Enough Is Enough, Unless of Course, It’s Not: A Missed Opportunity to Reexamine the Ambiguity of Penn Central

“In general it is not plain that a man’s misfortunes or necessities will justify his shifting the damages to his neighbor’s shoulders.”

I. INTRODUCTION

The Takings Clause of the Fifth Amendment protects property owners’ tangible and intangible interests by preventing the government from imposing public burdens on certain individuals without just compensation. The Founders envisioned the Takings Clause as a way to compensate property owners whose tangible property was physically seized by the government. In 1922, Justice Oliver Wendell Holmes expanded protections offered under the Takings Clause by stating land use regulations that go “too far” constitute a taking. This was the first time the Court used the Takings Clause to address government regulations that interfered with private property.

2. See U.S. Const. amend. V (guarding property owners from unlawful seizure of land); see also Armstrong v. United States, 364 U.S. 40, 49 (1960) (discussing reasoning behind just compensation for Fifth Amendment takings); Joseph L. Sax, Takings and the Police Power, 74 Yale L.J. 36, 36, 50 (1964) (providing examples of government compensating property owners). The Fifth Amendment states, “nor shall private property be taken for public use, without just compensation.” See U.S. Const. amend. V. Governments often compensate property owners when constructing public infrastructure such as highways. See Sax, supra, at 36. When the value of a landowner’s property has been diminished due to government action, the government may provide monetary “just compensation” in an effort to make the landowner whole again. See id. Nevertheless, just compensation is not always owed to those affected by government action. See id. Some government interference is seen as “mere incident” of the use of lawful police power. See id.; see also Vill. of Euclid v. Ambler Realty Co., 272 U.S. 365, 387 (1926) (justifying zoning laws with police power and public welfare); Hadacheck v. Sebastian, 239 U.S. 394, 411 (1915) (allowing state police power to prevent nuisance use on land).
4. See Pa. Coal Co., 260 U.S. at 415 (recognizing damages to one citizen not justified by desire to improve public). Justice Holmes noted that compensation acts as a limitation on governments’ police power. See id. Requiring just compensation helps prevent burdening one private party to benefit society. See id. at 416. Nevertheless, Justice Holmes also recognized that the government would hardly be able to function if every party burdened by a regulation received compensation from the government. See id. at 413. Accordingly, his analysis relied on the magnitude of the loss suffered under the regulation. See id.
The Supreme Court has developed three major tests to analyze takings claims involving regulations that economically impact private land. 6 Loretto v. Teleprompter Manhattan CATV Corp. showed how landowners may successfully bring a takings claim when a regulation causes a physical invasion to occur on one’s land. 7 Likewise, Lucas v. South Carolina Coastal Council exhibited that a regulatory taking can occur when a regulation strips a property of its economic value. 8 Penn Central Transportation Co. v. New York City, however, provides an ad hoc balancing test for cases involving only partial diminution of a private property’s economic value with little instruction as to how courts should apply the balancing factors. 9

The three-pronged test has faced criticism for its ambiguity and lack of guidance. 10 While the Supreme Court addressed the test briefly in recent cases such as Palazzolo v. Rhode Island and Lingle v. Chevron U.S.A. Inc., 11 the Court has yet to thoroughly address the many questions raised about Penn Central, resulting in inconsistent reasoning and outcomes when courts apply the test. 12 Recently, in Smyth v. Conservation Commission, 13 the Massachusetts Appeals Court held that an owner of a residential lot could not recover just compensation after suffering a 91.5% economic loss on her property resulting from a wetland regulations that economically impact private land. 6 Loretto v. Teleprompter Manhattan CATV Corp. showed how landowners may successfully bring a takings claim when a regulation causes a physical invasion to occur on one’s land. 7 Likewise, Lucas v. South Carolina Coastal Council exhibited that a regulatory taking can occur when a regulation strips a property of its economic value. 8 Penn Central Transportation Co. v. New York City, however, provides an ad hoc balancing test for cases involving only partial diminution of a private property’s economic value with little instruction as to how courts should apply the balancing factors. 9

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7. See Loretto, 458 U.S. at 441 (equating permanent physical occupation to taking).
8. See Lucas, 505 U.S. at 1015-16 (recognizing categorical rule of total economic loss equals taking).
9. See Penn Cent., 438 U.S. at 124 (outlining ad hoc analysis); see also Dale A. Whitman, Deconstructing Lingle: Implications for Takings Doctrine, 40 J. MARSHALL L. REV. 573, 576-78 (2007) (discussing three prongs of Penn Central test). The Penn Central test uses three prongs to determine whether the landowner can establish a regulatory takings claim. See Whitman, supra, at 575-76. The first prong analyzes the economic impact that the regulation has imposed, which the court assumes is less than 100%. See id. at 576-77. The second prong looks at the owner’s investment-backed expectations of the property, but this factor is somewhat contradicted by a Supreme Court ruling in Palazzolo v. Rhode Island, which allows for property owners to challenge a regulation even when the purchasing property owner has prior knowledge of the regulation’s existence. See id. at 577; Palazzolo v. Rhode Island, 533 U.S. 606, 628 (2001). The third prong examines the “character of the governmental action” to determine how closely it resembles a physical taking. See Whitman, supra, at 577-78.
12. See id. at 540, 545 (reviewing validity of analyzing if regulation substantially advances government interest); Palazzolo, 533 U.S. at 630 (establishing ripeness of takings claim not eliminated when transferring title); see also Whitman, supra note 9, at 575, 582-83 (discussing recent cases and inconsistent effect on Penn Central).
regulation implemented after her family purchased the lot.\textsuperscript{14} The court used the \textit{Penn Central} test and concluded that although the owner lost a portion of the value, she still possessed some economic value in the property, and therefore any just compensation would result in a “windfall,” i.e., the owner receiving more compensation than necessary.\textsuperscript{15}

Although \textit{Penn Central} provided an ad hoc framework for establishing regulatory takings claims, courts have struggled to consistently apply the test.\textsuperscript{16} This Note will first examine the evolution of regulatory takings jurisprudence under the Takings Clause, as well as the three major tests used to analyze takings claims involving regulations that economically impact private property.\textsuperscript{17} Next, this Note will discuss the Massachusetts Appeals Court’s application of the \textit{Penn Central} test in \textit{Smyth}.\textsuperscript{18} Finally, this Note will analyze the application of the \textit{Penn Central} test and explain why \textit{Smyth} would have been a perfect opportunity for the Supreme Court to reexamine \textit{Penn Central} and provide much-needed clarity to the balancing test.\textsuperscript{19}

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\item \textsuperscript{15} See \textit{Smyth}, 119 N.E.3d at 1193, 1195-96 (holding \textit{Penn Central} test factor not satisfied). The court in \textit{Smyth} concluded that compensation for a regulatory taking would result in a windfall for the plaintiff because the property’s unbuildable value of $60,000 was still greater than the original purchase price of $49,000. See \textit{id.} at 1195-96. Therefore, if the Commonwealth compensated Smyth because she could not build on her property due to government regulations, she would receive more money than the original purchase price of the land, which had already increased in value. See \textit{id.} The court also acknowledged that the regulation does not single out Smyth, noting that the Massachusetts Supreme Judicial Court had previously considered whether a landowner was “singled out” when analyzing the character of governmental action. See \textit{id.}; Giovanella v. Conservation Comm’n, 857 N.E.2d 451, 462 (Mass. 2006) (recognizing bylaw does not single out plaintiff).

\item \textsuperscript{16} See supra note 10 and accompanying text (showing vast criticism of test’s lack of continuity).

\item \textsuperscript{17} See infra Sections II.A-B.

\item \textsuperscript{18} See infra Section II.C.

\item \textsuperscript{19} See infra Part III.
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II. HISTORY

A. Historical Background of the Takings Clause

Through the Fifth Amendment of the United States Constitution, the Takings Clause acts as a limitation to the federal government’s inherent taking power. It also applies to state governments through the Fourteenth Amendment. The Takings Clause prevents the government from acquiring property for public use without providing just compensation to injured parties.

In 1875, the Supreme Court officially acknowledged the power of eminent domain, the government’s power to take public land for private use, calling it “an inseparable incident of sovereignty.” The Court described eminent domain as an inherent power that every independent government possesses, needing no constitutional recognition. This inherent power may still be limited by requiring that just compensation be paid to landowners when taking their property for public use. States widely accepted the Takings Clause as “natural law,” and many states recognized it even without it being formally written into their state constitutions. Nevertheless, the exercise of eminent domain must provide some

20. See U.S. CONST. amend. V (requiring just compensation for taken property); see also Sax, supra note 2, at 36 (describing power and use of eminent domain); Ann K. Wooster, Annotation, What Constitutes Taking of Property Requiring Compensation Under Takings Clause of Fifth Amendment to United States Constitution—Supreme Court Cases, 10 A.L.R. Fed. 2d § 2 (2006) (summarizing Fifth Amendment and takings).

A taking occurs when the government encroaches upon or occupies private land for its own proposed use. A finding of a taking requiring just compensation depends on whether someone has been deprived of the economic benefits of ownership, not whether the state captures any of those benefits. The United States Supreme Court has stated that a taking, within the meaning of the Takings Clause, includes any action the effect of which is to deprive the owner of all or most of his or her interest in the subject matter, such as destroying or damaging it.

Wooster, supra, §2.

21. See U.S. CONST. amend. XIV, § 1 (providing states may not deprive citizens of property without due process); see also Wooster, supra note 20, §2 (describing application of Fifth Amendment through Fourteenth Amendment).


25. See Patterson, 98 U.S. at 406 (recognizing states’ ability to limit eminent domain); see also Jones, 109 U.S. at 518 (labeling just compensation condition of eminent domain).

The government may not simply take property for the sole benefit of private parties, even if the owner of the taken land is justly compensated. In it reasoning in *Kelo v. City of New London*, the Court provided the classic example of land being transferred to a railroad company with “common-carrier duties” as a valid transfer of taken land from one private party to another. While the railroad company benefits from the land, the public will eventually benefit as well by using the railroad for some purpose such as delivery or transportation. The holding in *Kelo*, where the land was transferred for the purpose of economic development, expanded the idea of “public use” to a broader standard of “public purpose.” This standard allows sovereignties to transfer land from one private party to another, provided that the public derives some benefit from the land, even when the benefit is not necessarily related to direct use. This allowed states more leeway to exercise eminent domain for economic development purposes. This decision was met with much political backlash and many states...

27. *See Kelo v. City of New London*, 545 U.S. 469, 477 (2005) (recognizing sovereign’s ability to transfer land to private party if purpose public use). In this case, the city took land from one private party and sold it to private developers, with the intention that the transferred land would eventually spur commerce, create jobs, and revitalize the community. See *id.* at 472, 474-75.

28. *See id.* at 477 (positing long-accepted idea of not taking property for sole benefit of private party). In another opinion, the Court explicitly stated, “one person’s property may not be taken for the benefit of another private person without a justifying public purpose, even though compensation be paid.” *Thompson v. Consol. Gas Util. Corp.*, 300 U.S. 55, 80 (1937).

29. *See Kelo*, 545 U.S. at 477 (noting importance of future public use when transferring taken land to private party); *see also Haw. Hous. Auth. v. Midkiff*, 467 U.S. 229, 245 (1984) (stating solely private taking could not meet public use requirement). In *Midkiff*, the Court acknowledged that a solely private taking “would serve no legitimate purpose of government and would thus be void.” *See Midkiff*, 467 U.S. at 245. The Hawaiian government used the power of condemnation to prevent the concentration of property ownership in Hawaii, which was seen as a legitimate public purpose and therefore a rational use of eminent domain. See *id.*

30. *See Kelo*, 545 U.S. at 477 (illustrating acceptable condemnation with example of transfer to railroad with common-carrier duties).

31. *See id.* at 480 (explaining Court’s natural interpretation of “public use” and “public purpose”). The Court cites Justice Holmes’s opinion in *Strickley v. Highland Boy Gold Mining Co.*, stressing “[t]he inadequacy of use by the general public as a ‘universal test.’” *Id.* (quoting *Strickley v. Highland Boy Gold Mining Co.*, 200 U.S. 527, 531 (1906)).

32. *See Kelo*, 545 U.S. at 480 (explaining no basis for exempting economic development from public purpose). The Court rejected the notion of requiring “‘reasonable certainty’ that the expected public benefits will actually accrue,” fearing that many plans utilizing the power of eminent domain would be significantly stalled. See *id.* at 487-88. Another case similarly stated:

It is not for the courts to oversee the choice of the boundary line nor to sit in review on the size of a particular project area. Once the question of the public purpose has been decided, the amount and character of land to be taken for the project and the need for a particular tract to complete the integrated plan rests in the discretion of the legislative branch.


subsequently enacted restrictions on the power of eminent domain to avoid takings for the purpose of economic development.34 As of 2019, forty-five states have enacted post-\textit{Kelo} reforms.\textsuperscript{35}

In 1922, Justice Oliver Wendell Holmes described a new form of takings that can occur when government regulations infringe upon a landowner’s economic use of property.\textsuperscript{36} Justice Holmes explained that if a regulation infringes in a way that “goes too far,” a regulatory takings claim may seek just compensation for the infringement.\textsuperscript{37} Requiring just compensation acts as a limitation on the government’s inherent power to regulate and prevents the government from placing public burdens on private landowners.\textsuperscript{38} Many courts, however, have struggled to define what Justice Holmes meant by a regulation that “goes too far,” while recognizing the impracticability of providing compensation for every regulatory taking.\textsuperscript{39} As acknowledged in \textit{Pennsylvania Coal Co.}, it would be impossible for the government to properly function “if to some extent values incident to property could not be diminished without paying for every such change in the general law.”\textsuperscript{40}

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34. See id. at 489 (emphasizing state power to restrict takings power); see also Ilya Somin, Opinion, \textit{The Political and Judicial Reaction to Kelo}, WASH. POST: THE VOLOKH CONSPIRACY (June 4, 2015, 1:12 PM), https://www.washingtonpost.com/news/volokh-conspiracy/wp/2015/06/04/the-political-and-judicial-reaction-to-kelo/ [https://perma.cc/GK4B-4SBD] (describing backlash of \textit{Kelo} decision). \textit{Kelo} used an expanded definition of “public use,” allowing the requirement to be satisfied by use for a “public purpose.” See \textit{Kelo}, 545 U.S. at 480. This decision was met with much opposition because government could now justify taking a property based on whether the taking benefitted the public in general, as opposed to evaluating the public’s actual physical use of the land. See id.; see also Somin, supra (explaining survey data collected about \textit{Kelo} decision). One poll showed that 80\% of the public disagreed with the decision. See Somin, supra (noting opposition cut across ideological lines). Ohio, Oklahoma, and South Dakota even refused to use the decision in \textit{Kelo} when interpreting their state constitutions. See id.

35. See Ilya Somin, \textit{Will Connecticut Finally Enact Meaningful Eminent Domain Reform?}, REASON: THE VOLOKH CONSPIRACY (Apr. 23, 2019, 11:34 PM), https://reason.com/2019/04/23/will-connecticut-finally-enact-meaningful-eminent-domain-reform/ [https://perma.cc/8EKJ-D5XK] (showing number of states reforming eminent domain laws). Some state reforms provide strong, meaningful protection to property owners, while others provide lesser, weaker restrictions that still allow state seizure for private interests. See id. For example, a Connecticut law prevents condemnation of property for the sole purpose of increasing local tax revenue, but does not prevent specific alternative condemnation justifications, such as economic development or blight alleviation. See id.; see also Ilya Somin, \textit{The Limits of Backlash: Assessing the Political Response to Kelo}, 93 MUNN. L. REV. 2100, 2118 tbl.5 (2009) (detailing reforms states implemented post-\textit{Kelo}).


37. See \textit{Pa. Coal Co}, 260 U.S. at 415 (describing Fifth Amendment protections requiring compensation for property owners if property taken for public use). Justice Holmes argues that a government would be unsustainable if it had to compensate property owners every time a regulation diminished property values. See id. at 413. Instead, Justice Holmes suggests that the government has an implied limitation on the amount its regulations may diminish a property’s value, and compensation is required when that amount is exceeded. See id.

38. See id. at 413 (discussing need to balance government regulatory interest with private ownership rights).


40. 260 U.S. at 413.
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B. Major Regulatory Takings Tests

The Supreme Court has frequently noted that the existence of “extreme circumstances” may establish a valid regulatory takings claim. Nevertheless, the Court has consistently recognized the desire to place societal burdens on the public as a whole, rather than a few select property owners. This belief became known as the “Armstrong Principle” and was one of the first principles of takings jurisprudence that the Court recognized. Expanding on the Armstrong Principle, the Court has developed three major tests for examining regulatory takings claims. The main goal of the tests is to determine whether a regulation acts as the “functional[ally] equivalent” of eminent domain.

In Penn Central Transportation Co. v. New York City, the Supreme Court established a test that analyzes three factors of a regulatory takings claim: the economic impact of the regulation on the property owner, the extent to which the regulation has interfered with the investment-backed expectations of the property owner, and the character of the governmental action being imposed by the regulation. In Penn Central, the owner of Grand Central Terminal entered into a

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42. See Armstrong v. United States, 364 U.S. 40, 49 (1960) (discussing legislative intent of Fifth Amendment); Carlos A. Ball & Laurie Reynolds, Exactions and Burden Distribution in Takings Law, 47 WM. & MARY L. REV. 1513, 1534 (2006) (noting Supreme Court’s ongoing support for Armstrong decision). In Armstrong, Justice Black declared “[t]he Fifth Amendment’s guarantee that private property shall not be taken for a public use without just compensation was designed to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole.” Armstrong, 364 U.S. at 49. The Supreme Court referred to this statement in subsequent cases involving eminent domain to reiterate the Court’s agreement with Armstrong. See Ball & Reynolds, supra (discussing endorsement of Armstrong by Supreme Court within last thirty years).


44. See Lingle, 544 U.S. at 538-39 (providing three tests for regulations functionally equivalent to takings); Lucas v. S.C. Coastal Council, 505 U.S. 1003, 1027-28 (1992) (allowing compensation when regulation deprives land of all economic use); Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419, 441 (1982) (providing compensation when physical invasion has occurred); Penn Cent., 438 U.S. at 124 (permitting compensation when three-factor balancing test is satisfied).

45. See Lingle, 544 U.S. at 539 (identifying “common touchstone” amongst tests).

46. See Penn Cent., 438 U.S. at 124 (listing three most important factors); see also Palazzolo v. Rhode Island, 533 U.S. 606, 628 (2001) (rejecting “notice” rule typically preventing purchasers with notice of encumbrance from receiving compensation). In Palazzolo, the Court opined that a landowner’s prior knowledge of a regulation’s effect on a property cannot be used to justify an automatic rejection of a takings claim. See Palazzolo, 533 U.S. at 628-30. Nevertheless, some lower courts consider notice of regulatory restrictions as a factor in the takings analysis. See Appolo Fuels, Inc. v. United States, 381 F.3d 1338, 1348 (Fed. Cir. 2004) (relying on language in Palazzolo indicating regulatory regime at time of conveyance helps shape claim). A recent Federal Circuit case has broken down the second prong analysis of the property owner’s investment-
lease agreement that allowed the lessee to build a multistory building above the terminal. A year prior to the lease agreement, New York City designated Grand Central Terminal as a “landmark” under the city’s Landmarks Preservation Law. This designation required owners of landmark properties to preserve the exterior features of the building and seek approval from the Landmark Preservation Commission (Commission) for any alteration of external features or construction of external improvements. Accordingly, the owner and lessee applied to the Commission seeking approval of the proposed construction. The Commission denied the application, stating “to balance a 55-story office tower above a flamboyant Beaux-Arts façade seems nothing more than an aesthetic joke,” explaining that New York must try to preserve its limited landmark sites by only allowing additions or alterations that would enhance the landmarks, rather than divorce them from their original setting. The owner and lessee brought a takings claim against the Commission, requesting injunctive relief and damages to compensate the taking of the property’s development rights.

When deciding Penn Central, the Supreme Court had no “set formula” to analyze regulatory takings claims, and therefore set forth a balancing test, weighing three factors of the regulatory impact: the economic impact; the investment-backed expectations of the property owner; and the character of the governmental action. The Court recognized that the regulation interfered with the owner backed expectations into more definite elements, including: whether the plaintiff was operating in a “highly regulated industry,” whether the plaintiff knew of the government restrictions at the time of purchase, and whether the regulations could have been “reasonably anticipated.” See Commonwealth Edison Co. v. United States, 271 F.3d 1327, 1348 (Fed. Cir. 2001) (outlining expanded approach to second prong).
and lessee’s development rights but proceeded to analyze the property as a whole, noting that its existing economic use without the proposed construction showed that the property’s value was not completely diminished.\textsuperscript{54} The regulation intended to promote general public welfare and did not restrict any existing use of the property; therefore, although the regulation caused a significant diminution of property value, the Court held that this alone did not constitute a taking.\textsuperscript{55} The Court’s identification and application of the three major relevant factors was the closest thing to a “set formula” developed in regulatory takings jurisprudence thus far.\textsuperscript{56} Many questions as to what constitutes a regulatory takings claim remained unanswered following \textit{Penn Central}, such as Justice Holmes’s famous inquiry of how far a regulation must go to constitute a taking.\textsuperscript{57}

The Court established another major test in \textit{Loretto v. Teleprompter Manhattan CATV Corp.}, acknowledging a taking exists when the impact of a regulation involves physically occupying a person’s property.\textsuperscript{58} Loretto, the plaintiff landlord, claimed that a taking occurred when the defendant cable company installed cables on Loretto’s property.\textsuperscript{59} The prior owner of the building had allowed the cable company to install a cable that would provide tenants with cable services.\textsuperscript{60}

\texttt{\textsuperscript{54} See \textit{Penn Cent.}, 438 U.S. at 130-31 (focusing on whole lot designated “landmark site”). The Court explained that the development rights could not be deemed completely valueless for two reasons: first, there was no evidence that plans for a smaller structure would be denied by the commission when such plans had never been submitted; and second, the development rights could still be transferred to surrounding parcels. See \textit{id.} at 137 (observing these facts mitigate financial burdens). In 1968, the only lots eligible to receive the rights were those immediately adjacent to the station and those across the street from it, and these lots were either adequately improved or unavailable for development. See Marcus, \textit{supra} note 52, at 885. Penn Central, however, successfully lobbied the planning commission to relax the development rights transfer limits prior to the case reaching the Supreme Court. See \textit{id.}}


\texttt{\textsuperscript{56} See \textit{id.} at 124 (quoting Goldblatt, 369 U.S. at 594) (recognizing takings analysis heavily fact-based assessment).}

\texttt{\textsuperscript{57} See Whitman, \textit{supra} note 9, at 576 (criticizing \textit{Penn Central} test “disaster in terms of clarity and predictability”); \textit{supra} notes 37-39 and accompanying text (discussing struggle to define when impact goes “too far”). Whitman protests that “[n]one of the test’s three ‘prongs’ can be calculated by landowners or government officials with any certainty.” Whitman, \textit{supra} note 9, at 576. Although the test shows the possibility that an adverse impact to property value of some amount less than 100% could constitute a taking, the test provides no insight as to just how much impact is required. See \textit{id.} at 576-77 (criticizing first of test’s three prongs). Courts have generally held that losses of 75%-90%, although significant, cannot establish a regulatory takings claim on their own. See \textit{Concrete Pipe & Prods. of Cal., Inc.}, 508 U.S. at 645 (addressing economic diminution and takings); cf. FLCT, Ltd. v. City of Frisco, 493 S.W.3d 238, 273 (Tex. App. 2016) (calling 46% economic loss “significant” in regulatory takings analysis); Formanek v. United States, 26 Cl. Ct. 332, 340 (1992) (clarifying 88% loss more than mere diminution in value).}

\texttt{\textsuperscript{58} See \textit{Loretto v. Teleprompter Manhattan CATV Corp.}, 458 U.S. 419, 425-26 (1982) (concluding government-authorized permanent physical occupation constitutes taking).}

\texttt{\textsuperscript{59} See \textit{id.} at 423.}

\texttt{\textsuperscript{60} See \textit{id.} at 421-22. The court explained the relevant facts:}
In 1973, New York enacted New York Executive Law Section 828, which prevents landlords from “interfer[ing] with the installation of cable television facilities upon his property or premises.” Loretto discovered the cables after she purchased the land and brought a class action against the cable company on behalf of all owners of real property in New York affected by cables the company installed.

Upon review, the Supreme Court acknowledged the previously established *Penn Central* test, but distinguished Loretto’s takings claim because the regulation’s prohibition against removing the building’s cable wires constituted a physical occupation of the property. The Court described physical occupation as “a government action of such a unique character that it is a taking without regard to other factors that a court might ordinarily examine.” The Court reviewed the claim and narrowly affirmed the “traditional rule” that the existence of a permanent physical occupation effectuates a taking per se. The Court’s affirmation made a definite connection between physical occupation and government takings. Unlike *Penn Central*, there was no need to measure the extent of the intrusion to establish a claim, only to calculate damages owed to a property owner. 

On June 1, 1970 TelePrompter installed a cable slightly less than one-half inch in diameter and of approximately 30 feet in length along the length of the building about 18 inches above the roof top, and directional taps, approximately 4 inches by 4 inches by 4 inches, on the front and rear of the roof. By June 8, 1970 the cable had been extended another 4 to 6 feet and cable had been run from the directional taps to the adjoining building at 305 West 105th Street.

Loretto v. Teleprompter Manhattan CATV Corp., 423 N.E.2d 320, 324 (N.Y. 1981), rev’d, 458 U.S. 419 (1982). See N.Y. EXEC. LAW § 828(1)(a) (repealed 1995) (stopping landowners from removing installed cable infrastructure); Loretto, 458 U.S. at 423 (describing restriction placed on landlord through regulation). Along with protecting the placement of cables, the law also prevented landowners from collecting payments from tenants for allowing the installation of the cables, or from cable companies, past a certain amount. See Exec. § 828(1)(b). Nevertheless, the law did allow the landowner to hold the tenant or cable company responsible for expenses or damages arising from the installation. See id. § 828(1)(a)(ii).

See Loretto, 458 U.S. at 424 (detailing plaintiff’s claim against defendant). The plaintiff sought damages and injunctive relief for herself and other class members included in the suit. See id. “Class-action status was granted in accordance with appellant’s request, except that owners of single-family dwellings on which a CATV component had been placed were excluded.” Id. at 424 n.4.

See id. at 432 (recognizing “permanent physical occupation” not exempt from Takings Clause); see also Penn Cent. Transp. Co. v. New York City, 438 U.S. 104, 124 (1978) (emphasizing taking more readily found when physical invasion involved).


See id. at 441 (explaining character of invasion more intrusive than any other category of property regulation).

See id. The Court was careful to not encroach on a state’s power to impose requirements on landlords, such as compliance with building codes and provision of utility connections. See id. at 440. These regulations, however, may not extend into the realm of requiring physical occupation of the landowner’s property. See id.
All other claims lacking a physical occupation or intrusion would be left to a *Penn Central* test. \(^\text{68}\)

The last major test, established in *Lucas v. South Carolina Coastal Council*, recognizes that a regulatory taking occurs when a regulation completely strips a property of its economic benefit. \(^\text{69}\) In 1986, Lucas, a land developer, bought two residential beachside lots in South Carolina, on which he intended to build single-family homes. \(^\text{70}\) Two years later, South Carolina enacted the Beachfront Management Act, prohibiting new construction along South Carolina’s shores in an effort to protect South Carolina’s beaches and dunes. \(^\text{71}\) The Act prohibited Lucas from constructing any permanent structure on either lot. \(^\text{72}\) Lucas did not challenge the validity of the Act, but instead claimed that South Carolina owed him just compensation of $1,232,387.50 for the extinguishment of his preexisting property right. \(^\text{73}\)

The Supreme Court began its review by acknowledging the two main categories within regulatory takings jurisprudence that constitute a taking per se. \(^\text{74}\) The

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\(^\text{67}\) See Whitman, *supra* note 9, at 576 (describing relevancy of magnitude of invasion).

\(^\text{68}\) See *Loretto*, 458 U.S. at 440 (emphasizing physical occupation establishing taking). The narrow affirmation of the “traditional rule” allowed Loretto to establish a takings claim. *See id.* at 441. The Court remanded the case to allow the state court to consider the amount of just compensation owed. *See id.*

\(^\text{69}\) See *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1017 (1992) (acknowledging Justice Brennan’s language on total taking’s equivalency to physical appropriation). The Court recognized that no rule has been set forth solidifying the connection between takings and a total economic loss. *See id.* “Perhaps it is simply, as Justice Brennan suggested, that total deprivation of beneficial use is, from the landowner’s point of view, the equivalent of a physical appropriation.” *Id.*

\(^\text{70}\) See *id.* at 1006-07 (summarizing plaintiff’s investment and subsequent loss). The vacant lots were located on the Isle of Palms in Charleston County. *See id.* at 1006. Lucas engaged in extensive residential development on the Isle of Palms and purchased two lots on the Isle for $975,000. *See id.* at 1006-08. Both lots were located approximately 300 feet from the beach. *See id.* at 1008-09. At the time of the purchase, neither lot was designated as a “critical area” under the 1977 Act. *See id.* at 1008. Therefore, at the time, Lucas possessed the same right to build as abutters who had already constructed single-family homes on their lot. *See id.*

\(^\text{71}\) See *id.* (showing Beachfront Management Act’s restrictions). Under the Beachfront Management Act, the Council created a “baseline” by connecting various points of erosion along the coast. *See id.* “[U]nder the Act, construction of occupiable improvements was flatly prohibited seaward of a line drawn 20 feet landward of, and parallel to, the baseline.” *Id.* at 1008-09. Despite the prohibition, “[t]he Act did allow the construction of certain nonhabitable improvements, e.g., ‘wooden walkways no larger in width than six feet,’ and ‘small wooden decks no larger than one hundred forty-four square feet.’” *See id.* at 1009 n.2 (quoting S.C. CODE ANN. §§ 48–39–290(A)(1)-(2) (Supp. 1988)).

\(^\text{72}\) See *id.* at 1008-09.

\(^\text{73}\) See *Lucas*, 505 U.S. at 1009 (detailing plaintiff’s claim). Lucas did not question the legitimacy of South Carolina’s police power. *See id.* Instead, Lucas concede[d] that the beach/dune area . . . is an extremely valuable public resource; that the erection of new construction, *inter alia*, contributes to the erosion and destruction of this public resource; and that discouraging new construction in close proximity to the beach/dune area is necessary to prevent a great public harm.


\(^\text{74}\) See *Lucas*, 505 U.S. at 1014-15 (recognizing total economic loss category); *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 441 (1982) (establishing physical occupation category).
first category applies to scenarios where a physical invasion of a property exists, as established in *Loretto*. The second category applies to cases “where [a] regulation denies all economically beneficial or productive use of land.” The Court equated the restrictions placed on Lucas’s land to a “physical appropriation,” despite the legitimate state interest of protecting natural resources, because it would have left Lucas’s property “economically idle.” The Court also warned that allowing the property’s total economic diminution to be justified by the state’s legitimate interest to prevent harmful uses would essentially nullify the limitations placed on police power outlined in *Pennsylvania Coal Co.*

**C. Modern Application of Takings Claims Involving Economic Impact**

The regulatory takings tests established in *Loretto* and *Lucas* show that physical occupation and total economic diminution are two strong indicators that a regulatory taking has occurred. *Penn Central*, however, has provided little clarity as to when a regulation goes “too far.” Under these tests, the Court seems to embrace an all-or-nothing approach to regulatory takings involving economic impact by denying compensation to claims based solely on partial economic...
diminution, i.e., an economic loss that is less than 100%. Cases involving partial economic diminution must instead undergo the \textit{Penn Central} balancing test.

In Smyth, the court used the \textit{Penn Central} balancing test to address a claim by a landowner whose property suffered a 91.5% economic loss after being denied a variance from wetland regulations. Smyth owned an unimproved lot located in Wild Harbour Estates, a residential subdivision containing about 174 lots. Smyth inherited the lot from her parents, who purchased it for $49,000 in 1975 with the intention of one day building a residence for their retirement. The parents, and later Smyth, left the lot unoccupied and unimproved but continued to pay the taxes and homeowner association fees on the land.

In 2006, Smyth hired a consultant to perform soil evaluation tests for a potential septic system. Then, in 2007, Smyth began to move forward with the project, hiring professionals to produce formal plans and begin the permitting process. In 2012, Smyth filed a notice of intent seeking approval of the project from the defendant, the town’s Conservation Commission. The Conservation Commission denied the variance requests and left Smyth unable to build due to the restrictions on the land.

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84. \textit{See id.} at 1190-91.

85. \textit{See id.} Smyth’s parents purchased the land prior to any wetland regulation restrictions. \textit{See Petition for Writ of Certiorari, supra} note 14, at 6. Almost all the other lots within Wild Harbour Estates have been developed, including the lots to the immediate left and right of Smyth’s lot. \textit{See id.} Smyth’s lot was taxed as a “prime” building site for almost forty years, but Smyth claims her parents were unable to build the home themselves. \textit{See id.}

86. \textit{See Smyth, 119 N.E.3d at 1191} (showing land-related expenses incurred). Smyth also expended legal fees to transfer title from her parents but did not otherwise put money toward development plans until 2006. \textit{See id.}

87. \textit{See id.} (iterating plaintiff’s steps toward construction). Smyth’s husband is an architect and prepared potential house sketches. \textit{See id.}

88. \textit{See id.}


90. \textit{See id.} “Under the town zoning bylaw, permitted uses in the zoning district in which the property is located include, among other things, one-family detached houses; parks; playgrounds; beaches; watershed;
Smyth brought suit, seeking relief and just compensation under both the Fifth Amendment and article 10 of the Massachusetts Declaration of Rights. \(^91\) Smyth argued that the property had a value of $700,000 if buildable and $60,000 if unbuildable. \(^92\) At trial, the Barnstable County Superior Court submitted the question of whether a taking occurred to a jury, which found that the wetlands regulations had, in fact, caused a regulatory taking. \(^93\) The jury awarded $640,000 in damages to Smyth; both parties subsequently appealed. \(^94\)

Upon review, the Massachusetts Appeals Court held that Smyth’s regulatory taking claim was a “‘wholly new’ cause of action, to which the right to a jury trial does not attach.” \(^95\) The court then examined Smyth’s takings claim under the Penn Central test. \(^96\) Analyzing the first prong, the court noted that “even quite significant reductions in value do not necessarily constitute a regulatory taking,” and that the land may provide other economic uses, such as an expansion lot for abutting owners or a playground. \(^97\) Next, the court looked at Smyth’s...
investment-backed expectations, which consisted of taxes and exploration costs. Because the property value was greater than its original purchase price, the court held that any compensation awarded would constitute a “windfall” for the plaintiff. Finally, the court reviewed the last prong of the Penn Central test—the character of the governmental action. The court concluded that because the wetlands regulations are generally applied to all members of the town, the regulations did not unjustly single out Smyth.

In sum, the court held that the regulations had not caused a taking of the property and reversed the lower court’s judgment. The Supreme Judicial Court of Massachusetts denied the plaintiff’s petition for further appellate review. The Supreme Court of the United States also refused to grant the plaintiff’s writ of certiorari.

uses for affected property). In her petition for certiorari, Smyth argued that the court’s decision left her with “nothing but a token interest” in the property. See Petition for Writ of Certiorari, supra note 14, at 19 (arguing uselessness of property).

98. See Smyth, 119 N.E.3d at 1196 (showing plaintiff’s lack of investment). The court failed to give sufficient weight to the purpose of the Smyth family’s purchase: Constructing a home in a residential area. See id.; see also 1902 Atl. Ltd. v. United States, 26 Cl. Ct. 575, 580 (1992) (holding regulations frustrated plaintiff’s desire to develop property).

99. See Smyth, 119 N.E.3d at 1195-96 (explaining $60,000 sale price would allow Smyth to recoup original $49,000 investment). The court compared the original purchase price and the current estimated value without adjusting for inflation. See id. Had the court adjusted for inflation, it would have been unable to rely on the theory that Smyth would receive a windfall if awarded compensation. See id. Using this method of comparison, the current value of $60,000 would not be enough to recoup the original purchase price, estimated to be around $216,000 in today’s dollars. See William W. Wade, Guest Post: An Economist Looks at Takings Law - Smyth and Massachusetts’ New Penn Central Factor, INVERSECONDEMNATION (Aug. 25, 2019), https://www.inversecondemnation.com/inversecondemnation/2019/08/guest-post-an-economist-looks-at-takings-law-smyth-and-massachusetts-new-penn-central-factor.html [https://perma.cc/D9WX-YNQS]. This method of testing the unbuildable property value against the original unadjusted purchase price has been criticized as a “new prong” created by the Massachusetts court. See id. As one scholar has stated, “[s]eemingly the court adopted Professor Michelman’s inference in his famous 1967 article that land speculators are some sort of moral plague on society with no need of protection against changing regulations.” Id.; see Fla. Rock Indus. v. United States, 45 Fed. Cl. 21, 43 (1999) (reviewing ability to recoup investment when analyzing economic impact).

100. See Smyth, 119 N.E.3d at 1196; see also Giovanella, 857 N.E.2d at 735 (discussing character of governmental action analysis). “The most straightforward analysis, and the one the judge applied, is whether the character of the government action is like a physical invasion.” Giovanella, 857 N.E.2d at 735. “The Supreme Court also has considered whether a regulation unfairly singles out the owner. . . Other courts have looked at whether the government regulation is limited to mitigating harms or nuisances. Such regulations typically do not require compensation.” Id. (citation omitted).


102. See id.


III. ANALYSIS

A. The Incoherence of Penn Central

Scholars have long criticized the Penn Central analysis for its lack of guidance on how courts should handle regulatory takings claims involving partial economic loss. As one scholar noted, “[n]o one knows how much diminution in value is required before a landowner is entitled to compensation, and no one knows what kind of public justifications cut off the right to reparations.” There hardly seems to be any “balancing” involved when applying the Penn Central test’s three prongs. The discretion involved makes for inconsistent reasoning when balancing the test’s factors, resulting in weak rights for landowners who suffer heavy losses that fall just below the total economic loss threshold.

A reevaluation of the Penn Central test by the Supreme Court is long overdue. Recent Supreme Court cases have added to the framework of Penn Central, but they raise more questions about the test. Concrete Pipe clarified that any economic impact less than a total taking cannot, on its own, establish a takings claim requiring just compensation, but failed to explain when and how economic impact can hold weight in a takings claim involving other factors.

105. See Echiverria, supra note 10, at 172 (noting Court’s failure to embrace interpretation of factors); Epstein, supra note 10, at 607 (labeling Penn Central standard “confused and mischievous”); Oakes, supra note 10, at 613 (criticizing gray area of Penn Central analysis); Whitman, supra note 9, at 576 (calling Penn Central “disaster in terms of clarity and predictability”).

106. Epstein, supra note 10, at 604 (noting lack of any common scale used for balancing). The term “balance” gives the impression that different weight can be placed on certain factors depending on their severity. See Whitman, supra note 9, at 577.

107. See Epstein, supra note 10, at 604 (criticizing ambiguity in balancing); Whitman, supra note 9, at 577 (stating term “balance” inapt when applied to Penn Central).

108. See Epstein, supra note 10, at 604; Oakes, supra note 10, at 613 (detailing subjective nature of Penn Central test); Petition for Writ of Certiorari, supra note 14, at 3 (stating 91.5% elimination of value not sufficient for takings claim).

109. See Echiverria, supra note 10, at 171-72 (emphasizing need for resolution of factors).


111. See Concrete Pipe & Prods. v. Constr. Laborers Pension Tr. for S. Cal., 508 U.S. 602, 645 (1993) (holding “mere diminution” in property value alone not enough to establish takings claim); see also FLCT, Ltd. v. City of Frisco, 493 S.W.3d 238, 273 (Tex. App. 2016) (calling 46% economic loss “significant” in regulatory takings analysis); Fla. Rock Indus. v. United States, 45 Fed. Cl. 21, 43 (1999) (considering 73.1% loss significant); Formanek v. United States, 26 Cl. Ct. 332, 340 (1992) (clarifying 88% loss more than mere diminution in value). Although there has been some uniformity among courts about when an economic impact is significant, there is no indication as to whether the economic impact factor should hold more weight as the losses suffered increase. See Echiverria, supra note 10, at 180 (discussing technically challenging implementation of economic impact analysis). In his dissent in Lucas, Justice Stevens recognized the arbitrariness of owners suffering losses close to 100%, yet receiving no compensation, stating “[a] landowner whose property is diminished in value 95% recovers nothing, while an owner whose property is diminished 100% recovers the land’s full value. The case at
Palazzolo showed that transferring land with knowledge of existing regulation restrictions does not extinguish a landowner’s takings claim, but questions remain regarding satisfaction of “investment-backed expectations” of the test’s second prong. Justice O’Connor stated in Lingle that determining whether a regulation substantially advances a government interest is “not a valid method of discerning whether private property has been ‘taken’ for the purposes of the Fifth Amendment,” which clarifies that, like in Concrete Pipe, one of the factors may not be used to establish a takings claim on its own but raises questions as to what weight this prong should have in a Penn Central analysis. These inquiries, along with the lack of guidance as to how to balance the factors, demonstrate that the Court could provide much-needed clarity by revisiting the Penn Central test.

B. Application of Penn Central in Smyth

Smyth is the most recent example of a court using its own discretion to interpret the Penn Central test. The court could not analyze Smyth’s claim under Lucas because not all economic benefit was stripped from the land. Unlike the plaintiff in Lucas, Smyth possessed some economically viable options, such as erecting a playground or selling the land to abutters. These potential uses pushed Smyth’s claim out of the realm of total economic loss, which alone can establish a takings claim, and into the muddied jurisprudence of partial economic diminution, where economic loss becomes only a weighed factor. Upon applying the balancing test, the court held that the regulation did not cause a taking, despite its economic impact on Smyth’s investment-backed expectations of building a home on the land. The court referenced language from the hand illustrates this arbitrariness well. “Lucas v. S.C. Coastal Council, 505 U.S. 1003, 1064 (1992) (Stevens, J., dissenting).

112. See Palazzolo, 533 U.S. at 617-18, 630, 632 (holding ripeness not eliminated when transferring title); Whitman, supra note 9, at 557 (inquiring about second prong).
113. See Lingle, 544 U.S. at 542 (emphasizing validity of “substantially advances” formula when analyzing takings claims); Concrete Pipe & Prods. of Cal., Inc., 508 U.S. at 645 (weighing Penn Central factors); see also Whitman, supra note 9, at 581-82 (questioning effect of Lingle on third prong’s relevancy).
114. See Whitman, supra note 9, at 582 (weighing relevancy of balancing test in wake of Lingle).
117. See Smyth, 119 N.E.3d at 1195 (stating other permissible uses). “Under the town zoning bylaw, permitted uses in the zoning district in which the property is located include, among other things, one-family detached houses; parks; playgrounds; beaches; watershed; agriculture and floriculture; and common piers, floats, and docks.” Id. at 1191 n.5. But see Lucas, 505 U.S. at 1044 (Blackmun, J., dissenting) (disagreeing with Court’s failure to recognize residual uses Lucas possessed). Justice Blackmun argued that the ability to “picnic, swim, camp in a tent, or live on the property in a movable trailer” constituted uses that prevented a total taking. See id.
118. See Smyth, 119 N.E.3d at 1195-96 (applying Penn Central balancing factors).
119. See id.
Massachusetts Supreme Judicial Court in *Gove*, suggesting that compensation is rarely owed when a government regulation mitigates a reasonable harm, i.e. wetlands preservation, and does not involve a total taking.\(^\text{120}\) The court’s conclusion—that compensating Smyth would result in a windfall—merely focused on the $11,000 gain found when comparing the property’s original purchase price in 1975 ($49,000) to its value in 2019 ($60,000), even though the original purchase price “in today’s dollars” is approximately $216,000.\(^\text{121}\) Comparison of the adjusted original purchase price of $216,000 and the current value of $60,000 results in an overall loss, and failure to account for this adjustment allowed the court to deny just compensation by simply classifying Smyth’s situation as a low-yield investment.\(^\text{122}\) The court recognized the “likelihood that the present value of the original purchase price may exceed the current value of the lot,” yet relied on the vagueness of prior case law, stating, “even a substantial reduction of the value of property can occur without effecting a regulatory taking.”\(^\text{123}\)

The court’s explanation in *Smyth* allows future courts to bypass the balancing test by utilizing factors such as economic inflation and residual land uses, regardless of their relation to the owner’s original investment-backed expectations or the surrounding uses in the area.\(^\text{124}\) Here, the court noted that Smyth and her parents had not shown strong investment-backed expectations because they had

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120. *See id.* at 1196 (concluding no taking occurred). The court recognized the significance of the loss that Smyth suffered. *See id.* at 1195. Likewise, Smyth admitted that the government action was not like a physical invasion. *See id.* at 1196. The Massachusetts Supreme Judicial Court held in *Gove* that government action used to protect state resources such as wetlands, “at the very least when it does not involve a ‘total’ regulatory taking or a physical invasion, typically does not require compensation.” *See Gove* v. Zoning Bd. of Appeals, 831 N.E.2d 865, 875 (Mass. 2005). This left Smyth’s claim hinging upon the second prong of investment-backed expectations, which the court disregarded as insufficient due to the lack of effort and expenses put toward development. *See Smyth*, 119 N.E.3d at 1196. *But see* 1902 Atl. Ltd. v. United States, 26 Ct. Cl. 575, 580 (1992) (showing frustration of expectations due to investment’s focus on development).

121. *See Smyth* v. Conservation Comm’n, 119 N.E.3d 1188, 1196 (Mass. App. Ct. 2019) (holding compensation would result in windfall), *review denied*, 123 N.E.3d 199 (Mass. 2019), and cert. denied, 140 S. Ct. 667 (2019) (mem.); *supra* note 92 and accompanying text (estimating original purchase price “in today’s dollars”); *see also Gove*, 831 N.E.2d at 875 (refusing compensation to prevent windfall). The court noted that Gove was an heir who received “real property of significant value,” and not a bona fide purchaser of the property. *See Gove*, 831 N.E.2d at 874. Although the court stated that a lack of personal investment does not defeat Gove’s claim, it concluded that any compensation to Gove would result in a “windfall.” *See id.* at 874-75. Gove’s actions demonstrated that she had no reasonable expectation of residential development. *See id.*

122. *See Smyth*, 119 N.E.3d at 1195 n.15 (justifying substantial loss in property value); *see also supra* note 92 and accompanying text (describing effect of using past and present value calculations on court’s reasoning); Palazzolo v. Rhode Island, 533 U.S. 606, 631 (2001) (addressing “token” interest and compensation). A comparison of values “in today’s dollars” would prevent the court in *Smyth* from writing off just compensation as a “windfall” by eliminating the “token” value that Smyth was supposedly left with. *See supra* note 92 and accompanying text. “Assuming a taking is otherwise established, a State may not evade the duty to compensate on the premise that the landowner is left with a token interest.” *Palazzolo*, 533 U.S. at 631.


124. *See id.* at 1195 (listing other potential uses for land); *see also* FIC Homes of Blackstone v. Conservation Comm’n, 673 N.E.2d 61, 71 (Mass. App. Ct. 1996) (acknowledging abutter’s willingness to purchase property for additional acreage when discussing potential residual uses).
not taken steps towards development until 2006. This type of discretion in deciding what constitutes “investment-backed expectations” makes it impossible for landowners to foresee how they can secure and protect their rights. Smyth, for example, may have taken earlier steps to show her interest in developing the land if she knew that investment-backed expectations required she show more than the purchase or inheritance of an undeveloped lot in a residential area.

C. The Need to Reexamine the Penn Central Test

A reexamination of the Penn Central test is long overdue, and the Court should have granted certiorari in Smyth to address its inconsistencies. Economic impact and investment-backed expectation factors provide landowners suffering high percentage losses little to no guidance as to what entails a successful regulatory takings claim under Penn Central. The application of the Penn

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125. See Smyth, 119 N.E.3d at 1196 (recognizing Smyth’s investment in 2006 for percolation test not enough). The purchase of undeveloped land in a 174-lot subdivision was not enough to satisfy the second prong involving investment-backed expectations. See id. at 1190-91, 1196. Smyth’s investment is more comparable to the investment made in Lucas, where an undeveloped residential lot was purchased for the purpose of development, as opposed to Penn Central, where the landmark was originally purchased with an existing substantial economic use. See id.; Lucas v. S.C. Coastal Council, 505 U.S. 1003, 1008 (1992) (detailing ownership of lot); Penn Cent. Transp. Co. v. New York City, 438 U.S. 104, 115 (1978) (describing ownership of terminal); see also Palazzolo, 533 U.S. at 634-35 (O’Connor, J., concurring) (expressing lack of personal investment by post enactment acquirer not enough to defeat takings claim).

126. See Whitman, supra note 9, at 577 (noting lack of guidance on second prong). While Palazzolo shed some light on investment-backed expectations in regard to post enactment landowners, many questions about factors that apply to this prong remain. See id.

A relatively recent en banc decision by the Federal Circuit appears to strike the right balance. The court broke down the expectations analysis into three components: (1) whether the plaintiff operated in a “highly regulated industry;” (2) whether the plaintiff was aware of the problem that spawned the regulation at the time it purchased the property; and (3) whether the plaintiff could have “reasonably anticipated” the possibility of such regulation in light of the “regulatory environment” at the time of purchase.

Echeverria, supra note 10, at 184 (describing possible approach to investment-backed expectations prong). But see Petition for Writ of Certiorari, supra note 14, at 6 (claiming parents unable to build). Smyth’s parents were supposedly unable to build a house on the lot at the time of their ownership but continued to pay taxes on the lot as if it were buildable. See Petition for Writ of Certiorari, supra note 14, at 6. Providing examples of how property owners can secure their rights can help landowners like Smyth’s parents, who may be unable to build on a particular lot but continue to hold the lot as an investment. See id. at 28.


128. See Penn Cent., 438 U.S. at 124 (establishing balancing test); Echeverria, supra note 10, at 171-72 (noting potential benefit from guidance on Penn Central factor application); Petition for Writ of Certiorari, supra note 14, at 1-2 (arguing for clarification of Penn Central test); see also Echeverria, supra note 10, at 210 (suggesting cost-basis analysis comparing original and present values of property).

129. See Whitman, supra at note 9, at 576-77 (labeling Penn Central test disastrous); Echeverria, supra note 10, at 171-72 (criticizing incoherence of test); Oakes, supra note 10, at 613 (calling Penn Central test results “purely subjective”).
Central test in Smyth provided a perfect opportunity for the Supreme Court to reexamine the prongs of the Penn Central test and provide some clarity for lower courts in relation to the elements of Smyth, specifically for residential property owners affected by regulations. The Court should have addressed which aspects of a claimant’s economic impact a court should analyze, such as past and present value comparison, and where discretion can be used. The Court also should have addressed the factors relevant to analyzing an owner’s investment-backed expectations and how a landowner with an investment-backed interest must act to protect that interest. Smyth provides a case involving a high percentage loss of value on a property with a questionable “taken interest”; here, the possibility that the Smyths could sell the land to an abutter or build a park, which keeps it out of the realm of a total taking. Smyth also provides a scenario similar to Palazzolo, where the land is transferred with an encumbrance; however, in Smyth, the lack of action taken by Smyth’s parents affected Smyth’s rights because the court found that she failed to show an active interest in developing the land. Most importantly, the Court should provide a better example of how to properly weigh the factors of Penn Central against each other.

While the refusal to address this murkiness allows the government to operate without fear of compensating an owner with every regulation passed, it leaves too much room for uncertainty for land owners such as Smyth, who must chase litigation with no real assurance that they can establish a claim. Landowners should not have to go through the cost of litigation only to wind up in the realm of Penn Central because they can still use their land as a park. Allowing these

130. See Smyth, 119 N.E.3d at 1190-91, 1195 (showing Massachusetts Appeals Court’s application of balancing prongs).
131. See id. at 1195 n.15 (acknowledging past value of land most likely greater than present).
132. See id. at 1196 (holding Smyth’s expenditures on percolation tests for septic system insufficient).
135. See Echeverria, supra note 10, at 208 (commenting on uncertainty of Penn Central test application).
136. See id. (discussing ad hoc factor balancing).
137. See Smyth, 119 N.E.3d at 1195 (justifying economic loss with residual uses like playground or park).
uses, unrelated to the owner’s original intended use, to act as the 5-10% value that prohibits a total takings claim has harmful potential to allow governments to heavily regulate land and escape paying just compensation.¹³⁸

IV. CONCLUSION

By failing to grant certiorari for Smyth, the Supreme Court missed an opportunity to clear up one of the most muddled areas of Takings Clause jurisprudence and provide courts guidance when analyzing regulatory takings claims involving partial diminution of value. Smyth lays out a textbook fact pattern that would have allowed the Supreme Court to answer many lingering questions about the Penn Central test and those raised by subsequent cases such as Palazzolo and Lingle. By refusing to grant certiorari and analyze the issues teed up by Smyth, the Supreme Court is causing landowners, who have already suffered loss under regulations, to go through the cost of litigation only to wind up in the confused realm of the balancing test. Even if the Court wanted to avoid creating bright line rules to govern something as complicated as real estate, the Court could have clarified whether the Penn Central test was meant to be applied with varying discretion by the courts.

For now, state and federal courts will continue to apply the Penn Central test with their own interpretation of each prong, just as the Massachusetts Appeals Court did in Smyth. Smyth was denied any just compensation, despite suffering an actual loss when comparing past and present values of the property in today’s dollars. The holding in Smyth shows that simply purchasing an unimproved residential lot and paying taxes on it as if it were buildable is not enough to prove investment-backed expectations. Furthermore, even if it were enough, the court explained that an existing use such as a park or playground can show that a landowner may still salvage some value from the land, making just compensation a “windfall.” Such a holding has the potential to grant states the ability to avoid paying just compensation by sprinkling these residual uses throughout zoning laws, making it harder for regulations to ever truly strip a landowner of all economic use of their property. For the time being, it appears that the many questions surrounding the Penn Central test will remain unanswered, especially in cases involving a partial economic diminution, leaving landowners without clear guidance as to when and if they are owed just compensation.

Jay T. Jarosz

¹³⁸. See id.; see also Echeverria, supra note 10, at 209-10 (providing reasons why most claims without physical invasion will fail).