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# Historic Preservation and the New Takings Cases: Landmarks Preserved

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# HISTORIC PRESERVATION AND THE NEW TAKINGS CASES: LANDMARKS PRESERVED

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## INTRODUCTION

Since 1987, the United States Supreme Court has announced a series of opinions granting greater protection to private property owners. In *First English Evangelical Lutheran Church v. County of Los Angeles*,[1] the Court formalized the requirement that "just compensation" be paid upon a judicial finding of a regulatory taking. In *Nollan v. California Coastal Commission*,[2] the Court found a taking where a government agency had attached a condition to the grant of a development permit that was insufficiently related to the asserted government purpose. In *Lucas v. South Carolina Coastal Council*,[3] the Court affirmed a so-called "categorical" test for regulatory takings guaranteeing owners economically viable use of their property. Most recently, in *Dolan v. City of Tigard*,[4] the Court added flesh to the bones of *Nollan* through standards requiring "essential nexus" and "rough proportionality" when government imposes conditions on development permits.

This steady march of judicial decisions favoring property owners has led some prognosticators to predict, and some property rights advocates to hope, that the next judicial shoe to drop will overturn or greatly limit *Penn Central Transportation Co. v. New York City*,[5] the landmark opinion upon which so much modern-day federal and state court Takings Clause jurisprudence relies. In *Penn Central*, the Court upheld,[6] facially and as applied, New York City's Landmarks Preservation Law.[7] Prognostication and hope are no substitutes for analysis, however. Neither the holdings nor the rationales of the Court's recent takings jurisprudence support an opinion that *Penn Central*'s days are legally numbered.

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1. 482 U.S. 304 (1987).
2. 483 U.S. 825 (1987).
3. 112 S. Ct. 2886 (1992).
4. 114 S. Ct. 2309 (1994).
5. 438 U.S. 104 (1978).
6. *Id.* at 138.
7. NEW YORK, N.Y., ADMIN. CODE §§ 25-301 to -321 (1992).

## I. THE *PENN CENTRAL* DECISION

In *Penn Central*, the Supreme Court reached two basic conclusions. First, the Court determined that landmarks preservation laws substantially advance legitimate state interests because historic preservation enhances the quality of life in urban neighborhoods.[8] Second, the Court found that the City's landmarks law, as applied to Grand Central Terminal, did not violate what may be termed the "economic" component of the Takings Clause. The Court formulated a three-factor inquiry to determine whether government regulation has effected a taking, requiring case-by-case consideration of the (1) economic impact on the claimant, (2) effect on his or her distinct investment-backed expectations, and (3) character of the governmental action, such as whether or not it authorizes a physical invasion.[9]

Focusing on the first two factors of this inquiry, the *Penn Central* Court noted three salient facts. First, in what hindsight suggests was a strategic blunder, Penn Central had conceded that it earned a reasonable financial return on its investment.[10] Second, the Court cited the possibility of gaining economic benefit by transferring the unused development rights above the Terminal to surrounding parcels owned by Penn Central.[11] Third, the Court observed that Penn Central's primary investment-backed expectation had been to operate Grand Central Terminal, not to build an office building above it—an expectation that remained undisturbed by the landmarks law.[12] Accordingly, the *Penn Central* Court held that New York City's landmarks law did not violate the Takings Clause.[13]

## II. THE *AGINS* GLOSS

Several years after *Penn Central*, the Court announced its decision in *Agins v. City of Tiburon*,[14] which provided a slightly different linguistic formulation for evaluating regulations under the Takings Clause. Unlike *Penn Central*'s three-factor inquiry, the *Agins* formulation is a two-prong disjunctive test. It provides that a regulation effects a taking if it (1) does not substantially advance legitimate state interests, or (2) denies an owner economically viable use of his or her property.[15]

How do these two tests relate to one another? One interpretation is that the *Agins* two-prong disjunctive test is an outcome-determinative recapitulation of the *Penn Central* three-factor inquiry. Under

8. *Penn Central*, 438 U.S. at 108, 129.
9. *Id.* at 124.
10. *Id.* at 129, 136.
11. *Id.* at 137.
12. *Id.* at 136.
13. *Id.*
14. 447 U.S. 255 (1980).
15. *Id.* at 260.

this view, *Agins* clarifies how much economic impact and effect upon distinct investment-backed expectations are necessary to transgress the constitutional line. Simply put, if the property owner has been deprived of economically viable use, there has been a taking; if economically viable use remains, then there has not been a taking. A variant of this interpretation is that *Agins* confirms the constitutional minimum of economically viable use, but leaves open the issue of what happens when there is not a denial of economically viable use. Under either interpretation, however, *Agins* fails to define exactly what is meant by economically viable use,[16] an oversight rectified to some extent twelve years later in *Lucas v. South Carolina Coastal Council*.[17] Throughout the 1980s, the *Penn Central* three-factor inquiry and the *Agins* two-prong disjunctive test were repeatedly and interchangeably cited, mantra-like, in literally thousands of federal and state court cases.

## III. THE *LUCAS* CONFIRMATION

In *Lucas v. South Carolina Coastal Council*,[18] the Court essentially approved the *Agins* outcome-determinative interpretation of *Penn Central* by holding that a denial of *all* economically viable, beneficial, productive or feasible use constitutes a categorical taking.[19] If the challenged regulation leaves some economically viable use, which in the *Lucas* context means some use producing a value greater than zero,[20] *Lucas* directs the analysis to the impressionistic, ad hoc, no-set-formula *Penn Central* economic inquiry, under which a court is to examine the economic impact of the regulation on the claimant, as well as the impact upon his or her distinct investment-backed expectations.[21] *Lucas* effectively provides the property owner with two bites at the economic apple.

*Lucas* additionally endorses *Penn Central*'s view that the characterization of a regulation as preventing harm rather than promoting benefit is linguistic gamesmanship incapable of yielding a defensible takings jurisprudence.[22] Ironically, landmark designation is most vul-

16. For example, the definition of economically viable use depends on whether it is determined from the point of view of a property's actual owner or from the point of view of an arm's-length market investor.

17. 112 S. Ct. 2886 (1992).

18. *Id.*

19. *Lucas* adds the word "all," as well as the adjectives "beneficial," "productive," and "feasible" to the test. *Id.* at 2893, 2899.

20. *Id.* at 2895 & n.8.

21. *Id.* at 2893, 2895 n.8.

22. *Id.* at 2898 nn.11-12; *Penn Central*, 438 U.S. at 133-34 n.30. Note also that while Justice Stevens accused the *Lucas* majority of neglecting the "most important factor in takings analysis: the character of the government action," *Lucas*, 112 S. Ct. at 2922-23 (Stevens, J., dissenting), this factor was, in fact, addressed by the majority in its discussion of physical invasions. *Id.* at 2893. *Penn Central*'s paradigm of this factor was also physical invasions. *Penn Central*, 438 U.S. at 124.

nerable when analyzed under a constitutional regime that gives credence to the distinction between regulations that prevent classic harms or nuisances, and regulations that secure public benefits.[23] Thus, in *Lucas*, *Penn Central* was not only cited, but burnished.

However, *Lucas* does draw into question one frequently cited aspect of *Penn Central*—the so-called "parcel as a whole" rule. In *Penn Central*, the majority suggested that in assessing a regulation's impact, the constitutional inquiry should focus on the entire parcel, and not simply on that part of the parcel specifically restricted by the challenged regulation.[24] Penn Central argued that 100% of its air rights above Grand Central Terminal had been taken, effectively describing a complete elimination of economic value similar to the *Lucas* categorical taking.[25] New York City countered that, correctly viewed, the parcel included not only the air rights above the terminal, but also the terminal itself. The *Penn Central* majority agreed with the City[26] over a dissent by Justice Rehnquist.[27] In *Keystone Bituminous Coal Ass'n v. DeBenedictis*,[28] the Court approved *Penn Central*'s parcel as a whole rule,[29] again over a dissent by Chief Justice Rehnquist.[30]

In *Lucas*, the majority revisited this issue, implying a greater willingness to focus on the restricted part of the parcel—a position that would necessarily make it easier for property owners to claim a categorical taking.[31] Although the Supreme Court rejected this view in *Concrete Pipe & Products, Inc. v. Construction Laborers Pension Trust*,[32] it has since been championed by the United States Court of Appeals for the Federal Circuit in *Loveladies Harbor, Inc. v. United States*.[33]

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23. *See* First English Evangelical Lutheran Church v. County of Los Angeles, 258 Cal. Rptr. 893, 904 (Cal. Ct. App. 1989) (suggesting, on remand from the United States Supreme Court, a hierarchy of legitimate state interests with health and safety at the top).

24. *Penn Central*, 438 U.S. at 130-31.

25. *Id.* at 130.

26. *Id.* at 130-31.

27. *Id.* at 138.

28. 480 U.S. 470 (1987).

29. *Id.* at 496-501.

30. *Id.* at 506, 515-18.

31. *Lucas*, 112 S. Ct. at 2894 n.7. The Court stated:

> [w]hen, for example, a regulation requires a developer to leave 90% of a rural tract in its natural state, it is unclear whether we would analyze the situation as one in which the owner has been deprived of all economically viable use of the burdened portion of the tract, or as one in which the owner has suffered a mere diminution in value of the tract as a whole.

*Id.*

32. 113 S. Ct. 2264, 2290 (1993) ("To the extent that any portion of property is taken, that portion is always taken in its entirety; the relevant question, however, is whether the property taken is all, or only a portion of the parcel in question.").

33. 28 F.3d 1171 (Fed. Cir. 1994).

## IV. LINGERING QUESTIONS

The other significant post-*Penn Central* Takings Clause opinions, *Nollan v. California Coastal Commission*[34] and *Dolan v. City of Tigard*,[35] embroider the "substantially advance legitimate state interests" prong articulated by *Agins*, in the context of conditions on building permits. Taking the *Agins* linguistic formulation at face value, it is undeniable that landmarks law in general, and designation of landmark buildings in particular, substantially advance the legitimate state interest of historic preservation. Even the claimant, Penn Central Transportation Co., in *Penn Central* conceded that the preservation of buildings "is an entirely permissible goal . . . [and that] the restrictions imposed [on landmarks] are appropriate means of securing the purposes" of the law.[36]

*Nollan* and *Dolan*, however, delve more deeply than do previous cases into the justifications underlying burdens imposed by the government on individual property owners. For example, in *Nollan*, the Court failed to discern any connection between the California Coastal Commission's asserted goals and the lateral beach access condition.[37] In *Dolan*, the Court concluded that the City of Tigard had not sufficiently demonstrated that the exacted greenway and bicycle path would mitigate the negative flooding and traffic impacts of Mrs. Dolan's proposed store expansion in a roughly proportionate fashion.[38] The *Dolan* Court suggested that the evidentiary burden for justifying governmental actions is on the government when actions are "adjudicative" rather than "legislative" in nature.[39]

Should this increased judicial concern about government actions that selectively burden individual property owners undermine the designation of individual landmark buildings, especially when contrasted with the designation of historic districts? In one way, landmark designation axiomatically answers why particular property owners should have to bear the burdens associated with historic preservation. Landmark laws specifically target the negative impacts resulting from alteration or demolition of a designated landmark. Furthermore, individual designations may secure for the burdened property owner what Justice Holmes dubbed "average reciprocity of advantage"[40] when understood as part of a comprehensive program of historic preservation. The *Penn Central* majority cited the sweep of

34. 483 U.S. 825 (1987).

35. 114 S. Ct. 2309 (1994).

36. *Penn Central*, 438 U.S. 104, 129 (1978). The Court found New York's landmarks ordinance to be "reasonably related to the promotion of the general welfare." *Id.* at 131.

37. *Nollan*, 483 U.S. at 838-39.

38. *Dolan*, 114 S. Ct. at 2321-22.

39. *Id.* at 2320 n.8.

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

New York City's landmarks program, which included more than 400 individual landmarks and thirty-one historic districts at that time, to conclude that the City's approach reflected a "comprehensive" plan.[41]

## CONCLUSION

For seventeen years, *Penn Central* has remained the most prominent and complete constitutional statement from the United States Supreme Court on the meaning of the Takings Clause. Later cases, such as *First English*, *Nollan*, *Lucas*, and *Dolan*, have confirmed and elaborated upon its basic analytical approach, but have never contradicted it. That landowners have recently turned to federal and state legislatures—a statutory, rather than constitutional avenue—to secure heightened protection for property rights merely underscores the enduring constitutional legacy of *Penn Central* and the improbability that future opinions from the Supreme Court will deviate greatly from this pillar of Takings Clause jurisprudence. At least in the judicial branch, historic preservation efforts and the existing balance between government regulation and private property rights will likely continue to enjoy approval.

41. *Penn Central*, 438 U.S. at 134. Justice Rehnquist disagreed with this conclusion in his dissent. *Id.* at 138 n.1 (Rehnquist, J., dissenting).