Penn Central after 35 Years: A Three-Part Balancing Test or a One-Strike Rule?

R. S. Radford
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by Adam R. Pomeroy∗

I. Introduction

Penn Central Transportation Co. v. City of New York1 has been called the “polestar” of regulatory taking jurisprudence.2 For nearly thirty-five years, the test laid out by the Supreme Court in Penn Central has been the principal means for determining whether a land use regulation constitutes a taking under the Fifth and Fourteenth Amendments.3 There is a broad consensus that the standard set forth by Penn Central is a balancing test which considers three factors: the character of the state action, the economic impact of the regulation, and the regulation’s interference with the owner’s investment-backed expectations.4 How to balance the factors might be in dispute, but a balancing test it is.5

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2 Palazzolo v. Rhode Island, 533 U.S. 606, 633 (2001) (“Our polestar . . . remains the principles set forth in Penn Central itself and our other cases that govern partial regulatory takings.”).

3 Lingle v. Chevron U.S.A., Inc., 544 U.S. 528, 539 (2005) (“The Penn Central factors . . . have served as the principal guidelines for resolving regulatory takings claims that do not fall within the physical takings or Lucas rules.”)

4 Penn Central, 438 U.S. at 124.

Despite *Penn Central*'s preeminence as the test for regulatory takings, three and a half decades has not been long enough for the Supreme Court to mold the test into a workable standard. Consequently, regulatory takings law is in disarray, guided by little more than muddled, incoherent, if not incomprehensible rhetoric. In light of this, perhaps the most surprising aspect of the scholarly consensus concerning the meaning of *Penn Central* is that no reference to balancing can be found in the opinion itself, which can easily be read not as a balancing test but as a general call for courts to consider the totality of the circumstances.

*Penn Central* concerned a challenge to New York City’s landmark preservation law, which was being enforced to prevent the Penn Central Transportation Company from building an office tower on top of Grand Central Station. The company alleged that the decision by the New York City Landmarks Preservation Commission to deny their building proposals constituted a regulatory taking of its property interests. In addressing the claim, the United States Supreme Court noted that it “quite simply, has been unable to develop any ‘set formula’” for determining when a regulatory taking occurs. Rather, the Court engages in “essentially ad hoc, factual inquiries” where the result in each case “depends largely upon the particular circumstances in that case.” In elucidating how this ad hoc inquiry was to be performed, Justice Brennan “identified several factors that have particular significance. The economic impact of the regulation on the claimant and, particularly, the extent to which the regulation has interfered with distinct investment-backed expectations are, of course, relevant considerations. So, too, is the character of the governmental action.”

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6 See, e.g., Johnson, *supra* note 5 (recognizing the unworkable nature of the *Penn Central* test); Michael M. Berger, *Tahoe Sierra: Much Ado About-What?*, 25 HAWAI'I L. REV. 295, 314 (2003) (referring to the *Penn Central* balancing test as an “unworkable . . . lot-by-lot, fact-by-fact method of adjudication . . . so fraught with uncertainty that landowners must often litigate to the highest court that will hear them out to determine whether they have even properly stated a claim on which relief can be granted”).

7 See, e.g., Fenster, *supra* note 5, at 527 (attributing the Supreme Court’s lack of a predictable takings doctrine to “*Penn Central*’s inherent messiness”); Claey's, *Takings, Regulations, and Natural Property Rights*, *supra* note 5, at 1557 (“the *Penn Central* approach is admittedly standardless”); Andrea L. Peterson, *The Takings Clause: In Search of Underlying Principles Part I – A Critique of Current Takings Clause Doctrine*, 77 CAL. L. REV. 1301, 1303–04 (1989) (“the Court’s takings doctrine is in far worse shape than has generally been recognized – indeed, . . . it is difficult to imagine a body of case law in greater doctrinal and conceptual disarray”); Gordley, *supra* note 5, at 291 (“[t]he doctrine is incoherent”).

8 See, e.g., Echeverria, *supra*, note 5.

9 *Penn Central*, 438 U.S. at 115-17.

10 *Id.* at 119.

11 *Id.* at 124 (citations and internal punctuation omitted).

12 *Id.* (internal citation omitted).
Not only does the opinion never refer to this as a balancing test, it does not even describe these three factors as exclusive; they are merely “relevant factors.” Nor is it obvious that this is a list of three factors, as opposed to only two.\(^{13}\)

Despite the academic consensus that \textit{Penn Central} sets forth a balancing test, an examination of the case law reveals that no such consensus exists in the lower federal courts. For years, courts elevated the investment-backed expectations prong to dispositive status in cases involving regulations that existed prior to a plaintiff’s acquisition of the property.\(^{14}\) Although this foreshortening of \textit{Penn Central} was expressly repudiated by the Supreme Court in \textit{Palazzolo v. Rhode Island},\(^{15}\) the approach was seemingly revived in a recent Ninth Circuit case that collapsed the three-factor analysis into what the dissent called, a “one-strike you’re out’ checklist.”\(^{16}\) Highlighting the jurisprudential divide within the circuit, the dissent questioned whether \textit{Penn Central} is to be applied as a genuine three-factor balancing test, or does government escape liability for a taking if it can prevail on any one of those factors?\(^{17}\)

This paper answers that question. More specifically, it answers whether the lower federal courts apply \textit{Penn Central} as a true, three-factor balancing test, or a type of “one-strike you’re out” test, or something in between. It does so by comprehensively reviewing all cases in the First, Ninth, and Federal Circuits which cite to \textit{Penn Central}. The analysis reveals two facts, both of which indicate that \textit{Penn Central} is not applied as a balancing test: (1) most opinions do not discuss the three factors listed in \textit{Penn Central}, and (2) those cases which do discuss the three factors rarely apply them as a balancing test. Lastly, this paper discusses \textit{Guggenheim v. City of Goleta}, as a case study of two radically distinct methods of applying \textit{Penn Central} to the same fact set.


\(^{15}\) 533 U.S. at 627-630.


\(^{17}\) See Radford & Wake, \textit{supra} note 13, at 745 (identifying this as “perhaps the most fundamental issue that must be resolved in interpreting \textit{Penn Central}”).
II. Previous Empirical Research Relating to *Penn Central*

A. The Hubbard Study: An Empirical Review of *Penn Central*

1. Hubbard’s Was the Only Previous Empirical Survey of *Penn Central*

As of the publication of this article, there is only one previous empirical survey of *Penn Central* cases: 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?* (Hubbard).\(^{18}\)

Hubbard asked whether the *Penn Central* test is a “fair” approach to regulatory takings by questioning whether the test – appearing fair on its face – was in fact fair in application.\(^{19}\) Noting that determining whether the test is fair is notoriously “difficult because there is no substantive standard for identifying regulatory takings,” the authors indicated that despite “lack[ing] a standard of what the results should be, we may have a standard of what the results should not be. . . . if owners never prevail under the *Penn Central* test, there is a serious possibility that the process is so unfair that it is, in effect, a sham.”\(^{20}\) In other words, the extent to which property owners have a chance to succeed on a regulatory takings claim is an indication of whether the test is applied fairly by the courts. To make that determination, Hubbard addressed three questions: “How often do owners succeed? Is this rate of success sufficient to conclude that the process is fair in terms of the treatment of owners vis a vis regulators? Does the process take too long?”\(^{21}\)

To answer these questions Hubbard surveyed cases citing *Penn Central*.\(^{22}\) The authors created a 133-case sample set by using the Westlaw Keycite feature to generate a list of all cases citing *Penn Central* as of August 23, 2002, and then randomly selecting one-tenth of the resultant 1329 cases.\(^{23}\) The authors then reviewed their sample set looking at rates of success and the time required to obtain a judicial decision.\(^{24}\)

\(^{18}\) 14 DUK\_ ENVTL. L. & POL’Y F. 121 (2003).

\(^{19}\) *Id.* at 121-22.

\(^{20}\) *Id.* at 122.

\(^{21}\) *Id.*

\(^{22}\) See *id.* at 141-148.

\(^{23}\) *Id.* at 141; see also *id.* at 141, n. 143 (“The selection was done by using a random number table to select a case from the first ten cases on the list. Every tenth case on the rest of the list was then selected and reviewed.”).

\(^{24}\) Hubbard also discusses, briefly, the treatment of owners vis-à-vis regulators, but the discussion of the “presumptive fairness of the judiciary” was not based on the results of the article’s survey. See *id.* at 147-48.
According to Hubbard, the merits of the takings claims were addressed in eighty-two of the one-hundred and thirty-three cases reviewed. Owners prevailed in 13.4% of the cases where the merits were addressed and in 9.8% of all one hundred and thirty-three cases. Standing alone, Hubbard concludes, these low rates of success do not indicate whether the test is fair. The authors note that success rate data is likely to be influenced by the rational actions of owners: owners incur litigation costs when the expected gains sufficiently exceed the costs even if absolute chances of success are low. “This rational strategy could be employed in a system that is unfair just as easily as in a scheme that is fair.” Thus, Hubbard continued, even if the test was proven unfair and courts suddenly gave vastly greater weight to owners’ rights in response, the success rate might equilibriize at the initial rate because rational owners would bring more and more suits in response to the favorable change. For this reason, Hubbard concluded that, although the success rate in his sample was low, this was inconclusive as to fairness because owners “litigate at a rational level regardless of the fairness or unfairness of the application of the balancing scheme.”

It should be noted that Hubbard’s analysis of the relationship between fairness and a low rate of success is not necessarily correct, because it fails to distinguish between average and marginal probabilities of success. It is always true that cases will proceed to litigation if \( Vp > C \), where \( V \) is the potential value of a favorable outcome, \( p \) is the probability of success in the given case, and \( C \) is the cost of litigation. If some exogenous event (such as an increase in the perceived importance of strong property rights) causes the average value of \( p \) to rise across all potential takings claims, then more cases will be litigated, until the probability of success for the marginal case settles back to the original level of \( p \). But as Professor Ilya Somin has noted,

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25 ld. at 141.

26 The data tend to bear this out: in sixty-four of the seventy-one cases where the owners lost, the cases involved situations where the rewards for success were very high or the litigation costs were reduced. ld at 141-42.

27 ld. at 142.

28 ld. at 143.

29 ld. at 144.

30 Ilya Somin, Stop the Beach Renourishment and the Problem of Judicial Takings, 6 DUKE J. CONST. LAW & PUB. POL’Y 91, 103 (2011) (“Property owners are only likely to file judicial takings cases in federal court if they believe that they have a strong enough case to justify the cost of litigation.”).
virtually all of the cases in Hubbard’s sample – not just the marginal cases – had a small p. This implies that either the government agrees to settle all cases where the landowner has more than a slight chance of prevailing on a takings claim (which hardly conforms to day-to-day observations), or all takings claims have only a small likelihood of prevailing. Professor Somin, who does not consider the first possibility, concludes that the latter would be evidence of systemic judicial bias against takings plaintiffs.

Of course, someone with a different philosophical view might counter that all takings claims have a low probability of success because the whole concept of regulatory takings is suspect and property owners should never prevail on such a claim in a fair system. In any event, whether low probabilities of success imply anything concerning the fairness of the process is a more complex topic than Hubbard’s discussion indicates.

Hubbard also concluded that the length of litigation is inconclusive as to fairness. Of the aforementioned eighty-two cases reaching the merits, twenty-two were decided in two years or less, nine within three years, five within four years, and sixteen took more than four years; the time frame could not be determined for the additional thirty cases. To the authors, such time frames cannot conclusively prove unfairness in the judicial application of Penn Central. Overall, Hubbard concludes that “the Penn Central approach has not been shown to be unfair in terms of patterns of regulatory and judicial decisions.”

31 Id. at 104, n. 72 (“all but one of the cases where property owners lost were ones where low litigation costs or high potential rewards justified pursuing a case with a low probability of success” citing Hubbard, supra note 18, at 141-42).

32 See id. (“[T]he fact that nearly all of the Penn Central cases litigated in the authors’ sample involved cases where plaintiffs had incentives to go forward with even a low probability of success merely underscores the fact that the test is tilted against owners. Otherwise, we should observe a much larger number of cases where plaintiffs went forward despite the fact that they needed a substantial chance of winning in order to make the costs of litigation worthwhile.”) and id. at 105 (“[M]ore litigation can be expected if the Court were to adopt stronger rules for regulatory takings claims generally, a position that others and I have advocated. The additional litigation, however, would be justified if the case for a stronger regulatory takings jurisprudence is sound. After all, the new litigation would arise only because the federal courts had under-enforced a constitutional right for many years, thereby incentivizing state and federal officials to violate that right on a large scale.” (citation omitted)).


34 Hubbard, supra note 18, at 145.

35 Id. at 147.

36 Id.
2. This Article Compared to Hubbard

This article, and its accompanying survey, departs significantly from Hubbard.

First, whereas Hubbard asked whether the *Penn Central* balancing test is fair, this article questions whether it is even proper to call it a balancing test. That is a descriptive matter having little to do with its substantive fairness. This survey concerns itself more with how the courts treat *Penn Central* claims than how the courts rule on those claims.

Second, this article takes a different approach to selecting its sample than Hubbard. Instead of randomly selecting and reviewing ten percent of all cases citing *Penn Central*, this survey reviewed all cases in three federal jurisdictions.\(^{37}\) Thus instead of being a random sample of all cases across the nation, it was a comprehensive analysis of a limited number of jurisdictions.

Finally, this survey diverges from Hubbard’s regarding takings plaintiffs’ rates of success. Although computing property owners’ success rates was not an objective of this survey, the data was readily available and since empirical reviews of *Penn Central* are so rare they are included for comparison to Hubbard’s findings.

B. The Mattingly Study: A Broader Empirical Review of Takings Cases

Besides Hubbard, I am aware of one other empirical review of regulatory takings cases more broadly: Basil H. Mattingly, *Forum Over Substance: The Empty Ritual of Balancing in Regulatory Takings Jurisprudence* (Mattingly).\(^{38}\)

Mattingly sought to clarify the underlying approach to regulatory takings cases through a statistical analysis of reported cases. He did so by employing a recursive statistical technique known as Classification and Regression Tree analysis, or CART.\(^{39}\) The purpose of using CART was to identify those factors which lead a court to conclude a particular governmental action is a taking.\(^{40}\) This led the author to create a decisional tree useful in predicting the outcome of any given regulatory takings case. After an analysis of ninety-one different regulatory takings cases using the CART analysis, the author reported that his analysis can predict the correct outcome of cases 87% of the time.\(^{41}\)

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\(^{37}\) Additionally, this survey limited itself to federal cases whereas Hubbard apparently included state court decisions.


\(^{39}\) Id. at 737.

\(^{40}\) Id.

\(^{41}\) Id. at 745.
Mattingly makes two claims relevant here. First, that if a case is decided under the parameters of *Penn Central*, that the courts do not apply a true balancing test. Rather there is “a very strong presumption” in favor of the government, resulting in “the government almost always win[ning].” Mattingly calls this “surface balancing,” where courts use “the rhetoric of balancing but almost always reach a predictable result, the antithesis of a true balancing regime.” This view assumes that the Supreme Court intended to create a balancing test where plaintiffs prevail as often as, or more often than, the government. The Supreme Court, however, could have intended to create a balancing test which places a thumb on the scale in favor of the government. This would still be a balancing test, albeit one where plaintiffs rarely prevail. In the absence of a clearer expression by the Supreme Court of what type of test it was trying to create, it does not logically follow that a low rate of success proves that *Penn Central* is not a balancing test; it may just prove what type of balance really exists between the parties.

Second, Mattingly claims that there is a substantial difference of results when the Court of Federal Claims applies *Penn Central*, versus other federal courts. According to Mattingly’s analysis, when a federal district court applies the *Penn Central* test the government wins 85% of the time, but when the action is brought in the Court of Federal Claims the government wins only 67% of the time. In other words, Mattingly found that property owners have a 15% chance of success in federal courts other than the Court of Federal Claims, but a 33% chance of success in that forum – a statistically significant difference.

Mattingly views this difference in results as implicating a plaintiff’s “choice of forum” and “forum shopping.” But that is not the difference between the two sets of data; the difference is the defendant. The Court of Federal Claims has exclusive jurisdiction over all significant monetary claims against the federal government, and nothing else. Plaintiffs have no “choice of forum,” and so cannot engage in “forum shopping” between the Court of Federal Claims and another federal court, except in cases seeking damages of less than $10,000. Regardless of

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42 *Id.*

43 *Id.*

44 *Id.* at 744.

45 *Id.*

46 *Id.*

47 See 28 U.S.C. § 1491 (conferring exclusive jurisdiction in the Court of Federal Claims for monetary claims against the United States in excess of $10,000).

48 *Id.*
this interpretive error, however, the data generated by the present survey can be used to test Mattingly’s broader point that property owners face a disparate rate of success in the Court of Federal Claims versus other federal courts.

Although Mattingly’s thesis is somewhat in line with the question this article addresses, the present study differs from Mattingly’s in several significant respects.

First, Mattingly reviews ninety-one regulatory takings decisions, many of which include a *Penn Central* analysis, whereas this article surveys nearly 500 cases which specifically cite to *Penn Central*. Furthermore, it is not clear how Mattingly selected his sample. The author calls it a “random sample of reported regulatory takings cases” where “random” means “that each case in the population of cases that fit the selection criteria has an equal chance of selection into the sample.” However, he never clearly states what these selection criteria were and how he was able to apply the criteria to those cases in order to define a population from which to extract a random sample. Failure to do so weakens the usefulness of his results.

Second, this article comes to a different conclusion than Mattingly regarding the success rate of takings claimants. While the present study generally confirms Mattingly’s finding of a statistical disparity between the success rates of plaintiffs before the Court of Federal Claims and other federal courts, both the success rates themselves and the disparity are smaller than Mattingly found. And although the Court of Federal Claims generates different outcomes than the federal appellate courts, it does not necessarily generate different outcomes than federal district courts.

Third, this article used a slightly different unit of analysis than Mattingly. Mattingly considered only the final result in any given case. This means that he disregarded the results of a case heard in a trial court if a decision was subsequently issued in that same case on appeal. By contrast, this article includes the outcomes of all final decisions in all the courts under study, regardless of the subsequent disposition of the cases. I report both this raw count as well as an adjusted data set which takes account of the final result in any given case. This difference in the definition of decisional units could account for the differences in computed success rates between this study and Mattingly.

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49 Mattingly, supra note 38, at 737-38.

50 The author does note several assumptions made in identifying the sample, but they still do not allow the reader to fully understand the methodology or replicate the study. See id. at 738.

51 Id. at 738 (“[O]nly the terminal decision in a particular controversy was considered.”).
Fourth, although Mattingly’s findings are similar to those here (that Penn Central is not applied as a balancing test), the present study differs from Mattingly’s both in its assumptions and its interpretation of the data. As mentioned above, Mattingly assumed that low rates of success prove that Penn Central is not balancing test, although this does not necessarily follow. Furthermore, Mattingly claims that courts go through the motions of conducting a balancing test before reaching a generally predetermined result – i.e. a false or “surface” balancing. This article, however, finds that courts generally do not go through the motions of a conducting balancing test at all – i.e., that most of the courts under study do not seem to conceive of Penn Central as a balancing test. This suggests that Mattingly’s fundamental interpretation of his findings with respect to “surface balancing” may have been misplaced.

III. The Survey

Since its inception, Penn Central has been cited nearly 1,200 times by federal courts and nearly 1,000 times by state courts. A comprehensive review of only the federal cases citing Penn Central would be a time consuming process, while a selective review of the cases risks being overly subjective. For these reasons I undertook a comprehensive review of the cases decided within a limited number of federal circuits. This would provide a definitive answer of, at a minimum, how courts in those circuits apply the Penn Central test for regulatory takings. Furthermore, if the results for the selected circuits were generally in agreement, this would suggest that all federal courts treat the test similarly. And if the circuits were split or otherwise unclear in their applications of the test, it would suggest an area where the Supreme Court needs to provide guidance.

A. Court Selection and Survey Methodology

For the present survey, I reviewed cases from the federal courts within three judicial circuits. The Federal Circuit was chosen in essence as a control, because it reviews virtually all of the substantial number of takings claims brought against the federal government. It was also chosen because the Mattingly study suggested that the Court of Federal Claims treats Penn Central cases differently than other federal courts, and decisions of the Court of Federal Claims are appealed to the Federal Circuit. The First and Ninth Circuits were chosen at random from the remaining federal courts. The trial courts were compared to their respective courts of

52 Count obtained from a LexisNexis Shepardization of Penn Central, 438 U.S. 104, on December 31, 2011.

53 Mattingly, supra note 38, at 745.

appeals to check for intra-circuit consistency and the trial courts and courts of appeal were compared to each other, respectively, to analyze inter-circuit consistency.

The cases were obtained by Shepardizing *Penn Central* on LexisNexis to generate a list of all cases citing *Penn Central*. A cut-off date of December 31, 2011, was employed. This resulted in fifty-five cases from the First Circuit (thirty-five from the district courts and twenty from the court of appeals), 139 cases from the Ninth Circuit (seventy-one from the district courts and sixty-eight from the court of appeals), and 297 cases from the Federal Circuit (223 from the Court of Federal Claims and seventy-four from the court of appeals). Together this sample of 491 cases represents 45.7% of the 1075 federal cases citing *Penn Central* as of December 31, 2011.

The case review method used was to ask a series of questions to determine the basis upon which the courts disposed of a case citing *Penn Central*. This decisional matrix is reproduced as Appendix I to this article. This matrix was used to eliminate cases which cite to *Penn Central* but are disposed of on ripeness or other procedural grounds rather than reaching the merits. Although this methodology yielded potentially useful data concerning the grounds and frequency with which federal courts disposed of *Penn Central* claims without reaching the merits, a detailed analysis of those cases would be beyond the scope of the present study.

### B. The Survey Results

The survey data has been broken down into three data sets: the factors rate, the balance rate, and the success rate. By “factors rate” I mean the rate at which courts utilize, or actually apply as opposed to merely mentioning, all three *Penn Central* factors in a case that reaches the merits. By “balance rate” I mean the rate at which courts expressly balance the *Penn Central* factors in those cases where the court discusses all three factors. And by “success rate” I mean the proportion of *Penn Central* cases in which a final decision favors the

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55 Technically the Court of Federal Claims is not a district court and it would be anomalous to refer to it so. Thus, I have chosen to use “trial courts” when referring to the district courts of the First and Ninth Circuits as well as the Court of Federal Claims.

56 These figures exclude opinions published by the U.S. Tax Court, by U.S. Bankruptcy Courts, by the Regional Rail Reorganization Court, in IRS Agency Materials, and in Administrative and Agency Decisions - which are included in the LexisNexis Shepardization results – because those forums do not have jurisdiction over Fifth Amendment takings claims against the government. See, e.g., Gideon Kanner, *A Potentially Momentous Taking Cases Waiting in the Wings*, GIDEON’S TRUMPET (July 30, 2012, 11:58 AM), http://gideonstrumpet.info/?p=3894 (“Bankruptcy courts regularly consider [and reject] takings claims, but a close reading of their opinions makes clear that when they make such rulings, they are explicit that they do so only for the purpose of resolving bankruptcy issues, and their decisions are not binding outside the bankruptcy context. In other words . . . the Court of Federal Claims is the only one [court] that has jurisdiction to consider on the merits monetary claims against Uncle Sam on a taking theory.”) (last visited August 21, 2012).
plaintiffs on the merits. The first two data sets provide different, but complementary, data indicating that courts do not apply *Penn Central* as a balancing test, but rather as – if anything – a checklist of factors to consider in making an *ad hoc* determination. The third data set, the success rate, is useful for comparison to the previous empirical results published in Hubbard and Mattingly.

1. Factors Rate

The most compelling indication that *Penn Central* is not applied as a balancing test is the rate at which the courts fail to apply all three of the *Penn Central* factors. If *Penn Central* is understood by the judiciary as a balancing test, then we would expect the courts to expressly consider all three factors specified in *Penn Central*.\(^\text{57}\) If *Penn Central* is not understood as a balancing test, we would expect the courts to generally focus on one or two factors in making their decisions. As it turns out, courts usually consider only one or sometimes two of the *Penn Central* factors:

**Table 1: Factors Rate in the Courts of Appeal**

<table>
<thead>
<tr>
<th>Appellate Courts</th>
<th>1st Cir.</th>
<th>9th Cir.</th>
<th>Fed. Cir.</th>
<th>Avg.</th>
</tr>
</thead>
<tbody>
<tr>
<td># of Cases Reaching The Merits</td>
<td>8</td>
<td>16</td>
<td>21</td>
<td></td>
</tr>
<tr>
<td># of Cases Applying All Three Factors</td>
<td>4</td>
<td>4</td>
<td>9</td>
<td></td>
</tr>
<tr>
<td># of Cases Applying Less than All Three Factors</td>
<td>4</td>
<td>12</td>
<td>12</td>
<td></td>
</tr>
<tr>
<td>% Applying All Three Factors</td>
<td>50%</td>
<td>25%</td>
<td>42.9%</td>
<td>37.8%</td>
</tr>
<tr>
<td>% Applying Less than All Three Factors</td>
<td>50%</td>
<td>75%</td>
<td>57.1%</td>
<td>62.2%</td>
</tr>
</tbody>
</table>

**Table 2: Factors Rate in the Trial Courts**

<table>
<thead>
<tr>
<th>Trial Courts</th>
<th>1st Cir.</th>
<th>9th Cir.</th>
<th>CFC</th>
<th>Avg.</th>
</tr>
</thead>
<tbody>
<tr>
<td># of Cases Reaching The Merits</td>
<td>14</td>
<td>27</td>
<td>70</td>
<td></td>
</tr>
<tr>
<td># of Cases Applying All Three Factors</td>
<td>9</td>
<td>12</td>
<td>41</td>
<td></td>
</tr>
<tr>
<td># of Cases Applying Less than All Three Factors</td>
<td>5</td>
<td>15</td>
<td>29</td>
<td></td>
</tr>
<tr>
<td>% Applying All Three Factors</td>
<td>64.3%</td>
<td>44.4%</td>
<td>58.6</td>
<td>55.9%</td>
</tr>
<tr>
<td>% Applying Less than All Three Factors</td>
<td>35.7%</td>
<td>55.6%</td>
<td>41.4</td>
<td>44.1%</td>
</tr>
</tbody>
</table>

\(^{57}\) It may be pointed out that *Penn Central* itself indicates that these factors are not exclusive and that therefore courts could still be using a balancing test by using factors other than the three. While theoretically possible, this is not supported by the data. With only rare exceptions, courts do treat the three factors as exclusively determinative. Other issues, or “factors,” are only ever discussed in context of determining whether any given *Penn Central* factor favors the plaintiff or the government. See, e.g., Section IV, infra, discussing *Guggenheim v City of Goleta*. 

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As the tables above indicate, the Courts of Appeals for First, Ninth, and Federal Circuits, and the district courts within the Ninth Circuit, all decided *Penn Central* cases utilizing less than three factors in a majority of the cases reaching the merits. On average, the circuit courts of appeal utilized three factors slightly more than one-third of the time, and utilized fewer than three factors nearly two-thirds of the time. Only the district courts within the First Circuit and the Court of Federal Claims utilized all three factors more than half the time, and then still less than two-thirds of the time. On the whole, these results show that the actual practice of the courts is to use the *Penn Central* test not as a balancing test, but as a checklist, as demonstrated by the courts habitually failing to utilize or analyze all three factors and relying solely on one or two factors for resolving regulatory takings claims.

2. Balance Rate

The conclusion that *Penn Central* is not applied as a balancing test by courts is bolstered by focusing more closely on those cases that actually do consider all three *Penn Central* factors. Even when a court actually discusses all three factors in a case, the court may still only be considering the factors as a checklist. If the opinions that cite all three factors fail to use them as a balancing test, this is another indication that *Penn Central* is not applied as a balancing test. (It is only an indication and not outright proof because a court could consider three factors, determine that all three go against one party or the other, and so rule without weighing the factors against each other. Even if the court was inclined to balance the factors there would be no need to do so in such a case.\(^{58}\))

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**Tables 3 and 4: Cases that Utilize All Three Factors & Actually Balance as a Percentage of Cases which Apply All Three Factors**

58 Although the data tables do not reflect the fact, in the majority of the cases where a court does consider all three factors, the court finds that all three factors go against the losing party.
<table>
<thead>
<tr>
<th>Appellate Courts</th>
<th>1st Cir.</th>
<th>9th Cir.</th>
<th>Fed. Cir.</th>
<th>Avg.</th>
</tr>
</thead>
<tbody>
<tr>
<td># of Cases That Utilize All Factors</td>
<td>5</td>
<td>4</td>
<td>9</td>
<td></td>
</tr>
<tr>
<td># Utilizing All Factors &amp; Balancing</td>
<td>0</td>
<td>1</td>
<td>3</td>
<td></td>
</tr>
<tr>
<td># Utilizing All Factors &amp; NOT Balancing</td>
<td>5</td>
<td>3</td>
<td>6</td>
<td></td>
</tr>
<tr>
<td>% Utilizing All Factors &amp; Balancing</td>
<td>0%</td>
<td>25%</td>
<td>33.3%</td>
<td>22.2%</td>
</tr>
<tr>
<td>% Utilizing All Factors &amp; NOT Balancing</td>
<td>100%</td>
<td>75%</td>
<td>66.6%</td>
<td>77.8%</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>Trial Courts</th>
<th>1st Cir.</th>
<th>9th Cir.</th>
<th>CFC</th>
<th>Trial Avg.</th>
<th>Total Avg.</th>
</tr>
</thead>
<tbody>
<tr>
<td># of Cases on that Utilize all Factors</td>
<td>9</td>
<td>12</td>
<td>41</td>
<td>62</td>
<td>80</td>
</tr>
<tr>
<td># Utilizing All Factors &amp; Balancing</td>
<td>1</td>
<td>2</td>
<td>4</td>
<td>7</td>
<td>11</td>
</tr>
<tr>
<td># Utilizing All Factors &amp; NOT Balancing</td>
<td>8</td>
<td>10</td>
<td>37</td>
<td>55</td>
<td>69</td>
</tr>
<tr>
<td>% Utilizing All Factors &amp; Balancing</td>
<td>11.1%</td>
<td>16.7%</td>
<td>9.8%</td>
<td>11.3%</td>
<td>13.75%</td>
</tr>
<tr>
<td>% Utilizing All Factors &amp; NOT Balancing</td>
<td>88.9%</td>
<td>83.3%</td>
<td>90.2%</td>
<td>88.7%</td>
<td>86.25%</td>
</tr>
</tbody>
</table>

Tables 5 and 6: Cases that Apply All Three Factors & Actually Balance the Factors as a Percentage of all Cases which Reach the Merits
<table>
<thead>
<tr>
<th>Appellate Courts</th>
<th>1st Cir.</th>
<th>9th Cir.</th>
<th>Fed. Cir.</th>
<th>Avg.</th>
</tr>
</thead>
<tbody>
<tr>
<td># of Cases on Merits</td>
<td>8</td>
<td>16</td>
<td>21</td>
<td></td>
</tr>
<tr>
<td># Utilizing All Factors &amp; Balancing</td>
<td>0</td>
<td>1</td>
<td>3</td>
<td></td>
</tr>
<tr>
<td># Utilizing All Factors &amp; NOT Balancing</td>
<td>4</td>
<td>3</td>
<td>6</td>
<td></td>
</tr>
<tr>
<td># Utilizing Less than All</td>
<td>4</td>
<td>12</td>
<td>12</td>
<td></td>
</tr>
<tr>
<td>% Utilizing All Factors &amp; Balancing</td>
<td>0%</td>
<td>6.25%</td>
<td>14.3%</td>
<td>8.9%</td>
</tr>
<tr>
<td>% Utilizing All Factors &amp; NOT Balancing</td>
<td>50%</td>
<td>18.75%</td>
<td>28.6%</td>
<td>28.9%</td>
</tr>
<tr>
<td>% Utilizing Less than all</td>
<td>50%</td>
<td>75%</td>
<td>57.1%</td>
<td>62.2%</td>
</tr>
<tr>
<td>% of Cases Reach Merits that Do Not Balance (sum of all factors &amp; not balancing and reaching less than all factors)</td>
<td>100%</td>
<td>93.75%</td>
<td>85.7%</td>
<td>91.1%</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>Trial Courts</th>
<th>1st Cir.</th>
<th>9th Cir.</th>
<th>CFC</th>
<th>Avg.</th>
</tr>
</thead>
<tbody>
<tr>
<td># of Cases on Merits</td>
<td>14</td>
<td>27</td>
<td>70</td>
<td></td>
</tr>
<tr>
<td># Utilizing All Factors &amp; Balancing</td>
<td>1</td>
<td>2</td>
<td>4</td>
<td></td>
</tr>
<tr>
<td># Utilizing All Factors &amp; NOT Balancing</td>
<td>8</td>
<td>10</td>
<td>37</td>
<td></td>
</tr>
<tr>
<td># Utilizing Less than All</td>
<td>5</td>
<td>15</td>
<td>29</td>
<td></td>
</tr>
<tr>
<td>% Utilizing All Factors &amp; Balancing</td>
<td>7.1%</td>
<td>7.4%</td>
<td>5.7%</td>
<td>6.3%</td>
</tr>
<tr>
<td>% Utilizing All Factors &amp; NOT Balancing</td>
<td>57.1%</td>
<td>37.0%</td>
<td>52.9%</td>
<td>49.5%</td>
</tr>
<tr>
<td>% Utilizing Less than all</td>
<td>35.7%</td>
<td>55.6%</td>
<td>41.4%</td>
<td>44.1%</td>
</tr>
<tr>
<td>% of Cases Reach Merits that Do Not Balance (sum of all factors &amp; not balancing and reaching less than all factors)</td>
<td>92.9%</td>
<td>92.6%</td>
<td>94.3%</td>
<td>93.6%</td>
</tr>
</tbody>
</table>

Whether one looks at the cases which utilize all three factors as a balancing test as a proportion of those cases which discuss all three factors or as a proportion of all cases reaching the merits, the data show that applying Penn Central as a balancing test is statistically rare.
Indeed the Court of Appeals for the First Circuit never applied *Penn Central* as a balancing test. On average, as a percentage of cases reaching the merits, applying *Penn* as a balancing test occurs less than 7% of the time.\(^{59}\) And as an average percentage of cases applying all three *Penn Central* factors (cases that themselves are less than half of all cases reaching the merits), it occurs less than 14% of the time.\(^{60}\) This is another strong indication that federal courts as a whole do not actually conceive of or apply *Penn Central* as a balancing test.

3. **Plaintiff Success Rate**

Lastly, this survey examined the success rate for plaintiffs asserting takings claims under the *Penn Central* test. This data is useful in reviewing the previous empirical efforts made in this area.

The Hubbard study looked at rates of success as a measure of how fairly the *Penn Central* test is applied by courts. Although it found low chances of success on plaintiffs’ claims, the authors concluded that the data was inconclusive as a measure of fairness. The data examined in this study found that a plaintiff’s success rate is lower than Hubbard reported.

The Mattingly Article, by contrast, argued that a low success rate conclusively proved that *Penn Central* was not a true balancing test; that it was the rhetoric of a balancing test hiding a judicial preference for the government. The data studied here found that plaintiffs have a much lower success rate than even Mattingly published. Again, this may be partly or wholly accounted for by the fact that Mattingly only counted the terminal decision in any given case whereas this study counted all final decisions, even if there was a later proceeding in the appellate court.

The data show that plaintiffs asserting *Penn Central* claims in federal courts rarely prevail on their actions. As mentioned, the merits of the *Penn Central* analysis were reached in only a small subset of the cases citing the decision.\(^{61}\) And when the merits are reached, owners simply do not prevail in significant numbers.

Over the period examined, owners prevailed on the merits only four times: once in the First Circuit, once in the Ninth Circuit, and twice in the Federal Circuit:

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\(^{59}\) The average for the federal circuit courts was 8.9%, for the trial courts 6.3%, and for all six courts 6.4%.

\(^{60}\) The average for the federal circuit courts was 22.2%, for the trial courts 11.3%, and for all six courts 13.8%.

\(^{61}\) In the courts of appeal the merits were reached by the First Circuit in 8 out 20 cases (40.0% of cases), by the Ninth Circuit in 16 out of 68 cases (23.5%), and by the Federal Circuit in 21 out of 74 cases (28.4%). In the trial courts, the merits were reached by First Circuit district courts in 14 of 35 cases (40.0%), by the Ninth Circuit district courts in 27 of 71 cases (38.0%), and by the Court of Federal Claims in 70 of 223 cases (31.4%).
Table 7: Success Rate in the Courts of Appeal

<table>
<thead>
<tr>
<th>Appellate Courts</th>
<th>1st Circ.</th>
<th>9th Cir.</th>
<th>Fed. Cir.</th>
<th>Avg.</th>
</tr>
</thead>
<tbody>
<tr>
<td># Taking</td>
<td>1</td>
<td>1</td>
<td>2</td>
<td></td>
</tr>
<tr>
<td># No Taking</td>
<td>7</td>
<td>15</td>
<td>19</td>
<td></td>
</tr>
<tr>
<td>% Owner Success</td>
<td>12.5%</td>
<td>6.25%</td>
<td>9.5%</td>
<td>8.9%</td>
</tr>
<tr>
<td>(taking)</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>% Government Success</td>
<td>87.5%</td>
<td>93.75%</td>
<td>90.5%</td>
<td>91.1%</td>
</tr>
<tr>
<td>(no taking)</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

Notably, in three of the four cases where property owners prevailed, the courts explicitly analyzed all three *Penn Central* factors.\(^{62}\) And in the fourth case, two factors were explicitly analyzed while the third factor was implicitly considered.\(^{63}\) Looking more closely at how the courts treated those factors:

- One case did not balance the three factors because all three went against the government.\(^{64}\)
- Another case is a jurisprudential mess (for our purposes) because the senior judge’s opinion (and thus lead opinion) looked at all three factors and found one dispositive while the concurring judge would have found a per se taking instead.\(^{65}\)
- A third case looked at all three factors finding two for the plaintiff and one for the government, but then decided the case based on the fact that the regulation completely abolished a fundamental right and not on the analysis of the factors.\(^{66}\)

\(^{62}\) See Youpee v. Babbitt, 67 F.3d 194 (9th Cir. 1995); Cienega Gardens v. United States, 331 F.3d 1319 (Fed. Cir. 2003); and Philip Morris v. Reilly, 312 F.3d 24 (1st Cir. 2003).

\(^{63}\) See Yancey v. United States, 915 F.2d 1534 (1990). In reviewing the case, the Federal Circuit based its discussion around the findings of the Court of Federal Claims. It explicitly considered the economic impact of the regulation and the impact on investment backed expectations, finding both weighed in favor of finding a taking. It then noted that

> There is simply no way that the Government can refute the Claims Court’s findings of fact. When adverse economic impact and unanticipated deprivation of an investment backed interest are suffered . . . compensation under the Fifth Amendment is appropriate. Even when pursuing the public good, as the USDA was doing . . . the Government does not operate in a vacuum. Bluntly stated, the consequences of the Government's action cannot be ignored. . . . The Yanceys' losses came about because of the Government's action. If the intent of the poultry quarantine was to benefit the public, the public should be responsible for the Yanceys’ losses.

*Id.* at 1542. In other words, the economic and investment back expectation factors were so tilted in favor of the Plaintiff that it simply did not matter what the character of the government regulation was, so that factor received only implicit examination. See *id.* at 540 (“the Government’s proper exercise of regulatory authority does not automatically preclude a finding that such action is a compensable taking” (citations omitted)).

\(^{64}\) *Cienega Gardens*, 331 F.3d 1319.

\(^{65}\) *Philip Morris*, 312 F.3d 24.
• The fourth case essentially balanced the three factors finding that two factors were so overwhelmingly against the government that a positive showing by the government on the third factor could not negate a finding of a taking.\(^\text{67}\)

Taken together, this data on the four cases where plaintiffs won provides evidence that a plaintiff’s success rate does not depend on the courts engaging in genuine balancing: win or lose, courts resolve regulatory takings claims according to their own subjective criteria and analysis of the facts, rather than by systematically applying *Penn Central’s* as a balancing test.\(^\text{68}\)

Additionally, beyond the numbers, the factual circumstances in which property owners prevail also serve to demonstrate how nearly impossible it is for property owners to win under the *Penn Central* ad hoc test.

The Ninth Circuit found a taking in only one case, *Youpee v. Babbitt*,\(^\text{69}\) because the law “completely abrogate[d]” both the “descent and devise of land by Indian landowners who do not have an heir who owns a share in the parcel. The amended statute continues to completely abolish one of the sticks in the bundle of rights for a class of Indian landowners.”\(^\text{70}\) Thus, it took a complete denial of a property right for the Ninth Circuit to actually find a taking under the *Penn Central* test. Although a destruction of one “stick” in the bundle of property rights is not always enough to warrant finding a taking,\(^\text{71}\) it appears here that the court found the deprivation so extreme as to be sufficiently similar to per se takings cases such as *Lucas*,\(^\text{72}\) which held that a regulatory taking destroying 100% of a property interest’s value is categorical and automatically counts as a taking, to find a taking here.

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\(\text{66} \) *Youpee*, 67 F.3d 194. Arguably, *Youpee* can be read as a case that analyzes the three factors and one factor – the character of the government regulation – is dispositive, but what really happened is that the court turns the case into categorical taking dressed in *Penn Central* garb. The character of the regulation was such that it completely destroyed a valuable right. This destruction resulted in a taking. This is exactly the same logic behind *Lucas v. S.C. Coastal Council*, 505 U.S. 1003 (1992), which is readily understood to be a categorical taking case. 505 U.S. at 1015 (“The second situation in which we have found categorical treatment appropriate is where regulation denies all economically beneficial or productive use of land.” (citations omitted)).

\(\text{67} \) *Yancey*, 915 F.2d 1534.

\(\text{68} \) See Section IV, *infra*, a case study of *Guggenheim v. City of Goleta*.

\(\text{69} \) 67 F.3d 194.

\(\text{70} \) Id. at 200.

\(\text{71} \) In *Andrus v. Allard*, 444 U.S. 51 (1979), the United States Supreme Court held that a complete prohibition on the sale of avian artifacts under the Eagle Protection Act and the Migratory Bird Treaty Act was not a taking. “The denial of one traditional property right does not always amount to a taking. At least where an owner possesses a full ‘bundle’ of property rights, the destruction of one ‘strand’ of the bundle is not a taking, because the aggregate must be viewed in its entirety.” *Id.* at 65-66.

\(\text{72} \) 505 U.S. at 1015 (describing two types of *per se* takings).
The Federal Circuit found takings in two cases: *Yancey v. United States*\(^{73}\) and *Cienega Gardens v. United States*.\(^{74}\) In *Yancey*, the USDA enacted quarantine zones in Maryland, Virginia, and Pennsylvania after outbreaks of certain forms of the Avian Influenza.\(^{75}\) Although testing showed that the Plaintiffs’ turkey flocks were free from the disease, the quarantine prohibited Plaintiffs from shipping the turkeys or eggs in interstate commerce during the quarantine. As a result Plaintiffs were forced to sell the birds for slaughter. Accepting the trial court’s determination that the loss constituted a severe economic impact, it was apparent that the Court of Appeal upheld the finding of a taking because of the peculiar situation of quarantining healthy birds. “Bluntly stated, the consequences of the Government’s action cannot be ignored. Why should the Yanceys be forced to bear their own losses when their turkeys were not diseased? The Yanceys’ losses came about because of the Government’s action. If the intent of the poultry quarantine was to benefit the public, the public should be responsible for the Yanceys’ losses.”\(^{76}\)

In *Cienega Gardens*\(^{77}\) Congress had passed two federal laws which abrogated real estate developers’ contractual rights to prepay their forty-year Department of Housing and Urban Development (HUD) mortgages after twenty years. The developers had vested property interests in their contractual and regulatory rights to the post-twentieth-year prepayment, and under real property law to repossess. The new laws expressly and deliberately abrogated those property interests. Thus both cases where the Federal Circuit found a taking were cases where the plaintiffs had specific property interests that were wholly abrogated by the government, in order to benefit the public as a whole.

The First Circuit found a taking in *Philip Morris v. Reilly*.\(^{78}\) Massachusetts passed a Disclosure Act requiring tobacco companies to disclose their ingredient lists to the state, which could publish the lists. The companies sued to block the law alleging their ingredient lists were trade secrets, that trade secrets were property protected by the takings clause, and that public disclosure would destroy the value of the secrets thereby affecting a taking. The suit produced three opinions: one judge found a taking under *Penn Central* because the act “cause[d] the

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\(^{73}\) 915 F.2d 1534.

\(^{74}\) 331 F.3d 1319.

\(^{75}\) 915 F.2d at 1536.

\(^{76}\) Id. at 1542.

\(^{77}\) 331 F.3d 1319.

\(^{78}\) 312 F.3d 24.
tobacco companies to lose their trade secrets, entirely, and appellants advance no convincing public policy rationale to justify the taking itself;” one judge found a taking but indicated that it was a *per se* taking and not a taking under *Penn Central*; and the third judge analyzed the case under *Penn Central*, but found that there was no taking because it was a facial challenge and he could conceive of a situation where there would be no taking (i.e. if the state never actually published the ingredient lists).

In each of these four cases, which represent every case in which these three circuits found a taking under *Penn Central* in thirty-four years, the courts did seem to apply *Penn Central* as a balancing test but found a taking only because of the extreme extent to which the government interfered with a property right: complete abrogation of both the descent and devise of land by certain Indian landowners; loss of property (poultry) due to a quarantine where the affected property was not actually diseased or otherwise dangerous; complete abrogation of a vested right (to prepay a mortgage); and destruction of all value in a trade secret.\(^79\)

The inference to be drawn, then, is that regardless of whether *Penn Central* is applied as a balancing test, plaintiffs can prevail under *Penn Central* only if they show that the impact of the regulation falls just short of a categorical taking. Indeed, the extent of what plaintiffs must prove to show a regulatory taking makes the cases seem very much like those found to be takings under the categorical rules set out in *Lucas*.\(^80\) *Lucas* identified two situations in which the Supreme Court has categorically found a regulation to be a taking: 1) “regulations that compel the property owner to suffer a physical ‘invasion’ of his property;” and, 2) “where regulation[s] denies all economically beneficial or productive use of land.”\(^81\) It seems that instead of balancing factual situations, the courts of appeal have found regulatory takings under *Penn Central* only when a claim falls barely short being a taking under one of the categorical rules.

This article’s data shows that, on average, the success rate for a plaintiff in the federal courts of appeals is 8.9%. In the First Circuit plaintiffs won one out of eight cases (12.5%); in the Ninth Circuit, one out of sixteen cases (6.25%); and in the Federal Circuit, two out of twenty-one

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\(^79\) It is also noteworthy that although *Penn Central* evokes images of land use cases, the Ninth Circuit case that found a taking was the only case among the three courts that actually involved real property. One possible reason for this is that, as difficult as it is to prevail under *Penn Central*, it is probably easier to win when the property interest does not involve real property because it is easier for government and courts to characterize real property regulations as laws which simply rebalance the burdens of living in society, rather than laws taking from one small group for the benefit of another larger group.

\(^80\) 505 U.S. 1003.

\(^81\) *Id.* at 1015.
cases (9.5%). Both on average and in any given circuit, plaintiffs stand only a small chance of success. While the results from the trial courts in the First, Ninth, and Federal Circuits, where more favorable to plaintiffs, they still tend to support these conclusions.

Table 8: Success Rate in the Trial Courts, Raw Data*

<table>
<thead>
<tr>
<th>Trial Courts</th>
<th>1st Circ.</th>
<th>9th Cir.</th>
<th>CFC</th>
<th>Avg.</th>
</tr>
</thead>
<tbody>
<tr>
<td>Total # Cases on Merits</td>
<td>14</td>
<td>27</td>
<td>70</td>
<td></td>
</tr>
<tr>
<td># Taking</td>
<td>3</td>
<td>3</td>
<td>14</td>
<td></td>
</tr>
<tr>
<td># No Taking</td>
<td>11</td>
<td>24</td>
<td>56</td>
<td></td>
</tr>
<tr>
<td>% Owner Success (taking)</td>
<td>21.4%</td>
<td>11.1%</td>
<td>20.0</td>
<td>18.0%</td>
</tr>
<tr>
<td>% Government Success (no taking)</td>
<td>78.6%</td>
<td>88.9%</td>
<td>80.0</td>
<td>82.0%</td>
</tr>
</tbody>
</table>

*Raw data: unadjusted data for the trial courts. This data is adjusted in the next table.

Table 9: Success Rate in the Trial Courts, Adjusted to Reflect Final Disposition*

<table>
<thead>
<tr>
<th>Trial Courts</th>
<th>1st Cir.</th>
<th>9th Cir.</th>
<th>CFC</th>
<th>Avg.</th>
</tr>
</thead>
<tbody>
<tr>
<td>Total # Cases on Merits</td>
<td>6</td>
<td>11</td>
<td>49</td>
<td></td>
</tr>
<tr>
<td># Taking</td>
<td>1</td>
<td>2</td>
<td>6</td>
<td></td>
</tr>
<tr>
<td># No Taking</td>
<td>5</td>
<td>9</td>
<td>43</td>
<td></td>
</tr>
<tr>
<td>% Owner Success (taking)</td>
<td>16.7%</td>
<td>18.2%</td>
<td>12.2</td>
<td>13.6%</td>
</tr>
<tr>
<td>% Government Success (no taking)</td>
<td>83.3%</td>
<td>81.8%</td>
<td>87.8</td>
<td>86.4%</td>
</tr>
</tbody>
</table>

*The final disposition data reflects those which were heard on appeal. For the cases where the court of appeal heard an appeal, I removed that case from the trial court data in this table.

Table 10: Combined Success Rate in the Combined Appellate and Trial Courts

<table>
<thead>
<tr>
<th>All Courts</th>
<th>Total</th>
<th>Total – Final Disposition*</th>
<th>All Cases</th>
<th>All Cases – Final Disposition*</th>
</tr>
</thead>
<tbody>
<tr>
<td>Total # Cases on Merits</td>
<td>156</td>
<td>111**</td>
<td>491</td>
<td>329**</td>
</tr>
<tr>
<td># Taking</td>
<td>24</td>
<td>13</td>
<td>24</td>
<td>13</td>
</tr>
<tr>
<td># No Taking</td>
<td>132</td>
<td>98</td>
<td>467</td>
<td>316</td>
</tr>
</tbody>
</table>

Again, this claim is only conclusive for the Court of Appeals for the First, Ninth, and Federal Circuits. While the similarity in results among these three circuits indicates that plaintiffs in other federal circuits would face similar chances of success, certainty would only come by reviewing cases in those circuits.
Two interesting facts reveal themselves in the trial court data. First, federal trial courts are more favorable to plaintiffs’ *Penn Central* claims than the courts of appeal. Second, the end result for plaintiffs, after taking into consideration appellate action reversing findings of takings, is just as bad in the trial and appellate courts. The appellate courts overturned 66% of cases in the First Circuit district courts that found a taking (two of three cases); 33% in the Ninth Circuit district courts (one of three cases); and over 50% of cases from the Court of Federal Claims (eight of fourteen). As a result, the adjusted rates of success for the trial courts – which accounts for the final disposition after case reversals – is just as low as for the rate for appellate courts, indicating that any win for the plaintiff in the trial courts is not likely to withstand review.

Compared to Hubbard, who found that “owners prevailed in 13.4% of the cases where the merits were addressed and in 9.8% of all one hundred and thirty-three cases,” this survey showed a similar average once the case was determined on the merits, but found that circuit courts of appeal are much less likely than the trial courts to find a regulatory taking. When one looks at the adjusted rate of success, accounting for reversals by the appellate courts, this survey revealed that plaintiffs are even less likely to prevail than Hubbard predicted: 11.9% chance of success in those cases that reach the merits and only 4.0% in all cases citing to *Penn Central*.

Compared to Mattingly, who found a 15% chance of success in general, but a 23% chance of success in the Court of Federal Claims, this survey found a similar chance of success (before appellate review was factored in), but could not confirm that the chance of success in the Court of Federal Claims was materially different than that of the other trial courts. When compared to the First Circuit district courts, there was a similar chance of success before appellate review was factored in, and when compared to the Ninth Circuit district courts, the results were similar after appellate review is factored in. The data may of course be skewed because of the relatively small sample size in the federal district courts compared to the large sample size of the Court of Federal Claims, but the data considered by this study are not

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83 Hubbard, *supra* note 18, at 141.
sufficient to conclude that the Court of Federal Claims treats cases materially different than other federal trial courts.

If one looks only at the rate of success in the appellate courts, this survey reveals much lower rates of success than shown in previous surveys. If one averages in the raw results from the trial courts with those of the appellate courts, this survey produces results nearly identical to the previous surveys. But if one looks at the adjusted data for final dispositions from the trial courts (the data most similar to that of the previous studies) which reflect the actual, effective chance of success (the more important question) then there is no greater chance of success in the trial courts than the appellate courts. Thus, the rate of success for plaintiffs is lower than that previous predicted. And while rate of success is not evidence of whether courts treat *Penn Central* as a balancing test, the low rate of success bolsters the conclusions that *Penn Central* is not favorable to plaintiffs. There is essentially a heavy presumption in favor of the government.

4. Plaintiff Success Rate

Taking the data as a whole – the factors rate and the balance rate – there is substantial evidence that courts simply do not apply *Penn Central* as a balancing test. More often than not, courts do not discuss all three *Penn Central* factors. Even in those cases where the courts do discuss all three factors, they rarely apply those factors as a balancing test. This indicates that *Penn Central* is not a balancing test, but a checklist under which plaintiffs rarely win. Lastly, the success rate indicates that plaintiffs will rarely prevail in a *Penn Central* claim.

IV. All Over the Map: A Case Study of *Guggenheim v. City of Goleta*

*Guggenheim v. City of Goleta* dramatically demonstrates how different judges can apply *Penn Central* to the same dispute in completely different ways. The original panel opinion84 expressly applied *Penn Central* as a balancing test, while the subsequent en banc opinion85 found one fact dispositive. As a result, the plaintiffs prevailed in the panel decision, but lost on en banc rehearing.

A. The Background

Daniel Guggenheim and others brought a facial challenge to the City of Goleta’s mobile home rent control ordinance. The ordinance effected a transfer of nearly 90% of the property value from mobile home park owners to mobile home tenants. Guggenheim argued that this was a regulatory taking under *Penn Central*.

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84 582 F.3d 996 (9th Cir. 2009).
85 638 F.3d 1111 (9th Cir. 2010) (en banc).
When Guggenheim purchased the mobile home park, the property was located in an unincorporated part of Santa Barbara County. The county had first enacted a Rent Control Ordinance (RCO) in 1979, and rents in Guggenheim’s park were controlled by the county’s RCO at the time he took ownership in 1997. Five years later, the City of Goleta incorporated and adopted the RCO as a permanent city ordinance. Because the mobile home park fell within the new city’s jurisdiction, its rents continued to be controlled under the newly-adopted city RCO, subject only to a brief hiatus during the transition from county to city regulation.

Guggenheim presented evidence that the RCO’s effect was to transfer wealth from the park owners to its tenants. During the time Guggenheim owned the park, housing costs in the city increased approximately 225%, but rents in the park could not and did not keep pace with that increase because of the RCO. These below-market rents resulted in the ability of mobile home owners to sell their mobile homes at a significant premium, compared to identical homes located outside Guggenheim’s park. This premium amounted to an average of 88% of the sale price. In other words, “an average mobile home worth $12,000 would sell for approximately $100,000 . . . the uncontroverted facts . . . establish the existence of a premium” and even “[t]he City has acknowledged the existence of such a premium.” Through this mechanism, the RCO effected a wealth transfer of nearly 90% of the property’s value from the mobile home park owners to the tenants.

B. The Panel Opinion

Judge Bybee’s panel opinion is one of the rare opinions which treats Penn Central as a balancing test. “We must first address each factor in turn, and then weight the factors together, in what has famously been described as an “essentially ad-hoc, factual inquir[y].”

First, the court considered the “economic impact of the regulation on the claimant.” The court found the RCO effected a transfer of approximately 90% of the value of the mobile home park. To Judge Bybee, this “wealth transfer from the Park Owners to their tenants is a naked

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86 Guggenheim, 582 F.3d at 1002.
87 Id. at 1018, n. 18.
88 Id. at 1020 (citation omitted).
89 Id.
90 Id. at 1013.
91 Id. at 1018 (citations omitted).
92 Id. at 1020.
transfer . . . [T]he RCO has effected the distribution of resources or opportunities to one group rather than another solely on the ground that those favored have exercised their raw political power to obtain what they want."93 A classic case of taking from A and giving to B,94 this “significant economic loss” weighed “heavily” in Plaintiffs favor.95

Second, the court looked at the extent to which the regulation interfered with investment-backed expectations. Guggenheim purchased the Park in 1997, eighteen years after the RCO was first adopted by the county, but five years before it was adopted by the city. Because the degree to which a property owner who purchases property subject to regulation may have a reasonable expectation of becoming free of that regulation is uncertain,96 Judge Bybee found this factor to yield mixed results: on the one hand, “expectations of the value of the Park when purchased . . . should have been, at all times, tempered by the knowledge that the [County’s] RCO [but not the City’s] would have an adverse effect on their investment;”97 but on the other hand “they also assumed ownership with some hope that they would be able to challenge the RCO under the Takings Clause.”98 Thus, this factor favored neither party.

Third, the court considered “the character of the governmental action.”99 Because the City “singled out the Park Owners and imposed solely on them a burden to support affordable housing,” and did not impose comparable costs on any other property owners,100 the RCO effected “the kind of expense shifting to a few persons that amounts to a taking.”101 Thus, this factor weighed strongly in Plaintiff’s favor.

93 Id. at 1021 (citing Cass R. Sunstein, Naked Preferences and the Constitution, 84 Colum. L. Rev. 1689, 1689 (1984)).
94 Id.
95 Id. at 1023.
96 See Palazzolo, 533 U.S. at 632-636 (O’Connor, J., concurring). Although Palazzolo expressly held that owners who purchase property subject to a regulation may challenge that regulation under Penn Central, id. at 627-630, the opinion did not explain how to analyze the investment-backed expectations factor in such a situation.
97 Guggenheim, 582 F.3d at 1026.
98 Id. at 1027.
99 Id.
100 Id. at 1029.
101 Id. at 1030; see also Armstrong v. United States, 364 U.S. 40, 49 (1960) (The Takings Clause 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.”).
Having reviewed each factor individually, Judge Bybee “weigh[ed] them together.” The court found that: 1) the RCO caused a substantial economic hardship; 2) the RCO looked more like a classic taking than a mere shifting of benefits and burdens, and it singled out mobile home park owners to bear the burden of providing affordable houses that should have fairly been borne by the taxpayers as a whole; but 3) the RCO had not strongly interfered with the Park Owners’ investment backed expectations. On the whole, the RCO “goes too far:” the suspect character of the governmental action and the substantial economic hardship outweighed any lack of interference with investment backed expectations.

C. The En Banc Opinion

The en banc panel opinion applies *Penn Central* to the case completely differently than the original panel did. Rather than applying *Penn Central* as a balancing test, Judge Kleinfield found that “[t]he case before us turns on the ‘primary’ factor.” In other words, Judge Kleinfield found one fact dispositive: the existence of a regulatory scheme prior to the Park Owner’s acquisition of the property. He then employed the three *Penn Central* factors simply to put three different glosses on the one fact he found dispositive.

Judge Kleinfield did not attempt to determine the Park Owner’s investment-backed expectations. Instead, he simply declared that Guggenheim “could have no ‘distinct investment-backed expectations’” under the facts of the case because the County had promulgated the RCO “long before” Guggenheim bought the land. Indeed, the bulk of Judge Kleinfield’s *Penn Central* analysis focuses on recasting the pre-existence of the regulatory scheme as the sole cognizable content of the investment-backed expectations factor so that any actual, demonstrable expectations Guggenheim may have acted upon, and the impact of the RCO upon those expectations, could be disregarded.

Nor did the en banc majority examine the economic impact of the City’s regulations on the value of Guggenheim’s property. That was considered irrelevant to the analysis, since

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102 *Guggenheim*, 582 F.3d at 1030.
103 *Id*.
104 *Id*.
105 *Guggenheim*, 638 F.3d at 1120.
106 *Id*. at 1118.
107 See *id*. at 1120-22 (no discussion of the economic impact of the City’s RCO on the Park owners); see also *id*. at 1120 (assuming for discussion that there was a wealth transfer, but finding that this happened before the Park Owners bought the property and therefore ignoring any discussion of the economic impact of the City’s ordinance on the Park Owners).
Judge Kleinfield declared that “[any wealth transfer] happened before the Guggenheims bought the mobile home park.”\textsuperscript{108} Thus, the existence of the pre-acquisition regulatory scheme settled this factor too, without further inquiry.

Lastly, the en banc panel did not consider any evidence of the “character” of the regulations as a one-time wealth transfer. In Judge Kleinfield’s view, the city’s RCO simply did not affect Guggenheim’s circumstances; “it left them as they had been for many years.”\textsuperscript{109} The existence of the regulatory scheme at the time the property was acquired was dispositive of the “character” factor, as well as of the other two \textit{Penn Central} elements.

Thus, Judge Kleinfield’s analysis under \textit{Penn Central} simply became an exercise in using the three specified factors as alternative ways to characterize the one fact he found important – the existence of rent control before Guggenheim acquired the park – and that single fact wholly determined the outcome of the case.

\textbf{D. Comparison of the Opinions}

The most important result of this case study is that it demonstrates both the wide range of approaches judges take to applying \textit{Penn Central}, and how different approaches lead to vastly different results. By applying a balancing test, courts would allow plaintiffs to win when \textit{on the whole} the regulation goes too far. By applying \textit{Penn Central} in more of a checklist fashion it does not matter how burdensome a regulation is if a plaintiff makes a weak showing on any “dispositive” or “primary” fact or factor. In an extreme example, a regulation could deprive an owner of 99\% of the value of their property (almost becoming a \textit{per se} taking under \textit{Lucas}) and could be done explicitly to make the owner pay for a public benefit that all community members would enjoy, but would not be a taking if the court determined that investment backed expectations was the primary factor and the plaintiffs made a weak showing on that factor. Judge Bybee’s panel opinion applied \textit{Penn Central} as a balancing test and Guggenheim was able to prevail with strong showings on two of the three enumerated factors. Judge Klienfield’s en banc opinion, by contrast, found one fact determinative of the outcome; his discussion of the \textit{Penn Central} factors simply repackaged that fact in three different ways to support his conclusion.

\textbf{V. Conclusion}

This article answers the question of whether \textit{Penn Central} is applied by the federal courts as a genuine three-factor balancing test or as a test where the government can escape

\textsuperscript{108} \textit{Id.} at 1120.

\textsuperscript{109} \textit{Id.} at 1121.
liability for a taking if it can prevail on any one of those factors. It attempted to do so through a comprehensive review of all cases in the First, Ninth, and Federal Circuits which cite to *Penn Central*.

The analysis revealed that the Courts of Appeals for the First, Ninth, and Federal Circuits, and the district courts within the Ninth Circuit, all decided *Penn Central* cases utilizing fewer than three factors in a majority of the cases reaching the merits: on average, the circuit courts of appeal utilized three factors only slightly more than one-third of the time (37.8%). Complementing these findings is data on how often the courts actually applied *Penn Central* as a balancing test. The data shows that applying *Penn Central* as a balancing test is statistically rare: as an average percentage of cases which reached the merits of the takings claim, the courts applied *Penn* as a balancing test less than 7% of the time; and as an average percentage of cases applying all three *Penn Central* factors (cases that themselves are less than half of all cases reaching the merits), courts applied it as a balancing test less than 14% of the time. Together these data indicate that the predominant practice of the federal courts is not to use *Penn Central* as a balancing test.

In addition to these findings, this survey also generated data on plaintiffs’ success rate in asserting *Penn Central* claims, which was useful for comparison to previous research in this area:

Compared with Hubbard, who found that owners prevailed in 13.4% of the cases which reached the merits and in 9.8% of all cases in its sample, this survey initially showed a similar average once the case was determined on the merits, but found that circuit courts of appeal are much less likely than the trial courts to find a regulatory taking. And when one looks at the final disposition data for rate of success, which accounted for reversals by the appellate courts, this survey revealed that plaintiffs are much less likely to prevail than Hubbard predicted: 11.9% chance of those cases which reached the merits and 4.0% in all cases citing *Penn Central*.

Compared to Mattingly, who found a 15% chance of success in general for plaintiffs, but a 23% chance of success in the Court of Federal Claims (which indicated that the Court of Federal Claims treated cases differently than other federal courts), this survey could not confirm that the chance of success in the Court of Federal Claims was significantly different than that of the other trial courts.

Finally, this article performed a case study of the two Ninth Circuit opinions in *Guggenheim v. City of Goleta*. Together the panel and en banc opinions are indicative of both the wide range of approaches judges take to applying *Penn Central*, and the difficulty of identifying that approach simply in terms of whether an opinion seems to invoke all three
factors. The ultimate outcome of this case is yet one more indication that the federal courts rarely apply *Penn Central* as a genuine balancing test.

**Appendix 1**

**Penn Central Decisional Matrix**

**Ripeness:** Williamson County Prong 1  
Did the plaintiff receive a final decision as to the allowable use of the property?

**Ripeness:** Williamson County Prong 2  
Did the plaintiff seek compensation via state procedures?

**Procedural Bars:** Abstention/Preclusion/Other  
Especially when the case is brought in federal court, does the court find a way (other than *Williamson County*) to duck the issue altogether?

**Relevant Parcel Issue**  
Does the court aggregate the property at issue with other parcels in order to minimize the extent of the taking?

(Note: this move can be applied temporally, as well as spatially; see *Cienega Gardens v. United States*.)

Alternate terminology: the denominator issue; the "parcel as a whole"; conceptual severance.

**Transferable Development Rights**  
Does the court consider whether the availability of TDRs mitigates liability for the alleged taking?

**Merits:** Character of the State Action  
Does the court consider the "character" of the regulation?

**Merits:** Economic Impact  
Does the court consider the regulation's financial impact on the value of the property?

**Merits:** Investment-Backed Expectations  
Does the court consider the extent to which the regulation disrupted the owner's planned use of the property?

**Variation of IBE Analysis:** Regulatory "Notice Rule"  
Did the plaintiff have real or constructive notice of the regulations before they were applied against him?

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