

**VERMONT LAW SCHOOL  
GEORGETOWN UNIVERSITY LAW CENTER  
BERKELEY LAW**

**THE 13TH ANNUAL CONFERENCE ON LITIGATING TAKINGS  
AND OTHER LEGAL CHALLENGES TO LAND USE AND  
ENVIRONMENTAL REGULATION**

**NOVEMBER 5, 2010  
BERKELEY, CALIFORNIA**

**DECIPHERING AND EXTRAPOLATING:  
SEARCHING FOR SENSE IN *PENN CENTRAL***

**by R.S. Radford & Luke A. Wake**

# DECIPHERING AND EXTRAPOLATING: SEARCHING FOR SENSE IN *PENN CENTRAL*

by R.S. Radford<sup>1</sup> and Luke A. Wake<sup>2</sup>

## I. INTRODUCTION

The notion that individual landowners hold rights against the State, which 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.<sup>3</sup> 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.<sup>4</sup>

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.<sup>5</sup> Except in the extreme circumstances of a permanent governmental invasion of property,<sup>6</sup> or the complete prohibition of economically beneficial use of land,<sup>7</sup> takings challenges to property regulations must be brought under the doctrinal framework of *Penn Central Transportation Co. v. City of New York*.<sup>8</sup> 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.<sup>9</sup>

---

<sup>1</sup> Director, Program for Judicial Awareness, Pacific Legal Foundation.

<sup>2</sup> Fellow, College of Public Interest Law, Pacific Legal Foundation.

<sup>3</sup> See, e.g., James W. Ely, Jr., *THE GUARDIAN OF EVERY OTHER RIGHT: A CONSTITUTIONAL HISTORY OF PROPERTY RIGHTS*, 1-42 (1992).

<sup>4</sup> See, e.g., Harold Demsetz, *Toward a Theory of Property Rights II: The Competition Between Private and Collective Ownership*, 31 *J. Legal Stud.* S653 (2002).

<sup>5</sup> “[P]rivate property [shall not] be taken for public use without just compensation.” U.S. Const. amend. V.

<sup>6</sup> See *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982).

<sup>7</sup> See *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992).

<sup>8</sup> 438 U.S.104 (1978).

<sup>9</sup> See, e.g., Lise Johnson, Note, *After Tahoe Sierra, One Thing Is Clearer: There Is Still a Fundamental Lack of Clarity*, 46 *Ariz. L. Rev.* 353 (2004) (recognizing the unworkable nature of the *Penn Central* test); Eric R. Claeys, *Takings, Regulations, and Natural Property Rights*, 88 *Cornell L. Rev.* 1549, 1557 (2003) (“the *Penn Central* approach is admittedly standardless”); Michael M. Berger, *Tahoe Sierra: Much Ado About-What?*, 25 *Hawaii L. Rev.* 295, 314 (2003) (referring to the *Penn Central* balancing test as an “unworkable . . . lot-by-lot, fact-by-fact method of adjudication . . . so fraught with uncertainty that landowners must often litigate to the highest court that will hear them out to determine whether they have even properly stated a claim on which relief can be

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

## II. 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 19<sup>th</sup>-century expansion of the regulatory state.<sup>10</sup> By 1922, the Supreme Court recognized that excessive regulation could also be characterized as running afoul of the Takings Clause. In *Pennsylvania Coal v. Mahon*,<sup>11</sup> 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 hyper-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."<sup>12</sup> Rather than immediately seeking to refine or elaborate upon that standard, however, the Court generally avoided takings cases for the next half century.<sup>13</sup>

*Penn Central* was not regarded, by either the Supreme Court or contemporary observers, as a vehicle for elaborating a reasoned doctrine of regulatory takings when it came before the Court in 1978.<sup>14</sup> 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 case, which had incorporated the economic theories of Henry George into that state's interpretation of the Fifth

---

granted.").

<sup>10</sup> See Ely, *supra* note 3, at 78-81.

<sup>11</sup> 260 U.S. 393 (1922).

<sup>12</sup> *Id.* at 416.

<sup>13</sup> 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 notable exception was *Armstrong v. United States*, 364 U.S. 40 (1960), which anchored the takings inquiry, equal-protection-like, in generalized considerations of fairness.

<sup>14</sup> See *Transcript, Looking Back on Penn Central: A Panel Discussion with the Supreme Court Litigators*, 15 Fordham Envtl. L. Rev. 287 (2004).

Amendment.<sup>15</sup> 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 Frank Michelman.<sup>16</sup> Michelman’s influence was particularly conspicuous in the Court’s recitation of the vaguely-specified factors that should be considered in a determination of takings liability:

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.<sup>17</sup>

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 the *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.<sup>18</sup> *Loretto v. Teleprompter Manhattan CATV Corp.* established that a permanent physical invasion of property is always compensable,<sup>19</sup> while *Lucas v. South Carolina Coastal Council* did the same for land-use restrictions that deprive property of all economically beneficial use.<sup>20</sup> *Nollan v. California Coastal Commission* imposed heightened judicial scrutiny of at least some permit conditions,<sup>21</sup> and *First English Evangelical Lutheran Church v. County of Los Angeles* found that a compensation remedy must always be available for regulatory takings claims.<sup>22</sup>

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

---

<sup>15</sup> See *Penn Central Transportation Co. v. City of New York*, 366 N.E.2d 1271 (1977). See also Kanner, *Making Laws and Sausages: A Quarter-Century Retrospective on Penn Central Transportation Co. v. City of New York*, 13 Wm. & Mary Bill Rts. J. 653, 749-63 (2005) (elaborating on Chief Judge Breitel’s opinion in *Penn Central*).

<sup>16</sup> See Frank I. Michelman, *Property, Utility, and Fairness: Comments on the Ethical Foundations of “Just Compensation,”* 80 Harv. L. Rev. 1165 (1967). Michelman had formerly served as a clerk for Justice Brennan, who drafted the majority opinion in *Penn Central*. See Frank I. Michelman, *BRENNAN AND DEMOCRACY* ix (1999).

<sup>17</sup> 438 U.S. at 124 (citation omitted).

<sup>18</sup> 447 U.S. 255, 260 (1980).

<sup>19</sup> 458 U.S. 419 (1982).

<sup>20</sup> 505 U.S. 1003 (1992).

<sup>21</sup> 483 U.S. 825 (1987).

<sup>22</sup> 482 U.S. 304 (1987).

applying only when property is permanently deprived of all value.<sup>23</sup> *Lingle v. Chevron, USA, Inc.* abandoned *Agins*'s substantial advancement standard, and clouded the applicability of *Nollan*'s heightened scrutiny requirement.<sup>24</sup> Even *Loretto*'s bright-line physical invasion rule has been called into question by subsequent dicta suggesting that physical takings may trigger only strict scrutiny, rather than categorical liability.

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 had started, with no guidance beyond the ad-hoc, standardless, situational relativism of *Penn Central*.<sup>25</sup> 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.<sup>26</sup> Authoritative, substantive interpretations of the central provisions of *Penn Central* are still lacking, and jurists, scholars, and practitioners must fill in the blanks as best they can.

### **III. GROPING FOR MEANING BY THE LIGHT OF THE POLESTAR: OR, CONSTITUTIONAL DOCTRINE AS A HIGH-STAKES CRAPSHOOT**

If they are to promote certainty and predictability in the law, judicial opinions must rest upon reasoned distinctions and intelligible principles. *Penn Central*, by contrast, serves up a barely intelligible *potpourri* of vaguely specified considerations, grounded in the particular facts and circumstances of the case.<sup>27</sup> As a current member of the Court has pointed out, such an approach suggests that "uniformity is not a particularly important objective with respect to the legal question at issue."<sup>28</sup> 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.<sup>29</sup>

---

<sup>23</sup> 535 U.S. 302 (2002).

<sup>24</sup> 544 U.S. 528 (2005).

<sup>25</sup> See *Palazzolo v. State of Rhode Island*, 533 U.S. 606, 633 (2001) (O'Connor, J., concurring); *Tahoe-Sierra*, 535 U.S. at 336; *Lingle*, 544 U.S. at 528.

<sup>26</sup> *Palazzolo*, 533 U.S. at 633 (O'Connor, J., concurring); *Tahoe-Sierra*, 535 U.S. at 336.

<sup>27</sup> See *Penn Central*, 438 U.S. at 124 (describing the determination of takings liability as an "essentially ad hoc, factual inquir[y]").

<sup>28</sup> Antonin Scalia, *The Rule of Law as a Law of Rules*, 56 U. Chi. L. Rev. 1175, 1179 (1989).

<sup>29</sup> *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." R. S. Radford, *Instead of a Doctrine: Penn Central as the Supreme Court's Retreat from the Rule of Law*, ALI-ABA Continuing Legal Education: Inverse Condemnation and Related Government Liability 815, 821 (April 12-14, 2007) (citing *Giovanella v. Town of*

By not attempting to flesh 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 which regulations may, or may not, 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 two)<sup>30</sup> 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 or evaluated.<sup>31</sup> What follows is a suggested interpretive roadmap 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 entirely unclear as to what sort of considerations that was meant to yield. Most commentators who have pondered the question would probably agree with Prof. Echeverria, that “[t]he so-called ‘character’ factor is the most confused and confusing feature of regulatory takings doctrine.”<sup>32</sup>

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.”<sup>33</sup>

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 the *Loretto* decision, four years later, seems to imply that the character inquiry was meant to be more nuanced than this. Since *Loretto* established *per*

---

Ashland, Supreme Court docket no. 06-972, Respondent's Brief in Opposition to Petition for Certiorari, filed Feb. 15, 2007.

<sup>30</sup> See *supra*, text accompanying note 17. One need not be an English major to notice that, in *Penn Central*'s formulation of “relevant considerations” set forth above, the investment-backed expectations factor is wholly subordinate to, and seems to be set out as a particular aspect of, the economic impact prong.

<sup>31</sup> Although these factors are almost always treated as comprising a three-pronged “balancing test,” they are not so described in *Penn Central* itself.

<sup>32</sup> John D. Echeverria, *The “Character” Factor in Regulatory Takings Analysis*, ALI-ABA Continuing Legal Education: Wetlands Law and Regulation, SK081 ALI-ABA 143, 145 (June 9-10, 2005).

<sup>33</sup> *Penn Central*, 438 U.S. at 124.

se takings liability for permanent physical invasions, putting them outside the *Penn Central* inquiry altogether, it must be the case that either the character prong was intended to incorporate a broader array of considerations, or else the prong has been rendered superfluous. Since the Court has never stated that the character prong should be eliminated from the ad-hoc partial takings inquiry, it 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, on the one hand, and regulatory interventions designed to promote the public good, on the other. This suggests that actions that promote the common good are somehow less likely to rise to the level of a taking, yet courts presume *all* regulatory acts to be carried out in the interest of promoting the common good, so long as they can be shown to have a rational basis. Even physical invasions are routinely justified as promoting some perceived common good, so this distinction is rather unhelpful in clarifying the doctrinal intention underlying *Penn Central*'s character prong.<sup>34</sup> 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,<sup>35</sup> and subsequent precedent banished from the takings analysis any inquiry into the effect of a regulation in advancing the common good,<sup>36</sup> *Penn Central*'s dicta on that point seems temporally, as well as conceptually, isolated.

A number of analysts have suggested that the character prong is best described as sounding in fairness,<sup>37</sup> 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.<sup>38</sup> Yet in describing this consideration as an inquiry into the "character" of the government action, the opinion appears to reframe it in an even broader context, such that one might describe the character prong as a "smell test," whereby acts of cronyism or intentional

---

<sup>34</sup> See, e.g., *Klump v. Borough of Avalon*, 202 N.J. 390, 397 (N.J. 2010) (government buried portion of landowner's property with sand, creating dunes for the benefit of the public); *Kim v. City of New York*, 90 N.Y.2d 1 (1997) (city buried portion of landowner's property with gravel to provide lateral support for newly elevated street).

<sup>35</sup> See *Pennsylvania Coal*, 260 U.S. at 416 ("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.")

<sup>36</sup> See *Radford*, *supra* note 29, at 822 ("The notion that courts should sit in judgment as to whether particular legislative enactments or administrative initiatives really do promote the common good seems shockingly anachronistic—a far more 'Lochnerian' exercise of substantive due process than anything the Court repudiated in *Lingle*.").

<sup>37</sup> See John D. Echeverria, *The "Character" Factor in Regulatory Takings Analysis*, ALI-ABA Continuing Legal Education: Wetlands Law and Regulation, SK081 ALI-ABA 143, 159-60 (June 9-10, 2005); Steven J. Eagle, "Character" as "Worthiness": A New Meaning for *Penn Central*'s Third Test?, 27 *Zoning & Planning L. Rep.* 6:1, \*2 (2004); Steven J. Eagle, "Character of the Governmental Action" in *Takings Law: Past, Present, and Future*, ALI-ABA Continuing Legal Education: Inverse Condemnation and Related Government Liability, SJ052 ALI-ABA 459, 470-71 (April 22-24, 2004).

<sup>38</sup> See *Armstrong v. United States*, 364 U.S. 40, 49 (1960).

targeting of individuals would be disfavored.<sup>39</sup> But those considerations would seem to play more into a due process or equal protection inquiry than a takings analysis. 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 considerations are relevant under *Penn Central*'s character prong.

## B. Economic Impact of the Regulation

*Penn Central* directs reviewing courts to consider the economic impact of a challenged regulation, but again, the decision is virtually silent as to how this prong should be evaluated and weighed.<sup>40</sup> An opaque footnote at the end of the majority opinion, coupled with the Court's subsequent decision in *Agins*, suggests that a taking may occur when a regulation deprives an owner of the ability to earn a competitive return on the property.<sup>41</sup> But, ironically, some commentators now assert that the landowner's subsequent victory in *Lucas* – establishing categorical takings liability for loss of *all* economic use – had the effect of extinguishing *Penn Central*'s and *Agins*'s implicit call for a finding of liability when the beneficial uses of a property are rendered uncompetitive.

The most straightforward application of the economic impact prong would cut in favor of a finding of liability when a regulation substantially impairs the property's rate of return. Any significant depreciation in value should therefore 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 the remaining two prongs. 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. 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 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 that have arisen over the years concerning appropriate methods of measuring

---

<sup>39</sup> This interpretation can draw on at least fleeting support in Supreme Court opinions and arguments. *See, e.g., Tahoe-Sierra*, 535 U.S. at 334 (listing governmental "bad faith" as grounds for recovery under a takings theory; *Monterey v. Del Monte Dunes At Monterey, Ltd.*, No. 97-1235, Transcript of Oral Argument at \_\_\_ (Justice Scalia: "When you have a consistent process of turning down one plan after another, isn't there some point where you begin to smell a rat?")

<sup>40</sup> *Penn Central*, 438 U.S. at 124.

<sup>41</sup> *See Agins*, 447 U.S. at 260 (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. *Penn Central*, 438 U.S. at 138 n.36.

economic impact.<sup>42</sup> 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.<sup>43</sup>

### 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.”<sup>44</sup> 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 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.”<sup>45</sup>

Prof. 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<sup>46</sup> was almost immediately abandoned by the Court in favor of an evaluation of the

---

<sup>42</sup> See, e.g., William W. Wade, “Sophistical and Abstruse Formulas” Made Simple: Advances in Measurement of *Penn Central*’s Economic Prongs and Estimation of Economic Damages in Federal Claims and Federal Circuit Courts, ALI-ABA Course of Study: Inverse Condemnation and Related Government Liability, SM040 (April 2007).

<sup>43</sup> See *Suitum*, 520 U.S. at 733 (indicating a split on the Court regarding the proper role of transferable development rights in the takings equation). See also R.S. Radford, *Takings and Transferable Development Rights in the Supreme Court: The Constitutional Status of TDRs in the Aftermath of Suitum*, 28 *Stetson L. Rev.* 685 (1999).

<sup>44</sup> *Penn Central*, 438 U.S. at 124.

<sup>45</sup> William K. Jones, *Confiscation: A Rationale of the Law of Takings*, 24 *Hofstra L. Rev.* 1, 50 (1995). The singular unhelpfulness of the expectations inquiry has long been a theme of scholarly commentary. See, e.g., Steven J. Eagle, *The Regulatory Takings Notice Rule*, 24 *Hawaii L. Rev.* 533, 537 (2002) (“The attempt to objectify occasional equitable deviations from well-defined rules through the development of “reasonable” investment-backed expectations has the effect of creating competing sets of legal norms.”); Meltz, Dwight H. Merriam, and Richard M. Frank, THE TAKINGS ISSUE: CONSTITUTIONAL LIMITS ON LAND-USE CONTROL AND ENVIRONMENTAL REGULATION 134 (1999) (investment-backed expectations criterion described as “amorphous . . . [i]ts parameters remain uncertain even today”); Richard A. Epstein, *Lucas v. South Carolina Coastal Council: A Tangled Web of Expectations*, 45 *Stan. L. Rev.* 1369, 1370 (1993) (“we should be deeply suspicious of the phrase ‘investment-backed expectations’ because it is not possible to identify even the paradigmatic case of its use”); Michael M. Berger, *Happy Birthday, Constitution: The Supreme Court Establishes New Ground Rules for Land-Use Planning*, 20 *Urb. Law.* 735, 758 (1988) (“in no case has the Court made any effort to either define these terms or to give guidance to lower courts in determining their meaning”).

<sup>46</sup> See Michelman, *supra* note 16, at \_\_\_. For a more detailed summary of the theoretical underpinnings of 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).

*reasonableness* of those expectations.<sup>47</sup> This switch gave reviewing courts virtually unlimited power to determine exactly which proposed uses of land would qualify for protection under the Takings Clause.

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,”<sup>48</sup> 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.

The Supreme Court repudiated this doctrine in *Palazzo*, 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 acquired title to the property.<sup>49</sup> The Court held that a takings claim may not be foreclosed merely because the owner acquired the property after enactment of the challenged regulation, because such an approach would allow the government to extinguish property rights entirely with successive enactments over time.<sup>50</sup> Yet Justice O’Connor’s concurrence in *Palazzo* left the door open for courts to assign *some* weight to the relative timing of land-use restrictions and acquisition of title. The details as to when, why, and to what extent these considerations should be relevant are, of course, completely undefined.

#### **IV. 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*, John Echeverria has proclaimed the

---

<sup>47</sup> See *Kaiser Aetna v. United States*, 444 U.S. 164, 175 (1979) (“This 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). Neither the *Kaiser Aetna* Court nor any subsequent incarnation has advanced any explanation for this abrupt switch in terminology.

<sup>48</sup> See *Eagle*, *supra* note 45.

<sup>49</sup> “The theory underlying the argument that post-enactment purchases 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 the loss.”

<sup>50</sup> “The State may not put so potent a Hobbsian stick into the Lockean bundle.” *Palazzo*, 533 U.S. at 626.

death of regulatory takings,<sup>51</sup> celebrating “the resolution of most of the fundamental questions that, until recently, plagued this field of law.”<sup>52</sup> The present authors are more inclined to agree with Professor Sax, who regards the Supreme Court as having “given up the effort to formulate workable rules for regulatory takings,”<sup>53</sup> retreating instead to “the open-ended, I-(hope)-I-know-it-when-I-see-it approach of *Penn Central*.”<sup>54</sup> The fundamental questions in takings law have not been resolved, they have merely been swept under the bed. Or, depending on your taste in metaphors, the barn wall has been painted over.

The following cases, now 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*.

### A. Mobile Home Rent Control – Again

The only species of regulation that has been struck down by the Ninth Circuit Court of Appeals under three different takings theories is rent control in mobile home parks.<sup>55</sup> 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.<sup>56</sup> Or, in the more genteel terms of the latest decision, *Guggenheim v. City of Goleta*, a “naked wealth transfer.”<sup>57</sup>

---

<sup>51</sup> John D. Echeverria, *The Death of Regulatory Takings*, 34 Ecology L.Q. 291 (2007).

<sup>52</sup> *Id.* at 297.

<sup>53</sup> Sax, *supra* note 13, at 157.

<sup>54</sup> *Id.* at 159.

<sup>55</sup> See *Hall v. City of Santa Barbara*, 797 F.2d 1493 (9<sup>th</sup> Cir. 1986) (finding mobile home rent ordinance unconstitutional as a physical taking); *Cashman v. City of Cotati*, 374 F.3d 887 (9<sup>th</sup> Cir. 2004) (finding mobile home rent ordinance unconstitutional for failure to advance legitimate state interests); *Guggenheim v. City of Goleta*, 582 F.3d 996 (9<sup>th</sup> Cir. 2009) (finding mobile home rent ordinance unconstitutional under *Penn Central*).

<sup>56</sup> See Diehang Zheng, Yongheng Deng, Peter Gordon & David Dale-Johnson, *An Examination of the Impact of Rent Control on Mobile Home Prices in California*, 16 J. Housing Econ. 209 (2007); Carl Mason & John Quigley, *The Curious Institution of Mobile Home Rent Control: An Analysis of Mobile Home Parks in California* (U. C. Berkeley Program on Housing and Urban Policy, June 1, 2006); David Dale-Johnson, Yongheng Deng, Peter Gordon, & Diehang Zheng, *An Examination of the Impact of Rent Control on Mobile Home Prices in California*, Working Paper No. 2004-1010, Lusk Center for Real Estate, University of Southern California (Nov. 1, 2004); Werner Z. Hirsch & Anthony M. Rufolo, *The Regulation of Immobile Housing Assets under Divided Ownership*, 19 Int'l Rev. L. & Econ. 383 (1999); Werner Z. Hirsch & Joel G. Hirsch, *Legal-Economic Analysis of Rent Controls in a Mobile Home Context: Placement Values and Vacancy Decontrol*, 35 UCLA L. Rev. 399 (1988); Werner Z. Hirsch, *An Inquiry into the Effects of Mobile Home Park Rent Control*, 24 J. Urb. Econ. 212 (1988).

<sup>57</sup> *Guggenheim*, 582 F.3d at 1022; 1037 (Kleinfeld, J., dissenting).

The process is straightforward. Park tenants pressure local legislators to enact measures holding their rents below market. This causes the value of mobile homes in rent-controlled parks to increase. The successful tenant-lobbyists then sell the mobile homes and pocket the capitalized dollar value of the reduced rent liability. There is no other kind of land-use regulation in which the beneficiaries can simply “cash out” in this way. 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 caused 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* should be applied, if it is to be taken seriously as a three-part balancing test. Judge Bybee considered each of the three factors in turn and found that both the character of the regulation (see above) and its economic impact (a 90% reduction in the park’s value) favored the plaintiff. On the other hand, the owner’s investment-backed expectations were weak, in the sense that the park had previously been regulated under an identical county ordinance, which was in effect at the time the park was acquired. Under the reasoning of Justice O’Connor’s *Palazzolo* concurrence, that factor should cut in favor of the city, 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 unequivocal rejection of that approach:

“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 [it was subject to rent control].”<sup>58</sup>

Judge Kleinfeld’s position found support from an unlikely source, University of Chicago law professor Richard Epstein. In a hastily-published essay that appeared shortly after the *Guggenheim* opinion was released, Epstein denounced Judge Bybee’s finding of a taking.<sup>59</sup> Ignoring *Palazzolo* altogether, 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.”<sup>60</sup>

The City of Goleta’s petition for rehearing en banc was granted, and the case was reargued in June of 2010. Regardless of how the en banc panel decides the case, a petition for certiorari will undoubtedly follow.

---

<sup>58</sup> *Id.* at 1035 (Kleinfeld, J., dissenting).

<sup>59</sup> Richard A. Epstein, *Takings Law Made Hard*, 32:4 Regulation 4 (Winter, 2009-10).

<sup>60</sup> *Id.* at 7.

## 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 (LIHPRHA). Decades earlier, the plaintiffs had taken advantage of attractive terms offered on federally-insured, 40-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.

Over nearly 20 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*,<sup>61</sup> that court determined that the repeal of LIHPRHA 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 – i.e., in the case of real estate, to infinity.

The *Cienega Gardens* plaintiffs settled with the government 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 again found that the government was liable for a regulatory taking.<sup>62</sup> This holding is now back before the Federal Circuit, and another cert petition will surely follow.

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

In *Pruneyard Shopping Center v. Robbins*,<sup>63</sup> the Supreme Court held that states are free to provide protections to individual rights “more expansive than those conferred by the Federal Constitution.”<sup>64</sup> 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

---

<sup>61</sup> 503 F.3d 1266 (2007).

<sup>62</sup> *CCA Associates v. United States*, 91 Fed. Cl. 580 (2010).

<sup>63</sup> 447 U.S. 74 (1980).

<sup>64</sup> *Id.* at 81.

*McShane v. City of Fairbault*.<sup>65</sup> 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.<sup>66</sup> Because the restrictions were adopted specifically to benefit a government enterprise, rather than to mediate among competing private uses of land, a more stringent standard of liability was applied: compensation for a taking is required when such regulations cause "a substantial and measurable decline in market value" of the affected property.<sup>67</sup>

The *McShane* Court'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.<sup>68</sup> However, the court also found support for this distinction in language from *Penn Central*, "in which the court concluded that a landmark preservation ordinance *was 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."<sup>69</sup>

Whether the *McShane* distinction retains its vitality is at issue in a case recently accepted for review by the Minnesota Supreme Court, *DeCook v. Rochester International Airport Joint Zoning Board*,<sup>70</sup> a case that raises a "virtually identical" takings challenge, on "strikingly similar facts," to those in *McShane*.<sup>71</sup> 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.<sup>72</sup> While operation of the airport may generally benefit the public, landowners near the airport are

---

<sup>65</sup> 292 N.W.2d 253 (1980).

<sup>66</sup> *Id.* at 257.

<sup>67</sup> *Id.* at 259.

<sup>68</sup> Joseph L. Sax, *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, *Takings, Private Property and Public Rights*, 81 Yale L. J. 149, 150 n.5 (1971).

<sup>69</sup> *McShane*, 292 N.W.2d at 258 (*citing Penn Central*)(emphasis added).

<sup>70</sup> 2010 Minn. App. Unpub. LEXIS 419 (2010).

<sup>71</sup> *Id.* at \*8-\*9.

<sup>72</sup> *Id.* at \*14.

forced to bear a disproportionate burden.<sup>73</sup> 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.”<sup>74</sup>

The majority in *DeCook* dismissed the assertion that *McShane* had established an alternative to *Penn Central*'s takings analysis, and instead interpreted *McShane* as setting forth a more rigorous standard for the application of *Penn Central* in cases where the challenged regulation is adopted to promote a specific governmental enterprise.<sup>75</sup> The dissent countered, in 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.<sup>76</sup>

## 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 certainty and predictability. Cases like *Guggenheim*, *CCA Associates*, and *DeCook* will continue to wend their way through the process 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.

---

<sup>73</sup> *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.”).

<sup>74</sup> *Id.* at \*14.

<sup>75</sup> *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 *Penn Central*.”

<sup>76</sup> *Id.* at \*18. Although Judge Johnson’s dissent faults the majority for not applying *Penn Central* as a “three-part balancing test,” *id.* at 17, he seems to argue against a finding of takings liability solely on the basis of the economic impact prong. Neither the majority nor the dissent consider the effect of the restrictions on *DeCook*’s investment-backed expectations.

