

HISTORIC PRESERVATION: LAUNCHED FROM GRAND CENTRAL TERMINAL, BUT DERAILING

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INTRODUCTION

The United Artists Theater sits abandoned—frozen in time.¹ It closed during the early days of the pandemic, never to reopen.² A developer now owns the 1970s-style theater, along with the surrounding land and parking lots.³ But the developer is banned from turning the site into 170 housing units as planned. Instead, because of the theater’s “historic value,” California determined that the developer must maintain the theater’s original structure.⁴ According to the state, the theater has historic value solely because its architectural style is “rare” in the area.⁵ As a result, the developer’s efforts to build housing are hampered in an area overwhelmed by an affordable housing crisis.⁶ The United Artists Theater saga is a movie those familiar with housing and land use issues have seen before. Historic preservation disputes are

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1. See Danielle Echeverria, *How an Empty 1970s S.F. Movie Theater Deemed ‘Historic’ Could Scale Back Housing Plans at Stonestown*, S. F. CHRON. (Sep. 8, 2022), <https://www.sfchronicle.com/bayarea/article/How-an-empty-1970s-S-F-movie-theater-deemed-17428396.php> (“The theater has been empty since 2020, when it closed for the pandemic.”).

2. *Id.*

3. *Id.*

4. *Id.*

5. *Id.*

6. *Id.*

commonplace nationwide, especially in cities facing a housing affordability crisis.⁷

The Supreme Court held that historic preservation was not covered by the Fifth Amendment’s Takings Clause⁸ in the landmark case *Penn Central Transportation Co. v. City of New York*.⁹ *Penn Central* arose in a unique historical context, aided by a temporary social movement.¹⁰ Although the *Penn Central* Court thought it crafted a narrow holding, it underestimated its influence. Today, legal observers know *Penn Central* for its balancing test used to determine whether a government action is a taking. The test balances: 1) the nature of the government action, 2) the impact on investment-backed expectations, and 3) the overall economic impact on the property owner.¹¹ Its historic preservation holding—that the practice is not a taking under the Fifth

7. Historic preservation fights have become common in large cities. See, e.g., Alexis Madrigal, *Community Divided Over Fate of Berkeley’s People’s Park*, KQED (Aug. 18, 2022), <https://www.kqed.org/news/11922900/community-divided-over-fate-of-berkeley-peoples-park> (explaining the fight over turning “People’s Park” in Berkeley into student housing); Lisa Prevost, *Town After Town, Residents Are Fighting Affordable Housing in Connecticut*, N. Y. TIMES (Sep. 4, 2022), <https://www.nytimes.com/2022/09/04/realestate/connecticut-affordable-housing-apartments.html> (“And in Greenwich, a developer recently withdrew an application to build a project that would include 58 apartments priced below market rate, after residents . . . said the buildings that would be demolished were historically significant.”); Jacob Anbinder, *What Historic Preservation Is Doing to American Cities*, THE ATLANTIC (May 2, 2022), <https://www.theatlantic.com/ideas/archive/2022/05/historic-preservation-has-tenuous-relationship-history/629731/> (chronicling various historic preservation efforts in a variety of cities and briefly charting the history of the practice).

8. The relevant part of the Fifth Amendment, commonly referred to as the Takings Clause, reads “Nor shall private property be taken for public use, without just compensation.” U.S. CONST. amend. V.

9. 438 U.S. 104 (1978).

10. For a discussion of the unique social, political, and cultural circumstances surrounding *Penn Central*, see J. Peter Bryne, *Penn Central in Retrospect: The Past and Future of Historic Preservation Regulation*, 33 GEO. ENVTL. L. REV. 399, 423 (2021) (“[Grand Central] was a symbol of New York City’s prestigious past—at a time when the City’s fortunes reached a low ebb. Preservationists mounted an astute campaign, greatly aided by the willingness of Jacqueline Kennedy Onassis to become the public face of the movement. . . . [T]he arrival at Union Station of the Landmark Express—on the day before the argument—may have made an impression at a time before efforts to send political messages to the Court became common.”); Gideon Kanner, *Making Laws and Sausages: a Quarter-Century Retrospective on Penn Central Transportation Co. v. City of New York*, 13 WM. & MARY BILL RTS. J. 679, 743 (2005) (“Their full-blown publicity campaign was professionally handled gratis by J. Walter Thompson, the large, highly regarded advertising and public relations agency. . . . I urge the readers to . . . gain a better understanding of how large, how professional, and how sophisticated this effort was. . . . [W]hen the *Penn Central* case was before the U.S. Supreme Court, they organized a publicity campaign that extended far beyond New York and culminated in organizing a whistlestop train trek that went to Washington through New Jersey, Pennsylvania, Delaware, and Maryland.”).

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

Amendment—is significant as well.¹² A second look at that holding is overdue; the Court’s stare decisis factors, as laid out in recent cases,¹³ support revisiting *Penn Central*’s ruling on historic preservation.

First, the relevant facts have changed. Cities no longer use historic preservation to save icons like Grand Central Terminal. Instead, they prevent changes to unremarkable homes, strip malls, and even parking lots—often against the owner’s wishes.¹⁴ The *Penn Central* majority wrote its opinion to be fact-specific, but the context of many modern historic preservation efforts looks very different.

Second, as historic preservation has changed, so has the Court’s regulatory takings doctrine. The Court has undermined *Penn Central* in *Loretto v. Teleprompter Manhattan CATV Corp.*,¹⁵ *Lucas v. South Carolina Coastal Council*,¹⁶ and *Cedar Point Nursery v. Hassid*.¹⁷ *Loretto* prohibits permanent physical occupations, no matter how small, of private property by the government.¹⁸ This rule, if taken seriously, could prohibit some current preservation efforts. *Lucas* rejected environmental regulations with similar goals, rationale, and operation to historic preservation.¹⁹ *Cedar Point* shifted the Court towards embracing a simple rule: a taking occurs when *any property right* is taken from the owner.²⁰ This rule would invalidate historic preservation because the practice appropriates the owners’ rights to use their property.

12. See Bryne, *supra* note 10, at 401 (arguing that *Penn Central* was a “a modest opinion holding together a skittish majority to sustain the protection of a beloved train station” but ended up giving “broad constitutional permission for historic preservation”).

13. These factors are discussed in more detail *infra* Section III, but they are: changed facts, changed legal doctrine, the quality of the original decision’s reasoning, the negative effects of the decision, the workability of the case’s rule, and any concrete reliance interests.

14. See, e.g., legallysociable, *Historic Preservation of a Strip Mall and Parking Lot*, LEGALLY SOCIABLE (July 21, 2015), <https://legallysociable.com/2015/07/21/historic-preservation-of-a-strip-mall-and-parking-lot/> (cataloging how residents in a D.C. suburb stopped a train station by historically preserving a strip mall and its parking lot).

15. 458 U.S. 419 (1982).

16. 505 U.S. 1003 (1992).

17. 141 S. Ct. 2063 (2021).

18. See *Loretto*, 458 U.S. at 430 (“Later cases, relying on the character of a physical occupation, clearly establish that permanent occupations of land by such installations as telegraph and telephone lines, rails, and underground pipes or wires are takings even if they occupy only relatively insubstantial amounts of space and do not seriously interfere with the landowner’s use of the rest of his land.”).

19. See *Lucas*, 505 U.S. at 1022 (summarizing South Carolina’s reasons for wanting to stop construction on the beach).

20. See *Nekrilov v. City of Jersey City*, 45 F.4th 662, 681–83 (3d Cir. 2022) (Bibas, J., concurring) (arguing that since *Cedar Point*, regulatory takings doctrine is a mess that would be better served by moving to this simple rule); see also, *Cedar Point*, 141 S. Ct.

Third, *Penn Central* is inconsistent with the original meaning of the Takings Clause. The framework the Court articulated in *New York State Rifle & Pistol Association, Inc. v. Bruen*, if applied to the Takings Clause, calls into doubt the constitutional validity of historic preservation.²¹ This framework asks: 1) is the restricted activity facially protected by the original public meaning of the Constitution’s text, and if so, 2) was the restriction at issue part of “the Nation’s tradition” of regulating that activity?²² In 1868, when the Takings Clause became binding on the states, the meaning of “private property” went beyond the physical and encompassed a bundle of property rights, including the right to use and modify one’s property.²³ At that time, historic preservation was not considered an appropriate restriction on those rights.²⁴ Thus, under *Bruen*’s framework, historic preservation is unconstitutional.

Fourth, these historic preservation efforts damage the American economy. Historic preservation has worsened the housing affordability crisis by preventing developers from building additional housing, especially in rapidly growing areas.²⁵ This crisis goes far beyond the increasing rent prices and limits the ability of Americans to move from place to place, seek new jobs, and live where they want.²⁶

Fifth, *Penn Central*’s rule has proved unworkable in the lower courts. Although it encouraged lower courts to engage in a fact-specific balancing test, today, virtually no legal challenges to historic preservation succeed.²⁷ Instead of engaging with the facts of each case, many lower courts have become a rubber stamp.²⁸ The “balancing test” that is supposed to revolve around specific facts has allowed one side to win almost every time for over forty years. The test is not working.

Lastly, the reliance interests created by *Penn Central* are not enough to overcome the other five factors. Although they are important, they do not fundamentally alter the analysis or tip scales towards upholding

21. 142 S.Ct. 2111; see *Nekrilov*, 45 F.4th at 686 (Bibas, J., concurring) (citing *Bruen* to show how historical analysis may be used in the Takings Clause context).

22. *Bruen*, 142 S.Ct. at 2129–30.

23. See the discussion of the history of property regulation in the United States *infra* Part III.C. The Supreme Court held the Fifth Amendment to be incorporated against the states in *Chicago, Burlington & Quincy Railroad Co. v. City of Chicago*, 166 U.S. 226 (1897).

24. *Id.*

25. For a full discussion of why historic preservation is a harmful policy, see *infra* Part III.D.

26. *Id.*

27. For a more detailed examination of how lower courts treat historic preservation challenges, see Part III.E.

28. *Id.*

the case. This is because states and localities do not have a strong interest in, or a reliance on, violating the Constitution.²⁹

These factors support a core conclusion. After almost a half-century, it is time for the Court to overturn, narrow, or reconsider its decision in *Penn Central*. A stare decisis analysis supports the idea that the Court should fully overturn *Penn Central*. But the Court could also stop short of fully overturning *Penn Central* and instead narrow its scope. It could do this by extending other relevant precedent or by ensuring preservation adheres more strictly to *Penn Central*'s factual circumstances. Many scholars have critiqued *Penn Central*'s overall balancing test, but none have looked at historic preservation specifically through a stare decisis lens, nor have any analyzed the constitutionality of historic preservation through a *Bruen* framework. This Note adds that to the literature by taking the Court's stated stare decisis framework step by step to evaluate whether *Penn Central* should remain good law and how it could change.

I. WHAT IS HISTORIC PRESERVATION?

A. *Historic Preservation Before Penn Central*

Scholars have defined historic preservation as “the process of identifying resources of historic, cultural, or architectural significance and then protecting, interpreting, maintaining, or rehabilitating such resources.”³⁰ Preservation has always existed. Humans have always preserved structures and objects they feel have historical, cultural, or religious significance.³¹

American historic preservation emerged as an organized force in the 1800s.³² Upper-class patrons with money, time, and interest in history championed the practice.³³ Individual citizens or associations either purchased historic sites or lobbied local governments to do so.³⁴ For example, early preservationists spurred by patriotism successfully

29. See *Ramos v. Louisiana*, 140 S. Ct. 1390, 1406–07 (2020) (discounting Oregon and Louisiana's reliance interest in keeping prisoners incarcerated based on non-unanimous jury verdicts because the method of conviction was unconstitutional).

30. SARA C. BRONIN & RYAN M. ROWBERRY, *HISTORIC PRESERVATION LAW IN A NUTSHELL 2* (2nd ed. 2017).

31. *Id.*

32. *Id.* at 8–9.

33. See Anbinder, *supra* note 7 (“[P]reservation still struck many as an eccentric, even reactionary hobby—a cause endorsed, in the words of the early New York preservationist Harmon Goldstone, only by ‘crackpots.’”).

34. BRONIN & ROWBERRY, *supra* note 30, at 8–9.

pressured the City of Philadelphia to purchase Independence Hall instead of allowing it to be demolished.³⁵ In other cases, wealthy patriotic patrons directly purchased sites like Mount Vernon.³⁶ Preservation was confined to these types of isolated efforts until the mid-twentieth century. Only two American cities had landmark preservation laws before 1945.³⁷

B. Modern Schemes—From Penn Central to Now

This Note concerns itself with the type of preservation that first emerged at a large scale in the United States around the time of *Penn Central*. This preservation, and the new legal regime that supported it, differed from past efforts by focusing on preventing current property owners from destroying or altering historic structures.³⁸ These restrictions may be imposed on isolated pieces of property or as part of a broader effort to create a historic “district.”³⁹

Today, local laws form the backbone of historic preservation and impose restrictions on property owners.⁴⁰ An individual or a group called a “historic preservation commission” typically decides which properties are “historic,” based on a set of fixed criteria.⁴¹

Once the commission landmarks a property as historic, an owner faces a variety of restrictions. Most statutes prevent the owner from demolishing the building without special permission.⁴² Commissions or other interested entities are often the ones that review applications for demolition.⁴³ Many statutes have exceptions, but these exceptions are often very narrow.⁴⁴ Renovations are similarly restricted.⁴⁵ Historic preservation boards or similar entities often review permits for renovations.⁴⁶ Property owners often must show that the renovation or

35. *Id.* at 8.

36. *Id.* at 9.

37. Anbinder, *supra* note 7.

38. See BRONIN & ROWBERRY, *supra* note 30, at 2 (“[I]t is human nature to preserve objects and sites we find meaningful. But only fairly recently have countries around the world begun to develop robust legal regimes for the preservation of historic resources.”).

39. See *id.* at 21–23 (outlining how localities use both historic districts and stand-alone preservation to achieve their goals).

40. *Id.* at 10.

41. *Id.* at 19; 68–69.

42. *Id.* at 196.

43. *Id.* at 197.

44. See, e.g., BRONIN & ROWBERRY, *supra* note 30, at 199 (describing the “public interest exception”); *id.* at 209 (describing the economic hardship exception).

45. *Id.* at 203–04.

46. *Id.* at 204.

demolition will be “appropriate” and will comport with the historic aspects of the property.⁴⁷ Some narrow exceptions allow owners to bypass this showing.⁴⁸

Modern preservation’s breadth and depth is stunning. Hundreds of localities across the country have historic preservation statutes.⁴⁹ It is unclear how many properties nationwide are landmarked in some way, but some clues exist. The National Register of Historic Places lists over 97,000 properties.⁵⁰ New York City alone claims that it has landmarked over 37,000 properties.⁵¹ San Francisco landmarks another 1,500 individual parcels.⁵²

II. *PENN CENTRAL*’S PERFECT STORM

Bad facts made bad law in *Penn Central*. *Penn Central*’s context was unique, but it had broad consequences for property rights. This piece is not the first to examine the unique factual circumstances of *Penn Central*’s background or its impact on the Court.⁵³ But it is the first piece to analyze the case’s factual background using a stare decisis framework.

The facts of *Penn Central* seem simple enough. Penn Central Transportation Company, a railroad company, owned and operated both Grand Central Station and Penn Station in New York City.⁵⁴ In 1963, real estate developers demolished Penn Station’s exterior to make way for Madison Square Garden.⁵⁵ The public was outraged. It saw Penn Station as an architectural landmark and Madison Square Garden as a slap in the face.⁵⁶ The outrage sparked preservation efforts in New

47. *Id.*

48. *See, e.g., id.* at 209 (describing the economic hardship exception).

49. *Id.* at 195.

50. *See National Register Database and Research*, NAT’L PARK SERV. (last updated Jan. 19, 2023), <https://www.nps.gov/subjects/nationalregister/database-research.htm#table> (listing 100 properties per page for 977 pages).

51. *About LPC*, NYC LANDMARKS PRES. COMM’N, <https://www.nyc.gov/site/lpc/about/about-lpc.page> (last visited Mar. 1, 2023).

52. S.F., CAL., PLANNING CODE ART. 10, APPENDIX A (2022).

53. *See, e.g.,* Byrne, *supra* note 10, at 423; Kanner, *supra* note 10, at 743.

54. Technically, the Pennsylvania Railroad operated Penn Station for most of its existence, but a merger between Pennsylvania Railroad and New York Central in 1970 created Penn Central. Byrne, *supra* note 10, at 404.

55. *Id.*

56. Christopher Gray, *Streetscapes/The Destruction of Penn Station: A 1960’s Protest That Tried to Save a Piece of the Past*, N. Y. TIMES (May 20, 2001), <https://www.nytimes.com/2001/05/20/realestate/streetscapes-destruction-penn-station-1960-s-protest-that-tried-save-piece-past.html>.

York City.⁵⁷ When Penn Central announced a plan to construct a massive office building above Grand Central Station, activists and politicians rushed to stop the project.⁵⁸ Years before, the New York City Landmark Commission designated Grand Central Station as a historic landmark, preventing the construction from moving forward.⁵⁹ But the background to this fight was much more complicated.

First, the 1970s saw new, immense pressure to limit urban development. Post-war “urban renewal,” highway construction, and policy neglect left many cities as hollowed-out fiscal messes.⁶⁰ While modern young professionals often live near city centers today,⁶¹ in the 1970s, cities had not yet seen these trends materialize.⁶² Advocates saw further development as deteriorating rather than reviving cities.⁶³ Thus, they also saw preserving important buildings and areas as saving cities from further decline.⁶⁴

Additionally, unlike today’s environmentalists, those of the 1960s and 70s emphasized a lack of growth as critical to a green future.⁶⁵ Many saw overpopulation as a looming disaster—the sheer strain of too many humans stripping the planet’s natural resources and beauty.⁶⁶ New environmental laws reflected the belief that human growth was a

57. Byrne, *supra* note 10, at 404.

58. *Id.* at 425.

59. *Id.* at 405.

60. See Alexander Laska & Beth Osborne, *Community Replenishment: Undoing the Damage of “Urban Renewal”*, THIRD WAY (Dec. 7, 2020), <https://www.thirdway.org/memo/community-replenishment-undoing-the-damage-of-urban-renewal> (explaining how highway construction meant to keep suburbanites coming to the city destroyed urban wealth instead of creating it).

61. See Hyojung Lee, *Are Millennials Leaving Town? Reconciling Peak Millennials and Youthification Hypotheses*, 26 INT’L J. OF URBAN SCIS. 68, 82 (2022) (discussing how cities continue to attract large numbers of young people).

62. See *id.* at 83 (explaining that Baby Boomers began moving into the suburbs in large numbers in the 1970’s, when the oldest ones would have been in their early to mid-twenties).

63. See Anbinder, *supra* note 7 (explaining how decades of highway construction and development had caused dismay at development in cities).

64. *Id.*

65. See Adam Rome, “Give Earth a Chance”: *The Environmental Movement and the Sixties*, 90 J. OF AM. HIST. 525, 549 (2003) (explaining that the more radical, younger core of the early environmental movement had a “new wariness about the attempt to master nature - and a new willingness to restrain economic growth . . . in order to preserve the natural environment.”).

66. See Items-in-Extracts From Statements of the 15th, 17th, 18th, 19th, 20th, and 24th Sessions of the General Assembly Referring to the Secretary-General in General (June 30 2006), <https://search.archives.un.org/uploads/r/united-nations-archives/8/f/5/8f51042e61f063d4c22b74d7830bce0d3c592d3d7f9fce10b8f8d8c5e6cd8f7d/S-0888-0008-04-00001.pdf> (U Thant, then UN Secretary General, tells a 1969 conference that the world has “ten years” to “defuse the population explosion” or see catastrophe); see also PAUL R. EHLRICH, *THE POPULATION BOMB* 66–67 (19th ed., 1970) (predicting that the planet’s natural features would die a horrible death because of there being too many people).

problem that government needed to solve.⁶⁷ The legal and political landscape began to slant towards *degrowth* in an attempt to preserve the planet. Historic preservation embodied many of the same concerns and interests, creating a pro-status quo legal regime.

Second, Grand Central Terminal was one of the most famous buildings in America's largest city. Even with the decline of passenger rail in the United States, Grand Central remained busy and important to New Yorkers' lives.⁶⁸ Moreover, public anger was still fresh over Penn Central's 1962 demolition of Penn Station.⁶⁹ Activists and the public watched in horror as Penn Central allowed the iconic Penn Station to be torn apart to make way for Madison Square Garden.⁷⁰ Grand Central was similarly iconic, both because of its architecture and because of what it represented. Many New Yorkers saw it as a symbol of the City's golden age, before decay and mismanagement.⁷¹

Third, activists put immense pressure on the Court to "save" Grand Central. Regulatory takings were not a hot-button topic in 1970s politics, but the case's stakes animated a large social movement. Jackie Kennedy spearheaded a campaign among New York elites seeking to prevent Grand Central from meeting the same fate as Penn Station.⁷² These preservation activists, especially Jackie Kennedy, would have been highly visible to the justices. The activists generated significant news coverage through a professionally funded public relations and pressure campaign.⁷³ They also went so far as to charter a symbolic train, the "Landmark Express," to travel from New York and arrive at Washington Union Station on the day of oral arguments.⁷⁴ The Court's opinion reflects this social context.

The Court ultimately ruled that New York's restrictions on landmarked properties like Grand Central were not takings.⁷⁵ Justice

67. See e.g., CAL. PUB. RES. CODE § 21000 (West 2022). The California Environmental Quality Act, commonly known as "CEQA," passed in 1970 explaining that because environmental capacity is limited, the state must ensure growth does not cross critical thresholds. *Id.*

68. See Byrne, *supra* note 10, at 422–23.

69. See *id.* at 425 ("The preservation of Grand Central brought forth a maximum effort by the preservation community, moved not only by the merit of protecting its integrity, but by painful memories of the destruction of Pennsylvania Station.").

70. Gray, *supra* note 56.

71. See Byrne, *supra* note 10, at 423 ("[Grand Central] was a symbol of New York City's prestigious past—at a time when the City's fortunes reached a low ebb.").

72. Kanner, *supra* note 10, at 742.

73. *Id.*, at 742–43.

74. Byrne, *supra* note 10, at 415.

75. Penn Cent. Transp. Co. v. City of New York, 438 U.S. 104, 138 (1978).

Brennan’s opinion begins with several policy reasons for historic preservation. He first mentions that all fifty states have preservation laws,⁷⁶ and then discusses the two reasons why historic preservation had become pervasive. Brennan claims they are: 1) the recent destruction of large numbers of landmarks, and 2) the increasing public recognition that historic structures have precious value.⁷⁷ Brennan’s discussion implicitly advances the view that preservation is good policy enacted for virtuous reasons.

Brennan refers throughout his opinion to the importance of historic preservation, Grand Central, and the case-specific facts. He first recites New York’s rationale for the landmark law, including its status as “a world-wide tourist center and world capital of business, culture and government” and its belief that preservation would produce “civic pride in the beauty and noble accomplishments of the past.”⁷⁸ He then characterizes New York’s laws as “controls to enhance the quality of life by preserving the character and desirable aesthetic features of a city.”⁷⁹ Finally, he finds that the landmarking of Grand Central is “substantially related to the promotion of the general welfare.”⁸⁰

Brennan repeatedly emphasizes the case’s specific facts. He concedes that Penn Central could not build the exact project it wanted but maintained that it could submit proposals for other projects or sell its “air rights.”⁸¹ He also observes that Penn Central could continue to operate the station, as it had for sixty-five years, at a reasonable profit.⁸² This is unsurprising, however, given how the case’s majority came together. Multiple justices in the majority believed it to be a close case.⁸³ Brennan’s majority shows an attempt to write a very fact-dependent, narrow opinion.⁸⁴

76. *Id.* at 107.

77. *Id.* at 108.

78. *Id.* at 109.

79. *Id.* at 129.

80. *Id.* at 138. *See infra* note 285 for a discussion on how the Court eventually repudiated this specific rationale in the context of the Takings Clause.

81. *Penn Cent. Transp. Co. v. City of New York*, 438 U.S. 104, 136–37 (1978).

82. *Id.* at 136.

83. The papers of Justice Powell indicate that Potter Stewart thought the case was “very, very close” and that Byron White agreed with him. Memorandum from Lewis F. Powell Jr., *Penn Central Transportation Company v. New York City* (Dec. 2, 1977) (available at <https://scholarlycommons.law.wlu.edu/casefiles/595>).

84. For a similar discussion, see J. Peter Bryne, *Penn Central in Retrospect: The Past and Future of Historic Preservation Regulation*, 33 *GEO. ENVTL. L. REV.* 399, 401 (2021) (calling *Penn Central* a “modest opinion holding together a skittish majority to sustain the protection of a beloved train station”).

Brennan then uses the case's specific facts to build his famous balancing test. Although this Note does not critique his balancing test as many scholars have done,⁸⁵ it is worth observing that its three parts almost incorporate *Penn Central*'s facts. The first and second prongs—the economic impact of the regulation⁸⁶ and the extent to which it interferes with “investment-backed expectations”⁸⁷—seem tailor-made for this case.⁸⁸ Brennan recurringly stresses that *Penn Central* had long operated Grand Central as a train station and could continue to do so with a reasonable financial gain, even without the new development.⁸⁹ Thus, these first and second prongs can be seen as guarding against this specific type of claim: one where a corporation that is already profitable seeks to destroy a landmark merely for profit.

The third and final prong, the character of the government action,⁹⁰ also incorporates the facts. Brennan says that a taking is harder to find when the government action seems to “promote the common good.”⁹¹ Here, the connection to the case's facts is obvious. As mentioned above, Brennan's opinion repeatedly references the landmarking law's positive goals and impacts.⁹²

Brennan's opinion, overall, reflects the one-of-a-kind context of *Penn Central*. America's premier city. Its premier train station. An aggressive social movement among elites. Those elites desperately fighting a large corporation. The urban prospects and emerging environmental movement of the moment. But these special circumstances, and their effect on the case, are some of the reasons why the Court should revisit *Penn Central*.

85. See, e.g., Richard A. Epstein, *From Penn Central To Lingle: the Long Backwards Road*, 40 J. MARSHALL L. REV. 593, 601–04 (2007) (criticizing the *Penn Central* balancing test for being illogical and out of step with the private law understanding of property rights).

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

87. *Id.*

88. For a discussion on how the particular facts of *Penn Central* impacted the outcome, see the discussion *supra* Part II and Byrne, *supra* note 10, at 427 (discussing how activists knew Grand Central was one of the best buildings for a test case and had sought out the most sympathetic facts possible).

89. *Penn Central*, 438 U.S. at 136.

90. *Id.* at 124.

91. *Id.*

92. See, e.g., *id.* at 124.

III. THE STARE DECISIS FACTORS

There is no bright-line test for when the Court will revisit precedent.⁹³ *Planned Parenthood of Southeast Pennsylvania v. Casey*,⁹⁴ *Ramos v. Louisiana*,⁹⁵ and *Dobbs v. Jackson Women’s Health Organization*⁹⁶ are the closest the Court has ever come to laying out a comprehensive set of factors. This Part synthesizes those cases and considers whether the following six factors weigh in favor of overturning *Penn Central*: changed facts,⁹⁷ changed legal doctrine,⁹⁸ the quality of *Penn Central*’s reasoning,⁹⁹ the negative effects of *Penn Central*,¹⁰⁰ the workability of *Penn Central*’s rule,¹⁰¹ and any concrete reliance interests.¹⁰² After careful consideration, these factors show that *Penn Central* meets the Court’s standard for a precedent that ought to be overruled.

A. Changed Facts

The facts of historic preservation have changed since *Penn Central*. First, modern preservation efforts often target unremarkable private residences, not world-famous icons like Grand Central Station. Second, many preservation efforts now happen in a vacuum, devoid of any larger plan or scheme. Third, they often do not allow the owners the economic security *Penn Central* had. And fourth, the social and political dynamics underlying the Grand Central preservation efforts have changed.

Penn Central revolved around one of America’s most famous train stations, but few modern preservation efforts target anything as well-known. Preservation is often targeted at private homes, not public

93. See *Dobbs v. Jackson Women’s Health Org.*, 142 S. Ct. 2228, 2264 (2022) (“[O]verruling a precedent is a serious matter. It is not a step that should be taken lightly. Our cases have attempted to provide a framework for deciding when a precedent should be overruled, and they have identified factors that should be considered in making such a decision.”).

94. 505 U.S. 833 (1992).

95. 140 S. Ct. 1390 (2020).

96. 142 S. Ct. 2228 (2022).

97. See *Casey*, 505 U.S. at 855 (“[W]hether facts have so changed, or come to be seen so differently, as to have robbed the old rule of significant application or justification.”).

98. See *id.* (“[W]hether related principles of law have so far developed as to have left the old rule no more than a remnant of abandoned doctrine.”); see also *Ramos*, 140 S.Ct at 1405 (explaining that the Court will look at a precedent’s “consistency with related decisions”).

99. See *Dobbs*, 142 S.Ct at 2265 (saying that the “quality of the reasoning” from *Roe* and *Casey* counseled overturning them).

100. *Id.*

101. *Id.*

102. *Id.*

spaces. For example, San Francisco lists over 1,500 parcels of land as subject to historic landmark regulations,¹⁰³ but most of these appear to be private residences located within historic districts.¹⁰⁴ Furthermore, individual public landmarks often do not have the same broad recognition or symbolism that Grand Central does—neither to their cities nor to the nation.¹⁰⁵ For example, a gas station,¹⁰⁶ a strip mall,¹⁰⁷ or the seats inside a closed movie theater¹⁰⁸ do not. It is hard to imagine the Court taking New York City’s case seriously if it asked to landmark a gas station in Queens.

Further, modern preservation efforts often do not fit into a larger scheme or plan. In *Penn Central*, the Court emphasized that New York was not *just* landmarking Grand Central.¹⁰⁹ It had a comprehensive preservation plan meant to influence the direction of the City’s aesthetics and character.¹¹⁰ Today, historic “districts” and plans do exist, but many preservation efforts target individual buildings in a vacuum.¹¹¹ Landmarks are often scattered, isolated, and created on an ad hoc basis.¹¹² In many cases, it is not clear that there is a specific “aesthetic” the historic commission is trying to achieve; landmarked

103. S.F., CAL., PLANNING CODE ART. 10, APPENDIX A (2022).

104. *See id.* (listing roughly 300 individual parcels but then listing numerous historic districts covering well over 1,000 parcels); *see also* S.F. Plan. Dep’t., *Map Viewer*, S.F. PROP. INFO. MAP, <https://sfplanningis.org/pim/map.html?search=1%20DR%20CARLTON%20B%20GOODLETT%20PL&layers=Zoning%20Districts> (showing that the vast majority of the city is zoned for private residences and most historic landmarks are in areas zoned this way).

105. For a broader discussion on how historic preservation has moved away from landmarks like Grand Central, *see* Byrne, *supra* note 10, at 422–25.

106. Elijah Chiland, *Silver Lake Gas Station Moves Toward Landmark Status*, CURBED L.A. (June 7, 2018, 2:36 pm), <https://la.curbed.com/2018/6/7/17438750/silver-lake-gas-station-landmark-historic-texaco>.

107. Legallysociable, *supra* note 14.

108. *See* Amanda Bartlett, ‘*Stop Punting This Issue*’: *Castro Theatre’s Landmark Status Further Delayed*, SFGATE (Dec. 8, 2022) <https://www.sfgate.com/local/article/castro-theatre-landmark-status-delay-17641400.php> (discussing how activists want not just the outside of the Castro Theater preserved but its interior features and primary use as well).

109. *See* *Penn Cent. Transp. Co. v. City of New York*, 438 U.S. 104, 107 (1978) (“The question presented is whether a city may, as part of a comprehensive program to preserve historic landmarks and historic districts, place restrictions on the development of individual historic landmarks.”).

110. *See id.* at 132 (“[T]he New York City law embodies a comprehensive plan to preserve structures of historic or aesthetic interest wherever they might be found in the city.”).

111. Echeverria, *supra* note 1.

112. *Id.*; *see also* David Garrick, *A Fight Over Antique Streetlamps in San Diego Holds Warning for Other Historic Neighborhoods*, L.A. TIMES (Dec. 5, 2022, 7:20 pm), <https://www.latimes.com/california/story/2022-12-05/san-diego-removal-antique-streetlamps-historic-neighborhoods> (detailing a fight in San Diego over whether to historically preserve individual street lamps residents feel are important).

buildings represent different architectural styles, building types, and time periods.¹¹³

Additionally, property owners often do not have the same economic security that Penn Central did. Over and over, the *Penn Central* Court emphasized that the company could continue to operate Grand Central at a profit¹¹⁴ and sell its “air rights” to another property.¹¹⁵ But many landmarks do not allow such economic luxuries to their owners. For example, West Park Presbyterian Church in Manhattan,¹¹⁶ a landmarked church that only retains twelve parishioners and has no full-time pastor.¹¹⁷ Even the church itself opposed the city’s original landmarking of its building ten years ago.¹¹⁸ But the city pushed ahead, calling the church “one of the best examples of a Romanesque Revival-style religious structure in New York City.”¹¹⁹ Now, the church claims that the building needs \$50 million in repairs that it cannot afford.¹²⁰ Instead, it wishes to sell the church to a developer who plans to tear it down, replace it with housing, and keep part of the housing as a community center the congregation could use for services.¹²¹ Without the sale, the congregation will likely disband.¹²² New York City has refused to approve the demolition despite this fact, and activists have accused the church of engaging in a “money grab.”¹²³

Lastly, the social context that spurred the Grand Central preservation has changed or disappeared. Urban areas are not in the same state of decay. Instead of needing to be propped up by preservation, many urban cores have been thriving for decades,

113. Compare Echeverria, *supra* note 1 (landmarking of a theater from the 1970’s, because it was built in the “new formalist” architecture style), with Sam Whiting, *San Francisco’s First Topless Bar Could Become an Official Legacy Business*, THE S.F. CHRON. (Nov. 2, 2022, 6:32 pm), <https://www.sfchronicle.com/sf/article/San-Francisco-s-first-topless-bar-could-become-17552697.php> (landmarking of a strip club due to its place as one of the City’s first topless bars).

114. See *Penn Central*, 438 U.S. at 136 (“[W]e must regard the New York City law as permitting Penn Central not only to profit from the Terminal but also to obtain a ‘reasonable return’ on its investment.”).

115. *Id.* at 137 (exploring how Penn Central can transfer its rights to develop the space above Grand Central to other parcels).

116. See James Barron, *The Fight Over Tearing Down a Landmark Red Church*, N.Y. TIMES (July 19, 2022), <https://www.nytimes.com/2022/07/19/nyregion/west-park-church-demolition-fight.html> (discussing the church and the preservation fight surrounding it).

117. *Id.*

118. *Id.*

119. *Id.*

120. *Id.*

121. *Id.*

122. *Id.*

123. *Id.*

attracting new residents and generating economic growth.¹²⁴ Further, the modern environmental movement is in a different place. Instead of emphasizing stasis and stability as the keys to a green future, many environmentalists now look to growth as a way to stop climate change.¹²⁵ While the emerging social movements of the 1970s saw growth as the core problem,¹²⁶ their descendants now often see it as the solution to quickly unlocking green technologies and abundance.¹²⁷ In other words, the urgency to stop development, which reached a fever pitch around the time of *Penn Central*, does not have the same power today.

B. Changed Doctrine

The Court's regulatory takings doctrine development has made *Penn Central*'s historical preservation holding a legal outlier. Three particular cases, *Loretto v. Teleprompter Manhattan CATV Corp.*,¹²⁸ *Lucas v. South Carolina Coastal Council*,¹²⁹ and *Cedar Point Nursery v. Hassid*,¹³⁰ have undermined the constitutionality of historic preservation laws.

1. *Loretto v. Teleprompter Manhattan CATV Corp.*

Loretto creates a per se taking category that could be applied to certain egregious historic preservation efforts. In *Loretto*, Manhattan passed a law requiring landlords to install television cable boxes on their buildings.¹³¹ A landlord challenged the law as a taking in violation of the Fifth Amendment.¹³² The Court held that the law, despite its minimal impact on the property, was a taking because placing the box

124. See Bruce Katz, *Reviving Cities: Think Metropolitan*, BROOKINGS INST. (June 1, 1998), <https://www.brookings.edu/research/reviving-cities-think-metropolitan/> (“After 50 years of decline, American cities have been reborn as safe and exciting places, certainly to visit if not to live.”).

125. See Ezra Klein, *Your Kids Are Not Doomed*, N.Y. TIMES (June 5, 2022), <https://www.nytimes.com/2022/06/05/opinion/climate-change-should-you-have-kids.html> (arguing that a movement of abundance and growth is a faster path to stopping climate change than one of temperance and sacrifice).

126. Ehrlich, *supra* note 66, at 66–67.

127. Klein, *supra* note 125.

128. 458 U.S. 419 (1982).

129. 505 U.S. 1003 (1992).

130. 141 S.Ct 2063 (2021).

131. *Loretto*, 458 U.S. at 421.

132. *Id.* at 424.

on the building constituted a permanent physical occupation of the landlord's property.¹³³

At first glance, *Loretto's* rule does not undermine historic preservation laws. The Court repeatedly emphasized the holding's narrowness, spending multiple pages explaining why the right to exclude is special among property rights, and distinguished it from the rights to use and dispose of property.¹³⁴ But the story is more complicated after a closer look at modern historic preservation.

Take the United Artists Theater as an example. Why can this historic preservation effort not be viewed under *Loretto's* permanent physical occupation rule? The developer bought the property after the theater had already closed permanently.¹³⁵ It never intended to operate the property as a theater.¹³⁶ It never leased the building to anyone.¹³⁷ The developer purchased the land intending to demolish the theater and replace it with apartments.¹³⁸ If it cannot demolish the theater, nothing indicates it will resume theater operations.¹³⁹ Thus, although the city did not physically place the building on the land, as it did with the cable box in *Loretto*, it is forcing the upkeep of an unwanted building.

Granted, unlike in *Loretto*, the state did not literally place the theater on the property or force its construction.¹⁴⁰ But it is making the developer keep some version of the theater on the property indefinitely, even though the developer did not build it and never used it. Physical space is being taken up by a physical object. California only mandated that the theater be preserved when the developer tried to remove it.¹⁴¹ The state, in other words, is forcing the developer to allow permanent physical occupation of its land by a building that otherwise would not exist. It defies logic to say that a permanent physical occupation of property only exists—and is therefore a taking—when the government places the object on the land but not when it compels the upkeep of an unwanted object.

133. *Id.* at 434–35.

134. *See id.* at 426–36 (explaining why the right to exclude is unique and separates *Loretto* from *Penn Central*).

135. Echeverria, *supra* note 1.

136. *Id.*

137. *Id.*

138. *Id.*

139. *See id.* (mentioning no plan by the developer to operate the theater as a theater).

140. *Id.*

141. *See id.* (“[A] handful of older buildings in the Stonestown area that would be altered or demolished as part of the new project were evaluated for historic value.”).

The Court's reasoning in *Loretto* is also applicable to cases like this. As the Court in *Loretto* explained, the right to exclude is sacred because when "the government permanently occupies physical property, it effectively destroys" the right to also use and dispose of the property.¹⁴² The same is true in the United Artists Theater case. Without the ability to demolish the theater, the developer's ability to use the land for anything other than preserving the theater would be severely curtailed. According to some estimates, the developer may be forced to cancel over one hundred planned housing units.¹⁴³

Similar problems extend across modern historic preservation efforts. For example, the Boston Landmarks Commission considered landmarking the famous "Citgo" sign outside Fenway Park after a developer bought the property, fearing it would rent the advertising space to someone else.¹⁴⁴ As one author examined, this could also be recast as a permanent physical occupation because it would prevent the owner from renting the advertising space to anyone else, even if Citgo stopped paying for the ad.¹⁴⁵ Thus, the space would become permanently occupied by Citgo's advertisement.¹⁴⁶

Further, the Court's decision in *Tahoe-Sierra Preservation Council Inc. v. Tahoe Regional Planning Agency* does not foreclose the idea that *Loretto* undermines historic preservation. In that case, the Court considered a temporary moratorium on building in the Lake Tahoe area.¹⁴⁷ The Court did reject this line of reasoning in part,¹⁴⁸ dismissing Chief Justice Rehnquist's dissent, which argued that the moratorium could be recast as a forced leasehold on the property.¹⁴⁹ Nevertheless,

142. *Loretto*, 458 U.S. at 435.

143. See Echeverria, *supra* note 1 (discussing various alternative proposals from the developer that range from 10-100 units of housing).

144. MICHAEL MCGUIRE, CITGO, SPONSORED BY BOSTON: WHY WE SHOULDN'T LANDMARK ADS 10-11 (2018), available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3265504.

145. *Id.* at 14-15.

146. See *id.* at 14 (explaining how the landmarking decision would require the maintenance of the sign even if Citgo did not renew its lease).

147. *Id.* at 306.

148. *Tahoe-Sierra Pres. Council Inc. v. Tahoe Regional Plan. Agency*, 535 U.S. 302 (2002).

149. See *id.* at 325 n.19 ("According to THE CHIEF JUSTICE's dissent, even a temporary, use-prohibiting regulation should be governed by our physical takings cases because . . . 'from the landowner's point of view,' the moratorium is the functional equivalent of a forced leasehold . . . Of course . . . there are critical differences between a leasehold and a moratorium. Condemnation of a leasehold gives the government possession of the property, the right to admit and exclude others, and the right to use it for a public purpose. A regulatory taking, by contrast, does not give the government any right to use the property, nor does it dispossess the owner or affect her right to exclude others.").

that case considered only a *temporary* moratorium on development.¹⁵⁰ Historic preservation, by contrast, has no expiration date. The potential analogy to *Loretto* remains because *Loretto* looked at *permanent* physical occupations.

The Citgo sign and the United Artists Theater reveal why *Loretto* undermined historic preservation. Although the government did not place an object on an owner's land, it forced the owner to keep and maintain a completely unwanted structure. These instances show how the line between preservation and physical occupation may blur. Moreover, the Court's reasons for prioritizing the right to exclude readily apply to these types of historic preservation efforts. Although *Tahoe-Sierra* weakens the potential connection between *Loretto* and historic preservation, it does not eliminate it altogether.

2. Lucas v. South Carolina Coastal Council

Lucas is another case that undermines historic preservation. In *Lucas*, the Court held that South Carolina affected a taking, when it imposed a construction moratorium on certain beachfront land to preserve the coastline from erosion.¹⁵¹ The Court reasoned that the moratorium deprived the property owner of all economically viable use of his property, and thus was a taking.¹⁵² *Lucas* is notable, not because its core holding undermines historic preservation, but because its reasoning does.¹⁵³ South Carolina enacted the ban because further construction would have likely eroded and destroyed a whole section of publicly usable coastline.¹⁵⁴ The Court gave this rationale almost no weight.¹⁵⁵

Although the *Penn Central* Court talked at length about the city's judgment regarding aesthetics and the public good,¹⁵⁶ the *Lucas* Court barely noticed the possible erosion of South Carolina's coastline. The majority opinion merely described it as "South Carolina's expressed

150. *Id.* at 306.

151. *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1020 (1992).

152. *Id.* at 1031–1032.

153. *Lucas* does say that some restrictions on land use can be takings, but only when they deprive the owner of all economically viable uses of the property. Historic preservation, even if it lowers property values, rarely would meet this standard.

154. *Id.* at 1038–39 (Blackmun, J., dissenting).

155. The Court says that this rationale only matters if the use constitutes a common law nuisance. *Id.* at 1031–32.

156. See *Penn Cent. Transp. Co. v. City of New York*, 438 U.S. 104, 124–26, 132–35 (1978) (discussing the city's rationale for the landmarks law and explaining why the Court should defer to it).

interest in intensively managing development activities in the so-called ‘coastal zone.’”¹⁵⁷ The Court rejected the idea that the state merely had to show the regulation had some public benefit, saying “this amounts to a test of whether the legislature has a stupid staff.”¹⁵⁸ It further emphasized “that to win its case South Carolina must do more than proffer the legislature’s declaration that the uses Lucas desires are inconsistent with the public interest.”¹⁵⁹ Thus, *Lucas* undermines *Penn Central* by chipping away at its rationale—that preservation promotes the public good. Although the *Penn Central* Court treated such preservation as a noble goal, the Court seemed to reject that rationale in *Lucas*.

Granted, *Lucas* dealt with preservation that made the property essentially worthless. And *Tahoe-Sierra*, ten years later, upheld a similar preservation scheme largely on the basis that it was temporary instead of permanent.¹⁶⁰ Yet, *Lucas*’s language repudiates the idea that preservation receives any special deference under the Takings Clause, weakening *Penn Central*’s reasoning.

3. Cedar Point Nursery v. Hassid

Cedar Point, the Court’s most recent regulatory takings case, undermines historic preservation because of the rule it endorses. In *Cedar Point*, California gave labor organizers access to farmland for 360 working hours per year so they could unionize more farm workers.¹⁶¹ The Court ruled that despite the time limit, the law created a regulatory taking of farm owners’ property. It held that any physical invasion, even a temporary one, is a taking—with some exceptions.¹⁶² In doing so, it cemented a new kind of per se regulatory taking—physical invasions of any duration.¹⁶³

Cedar Point moves the Court closer to a simple rule: when the government takes away an owner’s property right and presses it into public use, a taking has occurred. So far, the Court has limited this rule solely to the right to exclude.¹⁶⁴ In other words, the government only

157. *Lucas*, 505 U.S. at 1007.

158. *Id.* at 1025 n.12.

159. *Id.* at 1031.

160. *Tahoe-Sierra Pres. Council Inc. v. Tahoe Regional Plan. Agency*, 535 U.S. 320–21 (2002).

161. *Cedar Point Nursery v. Hassid*, 141 S.Ct 2063, 2073 (2021).

162. *Id.* at 2074; *see id.* at 2078–80 (enumerating exceptions to the Court’s announced per se rule).

163. *Id.* at 2074.

164. *See id.* at 2072 (distinguishing between physical intrusions and other infringements on property rights).

“takes” a property right when it strips away an owner’s right to exclude.¹⁶⁵ But the Court’s own logic shows that this limitation does not make sense.

First, eliminating the right to exclude does not always destroy other property rights. In both *Loretto* and *Cedar Point*, the Court argued that the right to exclude is critical because losing it endangers other property rights. For example, it said in *Loretto* that physical occupation “effectively destroys” every other property right,¹⁶⁶ and it said in *Cedar Point* that the right to exclude embodied “the very idea of property” and is “one of the most essential sticks in the bundle of rights that are commonly characterized as property.”¹⁶⁷ But this is not accurate. Anti-discrimination laws like the Civil Rights Act permanently override an owner’s right to exclude based on race, but the property can still be used as a restaurant, movie theater, or hotel.¹⁶⁸ Even in *Loretto*, the Court never finds that the presence of the cable wires will actually *impede* the use of the property as apartments for rent.¹⁶⁹ And in *Cedar Point*, there was no evidence that the labor organizing law seriously reduced farm owners’ ability to use their property as a farm.¹⁷⁰ Thus, neither infringement threatens the usefulness of the property, but in both cases, the infringement nonetheless constitutes a taking.

Second, the Court’s precedent views property rights as a one-way street. In its view, taking away the right to exclude destroys other rights, but never the other way around.¹⁷¹ This is also false. Take, for example, the owner of a popular and historically landmarked home who dislikes the hordes of tourists taking photos on his front lawn. Every time the tourists take photos on his lawn, they trespass on his property and infringe on his right to exclude. If the owner wants to build a five-foot-tall fence on his lawn to exclude the tourists more easily, the local historic preservation commission may prevent it. In this situation, all

165. *Id.*

166. *Loretto*, 458 U.S. at 435.

167. *Cedar Point*, 141 S.Ct at 2072 (quoting *Kaiser Aetna v. United States*, 444 U.S. 164, 176 (1979)). See also the discussion of property from a historical perspective *infra* Section III-C.

168. See *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241, 260, (1964) (saying that it is “doubtful” that public accommodation owners forced to integrate will suffer economic harm).

169. See generally 458 U.S. 419 (discussing the property regulation at length but never claiming that the cable box will impede the building’s use as rental property).

170. *Cedar Point*, 141 S.Ct at 2072 (“Rather than restraining the growers’ use of their own property, the regulation appropriates for the enjoyment of third parties the owners’ right to exclude.”) (emphasis added).

171. See *Loretto*, 458 U.S. at 435–36 (discussing how the right to exclude takes away other property rights but not extending this logic).

the historic preservation commission has done is restrict the owner's right to use or modify his property by constructing a fence. But as a result, the owner has lost much of his ability to exclude large numbers of people from intruding onto his property. Thus, limiting the right to use and modify the property with a fence has curtailed the owner's right to exclude.

Lastly, the Court's focus on the right to exclude leads to strange results by allowing the government to do directly what it cannot do indirectly. The Court prioritizes the right to exclude *because* losing the right destroys other property rights.¹⁷² But the Court has refused to recognize infringements on other property rights as a *per se* taking. This is backwards. Under this logic, the government cannot take away an owner's right to exclude without compensation because doing so would destroy his ability to exercise other property rights. But the government can directly take away those other rights without providing compensation.¹⁷³ For example, this logic would lead to the conclusion that in *Cedar Point*, the government is barred from mandating access for union organizers because it destroys the farmers' ability to use their property. But at the same time, it could simply order the farms to shut down and cease operations as a penalty for failing to hire enough union labor without committing a taking. Allowing the government to do directly what it is prohibited from doing indirectly makes no sense.

Cedar Point also undermines *Tahoe-Sierra*. In *Tahoe-Sierra*, the Court chipped away at both *Loretto* and *Lucas*'s applicability to historic preservation by limiting its reasoning in previous takings cases only to permanent regulations.¹⁷⁴ In fact, the temporary nature of the regulation at issue in *Tahoe-Sierra* was the Court's central justification for its holding.¹⁷⁵ *Cedar Point*, however, rejects the idea that a time limit wipes away liability for a regulation that would otherwise be a taking.¹⁷⁶ The Court purported to uphold *Tahoe-Sierra* by limiting its holding in *Cedar Point* only to physical invasions, not restrictions on the use of property.¹⁷⁷ As the next section will explore, however, the Court should, consistent with the Takings Clause's original meaning, expand its logic to restrictions on the use of property as well.

172. *Id.* at 435.

173. *See, e.g.,* *Vill. of Euclid v. Ambler Realty Co.*, 272 U.S. 365, 395 (1926) (upholding zoning restrictions as constitutional).

174. *Tahoe-Sierra Pres. Council Inc. v. Tahoe Regional Plan. Agency*, 535 U.S. 332 (2002).

175. *Id.*

176. *Cedar Point*, 141 S.Ct at 2074.

177. *Id.* at 2072.

These cases reveal a shift in the Court’s doctrine, one that weakens *Penn Central*’s historic preservation holding. *Loretto* provides a rule and reasoning that could be analogized to some modern preservation efforts by recasting the preservation of unwanted buildings as physical occupations. *Lucas* further undermines *Penn Central*’s reasoning by rejecting preservation and aesthetics as powerful state interests. In turn, *Tahoe-Sierra* undermines both cases’ applicability to historic preservation by deferring to a temporary preservation scheme. But *Cedar Point* chips away at *Tahoe-Sierra* by rejecting its main line of reasoning—that temporary property regulations should be treated differently than permanent ones. It also announces a simple rule that could be applied to historic preservation and will be explored in the next section. In effect, when the government takes away a property right, it takes private property in violation of the Fifth Amendment.

C. Quality of Reasoning

Penn Central was wrong when it was decided. This is especially apparent when viewing the case through an originalist lens and can be shown by using the Supreme Court’s recent two-step rule outlined in *Bruen v. New York State Pistol & Rifle Association*.¹⁷⁸ First, the *Bruen* test asks whether the relevant constitutional provision’s plain text covers the activity in question—in this case the Takings Clause.¹⁷⁹ The historical record shows that the Fifth Amendment’s text covers the right to use and modify one’s property. The Fifth Amendment facially protects the right, so historic preservation is presumptively unconstitutional.¹⁸⁰ Second, under *Bruen*, this presumption can be overcome only if the historical record shows that historic preservation was part of “the Nation’s historical tradition” of property regulation.¹⁸¹ Because historic preservation was not a historically acceptable restriction on property rights, it cannot be an acceptable one today.

This Note does not analyze *Penn Central*’s “balancing test” from an originalist perspective—only its holding on historic preservation. Many scholars have already critiqued the balancing test at a broad level from a variety of perspectives.¹⁸² Instead, this section looks only at the Court’s core holding—that the obligations of historic preservation,

178. N.Y. State Rifle & Pistol Ass’n, Inc. v. Bruen, 142 S. Ct. 2111, 2129–30 (2022).

179. *Id.*

180. *Id.* at 2130.

181. *Id.*

182. See, e.g., Epstein, *supra* note 85; Steven J. Eagle, *The Four-Factor Penn Central Regulatory Takings Test*, 118 PENN ST. L. REV. 601, 604 (2014); Kanner, *supra* note 10, at 683.

imposed on a property owner by the government, are not a taking—using a *Bruen* framework.¹⁸³

At the outset, it is important to recognize that the Court, even in *Bruen*, has never been clear about *which* year courts should look to when determining either the text’s meaning or the “historic tradition” of regulation.¹⁸⁴ The Court has suggested both the periods around 1791 (the passage of the Bill of Rights) and 1868 (the ratification of the 14th Amendment, and therefore the incorporation of the Bill of Rights against the states).¹⁸⁵ This piece will conduct a *Bruen* analysis of the Takings Clause as it was understood in 1868.¹⁸⁶ By 1868, preservation and similar property regulations had begun to proliferate.¹⁸⁷ Thus, the “tradition” of acceptable property regulation was likely broader in 1868 than in 1791. Because of that, if the original meaning of the Takings Clause during this time nonetheless prohibited takings for historic preservation, then there is a strong case that the 1791 meaning did as well.¹⁸⁸ Even assuming 1868 is the correct date for an originalist analysis, *Penn Central* still fails to adhere to an originalist understanding of the Takings Clause.

1. Original Meaning of “Property.”

First, an owner’s right to use property as he desires was covered by the original public meaning of the Takings Clause’s text. The Clause says that the government may not take private “property” for public use without just compensation.¹⁸⁹ But what is “property?” “Property” meant more than just bare bones ownership in 1868. It meant “the right to enjoy and to dispose of certain things in the most absolute

183. *Penn Cent. Transp. Co. v. City of New York*, 438 U.S. 104, 138 (1978).

184. *See Bruen*, 142 S. Ct. at 2138 (“We also acknowledge that there is an ongoing scholarly debate on whether courts should primarily rely on the prevailing understanding of an individual right when the Fourteenth Amendment was ratified in 1868 when defining its scope . . . We need not address this issue today.”).

185. *Id.*

186. 1868 is appropriate for this piece for a few reasons, some of which are discussed in the main text. However, the core reason why 1868 can be used as a date is because that was the year the Fourteenth Amendment was ratified. Thus, this is the year the Bill of Rights became binding on the states and not just the federal government. Because the type of historic preservation discussed here is almost entirely at the state and local level, this piece looks at potential state violations of Federal constitutional rights. Therefore, 1868 can be used to see what the meaning of the text was when it finally bound the states.

187. *See* JUKKA JOKILEHTO, *A HISTORY OF ARCHITECTURAL CONSERVATION* 379–380 (2d ed. 2018) (describing the mid-1800’s as a turning point for historic preservation).

188. Because 1868 is likely the weaker date for this piece’s argument, it is the more appropriate one to analyze.

189. U.S. CONST. amend. V.

manner.”¹⁹⁰ Dictionaries at the time defined “property” as an umbrella term, divided into “the senses, as lands, houses, goods, merchandise and the like,” as well as “legal rights, as choses in action, easements, and the like.”¹⁹¹ In other words, “property” in 1868 was thought to “include rights beyond physical possession of land or chattels.”¹⁹²

Private law’s treatment of property at the time reflects this broad understanding. As Professor Richard Epstein has discussed at length, private law historically viewed each discrete property *right* as its own kind of property—something that can be sold, something that has value—which together make up the whole.¹⁹³ Property, therefore, has always been not just physical occupation or title but what is commonly referred to as a “bundle of sticks.”¹⁹⁴

Case law from the years around 1868 paints a muddled picture. Because the Takings Clause did not yet apply to the states, cases from around this time are almost exclusively state court cases applying their versions of the Takings Clause.¹⁹⁵ But state courts differed on whether nonphysical “property” could be covered by a takings clause.

One set of state cases interpreted “property” narrowly. Nonphysical property or property rights simply could not be “taken.” For example, two cases in Massachusetts upheld the state’s right to restrict the use of property. One regulation barred the excavation of gravel and sand from a beach, and the other barred the construction of docks a certain distance out from Boston Harbor.¹⁹⁶ Similarly, the Rhode Island

190. *Property*, A LAW DICTIONARY, ADAPTED TO THE CONSTITUTION AND LAWS OF THE UNITED STATES OF AMERICA, AND OF THE SEVERAL STATES OF THE AMERICAN UNION at 394 (11th ed. 1862).

191. *Id.*

192. *Nekrilov v. City of Jersey City*, 45 F.4th 662, 684 (3d Cir. 2022) (Bibas, J., concurring).

193. *See, e.g.*, Epstein, *supra* note 85, at 602 (describing the private law understanding of property as one where “any landowner may block the efforts of any neighbor to impose unilaterally a restrictive covenant on land use”); Richard A. Epstein, *Taking Stock of Takings: An Author’s Retrospective*, 15 WM. & MARY BILL RTS. J. 407, 408 (2006) (“To start with the first key term, private property is one of our most comprehensive social institutions, so it seems odd to give it a narrow construction that bears scant resemblance to the term ‘private property’ as it is used in the private law.”).

194. This phrase became popular around the year 1868. *See* Kris W. Kobach, *The Origins of Regulatory Takings: Setting the Record Straight*, 1996 UTAH L. REV. 1211, 1236 (explaining that property as a “bundle of sticks” became a more popular idea in the Late Antebellum period).

195. *Id.* at 1213.

196. *See* William M. Treanor, *The Original Understanding of the Takings Clause and the Political Process*, 95 COLUM. L. REV. 782, 794 (1995) (discussing both *Commonwealth v. Tewksbury*, 52 Mass. (11 Met.) 55 (1846) (sand and gravel) as well as *Commonwealth v. Alger*, 61 Mass. (7 Cush.) 53 (1851) (wharfs)).

Supreme Court affirmed that towns could restrict the use of buildings for activities such as prostitution or gambling.¹⁹⁷

Another line of state cases supports a broad interpretation of “property” that includes usage rights. In Connecticut, the state supreme court struck down a law allowing townsfolk to graze their farm animals on private property.¹⁹⁸ It based its decision on the owner’s right to use his property to graze his own animals, saying “[a]mong the rights thus retained by the owner is that of the herbage of the land, which belongs exclusively to him, and having himself thus the right to *depasture* it.”¹⁹⁹ In another case, New York’s highest court ordered compensation to be paid to property owners who could not use the river running across their property because of government construction downriver.²⁰⁰ It based its decision on usage rights, writing “[t]he proprietor of the bed and banks of the stream . . . can use the waters for his own benefit.”²⁰¹ The court went on to say that when the state overrides this right, it conducts a taking requiring just compensation.²⁰² The Ohio Supreme Court was even more explicit, writing that a property owner “possesses the same right to the use of the water flowing through his land that he does to the land itself. The water itself is not his. It is the use . . . [o]f this right he may be deprived. . . [only] first having been compensated for the injury.”²⁰³

The few United States Supreme Court cases from this time lack a clear pattern. In *Mugler v. Kansas*,²⁰⁴ the Court upheld a regulation that forced liquor manufacturers to close their facilities.²⁰⁵ The Court said that the right to use property is not what the Takings Clause protects. It wrote:

A prohibition simply upon the use of property for purposes that are declared, by valid legislation, to be injurious to the health, morals, or safety of the community, cannot, in any just sense, be deemed a taking. . . . The power which the States have of prohibiting such use

197. See *State v. Paul*, 5 R.I. 185 (1858) (while not explicitly a takings case, Justice Harry Blackmon did cite this case in his *Lucas* dissent as example of states being able to regulate the use of property); see also *Lucas v. S.C. Coastal Council*, 505 U.S. 1059 n.24 (1992).

198. *Woodruff v. Neal*, 28 Conn. 165, 171 (1859). For a more in-depth discussion of this case, see Kobach, *supra* note 194, at 1247–49.

199. *Woodruff*, 28 Conn. at 167–68 (emphasis added).

200. *Comm’rs of the Canal Fund v. Kempshall*, 26 Wend. 404, 421 (N.Y. 1841).

201. *Id.* at 422.

202. *Id.*

203. *Cooper v. Williams*, 5 Ohio 391, 392 (1832).

204. *Mugler v. Kansas*, 123 U.S. 623 (1887).

205. *Id.* at 675.

by individuals of their property as will be prejudicial to the health, the morals, or the safety of the public, is not, and, consistently with the existence and safety of organized society, cannot be, burdened with the condition that the State must compensate such individual owners for pecuniary losses they may sustain, by reason of their not being permitted, by a noxious use of their property, to inflict injury upon the community.²⁰⁶

In the *Legal Tender Cases*,²⁰⁷ the Court struck a different tone. It rejected a claim that the Legal Tender Act was a taking because it lowered the value of some debts.²⁰⁸ The Court instead explained that the Takings Clause only protects property from “direct appropriation,” not every negative consequence of a new law.²⁰⁹ But it stopped short of saying that “property” is only physical.²¹⁰ In the Court’s view, the issue was the proximity of the injury to the government action, not that the alleged taking was of an intangible right to payment.²¹¹

State constitutions enacted around 1868 are mixed but overall support a broad reading of the term “property.” For example, Colorado’s 1876 constitution prevents the taking of private property, except for, among other things “private ways of necessity . . . or sanitary purposes.”²¹² But private ways of necessity and “sanitary purposes” are not necessarily physical occupations or seizures.²¹³ The fact that they needed to be explicitly excluded suggests that the drafters intended for nonphysical property rights to be covered by the clause. Similarly, California’s 1880 constitution provides that the legislature can discourage unproductive uses of property, but only so long as their actions are “not inconsistent” with property rights.²¹⁴ This language suggests that the framers understood that the use of property was a right that the legislature had to work around, not one they could fully override. Lastly, Kansas’s 1859 constitution lacked any takings clause

206. *Id.* at 668–69.

207. *Legal Tender Cases*, 79 U.S. (12 Wall.) 457 (1871).

208. *Id.* at 551.

209. *Id.*

210. *Id.*

211. *See id.* (explaining that laws which merely reduce the wealth of some people are not takings).

212. COLO. CONST. of 1876, art. II, § 14.

213. Note that this provision of the Colorado Constitution is actually a private takings clause, preventing the taking of private property for “private use.” However, the language of the clause otherwise mirrors the Federal Takings Clause.

214. *See* CAL. CONST. of 1880, art. XVII, § w (repealed 1972) (“The holding of large tracts of land, uncultivated and unimproved, by individuals or corporations, is against the public interest, and should be discouraged by all means not inconsistent with the rights of private property.”).

but included a section allowing the legislature to regulate the “rights of aliens in reference to the purchase, enjoyment or descent of property.”²¹⁵ Although this language does not say anything about whether the drafters believed nonphysical property was protected by a takings clause, it does support the idea that they understood property in line with broad, contemporary dictionary definitions. That is, something that carries with it a bundle of rights, not just a title or physical possession.

Some state constitutions, however, do cut against this view. California’s Constitution discussed above also has a takings clause. This clause protects against takings *and* the forcible creation of private rights of way.²¹⁶ But private rights of way are not “take title” actions. They do not physically seize the property as a whole or dispossess the owner. The fact that the drafters explicitly included this last protection against something that is not physical seizure or possession suggests that they did not think it would be included otherwise. Similarly, the Arkansas Constitution of 1874 protects against private property being “taken, appropriated, or damaged.”²¹⁷ The inclusion of the phrase “appropriated or damaged” indicates that the drafters believed that the word “taken” did not itself encompass all infringements on property rights, just a narrower subset.

Overall, the linguistic evidence from 1868 is not completely one-sided, but it does lean toward a broad reading of the word “property” within the Takings Clause—one that includes not just physical possession or title, but intangible property rights as well. Federal cases from this era, as well as state court cases and state constitutions, are mixed and do not resolve the issue either way. Dictionaries and private law customs tip the scales in favor of a broader reading. Both unequivocally defined property as a bundle of rights, with each being its own distinct kind of “property.”

2. Historic Tradition

Second, the *Bruen* framework asks whether a regulation is part of “the Nation’s historical tradition” of regulating the targeted activity.²¹⁸ Because “property” under the original meaning of the Takings Clause includes the right to use and modify property, historic preservation will

215. KAN. CONST. BILL OF RIGHTS § 17.

216. CAL. CONST. of 1876, art. I, § 14.

217. ARK. CONST. of 1874, art. II, § 22.

218. N.Y. State Rifle & Pistol Ass’n, Inc. v. Bruen, 142 S. Ct. 2111, 2130 (2022).

only overcome the text of the Takings Clause if it is consistent with the “historical tradition” of property regulation.²¹⁹

Historic preservation does not meet this standard. Until the twentieth century, modern historic preservation did not exist in a meaningful sense. In fact, the preservation practices that did exist support the idea that the population understood such regulations to be beyond the scope of proper government.²²⁰ Analogies also fall short. Some regulations on property certainly existed, but the historical record lacks evidence of policies that *froze* property in time, as historic preservation does.²²¹ In other words, there is little record of regulations that prevented virtually all new construction while also banning renovations and demolitions to existing structures.

First, modern historic preservation schemes did not exist before the middle of the twentieth century. There were no efforts made to regulate building construction, renovation, or demolition because of historic value until the 1930s.²²² Even these efforts were originally confined to historic “districts.”²²³ The common practice of regulating isolated properties did not emerge until around the time of *Penn Central*.²²⁴

Even when historic preservation schemes emerged, they were not extensive enough to create a tradition of regulation for the “nation.” Initial preservation laws only existed in a few select cities.²²⁵ As they proliferated, these laws were largely confined to cities in the mid-Atlantic and not the rest of the country.²²⁶ Widespread adoption of preservation laws eventually occurred, but only in the decades following World War II.²²⁷ No federal legislation replicating local preservation laws has ever existed in the United States.²²⁸

219. *Id.* at 2126.

220. *See, e.g.*, JOKILEHTO, *supra* note 187, at 379–80; BRONIN & ROWBERRY, *supra* note 30, at 9–10 (both discussing early preservation efforts as purely private endeavors).

221. *See* BRONIN & ROWBERRY, *supra* note 30, at 9 (“It was not until the 1930s, however, that efforts were made to regulate the demolition or alteration of historic buildings and the development of incompatible structures within historic districts.”).

222. *Id.*

223. *Id.*

224. *See id.* at 17 (describing the 1960s as a time of massive expansion in historic preservation law).

225. BRONIN & ROWBERRY, *supra* note 30, at 9.

226. *Id.*

227. *See* Anbinder, *supra* note 7 (explaining that by his count, only two cities had historic preservation laws as of World War Two).

228. *See generally* National Historic Preservation Act of 1966, 16 U.S.C. § 470 (laying out how the Federal Government will help encourage historic preservation but including nothing resembling modern local laws).

These preservation schemes help show that modern schemes are constitutionally deficient. Where preservation activists did have sway, they did not attempt to create anything that looked like the modern preservation regime. Early efforts focused on lobbying local governments to purchase properties themselves.²²⁹ In other cases, activists purchased the property directly.²³⁰ In the case of Colonial Williamsburg, preservationists bought and then reconstructed the town.²³¹ Anything resembling the modern preservation regime is noticeably absent from early preservation efforts. Activists neither attempted to use government power to regulate property owners directly, nor does it appear that they ever considered such a course of action.²³² This supports the idea that virtually nobody in this period considered this a valid exercise of government power.

The regulations that existed in 1868 were not nearly as restrictive as modern historic preservation laws. Restrictions on the right to use, modify, and enjoy property did exist in 1868. As discussed earlier, both federal and state courts permitted regulations outside the scope of either the federal or state-level takings power that included a ban on excavating gravel and sand from a beach,²³³ bans on building docks in Boston Harbor,²³⁴ a ban on using a building as an alcohol factory,²³⁵ and a ban on producing margarine.²³⁶ But in each case, the regulation in question prohibited specific conduct. At most, these cases show that *some* restrictions on the use of property for noxious purposes were historically acceptable and that the right to use was not absolute. But historic preservation goes much further. It freezes the property use in time, preventing virtually all changes to existing structures, not just a specific activity.²³⁷ No historical regulation appears to have gone nearly

229. See BRONIN & ROWBERRY, *supra* note 30, at 9.

230. See JOKILEHTO, *supra* note 187, at 379 (discussing preservationists purchase of Mount Vernon).

231. *Id.*

232. See, e.g., *id.* at 379–80; BRONIN & ROWBERRY, *supra* note 30, at 9–10 (both discussing early preservation efforts as purely private endeavors).

233. Commonwealth v. Tewksbury, 52 Mass. (11 Met.) 55, 57–58 (1846).

234. Commonwealth v. Alger, 61 Mass. (7 Cush.) 53, 53–54 (1851).

235. Mugler v. Kansas, 123 U.S. 623, 668–69 (1887).

236. Powell v. Pennsylvania, 127 U.S. 678, 687 (1888).

237. See Penn Cent. Transp. Co. v. City of New York, 438 U.S. 104, 146 (1978) (Rehnquist, C.J., dissenting) (discussing past cases where the Court upheld restrictions on the right to use or modify property, but distinguishing them by saying “appellees’ actions do not merely prohibit Penn Central from using its property in a narrow set of noxious ways. Instead, appellees have placed an affirmative duty on Penn Central to maintain the Terminal in its present state and in “good repair.” “Appellants are not free to use their property as they see fit within broad outer boundaries but must strictly adhere to their past use except where appellees conclude that

that far in circumscribing how property owners could use, modify, or enjoy their property.²³⁸

Because these historic regulations are not comparable to modern historic preservation schemes in scope, they cannot validate it as a practice. Thus, historic preservation is not part of the “nation’s tradition” of property regulation. As such, it cannot override the textual coverage given to property rights by the Takings Clause.

D. Nature of the Error

Penn Central has authorized historic preservation that has damaged the American economy. America faces a housing crisis—high rents and unaffordable homes caused by low supply. Instead of alleviating this problem, historic preservation worsens it by further restricting the supply of housing. This crisis has had drastic negative consequences for society beyond higher rents, such as separating families and making it harder for people to move from place to place.

Currently, American cities face a crisis²³⁹ of rising rent²⁴⁰ and home prices.²⁴¹ The trend is not limited to large coastal cities anymore.²⁴² In cities like Atlanta, new homeowners often adopt a “drive until you qualify” strategy, moving farther and farther away from city centers in search of affordable homes.²⁴³ Austin, once known as a bastion of affordability, saw its average rent increase fifty percent in the last year, up to one of the highest rates in the country.²⁴⁴ Even small cities such as Traverse City, Michigan and Greenville, South Carolina have seen their average rent nearly double.²⁴⁵

alternative uses would not detract from the landmark.”).

238. *See id.* (comparing historic preservation with historic examples of ordinary “land-use regulations”).

239. Emily Badger & Eve Washington, *The Housing Shortage Isn’t Just a Coastal City Problem Anymore*, N.Y. TIMES (July 14, 2022), <https://www.nytimes.com/2022/07/14/upshot/housing-shortage-us.html>.

240. Jonas Bordo, *The Complete 2022 Guide to Rent Prices in the US*, DWELLSY (Nov. 21, 2022), <https://dwellsy.com/blog/rent-price-data/>.

241. Chris Arnold, *There’s a Massive Housing Shortage Across the U.S. Here’s How Bad it is Where You Live*, NPR (July 15, 2022, 5:00 a.m.), <https://www.npr.org/2022/07/14/1109345201/theres-a-massive-housing-shortage-across-the-u-s-heres-how-bad-it-is-where-you-l>.

242. Badger & Washington, *supra* note 239.

243. Arnold, *supra* note 241.

244. Bordo, *supra* note 240.

245. *Id.*

Experts point to a lack of housing supply as the primary driver of rising housing costs.²⁴⁶ Cities large and small are simply not building enough housing to keep up with increased demand. For example, the Bay Area added 176,000 housing units at the same time it added nearly 700,000 new jobs.²⁴⁷ As the number of people looking for housing increases while the available supply stays largely the same, prices will rise.²⁴⁸ Experts largely reject the idea that housing markets can avoid the law of supply and demand.²⁴⁹

But historic preservation as a practice further restricts the housing supply. It mandates that property owners maintain existing buildings, often preventing them from adding housing units to their properties. When an area's demand sharply rises, historic preservation prevents developers from building housing on at least some existing parcels to capture some of that growth.²⁵⁰ This partially removes the primary method cities can use to alleviate the housing crisis.²⁵¹ Without an

246. See, e.g., Scott Lincicome, *The NIMBYs Come for North Carolina*, CATO INST. (Dec. 1, 2022), <https://www.cato.org/commentary/nimbys-come-north-carolina> (explaining how a new Raleigh City Council that restricts housing supply will cause prices to rise); Jerusalem Demas, *Housing Breaks People's Brains*, THE ATLANTIC (Nov. 23, 2022, 6:00 a.m.), <https://www.theatlantic.com/ideas/archive/2022/11/us-housing-supply-shortage-crisis-2022/672240/> (“The most basic fact about the housing crisis is the supply shortage. Yet many people deny this reality.”); JOINT CTR. FOR HOUS. STUD. OF HARV. UNIV., *THE STATE OF THE NATION'S HOUSING 2021*, at 1 (2021) (“The combination of robust demand and limited supply lifted home prices to their fastest pace in over a decade.”).

247. N.Y. Times, *Liberal Hypocrisy is Fueling American Inequality. Here's How.* | *NYT Opinion*, YOUTUBE (Nov. 9, 2021), <https://www.youtube.com/watch?v=hNDgcjVGHIw>.

248. *Id.*; JOINT CTR. FOR HOUS. STUD. OF HARV. UNIV., *supra* note 246; see also Edward Glaeser & Joseph Gyourko, *The Economic Implications of Housing Supply*, 32 J. ECON. PERSPS. 3, 8 (2018) (discussing how a lack of new housing construction will raise prices when demand rises because the supply is less elastic).

249. See Demas, *supra* note 246 (“Viral clips of hundreds of yuppies lining up to tour a single Manhattan apartment or stories of real-estate agents acting as bouncers at open houses to keep things orderly—these vivid examples demonstrate that demand has far outstripped supply.”); Emily Badger, *Something Has to Give in the Housing Market. Or Does It?*, N.Y. TIMES (Jan. 20, 2022), <https://www.nytimes.com/2022/01/20/upshot/home-prices-surgings.html> (“‘It’s not a bubble, it really is about the fundamentals,’ said Jenny Schuetz, a housing researcher at the Brookings Institution. ‘It really is about supply and demand — not enough houses, and huge numbers of people wanting homes.’”).

250. See Echeverria, *supra* note 1 (describing an example of a city like San Francisco, which badly needs housing, preventing more from being built via historic preservation).

251. An increase in housing supply, experts agree, is a straightforward way to lower housing costs in an area. See Xiaodi Li, *Do New Housing Units in Your Backyard Raise Your Rents?*, 22 J. ECON. GEOGRAPHY 1309, 1310 (2022) (finding that “every 10% increase in the housing stock within a 500-ft buffer, residential rents decrease by 1%”); Brian J. Asquith et al., *Local Effects of Large New Apartment Buildings in Low-Income Areas*, 103 THE REV. OF ECON. & STAT. 1, 2 (2021) (finding that new housing lowers rents in an area even when it increases the amenities); Evan Mast, *JUE Insight: The Effect of New Market-rate Housing Construction on the Low-income Housing Market*, J. URB. ECON. 1, 8 (2021) (finding that even market-rate housing decreases

increase in supply, cities are left to look toward less effective solutions.²⁵² As a result, historic preservation worsens the housing crisis because it prevents some increases in the supply of housing.²⁵³

Compounding these issues is that historic preservation may be especially restrictive in metro areas that face an influx of newcomers. Cities in this scenario, fearful of the changes new residents might bring, often enact restrictive land use policies aimed at keeping new residents out.²⁵⁴ Historic preservation can be a particularly appealing tool in this situation. Not only does it preserve the external appearance of a building, but often its use as well. This keeps the building the same as it always was, removing a parcel that new residents could have used as housing.²⁵⁵ Historic preservation may also have a deceptive normative appeal. Because it attempts to evoke people's nostalgia,²⁵⁶ historic

housing costs for middle- and low-income households). Additionally, problems are compounded due to the fact that many Americans are "supply skeptics." In other words, they believe housing supply does not impact prices and prices are instead set by a few, mostly malevolent actors. For a more in-depth discussion, see CLAYTON NALL ET AL., *FOLK ECONOMICS AND THE PERSISTENCE OF POLITICAL OPPOSITION TO NEW HOUSING* 40 (2022).

252. Experts reject the idea that alternative interventions such as rent control, vacancy taxes, or mandatory affordable housing fees meaningfully lower rents, and in fact, many argue they raise rents in the long run. See, e.g., Rebecca Diamond, *What Does Economic Evidence Tell Us About the Effects of Rent Control?*, BROOKINGS (Oct. 18, 2018), <https://www.brookings.edu/research/what-does-economic-evidence-tell-us-about-the-effects-of-rent-control/> (arguing that artificially keeping rents below market rates has negative effects on affordability in the long run).

253. It is not clear how much housing historic preservation prevents. Any definite number would require analyzing every landmarked parcel, its current structure, and how much housing could be built on it under current zoning. However, parcels can often fit much more housing than current structures. See Brianna Jegan (@briannajegan), TWITTER (Dec. 6, 2022, 1:46 AM), <https://twitter.com/briannajegan/status/1600018827739209728> (showing a single-family home parcel in Los Angeles that was turned into fifteen units of housing).

254. See, e.g., Sam Whiting, *California Attorney General: Woodside Can't Use Mountain Lions to Avoid Housing Law*, THE S.F. CHRONICLE (February 9, 2022, 9:09 a.m.), <https://www.sfchronicle.com/bayarea/article/State-attorney-general-threatens-Woodside-for-16837159.php> (describing a wealthy California town's efforts to avoid allowing new housing and residents by arguing it needs to be preserved as a habitat for mountain lions); Danielle Echeverria, *This Wealthy S.F. Neighborhood is Seeking Historic Status. YIMBYs Say it's an Effort to Block Housing — and Point to Racist Past*, THE S.F. CHRON. (Apr. 30, 2022, 8:35 a.m.), <https://www.sfchronicle.com/sf/article/YIMBYs-accuse-wealthy-S-F-neighborhood-of-trying-17137824.php> (detailing how a wealthy San Francisco neighborhood turned to historic preservation to avoid building more homes for new residents); see also *Mhany Mgmt., Inc. v. County of Nassau*, 819 F.3d 581, 608 (2d Cir. 2016) (holding that a city's zoning decisions were based on a fear of new non-white residents and a desire to keep them out).

255. See Echeverria, *supra* note 1 (describing how preservation of a movie theater may block the construction of new apartments).

256. See Jacob Anbinder, *Chapter Two: Salvation by Bricks: Preservation Politics and Spatial Ideology in Postwar New York* (full title not yet available) (2022) (Ph.D. dissertation, Harvard University) (forthcoming) (examining how pro-preservation media tried to play on nostalgia for rapidly disappearing buildings).

preservation may convey an especially powerful message to current residents in a rapidly changing area.²⁵⁷

Policies like historic preservation have far reaching consequences beyond higher prices. The national housing shortage—and corresponding housing crisis—has damaged the country’s economy by limiting the movement of people.²⁵⁸ When housing supply cannot meet increased demand, people struggle to find affordable housing where they want to live.²⁵⁹ Instead, they go wherever they can afford to live.²⁶⁰ When people’s mobility is limited, their ability to seek out wealth and happiness in a new location suffers.²⁶¹ The positive benefits of mobility are not limited to the individual.²⁶² The United States has seen first-hand the massive gains that migration, both domestic and international, can bring. The “Great Migration” of Southern Black residents away from the oppression and poverty of the Jim Crow South resulted in untold gains in both political freedom and wealth.²⁶³

Restricting the housing supply also displaces people and separates families. On a basic level, low housing supply may cause displacement by raising rents in an area.²⁶⁴ Unless the current residents simultaneously become much wealthier, they will be forced to move to find lower rent.²⁶⁵ Low housing supplies also separate families by making it impossible for adults to live close to where they grew up. For

257. See *id.* (discussing how the preservation movement gained steam as an opposition to the “growth machine” and a movement to stop the flow of people and capital to New York City).

258. See ILYA SOMIN, *FREE TO MOVE*, 52 (2nd ed. 2022) (describing how restrictive land use policies have locked millions out of the opportunity to move domestically).

259. See Jerusalem Demsas, *What Happens When Americans Stay in the Same House Forever?*, VOX (Feb. 24, 2022, 10:10 a.m.), <https://www.vox.com/22939038/rents-rising-home-prices-americans-moving-residential-stagnation-stuck-mobility-freedom> (explaining how housing supply limits raise housing costs and therefore transaction costs for Americans looking to move to a new place); see also Eric Segall, *Episode 80: Ilya Somin*, at 11:05 (Apr. 1, 2022), <https://open.spotify.com/episode/38Br69w27uvOPSEy3I1HEb?si=d390e24b311e432a> (arguing that more relaxed land use policies would allow a wider range of people to move to a wider variety of places and current policies make migration harder).

260. See Arnold, *supra* note 241 (describing “drive until you qualify”).

261. See Somin, *supra* note 258, at 25 (arguing that free movement allows for both massive economic gains and gains in political freedom for migrants).

262. See *id.* at 52 (examining how if land use regulations in only New York, San Francisco, and San Jose were loosened between 1964–2009, American GDP would have been thirty-six percent higher than it actually was due to gains from migration).

263. See *id.* at 47.

264. See Nall, et al., *supra* note 251, at 6–7 (explaining that it is “basic economic theory” that lower, not higher, supply causes increased housing costs).

265. See, e.g., Arnold, *supra* note 241 (describing how a family was pushed to leave a more centralized location in Atlanta and move to the exurbs after their rent was due to drastically increase).

example, San Francisco will graduate roughly 80,000 students from its schools and into adulthood over the next thirteen years.²⁶⁶ But in the thirteen years between 2008 and 2020, San Francisco has only added about 39,000 units of housing.²⁶⁷ Though not a perfect comparison, these numbers indicate that San Francisco is likely not building enough housing to keep up with baseline growth in demand. Some cities are worse. Santa Monica graduated about 7,000 high school seniors from its public schools between 2010 and 2020.²⁶⁸ In that time, the city added about 1,700 housing units.²⁶⁹ When this disparity exists, it makes it much harder for adults to live in their hometowns. That can make caring for elderly family more difficult and make childcare more burdensome as parents cannot rely on immediate family to provide childcare.

Of course, this is not to say that historic preservation has *no* value. Historic districts may bring large amounts of tourism income to a city. More than just dollars and cents, historic preservation may conserve unique, walkable neighborhoods that are now illegal to build under modern zoning laws.²⁷⁰ It may also allow cities to preserve symbols of their cultural heritage and educate future generations.²⁷¹ But these benefits do not themselves justify the practice of historic preservation. In addition to contributing to the housing crisis, historic preservation is out of step with how America treats other historic resources. Many important paintings, for example, are held by private owners.²⁷² No local

266. See *San Francisco Unified School District*, U.S. NEWS & WORLD REP., <https://www.usnews.com/education/k12/california/districts/san-francisco-unified-111777> (last visited Mar. 1, 2023) (asserting there are just under 52,000 students in San Francisco Public Schools); see also Paul Lorgerie & Jeremy Adam Smith, *San Francisco Schools' Changing Demographics*, S.F. PUB. PRESS (Feb. 2, 2015), <https://www.sfpublicpress.org/san-francisco-schools-changing-demographics/> (explaining that roughly 30% of children in San Francisco attend private schools). These two pieces of information put together support the conclusion that just under 80,000 students attend San Francisco K-12 schools.

267. S.F. PLAN. DEP'T, 2020 SAN FRANCISCO HOUSING INVENTORY 6 (2021).

268. This number is calculated by looking at the current number of high schoolers in each grade level in Santa Monica and then working backwards. See SANTA MONICA UNIFIED SCH. DIST., 2019-20 SCHOOL ACCOUNTABILITY REPORT CARD PUBLISHED DURING THE 2020-21 SCHOOL YEAR 2 (2020) (detailing current number of students in each high school grade level).

269. S. CAL. ASS'N OF GOV'TS, LOCAL HOUSING DATA FOR THE CITY OF SANTA MONICA 10 (2021).

270. See Not Just Bikes, *Why We Won't Raise Our Kids in Suburbia*, YOUTUBE, at 10:45 (June 6, 2022), <https://www.youtube.com/watch?v=oHlpmxLTxpw> (discussing how many walkable neighborhoods in North America are now illegal to build under zoning rules).

271. BRONIN & ROWBERRY, *supra* note 30, at 13.

272. Paul Dimmock, *7 Famous Works of Art That Are Stashed in the Collections of the Super Rich*, BUS. INSIDER (Dec. 23, 2011, 6:30 a.m.), <https://www.businessinsider.com/famous-art-privately-owned-2011-12>.

or state government has reacted to that fact by forcing the paintings' owners to publicly display them.

E. Workability

Penn Central's holding on historic preservation provided an unworkable rule. Critiquing the case's balancing test is beyond this Note's scope. This section, however, critiques courts' treatment of challenges to historic preservation in the years since the ruling.

Penn Central held that historic preservation was not a taking as applied to Grand Central Station.²⁷³ In reaching this conclusion, the Court purported to apply a careful balancing test that considered the specific facts of the case.²⁷⁴ But in the years since *Penn Central*, almost no challenges to historic preservation laws have been successful.²⁷⁵ If the *Penn Central* Court had truly conducted a fact-specific inquiry that weighed a number of factors, then there should be at least *some* cases of historic preservation that have crossed the constitutional line. But instead, courts have upheld almost every historic preservation effort as outside the scope of the Takings Clause.²⁷⁶ While *Penn Central* said its legal rule was the result of a careful, fact-specific inquiry, it turned out to be not much of a rule at all, allowing the same side to win almost every time.²⁷⁷

F. Reliance

Reliance interests are more complicated. The Court has never clarified how to assess whether a decision has created reliance interests.²⁷⁸ Here, defenders of *Penn Central* have a strong case.

273. *Penn Cent. Transp. Co. v. City of New York*, 438 U.S. 104, 138 (1978).

274. *Id.* at 124.

275. See J. Peter Byrne, *Regulatory Takings Challenges to Historic Preservation Laws After Penn Central*, 15 FORDHAM ENVTL. L. REV. 313, 326, 334 (2004) ("The overwhelming fact is that there is no other reported decision in which a local preservation agency seriously contested the economic viability of restoring a building and lost a subsequent takings claim . . . *Penn Central* nearly always protects historic preservation decisions from takings challenges.").

276. *Id.*

277. *Id.* at 334.

278. Compare *Dobbs v. Jackson Women's Health Org.*, 142 S. Ct. 2228, 2276 (2022) (holding that *Roe v. Wade's* protection of abortion did not create concrete reliance interests), with *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 856 (1992) (holding the exact same decision created so much reliance that for "two decades of economic and social developments, people have organized intimate relationships and made choices that define their views of themselves and their places in society, in reliance on the availability of abortion in the event that contraception should fail.").

Hundreds of American cities now have historic preservation laws.²⁷⁹ And these laws likely cover tens of thousands of properties. Historic preservation laws have become an integral feature of American local government. In this way, many actors, both at the state and local level, have relied on *Penn Central* to craft their property regulation schemes.²⁸⁰

Reliance interests, however, are complicated by this Note's earlier analysis of the Takings Clause's original meaning.²⁸¹ If *Penn Central* was wrong as an original matter, then it enabled decades of state and local governments' constitutional violations. The Court has rejected the idea that the government's interest in stability from continued constitutional violations can outweigh citizens' interest in having their rights respected.²⁸² At the very least, it is hard to imagine a reliance interest in continuing to use the same *scheme* of regulation in the future, as opposed to an interest in keeping existing landmarks protected.²⁸³

IV. WHERE TO GO FROM HERE

If the Court revisited *Penn Central*, it could modify its holding in multiple ways. First, it could fully overturn its precedent on historic preservation and instead hold that the practice is a taking. Second, it could extend *Loretto* to narrow *Penn Central*, holding that certain preservation efforts constitute takings if they look like a permanent physical occupation. Third, the Court could hold that historic preservation is only a taking when it singles out one property owner to bear a burden. Fourth, it could hold that historic preservation can only

279. BRONIN & ROWBERRY, *supra* note 30, at 195.

280. See Byrne, *supra* note 275, at 313 ("The constitutional framework created by the decision has fostered a remarkable blossoming of historic preservation as a major tool of urban land use regulation.").

281. See discussion *supra* Part III.C.

282. See *Ramos v. Louisiana*, 140 S. Ct. 1390, 1408 (2020) (dismissing Oregon and Louisiana's reliance interest in using nonunanimous jury verdicts and saying "Taken at its word, the dissent would have us discard a Sixth Amendment right in perpetuity rather than ask two States to retry a slice of their prior criminal cases. Whether that slice turns out to be large or small, it cannot outweigh the interest we all share in the preservation of our constitutionally promised liberties.").

283. In *Ramos*, the states did not claim that they had an interest in convicting defendants using non-unanimous juries going forward, just that an adverse ruling would disrupt *past* convictions. 140 S. Ct. at 1406 ("When it comes to reliance interests, it's notable that neither Louisiana nor Oregon claims anything like the prospective economic, regulatory, or social disruption litigants seeking to preserve precedent usually invoke. No one, it seems, has signed a contract, entered a marriage, purchased a home, or opened a business based on the expectation that, should a crime occur, at least the accused may be sent away by a 10-to-2 verdict.").

stand if the government action targets a broadly recognizable and significant building like Grand Central Terminal.

A. Total Reversal

The first and most justifiable option would be for the Court to fully overturn its historic preservation holding from *Penn Central*. Historic preservation would become a per se taking, in line with restrictions on the right to exclude. If a state or locality wanted to preserve a building, it would need to purchase the property or pay the owner to maintain the structure. If it decided against doing so, then a property owner could modify, renovate, demolish, or otherwise change the property in any way allowed by other applicable law.

This approach has a few benefits. It would bring the Court's doctrine in line with the original meaning of the Takings Clause and would better align the Court's current jurisprudence on the Takings Clause, reducing the inconsistency in how it treats exclusion rights and usage rights. It would also provide an easy-to-apply, bright-line rule that leaves little room for subjective judgments.

The Court is likely to see this option, however, as having significant downsides. First, it would throw many cities into chaos, with governments scrambling to purchase properties before owners began demolishing or renovating them. Second, it would make it difficult, if not impossible, for cities to maintain "historic districts" and limit other broad preservation efforts because purchasing multiple properties or compensating every owner would be cost prohibitive. These districts often drive tourism and are seen as integral to cities' identities. Third, such a rule could endanger recognized and adored landmarks. If cities are unwilling to purchase the properties, they would be powerless if owners tore them down or permanently modified them. Lastly, reversing *Penn Central* could call into question other restrictions on the right to use property, such as zoning laws. For now, the Court has steered clear of anything that could call into question these property regulations.²⁸⁴

These downsides are not enough to outweigh the benefits. Although tourism and communal identity are important, the Court has

284. Even justices who have wanted to expand the Court's regulatory takings doctrine have stopped short of questioning zoning. *See Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Plan. Agency*, 535 U.S. 302, 351–52 (2002) (Rehnquist, C.J. dissenting) (affirming that he would expand the Court's regulatory takings doctrine but still allow "normal delays in obtaining building permits, changes in zoning ordinances, variances, and the like").

been clear that these interests do not factor into its Takings Clause analysis.²⁸⁵ Furthermore, anything short of a total reversal would continue to proliferate the housing crisis facing America's cities.

B. Loretto Expansion

Another, milder option could be narrowing *Penn Central*. The Court could do this by holding that preservation resembling a permanent physical occupation is a taking but other types of preservation are not. As discussed earlier, some preservation efforts look like the physical occupation prohibited by *Loretto*, because they target unwanted structures that the owner had no intention of keeping or using for their original purpose. The Court could say that only these types of preservation efforts are takings.

This option could appeal to the Court for multiple reasons. First, it would resolve some of the most egregious preservation actions, like the United Artists Theater saga, which force an owner to upkeep an unwanted structure that they never intended to use. Second, it would limit takings claims only to those egregious scenarios and avoid jeopardizing most preservation efforts in the United States (which usually focus on landmarking structures that the owners have operated in the same fashion for years). It would not jeopardize the vast majority of already-implemented landmarks and historic districts. Third, it would not call into question more common forms of property regulation like zoning laws. Lastly, this decision would be firmly based in existing precedent. Expanding *Loretto* to narrow *Penn Central* would resolve a tension existing in the Court's current doctrine while still using precedent as a guide.

C. Benefits and Burdens

Another way the Court could narrow *Penn Central* would be to adapt it to what many view as the Takings Clause's original purpose. Some justices and scholars have emphasized that they view the Clause's original purpose as attempting to prevent individual property owners from being unfairly singled out by the majority.²⁸⁶ Thus, the Court could hold that historic "districts" are okay, but the landmarking of individual properties is not.

285. See *Lingle v. Chevron U. S. A. Inc.*, 544 U.S. 528, 528 (2005) (holding that a Fifth Amendment analysis does not rely on balancing government interests).

286. See, e.g., Treanor, *supra* note 196, at 856; *Penn Cent. Transp. Co. v. City of New York*, 438 U.S. 104, 123 (1978); *id.* at 147-48 (Rehnquist, C.J., dissenting).

This option would be broader in scope than expanding *Loretto* but potentially appealing for several reasons. It would prohibit most historic preservation efforts, but not touch historic districts and comprehensive plans to keep a city's character or aesthetic. One concern with ending historic preservation altogether is that cities that rely on preserved aesthetics to attract tourists, like Charleston and New Orleans, would be unable to prevent their landscapes from looking like every other city. These cities would be able to continue to preserve their look and atmosphere without needing to buy every single property they wish to preserve. This option could also be justified by the view many justices have held of the Takings Clause's original purpose, bolstering its intellectual and precedential basis.

This option, however, would also be out of step with how the Court views other constitutional rights. The Court so far has mostly treated the Takings Clause as protecting individual rights in the same manner as it protects other constitutional guarantees.²⁸⁷ If the Court held that broad historic preservation is okay but narrow preservation is not, it would create a paradox: violating citizens' constitutional rights would be acceptable so long as the government does it to enough people. This is exactly backwards from how the Court has treated government action in the past.²⁸⁸

D. Fact-Specific Inquiry

The last option for the Court would be to allow historic preservation only when the facts resemble *Penn Central*. In other words, historic preservation would be permissible only if the targeted landmark is a truly *public* place with broadly recognized social and historical value. Courts would need to analyze how broadly the landmark is recognized and how the government interest in preserving the property compares to the burden on the owner.

This has the benefit of allowing America's most treasured landmarks to be protected, while preventing landmarking from being deployed against pedestrian homes. The most significant buildings would be protected from destruction, guarding against fears that

287. See, e.g., *Lucas v. S.C. Coastal Council*, 505 U.S. 1003 (1992) (analyzing the property regulation as it applies to the plaintiff, and not asking how broadly it applies); *Cedar Point Nursery v. Hassid*, 141 S. Ct 2063 (2021) (using the same analysis).

288. The Court has rejected the idea that violating the rights of lots of people "cancels out" violations against an individual in other contexts. See *Bostock v. Clayton Cnty.*, 140 S.Ct. 1731, 1742–43 (2020) (holding that discriminating against both men and women on the basis of sex doubles, rather than eliminates, liability for sex discrimination).

developers could bulldoze places like Grand Central. It would also require courts to carefully analyze each case's facts and implicitly recognize that landmarking in practice has extended far beyond the unique facts of *Penn Central*.

This approach also has significant downsides. It would require subjective determinations from judges about the historic and social value of properties. This could tilt the scales against properties that hold historic value for marginalized or unpopular groups. It could also result in arbitrary outcomes—litigation about two similar properties could come out very differently depending on the quality of lawyering on either side, the judge, and other similar factors. It would also be out of step with the Court's precedent. The Court has already rejected the idea that the Takings Clause should be analyzed through the lens of the government interest at stake.²⁸⁹

CONCLUSION

Penn Central has blessed the practice of historic preservation for almost fifty years. In that time, the practice has become widespread, affecting hundreds of cities and likely hundreds of thousands of properties. But it's time for a second look. The context of the *Penn Central* case is wholly distinct from most modern preservation efforts. Moreover, the Court's regulatory takings doctrine since the ruling has pushed *Penn Central* aside, making it more and more of an outlier. Additionally, *Penn Central* was incorrect from an originalist perspective when it was decided. These legal and factual considerations are bolstered by the harm exacerbated by historic preservation—namely, worsening the housing crisis by preventing the creation of new housing supply in high-demand cities. Finally, *Penn Central*'s unworkable legal rule cannot be saved by the reliance of various cities and states in continuing to violate the Fifth Amendment. The Court's stated stare decisis factors point to a clear answer here: it is time for the Court to overturn, narrow, or at least revisit its holding that modern historic preservation is constitutional.

289. See *Lingle*, 544 U.S. at 540 (holding that the inquiry into whether the law “substantially advances” a legitimate state interest “has no proper place” in a takings analysis).