THE CHARACTER OF THE GOVERNMENTAL ACTION

Thomas W. Merrill[*†]

INTRODUCTION

Penn Central Transportation Co. v. New York City holds a secure position in the architecture of the regulatory takings doctrine.[1] That doctrine is at bottom a tool for distinguishing between different governmental powers; in particular, between the power of eminent domain and the police power. Because eminent domain requires that compensation be paid, whereas the police power does not, it is necessary to draw a line between these powers. Conceivably we could simply take the legislature at its word as to which power it is exercising. But at least since *Pennsylvania Coal Co. v. Mahon*, the Supreme Court has insisted independent judicial review is required to assure that when the government purports to be exercising the police power (or the power to tax) it is not in fact exercising the power of eminent domain.[2] Hence the regulatory takings doctrine, which is designed to identify those exercises of governmental power that are functionally equivalent to eminent domain and therefore require the payment of just compensation.[3]

As described in recent decisions, most prominently *Lingle v. Chevron U.S.A. Inc.*, the Court appears to understand the power of eminent domain and the police power to be arrayed along a spectrum.[4] At one end we have clear cases of eminent domain, as where the government condemns and takes title to private property for some public project.[5] At the other end, we have clear cases of the police power, as where the government makes it a crime to discharge toxic wastes into the city water supply.[6] The task in contested cases is to determine whether the challenged action resides closer to the eminent domain end of the spectrum, where compensation is required, or to the police power end of the spectrum, where it is not.

The Court has devised two general decisional tools for engaging in this process of classification. One tool consists of "categorical" rules that situate certain types of governmental actions as being conclusively at one end of

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* Charles Evans Hughes Professor, Columbia Law School.

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1. Penn Cent. Transp. Co. v. New York City, 438 U.S. 104 (1978).
2. Pa. Coal Co. v. Mahon, 260 U.S. 393, 413 (1922).
3. Lingle v. Chevron U.S.A. Inc., 544 U.S. 528, 539 (2005).
4. *Id.* at 538.
5. *See, e.g.*, United States v. Carmack, 329 U.S. 230, 239 (1946) (condemning one and one-half acres of land as a site for a post office and customhouse).
6. Lucas v. S.C. Coastal Council, 505 U.S. 1003, 1029–30 (1992).

the spectrum or the other. Thus, when the government authorizes a permanent physical occupation of property or imposes a regulation that deprives property of all economically beneficial use, these actions fall within categorical rules that conclusively identify these actions as being near the eminent domain end of the spectrum.[7] The Court has been less explicit about identifying categorical rules that place governmental actions at the police power end of the spectrum. But clearly there are such rules, such as the "navigational servitude," which tells us that dredging a river to improve navigation is never a taking,[8] or the understanding that forfeitures of property used in a criminal enterprise do not give rise to takings liability.[9]

What then about the gray area that lies in the middle of the spectrum, where no categorical rule applies? This is where the second general decisional tool, associated with *Penn Central*, kicks in. The Court in *Penn Central* described regulatory takings law as entailing "essentially ad hoc, factual inquiries."[10] Although it is possible to read the opinion as assuming that all regulatory takings inquiries would proceed in this fashion, subsequent decisions have made it clear that the "ad hoc" analysis is reserved for especially difficult cases not covered by any of the categorical rules clustered at either end of the spectrum.[11] As such, *Penn Central* obviously plays a critical role in regulatory takings law; it describes the decision rule for the hardest cases.

Although *Penn Central*'s importance in the architecture of regulatory takings law is secure, the content of the test *Penn Central* prescribes for resolving the most difficult cases has proven to be problematic. Immediately after describing regulatory takings law as entailing ad hoc factual inquiries, *Penn Central* observed that previous decisions had identified "several factors that have particular significance" to such an inquiry.[12] These were described as follows:

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7. Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419, 421 (1982) (permanent occupations); *Lucas*, 505 U.S. at 1015 (preventing the construction of permanent structures on beachfront island property).

8. United States v. Cherokee Nation of Okla., 480 U.S. 700, 707–08 (1987).

9. Bennis v. Michigan, 516 U.S. 442, 452 (1996).

10. Penn Cent. Transp. Co. v. New York City, 438 U.S. 104, 124 (1978).

11. *See, e.g.*, Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency, 535 U.S. 302, 342 (2002) (holding that a building moratorium, not being covered by a categorical rule, should be assessed under the *Penn Central* standard); Palazzolo v. Rhode Island, 533 U.S. 606, 630–31 (2001) (holding that a wetland preservation rule in effect when an owner acquired the property, not being covered by a categorical rule of non-liability, should be assessed under the *Penn Central* standard).

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

> The economic impact of the regulation on the claimant and, particularly, the extent to which the regulation has interfered with distinct investment-backed expectations are, of course, relevant considerations. So, too, is the character of the governmental action. A "taking" may more readily be found when the interference with property can be characterized as a physical invasion by government than when interference arises from some public program adjusting the benefits and burdens of economic life to promote the common good.[13]

Each of the factors mentioned in this passage has created great difficulty for the lower courts. The first factor—the extent of diminution in value caused by the governmental action—presents a dilemma about the unit of property used to measure diminution.[14] Defining the relevant unit broadly reduces the extent of diminution; defining the relevant unit narrowly increases it. Although it may be possible to develop guidelines for identifying the relevant unit of property, so far the Supreme Court has failed to do so.[15] The second factor—whether the action undermines investment-backed expectations—is problematic because it is largely circular. One's expectations about the durability of a government rule or practice are significantly shaped by whether the Constitution requires compensation if the rule or practice is abandoned.[16] That being the case, one cannot use "expectations" as an independent ground to ask whether compensation is required. The third factor—the character of the governmental action—is the most mysterious of all.[17] It is the subject of this Article.

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13. *Id.* (citing Goldblatt v. Hempstead, 369 U.S. 590, 594 (1962); United States v. Causby, 328 U.S. 256 (1946)).

14. *E.g.*, John E. Fee, Comment, *Unearthing the Denominator in Regulatory Takings Claims*, 61 U. CHI. L. REV. 1535, 1536 (1994); Keith Woffinden, *The Parcel As a Whole: A Presumptive Structural Approach for Determining When the Government Has Gone Too Far*, 2008 BYU L. REV. 623, 636–37; Danaya C. Wright, *A New Time for Denominators: Toward a Dynamic Theory of Property in Regulatory Takings Relevant Parcel Analysis*, 34 ENVTL. L. 175, 190–93 (2004).

15. *See* Lucas v. S.C. Coastal Council, 505 U.S. 1003, 1016 n.7 (1992) (acknowledging the failure). One solution might be to ask whether the interest taken by the government constitutes a bundle of rights that would ordinarily have to be purchased if it were acquired by a private party. Saul Levmore, *Takings, Torts, and Special Interests*, 77 VA. L. REV. 1333, 1340–41 (1991). This would effectively jettison any diminution inquiry and replace it with an inquiry into whether the government has taken a unit of property that is exchangeable on a stand-alone basis. DAVID A. DANA & THOMAS W. MERRILL, PROPERTY: TAKINGS 76–81 (2002); *see also* Steven J. Eagle, *Property Tests, Due Process Tests and Regulatory Takings Jurisprudence*, 2007 BYU L. REV. 899, 939–43 (urging adoption of a "commercial unit" test in lieu of the current diminution inquiry).

16. *See* Michael J. Graetz, *Legal Transitions: The Case of Retroactivity in Income Tax Revision*, 126 U. PA. L. REV. 47, 64 (1977).

17. *See* John D. Echeverria, *Making Sense of Penn Central*, 39 ENVTL. L. REP. 10,471, 10,477 (2009) (describing the current understanding of the term "character" as a "veritable mess").

In stating that the "character of the governmental action" is a relevant factor, the Court immediately illustrated what it meant by contrasting a physical invasion by the government with what it described as a "public program adjusting the benefits and burdens of economic life to promote the common good."[18] This explanation of the "character" factor poses a further question: Did Justice Brennan, writing for the Court, envision the character inquiry as entailing a single-variable distinction between invasions and land use regulations? Or was the character factor seen as a more open-ended category, encompassing a variety of potentially relevant variables, of which the distinction between invasion and regulation was simply one particularly relevant variable given the historic preservation statute at issue in *Penn Central*?

Whatever Justice Brennan may have intended in *Penn Central*, the Supreme Court has done relatively little in subsequent decisions to clarify the meaning of the "character of the governmental action." The Court's regulatory takings decisions since *Penn Central* have been largely devoted to determining when the ad hoc approach does or does not apply, not to spelling out how it applies when it does.[19] This may change. The process of identifying new categorical rules to supplement the *Penn Central* test appears to have ground to a halt. The Court has declined to extend the permanent occupation categorical test beyond easements.[20] It has limited the economic wipeout categorical test to permanent deprivations of economic value.[21] And it has scotched the idea that regulations that fail to substantially advance a legitimate governmental interest should be regarded as takings.[22] So it is not implausible to imagine that property rights advocates and their judicial sympathizers, after a long period of casting about for new or expanded categorical rules, will turn their attention back to

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18. *Penn Central*, 438 U.S. at 124. The Court referenced *United States v. Causby*, 328 U.S. 256, 261–62 (1946), a decision holding the government liable for low-level airplane flights, as an example of government invasion of property. *Penn Central*, 438 U.S. at 124.

19. F. Patrick Hubbard et al., *Do Owners Have a Fair Chance of Prevailing Under the Ad-Hoc Regulatory Takings Test of Penn Central Transportation Company*?, 14 DUKE ENVTL. L. & POL'Y F. 121, 121–22 (2003).

20. *Compare* Yee v. City of Escondido, 503 U.S. 519, 532 (1992) (declining to extend *Loretto* to a lease modification), *and* FCC v. Fla. Power Corp., 480 U.S. 245, 250–53 (1987) (stating that *Loretto* has "no application to the facts of this litigation"), *with* Dolan v. City of Tigard, 512 U.S. 374, 384 (1994) (applying *Loretto* to an imposition of an easement of indefinite duration), *and* Nollan v. Cal. Coastal Comm'n, 483 U.S. 825, 831–32 (1987) (holding that a "permanent and continuous right to pass to and fro" over someone's real property constitutes a "permanent physical occupation").

21. Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency, 535 U.S. 302, 331 (2002) (declining to extend *Lucas* to a building moratorium).

22. Lingle v. Chevron U.S.A. Inc., 544 U.S. 528, 532 (2005).

Penn Central. When they do, the most promising place to seek to expand on protection for owners will be the ill-defined character factor.

If the Supreme Court does decide to revisit the character factor, lower court decisions provide a rich source of material for particularizing this aspect of the *Penn Central* standard. The emerging jurisprudence in the lower courts is more consistent with the open-ended interpretation of the character factor than with the understanding that the factor incorporates a single-variable distinction between invasion and regulation. Although untidy, the open-ended construction, I believe, is also a better way to develop the ad hoc regulatory takings inquiry associated with *Penn Central*. If the central objective is to identify regulations that are the functional equivalent of condemnations of property under the power of eminent domain, as the Supreme Court tells us in *Lingle*, then history offers more factors that are relevant to the inquiry than the three variables listed in the much-quoted paragraph in *Penn Central*. Treating the character factor as embracing a multiplicity of considerations is thus a constructive doctrinal development moving the law in the right direction.

I. *PENN CENTRAL* ON THE CHARACTER OF THE GOVERNMENTAL ACTION

Although the iconic paragraph in *Penn Central* referring to diminution in value, investment-backed expectations, and the character of the governmental action is often the only portion of the opinion cited in cases that apply the ad hoc approach to regulatory takings, the opinion went on to say more about the character factor. Indeed, the next subpart of the opinion included four additional paragraphs devoted to the character analysis.[23] These paragraphs do not conclusively resolve the ambiguity about what the Court intended by referring to the character of the governmental action. But on the whole they are more consistent with the open-ended construction than the reductive single-variable idea.

One paragraph picked up on the idea of governmental invasions, again with specific reference to *United States v. Causby*, which had been heavily relied upon by the owners of the railroad terminal in *Penn Central*. Here the opinion made an unmistakable reference to the scholarship of Joseph Sax,[24] observing that the government in *Causby* was acting in an "enterprise capacity" and had appropriated the airspace above the Causbys' land for purposes of flights by military planes landing and taking off at a nearby

23. *Penn Central*, 438 U.S. at 124–26.

24. *See* Joseph L. Sax, *Takings and the Police Power*, 74 YALE L.J. 36, 63, 69 (1964) (arguing that takings law should distinguish between government "enterprise" and government as "arbiter").

military airport.[25] The present case, the Court said, was "not remotely" the same.[26] The city had simply prohibited the landowners or anyone else from "occupying portions of the airspace above the [t]erminal, while permitting [them] to use the remainder of [their property] in a gainful fashion."[27] Standing alone, this paragraph might support the single-variable invasion-versus-regulation interpretation, although the invocation of Professor Sax's test that distinguishes between enterprise and arbitration does not completely map onto this distinction.

The other paragraphs loosely grouped together under a discussion of the character of the governmental action all involved distinctions among different types of land use regulations. In one paragraph, Justice Brennan responded to the contention that historic preservation is a form of discriminatory or "reverse spot" zoning.[28] He concluded, to the contrary, that historic preservation, at least as implemented in New York, "embodies a comprehensive plan" affecting a large number of parcels.[29] The final two paragraphs addressed the claim that New York's law failed to impose "identical or similar restrictions on all structures located in particular physical communities," and was thus "inherently incapable of producing [a] fair and equitable distribution of benefits and burdens of governmental action."[30] Justice Brennan offered two responses. The more general rejoinder was that "zoning laws often affect some property owners more severely than others but have not been held to be invalid on that account."[31] The opinion also offered a more factually specific rejoinder: The New York law applied to thirty-one historic districts and over 400 individual landmarks, and thus the preservation program benefitted all citizens in New York, including the objecting owners.[32]

Taken together, the paragraphs devoted to the "character of the governmental action" could be read as saying little more than that the preservation ordinance in *Penn Central* was a land use regulation and did not entail any governmental invasion of the appellants' property. But they can also be read as saying that a variety of considerations are relevant in assessing the character of the governmental action, including whether it is comprehensive, applies neutral and general criteria, does not single out particular owners for special treatment, and provides benefits to all

25. *Penn Central*, 438 U.S. at 135.
26. *Id.*
27. *Id.*
28. *Id.* at 132.
29. *Id.*
30. *Id.* at 133.
31. *Id.* at 133–34.
32. *Id.* at 134–35.

members of the community. I am inclined to the more inclusive reading, on the ground that if nothing more than invasion versus use regulation was intended, the discussion could have been much shorter. But the matter is admittedly inconclusive.

II. POST-*PENN CENTRAL* SUPREME COURT DECISIONS

After *Penn Central*, the Supreme Court has done relatively little to clarify what it meant by the character of the governmental action—or for that matter what it meant by any of the three factors. One reason for this neglect is the penchant in constitutional law, at least when *Penn Central* was decided, for what Robert Nagel has called "formulaic" tests.[33] It is far from clear that Justice Brennan's opinion in *Penn Central* contemplated that a standard of three variables would govern ad hoc takings inquiries. Yet the intellectual fashions of the day demanded three- and four-part tests. Sure enough, *Penn Central* was soon restated as a three-part formula, with the implication that courts were to analyze each of the factors and then weigh them together to reach a final judgment about the proper classification of the challenged action.[34] Somewhat paradoxically, this led to an ossification of the doctrine. Rather than agonize over what any factor meant—a question of law open to further appellate review—lower courts generally eschewed definitive pronouncements about the meaning of any given factor, since each could be balanced against the other two equally opaque factors to reach virtually any outcome in any case.[35] Seeing no conflicts in the lower courts about the meaning of the *Penn Central* standard, the Court had little occasion to revisit the meaning of the factors.

Another reason for the neglect of *Penn Central* is the two-part ripeness requirement for regulatory takings cases set forth in *Williamson County*

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33. Robert F. Nagel, *The Formulaic Constitution*, 84 MICH. L. REV. 165, 165 (1985).

34. Takings cases decided shortly after *Penn Central* cited the decision but did not treat it as adopting a formal three-part test for assessing regulatory takings claims. Andrus v. Allard, 444 U.S. 51, 67–68 (1979); Kaiser Aetna v. United States, 444 U.S. 164, 175 (1979). The process of formalization began with *PruneYard Shopping Ctr. v. Robins*, 447 U.S. 74, 83 (1980), was solidified by *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 1005 (1984) and *Connolly v. Pension Benefit Guar. Corp.*, 475 U.S. 211, 225 (1986), and eventually became a matter of rote recitation, *e.g.*, *Concrete Pipe & Prods., Inc. v. Constr. Laborers Pension Trust*, 508 U.S. 602, 643–45 (1993).

35. Cases presenting challenges to bans on outdoor advertising signs illustrate this point in particular. *Compare* Naegele Outdoor Adver., Inc. v. City of Durham, 803 F. Supp. 1068, 1078–80 (M.D.N.C. 1992) (applying *Penn Central* and holding that a city ordinance prohibiting outdoor advertising did not constitute a regulatory taking), *with* Ga. Outdoor Adver., Inc. v. City of Waynesville, 690 F. Supp. 452, 458 (W.D.N.C. 1988) (applying *Penn Central* and holding that a substantially similar ordinance did constitute a regulatory taking). *See also* Outdoor Graphics, Inc. v City of Burlington, 103 F.3d 690, 695 (8th Cir. 1996) (examining an ordinance similar to those in *Naegele* and *Waynesville*, but grounding its holding on different factors).

Regional Planning Commission v. Hamilton Bank.[36] *Williamson County* held that regulatory takings claims, at least of the as-applied variety, nearly always have to be channeled through the state courts to determine the final form of the regulation and whether compensation is available under state law.[37] Under this understanding, unless the Supreme Court agrees to hear the case on certiorari after all the uncertainties are resolved, any federal constitutional issues decided in the state courts are barred from re-litigation in federal court.[38] And since most of the cases that survived the *Williamson County* gauntlet could be portrayed as "fact specific" applications of the established *Penn Central* three-factor test, easy arguments were usually available to deny further Supreme Court review.[39]

Perhaps most importantly, property rights activists and their judicial sympathizers quickly came to view *Penn Central* as a graveyard for takings claims. The three factors mentioned by *Penn Central* were designed to support the conclusion that a New York City law that operated like an ex post preservation easement was not a taking. The application of the same three factors by the lower courts in later cases seemed to confirm that not much else was a taking either.[40] Rather than invest energy in clarifying the *Penn Central* test, property rights activists quickly redirected their efforts onto a different path. First, in *Loretto v. Teleprompter Manhattan CATV Corp.*[41] and later in *Lucas v. South Carolina Coastal Council*,[42] the Court recognized new "categorical" grounds for identifying a regulatory taking. The combined effect was largely to divert the attention away from *Penn Central* toward the interpretation of these new categorical takings doctrines and the possible development of additional categorical rules. This too meant that the Court gave relatively little attention to refining the *Penn Central* test, including the character factor.

Notwithstanding this general neglect of *Penn Central* and the proper meaning of its "factors," the Court has decided a number of cases that bear

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36. Williamson Cnty. Reg'l Planning Comm'n v. Hamilton Bank, 473 U.S. 172, 186, 194 (1985).

37. *Id.*

38. San Remo Hotel, L.P. v. City of San Francisco, 545 U.S. 323, 338 (2005).

39. *See* Kevin H. Smith, *Certiorari and the Supreme Court Agenda: An Empirical Analysis*, 54 OKLA. L. REV. 727, 740 (2001) ("[C]ertain types of legal errors, such as an erroneous factual finding or the misapplication of a properly stated rule of law, are unlikely to result in a petition for a writ of certiorari being granted." (internal quotation marks omitted)); *see also* SUP. CT. R. 10 ("A petition for a writ of certiorari is rarely granted when the asserted error consists of . . . the misapplication of a properly stated rule of law.").

40. One random sampling of 133 takings cases citing to *Penn Central* (roughly 10% of the total number at that time) found that plaintiffs prevailed in only 13.4% of cases applying the *Penn Central* test. Hubbard et al., *supra* note 19, at 141.

41. Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419, 426 (1982).

42. Lucas v. S.C. Coastal Council, 505 U.S. 1003, 1019 (1992).

on the central ambiguity about the character factor: Does it incorporate a single variable distinction between invasion and regulation, or a wider set of considerations? Although it is possible to cite decisions that appear to presuppose the single-variable understanding,[43] the cumulative weight of these decisions comes down decisively on the side of the more open-ended understanding.

The Court decided two cases shortly after *Penn Central* that involved governmental invasions of property. Interestingly, neither decision treated the fact of the "invasion" as a factor to be assessed under the *Penn Central* balancing test.

The first invasion case, *Kaiser Aetna v. United States*, came close on the heels of *Penn Central.*[44] It involved a takings challenge to an order of the Army Corps of Engineers requiring the opening of a privately developed marina in Hawaii to the general public. Then-Justice Rehnquist, writing for the Court, identified the challenged order as imposing "an actual physical invasion of the privately owned marina."[45] Nevertheless, he did not treat the invasive nature of the governmental action as a factor to be weighed under *Penn Central*. Instead, he emphasized that the order abrogated the owners' right to exclude, something "universally held to be a fundamental element of the property right."[46] One should perhaps not make too much of this. *Penn Central* had not yet come to be regarded as a formalized three-part test, and Justice Rehnquist, who had dissented in *Penn Central*, was perhaps not eager to treat the decision as a foundational precedent. In retrospect, *Kaiser Aetna* is probably best regarded as a way station to the decision in *Loretto*, with its categorical rule about permanent occupations, rather than an application of the character factor of *Penn Central*.

Loretto, the other post-*Penn Central* case dealing with invasions, also declined to treat the invasive nature of the governmental action as merely a factor to be weighed under *Penn Central*. The Court acknowledged the relevance of invasions under the character factor of *Penn Central*, but went on to carve out a special rule for what it called "permanent physical occupations":

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43. *E.g.*, Connolly v. Pension Benefit Guar. Corp., 475 U.S. 211, 225 (1986). For early lower court decisions that appear to share this understanding, see, for example, *Hilton Wash. Corp. v. District of Columbia*, 777 F.2d 47, 49 (D.C. Cir. 1985) and *Barbian v. Panagis*, 694 F.2d 476, 485–86 (6th Cir. 1982) (citing Pa. Coal Co. v. Mahon, 260 U.S. 393, 415 (1922)).

44. Kaiser Aetna v. United States, 444 U.S. 164 (1979).

45. *Id.* at 180.

46. *Id.* at 179–80.

> As *Penn Central* affirms, the Court has often upheld substantial regulation of an owner's use of his own property where deemed necessary to promote the public interest. At the same time, we have long considered a physical intrusion by government to be a property restriction of an unusually serious character for purposes of the Takings Clause. Our cases further establish that when the physical intrusion reaches the extreme form of a permanent physical occupation, a taking has occurred. In such a case, "the character of the government action" not only is an important factor in resolving whether the action works a taking but also is determinative.[47]

Loretto thus seems to reaffirm that the character factor is about invasions versus regulations, with permanent invasions being such an extreme type of invasion that the analysis can stop at that point without considering other factors. With the benefit of hindsight, *Loretto*'s significance in understanding the character factor is arguably rather different. Once we assimilate the idea that there is an ad hoc takings test and categorical takings tests, and that one of the categorical tests involves government-sanctioned invasions, it seems odd that invasions would also be one of the three factors considered under the ad hoc approach. To be sure, one can distinguish between "permanent" invasions (categorical) and less-than-permanent invasions (ad hoc). Or can one? Very little in property law is "permanent" in the sense of lasting forever. What *Loretto* seems to have had in mind by a permanent occupation, with the benefit of later clarifying decisions, is governmental action that amounts to the imposition of an easement of indefinite duration.[48] If all invasions that fit this description are taken out of the ad hoc analysis, then there is not much left of the character analysis if all it refers to is invasions versus regulations. In this sense, *Loretto* pushes us toward a broader understanding of the character factor in order to avoid trivializing it.

Soon, other decisions were rendered that cannot be squared with the single-variable understanding of the character factor. The first was *Hodel v. Irving*.[49] At issue was a federal statute that attempted to reduce the fragmentation of ownership interests in Indian tribal lands subject to the

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47. Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419, 426 (1982).

48. *See* Dolan v. City of Tigard, 512 U.S. 374, 384 (1994) (noting that a government requirement that a property owner dedicate a strip of land as a public pedestrian/bicycle path would be a taking "[w]ithout question"); Nollan v. Cal. Coastal Comm'n, 483 U.S. 825, 832 (1987) (holding that a categorical taking occurs under *Loretto* "where individuals are given a permanent and continuous right to pass to and fro, so that the real property may continuously be traversed, even though no particular individual is permitted to station himself permanently upon the premises").

49. Hodel v. Irving, 481 U.S. 704 (1987).

allotment system by decreeing that small fractional interests not disposed of by will would escheat to the tribe.[50] In an opinion by Justice O'Connor applying the *Penn Central* test, the Court held this was a taking.[51] Since the interests were very small, neither diminution in value nor investment-backed expectations pointed toward a taking. So naturally, Justice O'Connor stressed the "extraordinary" character of the governmental action.[52] The law, she said, "amounts to virtually the abrogation of the right to pass on a certain type of property—the small undivided interest—to one's heirs."[53] Justice O'Connor seemed to be saying that governmental regulations that are inconsistent with longstanding and widely shared ideas about the prerogatives of ownership are suspect under the character factor. The decision has not been read so broadly. It is largely treated as establishing a special rule for abrogation of inheritance rights.[54] Insofar as it illuminates the understanding of the character factor, however, *Irving* is obviously inconsistent with the single-variable understanding; it can be integrated with the larger landscape of the law only by interpreting the character factor as a much broader catch-all.

Another O'Connor opinion, this time for a plurality of four in *Eastern Enterprises v. Apfel*, also departed from the single-variable invasion-versus-regulation construction of the character factor.[55] Her opinion would have found a federal statute imposing retroactive liability for retiree health care benefits to be a taking under the *Penn Central* test. Most of the analysis focused on investment-backed expectations.[56] Justice O'Connor did note, however, that the nature of the governmental action was "quite unusual" in that it "singles out certain employers to bear a burden that is substantial in amount" for conduct far in the past.[57] This, she said, was fundamentally unfair: "Eastern cannot be forced to bear the expense of lifetime health benefits for miners based on its activities decades before those benefits were promised."[58] The plurality opinion in *Eastern Enterprises* therefore suggests that retroactive regulations are suspect under the character factor.

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50. *Id.* at 709.

51. *Id.* at 714–18.

52. *Id.* at 716.

53. *Id.*

54. Youpee v. Babbitt, 67 F.3d 194, 199–200 (9th Cir. 1995), *aff'd*, 519 U.S. 234 (1997). An exception is *Philip Morris, Inc. v. Reilly*, 312 F.3d 24, 41–45 (1st Cir. 2002), which treated *Irving* as having created a virtually categorical rule of takings liability for "extraordinary" regulations that extinguish a traditional attribute of private property. But *Philip Morris* appears to stand alone in reading the decision this broadly.

55. E. Enters. v. Apfel, 524 U.S. 498 (1998) (plurality opinion).

56. *Id.* at 529–37.

57. *Id.* at 537.

58. *Id.*

Again, this is inconsistent with the single-variable interpretation and presupposes that the character factor is something like a big tent encompassing a variety of considerations.

Perhaps the decisions of greatest significance in terms of bending the understanding of the character factor are *Keystone Bituminous Coal Ass'n v. DeBenedictis*[59] and *Lucas*. Both reaffirm that whether the regulation tracks the common law of nuisance is relevant in determining whether it is a taking. In *Keystone*, the Court essentially overruled *Pennsylvania Coal Co. v. Mahon* and adopted Justice Brandeis's dissent in that case, holding that a Pennsylvania statute prohibiting mining activity that causes surface subsidence is not a taking because it regulates activity that tracks nuisance law.[60] The Court said this feature went to "the nature of the State's action," which "is critical in takings analysis."[61] *Keystone* also revived another Holmes chestnut: Regulations imposing an average "reciprocity of advantage" on landowners will ordinarily not be considered takings.[62] The Court observed that its historical "hesitance to find a taking when the State merely restrains uses of property that are tantamount to public nuisances is consistent with the notion of [average] 'reciprocity of advantage' that Justice Holmes referred to in *Pennsylvania Coal*."[63]

Lucas, for its part, recognized a categorical taking based on a total elimination of economic value but then immediately recognized what appears to be a categorical exception for regulations that track the common law of nuisance in the jurisdiction.[64] If correspondence with nuisance law is a categorical exception to a categorical rule of liability, then *a fortiori* it should be a relevant factor under the ad hoc analysis of *Penn Central*. Taken together, *Keystone* and *Lucas* necessarily mean that a regulation's correspondence to nuisance law is germane to regulatory takings analysis. And *Keystone,* while not entirely clear on the matter, seems to situate the nuisance-tracking feature in the character prong of *Penn Central*.

In no post-*Penn Central* decision has the Court undertaken to offer an explicit interpretation of what it meant by "the character of the governmental action." Nevertheless, a significant number of decisions clearly presuppose that the character factor means more than the single variable distinction between invasion and regulation.

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59. Keystone Bituminous Coal Ass'n v. DeBenedictis, 480 U.S. 470 (1987).
60. *Id.* at 492.
61. *Id.* at 488.
62. Pa. Coal Co. v. Mahon, 260 U.S. 393, 422 (1922).
63. *Keystone*, 480 U.S. at 491 (quoting *Pa. Coal Co.*, 260 U.S. at 422).
64. Lucas v. S.C. Coastal Council, 505 U.S. 1003, 1031 (1992).

III. LOWER COURT DECISIONS

With minimal guidance from the Supreme Court, lower courts have been left largely to their own devices in exploring the meaning of the character factor under the *Penn Central* test. Overall, it is possible to identify six themes or ideas—one could perhaps call them sub-factors—that lower courts have developed in the wake of *Penn Central* in giving further content to the character of the governmental action. One of these sub-factors—whether the regulation substantially advances a legitimate governmental interest—was the product of a head-fake by the Supreme Court that has now been repudiated,[65] and will likely disappear. The remaining five are alive and well, at least in certain jurisdictions.

A. Invasion

Perhaps the most common theme is that the character factor simply incorporates a distinction between governmental invasions and use regulations. This is usually stated in summary fashion, in decisions that otherwise conclude that the diminution in value and investment-backed expectation tests do not favor the property owner.[66] If something like a wetland regulation or re-zoning is involved, then the coup de grace to the takings challenge can be delivered by pointing out that there has been no governmental invasion, and hence the character factor also points toward no taking.[67] These decisions treat this reading of the character factor as self-evident. As such they are relevant data points, but they offer nothing by way of analysis that is especially illuminating.

B. Nuisance

Other decisions consider whether the regulation tracks the common law of nuisance as part of the character analysis. These decisions are more interesting because the majority opinion in *Penn Central* says nothing about the relevance of nuisance law. The obvious reason for this silence was that the New York City historic preservation ordinance did not conform to the

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65. Lingle v. Chevron U.S.A. Inc., 544 U.S. 528, 532 (2005).

66. *See, e.g.*, Get Away Club, Inc. v. Coleman, 969 F.2d 664, 667 (8th Cir. 1992); Rogers v. Bucks Cnty. Domestic Relations Section, 959 F.2d 1268, 1275 (3d Cir. 1992).

67. *See, e.g.*, K & K Constr., Inc. v. Dep't of Env. Quality, 705 N.W.2d 365, 383–84 (Mich. Ct. App. 2005) (wetland regulation); Kafka v. Mont. Dep't of Fish, Wildlife & Parks, 201 P.3d 8, 30 (Mont. 2008) (hunting regulation); Sheffield Dev. Co. v. City of Glenn Heights, 140 S.W.3d 660, 673 (Tex. 2004) (re-zoning).

type of regulation associated with traditional nuisance law.[68] Acknowledging this would have made it more difficult to conclude that the law did not impose a taking. Then-Justice Rehnquist's dissent cited the nuisance cases and argued their relevance,[69] but Justice Brennan chose not to respond. This may have left the impression in some that *Penn Central* had abolished the relevance of the nuisance analogy from regulatory takings law.

As we have seen, however, this would be mistaken. Previous decisions, including foundational precedents such as *Mugler v. Kansas*,[70] *Pennsylvania Coal Co. v. Mahon,*[71] *Euclid v. Ambler Realty Co*.,[72] and *Miller v. Schoene*,[73] had all drawn on nuisance law as a benchmark in interpreting the scope of the police power.[74] And the Court would turn again to the relevance of nuisance after *Penn Central* in *Keystone* and *Lucas*.[75]

The lower courts that have adverted to the point have agreed that the nuisance analogy should be included as part of the character analysis.[76] Most striking perhaps is the marathon litigation in the Federal Claims Court under the name *Rose Acre Farms v. United States*.[77] Rose Acre was a major egg producer, some of whose egg factories tested positive for salmonella bacteria.[78] The U.S. Department of Agriculture (USDA), as a precautionary measure, ordered that all eggs from these facilities be diverted to the "breaker egg" market, where they would be used in producing cake mixes

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68. Penn Cent. Transp. Co. v. New York City, 438 U.S. 104, 145–46 (1978) (Rehnquist, J., dissenting).

69. *Id.* at 145–46.

70. Mugler v. Kansas, 123 U.S. 623, 668–69, 671–74 (1887).

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

72. Village of Euclid v. Amber Realty Co., 272 U.S. 365, 387–88 (1926).

73. Miller v. Schoene, 276 U.S. 272, 280 (1928)

74. *See generally* RICHARD A. EPSTEIN, TAKINGS: PRIVATE PROPERTY AND THE POWER OF EMINENT DOMAIN 112–25 (1985) (developing a nuisance control interpretation of the police power).

75. *See supra* notes 59–64 and accompanying text.

76. *E.g*., Crepple v. United States, 41 F.3d 627, 631 (Fed. Cir. 1994); Walcek v. United States, 49 Fed. Cl. 248, 272 (2001); United States v. Brace, 48 Fed. Cl. 272, 278 (2000). After *Lucas*, the Federal Circuit briefly made nuisance law the key component of the character factor, to the point of virtually discarding the ad hoc test. *See* Loveladies Harbor, Inc. v. United States, 28 F.3d 1171, 1179 (Fed. Cir. 1994).

> The effect, then, of *Lucas* was to dramatically change the [character] criterion, from one in which courts, including federal courts, were called upon to make *ad hoc* balancing decisions, balancing private property rights against state regulatory policy, to one in which state property law, incorporating common law nuisance doctrine, controls.

Id. After the Supreme Court's *Palazzolo* decision, the Federal Circuit withdrew from this extreme position, not discarding the nuisance analogy but expanding it broadly to include "the purpose of the regulation and its desired effects" under the character factor. Bass Enters. Prod. Co. v. United States, 381 F.3d 1360, 1370 (Fed. Cir. 2004).

77. Rose Acre Farms, Inc. v. United States (*Rose Acre I*), 373 F.3d 1177 (Fed. Cir. 2004); Rose Acre Farms, Inc. v. United States (*Rose Acre II*), 559 F.3d 1260 (Fed. Cir. 2009).

78. *Rose Acre I*, 373 F.3d at 1182.

and such, rather than the "table egg" market. The breaker egg market pays less than the table egg market, and Rose Acre filed suit in the Claims Court seeking compensation for lost profits.[79] The trial court found the USDA's egg regulations were "misguided," and held that this supported a finding of a taking under *Penn Central*.[80] In a lengthy opinion in 2004, Judge Michel, writing for the Federal Circuit, overturned this ruling. Judge Michel, quoting an earlier opinion, concluded that "[i]f the regulation prevents what would or legally could have been a nuisance, then no taking occurred."[81] After another trip down to the Claims Court and back again—during which interval *Lingle* was decided—the Federal Circuit reaffirmed this conclusion.[82] The court concluded that *Lingle* left untouched the substantial body of law indicating that laws designed to protect the public health and safety are generally not takings, and that this should be taken into account under the character factor of *Penn Central.*[83]

C. Reciprocity of Advantage

A third theme developed in the lower courts picks up on the venerable idea that reciprocity of advantage is an important factor in regulatory takings cases. This idea, which initially appeared in *Pennsylvania Coal*, was downplayed in the majority opinion in *Penn Central* and highlighted in the dissent, again for fairly self-evident strategic reasons: the historic preservation ordinance at issue burdened a relatively small number of property owners for the benefit of the many. Looking only at the much-quoted canonical paragraph from *Penn Central*, one might gain the impression this factor no longer counts, since it is not mentioned. As we have seen, however, *Penn Central* attempted in later paragraphs to portray the historic preservation law as a general, community-wide measure, and sought to argue that even restricted structures obtained some advantage from the law, if not quite "reciprocal" advantage.[84] *Keystone*, for its part, breathed new life into reciprocity of advantage by explicitly characterizing

79. *Id.* at 1183.

80. *Id.* at 1179, 1192.

81. *Id.* at 1192 (quoting Rose Acre Farms, Inc., v. United States, 55 Fed. Cl. 643, 659–60 (Fed. Cir. 2004)).

82. *Rose Acre II,* 559 F.3d at 1281–82.

83. *Id*. at 1279. Other Federal Circuit decisions have spoken more broadly of the character factor as requiring an assessment of "the purpose of the regulation and its desired effects." Bass Enters. Prod. Co. v. United States, 381 F.3d 1360, 1370 (Fed. Cir. 2004). Although disconcertingly vague, in context this appears to be roughly synonymous with whether the regulation seeks to proscribe the kinds of harms regulated under the law of nuisance.

84. Penn Cent. Transp. Co. v. New York City, 438 U.S. 104, 134–35 (1978).

a mining-subsidence statute as having this feature and citing this as a reason why the statute was not a taking.[85]

Reciprocity of advantage focuses on the distributional impact of the challenged governmental action. Regulations that impose burdens and confer benefits on all property owners generally have a neutral distributional impact. Everyone loses but everyone gains.[86] An example would be an ordinance requiring that all buildings in a crowded urban area be constructed of fire-resistant material. Everyone pays higher construction costs, but the risk of catastrophic fire is reduced and insurance rates go down. Laws that generate these sorts of reciprocal burdens and benefits are often associated with the police power and rarely require compensation.[87]

In contrast, regulations that impose burdens exclusively on some owners while generating benefits for others have a skewed distributional impact. The most extreme form would be a law that takes from A and gives to B, often cited as something that would violate the public use requirement of the Takings Clause.[88] The most extreme forms of skewed distribution, on this view, are not permissible even under the power of eminent domain. Short of outright A-to-B transfers, traditional exercises of eminent domain typically have a skewed distributional impact, with the property of a few being taken for a project that benefits the many, and of course compensation is required in these cases. Thus, the presence of reciprocity of advantage seems like an appropriate proxy for police power regulations, and its absence is at least somewhat indicative of an action closer to eminent domain.

Several lower courts have picked up on the idea that the character factor is designed to measure the distributional impact of the challenged governmental action. These courts favor broad-based laws that offer reciprocity of advantage and find suspect laws that single out particular owners for severe burdens while conferring benefits on others.[89] One of the

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85. Keystone Bituminous Coal Ass'n v. DeBenedictis, 480 U.S. 470, 491–92 (1987).

86. Mark W. Cordes, *The Fairness Dimension in Takings Jurisprudence*, 20 KAN. J.L. & PUB. POL'Y 1, 21 (2010).

87. Sax, *supra* note 24, at 74–75.

88. Kelo v. City of New London, 545 U.S. 469, 477 (2005).

89. Reciprocity of advantage has no clear home within the *Penn Central* three-part formula. It has been considered as part of the investment-backed expectations prong. *E.g.*, Adams v. Village of Wesley Chapel, 259 F. App'x 545, 549 n.2 (4th Cir. 2007); Klauser *ex rel.* Whitehorse v. Babbitt, 918 F. Supp. 274, 277–78 (W.D. Wis. 1996). It has also been considered under the character prong. *E.g.*, Hendler v. United States, 36 Fed. Cl. 574, 588 (1996). And it has been considered as part of an economic impact analysis. *E.g.*, Meier v. Anderson, 692 F. Supp. 546, 555 (E.D. Pa. 1988); *see also* Sadowsky v. City of New York, 732 F.2d 312, 319 (2d Cir. 1984) (finding that regulation was a burden necessary to secure "the advantage of living and doing business in a civilized community" (quoting Andrus v. Allard, 444 U.S. 51, 67 (1979))).

first lower court decisions to engage in such an analysis emerged from marathon Federal Circuit litigation in the *Cienega Gardens* case.[90] The federal government had adopted a program that provided mortgage insurance for multi-family residential housing, which lowered the effective interest rate developers would otherwise have to pay.[91] In return, the developers agreed to cap rents on the projects for at least twenty years.[92] After that, they could elect to pre-pay the mortgages and withdraw from the program, raising rents to market levels.[93] As the twenty-year pre-pay date approached, housing advocates became concerned that large numbers of low-income rental units would be taken off the market.[94] Congress was prevailed upon to adopt legislation in 1987 and 1990 eliminating the opt-out privilege.[95] After many trips back and forth between the Federal Claims Court and the Federal Circuit, a panel of the Federal Circuit held that the repeal was a taking under the *Penn Central* test.[96]

Presumably because the economic impact of the repeal was not draconian, the *Cienega Gardens* court placed primary emphasis on the character of the governmental action factor. The court briefly suggested that the repeal might be considered a physical invasion, because it had the effect of forcing landlords to continue renting to low-income tenants they otherwise would be free to evict.[97] But it did not press the argument, perhaps because it was in obvious tension with the Supreme Court's decision in *Yee v. City of Escondido*.[98] Instead, the court shifted gears, suggesting that the character of the action was akin to a taking because, although "Congress acted for a public purpose (to benefit a certain group of people in need of low-cost housing), . . . just as clearly[] the expense was placed disproportionately on a few private property owners."[99] The court concluded that "this is not a case in which the burden for remedying a societal problem has been imposed on all of society. . . . The disproportionate imposition on the Owners of the public's burden of

90. Cienega Gardens v. United States, 331 F.3d 1319 (Fed. Cir. 2003).
91. *Id.* at 1325.
92. *Id.*
93. *Id.* at 1325–26.
94. *Id.* at 1326 (citing H.R. CONF. REP. NO. 100-426, at 192 (1987)).
95. *Id.*
96. *Id.* at 1353.
97. *Id.* at 1388.
98. Yee v. City of Escondido, 503 U.S. 519, 532 (1992). The Court in *Yee* held that a California law forcing landlords to continue leasing to tenants at controlled rents did not violate *Loretto*'s categorical rule against permanent occupations. *Id.* at 532.
99. *Cienega Gardens*, 331 F.3d at 1338.

providing low-income housing is not rendered any more acceptable by worthiness of purpose."[100]

The Minnesota Supreme Court has also interpreted the character factor as incorporating an inquiry into reciprocity of advantage. In *Wensmann Realty, Inc. v. City of Eagan* the court considered a *Penn Central* challenge to a city's denial of a zoning amendment that would allow an aging golf course to be turned into a low-density residential development.[101] The property owner claimed that the golf course was unprofitable, and that by insisting that the land be zoned for parks, open space, and recreation, "the city has placed an extreme burden on one property owner while benefiting the public as a whole with open space for which the city did not pay."[102] The Minnesota Supreme Court agreed. Although it said the character analysis is contextual, "an important consideration involves whether the regulation is general in application or whether the burden of the regulation falls disproportionately on relatively few property owners."[103] The court found the zoning designation flunked this test, and concluded: "We have trouble discerning any reciprocity of advantage resulting from the comprehensive plan designation for the property."[104]

Cienega Gardens and *Wensmann* were in turn followed by a panel decision of the Ninth Circuit in *Guggenheim v. City of Goleta*.[105] This was another rent-control case, this time involving rents charged on mobile home pads. Several California communities have adopted similar rent-control schemes.[106] California law allows mobile home tenants to select their successors in selling their homes without regard to the wishes of the landlord.[107] By combining this law with local laws strictly controlling the rents landlords can charge for pads, local governments can transfer the economic rent associated with the scarcity value of the pad from the owner of the land to the tenant.[108] The Supreme Court in *Yee v. City of Escondido* held that such a scheme could not be characterized as a permanent physical occupation of the landlord's property and declined to reach the *Penn*

100. *Id.* at 1340.
101. Wensmann Realty, Inc. v. City of Eagan, 734 N.W.2d 623, 633 (Minn. 2007).
102. *Id.* at 640.
103. *Id.* at 639.
104. *Id.* at 641.
105. Guggenheim v. City of Goleta (*Guggenheim I*), 582 F.3d 996 (9th Cir. 2009).
106. *Id.* at 1034.
107. *Id.* at 1000 (quoting Yee v. City of Escondido, 503 U.S. 519, 523 (1992)).
108. *Id.* at 1020 (quoting *Yee*, 503 U.S. at 530).

Central issue.[109] In *Guggenheim*, Judge Bybee's opinion for the panel majority found the scheme to be a taking under the *Penn Central* test.[110]

With respect to the character factor, Judge Bybee observed that two interpretations were possible. The first was invasion versus use regulation.[111] The second "considers whether the challenged regulation places a high burden on a few private property owners that should more fairly be apportioned more broadly among the tax base."[112] Although he stated (without any support) that the distinction between invasion and regulation interpretation "applied less frequently in practice" than the distributional interpretation, he concluded that the rent-control scheme failed under the second, distributional interpretation of the character factor.[113]

After a further rehearing en banc, the Bybee opinion was vacated and the rent-control statute upheld.[114] The new majority opinion, by Judge Kleinfeld, did not reach the character factor. He found that the statute could not be said to interfere with any investment-backed expectations, because the rent-control scheme was in effect when the current challengers acquired their property, and this was impacted in the price they paid.[115] He deemed this sufficiently decisive that it was unnecessary to consider the character factor.[116] Judge Bea's dissent, echoing the Bybee panel opinion, found that the ordinance was suspect under the character factor because it placed "a high burden on a few private property owners instead of apportioning the burden more broadly among the tax base."[117]

The en banc decision in *Guggenheim* means that it is an open question in the Ninth Circuit whether the character factor incorporates the idea of skewed distributional impact. Reciprocity of advantage has nevertheless been adopted as part of the character analysis by the Federal Circuit and the Minnesota Supreme Court, and it would not be surprising to see this understanding advanced in other decisions in the future.

D. Governmental Enterprise

Another interpretation of the character factor hinted at in *Penn Central* is that it adopts Professor Sax's distinction between government acting in

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109. *Yee*, 503 U.S. at 528.
110. *Guggenheim I*, 582 F.3d at 1034.
111. *Id.* at 1027.
112. *Id.* at 1028.
113. *Id.* at 1027–30.
114. Guggenheim v. City of Goleta (*Guggenheim II*), 638 F.3d 1111, 1116 (9th Cir. 2010) (en banc).
115. *Id.* at 1120.
116. *Id.* at 1121.
117. *Id.* at 1132 (citing Armstrong v. United States, 364 U.S. 40, 49 (1960)).

an enterprise as opposed to an arbitral capacity.[118] The Court characterized the U.S. military as having acted in an "enterprise" capacity in building an airfield next to the Causby farm and then using the Causby's air rights as a path of glide for bombers taking off and landing.[119]

At least one lower court has taken the hint and developed it into a full-fledged doctrine. In a case decided shortly after *Penn Central*, the Minnesota Supreme Court considered a municipal ordinance that restricted development within an airport runway safety zone.[120] A municipal airport is a governmental enterprise, the court reasoned in *McShane v. City of Faribault*, and just compensation should be paid for restrictions on development of property surrounding the airport needed to support its operations.[121] *McShane* cited *Penn Central* and its discussion of the character of the governmental action in support of this conclusion.[122] *Wensmann*, the previously mentioned reciprocity-of-advantage decision, appeared to interpret *McShane* as simply an application of federal takings law, suggesting that the distinction between enterprise and arbitration had fallen out of favor.[123] More recently, however, in *DeCook v. Rochester International Airport Joint Zoning Board*, the Minnesota Supreme Court clarified that *McShane* was grounded in state constitutional law, not federal law, and that Minnesota law requires that landowners be paid for lost development rights due to airport expansion. [124] The court wrote:

> In *McShane*, we drew a distinction between zoning regulations such as those that implement comprehensive land-use plans, under which "a reciprocal benefit and burden accru[es] to all landowners from the planned and orderly development of land use," and zoning regulations enacted "for the sole benefit of a governmental enterprise," such as the Faribault airport. We referred to the former as "arbitration" regulations and gave as an example regulations that implement a comprehensive land-use plan. For the latter—which we called "enterprise" regulations—we held that "where land use regulations, such as the airport zoning ordinance here, are designed to benefit a specific public or governmental enterprise, there must be

118. Penn Cent. Transp. Co. v. New York City, 438 U.S. 104, 135 (1978); *see also* Sax, *supra* note 24, at 69 (arguing that takings law should distinguish between government "enterprise" and government as "arbiter").

119. *Penn Central*, 438 U.S. at 135.

120. McShane v. City of Faribault, 292 N.W.2d 253, 255 (Minn. 1980).

121. *Id.* at 258–59.

122. *Id.* at 258.

123. Wensmann Realty, Inc. v. City of Eagan, 734 N.W.2d 623, 641 n.14 (Minn. 2007).

124. DeCook v. Rochester Int'l Airport Joint Zoning Bd., 796 N.W.2d 299, 306–07 (Minn. 2011).

> compensation to landowners whose property has suffered a substantial and measurable decline in market value as a result of the regulations.[125]

So at least one court, albeit as a matter of state constitutional law, has interpreted the character factor as incorporating Sax's test distinguishing between enterprise and arbitration.[126]

E. Retroactivity

Not surprisingly, there is also some suggestion in the lower court cases that retroactive regulations are to be assessed with greater skepticism under the character factor.[127] This of course was the interpretation of the character factor adopted by Justice O'Connor's plurality opinion in *Eastern Enterprises*.

Perhaps the best example is *American Pelagic Fishing Co. v. United States*.[128] The plaintiffs purchased a large freezer trawler outfitted for fishing Atlantic mackerel and herring in the U.S. exclusive economic zone.[129] The relevant federal agency issued the required permits for one year, which would ordinarily be renewed in subsequent years.[130] The size of the vessel provoked controversy among incumbent permit holders, and after hearings in which the vessel was singled out as a cause for concern Congress passed appropriations riders cancelling permits for any Atlantic mackerel and herring vessel above a certain size—of which the plaintiffs' vessel was the only one.[131] As a result of this action, the vessel's permits were cancelled.[132] The plaintiff owners alleged, without contradiction, that the vessel could not be operated profitably in any other fishing ground and had been sold at a substantial loss.[133] The plaintiffs claimed a regulatory taking, and the Claims Court agreed.[134] Looking to the character factor, the court interpreted the plurality opinion in *Eastern Enterprises* to mean that

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125. *Id.* at 306 (alteration in original) (citations omitted) (quoting *McShane*, 292 N.W.2d at 257–59).

126. *Accord* Interstate Cos. v. City of Bloomington, 790 N.W.2d 409, 415 (Minn. Ct. App. 2010).

127. *E.g.*, Lost Tree Vill. Corp. v. United States, 100 Fed. Cl. 412, 438 (2011); Brace v. United States, 72 Fed. Cl. 227, 356 (2006); Carolina Power & Light Co. v. United States, 48 Fed. Cl. 35, 49 (2000).

128. Am. Pelagic Fishing Co. v. United States, 49 Fed. Cl. 36 (Fed. Cl. 2001) *rev'd on other grounds*, 379 F.3d 1363 (Fed. Cir. 2004). *Cienega Gardens*, involving legislative abrogation of a right to pre-pay insured mortgages, could have rested on this ground, but it did not. Cienega Gardens v. United States, 331 F.3d 1319, 1325 (Fed Cir. 2003).

129. *Am. Pelagic Fishing Co.*, 49 Fed. Cl. at 38.

130. *Id.* at 40–42.

131. *Id.* at 42.

132. *Id.* at 44.

133. *Id.* at 37.

134. *Id.* at 50.

where "the action is retroactive in effect" and "is targeted at a particular individual," this supports a finding of a taking.[135] On appeal, the Federal Circuit reversed without reaching the retroactivity argument, finding that the plaintiffs' fishing permits did not constitute "private property" for purposes of the Fifth Amendment.[136]

F. Substantially Advances a Legitimate Governmental Interest

In *Penn Central* the Court remarked in passing that "a use restriction on real property may constitute a 'taking' if not reasonably necessary to the effectuation of a substantial public purpose."[137] This was paraphrased in *Agins v. City of Tiburon* as asking whether a regulation "substantially advance[s] legitimate state interests."[138] Not surprisingly, some lower courts took this to mean that the "substantially advances" question should be folded into *Penn Central* via the character factor.[139] In *Lingle*, the Court disavowed the "substantially advances" inquiry, finding that it focused on the rationality of the government regulation—whether the means were rationally related to a legitimate end—and that this was a matter for the Due Process Clause, not the Takings Clause.[140]

After *Lingle*, lower courts will predictably avoid considering the reasonableness of a government regulation in determining whether the character of the action points toward the need for compensation. In previous writing, I have questioned whether this is necessarily correct.[141] *Lingle* was right to disavow any facial takings test keyed to the reasonableness of the government regulation, which is the way the *Agins* language had been developed in the Ninth Circuit. Arguably, however, the rationality of a regulation might be relevant in an ad hoc inquiry trying to locate a regulation along a spectrum ranging from clear cases of eminent domain to

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135. *Id.*

136. Am. Pelagic Fishing Co. v. United States, 379 F.3d 1363, 1383 (Fed. Cir. 2004). Other Federal Circuit decisions have likewise denied takings claims involving the revocation of permits and licenses on the ground that these interests are not constitutional property. *See* Mitchell Arms, Inc. v. United States, 7 F.3d 212, 217 (Fed. Cir. 1993) (holding that retroactive revocation of a firearms importation license was not a taking, even if the products had already been imported); Conti v. United States, 48 Fed. Cl. 532, 538–40 (2001) (holding that a retroactive policy banning the use of a specific type of gill-net was not a taking of a fishing company's property).

137. Penn Cent. Transp. Co. v. New York City, 438 U.S. 104, 127 (1978) (citing Nectow v. City of Cambridge, 277 U.S. 183 (1928); Moore v. City of E. Cleveland, 431 U.S. 494, 513–14 (1977) (Stevens, J., concurring)).

138. Agins v. City of Tiburon, 447 U.S. 255, 260 (1980) (citing *Nectow*, 277 U.S. at 188).

139. *E.g.*, Smith v. Town of Mendon, 822 N.E.2d 1214, 1221 (N.Y. 2004).

140. Lingle v. Chevron U.S.A. Inc., 544 U.S. 528, 544–45 (2005).

141. Thomas W. Merrill, *Why* Lingle *Was Half Right*, 11 VT. J. ENVTL. L. 421, 430–31 (2010).

clear cases of the police power. If a regulation substantially advances a legitimate governmental interest, this is some evidence it is a valid police power measure. If it does not, this is some evidence that it is motivated by some other motive, perhaps expropriatory in nature. I admit the inference value here is weak, and that other tests like reciprocity of advantage, the nuisance analogy, and the distinction between enterprise and arbitration may have better traction. In any event, given the emphatic rejection of the "substantially advances" test in *Lingle*, it will not reappear anytime soon in lower court takings cases.

CONCLUSION: THE PROPER ROLE OF THE CHARACTER FACTOR

Penn Central remains a cornerstone in the architecture of the regulatory takings doctrine. The central insight of the decision—that the hardest cases cannot be resolved without engaging in a case-specific analysis of the particular facts—is sound and unlikely to be repudiated. Nevertheless, the understanding of the relevant variables that courts should consider in engaging in these inquiries needs further refinement and development, which only the Supreme Court can provide.

The starting point is recognizing that *Penn Central*, like the regulatory takings doctrine more generally, is a decisional tool for differentiating between governmental powers, in particular between the power of eminent domain and the police power. The general strategy for differentiating among governmental powers, as I have previously argued, is to start with ideal typical situations governed by one power or the other, then reason by analogy from these settled understandings in fitting novel situations into the picture.[142] Viewed from this perspective, the Court's categorical rules can be seen as isolating situations where we are highly confident the governmental action always should be (or always should not be—there are categorical rules of non-liability as well) a taking. The *Penn Central* test occupies a gray zone in between these categorical tests, where we are unsure about whether to treat the governmental action as sufficiently like eminent domain that compensation is required. Hence, more facts are required before we reach a final decision about the matter.

In resolving the cases that fall into the gray zone, there is no reason why we should limit ourselves to the three variables that were fortuitously elevated to the status of a formulaic test in the wake of *Penn Central*: diminution in value, investment-backed expectations, and invasions versus

142. *See generally* DANA & MERRILL, *supra* note 15, at 86–164.

use regulations.[143] The Court in *Penn Central* intimated that there is more to the character of the governmental action than invasions versus regulations; it suggested that the generality and reciprocity of a regulation also bear on the inquiry. Later Supreme Court decisions have pointed to correspondence with traditional nuisance law, average reciprocity of advantage, and retroactivity as relevant considerations under the *Penn Central* approach.[144] Lower court decisions have likewise focused not just on invasions but also nuisance law, reciprocity of advantage, retroactivity, and the distinction between enterprise and arbitration as elements to be considered under the character analysis.[145]

The important lesson in all this is that the ad hoc inquiry mandated by *Penn Central* should not be artificially confined to just three factors, or even to factors that suggest a connection to traditional exercises of eminent domain. Courts should consider all factors that have enduring persuasive force in differentiating governmental powers, including factors suggesting the governmental action falls toward the police power end of the spectrum. Thus, courts should consider diminution in value, whether the action singles out the property owner for unusually burdensome treatment, and whether the action is designed to implement a governmental enterprise; i.e., factors that point toward a similarity with exercises of eminent domain. Additionally, courts should consider whether the action regulates something that could be regarded as a nuisance at common law, operates prospectively rather than retroactively, and seeks to arbitrate among competing land uses; i.e., factors that point toward a similarity with exercises of the police power.

As to which factors should be given more or less emphasis, further work needs to be done. Now that the Court has made it clear that the function of the regulatory takings doctrine is to identify actions that are "functionally equivalent" to eminent domain,[146] one would think the critical inquiry would be empirical in nature: Does the challenged governmental action transfer rights that ordinarily would be acquired by a purchase of rights or the exercise of eminent domain in the relevant political jurisdiction?[147] For whatever reasons, the Supreme Court has not yet perceived the relevance of actual practice in property markets in resolving

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143. *See supra* note 34 and accompanying text (discussing the transformation of the *Penn Central* decision into a formulaic test composed of three variables).

144. *See supra* note 75 and accompanying text (describing the Court's adherence to the nuisance doctrine); *supra* note 85 and accompanying text (noting *Keystone*'s revival of average reciprocity of advantage); *supra* note 58 and accompanying text (citing recognition of retroactivity as a factor in Justice O'Connor's plurality opinion in *Eastern Enterprises*).

145. *See* discussion of lower court cases *supra* Part III.

146. Lingle v. Chevron U.S.A. Inc., 544 U.S. 528, 539 (2005).

147. *See supra* note 15 and accompanying text.

regulatory takings cases. Perhaps the Court is uncomfortable with the idea that constitutional rights might vary with conditions in local property markets; perhaps the Court has simply not had occasion to consider the point given the dearth of opportunities to develop the ad hoc approach associated with *Penn Central*. There is, however, no reason why takings claimants (or opponents) should await the green light from the Supreme Court before developing such evidence through expert testimony and presenting it to courts for their consideration. Such evidence would be logically relevant to the "functional equivalence" question, and would seem more probative than the various proxies for equivalence identified in *Penn Central* and lower court decisions following *Penn Central*.

If we are limited to the proxies, i.e., the factors identified in *Penn Central* and other decisions applying the ad hoc approach, I am inclined to think that some of the themes identified by the lower courts in interpreting the character factor—including the nuisance analogy, average reciprocity of advantage, and retroactivity—are more probative in situating governmental action between eminent domain and police power poles than are two of the variables highlighted in *Penn Central*, namely, diminution in value and investment-backed expectations. As previously noted, these two factors are notoriously indeterminate and circular.[148] But one can hardly expect the Court to engage in wholesale revisionism in applying the *Penn Central* approach. What is needed is serious attention to the factors, through a process of adjustment and trial and error, until the right mix of variables with the right emphasis is developed.

Penn Central, read as one decision in a line of precedent rather than a formulaic test handed down like a legislative code, is broadly consistent with this approach. The key move going forward is to interpret the "character of the governmental action" as encompassing a variety of considerations historically deemed to be relevant in distinguishing between eminent domain and the police power. Interpreting the character factor in this fashion would be broadly consistent with both Supreme Court and lower court precedent and would move the ad hoc analysis mandated by *Penn Central* in the right direction.

148. *See supra* notes 14–17 and accompanying text.