some permit conditions, and First English Evangelical Lutheran Church v. County of Los Angeles held that even temporary takings require just compensation under the Fifth Amendment.

In the final decade of the Rehnquist Court, however, these seeming advances in takings doctrine were almost all undermined or stripped away. Tahoe-Sierra Preservation Council v. Tahoe Regional Planning Agency implicitly overruled First English and seemingly redefined Lucas as applying only when property is permanently deprived of all economic value. Lingle v. Chevron USA Inc. abandoned Agins’s substantial advancement standard, and clouded the applicability of Nollan’s heightened scrutiny requirement. Even Loretto’s bright-line physical invasion rule has been called into question by

subsequent dicta that suggests physical takings may trigger only heightened scrutiny, rather than categorical liability.\(^{24}\)

Having successively divested itself of the more specialized tools it had crafted for evaluating takings liability over the past three decades, the Court was left at the end of the Rehnquist era back where it started with no guidance beyond the ad hoc, standardless, situational relativism of *Penn Central*.\(^{25}\) It is a measure of the doctrinal fog with which the Court has shrouded itself that the formless, directionless haze embodied by that decision has been called the “polestar” of the Court’s regulatory takings doctrine.\(^{26}\) With authoritative, substantive interpretations of the central provisions of *Penn Central* still lacking, jurists, scholars, and practitioners must fill in the blanks as best they can.

II. GROPING FOR MEANING BY THE LIGHT OF THE POLESTAR: CONSTITUTIONAL DOCTRINE AS A HIGH-STAKES CRAPSHOOT

If judicial opinions are to promote certainty and predictability in the law, they must rest upon reasoned distinctions and intelligible principles.\(^{27}\) *Penn Central*, by contrast, serves up a barely coherent potpourri of vaguely specified considerations, grounded in the facts and circumstances of each case.\(^{28}\) As a current member of the Court has observed, such an approach suggests that “uniformity is not a particularly important objective with respect to the legal question at issue.”\(^{29}\) And indeed, there has been little uniformity in the outcome of cases decided under *Penn Central*, beyond the fact that the application of the doctrine has been as random and unpredictable as a game of chance.\(^{30}\)

\(^{24}\) For example, Lingle’s characterization of *Nollan* and *Dolan* as supposedly involving physical occupations would logically undermine *Loretto*’s categorical rule, 544 U.S. at 547. In *Nollan* and *Dolan*, the Court applied heightened scrutiny to takings claims challenging extortionate land-use exactions, but if those cases had actually involved permanent physical occupations, then *Loretto* should have triggered per se liability. See also Robert Brauneis, Note, *Taking a Step Back: A Reconsideration of the Takings Test of Nollan v. California Coastal Commission*, 102 Harv. L. Rev. 448, 465–66 (1988) (characterizing *Nollan* as a physical invasion case and thereby interpreting it as “a limited retreat from the rule, enunciated in *Loretto v. Teleprompter Manhattan CATV*, that permanent physical occupation of property by the government is a per se taking”).

\(^{25}\) See *Palazzolo* v. Rhode Island, 533 U.S. 606, 633 (2001) (O’Connor, J., concurring) (“Our polestar...remains the principles set forth in *Penn Central*. (quoted in *Tahoe-Sierra*, 535 U.S. at 336 and in Lingle, 544 U.S. at 538)).

\(^{26}\) *Palazzolo*, 533 U.S. at 633; *Tahoe-Sierra*, 535 U.S. at 336.

\(^{27}\) See, e.g., Vieth v. Jubelirer, 541 U.S. 267, 278 (2004) (“[L]aw pronounced by the courts must be principled, rational, and based upon reasoned distinctions.”).


\(^{30}\) *Penn Central* has “resulted in a body of law so arbitrary and rudderless that a government attorney recently argued that no conflicts among the lower courts can possibly arise—since each case is decided on its own facts, no decision has any bearing on the outcome of any other claim.” Radford, supra note 8, at 821 (citing Respondent’s Brief in Opposition to Petition for Certiorari, Giovanella v. Town of Ashland Conservation Comm’n, 549 U.S. 1280 (2007) (No. 06–972)).
By not fleshing out the paradigm it created, the Penn Central Court muddled regulatory takings law to the point that land-use practitioners and regulators alike are left virtually without guidance as to whether any given restriction may rise to the level of a taking. Nonetheless, efforts to extract meaning from Penn Central are not entirely devoid of direction. As noted above, courts attempting to follow the decision are instructed to consider three—or perhaps only two—factors in the partial-takings inquiry, but the opinion does very little to define those factors, and offers no direction as to how they should be weighed, compared, aggregated, or otherwise evaluated.

What follows is a suggested interpretive road map of Penn Central, albeit one in which virtually all the routes are marked “under construction.”

A. Character of the State Action

Penn Central instructs reviewing courts to take account of the “character of the governmental action,” but it is virtually silent as to what sort of considerations that term was meant to encompass. Most commentators who have pondered the question would probably agree with Professor John Echeverria that “[t]he so-called ‘character’ factor is the most confused and confusing feature of regulatory takings doctrine.”

The only guidance the Penn Central Court offered when discussing the character prong was that “a ‘taking’ may more readily be found when the interference with property can be characterized as a physical invasion by government than when interference arises from some public program adjusting the benefits and burdens of economic life to promote the common good.” Yet this example is more confusing than illustrative. Superficially, it might be taken to mean no more than that the character prong weighs in favor of a taking when the government action entails a physical invasion of property, but not otherwise. The Loretto decision, however, seems to imply that the character inquiry was meant to be more nuanced than this. Handed down just four years after Penn Central, Loretto established per se takings liability for permanent physical invasions, thereby placing them outside the Penn Central inquiry.


32. See supra text accompanying note 16. One need not be an English major to notice that, in the Penn Central Court’s formulation of “relevant considerations,” id., the investment-backed expectations factor is subordinate to, and seems to be set out as a particular aspect of, the economic impact prong.

33. Although these factors are almost always treated as comprising a three-pronged “balancing test” (see, e.g., Tahoe-Sierra, 535 U.S. at 317; Loretto, 458 U.S. at 444 (Blackmun, J., dissenting)), they are not so described in Penn Central itself.


35. Echeverria, The “Character” Factor in Regulatory Takings Analysis, supra note 8, at 145.

36. Penn Cent., 438 U.S. at 124 (citations omitted).
altogether.\(^\text{37}\) It must therefore be the case that either the character prong was intended to incorporate a broader array of considerations, or it was rendered superfluous by \textit{Loretto}. Since the Court has never stated that the character prong should be eliminated from the ad hoc, partial takings inquiry, and in fact continues to cite it in cases not involving physical invasions,\(^\text{38}\) this factor must not be so limited in its application.

On the other hand, it is not easy to find relevance in the distinction between physical invasions and regulatory interventions designed to promote the public good. This suggests that enactments which promote the common good are in some sense less likely to rise to the level of a taking; yet courts presume that \textit{all} regulatory acts are designed to promote the common good so long as they can be shown to have a rational basis.\(^\text{39}\) Even physical invasions are routinely justified as promoting some perceived common good, so this distinction is rather unhelpful in clarifying the doctrinal intention underlying \textit{Penn Central}’s character prong.\(^\text{40}\) Moreover, since the Court’s own precedent had previously disavowed the notion that a desire to promote the common good could justify the uncompensated taking of property,\(^\text{41}\) and a subsequent decision banished from the takings analysis any inquiry into the extent to which a regulation in fact advances the common good, \textit{Penn Central}’s dictum on that point seems temporally, as well as conceptually, isolated.\(^\text{42}\)

A number of analysts have suggested that the character prong is best described as grounded in fairness,\(^\text{43}\) and indeed the opaque distinction the opinion advanced might be viewed as a particular application of the principle that individuals should not, in justice, be singled out to bear general public burdens.\(^\text{44}\) Yet incorporating such considerations into a determination of the \textit{character} of a governmental action invites reframing the inquiry as a sort of

\(^{37}\) See \textit{Loretto v. Teleprompter Manhattan CATV Corp.}, 458 U.S. 419, 430 (1982).


\(^{39}\) See, e.g., \textit{Vill. of Euclid v. Ambler Realty Co.}, 272 U.S. 365, 395 (1926) (“[B]efore the ordinance can be declared unconstitutional, [a court must find] that such provisions are clearly arbitrary and unreasonable, having no substantial relation to the public health, safety, morals, or general welfare.”).

\(^{40}\) See \textit{Klumpp v. Borough of Avalon}, 997 A.2d 967, 971 (N.J. 2010) (government buried portion of landowner’s property with sand, creating dunes for the benefit of the public); \textit{Soon Duck Kim v. City of New York}, 681 N.E.2d 312, 313 (N.Y. 1997) (city buried portion of landowner’s property with gravel to provide lateral support for newly elevated street).

\(^{41}\) See \textit{Pa. Coal Co. v. Mahon}, 260 U.S. 393, 416 (1922) (“[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.”).

\(^{42}\) See \textit{Lingle}, 544 U.S. at 544.


\(^{44}\) See \textit{Armstrong v. United States}, 364 U.S. 40, 49 (1960).
“smell test,” whereby acts of governmental bad faith, cronyism, or intentional targeting of discrete individuals or groups would be disfavored.\textsuperscript{45} But those considerations would seem to play more into a due process or equal protection inquiry than a takings analysis.\textsuperscript{46} There seems to be no escaping the conclusion that courts and practitioners are left to their own devices in determining which, if any, of these criteria are relevant under \textit{Penn Central}’s character prong.

B. Economic Impact of the Regulation

\textit{Penn Central} directs reviewing courts to consider the economic impact of a challenged regulation, but once again, the decision is virtually silent as to how this prong should be evaluated and weighed.\textsuperscript{47} A cryptic footnote at the end of the majority opinion, coupled with the Court’s subsequent decision in \textit{Agins}, suggests that a taking may occur when a regulation deprives an owner of “economically viable use,” or the ability to earn a competitive return on the property.\textsuperscript{48} But, ironically, following a landowner’s subsequent victory in \textit{Lucas} establishing categorical takings liability for loss of all economic use of the property, \textit{Penn Central}’s economic impact criterion has sometimes been interpreted as requiring a showing of total economic loss.\textsuperscript{49}

The most straightforward application of the economic impact prong as it was originally conceived would cut in favor of finding liability when regulation substantially impairs an income property’s rate of return.\textsuperscript{50} Any significant

\begin{itemize}
\item \textsuperscript{45} This interpretation can draw on at least fleeting support in Supreme Court opinions and arguments. \textit{See, e.g.}, Tahoe-Sierra Pres. Council v. Tahoe Reg’l Planning Agency, 535 U.S. 302, 334 (2002) (listing governmental “bad faith” as grounds for recovery under a takings theory); Oral Argument at 15:23, City of Monterey v. Del Monte Dunes at Monterey, Ltd., 526 U.S. 687 (No. 97–1235), available at \url{http://www.oyez.org/cases/1990-1999/1998/1998_97_1235/argument} (Justice Scalia: “[W]here you have a consistent process . . . of turning down one plan, the next plan, the next plan . . . isn’t there some point at which . . . you begin to smell a rat?”).
\item \textsuperscript{46} \textit{Cf.} Lingle v. Chevron U.S.A. Inc., 544 U.S. 528, 542 (2005) (“An inquiry” into whether a land-use regulation substantially advances a legitimate governmental purpose “has some logic in the context of a due process challenge,” but not a takings claim).
\item \textsuperscript{48} \textit{See Agins v. City of Tiburon}, 447 U.S. 255, 260 (1980) (a land-use regulation effects a taking if it deprives the owner of “economically viable use”). The Court had described a use of property as “economically viable” only once before, referring to the plaintiff’s ability to earn a competitive return on Grand Central Terminal. \textit{Penn Cent.}, 438 U.S. at 138 n.36.
\item \textsuperscript{49} \textit{See, e.g.}, City of Monterey v. Del Monte Dunes at Monterey, 526 U.S. 687, 700 (1999) (reciting jury instructions calling for Takings Clause liability if regulations failed to substantially advance legitimate interests or deprived the property of all economically viable use). \textit{(Cf.} Timothy J. Dowling, \textit{On History, Takings Jurisprudence, and Palazzolo A Reply to James Burling}, 30 B.C. ENVTL. AFF. L. REV. 65, 96 (2002) (reinterpreting \textit{Penn Central} as turning on the fact that “[b]ecause the owners could still operate the Terminal and the surrounding contiguous properties that they owned, the challenged regulation did not deny them all economically viable use of their entire parcel”).
\item \textsuperscript{50} \textit{See Penn Cent.}, 438 U.S. at 138 n.36 (“[I]f appellants can demonstrate at some point in the future that circumstances have so changed that the Terminal ceases to be ‘economically viable,’ appellants may obtain relief.”). The lack of conceptual precision in the notion of economic viability is well illustrated by \textit{Lucas}, the only case in which a taking was found because of its absence. Justice Scalia’s majority opinion in \textit{Lucas} refers interchangeably to the property’s loss of “economically viable
depreciation in value should therefore presumably weigh in favor of liability, and an impact approaching total deprivation of economically viable use could reasonably be assumed to swamp any countervailing considerations under Penn Central’s remaining two prongs.\textsuperscript{51} Yet some courts have taken the opposite approach, holding that the retention of any residuum of value in a property tips the scales in favor of the government.\textsuperscript{52} This interpretation bears a certain commonality with viewing the character prong as a proxy for a physical invasion. In both instances, subsequently enunciated per se rules would become the default for liability under Penn Central, which is supposedly the Court’s “polestar” for evaluating liability for non-categorical takings!

Unsurprisingly, the Penn Central Court made no effort to resolve, or even to address, any of the thorny issues concerning appropriate methods of measuring economic impact.\textsuperscript{53} Even the question of whether the economic injuries imposed by regulations should be offset by the value of development credits concurrently granted to the owner—an issue that arose under the facts of Penn Central itself—has been left to subsequent courts and litigators to resolve.\textsuperscript{54}

\textbf{C. Distinct (or Reasonable) Investment-Backed Expectations}

The remaining “relevant consideration” Penn Central sets forth is the extent to which a challenged regulation interferes with the property owner’s “distinct, investment-backed expectations.”\textsuperscript{55} As we should expect by now, however, the decision offers virtually no guidance as to precisely what counts as an investment-backed expectation, how to gauge an expectation’s distinctness, or how such expectations are to be weighed in arriving at a

\textsuperscript{51.} See Pa. Coal Co. v. Mahon, 260 U.S. 393, 413 (1922) (“One fact for consideration in determining such limits is the extent of the diminution.”).

\textsuperscript{52.} See, e.g., William C. Haas & Co. v. City and Cnty. of S.F., 605 F.2d 1117, 1120–21 (9th Cir. 1979) (holding that 95 percent diminution in value did not effect a taking); Bernardsville Quarry, Inc. v. Borough of Bernardsville, 608 A.2d 1377, 1386–90 (N.J. 1992) (holding that 90 percent diminution in value did not effect a taking).

\textsuperscript{53.} See, e.g., Wade, supra note 8, at 338-42.


\textsuperscript{55.} Penn Cent., 438 U.S. at 124.
determination of liability. Despite more than three decades of analysis, the best that can be said is that “it is hard to fathom what the court had in mind.”

The Court’s invocation of Professor Michelman’s concern with the extent to which an owner’s subjective plans have been frustrated, which was the immediate progenitor of Penn Central’s focus on “distinct” expectations, was almost immediately abandoned in favor of an evaluation of the reasonableness of those expectations. This switch gave reviewing courts virtually unlimited


57. See Michelman, Property, Utility, and Fairness, supra note 15, at 1233. For a more detailed summary of the theoretical underpinnings of Professor Michelman’s investment-backed expectations concept, see Lynda J. Oswald, Cornering the Quark Investment-Backed Expectations and Economically Viable Uses in Takings Analysis, 70 WASH. L. REV. 91, 101–04 (1995).

58. See Kaiser Aetna v. United States, 444 U.S. 164, 175 (1979) (“[T]his 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.”) (emphasis added); see also Radford & Breemer, supra note 56, at 460–61 (“Regardless of whether, as scholars have argued, this change in terminology was meant to reflect a shift to an objective standard, or represented the adoption of a ‘balancing test that weighs public benefits against private costs,’ the effect has been to invite courts to rely on their own evaluation of the validity of a claimant’s expectations, rather than examining the impact of governmental restrictions in foreclosing distinctly identifiable planned uses of land.”) (citations omitted).
power to determine exactly which proposed uses of land would qualify for protection under the Takings Clause.\(^{59}\)

Some government attorneys seized upon this development to argue that, once restrictive regulations are imposed—regardless of their constitutionality—subsequent landowners can no longer hold a “reasonable” expectation that their right to use their property inconsistently with those regulations will be protected by the courts. This argument, which became known as the regulatory “notice rule,”\(^{60}\) seemed compelling to a number of pro-regulatory judges, resulting in a line of cases ultimately holding that constitutional rights could be snuffed out by the mere possibility that land-use prohibitions might one day be adopted.\(^{61}\)

The Supreme Court repudiated this doctrine in \textit{Palazzolo}, holding that a landowner was free to pursue a regulatory takings claim against the State of Rhode Island, despite the fact that the regulatory scheme at issue had been adopted before he obtained title to the property.\(^{62}\) The Court held that a takings claim may not be foreclosed merely because the owner acquired the property after enactment of the challenged regulation, as such an approach would allow the government to extinguish property rights entirely with successive


\(^{61}\) See, e.g., Claridge v. N.H. Wetlands Bd., 485 A.2d 287, 291 (N.H. 1984) (“A person who purchases land with notice of statutory impediments to the right to develop that land can justify few, if any, legitimate investment-backed expectations of development rights which rise to the level of constitutionally protected property rights.”); Furey v. City of Sacramento, 592 F. Supp. 463, 470 (E.D. Cal. 1984) (“Reasonable in this context, means at least consistent with the law in force at the time of the formation of the expectation.”); City of Va. Beach v. Bell, 498 S.E.2d 414, 417 (Va. 1998) (“[T]he Ordinance at issue here predated Bell’s and the Trustee’s acquisition of the property. Therefore, the ‘bundle of rights’ which either Bell or the Trustee acquired upon obtaining title to the property did not include the right to develop the lots without restrictions.”); McQueen v. S.C. Coastal Council, 530 S.E.2d 628, 634–35 (S.C. 2000) (“[P]rolonged neglect of the property and failure to seek developmental permits in the face of ever more stringent regulations demonstrate a distinct lack of investment-backed expectations.”); But see Nollan v. Cal. Coastal Comm’n, 483 U.S. 825, 833 n.2 (1987) (“Nor are the Nollans’ rights altered because they acquired the land well after the Commission had begun to implement its policy.”); Karam v. State Dep’t of Envtl. Prot., 705 A.2d 1221, 1229 (N.J. Super. Ct. App. Div. 1998) (“We recognize that rights in property pass from one owner to the next. Thus, the right of a property owner to fair compensation when his property is zoned into inutility by changes in the zoning law passes to the next owner despite the latter’s knowledge of the impediment to development.”), aff’d and adopted, 723 A.2d 943 (N.J. 1999); K & K Constr., Inc. v. Dep’t of Natural Res., 551 N.W.2d 413, 417 (Mich. Ct. App. 1996) (“[The Court does] not agree that the timing of the regulation and ownership would act to preclude just compensation where it would otherwise be due.”), rev’d on other grounds, 575 N.W.2d 531 (Mich. 1998).

enactments over time.63 Yet Justice O’Connor’s concurrence in Palazzolo left the door open for courts to assign some weight to the relative timing of land-use restrictions and acquisition of title.64 The details as to when, why, and to what extent these considerations should be relevant are, of course, completely undefined.65 Consequently, it is entirely possible that pro-regulatory courts will place such heavy reliance on the O’Connor concurrence that the majority holding in Palazzolo will be reduced to a curiosity, its significance limited to the facts of the case.66

III. WRITING ON AN (ALMOST) BLANK SLATE: CASES NOW PERCOLATING WITHOUT GUIDANCE WILL SHAPE FUTURE TAKINGS DOCTRINE BY DEFAULT

Perhaps writing while still under the euphoria of Lingle, Professor Echeverria has proclaimed the death of regulatory takings,67 celebrating “the resolution of most of the fundamental questions that, until recently, plagued this field of law.”68 The present authors are more inclined to agree with Professor Joseph Sax, who regards the Supreme Court as having “given up the effort to formulate workable rules for regulatory takings,”69 retreating instead to “the open-ended, I-(hope)-I-know-it-when-I-see-it approach of Penn Central.”70 The fundamental questions in takings law have not been resolved; they have merely been swept under the bed. Or, depending on one’s taste in metaphors, the barn wall has been painted over.

The following cases, recently percolating through the lower federal and state courts, may represent the tabula rasa on which the Roberts Court will inscribe its own version of regulatory takings law, post-Penn Central.

63. Id. at 626 (“The theory underlying the argument that post-enactment purchasers cannot challenge a regulation under the Takings Clause seems to run on these lines: Property rights are created by the State. So by prospective legislation the State can shape and define property rights and reasonable investment backed expectations, and subsequent owners cannot claim any injury from lost value. After all, they purchased or took title with notice of the limitation.”) (citations omitted).
64. Id. at 633 (O’Connor, J., concurring) (“Indeed, it would be just as much error to expunge this consideration from the takings inquiry as it would be to accord it exclusive significance.”).
66. See, e.g., Guggenheim v. City of Goleta, 638 F.3d 1111 (9th Cir. 2010) (discussed infra); Bair v. United States, 515 F.3d 1323, 1328 (Fed. Cir. 2008) (citing the O’Connor concurrence for the proposition that “[a]ny lawful regulation defining the scope of the property interest that predates the creation of that interest will ‘inhere in the title’ to the property”).
68. Id. at 297.
70. Id. at 159.
A. Does Notice of Preexisting Regulations Swamp Penn Central's Balancing Test?

It should not be surprising that one of the highest-profile cases interpreting *Penn Central* arises from a challenge to rent control in a mobile home park. After all, this is the only species of land-use regulation that has been struck down by three-judge panels of the Ninth Circuit Court of Appeals under three different takings theories.\(^71\) It is not hard to understand why these measures keep running afoul of the law, since every economist who has considered the matter has concluded that they amount to little more than legalized theft.\(^72\) Or, in the more genteel terms of the latest decision, *Guggenheim v. City of Goleta*, a “naked wealth transfer.”\(^73\)

The process is straightforward. Park tenants pressure local legislators to enact measures holding their rents below market. This causes the value of tenant-owned mobile homes in regulated parks to increase. The successful tenant-lobbyists then sell the mobile homes and pocket the capitalized dollar-value of the reduced rent liability.\(^74\) There is no other kind of land-use regulation in which the beneficiaries can simply “cash out” their winnings in this manner. And since the increased sales value of the mobile homes is simply the flip side of the reduction in the value of the underlying land imposed by the regulation, the taking of property is readily measurable.

The Ninth Circuit panel opinion in *Guggenheim* could serve as a model of how *Penn Central* might be applied to this scenario, if it is to be taken seriously.

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71. See Hall v. City of Santa Barbara, 797 F.2d 1493 (9th Cir. 1986) (finding mobile home rent ordinance unconstitutional as a physical taking); Cashman v. City of Cotati, 374 F.3d 887 (9th Cir. 2004), withdrawn, reh’g granted, 415 F.3d 1027 (9th Cir. 2005) (finding mobile home rent ordinance unconstitutional for failure to advance legitimate state interests); Guggenheim v. City of Goleta, 582 F.3d 996 (9th Cir. 2009) (finding mobile home rent ordinance unconstitutional under *Penn Central*), reh’g en banc granted, 598 F.3d 1061 (9th Cir.), vacated on reh’g en banc, 638 F.3d 1111 (9th Cir. 2010).


73. *Guggenheim*, 582 F.3d at 1037 (Kleinfeld, J., dissenting).

74. Because tenants of mobile home parks normally own their own coaches, rent control increases the resale value of their coaches by reducing housing costs in the form of rent payments to the park owner. The expectation of below-market rents in the future is then capitalized into the resale value of the coaches and captured by the initial park tenants, leaving aggregate housing costs the same as in an unregulated market. Werner Z. Hirsch & Joel G. Hirsch, *supra* note 72, at 423–24. For confirming empirical analyses of the effect of rent control in mobile home parks, see sources cited *supra* note 72.
as a three-part balancing test. Writing for the majority, Judge Bybee considered each of the three *Penn Central* factors in turn and found that both the character of the regulation and its economic impact—an 80 to 90 percent reduction in the park’s value—favored the plaintiffs. On the other hand, the owners’ investment-backed expectations were weak, in the sense that the park had previously been regulated under an identical county ordinance, which was already in effect at the time the property was acquired. Under the reasoning of Justice O’Connor’s *Palazzolo* concurrence, that factor should cut in favor of the City of Goleta, leaving the owner prevailing on two prongs out of three. Should that be enough to win?

Not according to the dissenting opinion of Judge Kleinfeld, who argued strenuously for a binding application of the notice rule, notwithstanding *Palazzolo*’s apparent rejection of that approach. Judge Kleinfeld’s position found support from an unlikely source: University of Chicago’s Professor Richard Epstein. In a hastily published essay that appeared shortly after the *Guggenheim* opinion was released, Professor Epstein denounced Judge Bybee’s finding of a taking. Ignoring *Palazzolo* altogether, Professor Epstein proclaimed that “anyone who buys any property with notice that certain regulations are in place cannot protest the takings, which would doom the *Guggenheim* challenge.”

The City of Goleta’s petition for rehearing en banc was granted, and on December 22, 2010, the court handed down a new decision. The new majority opinion, written by Judge Kleinfeld, adopted his earlier dissent in all respects. Collapsing *Penn Central*’s three-factor analysis into what the en banc dissent labeled a “‘one-strike-you’re-out’ checklist,” the City’s wealth-transferring rent ordinance was upheld primarily on the grounds that the park owners “could have no ‘distinct investment-backed expectations’ that they would obtain

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75. *Guggenheim*, 582 F.3d at 1023, 1030 (“The undisputed evidence shows that the mere enactment of the RCO has caused a significant economic loss for the Park Owners. . . . Singling out mobile home park owners[,] . . . and forcing them to rent their property at a discount of 80 percent below its market value, ‘is the kind of expense-shifting to a few persons that amounts to a taking.’”) (internal citations omitted).

76. *Id.* at 1023.

77. See *Palazzolo* v. Rhode Island, 533 U.S. 606, 635–636 (2001) (O’Connor, J., concurring) (“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. . . . The Takings Clause requires careful examination and weighing of all the relevant circumstances in this context.”).

78. *Guggenheim*, 582 F.3d at 1035 (Kleinfeld, J., dissenting) (“I cannot agree that there was a taking of anything for which the Guggenheims would be entitled to compensation, because they purchased the park after the regulatory takings that mattered.”).


80. *Id.* at 7.

81. *Guggenheim* v. City of Goleta, 638 F.3d 1111 (9th Cir. 2010).

82. *Id.* at 1123 (Bea, J., dissenting).
illegal amounts of rent.” Judge Kleinfeld effectively limited Palazzolo to its facts, arguing that a takings claim can survive a transfer of title only when—as was true in that case—the transferor and the transferee are the same person.

In a lengthy dissent, Judge Bea disputed the majority’s treatment of the investment-backed expectations factor, arguing that the plain language of Palazzolo favored the Guggenheims’ claim on that score. The distinctions relied on by Judge Kleinfeld to avoid that conclusion, according to the dissent, were “no more significant than that the Palazzolo land was in Rhode Island and the Guggenheim land was in California.” More important, in a clear bid for Supreme Court review, Judge Bea highlighted the core doctrinal dispute that divided the Ninth Circuit: Is Penn Central to be applied as a genuine three-factor balancing test, or should the government escape liability for a taking if it can prevail on any one of that decision’s “relevant factors?” This is perhaps the most fundamental issue that must be resolved in interpreting Penn Central, and only the Supreme Court can resolve it. But since the Court denied certiorari in Guggenheim, such resolution will have to await another day.

B. Can a Penn Central Taking Be Temporary?

In CCA Associates v. United States, the Federal Circuit is once again considering the takings implications of the Low-Income Housing Preservation and Resident Homeownership Act of 1990. Decades earlier, the plaintiffs took advantage of attractive terms offered on federally-insured, forty-year mortgages to construct low-income housing. The Act nullified those owners’ contractual right to prepay the mortgages and convert the properties to market-rate rental units, thereby restricting the return on the properties to below-market rates for the full forty years.

Over nearly twenty years of litigation, the Federal Circuit has handed down a series of inconsistent and even contradictory rulings on this issue. Most recently, in Cienega Gardens v. United States, that court determined that
Congress’s subsequent repeal of the Act’s restrictions in 1996 did not simply place a terminus on the time period of the taking. Rather, the fact that the taking was not permanent should go into the court’s determination of whether takings liability had accrued at all! According to the Federal Circuit’s interpretation of Penn Central, the economic impact prong must be evaluated in terms of the regulation’s impact on the value of the property over its entire expected life—in the case of real estate, its expected value discounted to infinity.

The Cienega Gardens plaintiffs reached a settlement while their petition for certiorari was pending. CCA Associates, a companion case arising from the same body of facts, was remanded for further proceedings in light of Cienega, and the Court of Federal Claims once again found that the government was liable for a regulatory taking. This holding is now back before the Federal Circuit, and another certiorari petition will surely follow.

C. Can States Provide Greater Protection from Uncompensated Takings Than Penn Central Offers?

In Pruneyard Shopping Center v. Robbins, the Supreme Court held that states are free to extend protections to individual rights “more expansive than those conferred by the Federal Constitution.” Since Penn Central represents the Court’s best effort to shield property owners from regulatory overreaching, Pruneyard arguably authorizes state courts to forge their own regulatory taking doctrines to provide more meaningful protections of individual rights than are available under Penn Central.

The Minnesota Supreme Court did just that, two years after Penn Central was decided, in McShane v. City of Faribault. In that case, a municipal airport board enacted severe restrictions on the use of land adjacent to the airport. The court found that the restrictions amounted to a compensable taking of the plaintiff’s property, even though the impact of the regulations did not rise to Minnesota’s normal standard for a taking in the context of zoning ordinances—the loss of all reasonable use of the land. Because the restrictions were adopted specifically to benefit a government enterprise, rather than to mediate among competing private uses of land, the court applied a more stringent

93. Id. at 1287–88.
94. Id. at 1287.
95. Id. at 1280.
97. The Federal Circuit’s analysis in its final Cienega Gardens opinion, which resulted in the latest remand in CCA Associates, has been described as “economic nonsense . . . [that] side-steps a strong line of Supreme Court precedent that relied on the correct return on equity approach.” William W. Wade, ALI-ABA Course of Study Materials: Eminent Domain and Land Valuation Litigation, SS035 ALI-ABA 545 (Feb. 2011).
98. 447 U.S. 74, 81 (1980).
99. 292 N.W.2d 253 (Minn. 1980).
100. Id. at 257.
standard of liability: compensation for a taking is required when such regulations cause “a substantial and measurable decline in market value” of the affected property.\textsuperscript{101}

McShane’s invocation of different standards for takings liability arising from government’s “enterprise” and “arbitration” functions derived from a 1964 law review article by Professor Sax.\textsuperscript{102} However, the court also found support for this distinction in language from \textit{Penn Central}, “in which the court concluded that a landmark preservation ordinance was \textit{not related to a governmental enterprise} and therefore did not constitute a taking so long as it permitted some use of the property which would yield a reasonable return on investment.”\textsuperscript{103}

Whether the McShane distinction retains its vitality was at issue in a case recently accepted for review by the Minnesota Supreme Court, \textit{DeCook v. Rochester International Airport Joint Zoning Board}, that raised a “virtually identical” takings challenge on “strikingly similar” facts to those in McShane.\textsuperscript{104} As in McShane, the appellate court found that the challenged airport zoning restrictions imposed a special burden on affected landowners because, unlike typical zoning restrictions which are imposed for the mutual benefit of all landowners, airport zoning restrictions are imposed for the sole benefit of the government’s airport enterprise.\textsuperscript{105} While operation of the airport may generally benefit the public, landowners near the airport are forced to bear a disproportionate burden.\textsuperscript{106} As such, the appellate court held that it would be “manifestly unfair to require [these few landowners] to sustain the diminution in market value without just compensation.”\textsuperscript{107}

The majority in \textit{DeCook} dismissed the assertion that McShane had established an alternative to \textit{Penn Central}’s takings analysis, and instead interpreted McShane as setting forth a more rigorous standard for the application of \textit{Penn Central} in cases where the challenged regulation is adopted to promote a specific governmental enterprise.\textsuperscript{108} The dissent countered, in

\begin{itemize}
\item \textsuperscript{101} Id. at 258–59.
\item \textsuperscript{102} Joseph L. Sax, \textit{Takings and the Police Power}, 74 YALE L.J. 36 (1964). There is some irony in this application of Prof. Sax’s distinction, since the author himself had repudiated this line of analysis in 1971, as being overly generous to property owners. See Joseph L. Sax, \textit{Takings, Private Property and Public Rights}, 81 YALE L.J. 149, 150 n.5 (1971).
\item \textsuperscript{103} McShane, 292 N.W.2d at 258 (emphasis added) (citing Penn Cent. Transp. Co. v. City of New York, 438 U.S. 104 (1978)).
\item \textsuperscript{104} No. A09–969, 2010 Minn. App. Unpub. LEXIS 419 at *8–9 (Minn. Ct. App. May 11, 2010).
\item \textsuperscript{105} Id. at *14.
\item \textsuperscript{106} Id. at *13–14 (“Although appellants have acknowledged that they are benefitted as well as burdened by being close to the airport, no record evidence suggests that they are benefitted by their proximity to the airport more than their neighbors, whose properties do not abut the runway and are not subject to Safety Zone A.”).
\item \textsuperscript{107} Id. at *14.
\item \textsuperscript{108} Id. at *10 (“But we disagree with respondent’s cavalier and dismissive assertion that . . . ‘[i]f McShane remains useful at all, it may merely be instructive in considering the character factor under \textit{Penn Central}.’”)
\end{itemize}
effect, that McShane gives dispositive effect to the “character” prong of Penn Central. On this view, liability in DeCook was inappropriate because devaluation of the owner’s property was insufficient to violate Penn Central’s economic impact prong.\footnote{Id. at *18–19. Although Judge Johnson’s dissent faults the majority for not applying Penn Central as a “three-part balancing test,” he seems to argue against a finding of takings liability solely on the basis of the economic impact prong. \textit{Id.} at *17. Neither the majority nor the dissent consider the effect of the restrictions on DeCook’s investment-backed expectations.} In a decision handed down in March of 2011, the Minnesota Supreme Court affirmed, preserving—at least for now—the state’s more rigorous protection of private property rights placed at risk by public enterprises.\footnote{DeCook v. Rochester Int’l Airport Joint Zoning Bd., 796 N.W.2d 299 (Minn. 2011).}

**CONCLUSION**

Whether Penn Central will survive as a guide to regulatory takings liability depends on whether its key provisions can be imbued with a modicum of intelligibility, certainty, and predictability. Cases like Guggenheim, CCA Associates, and DeCook will continue to wend their way through the judicial system until the Roberts Court either selects a vehicle for a meaningful application of Penn Central or jettisons that decision for a new paradigm of liability under the Takings Clause.

We welcome responses to this Article. If you are interested in submitting a response for our online companion journal, Ecology Law Currents, please contact ecologylawcurrents@boalt.org. Responses to articles may be viewed at our website, http://www.boalt.org/elq.