

1-1-2012

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Recommended Citation

David Crump, *Takings by Regulation: How Should Courts Weigh the Balancing Factors*, 52 SANTA CLARA L. REV. 1 (2012).
Available at: <http://digitalcommons.law.scu.edu/lawreview/vol52/iss1/1>

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TAKINGS BY REGULATION: HOW SHOULD COURTS WEIGH THE BALANCING FACTORS?

David Crump*

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INTRODUCTION

The Fifth Amendment to the Constitution provides that private property may not be taken without just compensation.¹ But the Takings Clause does not provide adequate guidance to a court that is struggling to determine whether the facts involved amount to a taking. In *Penn Central Transportation Company v. City of New York*, the Supreme Court held that the usual test for a regulatory taking required an ad hoc, factual inquiry.² The Court provided only minimal guidance for approaching this inquiry, by giving examples of the factors that a court should consider.³ The Court has done little to clarify its ad hoc, multifactor approach since *Penn Central*. The original decision still controls this murky area of constitutional interpretation.⁴

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1. U.S. CONST. amend. V.

2. *Penn Cent. Transp. Co. v. City of New York*, 438 U.S. 104, 123–24. (1978).

3. *Id.* at 124–28.

4. *See, e.g.*, *Yee v. City of Escondido*, 503 U.S. 519, 523, 529–31 (1992) (deciding that rent control is not “physical occupation” pursuant to *Penn Central*; construing that case as providing the general rule, with such imprecision

Depending upon how they are counted, there are six, or possibly seven, factors that can be extracted from the Court's opinion.⁵ The factors are to be balanced against each other, but in an unspecified way, and they are only loosely defined. The Court did not articulate which factors, if any, should be given more weight. In fact, the Court has never explained the factors, and surprisingly, neither have the commentators. Although there is a great deal of literature criticizing the *Penn Central* decision, the critics have failed to tell the courts how to make the factors work rationally, and therefore, the issue remains as murky today, thirty-three years later. And so this question—how to consider the balancing factors and discern whether a regulation has gone too far and become a taking—is a subject that unfortunately is still an issue today.⁶

The question is important because a multifactor balancing test is unavoidably vague.⁷ Arguably, in the case of takings by regulation, the law will necessarily be expressed in a multifactor balancing test, however vague it may be, because there are too many varieties of takings claims for a neat and orderly test to be useful. In fact, in *Penn Central*, Chief Justice Rehnquist did not provide any alternative to the Court's mushy, ad hoc approach in his dissent.⁸ He simply concluded that the Court should have weighed the balancing factors differently.⁹ If we knew how the factors should be weighed, perhaps we could reduce the vagueness of the ad hoc test, even if we were unlikely to eliminate it. Thus, it is surprising that the Supreme Court has done so little to refine the *Penn Central* approach, even though it is more than thirty years old and has been the subject of discussion in

phrases as “considerations . . . suggest” and “complex factual assessments”).

5. See *infra* Part I.C.1 (identifying the factors).

6. See *E. Enter. v. Apfel*, 524 U.S. 498, 541 (1998) (“Cases attempting to decide when a regulation becomes a taking are among the most litigated and perplexing in current law.”).

7. See *infra* notes 11–13 and accompanying text; William P. Barr et al., *The Gild That Is Killing the Lily: How Confusion over Regulatory Takings Doctrine Is Undermining the Core Protections of the Takings Clause*, 73 GEO. WASH. L. REV. 429 (2005) (considering the issue in the context of utility regulation); Donald W. Large, *The Supreme Court and the Takings Clause: The Search for a Better Rule*, 18 ENVTL. L. 3, 24–25 (1987) (discussing the “defects” of a balancing test).

8. *Penn Cent.*, 438 U.S. at 138–53.

9. *Id.*

intervening Supreme Court opinions.¹⁰

A constitutional rule that lacks precision, such as the *Penn Central* approach, may exhibit several types of disadvantages. In fact, a statement that outcomes are “ad hoc” is a confession of relative lawlessness. This kind of approach invites overreaching by government officials who evaluate cases differently than those whom they regulate.¹¹ It is likely to produce a large proportion of inconsistent results—a case in courtroom A may result in the finding of a taking while a closely similar case in courtroom B does not.¹² Also, an imprecise approach will undoubtedly produce more expensive litigation, as governments and citizens struggle not only to prove the facts essential to the balancing factors, but also to persuade courts about how they should weigh and understand those factors.¹³ On the other hand, a vague rule or test that lacks precision, may nevertheless be the most accurate way to approach a given problem—if the problem itself is difficult to define. This is the case for regulatory takings, or at least the Supreme Court seems to think so.

This Article offers suggestions for how courts should define and weigh the *Penn Central* balancing factors. Part One of the Article differentiates three different types of takings: condemnations, per se takings, and regulatory takings. The interaction among these different types of takings affects any evaluation of the balancing approach addressed in this Article. Part Two describes the *Penn Central* case itself, with an emphasis upon identifying and deciphering the balancing factors that the Court used in making its decision. Part Three contains a discussion of the difference between formal or rule-oriented approaches, on the one hand, and instrumental or policy-based approaches on the other. It also describes the policies that support the

10. See *supra* note 4 and accompanying text.

11. Cf. *Kolender v. Lawson*, 461 U.S. 352, 357–58 (1983) (explaining that the principal problem of vague regulation is that it fails to guide and limit enforcement by public officials).

12. Cf. *id.* at 357 (explaining tendency of vague regulation to produce “arbitrary” and “discriminatory” results).

13. Cf. *New York v. Belton*, 453 U.S. 454, 458 (1981) (discussing need for a “bright-line” rule to reduce collateral consequences of vagueness), *distinguished in Arizona v. Gant*, 556 U.S. 332, 499–500 (2009) (recognizing the policy underlying bright-line rules but limiting *Belton* to cases where its policy is supported).

Takings Clause, since the *Penn Central* factors are part of an instrumental approach¹⁴ that attempts to produce results that advance these policies. Part Four contains the most important feature of the Article: a framework for considering the balancing factors. The final section provides conclusions, which include the suggestion that the greatest weight should be placed upon relatively few of the factors, and that at least one factor should be accorded very little weight because it should not have been included in the first place.

I. THREE TYPES OF TAKINGS CASES

A. *The Simplest Cases: Straight Condemnation*

The simplest kind of takings case occurs when the government takes title to property.¹⁵ These cases usually involve straight condemnation, in which the government exercises the power of eminent domain. There can be serious issues in these cases regarding the compensation amount,¹⁶ but usually, if the government takes title to property, it recognizes that it has engaged in a taking and that just compensation is due.¹⁷

Occasionally, there are cases concerning whether the government has, in fact, taken title to property. For example, consider the possibility that the government uses a patented invention. It seems well established that the government owes a royalty as just compensation,¹⁸ but even if this conclusion did not follow from statutes and common law, perhaps it should be the result by reason of the Takings Clause.¹⁹ There are other situations in which the government

14. See *infra* Part II.A (identifying instrumentalism).

15. See *Yee*, 503 U.S. at 522 (describing cases in which government “takes title”).

16. *E.g.*, *First English Evangelical Lutheran Church of Glendale v. Cnty. of Los Angeles*, 482 U.S. 304 (1987) (discussing the remedy for takings, i.e., “just compensation”); *United States v. 50 Acres of Land*, 469 U.S. 24 (1984) (discussing different methods of determining compensation).

17. *Yee*, 503 U.S. at 522 (explaining that these cases “generally require compensation”).

18. *E.g.*, *United States v. Adams*, 383 U.S. 39 (1966) (determining that Adams’s battery was patented validly and assuming that the United States’ use of it required payment).

19. See *infra* Part I.B. The issue is unclear; however, it seems difficult to conclude that the case is one of physical occupation. In addition, it is hard to analyze the case so that it requires compensation under the *Penn Central*

obtains the benefit of intangible or other personal property without clearly taking title, but it should owe just compensation by analogy to the land condemnation cases.²⁰

B. Cases Resulting in "Virtually Per Se" Takings: The Loretto, Nollan, Dolan, and Lucas Decisions

1. Physical Occupation as a Per Se Taking

In *Loretto v. Teleprompter Manhattan CATV Corporation*,²¹ the Court created a category of just compensation cases that result in "virtually per se" takings. The government in *Loretto* required landowners to allow cable television providers to install equipment on their property and gave so-called compensation of one dollar per instance.²² The Court characterized the case as one of "physical occupation" of property, holding that such an occupation results in a taking, virtually per se.²³ This kind of case does not require a balancing test.

Identifying a physical occupation, according to the Court, depended upon the kind and amount of government interference to the enjoyment of the bundle of rights that flowed from ownership of the particular property. One of the most important indicators was the loss of the right to exclude others from the property.²⁴ Because the government denied landowners the right to exclude cable operators from installing equipment on the landowners' property, the government's action amounted to a physical occupation of the land, and it was a virtually per se taking. One of the problems that the Court considered was how to distinguish cases in which the government itself necessarily encroached physically upon land while performing a regulatory function.²⁵ The Court solved that problem simply by describing the regulatory-presence problem as outside the scope of its ruling.²⁶

factors. *See infra* Part I.C.

20. *E.g.*, *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986 (1984) (holding that government acquisition and publication of trade secrets can be a taking).

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

22. *Id.* at 421-24.

23. *Id.* at 421.

24. *Id.* at 435.

25. *Id.* at 440.

26. *Id.*

The Court developed its *per se* analysis more completely in *Nollan v. California Coastal Commission*.²⁷ There, the California Coastal Commission had required a landowner to dedicate publicly a lateral easement along the landowner's beach property, as a condition of permitting the landowner to remodel an oceanfront home.²⁸ The lateral easement would have allowed members of the public to walk along the beach over the landowner's property.²⁹ The Commission offered two justifications for what it argued was regulation rather than a taking: the obstruction of views that would result from the new construction and the accompanying psychological barrier preventing accessing the beach caused by the larger construction.³⁰ The Court, through Justice Scalia, held that the easement requirement resulted in a loss of the right to exclude barefooted wanderers across the Nollans' beach.³¹ The government therefore created a physical occupation of the property, and consequently the government's action amounted to a *per se* taking. Justice Brennan dissented, believing that the easement created only temporary and slight occupations, and arguing that the *per se* category was not a proper means of analyzing takings cases in the first place.³²

2. *The Nollan-Dolan Test: Physical Occupations That Are Not Takings*

The more interesting aspect of the case was the Court's treatment of physical occupations that are necessary for regulatory reasons and therefore are excused from becoming *per se* takings. For example, a city may require a subdivision developer to publicly dedicate adequate streets, even though this regulation results in a physical occupation of land under the streets. Justice Scalia wrote that the government could salvage its regulation, even in a case of physical occupation, if it could demonstrate a close nexus between its regulatory goals and the regulatory means chosen.³³ In other words, if

27. *Nollan v. Cal. Coastal Comm'n*, 483 U.S. 825 (1987).

28. *Id.* at 827–28.

29. *Id.* at 828.

30. *Id.* at 828–29.

31. *Id.* at 831–32.

32. *Id.* at 842–64 (Brennan, J., dissenting).

33. *Id.* at 835–36; *see also id.* at 865 (Blackmun, J., dissenting) (using the “close nexus” terminology).

the exaction the government proposed to impose upon the landowner was not closely related to its justification or regulatory goal, the case would not result in a mere regulation, but in a taking that required just compensation. The close nexus requirement, said Justice Scalia, was not so lax as to amount to the kind of rational basis test that applies in property-related Due Process cases, nor was it a supremely heavy burden like the requirements in strict scrutiny cases; it was an intermediate standard.³⁴

Why did Justice Scalia specify a close nexus standard? The answer, one can infer, is that this standard prevents pretextual takings—although the Court did not explain its standard precisely this way. Imagine that the government wants to take land that belongs to a private owner—call him John Jones—but the government does not want to pay for it. The government therefore engages in the subterfuge of “regulating” Jones’s land in a manner that is unrelated to its regulatory goal of creating a park. It tells Mr. Jones, for example, that drainage is needed and that he cannot build on the land or use it for any purpose other than recreation by the general (nonpaying) public. The close nexus test would cut through this pretext and identify the government’s action as a taking.

On the other hand, there are situations in which the government requires the loss of the right to exclude for proper regulatory reasons. Imagine, instead, that Mr. Jones is a residential subdivision developer who has submitted a plat of his land to the city for approval. The city requires him to dedicate parts of the land as streets, for use by the public. In this case, the regulatory goal is traffic and transportation, the regulatory means is streets, and the two are closely related. The city passes the close nexus test in this case, and its requirement of adequate streets is regulation, not a taking, even though Jones has lost the right to exclude the public from the streets. The close nexus test separates proper regulation from pretextual takings.

This test, when applied to the *Nollan* case, resulted in the conclusion that the government could not salvage its regulation, because there was no close nexus between the regulatory goals and means. The regulatory goals were scenic

34. See *id.* at 837.

views of the beach from afar and removal of a psychological barrier against entry to the beach.³⁵ According to Justice Scalia, it was “quite impossible” to see how these goals were advanced by the creation of a public right to walk laterally *along* the beach.³⁶ Since the landowner had lost the right to exclude, the case fit into the category of virtually *per se* takings, and because there was no close nexus between the regulatory means and the regulatory goal, the Commission’s regulation was a pretextual taking—thus the Commission could not extract the easement without paying just compensation.

The Court soon added another requirement for a government that claims its encroachment upon property is mere regulation and not a taking. In *Dolan v. City of Tigard*, the Court required a “rough proportionality” between the burden created upon a landowner and the need addressed as the regulatory goal.³⁷ The government there had required a landowner to refrain from building on part of the land to allow for drainage and to create a bicycle path to alleviate congestion.³⁸ The Court remanded for a determination whether the exaction from the landowner was in rough proportion to the regulatory need.³⁹ The rough proportionality requirement prevents the government from taking more than it needs for the claimed regulatory purpose.

Together, the *Nollan* and *Dolan* cases provide a two-part test for regulatory justifications of governmentally required physical occupations. First, the government must show a close nexus between the regulatory goal and the regulatory means. Second, the government must demonstrate that there is a rough proportionality between the size of the exaction from the landowner and the extent of the need for the regulatory purpose. The first requirement prevents pretextual takings, such as the hypothetical regulation of John Jones’s land that converts it, in reality, into a park. The second prevents the government from using a valid regulatory justification to impose a much greater burden on the citizen than the justification supports. In other words, it

35. See *supra* note 30 and accompanying text.

36. *Nollan*, 483 U.S. at 838.

37. *Dolan v. City of Tigard*, 512 U.S. 374, 391 (1994).

38. *Id.* at 380.

39. *Id.* at 396.

prevents the government from “taking a mile when an inch would do.”

3. *Another Type of Per Se Taking: Destruction of All Value*

The Court added another category of virtually per se takings in *Lucas v. South Carolina Coastal Council*: regulation that destroys all economic value.⁴⁰ In *Lucas*, the government regulated a parcel of privately owned land in a way that prevented it from being used in any economical manner.⁴¹ The Court held that the destruction of all economic value in a piece of property created a taking per se, without the need for balancing various factors.⁴² The Court has never indicated whether a government can salvage a destruction-of-all-value regulation by demonstrating compliance with the *Nollan-Dolan* test, although perhaps it can, by analogy to the physical occupation cases.

4. *A Summary: Per Se Takings*

In summary, the Court created two categories of virtually per se takings: those in which the government has required a physical occupation of the property, and those in which the government regulates in such a way as to destroy all economic value in the property. At least in the first type of case, and possibly in the second, the Court has created a method in which the government can avoid having its regulation characterized as a taking, even if it would otherwise fit within the virtually per se category. Specifically, the government can succeed at salvaging its regulation by demonstrating compliance with the *Nollan-Dolan* test: that is, by showing, first, that its regulatory means and goals are in close nexus, and second, that the burdens it has imposed are roughly proportional to the regulatory need. These statements reflect a short summary of per se takings law.

40. *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1014–19 (1992).

41. *Id.*

42. *Id.* at 1015–16, 1027–29.

C. *Regulatory Takings: The Penn Central Balancing Approach*

Not all takings cases can be analyzed by per se rules. Per se rules are narrowly defined and there are an infinite number government actions that might result in takings.⁴³ In most takings cases that involve regulation, the prevailing analysis does not apply these per se rules. Instead, the Court applies the balancing test described in the *Penn Central* case.

The *Penn Central* case centered on actions by the New York City Preservation Commission charged with protecting historical landmarks.⁴⁴ One of Penn Central's rail terminals in New York was Grand Central Station.⁴⁵ The Station's longstanding function, appearance, and character made it an obvious candidate for historical designation.⁴⁶ Treatment of a structure as a historical landmark might seem an honor, but if so, it was not without disadvantages, and this particular designation was costly to Penn Central. It meant that the building had to be preserved in its historical form, and changes required the Commission's approval.⁴⁷ Penn Central, as a railroad, was almost by definition financially strapped.⁴⁸ It proposed to build a skyscraper on the site of Grand Central Station.⁴⁹ The land was valuable for this use and skyscrapers surrounding Grand Central were far more economically valuable than Grand Central Station itself. Since it had to preserve Grand Central Station, Penn Central proposed to have its lessee construct a skyscraper that would be cantilevered over the terminal.⁵⁰ The Preservation Commission rejected this development plan, while leaving open the possibility that another plan might be approved.⁵¹ Penn Central, believing with some justification that the Commission would never permit any viable construction

43. Compare, e.g., *Andrus v. Allard*, 444 U.S. 51 (1979) (involving prohibition of sales of parts of birds), with *Duquesne Light Co. v. Barasch*, 488 U.S. 299 (1989) (involving electricity rate regulation).

44. *Penn Cent.*, 438 U.S. at 110.

45. *Id.* at 115.

46. *Id.* at 115–16.

47. *Id.* at 112.

48. *ICC v. Texas*, 479 U.S. 450, 460 (1987) (recognizing “financial difficulties” of major railroads).

49. *Penn Cent.*, 438 U.S. at 116.

50. *Id.*

51. *Id.* at 117–18.

plan,⁵² filed suit. It claimed that the Commission's actions, even though undertaken in the guise of regulation, amounted to a taking of its property.⁵³

1. *The Penn Central Balancing Factors*

Justice Brennan wrote the opinion for the Court. This in itself indicated the likely outcome, because Justice Brennan took a limited view of the Takings Clause, sometimes in ways that had to be read to be believed.⁵⁴ He began by announcing that the identification of takings was "a problem of considerable difficulty."⁵⁵ He quoted a frequent statement: the purpose of the Fifth Amendment was to bar government from forcing "some people to bear public burdens alone, which, in all fairness and justice, should be borne by the public as a whole."⁵⁶ By defining the issue in this way, Justice Brennan set the stage for a confined reading of the Takings Clause, as discussed later in this Article.⁵⁷

The reason for the difficulty of the problem, Justice Brennan said, was that the Court had been unable to develop any "set formula" for recognizing when the government should compensate for an injurious action, versus when it should allow the loss to be "concentrated on a few persons."⁵⁸ The question remained an "essentially ad hoc, factual inquir[y]."⁵⁹ The Court had "identified several factors that have particular significance" in pursuit of this inquiry.⁶⁰ Then, Justice Brennan proceeded to identify (or rather, suggest) what today we know as the *Penn Central* balancing factors. Unfortunately, it is difficult to count the factors,

52. For example, no construction has ever occurred over the years, in spite of the economic value a building might have.

53. *Penn Cent.*, 438 U.S. at 120.

54. *E.g.*, in *Andrus*, Justice Brennan wrote the Court's opinion in a case in which federal law prevented any sales of certain taxidermist-preserved eagles, including those purchased by investors before the law had passed. One might readily conclude that this law would produce negative economic effects for the investors, but Justice Brennan denied that any such effect was "clear," because the investors "might exhibit the artifacts for an admissions charge." *Andrus*, 444 U.S. at 66. This supposition enabled him to reject a takings claim. *Id.*

55. *Penn Cent.*, 438 U.S. at 123.

56. *Id.* (quoting *Armstrong v. United States*, 364 U.S. 40, 49 (1960)).

57. *Infra* Part III.B (discussing this formulation and its tendency to limit the protections of the Takings Clause).

58. *Penn Cent.*, 438 U.S. at 124.

59. *Id.*

60. *Id.*

because the Court did not identify them in a way that allows them to be easily separated, but there are at least six factors and possibly more.

i. Interference with Distinct Investment-Backed Expectations

The first factor was “[t]he economic impact of the regulations on the claimant.”⁶¹ This statement of the factor was modified by the observation that it was “particularly” the “extent to which the regulation has interfered with distinct investment-backed expectations” that was “relevant.”⁶² The Court apparently regarded the importance of this factor as obvious, because it preceded its identification of the factor with the phrase, “[o]f course.”⁶³ The precise wording of the factor matters, however, and the function it fulfills depends upon the view one takes of several loaded terms, as discussed in a later section of this Article.

ii. The Extent of Physical Invasion

The “character of the government action” was a second factor.⁶⁴ The Court further elaborated on this general statement: “A ‘taking’ may more readily be found when the interference with the property can be characterized as a physical invasion by government,” rather than an “adjust[ment of] the benefits and burdens of economic life to promote the common good.”⁶⁵ This factor looks strange in light of the holdings in *Loretto* and *Nollan*, which established that physical occupation amounted to a virtually per se taking rather than just a balancing factor.⁶⁶ The conflict is explainable by the observation that *Penn Central* was decided first, before the creation of the doctrine of virtually per se takings. Justice Brennan, who dissented in the per se cases, wrote the opinion in *Penn Central*, and his reasoning reflects his anti-per-se philosophy. Nevertheless, the conflict remains between the treatment of physical occupation in *Penn Central* as a balancing factor and its use in *Loretto* and *Nollan* as a

61. *Id.*

62. *Id.*

63. *Id.*

64. *Id.*

65. *Id.*

66. *See supra* Part I.B.1.

non-balancing per se indicator—and therefore the conflict requires some sort of reconciliation if takings jurisprudence is to maintain coherence. The required reconciliation also will be discussed in a later section.⁶⁷

iii. A Broad Public Purpose, Short of Destruction of All Economic Value

To discern the next element in *Penn Central*, the broad-public-purpose factor, the reader must parse the Court's description of a number of decisions that coalesce to form the factor. The Court's analysis of the decisions identifies broad public purpose as a factor in a disembodied way, but unmistakably. The Court first states that governments can avoid the finding of a taking when it reasonably believes that the "health, safety, morals or welfare" will benefit from actions by which property interests will be "destroyed or adversely affected."⁶⁸ This general statement, of course, would allow any regulatory taking to avoid being compensated for, no matter how confiscatory. The Court narrowed the factor somewhat, by characterizing favored government action as promoting a "substantial public purpose."⁶⁹ The limit is reached when there is "an unduly harsh impact" upon the property owner.⁷⁰ The word "unduly," unfortunately, makes this statement so vague as to be of little value, but the Court gave at least one example: takings that result from the "complete destruction of [the property owner's] rights."⁷¹ A later section will attempt to define this vaguely outlined factor.⁷²

iv. Regulation of Noxious Uses

The fourth factor is regulation of noxious uses of property. This factor, again, emerges from statements that identify it only indirectly, but nonetheless clearly. The Court cited a case in which government action required the removal of cedar trees without compensation because cedar rust

67. See *infra* Part III.B.

68. *Penn Cent.*, 438 U.S. at 105.

69. *Id.*

70. *Id.* at 127.

71. *Id.*

72. See *infra* Part III.A.

fatally affected other trees.⁷³ It also cited a decision that halted a longstanding business of sand and gravel mining because the property owner's activities were conducted below the water table and thus were interfering with the water supply.⁷⁴ In cases in which the government prevents a noxious use—those in which the circumstances require a “choice” between preservation of “one class of property or [another]”⁷⁵—a taking can be avoided even if the government's action destroys value in the property.

v. Uniquely Public Functions

The Court said that takings often occur when they arise from “acquisitions of resources to permit or facilitate uniquely public functions.”⁷⁶ As an example, the Court cited a case in which direct overflights of aircraft above the claimant's land destroyed its present use for livestock farming.⁷⁷ The government had not “merely destroyed property [but was] using a part of it for the flight of its planes.”⁷⁸ This factor, too, requires interpretation, and a later section will supply it.⁷⁹

vi. Comprehensiveness or Reciprocity of Advantage

This factor (or pair of factors) emerges not from the part of the opinion in which the Court stated the law, but from its application of the law to the facts. More accurately, it appears in the Court's rejection of Penn Central's attempted distinction of the New York Landmark Law from constitutionally permissible zoning laws. Zoning and related kinds of regulation are constitutional, said the Court, if they exercise “land use control as part of some comprehensive plan.”⁸⁰ The requirement of comprehensiveness tends to prevent “discriminatory” regulation.⁸¹ If one's neighbor is subject to the same regulation that burdens one's own

73. *Penn Cent.*, 438 U.S. at 125–26, citing *Miller v. Schoene*, 276 U.S. 272 (1928).

74. *Id.* at 126–27.

75. *Id.* at 126.

76. *Id.* at 128.

77. *Id.*

78. *Id.*

79. See *infra* Part III.D.

80. *Penn Cent.*, 438 U.S. at 132.

81. *Id.*

property, not only is it unlikely that the law discriminates in the sense of invidiously singling anyone out, but the very fact of comprehensiveness means that democratic action will probably prevent unduly severe or dysfunctional government action.

As for reciprocity of advantage, it might be argued that this factor is distinct from the comprehensiveness element, or it might be argued that it is an aspect of comprehensiveness. In any event, the concept of reciprocity of advantage can be seen as an element in the Court's rejection of Penn Central's distinction of zoning laws. The Court maintained that Penn Central was not "unbenefited" by the New York law.⁸² It observed that hundreds of other structures in more than 30 historical districts were similarly designated as landmarks, "many of which are close to the Terminal."⁸³ The preservation of landmarks in this manner "benefits all New York citizens and all structures, both economically and by improving the quality of life in the city as a whole."⁸⁴ In other words, Penn Central benefited economically from the Landmark Law because, for example, an attractive city serves as a tourist and business magnet that increases transportation and expands its business. Arguably, it also results in a better quality of life that benefits Penn Central less directly because, for example, it makes employment with Penn Central more desirable. This factor can be seen as a consequence of the comprehensiveness of the regulation, which leads to mutual benefit, or it can be seen as a separate factor. This is an example of the difficulty of quantifying the *Penn Central* factors, because one can readily argue that the six factors identified here are actually seven. In any event, the meanings of comprehensiveness and reciprocity of advantage are dealt with later in the Article.⁸⁵

2. Other Possible Factors

There are other possible factors. The Court adds, near the end of its reasoning, that it must consider whether the interference with Penn Central's property is "of such a

82. *Id.* at 134.

83. *Id.*

84. *Id.*

85. See *infra* Part III.C.2.

magnitude” that it should be characterized as a taking.⁸⁶ But there are substantial arguments against the inclusion of this element among the balancing factors. The question whether anything is “of such magnitude” as to be characterized as a taking is too indefinite to be useful. It does not explain how to measure the “magnitude” in question, or even determine what the crucial magnitude is composed of. To answer that question, one would need to consult more specific indications, such as the same six factors that are described above. In fact, the Court interpreted the “magnitude” inquiry as an investigation into the first factor: interference with distinct investment-backed expectations.⁸⁷ Penn Central, it pointed out, could still employ Grand Central Station in its present use; it could still hope to make a profit from the Terminal even if not a profit from its operations overall; it could reapply to the Commission for permission to build a different (smaller) cantilevered building; and it had been provided with transferable rights usable in other locations as a kind of quid pro quo.⁸⁸ The Court’s observation that these factors mitigated the “financial burden” on Penn Central indicates that the inquiry into the magnitude of the interference was not a distinct inquiry.

3. *The Court’s Application of the Penn Central Factors*

Once Justice Brennan had set the framework of these principles, the pathway to the outcome was downhill from there. The Landmark Law did not frustrate investment-backed expectations of Penn Central because, among other reasons, the company could still earn a return from the Terminal.⁸⁹ There was no physical invasion of the land, and the Court spent little effort to establish this conclusion.⁹⁰ The law was like those upheld for having a broad public purpose, and it was unlike those in which regulations went too far by destroying all of the landowner’s rights.⁹¹

The noxious use factor had little to do with the Court’s analysis, because there was no obvious application of this

86. *Penn Cent.*, 438 U.S. at 136.

87. *Id.* at 124.

88. *Id.* at 136–37.

89. *Id.* at 136.

90. *Id.*

91. *See id.* at 135.

factor under the facts. Furthermore, the Commission's actions, according to the Court, did not amount to an acquisition of resources to facilitate uniquely public functions.⁹² Finally, the regulation, like proper zoning laws, was comprehensive, and it provided a reciprocity of advantage to Penn Central.⁹³ The conclusion followed that the City "ha[d] not effected a 'taking'" of Penn Central's property.⁹⁴

4. *The Dissent: Just How Mushy Are These Balancing Factors?*

The dissent is remarkable in its apparent acceptance of the principles emphasized by the Court, or at least some of them. The disagreement arises from the application of the principles to the facts. In other words, the dissent gives evidence of the "mushiness" of the law that governs regulatory takings.

Justice Rehnquist, joined by Chief Justice Burger and Justice Stevens, began by rejecting the conclusion that the Landmark Law was comprehensive.⁹⁵ "Only in the most superficial sense of the word can this case be said to involve 'zoning.'"⁹⁶ While neighboring landowners were free to use their land in any manner consistent with other laws, Penn Central was bound by this law to "forever maintain its property in its present state."⁹⁷ Further, according to the dissent, there was no reciprocity of advantage. The law imposed losses upon "less than one-tenth of one percent of the buildings in New York City for the general benefit of all its people."⁹⁸ The economic impact of the government's action was significant: the City had "thus destroyed—in a literal sense, 'taken'—substantial property rights of Penn Central."⁹⁹ The regulation was not aimed at abating a nuisance or noxious use. "It is exactly this imposition of general costs on a few individuals at which the 'taking' protection is

92. *See id.* at 128.

93. *Id.* at 132.

94. *Id.* at 138.

95. *Id.* at 139 (Rehnquist, J., dissenting).

96. *Id.*

97. *Id.* at 143.

98. *Id.* at 147.

99. *Id.* at 143.

directed.”¹⁰⁰

II. THE ULTIMATE QUESTION: WHAT IS THE TAKINGS CLAUSE SUPPOSED TO ACCOMPLISH?

This disagreement between the majority and the dissent indicates a need to return to first principles, precisely because the difference between the two opinions is itself largely unprincipled. First principles are particularly important here because the jurisprudence of the *Penn Central* approach is an example of “instrumentalism”: an approach that attempts to fulfill underlying policies rather than follow formal rules. This section will examine the ramifications of this conclusion and of the resulting need to examine first principles. Furthermore, this section will explore the possible underlying principles of the *Penn Central* balancing approach. The balancing factors should be compared to those principles, because the value of the balancing approach depends upon how well it achieves the underlying policies.

A. Formalism and Instrumentalism

The regulatory takings jurisprudence is an interesting application of the difference between formalism and instrumentalism. Formalism, sometimes referred to as literalism, is a jurisprudence of precise rules that can be applied directly to situational facts.¹⁰¹ Instrumentalism, which can also be called functionalism, instead attempts to discern the purposes or policies underlying a law and applies the law to achieve those purposes.¹⁰² In construing a murder statute, for example, the formalist would consider the words of the law and compare each element to the case facts. For example, the formalist would consider whether the evidence shows that the defendant (1) caused (2) the death of (3) an individual (4) by acting purposefully (intentionally) or knowingly. The instrumentalist, on the other hand, would attempt to discern the purpose of the law and construe it to carry out that purpose. For example, the instrumentalist would evaluate whether the evidence shows an unjustified

100. *Id.* at 147.

101. See DAVID CRUMP, HOW TO REASON ABOUT THE LAW: AN INTERDISCIPLINARY APPROACH TO THE FOUNDATIONS OF PUBLIC POLICY 322–23 (2001).

102. See *id.*

taking of human life in a way that is characterized by blameworthiness.

Both types of jurisprudence have advantages and disadvantages. Formalism promotes predictability, uniformity, consistent application, and confinement of government action by rules. But an excess of formalism leads to wooden application of law in ways that contradict its purposes.¹⁰³ Instrumentalism, on the other hand, promotes interpretation of law to carry out its intended results, but it creates a great risk of inconsistency, arbitrariness, and unconfined government action.¹⁰⁴ Sometimes it is difficult to create formal rules to deal with complex issues. Sometimes, on the other hand, formal rules are needed to rationalize laws that are necessarily written in general terms. There is constant tension between these two approaches.

In the takings jurisprudence, the rules about virtually per se categories, including the *Nollan-Dolan* test, are examples of relative formalism. They create rules that usually can be applied directly to case facts. They give more or less predictable outcomes. The *Penn Central* balancing test, on the other hand, is more instrumental. Its factors are designed to carry out the purposes of the Takings Clause discerned by the Court. Both of these conclusions are relative; most approaches to legal questions partake somewhat of both formalism and instrumentalism. It is easy, for example, to hypothesize cases in which application of the formal rules for per se takings require application to new facts that can best be considered in an instrumentalist way.¹⁰⁵ Similarly, it is equally possible to conjure up examples in which the application of the *Penn Central* factors is so clear that it reduces to one or more rules that can be applied formally.¹⁰⁶

The *Penn Central* balancing factors represent the general approach to the Takings Clause, applicable to cases that do not fit a mold so neat as to be amenable to specific rules.

103. See *id.* at 322–23.

104. See *id.*

105. For example, one might consider a case in which it is unclear whether a physical occupation has taken place and in which figuring out what is meant by “physical occupation” depends upon the policy underlying this concept.

106. For example, one might consider a case in which the economic impact is severe and the law is not comprehensive, in which case the balance may be so tilted that the outcome is as clear as the result of a formal rule.

When specific rules are possible, they are desirable, provided that one considers the need not to apply them too rigidly.¹⁰⁷ The categories of virtually per se takings are examples. They provide exceptions to the general approach of *Penn Central*, with its undefined balancing of vaguely described factors. In the general case, a balancing test may be the best we can hope for, as the dissent's apparent acceptance of some of the balancing factors arguably indicates.

The first step in the use of an instrumental approach is to define the purpose of the law. This step is crucial, and it was not carried out with much attention in *Penn Central*. Therefore, this Article turns next to the identification of the policies underlying the Takings Clause.

*B. The Policies Underlying the Takings Clause:
Deontological and Consequentialist Approaches*

Unfortunately, we do not have a unified field theory of the policies underlying the Takings Clause. There are some indications in the original understanding, but they are not so specific as to control the resolution of specific cases.¹⁰⁸ Statements about the policies differ significantly. There are some statements of policy that are anchored in the kind of moral, right-and-wrong philosophy that is characteristic of deontological philosophy:¹⁰⁹ the justice-based philosophy of Immanuel Kant. This approach emphasizes the following of fair rules for individuals, simply put. There are other statements that are characterized more by the consequentialist, utilitarian philosophy of Jeremy Bentham and John Stuart Mill: an approach that emphasizes economics as a guide. This approach attempts to make rules work out to enlarge the pie for the society in general (again,

107. This is because of the vagueness of balancing rules, which create several disadvantages. See *supra* notes 7–10 and accompanying text.

108. Thus, opponents of the regulatory takings doctrine argue that the original meaning of the Takings Clause cannot be reconciled with the modern approach, while proponents argue the opposite. See James S. Burling, *A Short History of Regulatory Takings—Where We Have Been and What Are the Hot Issues of Today*, ALI-ABA CONTINUING LEGAL EDUC., CONDEMNATION 101: HOW TO PREPARE AND PRESENT AN EMINENT DOMAIN CASE (unpaginated; followed by n. 26) (Jan. 8–10, 2009) (presenting differing views), but see Douglas W. Kmiec, *The Original Understanding of the Takings Clause Is Neither Weak nor Obtuse*, 88 COLUM. L. REV. 1630 (1988).

109. Cf. Burling, *supra* note 108 at nn.7–9 and accompanying text.

perhaps simplistically put).¹¹⁰ This is the great divide in moral philosophy—that between consequentialism (here, economics) and deontology (here, justice)—and it bears upon the inquiry into the purposes of the Takings Clause.

1. *A Deontological or Civil-Liberties Policy: Preventing Sacrifice of the Individual*

The policy statement contained in Justice Brennan's *Penn Central* opinion emphasizes the inappropriateness of "forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole."¹¹¹ This approach is heavily deontological. Its criteria are "fairness and justice." Unfortunately, the meaning of this statement is enormously malleable, because it depends upon one's concept of fairness and justice. The statement has appeared in many Supreme Court opinions,¹¹² and one probably can infer that it is a part of what the Fifth Amendment means, when judged either by the original understanding or by contemporary standards.¹¹³

2. *An Economic Policy: Limiting Thoughtless Regulation, Harmonizing Competing Needs, and Encouraging Investment*

On the other hand, the Takings Clause serves distinct economic purposes.¹¹⁴ This approach to the clause is consequentialist, and it is utilitarian. The economic view of the Takings Clause is more difficult to describe than the deontological view, as is often the case, since deontology

110. See CRUMP, *supra* note 101, at 220–21 (showing that this philosophy supports an economic view); *cf. id.* at 211–13 (describing Kant's deontology and showing its greater tendency to prevent confiscation of property than certain kinds of consequentialism, such as pure utilitarianism as described by Bentham).

111. See *supra* note 56 and accompanying text.

112. *E.g.*, *Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528, 537 (2005) and authorities therein cited.

113. *Cf.* Eric T. Freyfogle, *Property and Liberty*, 34 HARV. ENVTL. L. REV. 75, 85, 88 n.31 (2010) (demonstrating the prevalence of moral arguments in the pre-constitutional colonies). For contemporary standards, see *supra* notes 108–09 and accompanying text.

114. See DAVID CRUMP ET AL., CASES AND MATERIALS ON CONSTITUTIONAL LAW 354 (5th ed. 2009) (citing Donald G. Hagman, *The Compensation Issue: Theories of Liability for Damages from Planning and Land Use Controls*, ABA-ALI CONTINUING LEGAL EDUC., Mar. 26, 1980).

depends on an intuitive sense of justice. The economic purposes of the Takings Clause can be described in at least three different ways:

Limiting Thoughtless and Excessive Government Intervention That Might Result from a Failure to Confront the Costs. If we focus upon the regulator, rather than the potentially small part of society “sacrificed” to the general good, we discover that the compensation requirement has a beneficial effect by requiring the regulator to consider the costs of the regulation.¹¹⁵ This notion has been put in terms of restraining the “exuberance” of regulators.¹¹⁶ If there is no need to pay for the property taken, the regulator is likely to focus only on the issues that the regulator is interested in—without the restraint of weighing the real costs imposed upon other individuals, and possibly on the society as a whole.¹¹⁷

Harmonizing Competing Social Needs. A regulatory taking may remove productive property from its best use. Jobs, commerce and products may be lost because firms and individuals will fear that their interests are unprotected.¹¹⁸ This purpose really is a generalized version of the previous concern with restraining the exuberance of regulators.¹¹⁹ Individuals and, possibly, society as a whole bear the costs imposed.¹²⁰ For example, if a regulator wishes to condemn land upon which a factory is operating and convert it to park space, the takings jurisprudence requires that regulator to harmonize the need for park space against the cost in jobs, products, and commerce that would be imposed by shutting down the factory.

Inducing Investment Through Protecting Settled Expectations. The compensation requirement furthers the policy that “certain settled expectations of a focused and crystallized sort should be secure against the

115. *See id.*

116. *See id.*

117. *See id.*

118. *See id.*

119. *See id.*

120. *See id.*

government's disruption, at least without appropriate compensation."¹²¹ Thus, the Supreme Court has emphasized the importance of investment-backed expectations in the takings jurisprudence.¹²² There are "a number of expectancies embodied in the concept of 'property'—expectancies that, if sufficiently important, the government must condemn and pay for [the property] before it takes over the management of the landowner's property."¹²³

3. *Comparing the Two Approaches*

Which approach—the deontological concern with preventing unfair sacrifice of the individual, or the consequentialist focus upon economics—provides greater protection to the landowner? At first blush, one might be tempted to say that the civil liberties approach provides greater protection. But there is a paradox here. Actually, the economic approach may provide greater security to owners of property in many cases, although the answer probably depends upon the situation. This conclusion must seem counterintuitive to lawyers schooled in the jurisprudence of Due Process.¹²⁴

The paradox is resolvable by consideration of an example. Imagine an investor whose farsightedness has been rewarded by significant returns. As a result, the investor is far wealthier than his fellow citizens. The government has an incentive to regulate in a manner that limits the returns that would naturally flow from the investor's skill, foresight, and industry, so the advantages can be redirected to the broad majority of people. Let us imagine that the government, having this motivation, figures out an effective way to cut the investor's returns by half (or by nine-tenths). Some people, following a "fairness" approach, may not feel offended by this kind of regulation. It seems "fair" to many people for wealth

121. *Id.* (citing LAWRENCE TRIBE, AMERICAN CONSTITUTIONAL LAW § 9-4 (2d ed. 1988)).

122. *See id.*

123. *Id.* at 355 (citing *Kaiser Aetna v. United States*, 444 U.S. 164, 179 (1979)).

124. Or, perhaps not. The well-recognized law is that regulation of property does not violate the Due Process Clause unless it lacks any "rational basis": an approach that broadly permits intrusive regulation. *See id.* at 473.

to be redistributed.¹²⁵

This explains the Court's statement in *Penn Central*, that the purpose of the Takings Clause is to prevent sacrifice of property-owning individuals when "fairness and justice" suggest that the burden should be borne publicly. Otherwise, an opening is provided to the regulator who would like to take away the gains of the successful investor. All that is necessary to decrease gains is to declare that the sacrifice is fair and just. The utilitarian analysis of the Takings Clause's purposes, on the other hand, may provide greater protection to the investor. In other words, an economic view may put the investor in a better position. A finding of a taking, when government's aim is to effect a redistribution, would restrain the exuberance of regulators, harmonize competing social needs, and induce investment through protecting settled expectations.¹²⁶ It may seem a paradox, but in the case of property rights, an economic approach arguably protects the individual more completely than a civil liberties approach.

Both of these purposes—avoiding sacrifice of the property owner and serving the economy—seem likely to have been motivators for the adoption of the Takings Clause. On the one hand, the Clause is a part of the Bill of Rights, which was considered a protection of individual liberties. On the other hand, the Founders were heavily concerned with economics and the protection of investment when they adopted the Constitution.¹²⁷ It is inconceivable that, in adopting either the original Constitution or the Bill of Rights, they did not have this purpose in mind.

125. Cf. *Energy Reserves Grp. v. Kan. Power & Light Co.*, 459 U.S. 400, 416–17 (1983) (applying this reasoning to a law decreasing a seller's contracted-for gains on the ground that the alleged contract impairment "rests on . . . significant and legitimate state interests").

126. See *supra* notes 114–23 and accompanying text.

127. See CHARLES A. BEARD, *AN ECONOMIC INTERPRETATION OF THE CONSTITUTION OF THE UNITED STATES* 180 (1956) (arguing that the principal causes of the Constitutional Convention were economic); ROBERT L. HEILBRONER, *THE WORLDLY PHILOSOPHERS: THE LIVES, TIMES, AND IDEAS OF THE GREAT ECONOMIC THINKERS* 37 (1967) (explaining that Adam Smith's *WEALTH OF NATIONS* became "an economic blueprint" for the new American state).

III. HOW SHOULD THE COURTS TREAT THE BALANCING FACTORS?: AN ANALYSIS

The balancing factors are designed to carry out the purposes and policies underlying the Takings Clause: the policies discussed in Part II.B above. The factors are, in other words, essentially instrumental guidelines. But as the *Penn Central* opinion identifies them (or in some instances, as it suggests or hints at them), they serve that goal only loosely. Some factors are very important but require further definition. Other factors are appropriate considerations in some cases, but they are less important in most cases, and these factors also require further development. And there is at least one factor that should not be included in the list at all.

A. *A Factor That Should Not Have Been Included (and That Should Be Given Little Weight): Broad Public Purpose*

The *Penn Central* opinion never specifically identifies “broad public purpose” as a balancing factor. The opinion, however, makes unmistakably clear the Court’s inclusion of some sort of balancing factor along these lines.¹²⁸ The analysis that produces this factor consists of an explication of cases that hold against takings in situations when broad public purposes are present. The relevance of this factor is limited, according to the Court, by the vague concern that regulation might go “too far.” “Going too far,” of course, is not a condition that can be reliably or uniformly recognized, and the only real limit provided by the Court comes from its condemnation (sometimes) of regulation that destroys all value in the property. The implication left is that destruction of value, short of complete destruction, is permissible without compensation, if the regulation serves a broad public purpose. But further consideration shows that this cannot be what the factor means.

A broad public purpose is a desirable thing in a democracy. Advantage provided by a regulation to a large number of people is one indication that the regulation is doing its job. But it is a very limited indicator by itself, and it is a misleading indicator if the objective is to distinguish regulations that go too far and become takings. An example

128. See *supra* notes 68–72 and accompanying text.

will show why.

Imagine that the people of Capital City have inadequate park space. There is a broad consensus about the need for more parks, and there is recognition that many people's lives would be improved if Capital City gains more parks. The City has a limited budget, and is in dire financial straits, just as many cities often are—just as New York City was at the time of the *Penn Central* case. When it comes to paying just compensation for private property that will later be converted to park space, the public fisc in Capital City will not allow for much. Therefore, people's representatives search for a way to obtain park space without paying for it. They do not have to look very far before they realize that a gentleman named William Wealthy owns real estate in different areas throughout the town. Some of it is employed in productive uses, such as factories or office spaces. In any event, Mr. Wealthy has plenty of money (he is a billionaire even aside from his real estate holdings), and it seems "fair" to ask him to pony up a greater share of resources toward the general welfare. The members of the Capital City Council therefore vote to "regulate" Mr. Wealth's land so that a portion of each parcel will be used as park space.

The City will serve a broad public purpose by this regulation, by providing the entire community with a free park, even if Mr. Wealthy thinks that it is pure confiscation. The City's action will avoid complete destruction of the value of Mr. Wealthy's property because it chose to convert only part of each parcel to park space. Perhaps Mr. Wealthy can argue that the regulation in this case "goes too far," but there is nothing in the broad-public-purpose balancing factor that distinguishes how far a regulation may go to be excessive from permissible regulation. In fact, the broad-public-purpose factor justifies the failure to pay compensation: a result obviously contrary to the Takings Clause.

The skeptic can argue that this example is outlandish. Of course, this hypothetical situation is antithetical to any sensible person's understanding of what would pass the Fifth Amendment without compensation, but the point is that the broad-public-purpose factor is of no help in recognizing this fact. The skeptic might further argue that there are multiple factors, and broad public purpose is only one of them. But it is hard to imagine a situation in which a taking could be

converted to a non-taking simply because many people are in favor of it. The broad-public-purpose factor is as likely to be a false indicator as a true one, and even if it only serves as a tie-breaker in close cases, it often will furnish a signpost in the wrong direction.

In fact, the broad-public-purpose factor may point in the wrong direction in most situations. By definition, it is triggered by the existence of a large constituency. This situation will elicit reaction from the political branches most readily when the unavoidable disadvantages are forced on a very few people. Democracy requires a large degree of deference to the majority, which will prevail whenever there is a broad public purpose. However, the point of the Bill of Rights, and the purpose of a Madisonian democracy, is to limit the accommodation of majority rule to protect the minority.¹²⁹

The broad-public-purpose factor does the opposite. This conclusion emerges with even greater clarity if the policies underlying the Takings Clause are consulted. A broad public purpose is not an indication that the regulation avoids concentrating public burdens on relatively few persons, and thus it fails to conform to a deontologically defined civil-liberties policy. Similarly, recognition of a broad public purpose as a justification for imposing burdens and losses cannot serve the consequentialist or economic purposes of confining regulatory exuberance, harmonizing competing uses, or protecting investors.

How, then, should a court treat the broad-public-purpose factor? Courts should follow the rule of law. Adhering to the rule of law includes following their best understanding of opinions by the Supreme Court. Courts cannot simply ignore a balancing factor that a Supreme Court opinion requires. Yet the broad-public-purpose factor leads to results that one would not expect to emerge from the Constitution. One possible solution is to recognize that the broad public purpose factor is not explicit in the opinion, and perhaps it does not really exist.¹³⁰ This conclusion is defensible, but it is opposed by the unmistakable clarity with which the factor emerges from Justice Brennan's opinion.

129. See CRUMP ET AL., *supra* note 114, at 38–40.

130. See *supra* notes 68–72 and accompanying text.

A second means of dealing with broad public purpose is to give it very little weight. This approach conforms to the logic of the Fifth Amendment, while preserving at least some amount of obeisance to the rule of law that is expressed in what is, after all, a Supreme Court opinion.

A third way to deal with the dilemma is to determine that the factor is inapplicable to some kinds of situations, such as cases in which the economic impact of the regulation is large and is concentrated by a non-comprehensive regime on one or a few persons. This approach is invited, perhaps, by the limit expressed by the Court to the effect that broad public purpose ceases to justify a regulation that goes too far. This approach produces the result that significant economic impact, lack of comprehensiveness, and concentration on few people creates a regulation goes too far and the broad public purpose, then, ceases to be a justification.

B. A Factor That Seems Obsolete in Light of Later Decisions: Physical Invasion of the Property

In *Penn Central*, Justice Brennan wrote that physical invasion was a factor that could show a taking.¹³¹ This pronouncement has to be read with an understanding that it was uttered before the Supreme Court developed its jurisprudence of per se takings in its present form. After *Loretto* and *Nollan*, physical invasion is more than a factor in the balance; it indicates a per se taking unless the government can demonstrate compliance with the *Nollan-Dolan* test.¹³² Therefore, this balancing factor seems obsolete, even though it is expressly emphasized in *Penn Central*. This reasoning is tantamount to saying that *Loretto* and *Nolan* overruled the part of *Penn Central* that treated physical invasion as a mere balancing factor rather than a determinative one.

There may, however, be some limited utility to the factor. Cases may exist in which government has interfered physically with the use of property in a manner than a physical occupation or invasion. Sometimes determining whether there is a physical occupation or invasion becomes a matter of definition. For example, if government sends sound

131. See *supra* notes 65–67 and accompanying text.

132. See *supra* Part I.B.1.

and vibration into a private person's property in a method to cause harm, the Supreme Court has decided that a taking can occur.¹³³ Whether sound and vibration is a physical invasion is arguable. On the one hand, sound waves are physical. On the other hand, the physical occupation decisions seem to contemplate the entry of a solid body onto the property, with the loss of the right to exclude the invaders. In any event, this factor seems to have little usefulness in most cases in light of the *per se* decisions, but arguably the factor could still be relevant.

C. The Most Important Factors: Economic Impact, Comprehensiveness, and Reciprocity of Advantage

1. The Economic Impact of the Regulation on the Claimant

The *Penn Central* opinion begins the list of factors by expressing that the "economic impact of the regulations on the claimant" is "of course, relevant" to the determination of a taking.¹³⁴ The opinion qualifies this factor by adding the "extent to which the regulation has interfered with distinct investment-backed expectations" is "particularly" important.¹³⁵ The Court's placement of this factor at the beginning of the list, and its use of the words "of course," are consistent with recognition that economic impact upon the property owner is a significant issue. This factor is related to both deontological and consequentialist policies underlying the Takings Clause. The deontological view would emphasize the concept that severe economic impact is indicative of regulation that singles out an individual property owner for sacrifice to the common good. The consequentialist view would emphasize economic policies. In this view, concern for adverse economic impact upon property owners would constrain the exuberance of regulators, require consideration of and harmonization of competing uses of property, and protect investment.¹³⁶

133. *United States v. Causby*, 328 U.S. 256, 261 (1946).

134. *Penn Cent.*, 438 U.S. at 124.

135. *See id.*

136. *See supra* Part II.B.2.

What does the economic impact factor mean and how should it weigh in the balance? It is immediately apparent that severe economic impact cannot, by itself, identify a taking. Government often regulates in ways that significantly reduce the value of property. Zoning, for example, can cut land values into fractions, and yet the Court's decisions upholding this kind of regulation does not seem controversial.¹³⁷ The government can eliminate means of livelihood in which people have invested significantly, without offending the Constitution. On the other hand, even a small exaction from a property owner can violate the Takings Clause if other factors mark it as a taking.¹³⁸ The conclusion follows that while the economic impact factor is important, identifying a taking depends upon other factors even if severe economic impact is present. Furthermore, determining a taking requires a more precise understanding of the kind of economic impact that matters.

The *Penn Central* opinion qualifies its pronouncement about economic impact by adding that what is important is "particularly" the "extent to which the regulation has interfered with distinct investment-backed expectations."¹³⁹ This observation may be useful in defining the type of economic impact that is most characteristic of a taking. The "expectations" of a person in the position of a property owner are significant, according to the Court.¹⁴⁰ And it is "investment-backed" expectations that matter most.¹⁴¹ Arguably, the sacrifice of the individual to the common good is most apparent when the government has acted in such a way to encourage people to invest and then has pulled the rug out from under them and contradicted their expectations. Furthermore, if this kind of government conduct could be engaged in without compensation, the Takings Clause would not fulfill its purpose of inducing investment. Nor would it restrain the exuberance of regulators or motivate them to harmonize competing uses of property.

137. *Village of Euclid v. Amber Realty Co.*, 272 U.S. 365, 379 (1926) (upholding a zoning ordinance with this effect even though Justice Sutherland, who opposed a great deal of regulation of commerce, delivered the opinion).

138. See *Phillips v. Wash. Legal Found.*, 524 U.S. 156 (1998); *Ferguson v. Skrupa*, 372 U.S. 726 (1963).

139. *Penn Cent.*, 438 U.S. at 124.

140. *Id.*

141. See *id.*

Yet, a requirement that the economic impact be focused upon “distinct investment-backed expectations” could prove misleading. It suggests that it is the precise cost paid recently by the current owner that determines this balancing factor, but this interpretation would have counterproductive consequences. For example, imagine that a regulator points out that the owner bought the property long ago under different conditions and paid a lesser price than would prevail today.¹⁴² The regulator concludes, therefore, that the property owner should not receive compensation measured by current market value.

Likewise, imagine that regulations severely reduce property value in a situation where the owner did not have any means of predicting how much return the property might produce at the time of acquisition, or even whether any return, rather than a loss, could be expected at all.¹⁴³ Imagine that a regulator in this case pounces on the Supreme Court’s use of the words “distinct . . . expectations” and argues that no taking should result because the investor lacked mathematical certainty that an investment would have turned out to be a solid return, except that it now has been reduced or destroyed by regulations. Finally, consider a case in which the property owner has inherited the property and therefore did not invest at all, and indeed, may not have had expectations of receiving a return from the property until it was inherited. In this case, imagine that the regulator argues that the economic impact is irrelevant because of the absence of both investment and expectations.

These regulatory arguments against the finding of a taking are fallacious and they rest on a too-literal interpretation of the “distinct investment-backed expectations” language. The property owner who bought the asset years ago in a less expensive market has held the property at a cost in the meantime. The investor who could not predict the exact future of the stock he purchased may nevertheless have used foresight in buying the asset. And the

142. *E.g.*, *Energy Reserves Grp. v. Kan. Power & Light Co.*, 459 U.S. 400 (1983) (upholding law that decreased income under a contract, in part because of lengthy term of contract).

143. *E.g.*, *id.* (upholding regulations, partly because investor’s expectations were uncertain).

person who unexpectedly inherited property without knowing its value was preceded by an owner who created that value. Each of these investors would be singled out for sacrifice to the common good if these excuses for not finding a taking were to succeed so that the deontological policy underlying the Takings Clause would be frustrated. From an economic standpoint, regulators could act with unrestrained exuberance by finding targets such as these; they would not need to harmonize their desired projects with other property uses and investors would not feel secure. The consequentialist purposes of the Clause would be frustrated by these economic results.

Yet, the *Penn Central* language encourages precisely this kind of fallacy. After its observations about the economic impact factor and its explanation that distinct investment backed expectations are what makes it significant, the Court went on to emphasize that the property owner (*Penn Central*) could still “profit” from Grand Central Station.¹⁴⁴ It could still “obtain a ‘reasonable return.’”¹⁴⁵ In other words, *Penn Central* had acquired the property at issue long ago and could not have expected with certainty that the value of its property would actually increase significantly, as it did years later. Apparently, the Court reasoned that trimming *Penn Central*’s return down to size was not a frustration of economic expectations under these circumstances.

There are several responses to this logic. First, *Penn Central*’s economic decisions about Grand Central did not end with its acquisition of the asset; it made the decision, year after year, to retain it, rather than selling it for a major profit and using those funds elsewhere. For example, imagine that *Penn Central* had sold the property to someone else the year before New York City adopted its Landmarks Law. The unfortunate buyer would now be unable to make a profit, much less a reasonable return, assuming the buyer paid market value. But it seems odd to make the takings issue depend upon who now owns the property or how recently that person paid value.

Second, trimming a private firm’s returns on its profitable business, while leaving it with its inevitable losses

144. *Penn Cent.*, 438 U.S. at 136.

145. *Id.*

on other businesses, is certain to frustrate economic expectations (not to mention, an undeniable way to produce bankruptcies). A favorite example of this principle is that Ford Motor Company was able to offset huge losses it suffered by producing a model called the Edsel (a failure that enticed very few buyers) because it obtained significant positive returns from the Mustang (which was phenomenally successful). If there had been a price regulation that limited Ford to bare minimum (or even assertedly “reasonable”) returns on the Mustang, it would have disappointed Ford’s proper economic expectations.¹⁴⁶ Along the same line, economists have made the case that so-called used-and-useful regulation of utility rates—which limit investment from which public service companies can earn returns—requires the allowance of higher return rates on investments that produce returns, to avoid characterization as a taking.¹⁴⁷ In Penn Central’s case, most of the company’s investment was unprofitable at the time,¹⁴⁸ and limiting its profitable investment while leaving it with its losses was a heads-we-win-tails-you-lose strategy for New York City. More to the point, it frustrated Penn Central’s perfectly proper expectations even if it did allow a return, because then, the return became so reduced that it could not offset much of Penn Central’s losses elsewhere.

So, how should the economic impact factor be understood? It is not inappropriate to say, as the Court did, that investment-backed expectations are significant in evaluating the impact of a regulation. But once they have identified the existence of these expectations, courts should evaluate the economic impact factor by reference to the market value of a successful investment, not by reference to some after-the-fact projection of what is a “reasonable” return from long-ago historical costs.

The weight of the economic impact factor should be evaluated according to a two-step process: (1) by determining first that the regulation frustrates investment-backed expectations generated at some time in the past, and (2) by measuring the severity of the resulting economic impact by

146. See CRUMP ET AL., *supra* note 114, at 374.

147. See *id.*

148. See *supra* note 48 and accompanying text.

reference to current market value. This two-step approach allows the economic impact factor to serve its purposes by preventing the sacrifice of the few to the many, restraining the exuberance of regulators, harmonizing competing uses of property, and encouraging investment.

Still, the weight of the economic impact factor will remain indeterminate, because this factor cannot determine a taking alone. Economic impact is an important factor and requires functional treatment that carries out its purpose, but it is possible for a regulation to have severe impact without becoming a taking.¹⁴⁹ The *Penn Central* balancing test remains just that: a balancing test, in which the outcome is the result of instrumentalism rather than formal rules. Other factors must be consulted, even if the economic impact is significant and adverse.

2. *The Comprehensiveness Factor and Reciprocity of Advantage*

The *Penn Central* opinion relies heavily on an analogy between the New York Landmark Law and zoning ordinances.¹⁵⁰ Zoning normally does not result in a taking.¹⁵¹ Usually zoning features a kind of comprehensiveness¹⁵² that avoids offending the policies underlying the Takings Clause. Even if the values of some properties are reduced, zoning arguably is consistent with the deontological policy underlying the Takings Clause, because the extent of the sacrifice of the few for the many may be lessened by the fact that a zoning ordinance applies to a complete community, not to a few selected properties. Similarly, the requirement of breadth of application in a zoning law serves consequentialist economic policies because it tends to restrain the exuberance of the zoning authority, by requiring it to harmonize competing uses and lessen its discouragement of investment. In other words, the comprehensiveness factor helps the balancing test serve its instrumentalist purposes, and the

149. *Penn Cent.*, 438 U.S. at 124.

150. *Id.* at 113–14.

151. *E.g.*, *Village of Euclid*, 272 U.S. at 365.

152. A “comprehensive plan” is required in model zoning legislation, and this model requirement has been widely adopted. See DAVID CRUMP ET AL., PROPERTY: CASES, DOCUMENTS AND LAWYERING STRATEGIES 530–33 (2d ed. 2008).

courts ought to treat this factor as an important one.

By the same token, the breadth of the application of a zoning ordinance produces a reciprocity of advantage in which even those whose property is downzoned can hope to benefit from the existence of the zoning scheme. For example, although a given homeowner may feel limited by being unable to open a gasoline filling station in the middle of a residential block, the homeowner's disappointment at this restriction is tempered by the benefits of a system in which no other property owner on the block can open a gasoline filling station.¹⁵³ The resulting regulation serves all homeowners better than a regime in which owners would compete to convert their properties to industrial uses that would devalue the whole residential community. An economist might describe zoning laws as mitigating negative externalities or preventing a tragedy of the commons.¹⁵⁴ It is a matter of debate whether reciprocity of advantage is a corollary of the comprehensiveness factor, a subsidiary consideration within it, or a separate factor to be weighed independently in the balance. In any event, the two concepts are related and should be considered together.

The *Penn Central* case shows, however, that comprehensiveness and reciprocity of advantage are ambiguous factors, like the economic impact factor. New York City's Landmark Law was not a zoning ordinance. It applied to only a tiny fraction of properties in the city.¹⁵⁵ Furthermore, although the decisions of the Preservation Commission were constrained by law, the criteria that they applied were more malleable than zoning rules. Under these circumstances, the majority and dissent came to different conclusions even though they applied the same principles. Justice Brennan's conclusion on these facts was that the New York law was not like "discriminatory, or 'reverse spot,' zoning."¹⁵⁶ Instead, the New York law "embodie[d] a comprehensive plan" that had resulted in the designation of

153. *E.g.*, *Sanborn v. McLean*, 206 N.W. 496 (Mich. 1925) (featuring exactly such a problem, although the solution was furnished not by zoning laws but by the somewhat analogous mechanism of equitable servitudes).

154. See CRUMP, *supra* note 100, at 118, 122-23 (explaining these concepts).

155. *Penn Cent.*, 438 U.S. at 111.

156. *Id.* at 132.

“over 400 landmarks.”¹⁵⁷ The dissenters, on the other hand, concluded from the same facts that the law was unlike zoning, except in “the most superficial sense.”¹⁵⁸ Instead of enacting a comprehensive plan, New York had “singled out 400” buildings in a city of over a million structures and subjected them to “nonconsensual servitude[s] that [were] not borne by any neighboring or similar properties.”¹⁵⁹ In summary, *Penn Central* demonstrates that the comprehensiveness and reciprocity factors, which the *Penn Central* opinion itself generated, do not convey a sufficiently specific meaning to be very useful. These factors should be considered against the policies that they are supposed to carry out, so that their interpretation can be consistent with those policies.

How can these concepts be understood to ensure that they accomplish the policies underlying the Supreme Court’s instrumentalist test? In the first place, the greater the flexibility of the criteria governing the application of the claimed comprehensive plan—the greater the “play in the joints,” so to speak—the greater the likelihood that government can impose burdens in a manner that defeats the comprehensiveness of the regulation at issue. This conclusion leads to the inference that in such a situation, government officials can act upon personal taste, social theories, or partisan political motivations in deciding upon whom to impose the burdens of the regulatory plan. Thus, they can single out some individuals for sacrifice to the general good. Furthermore, their regulatory exuberance will not be as easily contained, their motive to harmonize competing social objectives will not be as great, and investors who look at the process will not be encouraged by an atmosphere of arbitrary choices. Conversely, a politically well-connected property owner will have a greater ability to avoid being burdened, because this owner can use the “play in the joints” together with political favoritism to avoid being regulated as fellow citizens are. This factor also reduces the comprehensiveness of a regulatory plan.

157. *Id.* at 111, 132.

158. *Id.* at 139 (Rehnquist, J., dissenting).

159. *Id.* at 138, 143.

Second, the percentage of the relevant population that is affected adversely by a given regulation should affect a decision whether the regulation is comprehensive. A regulation that spreads burdensome effects over a relatively large percentage of the population should be considered more comprehensive. Such a regulation is less likely to reflect the singling out of individuals for burdens, cause unrestrained exuberance of regulators, fail to harmonize competing uses of property, or threaten investors.

Judged by these two considerations, the New York City law was less comprehensive than the Court's opinion made it appear. First, the flexibility of the governing criteria in the New York law made this factor less supportive of the Court's decision than the Court recognized. Criteria regarding historical significance are notoriously likely to prove elusive. Contemporary battles about the site of a New York mosque¹⁶⁰ and over school textbooks for social studies classes¹⁶¹ make this conclusion inescapable. Perhaps for this reason, the *Penn Central* opinion emphasized not the vagueness or specificity of the criteria that the Preservation Commission might have used, but the availability of judicial review of the Commission's decision. This argument bordered on the disingenuous, because judicial review of a land use decision is preformed under a rational basis standard, in which any plausible reason for the decision is sufficient.¹⁶² This

160. A recent and well publicized controversy involving plans to construct a mosque near the site of the attacks of September 11, 2001, on the World Trade Center in New York illustrates this point. Opponents hoped that New York's Landmarks Preservation Commission, the same body featured in *Penn Central*, would classify the relevant structures as a landmark, and they further hoped that such a designation would discourage plans for the mosque, which they opposed on the ground that it would detract from the significance of the site of the attacks. To make their case to the Commissioner, opponents advanced reasons for regarding the buildings as historic and distinctive. The commission ultimately decided, however, that the buildings were not "distinctive enough." To underscore the flexibility of the criteria, an advocacy group immediately announced that it would file suit to challenge the decision. See Karen Matthews & Beth Fouby, *New York City Panel Clears Way for Mosque Near Ground Zero*, HOUS. CHRON., Aug. 4, 2010, at A6.

161. Arguments in Texas during 2010 about standards for textbooks for public schools produced bitter battles over treatment in history books of racism, religion, free enterprise, and individual historical figures. See Gary Scharrer, *Divided Board Makes Curriculum History*, HOUS. CHRON., May 22, 2010, at A1.

162. See *Village of Euclid*, 272 U.S. at 389 (upholding zoning that is not "arbitrary"); *Anderson v. City of Wheeling*, 149 S.E.2d 243, 249 (W. Va. 1966) (upholding zoning that is "fairly debatable").

standard is appropriate, but it does not suffice to provide specificity to vague guidelines that are used by the deciding authority. Among most of the 400-plus properties that New York had designated as landmarks, a decision to remove the property from regulation, or to include another property, could be readily supported by plausible arguments about historical interest.¹⁶³ So could a decision to quadruple the list of properties, or to cut it in half. The Court would have come closer to the meaning of the Fifth Amendment if it had based its decision on the ambiguity of the criteria actually used by the Commission.

Second, the regulatory regime adversely affected only a tiny percentage of the relevant population. The Court avoided coming to grips with this issue by considering only the absolute number of affected properties: over 400 properties in 31 districts.¹⁶⁴ The dissent points out that the absolute value of 400 properties was a miniscule fraction of the relevant population of property owners, given the number of structures in New York City, which was over one million.¹⁶⁵

The likelihood of the effects that the Takings Clause is intended to prevent was more significant in *Penn Central* than the Court made it appear. The comprehensiveness and reciprocity of advantage factors are significant and the Court's treatment of them, as such, was appropriate. But an evaluation of these factors should be based on ambiguity in the regulatory regime and upon concentration of the effects on a relatively small minority, both of which are characteristics that undermine the Court's arguments against finding a taking. The majority of the Court failed to give these characteristics of the New York law their due significance.

D. Minor Factors: Uniquely Public Functions and Obnoxious Uses

Finally, there are two balancing factors that seem unlikely to be helpful in most cases but that might have places in some kinds of situations. The Court recognized that takings often are to be found from "government actions that

163. See *supra* note 160 (containing an example where the Commission simply decided that the structures in question were not sufficiently distinctive).

164. *Penn Cent.*, 438 U.S. at 134.

165. See *id.* at 138 (Rehnquist, J., dissenting).

may be characterized as acquisitions of resources to permit or facilitate uniquely public functions.”¹⁶⁶ The Court also observed that the finding of a taking could be avoided when government was forced to “make a choice between the preservation of one class of property and that of the other.”¹⁶⁷ The first of these factors might be called the “uniquely public function” element. The second can be characterized as the “noxious use” factor, because it arises from two types of property that are inconsistent with each other, and the property that can most readily be characterized as noxious will usually become the object of adverse governmental action.

Most of the time, the uniquely-public-function element is unhelpful because all regulations, by definition, are intended to advance some kind of public purpose. The case that the Supreme Court used to illustrate this factor certainly is not readily recognizable as one in which the government had “acqui[red] resources for uniquely public functions,” any more than any case involving regulation.¹⁶⁸ The case the Court cited resulted in the finding of a taking from the government’s creation of an airport that caused noisy overflights of the claimant’s land that destroyed the claimant’s use of the land for livestock.¹⁶⁹ Perhaps one can say that the act of developing an airport that results in the emission of noise above private land is somehow an acquisition of airspace to carry out a uniquely public function, this characterization proceeds from an unnatural reading of phrases such as “acquisition” and “uniquely public function.” The real point is that it is hard to use these words to distinguish takings from non-takings, and this is the object of the inquiry. Especially since the government’s regulation in *Penn Central* itself involved the government’s extension of its policies into the property owner’s airspace. Did New York City then “acquire” the airspace above Grand Central Station to carry out a “uniquely public function,” namely, the public function of preserving the view, or providing light and air? Then the uniquely-public-function factor seems useless in most cases, including *Causby* itself, even though the Court

166. *Penn Cent.*, 438 U.S. at 128.

167. *Id.* at 126.

168. *Causby*, 328 U.S. at 256, cited in *Id.* at 128.

169. *Causby*, 328 U.S. at 267.

used *Causby* as authority for the uniquely-public-function factor. Perhaps some utility for the factor can be salvaged by an interpretation that emphasizes that the uniquely public functions that matter are most likely to be traditionally recognized government activities. Therefore, the acquisition of a building for a post office or of land for a military base might fit this criterion, although in such cases, takings are likely already to be unmistakable.

The Court illustrated the noxious use element by *Miller v. Schoene*,¹⁷⁰ in which the state government required property owners to cut down ornamental cedar trees because they produced cedar rust that destroyed nearby apple trees. The Court held that this governmental action was not a taking because it reflected “a choice between the preservation of one class of property and that of [another].”¹⁷¹ In such a case, it is a matter of taste to decide which property is the “noxious” one, and this may be an argument against the usefulness of the factor. In situations in which one of two properties must disappear, the choice is necessary, and the characterization of the disadvantaged property as the noxious one is beside the point.

Ironically, this noxious-use factor might reverse one of the Court’s holdings that seems at first blush to be solidly reasoned, if the factor were properly applied. In *Hodel v. Irving*, the Indian Land Consolidation Act required the escheat to the tribe of any interest in Indian-territory land of less than two percent.¹⁷² Inheritance and similar diffusions of Indian lands had resulted in small parcels that were owned by so many different people in such small proportions that transfer or even development was impractical.¹⁷³ One example was a parcel that earned \$1080 in annual rent but had 439 owners, one-third of whom received less than 5¢ a year: an amount that presumably could not be accounted for or paid at a cost less than the amount itself.¹⁷⁴ In such a situation, these virtually valueless interests undermined the best use of property and destroyed value in the larger interests, because it was impractical to convey or use a

170. *Miller v. Schoene*, 276 U.S. 272 (1928).

171. *Id.* at 279.

172. *Hodel v. Irving*, 481 U.S. 704, 721–22 (1987).

173. *Id.* at 707.

174. *Id.* at 713.

property with so many owners who had so little inherent value. The Court recognized that most factors militated against a taking, including the broad public purpose, investment-backed expectations, and comprehensiveness or reciprocity-of-advantage factors.¹⁷⁵ But it held that there was a taking, because the Act destroyed all value in the interests of those who earned less than five cents a year.¹⁷⁶ If the Court had emphasized the noxious-use factor and had recognized that the Act reflected a choice between preservation of one class of property (the meaningful interests) or another (the meaningless interests), it might have decided the case the other way.¹⁷⁷

CONCLUSION

The Supreme Court has set up an ad hoc balancing test as the general method of recognizing takings under the Fifth Amendment. The Court has created some formal rules for so-called per se takings, and these rules probably produce greater consistency and predictability in the cases to which they apply, but the general approach toward recognizing takings remains a highly instrumentalist regime guided primarily by policy, with few formal guidelines. This kind of approach means that the rules are loose, the jurisprudence is susceptible to idiosyncratic preferences of individual judges, and connection to the purposes of the Fifth Amendment easily can be lost. An ad hoc balancing test may be the best that the Court can do in a situation in which the problems arise in such a wide variety, as they do for takings claims. It becomes particularly important for the balancing factors to reflect the policies that underlie the Fifth Amendment. Interpretation of the factors in the Supreme Court's framework as announced in its *Penn Central* decision, then, is an important issue.

The policies underlying the Takings Clause are controversial, but the original intent surely must have included both deontological (right-and-wrong-based) and consequentialist (economic) policies. Deontologically, the Takings Clause prevents government from engaging in the

175. *Id.* at 714.

176. *Id.* at 717-18.

177. *Cf. Phillips*, 524 U.S. at 156 (invalidating the escheat of interest amounts on accounts so small that the interest they generated was less than the costs of accounting for and paying it).

ethically wrong practice of sacrificing individuals to the greater good, by having them bear losses that should be borne by the public at large. In consequentialist terms, the Clause carries out economic purposes; it restrains the exuberance of government regulators, harmonizes competing uses of property, and encourages investment. These are the policies to which the *Penn Central* framework of balancing factors should be directed. Unfortunately, however, the identification and description of the factors in *Penn Central* are too indefinite to carry out these policies reliably. The *Penn Central* factors can be characterized as six in number (or possibly seven, depending upon one's classificatory scheme), and the work of this Article is to describe better how the courts should weigh these six (or seven) balancing factors.

There is at least one false factor, a factor that should not have been part of the Court's list: broad public purpose. A broad public purpose does not indicate the absence of a taking; just as often, or perhaps more often, it indicates that political power has been exercised on behalf of a large majority to subject the property of an individual to public use. In other words, this factor is a poor guide to the task at issue. A broad public purpose often will signify that political power is being used to sacrifice individuals to the common good and support by a majority that is benefited by a particular kind of regulation seems unlikely to restrain exuberant regulators, harmonize competing uses of property, or encourage investment. Since it is part of a pronouncement of the Supreme Court, the broad public purpose factor has to be taken seriously. It should be afforded little weight in most ad hoc balancing cases, however, to reflect the Court's opposing pronouncement that the breadth of the public purpose becomes less significant when regulation goes "too far." The real question, then, becomes whether the regulation goes too far, rather than whether there is a broad public purpose; and this question can better be answered by other considerations.

A second factor, physical invasion by government action, is obsolete, because after *Penn Central*, the Court has recognized physical occupation as creating per se takings. In such cases, the applicable approach does not involve balancing factors at all. Perhaps this physical-invasion factor retains some utility in a few cases in which the real question is whether the government's action is properly characterized

as a physical invasion. The factor then reduces to a consideration of the extent to which the government's action resembles a physical invasion. In these cases, perhaps the physical invasion factor can be helpful in carrying out the policies of the Takings Clause, as it arguably is when used in the *per se* cases.

A third factor, the economic impact of the regulation on the claimant, should be given significant weight. The Court explains this factor as particularly referring to "the extent to which the regulation has interfered with distinct investment-backed expectations." This qualification is helpful, because it describes the kind of case in which singling out of individuals for public burdens, concern for regulatory exuberance, competing uses of property, and discouragement of investment might become most significant. But some of the words in the qualification may be misleading. The courts should not interpret "expectations" as referring to certain or quantifiable calculations of a mathematical variety. Expectation, in the form of a generalized prediction that a particular investment is likely to be profitable, should be enough. Similarly, it should not matter that the original investment was made years before, or by someone else, so that the current situation involves property more valuable than might have been predicted. Courts easily can accept misinterpretations of these kinds. The tendency to limit a property owner's return to a "reasonable" amount (as defined by a judge, based on historical factors), rather than viewing the property according to its value, is an easy fallacy that contradicts the purposes of the Takings Clause. The economic impact factor should show solicitude for investment-backed expectations, but it should view the impact according to the value of the affected property, not by reconstruction of historical impressions about what was or could have been, or might have been expected.

A fourth factor is the comprehensiveness of the regulatory scheme, and this too is an important factor. If the regulation spreads its disadvantages by a broadly applicable plan, it is less likely to result in the singling out of the few for sacrifice to the many. Similarly, breadth of application among the public is likely to restrain regulatory exuberance, harmonize competing uses, and encourage investment, because by definition it reflects the individual members'

decision, within the democratic majority, to impose regulation upon themselves. The idea of a reciprocity of advantage can be treated as a separate factor, or it can be treated as a corollary of the comprehensiveness factor. A regulation that creates reciprocity of advantage to all to whom it applies is likely to avoid singling out a few individuals, to restrain regulatory excesses, to harmonize competing uses, and to encourage investment.

The fifth and sixth factors are likely to be useful only in limited cases. Acquisition for uniquely public functions is not normally likely to furnish a good guideline, because all regulation is intended to produce some sort of public benefit. The Supreme Court's example of this factor, in which a taking was found, is difficult to distinguish on public functions grounds from *Penn Central* itself, in which the Court held the opposite: that there was no taking. Perhaps some utility can emerge in the public function factor if it is viewed in terms of regulatory actions that assist in traditional governmental functions. The sixth factor, noxious use, is likewise of lesser application. This factor is best characterized as indicating against a taking when the government is forced to make "a choice between the preservation of one class of property and that of [another]." In such a case, the singling out of some individuals is based upon the justifiable premise that otherwise, other equally vulnerable individuals would be singled out, regulatory exuberance is not present because the government's decision is forced, harmonizing of competing uses is precisely what is occurring, and government cannot in any event encourage investment by attempting to avoid a necessary choice.

The mushy character of the *Penn Central* balancing factors may ultimately become irreducible after a short course of refinement. It is there because a balancing test is probably the best option, and balancing inherently involves more or less mushiness. But the mushiness can be minimized, if not eliminated, by careful definition of the balancing factors, and this kind of refinement can make the balancing test carry out its purposes better. The examination of the balancing factors undertaken here is intended to produce these results.
