Fordham Environmental Law Review

Volume 6, *Number* 3 2011 *Article* 1

Regulatory Takings, Historic Preservation and Property Rights Since Penn Central: The Move Toward Greater Protection

Chauncey L. Walker[*] Scott D. Avitabile[†]

*

†

Copyright ©2011 by the authors. *Fordham Environmental Law Review* is produced by The Berkeley Electronic Press (bepress). http://ir.lawnet.fordham.edu/elr

REGULATORY TAKINGS, HISTORIC PRESERVATION AND PROPERTY RIGHTS SINCE *PENN CENTRAL*: THE MOVE TOWARD GREATER PROTECTION

CHAUNCEY L. WALKER
*SCOTT D. AVITABILE**

INTRODUCTION

Seventeen years ago, the United States Supreme Court decided *Penn Central Transportation Co. v. New York City*.[1] Since then, the Supreme Court, as well as state and lower federal courts, have struggled to develop a suitable test to apply when required to determine whether a regulation that restricts or deprives a property owner of a right to develop, improve, or alter property constitutes a compensable taking under the Fifth Amendment. Although the Supreme Court has revisited this perplexing issue several times since *Penn Central*, no case has adopted a clear, unambiguous, bright-line test. However, a number of state, federal, and Supreme Court decisions have distinguished *Penn Central* and created tests providing greater protection of private property rights by requiring the payment of compensation for regulatory restriction.

This recent trend of increasing protection of private property rights may be due in part to the change in the makeup of the Supreme Court itself; Chief Justice Rehnquist is one of two remaining members of the Court that decided *Penn Central*, and his contribution was the now-famous dissent.

As regulatory takings jurisprudence has evolved, a disquieting problem has emerged with regard to environmental regulations and historic landmarking. There is a growing sense that it is proper to utilize environmental and historic preservation laws to control development and other change even in the absence of environmental protection, wildlife conservation, architectural, or historic preservation issues. Such private, hidden agendas threaten to undermine the legitimate goals of those who would protect the best in our man-made and natural environments through legitimate research and study.

This Article will first discuss the holding in *Penn Central*, with emphasis on Justice Rehnquist's forceful and prophetic dissent. Thereafter, it will examine Supreme Court, state, and federal takings cases since *Penn Central* and analyze their potential effect on historic preservation jurisprudence.

---

* Chauncey L. Walker is a partner and Scott D. Avitabile is an associate at Cuddy & Feder & Worby, a law firm in White Plains, New York.

1. 438 U.S. 104 (1978).

I. *PENN CENTRAL* AND ITS PROGENY

A. Penn Central Transportation Co. v. New York City

1. Majority Opinion

No case has had a greater impact on landmarking jurisprudence than *Penn Central Transportation Co. v. New York City*.[2] In 1965, New York City ("City") had adopted a Landmarks Preservation Law,[3] under which a Landmarks Preservation Commission ("Commission") created by the law was authorized to designate a building a "landmark" if certain statutory criteria were met.[4] Once designated a landmark, a property owner's options concerning the use of the landmark site became heavily restricted. The ordinance imposed an affirmative obligation on the owner to keep the exterior features of the building in "good repair."[5] Any proposal to alter the exterior architectural features of the landmark had to be approved in advance by the issuance of a certificate of appropriateness from the Commission.[6]

In 1967, the Commission designated Grand Central Terminal in New York City a landmark. Penn Central Transportation Company ("Penn Central"), which owns the station, sought approval to erect an office building addition above the terminal. Two plans were presented to the Commission in an attempt to secure the requisite certificate of appropriateness. Both were rejected.[7] Consequently, Penn Central filed suit in New York Supreme Court, alleging a taking of its property without just compensation and without due process of law, in violation of the Fifth and Fourteenth Amendments.[8]

The trial court granted injunctive and declaratory relief, barring the City from using the Landmarks Law to impede the construction of any lawful structure on the terminal site.[9] The City appealed and the New York Supreme Court, Appellate Division, reversed, holding that the restrictions on development above the terminal "were necessary to promote the legitimate public purpose of protecting landmarks."[10] The New York Court of Appeals affirmed, holding that there could be

2. *Id.*

3. Preservation of Landmarks and Historical Districts, 2 N.Y.C. ADMIN. CODE ch. 8-A, §§ 205-1.0 *et seq.* (1976).

4. The ordinance defines a "landmark" as:

> Any improvement, any part of which is thirty years old or older, which has a special character or special historical or aesthetic interest or value as part of the development, heritage or cultural characteristics of the city, state or nation and which has been designated as a landmark pursuant to the provisions of this chapter.

2 N.Y.C. ADMIN. CODE ch. 8-A § 207-1.0(n) (1976).

5. *Id.* § 207-10.0(a).

6. *Id.* §§ 207-4.0 to 207-9.0.

7. *Penn Central*, 438 U.S. at 116-18.

8. *Id.* at 119.

9. *Id.*

10. *Id.* at 119-20.

no "taking" since the Landmarks Law had not transferred control of the terminal to the City, but had only restricted Penn Central's use of the property.[11]

The U.S. Supreme Court framed the main issue to be reviewed as "whether the restrictions imposed by New York City's law upon [Penn Central's] exploitation of the Terminal site effect a 'taking' of [Penn Central's] property for a public use . . . ."[12] To make this determination, the Court reviewed several earlier "takings" cases and the factors that had shaped the decisions in those cases. The Court determined these factors to include the "economic impact of the regulation on the claimant and, particularly, the extent to which the regulation has interfered with distinct investment-backed expectations."[13] The Court noted that it had dismissed "takings" cases in the past when the challenged regulation did not interfere "with the reasonable expectations" of the claimant, "even when such action caused economic harm."[14]

The Court held that since Penn Central could (1) continue to use the terminal as it had used it prior to the designation, the law did not interfere with Penn Central's "primary expectation" concerning the use of the property and thus Penn Central would continue to obtain a "reasonable return" from the property;[15] and (2) had unused development rights "suitable for the construction of new office buildings" at another location, there was not a significant interference with Penn Central's investment-backed expectations.[16] Therefore, the law was held not to interfere with property rights to the point of unconstitutionality.[17]

2. Justice Rehnquist's Dissent

Justice Brennan, writing for the majority, conceeded that the Court has had difficulty structuring a "set formula" for determining when a compensable taking has occurred.[18] Justice Brennan recognized that

11. *Id.* at 121.
12. *Id.* at 122.
13. *Id.* at 124.
14. *Id.* at 124-25.
15. *Id.* at 136. The Landmarks Law defines "reasonable return" as an annual return of six percent of the value of the improved land. 2 N.Y.C. ADMIN. CODE ch. 8-A § 207-1.0(v)(1) (1976).
16. *Penn Central*, 438 U.S. at 137. The Court noted that under the Landmarks Law, Penn Central was not prohibited from occupying all space above the terminal. *Id.* at 136. Rather, the Court stressed that Penn Central had not sought approval for a smaller building, which may have been granted. *Id.* at 137. The Court further noted that the unused development rights were "transferable to at least eight parcels in the vicinity of the Terminal." *Id.* The Court noted that, although the transfer of rights in this manner may not have constituted "just compensation" if a "taking" occurred, this transfer served to mitigate any financial burdens. *Id.*
17. *Id.* at 138.
18. Justice Brennan stated, "this Court, quite simply, has been unable to develop any 'set formula' for determining when 'justice and fairness' require that economic injuries caused by public action be compensated by the government, rather than re-

each case had required an ad hoc, factual inquiry, although several factors, used inconsistently, have emerged from these cases.[19] In dissent, Justice Rehnquist criticized both the majority's test to determine if a taking had occurred and the rationale for the conclusion that no compensable taking had occurred under the facts as presented.

In three sentences, Justice Rehnquist set the tone for the dissent:

> The owner of a building might initially be pleased that his property has been chosen by a distinguished committee of architects, historians, and city planners for such a singular distinction. But he may well discover, as appellant Penn Central Transportation Co. did here, that the landmark designation imposes upon him a substantial cost, with little or no offsetting benefit except for the honor of the designation. The question in this case is whether the cost associated with the city of New York's desire to preserve a limited number of "landmarks" within its borders must be borne by all of its tax payers or whether it can instead be imposed entirely on the owners of the individual properties.[20]

The theme presented by the above quote expresses Justice Rehnquist's concern that society as a whole through the government, rather than an individual, should bear the burden of a high cost with low reciprocal benefits.

The dissent addressed the analogy between landmark preservation and zoning restrictions cited by the majority as a justification for its holding.[21] Justice Rehnquist distinguished between a zoning restriction, likely to be offset by an increase in property value that flows from restrictions similarly imposed on all landowners in a community, and landmark designation, affecting relatively few, separated buildings.[22] This tradeoff, in which all property owners in an area are under similar land-use restrictions, is a benefit to both the municipality and to all the owners. Quoting Justice Holmes, Justice Renquist found that there is "an average reciprocity of advantage."[23] However, when the cost associated with the promulgation of a restrictive landuse regulation is imposed solely upon an individual property owner and not uniformly upon all of his or her neighbors, "no such reciprocity exists."[24]

---

main disproportionately concentrated on a few persons." *Id.* at 124 (citing Goldblatt v. Town of Hempstead, 369 U.S. 590, 594 (1962)).

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

20. *Id.* at 138-39.

21. The majority compares the restriction against building above the Terminal to a zoning ordinance that prohibits, for aesthetic reasons, two or more adult theaters within a specified area. *Id.* at 135. The majority fails, however, to make the distinction between all property owners sharing the benefit, as well as the burden, in that situation, as opposed to the owner of a landmark, who bears the burden alone.

22. *Id.* at 139-40.

23. Pennsylvania Coal Co. v. Mahon, 260 U.S. 393, 415 (1922).

24. *Penn Central*, 438 U.S. at 140.

Under the New York City Landmarks Preservation Law, an owner of a designated property is under an affirmative duty to preserve the property as a landmark at his or her own expense.[25] Justice Rehnquist concluded that this type of affirmative obligation, which may cost the landowner (as in this case) millions of dollars, with no reciprocal benefit, and with no similar duty or restriction on neighboring landowners, was beyond the magnitude of the restrictions imposed by normal zoning regulations: "The rubric of 'zoning' has not yet sufficed to avoid the well-established proposition that the Fifth Amendment bars the 'Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole.' "[26]

Since the neighboring landowners are free to develop their properties under the broad New York City zoning laws, and Penn Central must forever maintain its property in its present state, the "property has been thus subjected to a nonconsensual servitude not borne by any neighboring or similar properties."[27]

Justice Rehnquist next addressed the majority's analysis of the nuisance exception to the guarantee of just compensation. The majority, in its analysis of cases upholding landuse regulations and restrictions, including zoning laws that destroyed or adversely affected property rights, discussed several cases in which the Court based its holding on the promotion of the health, safety, morals, or general welfare of the public.[28] The dissent rebutted any implied connection between a zoning law promulgated to prevent a harmful public nuisance and the restrictions imposed by the Landmarks Law. The dissent asserted that the nuisance exception is not "coterminous with the police power it-

---

25. *Id.* The relevant section of the ordinance mandates that:

> Every person in charge of an improvement on a landmark site or in an historic district . . . [must] keep in good repair (1) all of the exterior portions of such improvement and (2) all interior portions thereof which, if not so maintained, may cause or tend to cause the exterior portions of such improvement to deteriorate, decay or become damaged or otherwise to fall into a state of disrepair.

2 N.Y.C. ADMIN. CODE ch. 8-A, § 207-10.0(a).

26. *Penn Central*, 438 U.S. at 140 (quoting Armstrong v. United States, 364 U.S. 40, 49 (1960)).

27. *Id.* at 143. In a footnote to the quote, Justice Rehnquist noted that the fact that Penn Central had not made use of its development rights prior to the imposition of the restriction is irrelevant, as the Fifth Amendment must be applied with reference to all suitable uses. *Id.* at 143 n.6.

28. *Id.* at 125-28 (citing Goldblatt v. Town of Hempstead, 369 U.S. 590 (1962) (landowner prohibited from mining sand and gravel below the water line); Miller v. Schoene, 276 U.S. 272 (1928) (landowner forced to cut down infested trees); Pennsylvania Coal Co. v. Mahon, 260 U.S. 393 (1922) (landowner prohibited from mining coal within 150 feet of a residential property foundation); Hadacheck v. Sebastian, 239 U.S. 394 (1915) (landowner prohibited from operating an existing brickyard within a residential area)). Each of these cases presented clear issues of public health, safety, and welfare.

self. The question is whether the forbidden use is dangerous to the safety, health, or welfare of others."[29]

New York City was not preventing a nuisance, nor was there any danger to the community posed by the proposed development. The proposed building met all requisite zoning, safety, and health requirements. Penn Central was forbidden to build simply because the Landmark Preservation Commission wished to forever preserve, in its present state, what it believed to be an outstanding example of beaux arts architecture.[30]

The City acquired a servitude that required compensation because Penn Central was not free to use its property as would otherwise have been permitted under applicable zoning regulations, but must forever strictly adhere to past use and maintain the terminal in its present state and in good repair.[31]

The dissent concluded this issue by noting that a multimillion-dollar loss was imposed on Penn Central without the offset of benefits generally associated with a zoning restriction. Moreover, this restriction, as the City conceded, benefited all the citizens of New York. The dissent asserted that "[i]t is exactly this imposition of general costs on a few individuals at which the 'taking' protection is directed."[32]

The final issue addressed by the dissent was whether the ability to make a reasonable return on a property investment should affect a takings analysis. It pointed out that the Supreme Court has held that, even if the destruction of property rights would not otherwise constitute a taking, the inability of the owner to make a reasonable return on his or her property will trigger a compensable taking under the Fifth Amendment.[33] The dissent stressed that the converse was not the case; a taking does not become noncompensable simply because

---

29. *Id.* at 145.

30. *Id.* at 146. The dissent explained:

> Penn Central is prevented from further developing its property basically because *too good* a job was done in designing and building it. The City of New York, because of its unadorned admiration for the design, has decided that the owners of the building must preserve it unchanged for the benefit of sightseeing New Yorkers and tourists.

Id. (emphasis in original).

31. *Id.* at 146. The dissent stated that even though Penn Central may continue to use the terminal as it is presently used, the City otherwise "exercise[s] complete dominion and control over the surface of the land." *Id.* (quoting United States v. Causby, 328 U.S. 256, 262 (1946)).

32. *Id.* at 147. In a footnote, the dissent noted that to require Penn Central maintain its property at its sole expense, for the benefit to the public at large, would be analogous to a situation in which the government wished to preserve a pre-existing canal system for public use, and rather than condemn it and compensate the owner, simply order that the owner preserve it in its present state and keep it in "good repair." *Id.* at 146 n.9 (citing Monongahela Navigation Co. v. United States, 148 U.S. 312 (1893)).

33. *Id.* at 149 (citing United States v. Lynah, 188 U.S. 445, 470 (1903)).

government chooses to leave the landowner with some use of his or her property.[34]

The New York City Zoning Resolution permitted the owner of a designated landmark to "transfer" unused development rights from the landmark site to adjacent properties. These rights are referred to as "Transferrable Development Rights" or "TDRs."[35] In support of their determination that a compensable taking had not occurred, the majority noted that the property owner may therefore "transfer" development rights from the landmark to adjoining property. The dissent criticized the rationale on the ground that "just compensation" does not mean approximate compensation, but rather "a full and perfect equivalent for the property taken."[36]

The fact that the City believed TDRs to be "just compensation" was irrelevant. As Justice Rehnquist explained, even the New York Court of Appeals noted that TDRs have an uncertain and contingent market value and do not "adequately preserve" the diminution in value associated with a landmark designation.[37] The dissent conceded that Penn Central was offered a significant sum of money in return for the TDRs, and since the record was not clear as to exactly how much, considered that remand to the state court would be proper to determine if the value of the TDRs obviated the need for "just compensation" for the taking.[38]

In conclusion, the dissent borrows a prophetic quote from Justice Holmes, who in writing for the majority in *Pennsylvania Coal Co. v. Mahon*,[39] warned that the courts were "in danger of forgetting that 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."[40]

34. *Id.* at 149 (quoting United States v. Cress, 243 U.S. 316, 328 (1917) ("it is the character of the invasion, not the amount of damages resulting from it, so long as the damage is substantial, that determines the question whether there is a taking.")).

35. *See* New York City Zoning Resolutions 74-79 to 74-793. The dissent speculated that this law was promulgated specifically to ensure the constitutionality of the Landmarks Law. *Penn Central*, 438 U.S. at 150. The majority stated that this zoning law was expanded in 1969, apparently for the specific purpose of permitting the owners of the Grand Central Terminal to transfer their development rights "across a street and opposite to another lot or lots which except for the intervention of streets or street intersections [form] a series extending to the lot occupied by the landmark. . . ." *Id.* at 114.

36. *Id.* at 150 (quoting Monongahela Navigation Co. v. United States, 148 U.S. 312, 326 (1893)).

37. *Id.* at 151 (quoting Fred F. French Investing Co. v. City of New York, 350 N.E.2d 381, 383 (N.Y. 1976), *appeal dismissed*, 429 U.S. 990 (1976)).

38. *Id.* at 152. The dissent made it clear that once a taking has occurred, the determination of what constitutes just compensation is a question for the courts alone to decide. It is not to be left to the legislatures who are responsible for the very taking being compensated. *Id.* at 151.

39. 260 U.S. 393 (1922).

40. *Id.* at 152 (quoting Pennsylvania Coal Co. v. Mahon, 260 U.S. 393, 416 (1922)).

B. *Supreme Court Regulatory Takings Jurisprudence After* Penn Central

1. *Agins v. City of Tiburon*

Two years after *Penn Central*, the Supreme Court decided *Agins v. City of Tiburon*.[41] Unlike *Penn Central, Agins* was a unanimous decision. The Court had undergone no personnel changes in those two years.[42] However, the same Court that struggled with *Penn Central* had little difficulty holding that the Tiburon zoning ordinance did not take Agins's property without just compensation.

The issue before the Court did not present the complex takings and just compensation analysis of *Penn Central*. Agins purchased land for development. Subsequent to the purchase, Tiburon enacted a zoning ordinance[43] pursuant to a California state law that required the preparation of a plan for both land-use and development of open-space lands.[44] The zoning ordinance restricted the development of Agins's property to single-family residences.

Because Agins had not submitted a site-plan proposal for development under the challenged ordinance, the only question addressed by the Court was whether the mere enactment of the ordinance constituted a taking.[45] The Court applied a test not unlike that in *Penn Central*, and held that a general zoning law may constitute a taking only when "the ordinance does not substantially advance legitimate state interests, or denies an owner economically viable use of his land."[46] The Court held that the ordinance substantially advanced legitimate governmental goals.[47] The Court stated that the zoning ordinance was a legitimate exercise of the police power in that it would protect the residents of Tiburon from the "ill effects of urbanization."[48]

The issue of reciprocal benefits, a major concern in Justice Rehnquist's dissent in *Penn Central*,[49] was addressed and found to exist in this case. The public interest was served by the orderly and careful development of residential property and open-air spaces.[50] Moreover, there was no indication that Agins would be burdened by the restric-

---

41. 447 U.S. 255 (1980).

42. For the 1980 session, the Supreme Court was comprised of Justices Blackmun, Brennan, Marshall, Powell, Rehnquist, Stevens, Stewart, and White, and Chief Justice Burger. *See* BLACK'S LAW DICTIONARY 1654 (6th ed. 1990).

43. Tiburon, Cal., Ordinance No. 124 N.S. §§ 1(f) and (h).

44. CAL. GOV'T CODE § 65561 (West Supp. 1979).

45. *Agins*, 447 U.S. at 260.

46. *Id.* (citing Nectow v. Cambridge, 277 U.S. 183, 188 (1928); Penn Cent. Transp. Co. v. New York City, 438 U.S. 104, 138 n.36 (1978)).

47. *Id.* at 261.

48. *Id.*

49. *See supra* notes 21-25 and accompanying text.

50. *Agins*, 447 U.S. at 262.

tion alone.[51] Therefore, Agins would share both the benefits and the burdens of the ordinance.

The final factor of the *Penn Central* analysis concerned whether the ordinance prevented the best use of the land, or extinguished a fundamental attribute of ownership.[52] The Court noted that the ordinance permitted Agins to build as many as five single-family residences on his five acres of property. Since Agins was free to pursue his "reasonable investment expectations" by submitting a plan for development, the ordinance did not deny Agins the "justice and fairness" guaranteed by the Fifth Amendment.[53]

2. *Keystone Bituminous Coal Ass'n v. DeBenedictis*

The first Supreme Court case to address the issue of a regulatory taking since *Penn Central* after a change in the makeup of the Court,[54] was *Keystone Bituminous Coal Ass'n v. DeBenedictis*.[55] In *Keystone*, the Court reviewed a statute that limited coal mining so as to avoid subsidence damage to surface buildings.[56] The coal association challenged the statute as a taking under the Fifth Amendment.[57] The Court applied the *Penn Central* takings criteria to the facts, and concluded there was no compensable taking.

Writing for the majority, Justice Stevens upheld the statute, concluding that it abated a significant threat to the public welfare.[58] Moreover, the petitioners failed to demonstrate a financial deprivation significant enough to satisfy the "heavy burden placed upon one alleging a regulatory taking."[59] Since the statute prevented a threat to the public and the owner's investment-backed expectations were not unduly burdened, the statute survived a facial challenge.

In dissent, Justice Rehnquist, with whom Justice Powell and newly appointed Justices Scalia and O'Conner joined, again attacked the Court's policy of applying the nuisance exception broadly.[60] The dis-

51. *Id.*

52. *Id.* (citing United States v. Causby, 328 U.S. 256, 262 (1946); Kaiser Action v. United States, 444 U.S. 164, 179-80 (1979)).

53. *Id.* at 262-63 (quoting Penn Cent. Transp. Co. v. New York City, 438 U.S. 104, 124 (1978)).

54. Justice Burger and Justice Stewart retired and were replaced by Justices O'Conner and Scalia. *See* BLACK'S LAW DICTIONARY 1654 (6th ed. 1990).

55. 480 U.S. 470 (1987).

56. The challenged statute was PA. STAT. ANN. tit. 52, § 1406.6 (1986).

57. *Keystone*, 480 U.S. at 478-79.

58. *Id.* at 485. The first part of the test is whether the regulation is abating a public nuisance, so as to be consistent with the notion of a "reciprocity of advantage" that Justice Holmes referred to in Pennsylvania Coal Co. v. Mahon, 260 U.S. 393 (1922). Since all citizens benefit from governmental regulations that ensure the safety and welfare of the community, this test was satisfied here. *Keystone*, 480 U.S. at 491-92.

59. *Id.* at 493. Evidence that the Court was at least attempting to frame a concrete test for a regulatory taking can be seen in the fact that the section addressing this issue was titled "Diminution of Value and Investment-Backed Expectations." *Id.*

60. *Id.* at 511-13.

sent pointed to the narrow exceptions under the nuisance doctrine: first, that the regulation be based on health, safety, and welfare concerns, and second, that the regulation not allow "complete extinction" of the property's value.[61]

The dissent based its criticism of the Court's conclusion on the nature of the Subsidence Act, which was enacted primarily to preserve buildings, economic development, and maintenance of property values to insure significant tax rolls.[62] As to the economic development element, the petitioner's interests in particular coal deposits were completely destroyed. Therefore, the dissent argued, application of the nuisance exception under these circumstances would permit a regulatory authority to extinguish all beneficial use of a citizen's property with no compensation.[63]

3. *First English Evangelical Lutheran Church v. Los Angeles County*

In *First English Evangelical Lutheran Church v. Los Angeles County*,[64] decided three months after *Keystone*, Chief Justice Rehnquist delivered the opinion of the Court. After a flood destroyed the camp facilities on the twenty-one-acre parcel of land owned by the church in Angeles National Forest, the church was forbidden from rebuilding the camp on the site by an ordinance enacted in reaction to the flooding.[65] The ordinance stated that "[a] person shall not construct, reconstruct, place or enlarge any building or structure, any portion of which is, or will be, located within the outer boundary lines of the interim flood protection area . . . ."[66]

This prohibition on rebuilding lasted for three years and the church claimed this use restriction caused a compensable taking, despite the fact that the prohibition was not permanent.[67] The Court noted that although the issue of whether a temporary taking through regulation would require compensation had been presented before, the remedial question was never reached. In each prior case, either the regulations considered did not effect a taking, or the facts yet to be resolved might still conclude that no taking occurred.[68] Since the case before the Court did not present these obstacles, the Supreme Court could finally consider "whether the Just Compensation Clause requires the government to pay for 'temporary' regulatory takings."[69]

61. *Id.* at 513.
62. *Id.*
63. *Id.* at 514.
64. 482 U.S. 304 (1987).
65. *See* Los Angeles County Interim Ordinance No. 11,855 (Jan. 1979).
66. *Id.*
67. *First English*, 482 U.S. at 308.
68. *Id.* at 311.
69. *Id.* at 313.

The Court held that damages are recoverable for a temporary taking. The Court indicated that "where the government's activities have already worked a taking of all use of property, no subsequent action by the government can relieve it of the duty to provide compensation for the period during which the taking was effective."[70] Although the factors enumerated in *Penn Central* and *Keystone* were not factors in the decision, it bears noting that Justice Rehnquist, now writing for the majority, addressed the concern first voiced by the Court in *Pennsylvania Coal*[71] and embraced by the majority in *Penn Central* that "[g]overnment hardly could go on if to some extent values incident to property could not be diminished without paying for every change in the general law."[72]

The Court stated that this holding may indeed lessen the flexibility of legislators to enact land-use regulations. The justification is that "such consequences necessarily flow from any decision upholding a claim of constitutional right; many of the provisions of the Constitution are designed to limit the flexibility and freedom of governmental authorities, and the Just Compensation Clause of the Fifth Amendment is one of them."[73]

4. *Nollan v. California Coastal Commission*

In *Nollan v. California Coastal Commission*,[74] the third regulatory takings case to be decided by the Supreme Court in 1987, Justice Scalia, joined by Justices Powell, O'Conner, White, and Chief Justice Rehnquist, wrote for the 5-4 majority. In *Nollan*, owners of beachfront property applied to the California Coastal Commission for a permit to build a residence on their property. The California Commission required that the Nollans' grant a public easement across their property as a condition to its granting the building permit.[75]

The Court held that the requirement of a public easement constituted a taking of the property.[76] The Court explained that it had repeatedly held that "the right to exclude [others is] 'one of the most essential sticks in the bundle of rights that are commonly character-

70. *Id.* at 321.

71. Pennsylvania Coal Co. v. Mahon, 260 U.S. 393, 413 (1922).

72. Penn Cent. Transp. Co. v. New York City, 438 U.S. 104, 124 (1978). The Court in *Penn Central* also expressed concern that to embrace the argument that any restriction imposed on individual landmarks constitutes a taking requiring payment would invalidate not only the New York law, but all similar landmark legislation in the nation. *Id.* at 131. This concern that such a ruling would stifle legislators in their efforts to promulgate laws to protect the public welfare is refuted in Justice Rehnquist's dissent in *Penn Central*, in which he states that many states and cities have chosen to preserve landmarks by purchasing or condemning restrictive easements over the facades of the landmarks, and are satisfied with the results. *See id.* at 152 n.14.

73. *First English*, 482 U.S. at 321.

74. 483 U.S. 825 (1987).

75. *Id.* at 828.

76. *Id.* at 831.

ized as property.' "[77] In reaching this conclusion, the Court again indicated that the test for determining if a regulatory restriction amounts to a compensable taking is (1) whether or not the regulation substantially advances legitimate state interests or (2) denies an owner the economically viable use of his or her land.[78]

The Court concluded that a valid nexus between the restrictive condition and the justification for the prohibition did not exist. This lack of nexus between the condition (granting an easement to the public) and the purpose of the building restriction (protecting the public's ability to see the beach) converted the original purpose of the building restriction to something different from that which it had been.[79] The purpose became the obtaining of an easement to serve a valid government interest but without payment of compensation. The Court concluded that "unless the permit condition serves the same governmental purpose as the development ban, the building restriction is not a valid regulation of land use but 'an out-and-out plan of extortion.' "[80]

5. *Lucas v. South Carolina Coastal Council*

In *Lucas v. South Carolina Coastal Council*,[81] the shift toward greater protection of property rights for regulatory takings became more evident. Justice Powell and Justice Marshall, two more members of the majority in *Penn Central*, retired and were replaced by Justices Thomas and Souter prior to the Court's review of the claim in *Lucas*. Although the holding was not ground-breaking in the analysis it applied, the opinion makes it clear that this Court will not permit a compensable taking for public purpose to be disguised as a regulation for the "mitigation of serious public harm."[82]

Lucas purchased two beachfront residential lots on a barrier island off the coast of South Carolina in 1986 with the intention of constructing single-family homes.[83] Two years later, South Carolina enacted the Beachfront Management Act,[84] which restricted the use of the properties and prevented Lucas from erecting permanent habitable structures on the properties. Relying on the Court's holding in *Agins*

---

77. *Id.* (quoting Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419, 433 (1982); Kaiser Aetna v. United States, 444 U.S. 164, 176 (1979)).

78. *Id.* at 834.

79. *Id.* at 836-37. The Court further explained the "essential nexus" test by analogy. A law that protects the public welfare by forbidding the shouting of "fire" in theaters, but allows those who pay the government $100.00 to do so, is not dissimilar from demanding a public easement across private property in exchange for a waiver of the law that prohibits building structures that block the view of the beach from the public roadway. *Id.* at 837.

80. *Id.* (quoting J.E.D. Assocs., Inc. v. Atkinson, 432 A.2d 12, 14-15 (N.H. 1981)).

81. 112 S. Ct. 2886 (1992).

82. *Id.* at 2895.

83. *Id.* at 2889.

84. S.C. CODE ANN. §§ 48-39-10 to 48-39-360 (Law. Co-op Supp. 1992).

v. Tiburon,[85] Lucas challenged the act, asserting that it caused a taking because he had been deprived of all economically viable use of his property.[86]

In *Lucas*, the Court acknowledged that in more than seventy years of regulatory takings jurisprudence since *Pennsylvania Coal*, it had never stated a "set formula" for determining when a regulation restricting private property use goes "too far."[87] The Court explained that it had determined that a taking occurs when there is a physical invasion of the property, or when the regulation at issue denies the owner all economically beneficial or productive use of his or her land.[88] The Court further explained that the Fifth Amendment is also violated when the land-use regulation "does not substantially advance legitimate state interests *or denies an owner economically viable use of his land*."[89] In a footnote to that quote, the Court conceeded that the "deprivation of all economically feasible use" rule is not precise because it does not make clear which property interest the loss in value is to be measured against.[90]

The Court warned of the danger presented whenever a regulation leaves an owner of land without economically beneficial or productive options for its use by requiring it to remain in its present or natural state.[91] As the Court noted, these regulations "carry with them a heightened risk that private property is being pressed into some form of public service under the guise of mitigating serious public harm."[92] In explaining how the transition from a focus on regulations that controlled noxious uses to those that benefit the public was an easy one, the Court stated that the distinction between "harm preventing" and "benefit conferring" is "often in the eyes of the beholder."[93]

The Court concluded that when a statute deprives land of all economically viable uses, governmental authority may resist compensation only when the proscribed use was not part of the owner's title to begin with.[94] This inquiry must be made based upon the state's common-law nuisance standards. Thus, if an owner is barred by regulation from a use that is considered a common-law nuisance, the owner is deemed to have constructive notice that the use was subject to pro-

85. *See* notes 39-51 and accompanying text.
86. *Lucas*, 112 S. Ct. at 2890.
87. *Id.* at 2893.
88. *Id.*
89. *Id.* at 2894 (quoting Agins v. City of Tiburon, 447 U.S. 255, 260 (1980)).
90. *Id.* at 2894 n.7. The Court criticized the calculation used by the New York State Court of Appeals in determining that the diminution in a particular parcel's value is to be based upon the total value of a claimant's other holdings in the vicinity. The Court refers to this as "an extreme—and, we think, unsupportable—view of the relevant calculus." *Id.*
91. *Id.* at 2894-95.
92. *Id.* at 2895.
93. *Id.* at 2897.
94. *Id.* at 2899.

scription, and compensation is not required.[95] However, if the regulation proscribes a use that is not a common-law nuisance and all economically viable use of the land is lost as a result, compensation is required.[96]

Applied to the facts in *Lucas*, the Court held that it was unlikely that the construction of residences on one's property in South Carolina would be considered a common-law nuisance.[97] However, that inquiry was left to the state court to determine on remand. The Court offered guidance to the South Carolina court, stating that South Carolina would be required to identify the background principles of nuisance and property law that prohibit those uses Lucas intended under the present conditions of the property.[98] Only then could this regulation pass constitutional muster without compensating Lucas.

Justice Blackmun's dissent voiced concern that the majority had "launched a missile to kill a mouse" and that the changes in takings doctrine created by the *Lucas* decision may go beyond the narrow confines of the facts presented, and may well affect the takings doctrine in the future.[99]

6. *Dolan v. City of Tigard*

The most recent Supreme Court case to address regulatory takings is *Dolan v. City of Tigard*,[100] in which Chief Justice Rehnquist wrote the opinion for the Court, after the retirement of Justice White and the addition of Justice Ginsburg. The first issue before the Court was whether an essential nexus existed between the condition imposed on a landowner who sought a building permit and a legitimate state interest.[101] The Supreme Court reversed and remanded the decision of the Supreme Court of Oregon,[102] which had held that the Tigard City Planning Commission did not unconstitutionally "take" Dolan's property.[103]

When Dolan applied for a permit to expand her store and pave her parking lot, the Tigard City Planing Commission granted approval upon the condition that she dedicate a portion of her land for a public greenway and a pedestrian/bicycle pathway.[104] Dolan challenged the condition as a taking of private property for a public purpose requiring just compensation under the Fifth Amendment.[105]

---

95. *Id.* at 2901.
96. *Id.*
97. *Id.*
98. *Id.* at 2901-02.
99. *Id.* at 2917 (Blackmun, J., dissenting).
100. 114 S. Ct. 2309 (1994).
101. *Id.* at 2317.
102. *Id.* at 2322.
103. Dolan v. City of Tigard, 854 P.2d 437, 442 (Or. 1993).
104. *Dolan*, 114 S. Ct. at 2314.
105. *Id.* at 2315.

The Supreme Court stated that had the city required Dolan to dedicate a strip of land to public use, a taking would have occurred. The issue was whether conditioning the grant of the permit on such a dedication was a taking under the Fifth Amendment.[106] The Court required the use of the "essential nexus" test to determine whether an adequate connection existed between the "legitimate state interest" and the permit condition.[107] Citing *Nollan*,[108] the Court reiterated that under the doctrine of "unconstitutional conditions," the government may not require that a person give up one constitutional right in exchange for a discretionary benefit.[109]

The Court concluded that "the dedication [must] have some reasonable relationship to the needs created by the [development]"[110] and that the test to be applied by lower courts when addressing this type of regulatory taking issue should be that of "rough proportionality."[111] This test requires the authority imposing a condition to "make some sort of determination that the required dedication is related both in nature and extent to the impact of the proposed development."[112]

The Court reversed the decision of the Supreme Court of Oregon and remanded for factual proceedings consistent with the tests and analysis.[113]

C. *Recent State and Federal Circuit Court Cases*

1. *Shubert Organization Inc. v. Landmarks Preservation Commission*

In *Shubert Organization Inc. v. Landmarks Preservation Commission*,[114] several theater owners in New York City's Broadway area brought suit to annul the designation of twenty-two different Broadway theaters as landmarks.[115] The suit specifically challenged the designation process employed by the New York City Landmarks Preservation Commission. The petitioners claimed that this designation was an improper exercise of spot zoning, rather than a result of proper findings for designation under the New York City Landmarks Law.[116]

The theaters posed two notable arguments. First, the theaters argued that the process used to determine whether the theaters were genuine landmarks, and thus ripe for designation under the ordinance

106. *Id.* at 2317.
107. *Id.*
108. *See supra* notes 72-78 and accompanying text.
109. *Dolan*, 114 S. Ct. at 2317.
110. *Id.* at 2319.
111. *Id.*
112. *Id.* at 2319-20.
113. *Id.* at 2322.
114. 570 N.Y.S.2d 504 (N.Y. App. Div. 1991).
115. *Id.* at 505.
116. *Id.*

was arbitrary and not in accord with the mandates in the ordinance.[117] Second, the theaters claimed that the designation was an abuse of the ordinance, because the purpose was not to preserve valuable historic landmarks, but rather to protect the Broadway theater business, which was in decline.[118]

Despite these arguments, the Court of Appeals deferred to the "expertise of the members of the Landmarks Preservation Commission," even though evidence that the description and analysis in each of the Commission's reports about the theaters contained boilerplate introductions. Evidence further suggested uniformity and routineness in the designation procedure, rather than a review of each individual theater to establish the "special"[119] historic qualities of a nominated landmark.[120]

The Court of Appeals stated that manipulation of the Landmarks Law by the Landmarks Preservation Commission for the purpose of preserving the Broadway theater business, rather than preserving individual theaters worthy of landmark designation, would have constituted improper spot zoning.[121] However, the court found that the Landmarks Preservation Commission evaluated each theater's interior and exterior utilizing the criteria of the Landmarks Law. The court indicated that the administrative determination was not arbitrary or capricious because it was based upon substantial evidence to pass judicial inquiry.[122]

Therefore, the New York Court of Appeals held that under the holding in *Penn Central*, the Landmarks Law is constitutional, and the application of the Landmarks Law did not constitute a compensable taking.[123] Consequently, the Court of Appeals affirmed the lower court ruling dismissing the petition.[124]

2. *United Artists' Theater Circuit, Inc. v. City of Philadelphia*

In *United Artists' Theater Circuit, Inc. v. City of Philadelphia*,[125] an unusual case with a fact pattern similar to *Shubert*, the Supreme Court of Pennsylvania reviewed on reargument, its own decision,[126] which held that the Philadelphia Historic Preservation Ordinance was "unfair, unjust and amount[s] to an unconstitutional taking without just

117. *Id.* at 506. *See supra* note 3 and accompanying text.
118. *Shubert*, 570 N.Y.S.2d at 506.
119. *See supra* note 3 and accompanying text.
120. *Shubert*, 570 N.Y.S.2d at 506-07.
121. *Id.* at 507.
122. *Id.*
123. *Id.* at 508.
124. *Id.*
125. 635 A.2d 612 (Pa. 1993).
126. *See* United Artists' Theater Circuit, Inc. v. City of Philadelphia, 595 A.2d 6 (Pa. 1991).

compensation."[127] Reargument was granted on the sole issue of whether the designation of a building as historic was a taking under the Pennsylvania Constitution.[128]

The court first noted that the Pennsylvania Constitution may provide greater rights than those provided under the U.S. Constitution.[129] After a review of the relevant Pennsylvania case law, the court cited the three conditions for determining that governmental action does not constitute a taking requiring compensation:

> 1) the interest of the general public, rather than a particular class of persons, must require governmental action;
> 2) the means must be necessary to effectuate that purpose;
> 3) the means must be not unduly oppressive upon the property holder, considering the economic impact of the regulation, and the extent to which the government physically intrudes upon the property.[130]

The court applied each of these elements to the facts presented, and determined that (1) citizens empowered the legislature to act in areas of purely historic concern, reflecting a public interest in preserving historic landmarks; (2) the Supreme Court ruled in *Penn Central* that if there is no other practical means to preserve historic landmarks, the government may historically designate the sites rather than use its eminent domain powers to purchase the properties; and (3) although the regulation may deprive an owner of the property's most valuable use, it is not likely to deprive it of any profitable uses.[131]

The court held that historic designation did not constitute a compensable taking under the Pennsylvania Constitution.[132] The court noted that in the fifteen years since the Supreme Court decided *Penn Central*, no state court had found a taking in a historic preservation case.[133] Interestingly, the court stated that it would have broken with the *Penn Central* decision had it found that the historic preservation statute at issue constituted a taking under the Pennsylvania Constitution.[134]

3. *Loveladies Harbor, Inc. v. United States*

The most creative test to be adopted by a court since *Penn Central*, and one that clearly points to a change in judicial attitudes toward

---

127. *Id.* at 13-14.
128. *Id.*
129. *Id.* at 615.
130. *Id.* at 618.
131. *Id.*
132. *Id.* at 620.
133. *Id.* at 619.
134. *Id.* The court pointed out that in Commonwealth v. Edmunds, 586 A.2d 887 (Pa. 1991), the Supreme Court of Pennsylvania had rejected the U.S. Supreme Court's recognition of the good-faith exception to the exclusionary rule in United States v. Leon, 468 U.S. 897 (1984). *Id.*

regulatory takings cases, was applied by the Federal Circuit Court of Appeals in *Loveladies Harbor, Inc. v. United States.*[135] In *Loveladies*, the owner of a parcel of land in New Jersey that was primarily designated as wetlands sought the requisite federal permit for the development of the parcel.[136] When the Army Corps of Engineers denied the permit, despite the fact that all relevant state approvals had been acquired, Loveladies brought an action in the Court of Federal Claims for just compensation under the Fifth Amendment.[137]

Before addressing the issues at hand, the Court of Appeals noted that what was not at issue in the case was whether the government had the right to prevent a property owner from filling or otherwise damaging vital wetlands.[138] Rather, the question before the court was whether, once the government fulfills its obligation to preserve and protect the public interest, the cost of the benefit should burden the affected property owner only, or should be shared by the community at large.[139]

The court stated that this analysis would require a balancing between the legitimate claims of society to constrain individual action that threatens the larger community, and the rights of the individual and the U.S. Constitution's commitment to private property as a "bulwark for the protection of those rights."[140] The test required the court to decide "which collective rights are to be obtained at collective cost, in order to better preserve collectively the rights of the individual."[141]

In a lengthy analysis, the Court of Appeals interpreted the Supreme Court's test in *Penn Central*, indicating that "[t]hree criteria would determine the outcome: (1) the character of the governmental action, (2) the economic impact of the regulation on the claimant, and (3) the extent to which the regulation interfered with distinct investment-backed expectations."[142]

With regard to the third criterion, "distinct investment-backed expectations," the Court of Appeals made an interesting observation: this is a way of limiting takings recovery to landowners who can demonstrate that they purchased the subject property in reliance on a state of affairs that did not include the challenged regulation.[143] This, the court explained, would mean that an owner who bought property with knowledge of the restriction or restraint would not then have a protected reliance interest, as the owner could be said to have as-

135. 28 F.3d 1171 (1994).
136. *Id.* at 1174.
137. *Id.*
138. *Id.* at 1175.
139. *Id.*
140. *Id.*
141. *Id.*
142. *Id.* at 1176 (citing Penn Cent. Transp. Co. v. New York City, 438 U.S. 104 (1978)).
143. *Id.* at 1177.

sumed the risk that the restraint might prevent unlimited use of the property in the future.[144]

In the analysis of the various tests and policy considerations inherent in regulatory takings jurisprudence, the Court of Appeals noted that the Supreme Court had further defined a non-compensable regulatory taking in *Lucas*[145] to include those regulations that prevented a use that was not "within the bundle of rights that property lawyers understand to constitute property."[146] In other words, "if the imposed restraint would have been justified under the state's traditional nuisance law, then the property owner's bundle of rights did not include the right claimed, and no taking could occur."[147]

This, the Court of Appeals claimed, dramatically changed the *Penn Central* test by eliminating much of the previously necessary ad hoc analysis (balancing private property rights against state regulatory policy) and allowing that state's common-law nuisance doctrine to control.[148] Thus, the change removed from regulatory takings analysis the "vagaries of the balancing process," substituting instead a reference familiar to property lawyers everywhere, thereby finally permitting some substantial likelihood of predictability for both property owners and regulators.[149]

Further supporting a case for greater individual property rights protection, the Court of Appeals noted that in *Penn Central*, the test was whether a property owner had, in a sense, already been compensated by the regulation because it "adjust[ed] the benefits and burdens of economic life to promote the common good,"[150] whereas the Supreme Court in *Lucas* changed that test to whether the regulation adjusted "the benefits and burdens of economic life . . . in a manner that secures an 'average reciprocity of advantage' to everyone concerned."[151] Thus, the question of whether an individual property owner should bear the full burden of a regulation aimed at benefitting the community at large depends on whether that individual benefits equally.

The Court of Appeals had little trouble applying these tests to determine that a compensable taking had occurred. Loveladies had been deprived of all feasible economic use of the property, because without the permit allowing for the filling in of the wetlands, no use of any kind could be made of the property other than leaving it in its

144. *Id.*
145. *See supra* notes 76-97 and accompanying text.
146. *Loveladies Harbor*, 28 F.3d at 1179.
147. *Id.*
148. *Id.*
149. *Id.*
150. *Id.* at 1180 (quoting Penn Cent. Transp. Co. v. New York City, 438 U.S. 104, 124 (1978)).
151. *Id.* (quoting *Lucas*, 112 S. Ct. 2886, 2894 (1992)).

natural state.[152] Applying the state's nuisance laws, the court concluded that since Loveladies was entitled to fill the 11.5 acres as a result of negotiations conducted in accordance with applicable state law, there could necessarily not be any common-law nuisance issue.[153]

The court noted that Loveladies purchased the property with the clear intent to develop it long before the state and federal regulations at issue came into effect.[154] Since Loveladies had a clear investment-backed expectation to develop the land, and there did not exist any statute or state common-law nuisance doctrine that would have put Loveladies on notice, either actual or constructive, of the likelihood of the planned development being thwarted through this type of regulatory injunction, the Court of Appeals held that a compensable taking had occurred.

II. Historic Preservation Laws: Problems and Solutions

When the U.S. Supreme Court upheld the New York City Landmarks Law in *Penn Central*, it did not address the more practical problems associated with such ordinances: misuse and abuse at the administrative level. The problems inherent in the application of historic preservation and landmark designation laws at the local level, and even at the federal and state levels, are compounded by the hidden agendas of those who would abuse those laws for ulterior motives having little to do with historic preservation.

It is all too common today to find development-limiting laws and regulations, such as New York's State Environmental Quality Review Act[155] ("SEQRA") and historic preservation statutes, being used as swords to stifle development by those who would prefer either to see their own neighborhoods remain free from changes that they deem undesirable or to prevent the entry of an economic competitor, rather than as shields to protect genuinely fragile environments or to preserve genuinely significant historic landmarks.

For example, a property owner who desires to improve vacant land or renovate an existing structure may be unpleasantly surprised to find that, despite having received all necessary building approvals and permits, no construction may commence because the property is suddenly being considered for protection under a landmarks preservation ordinance at the insistance of a "concerned" citizens group. Although many such nominations may be triggered by genuine concerns, a trend towards less discriminate selection of what is historically "significant" or "special" coupled with minimal, inaccurate, or unreliable evidence

---

152. *Id.* at 1182.
153. *Id.*
154. *Id.*
155. New York Envtl. Conserv. Law §§ 8-0101 to 8-0117 (McKinney 1984).

of a property's historic value threatens to undermine the true goals of such legislation.

It has been noted by one commentator that:

> the growing breadth of the definition of what is important to preserve can reduce the concept to meaninglessness and lead to abuses. Preservation is not well served if it is trivialized by those claiming that much of what exists has historic virtue or if it is abused by those with a hidden agenda, such as to stop new development or to exact extractions from developers.[156]

The New York Court of Appeals has indicated that "challenges unrelated to environmental concerns can generate interminable delay and interference" with a development project.[157] The court has recognized "the danger of allowing special interest groups or pressure groups, motivated by economic self-interests, to misuse SEQRA for such purposes."[158]

These abuses have also been recognized by a former chairperson of the New York City Landmarks Preservation Commission, who wrote:

> [i]t is becoming increasingly apparent that there is a growing tendency to use designation for purposes outside the jurisdiction of the [Landmark Preservation] law and even at times explicitly denied to the Landmarks Preservation Commission by the law. . . . [L]andmarking is being used to stop demolition, to prevent development and change, to prevent a high-rise with change in use, bulk, scale, etc. . . . The misuse of the law places in jeopardy the past and future legitimate designations, and, most importantly, places in jeopardy the future of the Landmarks Preservation Commission and the Landmarks Law.[159]

Much of the problem is in the language of the laws themselves. For instance, the designation criteria in New York City's Landmarks Preservation Law[160] has often been criticized as vague and subjective. In his dissent in *Penn Central*, Justice Rehnquist offered one such criticism, when he noted that "the ordinance . . . gives little guidance to the Commission in its selection of landmark sites."[161] Without sufficient specific guidance, it is left to the subjective opinion of the Landmarks Preservation Commission to decide what is "special" and therefore eligible for designation under the ordinance.

Another problem can be found in the nomination process. In the absence of detailed statutory guidelines, too often the proponents of a

---

156. *See* DAVID LISTOKIN, LIVING CITIES 29 (1985).

157. Society of Plastics Indus. v. County of Suffolk, 573 N.E.2d 1034, 1041 (N.Y. 1991); *see* Mobil Oil Corp. v. Syracuse Indus. Dev. Agency, 559 N.E.2d 641 (N.Y. 1990).

158. *Society of Plastics*, 573 N.E.2d at 1041 (citations omitted).

159. Beverly Moss Spatt, *Letter to the Editor*, N.Y. TIMES, July 8, 1980, at A16.

160. *See supra* note 3 and accompanying text.

161. Penn Cent. Transp. Co. v. New York City, 438 U.S. 104, 138 n.1 (1978) (Renquist, J., dissenting).

designation will fail to produce the definitive information necessary truly to appreciate whether, in the case of the New York City Landmarks Law, a property has "special character and special historical or aesthetic interest or value."[162] Instead, they rely upon unsubstantiated allegations, rumors, and folk lore to attempt to justify landmark designation.

In the New York City ordinance, the phrases "special character" and "special historical or aesthetic interest or value"[163] are undeniably vague and require some subjectivity in the decision-making process, but they also make it clear that ordinary properties are not proper subjects for designation simply because they are old. Many building and landscape designs hold some aesthetic interest or value to someone, but it is not prudent public policy to designate undistinguished buildings and landscapes.

One commentator summarized the abuse of landmark preservation laws and the danger to be averted by stating:

> [A]ll too frequently it is used when the real, almost hidden agenda is something quite different—the equally legitimate issues of open space, wildlife conservation, architectural preservation, protection of property values or just plain "no more development wanted." By lumping them all under the label "historic-landmark preservation," we lessen our ability to weigh the values of each, and make it more difficult to preserve a truly historic landmark when one is in danger.[164]

There may be no sure way to prevent all abuses of landmark preservation laws. However, by clearly defining designation criteria at the legislative level, demanding definitive proof based upon scholarly research at the nomination level, and adhering to strict procedures at the administrative level, the possibility of a disingenuous nomination succeeding in thwarting a landowner's intended, legitimate use of his or her property will be significantly reduced.

III. PENN CENTRAL REVISITED?

In the seventeen years since the U.S. Supreme Court decided *Penn Central*, significant changes have occurred in both the Court's approach to regulatory takings cases and in the composition of the Court itself. Of the nine Supreme Court Justices sitting on the bench when *Penn Central* was decided, only Chief Justice Rehnquist, author of the dissent, remains. With the addition of several conservative Justices, the potential for a decision from the Supreme Court providing greater

162. *See supra* note 3 and accompanying text.
163. *See supra* note 3 and accompanying text.
164. Karolyn Wrightson, *Designing Landmarks: Beware Hidden Agendas*, N.Y. TIMES, May 15, 1988, at 40. Wrightson was Executive Director of the Westchester County Historical Society at that time.

protection of property rights in historic preservation and other regulatory takings cases is enhanced.

What if *Penn Central*, or a case with similar facts, were to be presented to the Supreme Court today? As the analysis of Justice Rehnquist's dissent in *Penn Central* reveals,[165] much of the criticism of the majority's reasoning was concentrated on what Justice Rehnquist viewed as a lack of reciprocal advantage, which should trigger the need for compensation.[166] The dissent also criticized any analogy between prior cases decided on nuisance principals and the facts presented in *Penn Central.*[167] Finally, the dissent addressed the issue of Penn Central's ability to make a reasonable return on its investment.[168]

Each of these criteria were addressed by the Supreme Court in subsequent regulatory takings cases, and the results disclose a trend toward stricter scrutiny and greater protection of private property rights. In *Keystone Bituminous Coal Ass'n v. DeBenedictis*,[169] Justice Rehnquist was joined in dissent by newly appointed Justices Scalia and O'Connor in again criticizing the Court's policy of applying the nuisance exception to compensable regulatory takings too broadly.[170]

It was *Nollan v. California Coastal Commission*,[171] another case decided in 1987, that first hinted that Justice Scalia (who wrote the opinion) and Justice O'Connor would join with Chief Justice Rehnquist in requiring a clear nexus between a restrictive regulation and the justification for the prohibition.[172] Although the government imposition in *Nollan* was the requirement of the grant of an easement in favor of the public rather than a restriction on the owner's use of the property,[173] the holding led the way to future decisions protective of the private property rights.

The case that best indicates the direction of the current Supreme Court with regard to regulatory takings is *Lucas v. South Carolina Coastal Council.*[174] The majority opinion, written by Justice Scalia, makes it clear that the Court will no longer permit a compensable taking for a public purpose to hide behind the "nuisance" exception unless a serious potential harm to the public is abated by the restriction at issue.

The Court emphasized the danger presented by a regulation that deprives an owner of the economic use of his or her land by requiring

165. *See supra* notes 17-38 and accompanying text.
166. *See supra* notes 21-26 and accompanying text.
167. *See supra* notes 27-30 and accompanying text.
168. *See supra* notes 32-37 and accompanying text.
169. 480 U.S. 470 (1987); *see supra* notes 58-59 and accompanying text.
170. *Id.* at 512-13.
171. 483 U.S. 825 (1987); *see supra* notes 73-78.
172. *Nollan*, 483 U.S. at 836-37.
173. *See supra* note 73 and accompanying text.
174. 112 S. Ct. 2886 (1992).

it to be left in its present state.[175] The Court stated that a governmental authority may only resist compensation in the name of "nuisance" if the proscribed use was not permitted prior to the regulation's enactment.[176] Thus, unless a regulation proscribes a use that would have constituted a common-law nuisance under state law, if the regulation forbids all economically viable uses of the land, a taking has occurred.

This type of "constructive notice" permits a landowner or prospective purchaser to predict what type of regulatory restrictions may be imposed without compensation through reference to state common law. This is precisely the interpretation of the *Lucas* holding that was applied by the Federal Circuit Court of Appeals in *Loveladies Harbor, Inc. v. United States*,[177] in which it was held that a compensable taking had occurred when an existing property right, not considered a nuisance under state common law, was denied by a newly enacted regulation.[178]

The Supreme Court, if presented with the facts of *Penn Central* today, could apply the takings criteria set forth in *Lucas* to hold that the designation of the Grand Central Terminal as a historic landmark constituted a compensable taking under the Fifth Amendment. By denying Penn Central a property use that: (1) was permitted when the property was purchased, (2) did not constitute a nuisance under New York common law, and (3) constituted a reasonable investment-backed expectation of Penn Central, the City restricted the use of the terminal through landmark designation in a manner similar to restrictions development of the beach property in *Lucas* or the wetlands property in *Loveladies*.

CONCLUSION

Thus, it is conceivable that, when the Supreme Court is next asked to address a case in which historic preservation already results in claiming a regulatory taking, the Court may find that a compensable taking has occurred without overruling *Penn Central*.

---

175. *Id.* at 2894.
176. *See supra* notes 92-94 and accompanying text.
177. Loveladies Harbor, Inc. v. United States, 28 F.3d 1171 (1994); *see supra* notes 133-45 and accompanying text.
178. *Loveladies Harbor*, 28 F.3d at 1182; *see supra* notes 150-52 and accompanying text.