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# DO OWNERS HAVE A FAIR CHANCE OF PREVAILING UNDER THE AD HOC REGULATORY TAKINGS TEST OF *PENN CENTRAL TRANSPORTATION COMPANY*?

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Recent Supreme Court decisions on regulatory takings<sup>12</sup> constitute a shift from per se categorical tests to the ad hoc balancing test of *Penn Central Transportation Co. v. City of New York*<sup>3</sup> and to an explicit recognition that the area of regulatory takings is so complex that no substantive rule is possible. This shift has occurred despite criticism that the *Penn Central* approach is so vague that it does not provide predictable results.<sup>4</sup> Even if the results are not predictable, there is reason to think judicial balancing of substantive values is fair.<sup>5</sup>

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1. The final clause of the Fifth Amendment of the United States Constitution provides that "private property [shall not] be taken for public use without just compensation." U.S. CONST. amend. V. This "'Just Compensation Clause' . . . applies to the States as well as the Federal Government" and applies not only to physical appropriation of land for public use but also to "regulatory takings", that is, regulatory prohibitions on use that go so far as to require compensation. *Tahoe-Sierra Pres. Council v. Tahoe Reg'l Planning Agency*, 535 U.S. 302, 307 n.1, 326 n.21 (2002).

2. See, e.g., *Tahoe-Sierra Pres. Council*, 535 U.S. 302; *Palazzolo v. Rhode Island*, 533 U.S. 606 (2001). See *infra* notes 45-133 and accompanying text for further discussion of these cases.

3. 438 U.S. 104 (1978).

4. See, e.g., Gideon Kanner, *Hunting the Snark, Not the Quark: Has the U.S. Supreme Court Been Competent in its Effort to Formulate Coherent Regulatory Takings Law?*, 30 URB. LAW. 307, 312-20 (1998).

5. See *infra* notes 160-161 and accompanying text for further discussion of this point. For arguments that the fairness of the process validates the *Penn Central* approach see F. Patrick Hubbard, Palazzolo, Lucas, and *Penn Central*: *The Need for Pragmatism, Symbolism, and Ad Hoc Balancing*, 80 NEB. L. REV. 465, 471-479, 513-518 (2001); Frank Michelman, *Takings, 1987*, 88 COLUM. L. REV. 1600, 1629 (1988) ("[B]alancing—or, better, the judicial practice of situated judgment or practical reason—is not law's antithesis but a part of law's essence.").

Nevertheless, even if a procedure appears fair, there is always the possibility that it is not, in fact, fair in application. Determining whether the application is fair is, of course, difficult because there is no substantive standard for identifying regulatory takings. However, even though we lack a standard of what the results should be, we may have a standard of what the results should *not* be. For example, if owners *never* prevail under the *Penn Central* test, there is a serious possibility that the process is so unfair that it is, in effect, a sham. In other words, no matter how carefully we construct a model of procedural fairness, “we cannot simply assume that the model works as intended; we must critique its performance in terms of its results.”<sup>6</sup>

The evaluation of the results under the *Penn Central* approach is not a simple matter. The test is, at least, not an obvious sham; owners have prevailed in some cases.<sup>7</sup> However, showing at least some victories for owners is a weak defense of the fairness of the results under the *Penn Central* approach. A stronger defense would address harder questions, such as: How often do owners succeed? Is this rate of success sufficient to conclude that the process is fair in terms of the treatment of owners vis a vis regulators? Does the process take too long?

This article will address these harder questions. Part I of the article summarizes the *Penn Central* approach and the Supreme Court’s recent recommitment to the approach. Part II discusses the results of a survey of cases citing *Penn Central*. This discussion focuses on the questions of how often owners litigate and prevail under the *Penn Central* test, how long the process takes, and to what extent, if any, the results of the survey support the fairness of the process approach of *Penn Central*.

## I. THE *PENN CENTRAL* AD HOC BALANCING APPROACH

### A. *Penn Central*

In the 1970s, the Supreme Court openly disavowed any explicit test or standard for determining when a regulatory taking occurs.

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6. *McCleskey v. Kemp*, 481 U.S. 279, 338 (1986) (Brennan, J., dissenting) (arguing that improper racial patterns in imposing the death penalty indicate that an apparently fair process for imposing the penalty is not, in fact, fair) (quoting F. Patrick Hubbard, *Reasonable Levels of Arbitrariness in Death Sentencing Patterns: A Tragic Perspective on Capital Punishment*, 18 U.C.D. L. REV. 1113, 1162 (1985)).

7. See *infra* note 143-144 and accompanying text.

*Penn Central* summarized the lack of a substantive test for identifying a taking as follows:

The question of what constitutes a “taking” for purposes of the Fifth Amendment has proved to be a problem of considerable difficulty. While this Court has recognized that the “Fifth Amendment’s guarantee . . . [is] designed to bar 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,” 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 remain disproportionately concentrated on a few persons. Indeed, we have frequently observed that whether a particular restriction will be rendered invalid by the government’s failure to pay for any losses proximately caused by it depends largely “upon the particular circumstances [in that] case.”<sup>8</sup>

In lieu of a test, *Penn Central* identifies several factors that are to be considered in an ad hoc balancing approach:

In engaging in these essentially ad hoc, factual inquiries, the Court’s decisions have identified several factors that have particular significance. The economic impact of the regulation on the claimant and, particularly, the extent to which the regulation has interfered with distinct investment-backed expectations are, of course, relevant considerations. So, too, is the character of the governmental action. 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>9</sup>

Neither the recognition of the lack of a “set formula” nor the adoption of the ad hoc balancing approach reflects a lack of effort<sup>10</sup> or

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8. *Penn Cent.*, 438 U.S. at 123-24 (citations omitted).

9. *Id.* at 124 (citations omitted).

10. “Thousands of square miles of our nation have been deforested to provide the paper to print the thousands—probably hundreds of thousands—of books, articles, notes, comments, seminar papers, newsletters, etc., dealing with *regulatory takings*.” Julian Conrad Jurgensmeyer, *Florida’s Private Property Rights Protection Act: Does It Inordinately Burden the Public Interest?*, 48 FLA. L. REV. 695, 696 (1966); see also CAROL M. ROSE, PROPERTY AND PERSUASION 49 (1994) (“Scholars have joined judges in spilling a great deal of ink over takings . . .”). The scale of the scholarly effort is reflected by the following: A WestLaw Keycite search in April 2003 for *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992), indicates 3394 citations, of which, 859 were cases or other official legal authority and 2535 were secondary sources including articles and briefs. There were 4067 citations of *Penn Central* in March 2003. Of these, 1446 were cases or other official legal authority and 2621 were secondary sources or briefs.

intelligence<sup>11</sup> on the part of judges and scholars. Instead, the adoption of the *Penn Central* balancing test should be viewed as a pragmatic acceptance of the problems that result from the complexity of the issues and the diversity of the circumstances involving regulation.<sup>12</sup> This complexity is reflected in the diversity of issues that the Supreme Court has addressed in its regulatory taking cases, which include zoning,<sup>13</sup> environmental schemes,<sup>14</sup> restrictions on landlords,<sup>15</sup> and prohibitions on business activities.<sup>16</sup>

Despite such complexity, it might be possible to develop a set of clear rules if there were an accepted standard of property rights that could be used to determine when land use is improperly limited. However, there is no such standard.<sup>17</sup> To the extent there has been agreement, the standards are too vague to provide a predictable test for distinguishing regulatory takings from other regulatory actions under the police power. For example, the common law relied on a shared view about limiting "harm to others"<sup>18</sup> in adopting the "rule" that the right to use land is subject to the maxim, *sic utere tuo ut ali-*

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11. "The judges and scholars who have addressed the issue in the twentieth century are as intelligent a group as is likely to address it in the twenty-first. The takings issue is muddy because it is inherently hard to deal with, not because the people who have addressed it haven't been smart enough to see the light." WILLIAM A. FISCHER, *REGULATORY TAKINGS: LAW, ECONOMICS, AND POLITICS* 325 (1995).

12. For a more complete discussion of these problems see, for example, F. Patrick Hubbard, "Takings Reform" and the Process of State Legislative Change in the Context of a "National Movement," 50 S.C. L. REV. 93, 97-106 (1998).

13. See, e.g., *Penn Cent.*, 438 U.S. 104 (upholding application of historic preservation ordinance); *Nectow v. City of Cambridge*, 277 U.S. 183 (1928) (striking down application of zoning ordinance on due process grounds); *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926) (upholding zoning scheme as a valid exercise of authority to protect the public health and welfare).

14. See, e.g., *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992) (holding that where environmental regulation destroys all economic value, there has been a taking).

15. See, e.g., *Yee v. City of Escondido*, 503 U.S. 519 (1992) (holding that a rent-control ordinance for mobile home parks was not a taking); *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982) (holding that a requirement that landlords allow installation of cable television was a taking); *Pennell v. City of San Jose*, 485 U.S. 1 (1988) (holding that a taking claim was premature, but noting that rent control was not necessarily a taking).

16. See, e.g., *Mugler v. Kansas*, 123 U.S. 623 (1887) (upholding prohibition of manufacture or sale of alcohol); *Hadacheck v. Sebastian*, 239 U.S. 394 (1915) (upholding rezoning that prohibited brick manufacture at a designated location as a valid exercise of police power); *Goldblatt v. Town of Hempstead*, 369 U.S. 590 (1962) (upholding injunction and ordinance against a gravel pit).

17. For a critique of recent "objective" formulations by the Supreme Court see Hubbard, *supra* note 5, at 489-91, 517-18.

18. This agreement underlies the continued appeal of John Stewart Mills' classic essay, *ON LIBERTY* (1859).

*enum non lædas* (“One should use his own property in such a manner as not to injure that of another.”)<sup>19</sup> *Keystone Bituminous Coal Ass’n v. DeBenedictis*<sup>20</sup> expresses the role of this principle in takings law as follows:

Long ago it was recognized that “all property in this country is held under the implied obligation that the owner’s use of it shall not be injurious to the community,” and the Takings Clause did not transform that principle to one that requires compensation whenever the State asserts its power to enforce it.<sup>21</sup>

Such maxims concerning harm to others have been widely recognized as vague and question-begging because they do not provide guidance until one answers the question: What is a harm?<sup>22</sup> Because there is no objective answer to this question, maxims like *sic utere* cannot help us determine whether an owner has a “right” to a use that may be taken by a regulatory limit on that use.<sup>23</sup>

Regulatory takings are further complicated by several types of “denominator problems,” which arise whenever one wants to determine the extent of the impact of a regulation on the owner’s rights. An example of the first type of problem arises when a parcel is rezoned from commercial to residential. Has the owner suffered a “total” loss of his right to use the land for commercial use or a “partial” loss of one among many possible uses of the land?<sup>24</sup> In terms of fractional analysis, the numerator in this example is the loss of commercial use, and the issue is whether the denominator is commercial use alone or all possible uses. The second type of denominator problem arises from the ability to subdivide land. For example, if an owner has a five-acre parcel containing one acre of wetlands, is the impact of an environmental regulation prohibiting the filling of wetlands meas-

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19. BLACK’S LAW DICTIONARY 1380 (6th ed. 1990).

20. 480 U.S. 470 (1987).

21. *Id.* at 491-92 (citations omitted); see also *Northwest Fertilizing Co. v. Vill. of Hyde Park*, 97 U.S. 659, 667-68 (1878) (stating that the restraint of nuisances through the exercise of the police power “rests upon the fundamental principle that every one shall so use his own [property] as not to wrong and injure another. . . . ‘Every right, from absolute ownership in property down to a mere easement, is purchased and holden subject to the restriction that it shall be so exercised as not to injure others.’” (quoting *Coates v. Mayor of New York*, 7 Cow. 585, 605 (N.Y. 1827))).

22. See Joseph L. Sax, *Takings and the Police Power*, 74 YALE L.J. 36, 48-50 (1964) (criticizing “noxious use” analysis on the ground that it is question begging).

23. See, e.g., *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1024-1026 (1992)

24. See, e.g., *Lucas*, 505 U.S. at 1065-66 (Stevens, J., dissenting) (phrasing denominator issue in terms of rezoning from multifamily residential to single family residential). Such rezoning is not treated as a total loss. See, e.g., 1 EDWARD H. ZIEGLER, JR., RATHKOPF’S THE LAW OF ZONING AND PLANNING § 6.05 (rev. ed. 2001).

ured by using one acre (the wetlands) or five acres (the total parcel) as the denominator?<sup>25</sup> The third type of denominator is temporal. If a restriction is in effect for only a specific length of time—for example a one-year moratorium on development—is the denominator that year or some longer period—for example a “useful life of the investment”?<sup>26</sup> The Supreme Court has been unable to develop a test to address these denominator problems, and “. . . this uncertainty regarding . . . the denominator in our ‘deprivation’ fraction has produced inconsistent pronouncements by the Court.”<sup>27</sup>

### B. *Categorical rules*

Though flexible enough to address the complexity involved, the ad hoc balancing approach has serious shortcomings, particularly if one is concerned with providing a predictable scheme to protect property rights from “excessive” regulation. In protecting other rights, the Supreme Court has explicitly rejected the approach of using ad hoc balancing in favor of categorical approaches.<sup>28</sup> In *Lucas v.*

25. See, e.g., *Lucas*, 505 U.S. at 1016 n.7 (recognizing uncertainty about the treatment of a regulation requiring “a developer to leave 90% of a rural tract in its natural state”); John E. Fee, Comment, *Unearthing the Denominator in Regulatory Taking Claims*, 61 U. CHI. L. REV. 1535 (1994).

26. For further discussion of this point see *infra* notes 75-122 and accompanying text.

27. *Lucas*, 505 U.S. at 1016 n.7.

28. For example, the Supreme Court recognized the need for a clear, easily applied categorical rule in assessing the voluntariness of confessions in *Miranda v. Arizona*, 384 U.S. 436 (1966). See *Dickerson v. United States*, 530 U.S. 428, 435 (2000) (holding that the case-by-case-totality-of-circumstances test of voluntariness of confessions is not sufficient given the coercive nature of modern custodial interrogation. *Miranda* “laid down ‘concrete constitutional guidelines for law enforcement agencies and courts to follow.’” (quoting *Miranda*, 384 U.S. at 442)). *Atwater v. Lago Vista*, 532 U.S. 318 (2001) contains similar language concerning the importance of clear rules in the context of Fourth Amendment. The Supreme Court has also emphasized the problems with the ad hoc approach in applying the First Amendment to common law defamation rules:

[T]he balance between the needs of the press and the individual's claim to compensation for wrongful injury might be struck on a case-by-case basis. . . . “[I]t might seem, purely as an abstract matter, that the most utilitarian approach would be to scrutinize carefully every jury verdict in every libel case, in order to ascertain whether the final judgment leaves fully protected whatever First Amendment values transcend the legitimate state interest in protecting the particular plaintiff who prevailed.” But this approach would lead to unpredictable results and uncertain expectations, and it could render our duty to supervise the lower courts unmanageable. Because an *ad hoc* resolution of the competing interests at stake in each particular case is not feasible, we must lay down broad rules of general application.

*Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 343-344 (1979) (quoting *Rosenblum v. Metromedia, Inc.*, 403 U.S. 29, 63 (1971) (Harlan, J., dissenting)). For an argument that there are important reasons for differences in approach between speech and takings see Gregory Daniel Page, *Lucas v. South Carolina Coastal Council and Justice Scalia's Primer on Property Rights: Advancing*

*South Carolina Coastal Council*, the Court attempted to provide more clarity and predictability in the takings area by identifying two limited per se categories of regulatory taking.<sup>29</sup> In *Lucas*, the Supreme Court notes it has “generally eschewed any ‘set formula’” for identifying regulatory takings and has, instead, engaged “in . . . essentially ad hoc, factual inquiries.”<sup>30</sup> However, *Lucas* also asserts that, where real property is involved,<sup>31</sup> the Supreme Court has held:

. . . at least two discrete categories of regulatory action as compensable without case-specific inquiry into the public interest advanced in support of the restraint. The first encompasses regulations that compel the property owner to suffer a physical “invasion” of his property. In general (at least with regard to permanent invasions), no matter how minute the intrusion, and no matter how weighty the public purpose behind it, we have required compensation. . . . The second situation in which we have found categorical treatment appropriate is where regulation denies all economically beneficial or productive use of land.<sup>32</sup>

At best, the per se categories in *Lucas* provide a “set formula” for an extremely limited class of regulatory takings. As an example of the first type of per se taking, *Lucas* refers to *Loretto v. Teleprompter Manhattan CATV Corp.*<sup>33</sup> and asserts that *Loretto* holds: “New York’s law requiring landlords to allow television cable companies to emplace cable facilities in their apartment buildings constituted a taking, . . . even though the facilities occupied at most only 1.5 cubic feet of the landlords’ property. . . .”<sup>34</sup> *Loretto* indicates that the physical invasion test is limited to the permanent “physical occupation of a portion of . . . [the property] by a third party.”<sup>35</sup> As a result, this categorical limit has very little impact in terms of protecting private property rights because the limit does not address a wide range of rules that, for example: (1) permit nonpermanent invasions;<sup>36</sup> (2) effectively

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*New Democratic Traditions by Defending the Tradition of Property*, 24 WM. & MARY ENVTL. L. & POL’Y REV. 161, 199-204 (2000).

29. 505 U.S. 1003.

30. *Id.* at 1015 (quoting *Penn Cent. Transp. Co. v. New York City*, 438 U.S. 104, 124 (1978)).

31. *See id.* at 1027-28 (indicating greater protection for land vis-à-vis personal property, which can constitutionally suffer a total loss in value without compensation).

32. *Id.*

33. *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982).

34. *Lucas*, 505 U.S. at 1015.

35. *Loretto*, 458 U.S. at 440.

36. *See id.* at 435 n.12 (“The permanence and absolute exclusivity of a physical occupation distinguish it from temporary limitations on the right to exclude. Not every physical *invasion* is a taking.”); *Id.* at 441 (upholding “the traditional rule that a *permanent* physical occupation of



require an owner to dedicate land and resources to a public use (for example, building setbacks and landscaping requirements for parking lots);<sup>37</sup> or (3) require a landlord to install things like utility connections for tenants at his expense.<sup>38</sup>

The "total takings" test has also had very little effect as a categorical test.<sup>39</sup> One reason for this lack of impact is the vagueness of the test, and one source of such vagueness is the denominator problem discussed above.<sup>40</sup> The *Lucas* opinion concedes that whether a taking is "total" involves denominator problems and that the Court has not identified a test for addressing these problems.<sup>41</sup> Given this lack of a test, "the rhetorical force of our 'deprivation of all economically feasible use' rule is greater than its precision. . . ."<sup>42</sup> In addition,

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property is a taking." (emphasis added)); *cf.* *Prune Yard Shopping Ctr. v. Robins*, 447 U.S. 74, 88 (1980) (holding that a shopping center must accommodate persons exercising their right of free speech).

37. *See, e.g.,* *Gorieb v. Fox*, 274 U.S. 603 (1927) (upholding setback requirements challenged as a denial of due process and equal protection); *Parking Ass'n of Ga., Inc. v. City of Atlanta*, 450 S.E.2d 200, 203 n.3 (Ga. 1994) (holding that a zoning ordinance requiring landscaping in surface parking lots was not a taking); *Dailey v. Blaine County*, 701 P.2d 234, 237 (Id. 1985) (holding that a setback zoning ordinance was not a taking); *see also* DANIEL R. MANDELKER, *LAND USE LAW* 9.11 to 9.23 (4th ed. 1997) (describing on and off-site improvements, impact fees, and other considerations that municipalities may "exact" from builders).

38. *See Loretto*, 458 U.S. at 440. The opinion in *Loretto* notes that, although the state was required to compensate landlords for the physical invasion resulting from a regulation requiring the installation of coaxial cable by the cable company in apartment buildings, it would be a "different question" if the landlord were required to install the cable for his tenants at his own expense. *Id.* at 440 n.19. The limited impact of *Loretto* is also reflected in the amount of compensation received by the landlord. *See Id.* at 437 n.15 (noting that state commission had established a presumptive award of \$1); *Loretto v. Teleprompter Manhattan CATV Corp.*, 446 N.E.2d 428, 434 (N.Y. 1983) ("[Amount receivable by any property owner is small. . . ."); *see also Loretto v. Group W Cable*, 522 N.Y.S.2d 543 (App. Div. 1987) (denying *Loretto's* claim for attorney fees under 42 U.S.C. § 1983 on ground that *Loretto* had not applied for compensation and, therefore, had not been denied constitutional right to compensation). *But see Loretto*, 458 U.S. at 438 (noting that arguments concerning value were "speculative").

39. *See* David F. Coursen, *The Takings Jurisprudence of the Court of Federal Claims and the Federal Circuit*, 29 ENVTL. L. 821 (1999); Robert L. Glicksman, *Making a Nuisance of Takings Law*, 3 WASH. U. J. L. & POL'Y 149 (2000); *See also* Hubbard, *supra* note 5, at 493-507; Ronald H. Rosenberg, *The Non-impact of the United States Regulatory Takings Cases on the State Courts: Does the Supreme Court Really Matter?*, 6 FORDHAM ENVTL. L.J. 523 (1995); Glenn P. Sugameli, *Lucas v. South Carolina Coastal Council: The Categorical and Other "Exceptions" to Liability for Fifth Amendment Takings of Private Property Far Outweigh the "Rule"*, 29 ENVTL. L. 939 (1999).

40. *See supra* notes 24-27 and accompanying text.

41. *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1016 n.7 (1992); *see id.* at 1054 (Blackmun, J., dissenting) (recognizing that there is "no 'objective' way to determine what the denominator should be"); *id.* at 1065-66 (Stewart, J., dissenting) (criticizing a lack of definition of property interest that will serve as denominator).

42. *Lucas*, 505 U.S. at 1016 n.7; *see* Hubbard, *supra* note 5, at 494-98.

there are problems with determining whether an owner has lost “all economically beneficial or productive use of land.”<sup>43</sup> Finally, a total loss of the economic value of the owner’s land is not a taking under *Lucas* if the proscribed uses were never “part of . . . [the owner’s] title to begin with.”<sup>44</sup> Because of this caveat, the “total loss” category of per se taking cannot be applied until after one has determined the uses that were permitted prior to the denial of development under the challenged regulation.<sup>45</sup>

### C. Renewed reliance on the ad hoc balancing test

*Tahoe-Sierra Preservation Council v. Tahoe Regional Planning Council*<sup>46</sup> and *Palazzolo v. Rhode Island*,<sup>47</sup> the Supreme Court’s most recent regulatory takings cases, adopt the *Penn Central* approach rather than the categorical approach to takings.

#### 1. Palazzolo

##### a. Facts and Procedural History

In 1978,<sup>48</sup> Anthony Palazzolo acquired title to property containing a large wetlands area as well as some higher land. After the denial of his second request to fill all or part of the wetlands, Palazzolo filed an inverse condemnation claim in state court, alleging that he had suffered a total taking because “the Council’s action deprived him of ‘all economically beneficial use’ of his property. . . .”<sup>49</sup> The trial court ruled against Palazzolo,<sup>50</sup> and the Rhode Island Supreme Court affirmed.<sup>51</sup> The court held that the claim was not ripe because Palazzolo had never applied for any scheme that did not involve substantial filling.<sup>52</sup> In addition, the court determined that Palazzolo had not suffered a total taking under *Lucas* because the upland portion of the land had a value of \$200,000<sup>53</sup> and because he did not acquire title un-

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43. See Hubbard, *supra* note 5, at 485, 489-99.

44. *Lucas*, 505 U.S. at 1027.

45. For discussion of problems in this area see Hubbard, *supra* note 5, at 487-91, 499-504, 509-10.

46. 535 U.S. 302 (2002).

47. 533 U.S. 606 (2001).

48. The chain of ownership in *Palazzolo* is complicated, and the Supreme Court concluded that Palazzolo did not acquire title until 1978. *Id.* at 614.

49. *Id.* at 615.

50. *Id.* at 616.

51. *Palazzolo v. State*, 746 A.2d 707 (R.I. 2000).

52. *Id.* at 714.

53. *Id.* at 715.

til after “the regulations limiting his ability to fill the wetlands were already in place.”<sup>54</sup> Given this chronology, the right to develop the wetlands was not part of his title to begin with. Finally, Palazzolo did not suffer a taking under the *Penn Central* balancing test when he acquired the property because “there were already regulations in place limiting Palazzolo’s ability to fill the wetlands for development,”<sup>55</sup> and, therefore, he had no investment-backed expectation of a right to fill. This lack of a right to fill was “dispositive of the case” and there was no need to “consider the other factors of the *Penn Central* test.”<sup>56</sup>

#### b. Supreme Court Decision

The Supreme Court held that the matter was ripe for review,<sup>57</sup> but held that there was no total taking involved. Palazzolo had argued that his situation satisfied *Lucas* because he had been left with only “a few crumbs of value”<sup>58</sup> when compared to his appraiser’s estimate that a 74-lot subdivision on the whole parcel would have a value in excess of three million dollars.<sup>59</sup> This argument was rejected on the grounds that Palazzolo had not challenged the finding that the upland parcel had a developmental value of \$200,000 and construction of a substantial residence on an 18-acre parcel would not leave the property “economically idle.”<sup>60</sup> His argument that “the upland parcel is distinct from the wetlands portion”<sup>61</sup> was also rejected because the issue was not presented in the petition for certiorari.<sup>62</sup>

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54. *Id.*

55. *Id.* at 717.

56. *Id.*

57. Three reasons were given for this holding. First, there was no doubt that Palazzolo would be denied a right to fill *any* wetlands, regardless of how grandiose or minimal his scheme might be. See *Palazzolo v. Rhode Island*, 533 U.S. 606, 618-22 (2001). (Justice Stevens joined the five-member majority on this issue. *Id.* at 637-45 (Stevens, J., concurring and dissenting).) Second, possible dispute as to the value of any wetlands development that would be permitted in light of other, unchallenged restrictions did not prevent the matter from being ripe as a takings issue. *Id.* at 624-26. Any dispute about the value of this development related to the determination of the fair market value of the wetlands, not to whether there was a final decision by the Council. *Id.* Third, the value of the upland development was sufficiently settled for review because both Palazzolo and the state had accepted \$200,000 as the value for upland development. *Id.* at 621-26. (This treatment of the record in terms of the state’s position was criticized in a dissenting opinion. *Id.* at 645-54 (Ginsburg, J., dissenting).)

58. *Palazzolo*, 533 U.S. at 631.

59. *Id.* at 616.

60. *Id.* at 631-32.

61. *Id.*

62. *Id.* However, the Court noted:

This contention asks us to examine the difficult, persisting question of what is the proper denominator in the takings fraction. Some of our cases indicate that the extent of deprivation

The Supreme Court rejected the Rhode Island Supreme Court's chronological approach<sup>63</sup> to determining whether filling the wetlands was ever a part of Palazzolo's title and explicitly held that a takings "claim is not barred by the mere fact that title was acquired after the effective date of the state-imposed restriction."<sup>64</sup> This chronological approach was characterized as a rule that "[a] purchaser or a successive title holder like petitioner is deemed to have notice of an earlier-enacted restriction and is barred from claiming that it effects a taking."<sup>65</sup> This rule would mean that "the postenactment transfer of title would absolve the State of its obligation to defend any action restricting land use, no matter how extreme or unreasonable."<sup>66</sup> Such an ability "to put an expiration date on the Takings Clause" could not be accepted.<sup>67</sup> Because of their approach to the effect of post-enactment acquisition, the Rhode Island courts had not applied the *Penn Central* balancing test to Palazzolo's situation.<sup>68</sup> Therefore, the Supreme Court remanded the case so that *Penn Central* could be applied to the partial deprivation suffered by Palazzolo.<sup>69</sup>

*Palazzolo* is clear on several points. First, *Palazzolo* holds that *Penn Central*, not *Lucas*, applies unless a *total* loss of use is involved. More specifically, *Palazzolo* holds that a very substantial loss in value will not be treated as a per se taking on the basis of the total takings categorical rule.<sup>70</sup> The loss to *Palazzolo* was substantial because, if one accepts his assertion of the value of development (\$3,150,000),<sup>71</sup>

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effected by a regulatory action is measured against the value of the parcel as a whole; but we have at times expressed discomfort with the logic of this rule, a sentiment echoed by some commentators. *Id.* (citations omitted).

63. For a discussion of this test and the similar "notice" test see Hubbard, *supra* note 5, at 499-504.

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

65. *Id.* at 626.

66. *Id.* at 627.

67. *Id.*; see *id.* at 627-30 (noting that precedent and the effect of standing rules also supported the decision).

68. See *Palazzolo v. State*, 746 A.2d 707, 717 (R.I. 2000).

69. *Palazzolo*, 535 U.S. at 632.

70. This treatment of substantial loss in value is consistent with prior cases. See, e.g., *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1019 n.8 (1992) (noting that "the landowner with 95% loss will get nothing" under the total taking rule); *Concrete Pipe & Prod., Inc. v. Constr. Laborers Pension Trust*, 508 U.S. 602, 645 (1993) ("[O]ur cases have long established that mere diminution in the value of property, however serious, is insufficient to demonstrate a taking."); *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365, 384 (involving approximately 75% diminution in value); *Hadacheck v. Sebastian*, 239 U.S. 394, 405 (1915) (involving 92.5% diminution in value)).

71. See *Palazzolo*, 533 U.S. at 616.

he would suffer a loss of 94% of the land's value if left with a value of only \$200,000.<sup>72</sup> Second, *Palazzolo* holds that whether the use at issue was a part of the owner's title to begin with will *not be* addressed simply by determining whether the regulation at issue was adopted before the owner acquired title.<sup>73</sup> Thus, Rhode Island Supreme Court's per se rejection of *Palazzolo*'s takings claim was clearly improper. Third, a majority of the Court takes the view that whether the time of the acquisition follows or precedes the adoption of the regulation is relevant to the determination of the owner's reasonable investment-backed expectations under the *Penn Central* balancing test.<sup>74</sup>

## 2. Tahoe-Sierra Preservation Council

### a. Facts and Procedural History

Beginning in the 1950s, residential development along the shore of Lake Tahoe resulted in a deterioration of its exceptionally clear water. Without a halt in this process the "lake will lose its clarity and

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72. *See id.* at 621-22, 630-31.

73. *Id.* at 626.

74. The majority opinion by Justice Kennedy does not indicate whether the chronology of acquisition vis-à-vis enactment is relevant to whether a taking has occurred. Justice Scalia's concurring opinion addresses this issue and asserts:

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

*Id.* at 637 (Scalia, J., concurring). Although three justices (Kennedy, Rehnquist, and Thomas) are silent on the issue, Justice Scalia's argument is rejected by five members of the Court. Two justices (O'Connor and Breyer) argue that the sequence of acquisition and adoption of the regulation is relevant to the determination of the owner's investment-backed expectations under *Penn Central*. *Id.* at 632-636 (O'Connor, J., concurring); *id.* at 654-55 (Breyer, J., dissenting). A third justice (Stevens) argues that a party who acquires property after enactment is "simply the wrong party" to bring the takings claim. *Id.* at 637-45 (Stevens, J., concurring in part and dissenting in part). A fourth justice (Ginsburg, joined by Breyer and Souter, who is the fifth justice), dissents on the issue of ripeness but notes: "If *Palazzolo*'s claim were ripe and the merits properly presented, I would, at a minimum, agree with Justice O'Connor, . . . Justice Stevens, . . . and Justice Breyer, . . . that transfer of title can impair a takings claim." *Id.* at 654 n.3 (Ginsburg, J., dissenting). Given this agreement by five justices that whether an owner acquired property after the enactment of a restriction would be relevant under *Penn Central*, it is logical to assume that "notice" of the *likely* adoption of a restrictive regulation would be relevant where the owner acquired title before enactment. *See, e.g.*, *Tahoe-Sierra Pres. Council v. Tahoe Reg'l Planning Agency*, 535 U.S. 302, 315 n.11 (2002); Daniel R. Mandelker, *Investment-Backed Expectations in Taking Law*, 27 URB. LAW. 215, 227-37 (1995).

its trademark blue color, becoming green and opaque for eternity.”<sup>75</sup> “Or at least for a very, very long time.”<sup>76</sup> In 1969, Congress approved a compact between California and Nevada to address this problem.<sup>77</sup> Efforts under this compact were not successful, and an extensively amended compact became effective in 1980.<sup>78</sup> This amended compact had two provisions that are important to the takings litigation. First, the compact provided that the Tahoe Regional Planning Agency (TRPA) would adopt environmental standards and a plan to implement these standards within 30 months.<sup>79</sup> Second, the compact contained a finding by the legislatures of California and Nevada of a need for a moratorium on development and imposed a deadline on new development until a new regional plan could be adopted or “until May 1, 1983, whichever is earlier.”<sup>80</sup> In order to comply with this legislatively required moratorium, TRPA adopted Ordinance 81-5, which temporarily halted a wide range of development effective August 24, 1981.<sup>81</sup> Although TRPA performed its “obligations in ‘good faith and to the best of its ability,’” it could not meet the 30-month deadline of the compact.<sup>82</sup> Therefore, it adopted Resolution 83-21, which continued the moratorium for construction in certain sensitive areas until the new regional plan was adopted.<sup>83</sup> The combined effect of Ordinance 81-5 and Resolution 83-21 was to impose a moratorium for a thirty-two-month period from August 1981 to April 1984.<sup>84</sup>

On April 26, 1984, a regional plan was adopted, and suits were filed immediately.<sup>85</sup> The State of California objected that the plan was

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75. *Tahoe-Sierra Pres. Council*, 535 U.S. at 308 (quoting 34 F. Supp. 2d 1226, 1231 (D. Nev. 1999)).

76. *Id.* at 308 n.3 (quoting 34 F. Supp. 2d at 1231).

77. *Id.* at 309.

78. *Id.* at 309-10.

79. *See id.* at 310.

80. *Id.* at 310. The compact noted: “[I]n order to make effective the regional plan . . . , it is necessary to halt temporarily works of development in the region which might otherwise absorb the entire capability of the region for further development or direct it out of harmony with the ultimate plan.” *Id.* (quoting Tahoe Regional Planning Compact, Pub. L. No. 96-551, art. VI., 94 Stat. 3235, 3243 (1980)).

81. *Tahoe-Sierra Pres. Council v. Tahoe Reg'l Planning Agency*, 216 F.3d 764, 768 (9th Cir. 2000).

82. *Tahoe-Sierra Pres. Council*, 535 U.S. at 310-311 (quoting 34 F. Supp. 2d at 1233).

83. 216 F.3d at 768. Initially, the moratorium on Resolution 83-21 was for ninety days, but was later extended until the adoption of the new plan. *Id.*

84. *Tahoe-Sierra Pres. Council*, 535 U.S. at 312.

85. *Id.* at 312.

not sufficiently stringent and immediately sought an injunction to bar its implementation.<sup>86</sup> Suits brought by the Tahoe Sierra Preservation Council and by a class of individual owners of vacant lots objected that the plan was too strict and sought, among other things, damages for unconstitutional takings.<sup>87</sup> The district court held that the thirty-two-month moratorium imposed by Ordinance 81-5 and Resolution 83-21 did not constitute a taking under the balancing test of *Penn Central*.<sup>88</sup> However, the Court also held that the moratorium's impact should be viewed as a total taking for the 32-month period involved.<sup>89</sup> Therefore, it held that the moratorium constituted a categorical total taking under *Lucas*<sup>90</sup> and ordered TRPA to pay damages for the taking.<sup>91</sup> California was also successful because an injunction, which barred implementation of the plan and included prohibition on new development, was issued and remained in effect until a revised plan was adopted in 1987.<sup>92</sup> Both sides appealed.<sup>93</sup>

The Ninth Circuit Court of Appeals upheld the injunction prohibiting development but reversed the holding on the categorical taking issue.<sup>94</sup> The court held that the temporal denominator for analyzing the moratorium was not "the temporal 'slice' of each fee that covers the time span during which" the moratorium was in effect.<sup>95</sup> Instead of such "conceptual severance in the temporal dimension of property rights,"<sup>96</sup> the panel concluded that the "'use' of the plaintiffs' property runs from the present to the future"<sup>97</sup> and that the moratorium "denied the plaintiffs only a small portion of this future

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86. *Id.* California sued on the same day the plan was adopted. *Id.* The day after California sued, the League to Save Lake Tahoe also sued to enjoin the plan on the same grounds. 216 F.3d at 768.

87. *Tahoe-Sierra Pres. Council*, 535 U.S. at 312-13.

88. 34 F. Supp. 2d at 1240-42.

89. *Id.* at 1242.

90. *See Tahoe-Sierra Pres. Council*, 535 U.S. at 316-17.

91. 34 F. Supp. 2d at 1255.

92. *Tahoe-Sierra Pres. Council*, 535 U.S. at 312. The revised plan also had prohibitions on development in environmentally sensitive areas. *Id.*

93. The district court had also held that the moratoria did not constitute a taking under *Penn Central*, and the owners did not appeal this holding. *See id.* at 314-18.

94. 216 F.3d at 788.

95. *Id.* at 774.

96. *Id.* at 775-76.

97. *Id.* at 782.

stream.”<sup>98</sup> The owners petitioned the Supreme Court for review of the taking decision and certiorari was granted.<sup>99</sup>

b. Supreme Court Decision

The Supreme Court affirmed the decision of the Ninth Circuit. An initial issue addressed in the majority opinion by Justice Stevens is whether the takings issue before the court involved only the 32-month moratorium imposed by Ordinance 81-5 and Resolution 83-21 or the broader prohibition resulting from the impact of the moratorium combined with the effects of the District Court injunction and prohibitions in the plan ultimately adopted in 1987.<sup>100</sup> The majority held that only the 32-month moratorium was at issue because certiorari was granted to address only the 32-month moratorium and because the later delays were caused by the district court injunction and by the plan that was ultimately adopted.<sup>101</sup>

The majority opinion then addressed and rejected the owners’ argument that any “temporary deprivation—no matter how brief—of all economically viable use trigger[s] a *per se* rule that a taking has occurred.”<sup>102</sup> Such a requirement of “compensation for every delay in the use of property would render routine government processes prohibitively expensive or encourage hasty decisionmaking.”<sup>103</sup> Therefore, the Court held that “whether a temporary moratorium effects a taking . . . depends upon the particular circumstances of the case.”<sup>104</sup> The Court resisted “[t]he temptation to adopt . . . *per se* rules . . .” and concluded “that the circumstances in this case are best analyzed within the *Penn Central* framework” with its “‘essentially ad hoc factual inquiries’ . . . designed to allow ‘careful examination and weighing of all the relevant circumstances.’”<sup>105</sup> Categorical rules are appropriate, but only where “the government physically takes possession of an interest in property for some public purpose. . . .”<sup>106</sup>

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98. *Id.*

99. *Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency*, 533 U.S. 948 (2001).

100. *Tahoe-Sierra Pres. Council*, 535 U.S. at 306-7.

101. *Id.* at 306-07, 310-14, 314 n.8.

102. *Id.* at 320.

103. *Id.* at 335.

104. *Id.* at 321; *see id.* at 335-37.

105. *Id.* at 321-322 (quoting *Penn Cent. Transp. Co. v. City of New York*, 438 U.S. 104, 124 (1978); *Palazzolo v. Rhode Island*, 533 U.S. 606, 636 (2001) (O'Connor, J., concurring)).

106. *Id.* at 322-23. Justice Stevens indicates that his scheme of a categorical rule for physical takings of an interest in property and ad hoc balancing for regulations of uses is based on the longstanding distinction between acquisitions of property for public use, on the one hand, and regulations prohibiting private uses, on the other. . . . *Id.* at 324. The utility of this distinction as



In applying the ad hoc balancing test of *Penn Central*, the impact on an owner's interest is done by reference to the "parcel as a whole."<sup>107</sup> Under this approach, it is improper to "sever a 32-month segment from the remainder of each landowner's fee simple estate, and then ask whether that segment has been taken in its entirety by the moratoria."<sup>108</sup> Such severance is improper because "defining the property interest taken in terms of the very regulation being challenged is circular" because this approach would mean that "every delay would become a total ban; [and] the moratorium and the normal permit process alike would constitute categorical takings."<sup>109</sup> Because of the need to consider the total temporal impact of a regulation, "a permanent deprivation of the owner's use of the entire area is a taking of 'the parcel as a whole,' whereas a temporary restriction that merely causes a diminution in value is not."<sup>110</sup> Temporary moratoria may reduce the value of land, but it will not "be rendered valueless by a temporary prohibition on economic use, because the property will recover value as soon as the prohibition is lifted."<sup>111</sup> "Mere fluctuations in value during the process of governmental decision-making, absent extraordinary delay, are 'incidents of ownership. They cannot be considered as a 'taking' in the constitutional sense."<sup>112</sup>

In addition to rejecting the categorical rule that would treat all delays in development as a taking, Justice Stevens considered and rejected six other possible theories that would support a holding that "considerations of 'fairness and justice' . . . support the conclusion that TRPA's moratoria were takings. . . ."<sup>113</sup> Two of these alternatives—defining takings by reference to restrictions rather than "normal" delays or by reference to a short fixed period—are rejected on the grounds that they would "impose serious financial constraints on the planning process"<sup>114</sup> that "may force officials to rush through the

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a guide for regulatory takings is beyond the scope of this article. See, e.g., *id.* at 349-51 (Rehnquist, C.J., dissenting) (criticizing the application of the framework to the moratorium at issue).

107. *Id.* at 327, 331 (quoting *Penn Cent.*, 438 U.S. at 130-31).

108. *Id.* at 331.

109. *Id.*

110. *Id.* at 332.

111. *Id.*

112. *Id.* (quoting *Agins v. City of Tiburon*, 447 U.S. 255, 263 n.9 (1980) (quoting *Danforth v. U.S.*, 308 U.S. 271, 285 (1939))).

113. *Id.* at 332-33.

114. *Id.* at 333, 337, 339.

planning process or to abandon the practice altogether.”<sup>115</sup> In addition, the distinctions between moratoria and normal delays are questionable<sup>116</sup> and fixed periods are more suitably adopted by state legislatures.<sup>117</sup> The other four alternatives are: (i) a view of all the prohibitions involved as a “series of rolling moratoria;”<sup>118</sup> (ii) bad faith;<sup>119</sup> (iii) lack of legitimate state interest;<sup>120</sup> and (iv) individual impact rather than on a facial challenge.<sup>121</sup> These are all rejected on the ground that these alternative theories were not before the court.<sup>122</sup>

### 3. Discussion

*Palazzolo* and *Tahoe-Sierra Preservation Council* clearly indicate a shift by the Supreme Court from attempts to devise categorized *per se* tests back to the *ad hoc* approach of *Penn Central*. *Tahoe-Sierra Preservation Council* notes “we still resist the temptation to adopt *per se* rules in our cases involving partial regulatory takings, preferring to examine ‘a number of factors’ rather than a simple ‘mathematically precise’ formula.”<sup>123</sup> The opinion also quotes frequently from Justice O’Connor’s endorsement of *Penn Central* in her concurring opinion in *Palazzolo*. For example, *Tahoe-Sierra Preservation Council* notes that Justice O’Connor’s concurring opinion “reaffirmed” the *Penn Central* approach and quotes the following language from her concurring opinion:

Our polestar . . . remains the principles set forth in *Penn Central* itself and our other cases that govern partial regulatory takings. Under these cases, interference with investment-backed expectations is one of a number of factors that a court must examine. *Penn Central* does not supply mathematically precise variables, but instead provides important guideposts that lead to the ultimate determination whether just compensation is required. The temptation to adopt what amount to *per se* rules in either direction must be resisted. The Takings Clause requires careful examination and weighing of all the relevant circumstances in this context.<sup>124</sup>

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115. *Id.* at 339.

116. *Id.* at 338 n.31.

117. *Id.* at 342 n.37.

118. *Id.* at 333; see *supra* note 102 and accompanying text for a rejection of this view by the majority.

119. *Id.* at 333-34.

120. *Id.* at 334.

121. *Id.*

122. *Id.*

123. *Id.* at 326.

124. *Id.* at 326 n.23 (quoting *Palazzolo v. Rhode Island*, 533 U.S. 606, 633-4, 636 (2001) (O’Connor, J., concurring)) (citations omitted)).

Part of the reason for the renewed concern for balancing the impact on the owner against the public interest is that *Palazzolo* and *Tahoe-Sierra Preservation Council* also constitute a shift from “regulator bashing” to an endorsement of “good” planning. Examples of “bashing” are found in Justice Scalia’s majority opinion in *Lucas*, which asserts that government has a natural tendency to use the police power to eliminate private property and engage in “plundering” and that the harm principle would not be an effective limit unless the legislature had a “stupid staff.”<sup>125</sup> In contrast, Justice Stevens’ opinion in *Tahoe-Sierra Preservation Council* discusses examples of “bad” planning, including bad faith and lack of legitimate state interest, but notes that none was involved in the two TRPA moratoria at issue.<sup>126</sup> Instead, the opinion stresses the environmental importance of the water quality of Lake Tahoe, the need for a comprehensive regional plan to protect the lake, and that delays in adopting a plan resulted “[d]espite the fact that TRPA performed [its] obligations in ‘good faith and to the best of its ability.’”<sup>127</sup> In addition, Justice Stevens notes that broad moratoria are fair because “with a temporary ban on development there is a lesser risk that individual owners will be ‘singled out’ to bear a special burden that should be shared by the public as a whole.”<sup>128</sup> Finally, Justice Stevens views moratoria as “an essential tool of successful development” because they enable a planning agency to “make well-reasoned decisions” and “obtain the benefit of comments and criticisms from interested parties . . . during its delib-

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125. See *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1014, 1025 n.12, 1027 n.14 (1992). Justice Scalia uses similar language in other opinions. See, e.g., *Nollan v. Cal. Coastal Comm'n*, 483 U.S. 825, 837 (1987) (referring to regulatory conditions as “an out-and-out plan of extortion”) (quoting *J.E.D. Assocs., Inc. v. Atkinson*, 432 A.2d 12, 14-15 (N.H. 1981)). For other discussions of “regulator bashing” see Gregory S. Alexander, *Takings, Narratives, and Power*, 88 COLUM. L. REV. 1752, 1755, 1764 (1988) (arguing that pro-owner decisions tell stories of “abuse of regulatory power and manipulation of powerless landowners”, of “regulatory extortion”, and of “regulatory manipulation and virtual deceit”); William W. Fisher, III, *The Trouble with Lucas*, 45 STAN. L. REV. 1393, 1408-1409 (1993) (noting attacks by Justice Scalia in *Lucas* and other opinions); Richard J. Lazarus, *Putting the Correct “Spin” on Lucas*, 45 STAN. L. REV. 1411, 1419-1420 (1993) (arguing that the majority in *Lucas* felt that regulatory actions were resulting in [such] “horrible” action and that a “win” for a landowner was needed).

126. *Tahoe-Sierra Pres. Council*, 535 U.S. at 333-34.

127. *Id.* at 307-11 (quoting 34 F. Supp. 2d at 1233), *id.* at 339. Justice Stevens has consistently held a pro-regulation position. See, e.g., *First English Evangelical Lutheran Church v. Los Angeles County*, 482 U.S. 304, 339-40 (1987) (Stevens, J., dissenting).

128. *Tahoe-Sierra Pres. Council*, 535 U.S. at 341 (quoting *Nollan v. Cal. Coastal Comm'n*, 483 U.S. 825, 835 (1987)).

erations.”<sup>129</sup> Justice Stevens’ opinion is also more positive about the ability of land use regulations to result in “givings” as well as takings.

[W]ith a moratorium there is a clear “reciprocity of advantage,” because it protects the interests of all affected landowners against immediate construction that might be inconsistent with the provisions of the plan that is ultimately adopted. “While each of us is burdened somewhat by such restrictions, we, in turn, benefit greatly from the restrictions that are placed on others.” In fact, there is reason to believe property values often will continue to increase despite a moratorium. . . . Such an increase makes sense in this context because property values throughout the Basin can be expected to reflect the added assurance that Lake Tahoe will remain in its pristine state.<sup>130</sup>

An additional indication of the renewed importance of *Penn Central* is the lack of a workable categorical rule in the dissenting opinions in *Tahoe-Sierra Preservation Council*. Chief Justice Rehnquist’s dissenting opinion, which is joined by Justices Scalia and Thomas, argues that there is a taking because the Court should consider the combined effect of the 32 month moratorium and the subsequent court injunction<sup>131</sup> and that this broader “moratorium” lasted “nearly six years.”<sup>132</sup> Though “property rights are enjoyed under an ‘implied limitation,’”<sup>133</sup> this broader “moratorium prohibiting all economic use for a period of six years is not one of the longstanding implied limitations of state property law.”<sup>134</sup> “[T]he prohibition on development of nearly six years in this case cannot be said to resemble any ‘implied limitation’ of state property law and is, therefore, a taking that requires compensation.”<sup>135</sup>

Chief Justice Rehnquist’s dissent is based on his disagreement as to the length of the “moratorium” at issue rather than on a disagreement about the applicability of *Penn Central*. Rehnquist does not offer a categorical rule for moratoria because it is his view that “[t]his case does not require us to undertake a more exacting study of state property law and discern exactly how long a moratorium must last before it no longer can be considered an implied limitation of property

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129. *Id.* at 337-38, 340.

130. *Id.* at 341 (citations omitted) (quoting *Pa. Coal Co. v. Mahon*, 260 U.S. 393, 415 (1922), and *Keystone Bituminous Coal Ass’n v. DeBenedictis*, 480 U.S. 470, 491 (1987)).

131. *Id.* at 343-46 (Rehnquist, J., dissenting).

132. *Id.* at 354.

133. *Id.* at 351 (quoting *Mahon*, 260 U.S. at 413).

134. *Id.* at 352.

135. *Id.* at 354.

ownership . . . .”<sup>136</sup> Though Rehnquist notes that normal permit delays and “ordinary moratoria,” perhaps as long as two years, *may* be legitimate,<sup>137</sup> neither the definition nor the permissibility of “ordinary moratoria” is addressed. Instead, he avoids these issues because of his view that “this case does not require us to decide as a categorical matter whether moratoria prohibiting all economic use are an implied limitation of state property law. . . .”<sup>138</sup> Thus, Rehnquist’s dissent provides no guidance, much less a categorical rule, on how to address moratoria. Instead, his “test” is that he knows a taking by moratorium when he sees it; and he sees it in this moratorium, which he views as lasting six years.<sup>139</sup>

Justice Thomas, joined by Justice Scalia, does offer a categorical rule, but this rule is so extreme that it is hard to believe that a majority of the Court would ever adopt it. Thomas “would hold that regulations prohibiting all productive uses of property are subject to *Lucas’s per se* rule, regardless of whether the property so burdened retains theoretical useful life and value if, and when, the ‘temporary’ moratorium is lifted.”<sup>140</sup> With such a broad rule, many instances of delay involved in getting a permit to develop vacant land would be considered a taking. For example, the land in *Lucas* apparently had no productive use unless a structure like a house was placed on it. Eventually, a house for this site was approved.<sup>141</sup> The delay in getting a building permit for that house would apparently constitute a taking under Thomas’s clear categorical rule. The taking caused by such a short delay might not have much impact on the value of the land, but under this *per se* approach “value bears on the amount of compensation due and has nothing to do with the question whether there was a taking in the first place.”<sup>142</sup>

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136. *Id.* at 353 n.4.

137. *Id.* at 351-54. The two year time period is from the Minnesota scheme, which is included in a list of state legislative time limits on moratoria. The sentence following the listing notes that “. . . it has long been understood that moratoria on development exceeding these short time periods are not a legitimate planning device.” *Id.* at 354.

138. *Id.* at 353.

139. *See id.*

140. *Id.* at 356 (Thomas, J., dissenting).

141. *See* ROBERT C. ELLICKSON & VICKI L. BEEN, *LAND USE CONTROLS: CASES AND MATERIALS* 209-10 (2d ed. 2000).

142. *Id.*

## II. DISCUSSION OF RESULTS OF REVIEW OF RANDOM SAMPLE OF CASES CITING *PENN CENTRAL*

In order to reduce the subjectivity that occurs when cases are selected to address an issue or to illustrate a point, a random selection of cases citing *Penn Central* was examined. The cases were selected on August 23, 2002 by using the Westlaw Keycite feature to generate a list of all the cases citing *Penn Central*. One hundred and thirty-three cases (one-tenth of the 1329 cases citing *Penn Central*) were selected randomly and reviewed.<sup>143</sup> A copy of the review sheet used for this process is included as Appendix 1 to this article. Appendix 2 contains a tabular summary of some of the results.

### A. *Rates of Success and Reported Decisions*

As the tabular summary indicates, the merits of the taking claims were addressed in eighty-two of these cases. Owners prevailed in eleven of these eighty-two cases. Thus, owners prevailed in 13.4% of the cases where the merits were addressed and in 9.8% of all one hundred and thirty-three cases. By themselves, these low success rates do not indicate unfairness because there are circumstances where it would be rational to incur litigation costs even if the odds of success were low. For example, where potential awards are high or where you can spread the costs across other litigation or claims or among other owners, it is rational to litigate even where it is known that the chance of success is low. In such situations, a low success rate, by itself, does not indicate *unfairness*.

A review of the seventy-one cases in which the owners lost indicates circumstances where it is rational for owners to litigate in a scheme in which they lose far more often than they win. Sixty-four of these seventy-one cases where the owners lost involved situations where the rewards of success were very high and/or litigation costs were reduced because of one or a combination of the following: (1) a very substantial amount of money (*vis-à-vis* litigation costs) was at stake; (2) an owner was a “repeat player” interested in the financial impact of a regulatory scheme in future situations; (3) a group was sharing litigation costs; or (4) multiple claims were involved so that the takings claim by itself was, to some extent, only a small portion of the litigation costs. In addition, there was a possibility of recovering attorney fees in the claims brought under 42 U.S.C. § 1983, and a

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143. The selection was done by using a random number table to select a case from the first ten cases on the list. Every tenth case on the rest of the list was then selected and reviewed.

small number of claims appear to have been funded, at least in part, by public interest groups. Of the seven cases where these factors were not involved, six involved at least one of the following: a cross-claim by an owner, determinations that no regulatory restriction was involved or that the plaintiff had no property interest of the owner at stake, or the unsuccessful use of a takings claim as a defense to a prosecution. The other case appears to be a situation where a small owner truly was, at least to some extent, litigating over a small amount of money (or perhaps, the principle of the matter).<sup>144</sup>

The success rate of the *Penn Central* sample contrasts sharply with a similar sample study of *Lucas*.<sup>145</sup> In the *Lucas* sample, owners prevailed under the *Lucas* total taking standard at a much lower rate—less than 3% of the time. However, in all the cases in the *Lucas* sample, the *Lucas* claim was an additional claim added to the suit because the owners always had a potential *Penn Central* claim even if *Lucas* did not apply. As a result, it was inexpensive to add the *Lucas* claim to the *Penn Central* claim, which would be brought anyway. Because adding the *Lucas* claim did little to increase the litigation costs already incurred in bringing the *Penn Central* claim, it was rational to add it even though the chances of success were low. The difference between the *Lucas* success rate and the *Penn Central* success rate clearly shows the importance of evaluating the rate of success of a particular claim in terms of rational litigation costs.

Thus, it is difficult to draw conclusions on the basis of the success rate data because the data are likely to be influenced by the rational actions by owners—that is owners spend litigation costs where the expected gains exceed the costs even if the chance of success is low. This rational strategy could be employed in a system that is unfair just as easily as in a scheme that is fair. Thus, success rates do not directly address arguments that current takings doctrine is inherently unfair because the owners' rights are always given too little weight.<sup>146</sup> Be-

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144. *Goldberg v. City of Wilmington*, 1992 WL 114074 (Del. Super. Ct. May 26, 1992). This is an unpublished case in which the owner claimed that a taking occurred as a result of an ordinance requiring owners to maintain trees on public property adjacent to the owner's property. The court relied in part on authorities with similar maintenance requirements for public sidewalks. *See id.* at \*2-\*3; *cf.*, Annotation, *Constitutionality of Statute or Ordinance Imposing on Abutting Owners or Occupants the Duty in Respect of Care or Condition of Street or Highway*, 58 A.L.R. 215 (1929).

145. *See* Hubbard, *supra* note 5 at 506-07, 521.

146. *See* RICHARD A. EPSTEIN, *TAKINGS: PRIVATE PROPERTY AND THE POWER OF EMINENT DOMAIN* (1985); MARK L. POLLOT, *GRAND THEFT AND PETIT LARCENY: PROPERTY RIGHTS IN AMERICA* (1993).

cause owners are so likely to be rational in expending litigation costs, the amount of weight given to owners' rights might have little impact on success rate. For example, the success rate might be unchanged over time if courts suddenly started giving vastly increased weight to owner's rights. In response to any higher success rate resulting from this increased weight, rational owners would simply bring more suits, and a new equilibrium could be reached at the same percentage rate of success. The absolute number of successful suits would be higher, which is an important difference, but the success rate would be unchanged because more total suits would be brought.

One might argue that, even if we assume the success costs simply reflects a rational litigation strategy, the sample data indicate unfairness because so few cases are brought. At the time the sample was selected in 2002, only 1329 appellate cases were reported. This means about fifty-five cases per year were decided over the twenty-four year period since *Penn Central* was decided in 1978. This figure is arguably very low, even though these fifty-five reported decisions probably reflect only a fraction of cases filed each year, because there are at least tens of thousands of regulatory decisions affecting real property occurring every year in zoning alone.<sup>147</sup> On the other hand, it could be argued that the low rate of appealed regulatory decisions simply reflects that owners have a high rate of success of having development plans approved at the prelitigation stage in many areas of land regulation.

This second view has some empirical support because studies show that owners are very successful at the regulatory level. For example, a recent survey of zoning and development controls in South Carolina indicates that owners have an extremely high rate of success in terms of such things as rezonings (74% approval rate), variances (76% approval rate), subdivision review (91% approval rate), and design review (90% approval rate).<sup>148</sup> Studies in other areas of the coun-

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147. See CENTER FOR COMMUNITY GROWTH AND CHANGE, LOCAL LAND USE PLANNING REVIEW SURVEY REPORT 33, 33-4 tbl.E5 (Nov. 22, 2002), available at [http://www.masc.sc/Legislative/land\\_use\\_survey.pdf](http://www.masc.sc/Legislative/land_use_survey.pdf) [hereinafter SOUTH CAROLINA LAND USE PLANNING SURVEY] (indicating that nearly five thousand zoning decisions were rendered by local governments in South Carolina in the years 1999, 2000, 2001).

148. *Id.* at 33 tbl.E5. Because of such things as the inclusion of pending cases in the total number of cases, the respective percentages of denials were: re-zonings – 16%; variance – 20%; subdivision review – 2%; and design review – 4%. *Id.*



try indicate similar high success rates in zoning matters.<sup>149</sup> The South Carolina survey also indicates that decisions are made relatively promptly and that very few of these decisions are appealed to the courts.<sup>150</sup>

Because takings challenges are similar to an appeal from an administrative agency, it is helpful to compare the rate of success for such suits with the *Penn Central* success rate. In terms of the federal courts of appeals, the reversal rate for appeals from administrative actions was 7.9% in the twelve-month period ending March 31, 2001.<sup>151</sup> The success rate of 13.4% for owners in *Penn Central* challenges compares favorably with this rate of successful reversal of administrative actions. In addition, the low rate of success for administrative appeals indicates that success rates are determined to a large extent by rational litigation strategies.

Ultimately, the success rate data are inconclusive on the issue of fairness. Given owners' concern for an efficient level of litigation and given the high success rate of owners at the administrative level, it can be argued that the success rate does not show that the *Penn Central* approach is *unfair* in application. However, the opposite conclusion—that is that the data do not show the approach is applied fairly—is also supported. As with the first conclusion, this opposing conclusion can be supported by the likelihood that owners will adopt efficient litigation strategies. Because of this strategy, owners would litigate at a rational level regardless of the fairness or unfairness of the application of the balancing scheme.

### B. *Time Required for Decision*

Takings doctrine is often criticized on the ground that it is extremely time-consuming to litigate takings cases.<sup>152</sup> The survey data do

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149. See, e.g., ELLICKSON & BEEN, *supra* note 141, at 330-31 (noting that numerous empirical studies have shown that zoning boards tend to grant between 50 percent and almost 90 percent of landowners' requests for variances).

150. SOUTH CAROLINA LAND USE PLANNING SURVEY, *supra* note 147, at 25 tbl.D2; see *id.* at 31 (indicating that of 6221 development applications of all types filed in 2001, only 31 appeals resulted).

151. ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS, FEDERAL JUDICIAL CASELOAD STATISTICS March 31, 2001, at 28 tbl.B-5 (2001).

152. Determining whether a taking has occurred is time-consuming for two reasons. First, given the lack of a set formula for identifying a taking, each case must be addressed upon its particular facts and case-by-case adjudication takes time. Second, to avoid being overwhelmed with the task of reviewing legislative and administrative decisions, courts utilize the ripeness doctrines to force the owner to receive a final decision by the regulatory agency involved before seeking judicial review. See, e.g., *Williamson County Reg'l Planning Comm'n v. Hamilton*

not support this criticism. Of the eighty-two cases which addressed the merits of a taking challenge: twenty-two were decided in two years or less, nine were decided within three years, five were decided within four years, and sixteen took more than four years. (It was not possible to tell the time frame for thirty cases.) Most of these decisions were final within the time period indicated because of these eighty-two cases, only nine involved an appeal with a published decision.

These time periods fall within the time periods for litigation in general. For example, the median time between filing of a civil suit and disposition by trial was 21.2 months for federal district courts in the twelve-month period April 1, 2001-March 31, 2002.<sup>153</sup> The time periods also compare favorably to the time required to resolve Strategic Lawsuits Against Public Participation (SLAPPs) brought by developers to deter citizens from challenging development schemes. A review of two of these indicated that the total time elapsed before resolution by out-of-court settlement was, in one suit, eleven years, nine months and, in the other, seven years, nine months.<sup>154</sup>

One basis for the claim of undue delay in takings litigation is that ripeness rules, which require remands to regulatory bodies for a “final” decision, unduly delay courts in addressing the merits until owners have spent excessive time with regulatory agencies.<sup>155</sup> One measure of the impact of ripeness rules is the ratio of cases addressing the merit of a takings claim to the cases which do not address the merits because the case is not ripe. The survey data concerning this measure

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Bank, 473 U.S. 172, 186-94 (1985) (holding a takings claim not ripe because of the difficulty of determining individualized impact of regulatory scheme, given that the owner had not sought a variance). There are good reasons for the ripeness doctrine. See *infra* note 157 and accompanying text. However, the ripeness requirement can substantially impede judicial review because land use regulation schemes are often flexible. For example, a takings challenge to a denial of a particular density for a residential development might be deemed not ripe because the owner had not requested a variance. Even with a denial of a specific request for a variance, the city can argue that the owner should have sought a lesser variance or should have sought rezoning. The net result may be that an owner spends time and money seeking a judicial determination only to be told to go back to the regulators. Because of possible delays like this, the ripeness doctrine has been criticized. See Max Kidalov & Richard Seamon, *The Missing Pieces of the Debate over Federal Property Rights Legislation*, 27 HASTINGS CONST. L.Q. 1, 5-11 (1999); Michael K. Whitman, *The Ripeness Doctrine in the Land-Use Context: The Municipality's Ally and the Landowner's Nemesis*, 29 URB. LAW. 13, 35-39 (1997).

153. ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS, FEDERAL JUDICIAL CASELOAD STATISTICS, March 31, 2001, at 56 tbl.C-5 (2001).

154. Penelope Canan & Chris Barker, *Inside Land-Use SLAPPs: The Continuing Fight to Speak Out*, LAND USE L. & ZONING DIG. 3, 5 (Mar. 2003).

155. See *supra* note 152.

of impact suggest that ripeness rules may have less effect than critics have asserted.

The *Penn Central* sample and the *Lucas* sample cases<sup>156</sup> have similar results concerning the ratio of cases where the merits were addressed vis-à-vis instances where the cases were held to be not ripe. In the *Lucas* study, forty-eight cases addressed the merits, and twenty-one cases viewed the matter as not ripe. In the *Penn Central* sample, the numbers were sixty-one and thirty-four respectively. If the cases that consider the merits are combined with the cases that view the matter as not ripe, the percentages of this total are as follows: in the *Lucas* sample, 72% of the cases address the merits, and 28% viewed the matter as not ripe. In the *Penn Central* sample, 71% addressed the merits, and 29% viewed the matter as not ripe. These figures do not necessarily indicate that critics are wrong in claiming that ripeness rules unfairly prevent owners from addressing the merits of a takings. A remand in nearly 30% of the cases constitutes a substantial impact.

On the other hand, this impact may be justified because there are good reasons for the ripeness doctrine.<sup>157</sup> One reason is that until such a final decision is rendered, it would be wasteful to review it, given that the final result might be sufficiently different that no appeal or impropriety would result. Another reason is that until the agency has rendered its final decision, the court has no case or controversy to adjudicate; the agency's final decision may satisfy the owner. Consequently, there are constitutional problems with review of a decision before it is final. Given these policies, it is not clear that a remand rate of nearly 30% is too "high" to be "fair." Nor is it clear that this remand rate is sufficiently "low" to be fair.

In evaluating the issue of the time involved in addressing takings decisions, it is useful to consider how much time is involved at the administrative level. The survey of zoning and development controls in South Carolina referred to above indicates that most decisions are made within forty-five days and that rezonings, particularly those involving planned unit developments (which are a more complicated

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156. See Hubbard, *supra* note 5, at 521.

157. For discussion of the reasons for ripeness doctrine see generally DANIEL R. MANDELKER, *LAND USE LAW* 2.21 to 2.27 (4th ed. 1997) (chronicling ripeness and finality rules in the context of takings litigation); LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* 3-10 (2d ed. 1988) (discussing ripeness doctrine).

approach to zoning),<sup>158</sup> are the only type of plan that typically takes more than forty-five days, and these are usually done within ninety days.<sup>159</sup> This lack of undue delay at the administrative level indicates that any criticism of delay must be limited to the judicial level, not the administrative level.

### C. *The “Burden of Proof” and the Presumptive Fairness of the Judiciary*

Because the data on success rate and delay in decision-making are inconclusive on the issue of fairness, it is necessary to address the issue of “burden of proof.” Is this burden on defenders of the fairness of the balancing process or on critics? A good starting point on this issue is to consider whether there is any reason to believe that judges, who do the *Penn Central* balancing, are likely to display a systemic bias against owners as they balance owners’ rights against the public interest?

In terms of the ideology of political parties, judges reflect both Democratic Party and Republican Party values. For example, based on the political party of the appointing president, the federal courts of appeals judges applying the *Penn Central* balancing test have represented both parties in fairly balanced percentages over time.<sup>160</sup> Thus,

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158. See JULIAN CONRAD JURGENSMEYER & THOMAS E. ROBERTS, *LAND USE PLANNING AND CONTROL LAW* 7.15-7.16, 7.18 (1998).

159. SOUTH CAROLINA LAND USE PLANNING SURVEY, *supra* note 147, at 35. Only 2% of all cases take more than ninety days. *Id.*

160. The following is a percentage breakdown by year of the non-senior appeals court judges by party of the appointing president:

YEAR	NUMBER	DEMOCRAT	REPUBLICAN
1980	137	.64	.36
1981	134	.62	.38
1982	138	.58	.42
1983	140	.57	.43
1984	142	.56	.44
1985	158	.48	.52
1986	158	.44	.56
1987	157	.41	.59
1988	158	.41	.59
1989	146	.38	.62
1990	157	.34	.66
1991	153	.31	.689
1992	155	.28	.72
1993	152	.28	.72
1994	158	.34	.66

to the extent that the politics of the judicial selection process is involved, there is no reason to believe that judges have some political bias against owners or against property rights or that bad faith is involved in either the adoption or the application of the balancing test.

It is possible to argue that there is a prevailing cultural lack of "proper" appreciation of the value of property rights and that, therefore, political party is irrelevant. However, this type argument raises fundamental issues concerning the basis of "objective normative truth" about the "proper value" of property rights. A full discussion of such issues is beyond the scope of this article.<sup>161</sup> However, in a society based on democratic values, cultural agreement on the importance of property rights, as reflected in decisions by politically appointed judges, is entitled to considerable weight. For this reason, the *Penn Central* approach should be viewed as *prima facie* fair, and the burden of proof should be on those who assert that the judges are not fair as they balance property rights against the public intent.

Because the data on success rate and time involved in litigation are inconclusive on the issue of fairness, it appears that these data do not assist critics in satisfying their burden of proof. In other words, the data do not provide a basis for concluding that the *Penn Central* balancing problem is *unfair*.

### III. Conclusion

Fairness is often in the eye-of-the-beholder, and it is impossible to demonstrate definitively that the balancing test of *Penn Central* is fair. However, if one takes the view that the weight and scope of owners' rights are not absolute, but rather contingent on the situation, then the ad hoc balancing test is necessary because of the complexity of the circumstances involving regulation. The process is also *prima facie* fair because the judges applying the test are appointed through a democratic political process. Given the necessity for and the *prima*

1995	161	.35	.65
1996	151	.36	.64
1997	146	.39	.61
1998	150	.44	.56
1999	142	.46	.54

(Table supplied to authors by Dr. Donald Songer, University of South Carolina, Department of Government and International Studies).

161. For a brief review of issues involved and of the importance of the cultural agreement see, for example, F. Patrick Hubbard, *Justice, Creativity, and Popular Culture: The "Jurisprudence" of Mary Chapin Carpenter*, 27 PACIFIC L.J. 1139, 1141-1152 (1996).

*facie* fairness of the balancing approach, the burden is on critics to show that the approach is not applied unfairly. The survey data do not provide support for satisfying the burden. Because the data are inconclusive, they do *not* indicate that the balancing approach is *un*-fair. Thus, the *Penn Central* approach has not been shown to be *un*-fair in terms of patterns of regulatory and judicial decisions.

## APPENDIX 1

## Review of Sample of Cases Citing

*Penn Central Transportation Co. v. City of New York*

Case Number:    Review Dates: \_\_\_/\_\_\_/02    by \_\_\_\_\_  
 \_\_\_/\_\_\_    Review Dates: \_\_\_/\_\_\_/02    by \_\_\_\_\_  
                  Review Dates: \_\_\_/\_\_\_/02    by \_\_\_\_\_  
                  Review Dates: \_\_\_/\_\_\_/02    by \_\_\_\_\_

## 1. Parties

## 1. Affected party

## 1. Nature

1. Individual person[s]
2. Business[es] (includes associations)
3. Could not tell

## 2. Size

1. Small
2. Large (e.g., likely to involve more than 20 residential lots in size or More than twenty employees)
3. Could not tell

## 2. Governmental unit

1. Federal
2. State
3. Local/regional

## 3. Other: \_\_\_\_\_

## 2. Court

## 1. Federal B which court

1. Traditional (Claims against state or local government)
  1. Court of Appeals (Circuits 1-11, D.C. Circuit)
  2. District Court
  - 3.

2. Claims against federal government
  1. Claims Court
  2. U.S. Court of Appeals for the Federal Circuit
  3. S.Ct.
  4. Other: \_\_\_\_\_
2. State
3. Program
  1. Environment
    1. Wetlands/flood plain
    2. Coastal
    3. Species (animal, plant) protection
    4. Other
  2. Zoning
  3. Forfeiture/nuisance abatement
  4. Other: \_\_\_\_\_
  5. Not a taking case
4. Taking issue addressed?
  1. If so, circle this Ayes@ and address the following:
    1. Was there a taking?
      1. Yes. If yes, was the finding of a taking based on
        1. *Penn Central*
        2. *Lucas*
        3. *Loretta*
        4. Other
      2. No. In determining that no taking occurred, was *Penn Central* test applied?
        1. Yes
        2. No. In determining that no taking occurred, what test was used?
    2. How long did it take to identify (Measured by time between last application date and date of decision in the sample)?[Note that decision not necessarily final; see 3 below. Note also that appellate decisions (e.g., F.3d) take longer than trial court (e.g., F. Supp.2d).]
      1. Not possible to tell
      2. Two years or less
      3. Three years
      4. Four years
      5. More than four years



3. Appeals
  1. Was there an appeal with a published decision (before August 30, 2002)?
    1. Yes
    2. No
  2. If Aa@ above is Ayes,@ did the appeal address the takings issues
    1. Yes, if yes, was the previous decision
      1. Affirmed
      2. Reversed. If reversed, did the appellate decision find a taking under *Penn Central*?
        1. Yes
        2. No
    2. No
2. If not addressed, circle this Ano@ and address the following
  1. Concerning the role of *Penn Central* in the case:
    1. *Penn Central* was merely cited as a general proposition
    2. Taking was at issue but held not ripe (or not yet possible to tell if taking had occurred)
    3. Other: \_\_\_\_\_
  2. Appeals
    1. Was there an appeal with a published decision (before August 30, 2002)?
      1. Yes
      2. No
    2. If Aa@ above is Ayes,@ did the appeal address the takings issues?
      1. Yes. If yes, was the previous decision
        1. Affirmed
        2. Reversed. If reversed, did the appellate decision find a taking under *Penn Central*?
          1. Yes
          2. No
      2. No

NOTES ON APPEALS: (1) No attempt was made to determine subsequent history of published appeals of cases in the sample; (2) the

category of Appeals@ decisions does not include published opinion in denial of petition for: (i) certiorari; or (ii) rehearing.

## APPENDIX 2

Cases Citing Lucas v. Penn Central			Federal Court					Other	Total
			Traditional Ct. App.	D. Ct.	Claims against Claims Ct.	Fed. G.S. Ct. US Ct. App.	Fed		
Total Cases			21	30	13	6	3	3	76
Parties	Nature	Individual	9	9	10	3	2	3	36
		Business	15	21	6	3	1	3	49
		Uncertain	0	0	1	1	0	0	2
Size	Size	Small	9	7	4	0	2	0	22
		Large	8	16	6	3	1	2	36
		Uncertain	5	7	3	3	0	1	19
Governmental Unit	Federal	Federal	5	7	13	6	0	3	34
		State	3	6	1	0	1	0	11
		Local/Regional	13	16	0	0	2	0	31
		Other	0	1	0	0	0	0	1
Program	Environment	Wetlands/Flood plain	0	0	4	2	1	0	7
		Coastal	0	1	0	0	1	0	2
		Species protection	1	0	1	0	0	0	2
		Other	0	3	4	3	0	0	10
		Total Environmental Cases	1	4	9	5	2	0	21
		Zoning	11	11	0	0	0	0	22
		Forfeiture/Nuisance Abatement	1	0	0	0	0	0	1
		Other	9	14	7	3	1	1	35
		Not a Taking Case	3	2	2	0	1	2	10
		Taking	Add	1	2	1	1	0	0
Taking	Add	four Penn Central	0	0	0	0	0	0	0
		Lucas	0	0	0	0	0	0	0
		Loretta	0	1	0	0	0	0	1
No Taking	Yes	Yes	10	17	2	0	0	0	29
		No	0	2	4	1	0	0	7
Time to Ide	Not Possible to Tell	Two Years or Less	3	5	0	1	0	0	9
		Three Years	3	11	1	0	0	0	15
		Four years	3	1	0	0	0	0	4
		More Than Four Years	0	2	2	0	0	0	4
		Appeal with	Yes	2	3	4	1	0	0
Appeal with	Yes	Appeal Add	0	3	1	0	0	0	4
		Reversed u	0	0	0	0	0	0	0
		No	0	1	1	0	0	0	2
Appeal did not Address Taking Iss	No	Appeal did not Address Taking Iss	1	2	0	0	0	0	3
		No	10	16	5	2	0	0	33
Taking Not Penn Central cited as a general proposition	Taking was at issue but not held ripe	Other	4	4	3	1	2	3	17
		Appeal with	6	6	4	4	2	0	22
		Yes: Appea	5	0	2	3	1	0	11
		Affirmed	0	0	1	1	0	0	2