Giving and Taking:
Regulating Land Development in Post-Katrina New Orleans

Jeremy Buxbaum
Erin Ziegler

Abstract

It is likely that in some heavily damaged parts of New Orleans redevelopment will be restricted, either temporarily, or even permanently. The possibility of such restrictions immediately gives rise to the following question: Will restrictions on development in New Orleans effect compensable regulatory takings under the Fifth Amendment of the U.S. Constitution? In this paper, we try to answer that question, or to at least provide a framework for answering it. We conclude, although cautiously, that it is more likely than not that temporary restrictions will not effect compensable takings because property owners still have economically valuable interests, while it is more likely than not that permanent restrictions will result in compensable takings because of owner expectations and a lack of reciprocity of advantage.

We have three primary goals. First, we summarize the proposal for redevelopment which explicitly allows for the possibility of moratoria on redevelopment in certain neighborhoods. Second, we situate the current case law on this issue within the larger context of takings jurisprudence. Understanding the courts' trends on this issue, if any are discernible, will be indispensable in trying to get a sense of how courts would rule in litigation that might arise out of regulating redevelopment in New Orleans. Third, we give an analysis of how current holdings on takings issues might apply to the situation in New Orleans. Because of the complexity of takings jurisprudence, and because of the somewhat unusual nature of the situation in New Orleans, it is difficult to make a confident prediction about how such claims would come out.

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When Hurricane Katrina made landfall just east of New Orleans in August of 2005, many Americans were unaware of just how vulnerable the city and wider metropolitan area were to flooding and severe hurricane-related damage. America, and the world, would soon find out. When the levee system protecting the city from Lake Pontchartrain on the east, and the Mississippi River on the west, massively failed, much of the city was severely flooded. About half of the homes in the city of New Orleans itself sustained serious damage. What resulted was the greatest natural disasters to ever occur in the United States. While the devastation in New Orleans, and the surrounding Gulf Coast, revealed a host of social, economic, bureaucratic, engineering, and planning problems, residents and concerned supporters were particularly concerned with questions about redevelopment. What areas of the city would be redeveloped? If some areas were deemed too dangerous (or damaged) for redevelopment, what would happen to those homeowners and residents who had previously lived in such areas? Agencies and organizations were quick to respond with proposals and strategies for redevelopment. While most of these proposals are preliminary and vague, a common theme is that some extremely vulnerable neighborhoods may be restricted from redeveloping, either temporarily or permanently.

This possibility gives rise to many questions, but of particular interest is whether such regulations on development would fall under the Takings Clause of the Fifth Amendment of the U.S. Constitution. That clause limits the Government's capacity to take private property without

due compensation.[1] It says, "Nor shall private property be taken for public use, without just compensation."[2] Just how this restriction should be interpreted has been the subject of much scholarly and jurisprudential debate over the last century. On the one hand, what has counted as a taking has been interpreted quite broadly, to the advantage of property owners.[3] On the other hand, courts have sometimes been willing to find exceptions to the Takings Clause, empowering the Government to regulate land use without compensating property owners.[4] In New Orleans, if redevelopment is regulated, those affected will surely want to be compensated for their perceived loss. But if the Government feels it must restrict development for a large number of residences, this could leave the Government open to overwhelming liability.

The Post-Katrina situation in New Orleans is of special interest for at least two related reasons. First, potential Government regulation would not be, presumably, a standard takings case. Ordinarily, the Government takes private property for the greater public use, where "public use" usually entails a park, a bridge, or, say, a shopping mall. Or, the Government restricts development for, say, ecological reasons. In New Orleans, regulations on development would be in the interest of public safety, and those areas restricted from redeveloping would most likely be left to return to their natural state. Second, there is a sense that not only are certain areas in New Orleans now too vulnerable to develop, but that some believe these areas never should have been developed in the first place. According to a recent *New York Times* article, "Michael M. Liffmann, the associate director of the Louisiana Sea Grant College at Louisiana State University, which studies land-use issues along the Gulf Coast, said most experts agreed that the roughly one-quarter to one-third of the city located dangerously below sea level should not be

[1] U.S. Const. amend. V.
[2] *Id.*
[3] *See Lucas v. S.C. Coastal Council, 505 U.S. 1003 (1992).*
[4] *See Tahoe-Sierra Pres. Council v. Tahoe Reg'l Planning Agency, 535 U.S. 302 (2002).*

rebuilt."[5] Liffmann said, "There are parts of New Orleans that are not fit for human habitation. They never were and never will be."[6] This opinion may be in tension, of course, with the views of those residents whose homes were severely damaged and who may be restricted from redeveloping their property.

In what follows, we have three primary goals. First, we want to summarize the proposal for redevelopment that has been put forward by the New Orleans city council. While there are a number of proposals, almost all agree in allowing for the possibility of moratoria on redevelopment in certain neighborhoods. Second, we want to situate the current case law on this issue within the larger context of takings jurisprudence. Understanding the courts' trends on this issue, if any are discernible, will be indispensable in trying to get a sense of how courts would rule in litigation that might arise out of regulating redevelopment in New Orleans. Third, we want to give an analysis of how current holdings on takings issues might apply to the situation in New Orleans. It may initially seem clear that certain forms of regulation on redevelopment will uncontroversially trigger takings compensation. So we are particularly interested in what sorts of defenses might be available to the Government in trying to avoid massive takings liability. As it turns out, holdings that initially seem to favor the rights of property owners may be interpreted in ways that provide strategies for regulation without takings liability.

I. Facts

Before canvassing some proposals for redevelopment, we want to provide some basic facts about New Orleans and the Katrina disaster. At the time of the most recent census, in 2000,

[5] Gary Rivlin, "All Parts of City in Rebuild Plan of New Orleans", *N.Y. Times*, January 8, 2006, available at www.nytimes.com.
[6] *Id.*

the city of New Orleans had a population of 485,000.[7] At the time of Hurricane Katrina, the city was estimated to have lost about 20,000 people, bringing the population to 465,000.[8] In 2000, the New Orleans greater metropolitan area had a population of 1.3 million.[9] 583,000 people, or 44.3% of the metro population, resided in the zone of flooding caused by Hurricane Katrina.[10] 228,000 homes, or 41% of the metro area's total, were flooded.[11] In New Orleans itself, 108,731 households had over four feet of flood water.[12] This amounts to roughly 50% of all New Orleans households. [13] In January of 2006, the population of New Orleans was estimated at 144,000.[14] By September of 2008, the population is estimated to rise to only 247,000, roughly half of the pre-Katrina population.[15]

According to the Urban Land Institute, much of New Orleans is between one and ten feet below sea level.[16] The Brookings Institute found that federal flood control spending created a false sense of security, and ultimately led to development in some of the most vulnerable areas, including the Lower Ninth Ward.[17] Because the future population of New Orleans will likely be significantly smaller than its pre-Katrina population, and because of the geological and geographic realities, it is not surprising that many of the proposals for redevelopment allow for the possibility of restricting redevelopment in the most vulnerable areas.

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[7] "New Orleans after the Storm: Lesson from the Past, a Plan for the Future", The Brookings Institution Metropolitan Policy Program (October 2005).
[8] *Id.*
[9] *Id.*
[10] *Id.*
[11] *Id.*
[12] "Action Plan for New Orleans: The New American City", Bring New Orleans Back Commission, Urban Planning Committee (January 11, 2006).
[13] *Id.*
[14] *Id.*
[15] *Id.*
[16] "A Strategy for Rebuilding New Orleans", Urban Land Institute (December 10, 2005), 40.
[17] "New Orleans after the Storm" at 25, 23.

II. Proposal for Redevelopment

Perhaps the most widely reported on proposal was the report issued by the Bring New Orleans Back Commission, which was put together by the New Orleans city council, and led by Mayor Ray Nagin. This report provides general recommendations and leaves much open to decision and debate. It recommends immediate redevelopment in areas with the least damage.[18] But, for areas more severely damaged, the Commission recommended the establishment of neighborhood planning teams, which would measure each neighborhood's future vulnerability versus its capacity for redevelopment.[19] These teams were to have started work in February, 2006, and would complete work no earlier than May, 2006.[20] It is likely that such evaluation would take significantly longer. Until these planning teams approve redevelopment, the neighborhoods under evolution will effectively be restricted from redevelopment. If it is determined that a neighborhood is simply too vulnerable to rebuild, or that too few residents are interested in rebuilding, the BNOB Commission's plan leaves open the possibility that these neighborhoods would be permanently restricted from development.[21]

The BNOB Commission also recommended the immediate formation of the Crescent City Recovery Corporation. The CCRC would buy and sell property for redevelopment, and would retain the power of eminent domain as a last resort.[22] In such cases, the Commission supports a buy-out of homeowners in heavily flooded and damaged areas for 100% of the pre-Katrina market value, less insurance recovery proceeds and mortgage.[23] In the mean time, the Commission advised the city not to issue any permits to build or rebuild in heavily flooded and

[18] "Action Plan For New Orleans".
[19] *Id.*
[20] *Id.*
[21] *Id.*
[22] *Id.*
[23] *Id.*

damaged areas until FEMA completes an evaluation of the possibility of future flooding, the planning teams have completed their surveys, and all relevant services are available to residents.[24] Besides the BNOB proposal, there are at least four other reports issuing recommendations for redevelopment. While these reports differ in some ways, they all generally agree with the BNOB proposal in allowing for the possibility of temporary or permanent moratoria on development.[25]

None of these proposals is very specific about which neighborhoods such restrictions could affect, what counts as too vulnerable, and what counts as too few people to sustain a neighborhood. Still, they all recognize the distinct possibility that some residents will have to be restricted from rebuilding, either temporarily, or permanently. The basis for such restrictions seems to be public safety, and perhaps efficient use of redevelopment funding. While it will take some time to work out the details of these restrictions, such potential regulations raise just the sort of jurisprudential questions we are interested in here. Before we can address those questions, though, it will be helpful to understand some recent and important decisions in takings litigation.

III. Physical Takings And Permissible Land Use Regulations

The plain language of the Fifth Amendment requires that the government pay compensation when it acquires private property for a public use.[26] However, the Constitution does not include any language addressing the issue of a regulatory action which prohibits a property owner from making certain uses of her private property. [27] The jurisprudence

[24] *Id.*
[25] See "New Orleans After the Storm" supra n.7, "A Strategy For Rebuilding New Orleans" supra n.16, "Charting the Course for Rebuilding a Great American City: An Assessment of the Planning Function in Post-Katrina New Orleans", American Planning Association (November 15, 2005), and "The Road Home Housing Program: A Blueprint for Building a Safer, Stronger, Smarter Louisiana", Louisiana Recovery Authority (March 5, 2006).
[26] *Tahoe-Sierra Pres. Council v. Tahoe Reg'l Planning* Agency, 535 U.S. 302, 321 (2002).
[27] *Id.* at 322.

surrounding the issue of regulatory takings is diverse and is "characterized by essentially *ad hoc*, factual inquiries."[28] The Court has recognized that "the question of what constitutes a "taking" for purposes of the Fifth Amendment has proved to be a problem of considerable difficulty."[29] "This Court, quite simply, has been unable to develop any "set formula" for determining when "justice and fairness" require that economic injuries caused by public action be compensated by the government, rather than remain disproportionately concentrated on a few persons." [30]

The precedent established in cases of physical takings is not applied to cases of regulatory takings claims where there is no physical invasion of the land. This is because of the difference in nature of the governmental action.[31] The varied nature and important policy concerns behind many land-use regulations requires that they not all be treated as takings.[32]

The State of Louisiana follows similar jurisprudence in takings cases.[33] The Louisiana Constitution, Article I, Sec. 4 provides:

> A. Every person has the right to acquire, own, control, use, enjoy, protect, and dispose of private property. This right is subject to reasonable statutory restrictions and the reasonable exercise of the police power.
>
> (B) Property shall not be taken or damaged by the state or its political subdivisions except for public purposes and with just compensation paid to the owner or into court for his benefit. Property shall not be taken or damaged by any private entity authorized by law to expropriate, except for a public and necessary purpose and with just compensation paid to

[28] *Id*. at 323.
[29] *Penn Cent. Transp. Co. v. New York City*, 438 U.S. 104, 123 (1978).
[30] *Id.* at 124.
[31] *Id.*
[32] *See Tahoe-Sierra*, 535 U.S. at 324.
[33] *See Constance v. DOTD*, 626 So. 2d. 1151, 1156 (S. Ct. of LA.) (1993).

> the owner; in such proceedings, whether the purpose is public and necessary shall be a judicial question. In every expropriation, a party has the right to trial by jury to determine compensation, and the owner shall be compensated to the full extent of his loss. No business enterprise or any of its assets shall be taken for the purpose of operating that enterprise or halting competition with a government enterprise. However, a municipality may expropriate a utility within its jurisdiction.[34]

Justice Holmes established the general rule of regulatory takings jurisprudence in *Pennsylvania Coal Co. v. Mahon*, that "if regulation goes too far it will be recognized as a taking." [35] The failure to create a bright line rule in *Penn Coal* meant that future regulatory takings claims were to be determined on a case by case basis.[36] In *Penn Central Transportation Co. v. New York City*, the Court was faced with the question of whether or not restrictions the city placed on development in order to preserve historic landmarks constituted a "taking," thus requiring the city to pay just compensation.[37] The City of New York had designated Grand Central Station as a landmark and this designation allowed the Landmarks Preservation Commission to deny Penn Central's application to build a multistory building which the Commission believed would have detracted from the architectural integrity of the station.[38] Penn Central argued that the city's application of the Landmarks Preservation Law constituted a taking of their property without just compensation in violation of their Fifth and Fourteenth Amendment rights.[39]

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[34] LA. Const. art. I, § 4.
[35] *Pa. Coal Co. v. Mahon*, 260 U.S. 393, 415 (1922).
[36] *Id*. at 416.
[37] *Penn Cent. Transp. Co. v. New York City*, 438 U.S. 104 (1978).
[38] *Id*. at 117.
[39] *Id*. at 119.

The court examined several criteria which are significant when analyzing the character of the regulation and went on to establish a balancing test based on these elements: (1) the extent of the economic impact of the regulation on the claimant; (2) the regulation's impact on investment-backed expectations; (3) and the character of the governmental actions.[40] The court found that being "denied the ability to exploit a property interest that they heretofore had believed was available for development," did not in and of itself constitute a taking.[41] Instead the court focused on the "character of the action and on the nature and extent of the interference with rights in the parcel as whole…"[42] Holding that the restrictions did not interfere in any way with the primary use of the terminal or Penn Central's "primary expectation concerning the use of the parcel," the court found that the restriction did not constitute a "taking."[43]

These three factors known as the *Penn Central* framework have become firmly embedded in takings doctrine. As Justice O'Connor wrote in her concurrence in the case of *Palazzolo v. Rhode Island*, "Penn Central does not supply mathematically precise variables, but instead provides important guideposts that lead to the ultimate determination whether just compensation is required."[44] In certain factual situations these guideposts are now the basis for a court's determination regarding whether or not a taking has occurred.

[40] *Id.* at 128.
[41] *Id*. at 130.
[42] *Id*. at 130,131.
[43] *Id*. at 136.

[44] 533 U.S. 606, 634 (2001),

A. A *Per Se* Rule for Regulatory Takings

The Court in *Lucas* established the bright-line rule that a regulatory action which deprived land of *all* economically viable use would constitute a taking. [45]After purchasing two lots on which Lucas intended to build, the South Carolina legislature enacted legislation which prevented him from building on the property for purposes of environmental protection, thus rendering his property "valueless."[46] In *Lucas,* the regulation permanently deprived the property of all value since he was not able to build on the land. The categorical rule established in *Lucas* will only be applied to cases where a "total taking" has occurred, continuing the need for the use of the *Penn Central* framework in situations where the owner has not been deprived of all economically viable uses of their land.[47]

In *Lucas* the Court left open the possibility that not all regulatory land use restrictions which eliminate "the lands only economically productive use" will automatically entitle the owner to compensation.[48] If the use was not previously permissible under "relevant property and nuisance principles" the state may expressly prohibit that use without compensation.[49] Furthermore, "the fact that a particular use has long been engaged in by similarly situated owners ordinarily imports a lack of any common-law prohibition though changed circumstances or new knowledge may make what was previously permissible no longer so."[50] To illustrate this point the Court drew a comparison to a nuclear power plant which was later discovered to be built on top of an earthquake fault.[51] When the owners of the plant would be instructed to disassemble the infrastructure they would not be entitled to compensation based on the background principles of

[45] *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1029 (1992).
[46] *Id.* at 1006.
[47] *See id.* at 1017.
[48] *Id*. at 1029.
[49] *Id*. at 1030.
[50] *Id*. at 1031.
[51] *Id.*

nuisance law.[52] That is to say, for obvious reasons, property owners do not have the right to build a nuclear power plant on top of an earthquake fault, and so restricting that use is no violation of rights and so not compensable.

The concurrence by Justice Kennedy in *Lucas* focuses on his concern that the background principles of nuisance were simply "too narrow a confine for the exercise of regulatory power in a complex and interdependent society."[53] Changing conditions necessarily lead to the enactment of new regulatory restrictions and the State should not be hampered in its attempt to respond to these changes by takings jurisprudence.[54] As Justice Kennedy stated, "The Takings Clause does not require a static body of property law."[55] As we will see, in the Court's more recent examination of temporary takings cases, the Court appears to treat government regulations with more deference.

B. Temporary Takings

1. Compensation Issues and A Public Safety Exception

The Court in *First English* held that for purposes of compensation, a temporary taking was no different than a permanent taking if a landowner was denied all use of her property.[56] If the burden created by the government action resulted in a taking, then the Fifth Amendment requires that the landowner be paid for the value of the use of her land during that period.[57]

After a devastating flood which damaged First English's campground, the County of Los Angeles passed an ordinance preventing rebuilding in the flood prone areas.[58] Citing health and

[52] *Id.*
[53] *Id*. at 1035.
[54] *Id.*
[55] *Id.*
[56] *First English Evangelical Lutheran Church of Glendale v. County of L.A.,* 482 U.S. 304, 319 (1984).
[57] *Id*.
[58] *Id.* at 306.

safety concerns for the public, the ordinance went into effect immediately.[59] The Supreme Court held that "where the government's activities have already worked a taking of all use of property, no subsequent action by the government can relieve it of the duty to provide compensation for the period which the taking was effective."[60] The Supreme Court did not rule on whether or not the regulation constituted a taking, instead only examining the issue of monetary damages.[61] On remand, the California Supreme Court held that no taking had occurred since the regulation continued to allow for several uses of the property, such as a campground.[62] The California Supreme Court went on to describe the potential for a regulation enacted for public safety reasons to not be labeled as a *per se* taking:

> "It would not be remarkable at all to allow government to deny a private owner "all uses" of his property where there is no use of that property which does not threaten lives and health … Indeed it would be extraordinary to construe the Constitution to require a government to compensate private landowners because it denied them "the right" to use property which cannot be used without risking injury and death."[63]

2. Absence Of A *Per Se* Rule In Temporary Takings Cases

In *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency* the Court more recently established that there should not be "an extreme categorical rule that any deprivation of all economic use, no matter how brief, constitutes a compensable taking."[64] The

[59] *Id*. at 307.
[60] *Id*. at 321.
[61] *First English Evangelical Lutheran Church of Glendale v. County of Los Angeles*, 210 Cal. App. 3d 1353, 1359 (Ct. App. 1989).
[62] *Id.* at 1371.
[63] *Id*. at 1366.
[64] *Tahoe-Sierra Pres. Council v. Tahoe Reg'l Planning* Agency, 535 U.S. 302, 334 (2002).

issue presented in *Tahoe-Sierra* was whether or not a moratorium on development constituted a "taking" requiring compensation under the Fifth Amendment.[65] The Tahoe Regional Planning Agency instituted a moratorium on almost all development surrounding the lake for environmental reasons during a 32 month period.[66] The government enacted the building moratoria in an attempt to prevent the deterioration of the pristine nature of the lake which was due in part to rapid development in the surrounding area.[67]

The District Court had ruled that under the *Penn Central* approach there had not been an *ad hoc* taking, but that under a *Lucas* analysis it constituted a categorical taking.[68] In the appeal to the Supreme Court the defendant only appealed the district court's ruling under the *Lucas* analysis and the plaintiffs stated on appeal that they did not want to argue under the balancing approach of *Penn Central.*[69] Thus the only issue before the Court of Appeals was whether or not the categorical rule established in *Lucas* applies.[70] The Court of Appeals held that it was not a categorical taking since the regulations only had a temporary impact and thus only affected a portion of the parcel.[71]

On further appeal, the Supreme Court examined the extent to which the property was taken, if it was only a segment of the property, a small number of sticks in the bundle of property rights, or if all of the sticks were taken.[72] The Court determined that the *Penn Central* approach was superior to establishing a bright-line rule based solely on the duration of the restriction.[73] The Court reasoned that the regulation only affected a portion of the parcel, and regulations that

[65] *Id.* at 306.
[66] *Id*. at 307.
[67] *Id*.
[68] *Id.* at 318 n. 14.
[69] *Id.*
[70] *Id.*
[71] *Id*. at 319
[72] *Id*. at 331.
[73] *Id*. at 342.

affect only a portion of a parcel by either time, use, or space do not deprive the owner of all economically beneficial use.[74]

The Supreme Court's holding was not determinative over all temporary land-use restrictions, instead stating that a temporary restriction is not to be automatically recognized as either a compensable taking or a non-compensable regulation.[75] In Chief Justice Rehnquist's dissent, he argued that a delay lasting six years or more should be treated as a *per se* taking.[76] The majority rejected this rule, instead favoring the *Penn Central* framework in making a determination as to whether or not the regulation was compensable.[77]

The Court was especially concerned by the policy risks of forcing governmental bodies to pay compensation during a moratorium period which could lead officials to proceed through the planning process with unwise speed.[78] It added that in cases where the decision process involves more than just an individual permit and will affect many people, there is even greater cause to protect and allow for the decision making process.[79]

A temporary ban on development, the Court reasoned, had an impact on all landowners and did not single out any land owners in particular.[80] This all out ban, the court believed, led to "reciprocity of advantage," because no member of the group of affected landowners would be able to do anything that was inconsistent with the plan that was later adopted.[81] Instead, all members of the affected community would suffer the same detriment when a moratorium was

[74] *Id*.
[75] *See id.* at 337.
[76] *Id*, 338 n. 4.
[77] *Id*. at 339.
[78] *Id*.
[79] *Id*. at 340.
[80] *Id*. at 341.
[81] *Id*. at 341.

instituted and they would all benefit by having the same restrictions uniformly placed on others.[82]

C. A Further Narrowing Of The Takings Test

Before the recent Supreme Court ruling in *Lingle v. Chevron*, the phrase "land use regulation does not affect a taking if it substantially advances legitimate state interests and does not den[y] an owner economically viable use of his land"[83] had been key to takings jurisprudence.[84] This rule was first established in *Agins*, and a standard for what constituted a legitimate state interest was never established.[85] The Court at one point said that when a governmental body "reasonably concludes that the health, safety, morals, or general welfare, would be promoted by prohibiting particular contemplated uses of land, compensation need not accompany prohibition."[86] The court had recognized that a "broad range of governmental purposes and regulations satisfy these requirements."[87] While *Lingle* was the first time the Court stated that the "substantially advances language" was not alone sufficient to avoid compensation, other courts had recognized this distinction.[88] In *McDougal v. County of Imperial*, 942 F.2d 668 (9th Cir. 1991) plaintiffs argued a flood control ordinance which restricted the use of their property constituted a taking.[89] The Ninth Circuit held that the Supreme Court "has never looked only at the government's interest – stopping there, if it is legitimate," finding that legitimacy of

[82] *See id.*
[83] *Nollan v. Cal. Coastal Comm'n*, 483 U.S. 825 (1987).
[84] *Lingle v. Chevron U.S.A. Inc.*, 125 S. Ct. 2074 (2005).
[85] *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1023 (1992).
[86] *Id.*
[87] *Id*.
[88] *See McDougal v. County of Imperial*, 942 F.2 668 (9th Cir. 1991).
[89] *Id*. at 671.

the state purpose was never solely conclusive as to whether or not the act constituted a *per se* taking.[90]

The Court in *Lingle* established that as a freestanding takings test, the "substantially advances language" was not valid.[91] It was flawed because it was too limited; the test did not allow for an examination of the burden placed on private property owners and how that burden was distributed amongst landowners.[92] The inquiry instead focused on the validity of the taking, a question of analysis that is prior to the question of whether or not a taking had occurred.[93]

In *Lingle* the Court held that a plaintiff who is seeking to establish that a government regulation effected a taking could proceed under several different theories, two of which can be applied to the instant facts in the City of New Orleans. These two tests include the strict *Lucas* rule for cases of total regulatory takings and the *Penn Central* framework.

IV. Restrictions in New Orleans: Permissible Land Use Regulations or Takings?

A. Temporary Restrictions

Under the Bring New Orleans Back Proposal, properties which are under evaluation by the neighborhood planning teams will have their development restricted until a determination is made regarding the neighborhoods' future vulnerability versus its capacity for redevelopment.[94] It is not known how long this restriction will be in effect, but it is proposed to only take four months, and to be completed by May 2006, but may potentially take much longer.[95] With this

[90] *Id*. at 678.
[91] *Lingle v. Chevron U.S.A. Inc.*, 125 S. Ct. 2074, 2083 (2005).
[92] *Id*. at 2084.
[93] *Id*.
[94] "Action Plan For New Orleans."
[95] *Id*.

restriction on redevelopment in place until an evaluation can be made regarding the potential dangers of rebuilding in designated areas, it is possible that homeowners could make an assertion of a regulatory taking and seek just compensation under the Fifth Amendment for the time during which the use of their property is restricted. The owners may argue that the regulation is so severe that it is "tantamount to a condemnation or an appropriation" and thus could constitute a taking.[96]

The Supreme Court has held that, "In our view the answer to the abstract question whether a temporary moratorium effects a taking is neither "yes, always" nor "no, never"; the answer depends upon the particular circumstances of the case."[97] In the temporary moratoria case of *Tahoe-Sierra* the Court moved away from the categorical approach which it established in *Lucas*, instead favoring the framework established in *Penn Central*.[98] The majority in *Tahoe-Sierra* also rejected the proposals put forth in an *amicus curiae* urging the court to establish a fixed period, or acceptable length of time for a moratorium.[99] This would have established a bright-line rule where if a regulation which temporarily restricts development was in effect for an amount of time exceeding that established by the Court, just compensation requirements would go into effect.[100] In declining to establish another categorical rule the Court reaffirmed that the "interest in fairness and justice will be best served by relying on the familiar *Penn Central* approach."[101]

Because the categorical rule established in *Lucas*, where a regulation that completely deprives an owner of "all economically beneficial use" of her property will not apply to a

[96] *Tahoe-Sierra Pres. Council v. Tahoe Reg'l Planning* Agency, 535 U.S. 302, 322 (2002).
[97] *Id*. at 321.
[98] *Id*.
[99] *Id*. at 333.
[100] *Id*. at 333.
[101] *Id*. at 342.

temporary taking, the regulatory taking framework which will apply to a temporary moratoria on development in New Orleans will be the *Penn Central* framework.[102] The *Penn Central* framework directs an inquiry into three factors: 1) the extent of the economic impact of the regulation on the claimant; 2) the impact of the regulation on investment-backed expectations; and 3) the character of the governmental actions. These factors are not exclusive and do include things such as the length of the delay created by the moratoria.[103] It seems likely that when balancing these factors the court could determine that both the extent of the economic impact and the impact on investment-backed expectations was limited due to the length of the delay, and that because of the public safety concerns driving the actions of the government the regulation temporarily restricting development would not constitute a taking.

When looking specifically at the third factor, the character of the governmental actions, it may be helpful to examine the police power which the State of Louisiana extends to all reasonable police regulations.[104] Under Louisiana law police power has been described as "the inherent power of the state to govern persons and things, within constitutional limits, for the promotion of general security, health, morals and welfare."[105] This definition of the police powers given to the State would seem to allow for a temporary regulatory restriction based on safety concerns.

The homeowners may be able to argue that a moratorium that lasts for a significant period of time interferes with their investment backed expectations.[106] Those are the reasonable expectations the property owners had when they originally purchased their property.[107] The

[102] See *Lingle v. Chevron U.S.A. Inc.*, 125 S. Ct. 2074, 2081 (2005).
[103] *See Tahoe-Sierra*, 535 U.S. at 338.
[104] *Francis v. Morial*, 455 So. 2d 1168 (S. Ct. of L.A. 1984).
[105] *Id.* at 1172.
[106] *Tahoe-Sierra*, 535 U.S at 342.
[107] *See id.*

property owners can also argue that the restrictions have had a profound economic impact as their ability to rebuild their primary residence has been sharply limited by the regulations.

As the Supreme Court stated in *Tahoe*, a temporary moratorium is not by its nature automatically either compensable under takings doctrine, nor is it an action that is never compensable.[108] Thus the case of a temporary moratorium on development in New Orleans is not automatically precluded from a finding that it is indeed a taking deserving of compensation under the Fifth Amendment.

In the dissent by Chief Justice Rehnquist in *Tahoe* he criticizes the distinction between a temporary and permanent prohibition in relation to the effect that distinction has on a *Lucas*-like analysis. He states that, "neither the Takings Clause nor our case law supports such a distinction. For one thing, a distinction between "temporary" and "permanent" prohibitions is tenuous."[109] The Chief Justice went on to point out the "temporariness" of the prohibitions that were in place in *Lucas*, where the prohibition lasted only two years because the South Carolina Legislature changed the law, but the Court found a taking; the prohibition in *Tahoe* lasted nearly six years, but the Court did not find a taking.[110] This obvious discrepancy may eventually convince a court that a categorical rule is necessary when making a determination regarding a "temporary taking."

B. Policy Concerns

In *Tahoe-Sierra* the court expressed a concern which had guided their previous decisions and which is particularly salient to redevelopment in New Orleans: Treating all land use regulations as a *per se* taking might have the effect of transforming government regulations into a

[108] *See id.* at 321.
[109] *Tahoe Sierra*, 535 U.S. at 347.
[110] *Id.*

prohibitively expensive exercise.[111] In the context of New Orleans, where the city is struggling financially, if all of the land-use regulations, including those that are temporary, were treated as a *per se* taking the city could simply not afford to institute these types of land-use regulations.

The Court presented two reasons in *First English*, which it revisited in *Tahoe-Sierra*, for why a regulation such as that proposed in the BNOB plan, where an owner might be denied all use of her property for a period of time, could be interpreted to not constitute a taking.[112] The first reason established was that "the county (in the case of *First English*) might avoid the conclusion that a compensable taking had occurred by establishing that the denial of all use was insulated as a part of the State's authority to enact safety regulations."[113] Clearly this is an assertion which the City of New Orleans could make in regard to the reasons for the temporary freeze on development while further studies were conducted regarding the suitability of rebuilding in certain areas, the potential risks of future hurricane damage in that area, concerns over the safety of the levees, the requirements placed on the levee construction, etc. Secondly, the Court noted that the *First English* holding was limited and did not consider issues of "normal delays in obtaining building permits, changes in zoning ordinances, variances, and the like." [114] These types of permitting issues could certainly come to the forefront in disagreements over rebuilding within the City of New Orleans and may require a different evaluation.

C. Likely Outcome

With the absence of a bright line rule for the determination of a "temporary taking," it seems unlikely that a court operating under the principles stated in *Tahoe-Sierra* would find that the

[111] *Id*. at 324.
[112] *See id*. at 329.
[113] *Id*. at 329.
[114] *Id*.

property owners, who are impacted under the Bring New Orleans Back proposals requirement of a temporary building restriction, would be able to receive compensation. The strict rule of *Lucas* will not apply because "logically, a fee simple estate cannot be rendered valueless by a temporary prohibition on economic use, because the property will recover value as soon as the prohibition is lifted."[115] Furthermore, the balancing test required by *Penn Central* would in all likelihood favor the regulatory interests of the state, though the property owners can mount their own defenses under the three factor framework.

V. Permanent Restrictions in New Orleans: Permissible Regulations or Takings?

A. Does Lucas Even Apply?

It is quite possible that some areas of New Orleans will never be rebuilt. For some of these areas it will be because nobody wants to rebuild there, or because not enough people want to, or can afford to. But it seems at least possible, that even in some areas where people would desire to rebuild, redevelopment would be simply too dangerous. The government, at all levels, has a responsibility to protect people. Some might argue this is the government's greatest responsibility. As the redevelopment proposals have shown, it is possible that some landowners will be permanently restricted from rebuilding their homes because the area in question is deemed too dangerous for redevelopment of any sort.

On the face of it, the categorical takings rule set out in *Lucas* would suggest that permanent restrictions like these would amount to compensable takings. The rule set out in *Lucas* requires compensation for regulations that deny all economically beneficial or productive use of the land. Permanently restricting redevelopment in parts of New Orleans would seem to

[115] *Id.* at 332.

qualify as a denial of all economically beneficial or productive use of the land. These restrictions, then, would be obvious takings.

But, as it turns out, there may be a number of defenses that government defendants could rely on to avoid takings liability. Since the case for a compensable taking does not seem hard to make, we will focus here on some possible defenses to takings claims. How likely these defenses are to succeed is hard to tell. More likely than not, total restrictions on development for previous homeowners would amount to a taking, deserving of at least some compensation. Still, there are interesting defenses available, and their applicability to the Post-Katrina New Orleans situation is unpredictable. So, an awareness of such defenses should be not only interesting to the scholar, but important to both plaintiffs and government defendants.

Ironically, the source for some important takings defenses is in *Lucas* itself, and subsequent interpretations of that opinion. First, the holding in *Lucas*, and as reaffirmed in *Tahoe-Sierra*, applies to a very narrow class of cases. The categorical takings rule applies only when a regulation effects a total elimination of a property's value and use. In *Palazzolo* the Court held that a 93.7% decrease in property value was not sufficient to trigger the categorical rule.[116] The *Tahoe-Sierra* Court said that the Lucas rule was limited to "the extraordinary circumstance when no productive or economically beneficial use of land is permitted."[117] The Court held that anything less than a complete elimination in value would require an analysis by the balancing test applied in *Penn Central*.[118]

That is to say, it might be argued that the categorical rule from *Lucas* simply does not apply to permanent restrictions on development in New Orleans. If this were the case, then the *Penn Central* balancing test would have to be applied, with perhaps unpredictable results. Such a

[116] *Palazzolo*, 533 U.S. at 631.
[117] *Tahoe-Sierra*, 535 U.S. at 330.
[118] *Id.*

finding would not be altogether surprising. As we mentioned in the previous section, the most recent takings holdings have been reluctant to employ *per se* rules, and so the current trajectory of takings jurisprudence favors a return to the more flexible *Penn Central* test. Furthermore, we can imagine some benefits or uses that the property owners might retain, even if they were restricted from rebuilding homes in areas where that was too dangerous. For instance, the property owners may retain various sorts of easements, or rights of way, such that access to the restricted land could be sold. The property owners might retain rights to natural resources – if the land is to return to its natural state, who knows what sorts of valuable commodities it may supply. If the land were to be returned to wetlands, it may be of some value to conservation organizations like the Nature Conservancy, who might be interested in forming conservation easements and the like. The point is, permanently restricting redevelopment of homes does not automatically trigger the categorical rule.

At the same time, falling outside of the Lucas rule does not at all guarantee that government defendants will be able to avoid takings liability. Once the categorical rule is set aside, the *Penn Central* test would have to be applied. Arguably, the regulation would effect a tremendous loss on the property owners, and so the balancing test may very well come out on their side. Still, avoiding the *Lucas* rule would at least give government defendants a leg to stand on. Once engaged in the balancing test, their arguments would have to emphasize the tremendous public liability that would be at stake if private property owners were allowed to rebuild on land found to be much too dangerous for residences. Government defendants could argue that allowing to rebuild in such areas would be to repeat the grave mistakes of the past that partially led to the Katrina disaster in the first place. Furthermore, allowing rebuilding, and the consequent risk of another disaster, might put an enormous burden on tax payers, who at some

level have to pay for such disasters. If it is determined that the categorical rule does not apply to permanent restrictions on development, then arguments can be made on either side, and it is hard to say just how successful those arguments would be.

B. Background Principles Defenses: Nuisance

A second, and potentially more promising defense against takings claims also comes directly out of the *Lucas* opinion. Beyond introducing a categorical "wipeout" rule, the Lucas decision also introduced a defense to that categorical rule. A taking would not be found if the regulation in question was merely forbidding uses that would otherwise be prohibited by "background principles of the state's law of property and nuisance."[119] Interestingly, and importantly, the analysis of relevant background principles is the "logically antecedent" inquiry in a takings case.[120] In other words, if a regulation merely restricts a use that the property owner had no right to in the first place, then no taking could be found. The question then, of which sticks the property owner had in his bundle, became a threshold question. Consequently, the "background principles" defense can act as an affirmative and absolute defense to takings challenges.

The background principles defense can come in at least two varieties. The *Lucas* opinion mentions background principles of nuisance law and background principles of property law.[121] Defenses against takings challenges from regulations in New Orleans could potentially be rooted in both kinds of background principles. The pre-*Lucas* nuisance exception to takings stems from *Mugler v. Kansas,* where the Court denied a takings challenge to a state ban on the production

[119] *Lucas*, 505 U.S. at 1029.
[120] *Id.* at 1027.
[121] *Id.* at 1029.

and sale of alcoholic beverages.[122] There the Court said that a prohibition on the use of property for purposes that are injurious to the "health, morals, or safety" of the community cannot be deemed a taking.[123] The *Lucas* opinion made the nuisance defense somewhat more rigorous, holding that the government defendant must do more than show the use in question violates the 'use what is yours so as not to harm what is others' principle.[124] Rather, the government defendant must identify background principles of nuisance and property law that prohibit the use now intended.[125] The *Lucas* rule stated that a taking could not occur if a regulation effect simply duplicated the relief which "could have been achieved in the courts" by those affected under the relevant nuisance laws, or by the State under its own power to abate public nuisances.[126] The *Lucas* ruling strengthened the traditional nuisance exception by pointing out that the background principles analysis is logically antecedent, and hence, an affirmative defense to takings challenges. Furthermore, the *Lucas* defense can potentially be extended to apply to any use-limiting regulation.

Several decisions have made use of the nuisance defense to takings challenges. The general idea behind this sort of defense is that the State's inherent police power can be used to abate a nuisance, and if in doing so property is devalued, the State action cannot effect a taking. In *Colorado Department of Health v. The Mill*, the Colorado Supreme Court held that use restrictions on a uranium disposal site did not effect a taking because Colorado common law nuisance principles would not permit a property owner to engage in the activities in question.[127]

[122] *Mugler v. Kansas*, 123 U.S. 623 (1887).
[123] *Id.* at 668-69.
[124] *Lucas*, 505 U.S. at 1031.
[125] *Id.*
[126] *Id.* at 1029.
[127] *Colorado Department of Health v. The Mill*, 887 P.2d 993, 1002 (Colo. 1994).

In *Hendler v. United States*, the Court of Federal Claims denied a takings challenge because the plaintiff's land use violated a public nuisance statute.[128]

In takings challenges due to development restrictions in New Orleans, government defendants might try to rely on the background principles nuisance defense as articulated in *Lucas*. That is to say, if it could be shown that building or rebuilding a residence in a dangerous area is a public nuisance, then restrictions on development might not effect a taking. While Louisiana nuisance law seems unevenly focused on gambling, prostitution, and other 'vices', there is a relevant statute. A statute on criminal blighting of property defines "public nuisance" as "any garage, shed, barn, house, building, or structure, that by reason of the condition in which it is permitted to remain, may endanger the health, life, limb, or property of any person, or cause any hurt, harm, damages, injury, or loss to any person in any one of the following conditions…"[129] While this definition of "public nuisance" clearly applies to already existing structures, the principle behind it could be easily transferred to potential structures. Obviously the statute is concerned with protecting the public welfare and safety. If building on unsafe land can be shown to seriously compromise the public welfare and safety, the nuisance defense might free the government defendant from potential takings liability. While there is some motivation behind this defense, there seems to be little precedent, at least in Louisiana, for labeling potential development a public nuisance. This may be because development is restricted in terms of zoning laws, while nuisance law is reserved to apply to already existing actions or structures. Still, this sort of defense might be used against takings challenges for development restrictions.

Perhaps most promising for the government defendant is the fact that the *Lucas* Court acknowledged that "Changed circumstances may make what was previously permissible no

[128] *Hendler v. United States*, 38 Fed. C1. 611, 615 (1997), aff'd, 175 F.3d 1374 (Fed. Cir. 1999).
[129] *La. R.S. 14: 107.3* (2006).

longer so."[130] That is to say, while plaintiff property owners subjected to building restrictions will certainly argue that the right to develop was originally in their bundle, government defendants can argue that we now know just how uninhabitable certain areas of New Orleans are, and so the right to develop should not presently be part of the bundle. This seems quite relevant to us, because there is no doubt that, in one sense, potentially restricted property owners once did have the right to develop on their property. But the more important question is whether they should have been granted that right, and in some cases, the answer may turn out to be "no". The *Lucas* opinion leaves open the possibility for correcting such "right granting mistakes", and such a possibility may contribute to a takings defense.

In a related, and perhaps even synonymous point, the States' inherent police power can sometimes trump any diminution in property value that may result from restrictions and regulations. In Louisiana, the police power has been defined generally as the inherent power of the state to govern persons and things, within constitutional limits, for the promotion of general security, health, morals and welfare.[131] There is a three-prong analysis in determining whether a claimant is entitled to eminent domain compensation. In accordance with this analysis, a court must: (1) determine if a recognized species of property right has been affected; (2) if it is determined that property is involved, decide whether the property has been taken or damaged in a constitutional sense; and (3) determine whether the taking or damaging is for a public purpose under La. Const. art. I, § 4.[132] A regulation that prohibits all economically beneficial use of land should be treated in the same manner as state action which results in a "permanent physical occupation" of the land, in which the government has a categorical duty to compensate the former owner. However, even in this circumstance, compensation is not owed if the state action

[130] *Lucas*, 505 U.S. at 1031.
[131] *Francis v. Moral*, 455 So. 2d 1168 (La. 1984)
[132] *Avenal v La*., 886 So. 2d 1085, 1104 (La. 2004).

is in accordance with a "background principle" of the state's property law that already prohibits the landowner from the use he claims was taken, or is undertaken in the exercise of the state's police power. Compensation is not owed because no legally existing rights were being taken under those circumstances.[133]

Government defendants might be able to make use of these Louisiana rulings by arguing that allowing rebuilding on unsafe land would compromise the general health and welfare of the public, and that the State's inherent police power to promote those public interests trumps any development rights that property owner's might claim to have. The government would be arguing, in essence, that property owners do not have, and never did have, the right to act in ways that compromise the general health and welfare of the public.

C. Background Principles Defenses: Property

A background principles defense to takings challenges is also available in terms of property rights. Many background principles of property law will not apply to cases involving restrictions on development in New Orleans, so we will focus on the "natural use" doctrine, which seems most promising for government defendants. The natural use doctrine says that property owners have no inherent right to transform lands from their naturally existing state. In *Just v. Marinette County*, the Wisconsin Supreme Court articulated this rule when it rejected a takings claim for the denial of a county permit required to fill a wetland.[134] The court held that "An owner of land has no absolute and unlimited right to change the essential natural character of his land so as to use it for a purpose for which it was unsuited in its natural state and which

[133] *Id*. at 1108
[134] *Just v. Marinette County*, 201 N.W.2d 761 (Wis. 1972).

injures the rights of others."[135] In *Marshall v. Town of Somers* the Wisconsin Supreme Court reaffirmed its ruling in *Just*, holding that county-imposed wetland conservancy restrictions that precluded a property owner from developing ninety percent of his land did not effect a taking because of the natural use principle.[136]

Government defendants might be able to mount a defense to takings challenges in New Orleans by arguing that the natural use doctrine precludes takings liability. The argument would again make use of background principles, claiming that some New Orleans residents lack the right to transform their lands in dangerous ways by building or rebuilding homes there. This sort of argument would have to rely heavily on empirical data which convincingly show that some of the areas in question are indeed unsuitable for development. This data may not be hard to find, though, as we have already noted some scientists who believe just that. Government defendants might be able to argue that not only are certain areas in New Orleans unsuited for residential development in their natural state, but that even in their unnatural, "flood protected" state, they proved to be unsuitable and dangerous. This might be a powerful defense to takings challenges, but it is unclear how dangerous redevelopment would have to be in order for the natural uses doctrine to apply. So, it is difficult to say how successful such a strategy would ultimately be.

In sum, while the government will likely be liable, at least in some cases, for takings due to permanent restrictions on redevelopment in New Orleans, there are a number of defenses available to government defendants. How successful any of these strategies would be is hard to say. But plaintiff property owners should understand that their takings litigation may not be as easily successful as they might first imagine, and government defendants will be pleased to know that few takings challenges will result in "knock down" wins for plaintiffs, and that the *Lucas*

[135] *Id.* at 768.
[136] 414 N.W.2d 824, 825 (Wis. 1987).

opinion in particular seems to have provided a set of categorical defenses along with its categorical takings rule.

VI. Conclusion

We have examined the ebb and flow of takings jurisprudence and tried to apply it to potential restrictions on development in Post-Katrina New Orleans. At all levels, and especially at the Federal level, the courts have gone back and forth between *ah hoc* rules and categorical rules, between favoring the rights of Government and favoring the rights of private land owners. The issue is made even more complex with the recent consideration of temporary restrictions. In short, the history of takings jurisprudence has been one of giving and taking.

In New Orleans, the possibility of restrictions on development is real. This is confirmed by all of the major proposals for redevelopment, which explicitly recommend temporary restrictions in the most damaged areas, and leave open the possibility of permanent restrictions in areas deemed too dangerous for human habitation. In the face of such restrictions, at least some landowners will surely file suit for takings under the Fifth Amendment.

Because of the complexity of takings jurisprudence, and because of the somewhat unusual nature of the situation in New Orleans, it is difficult to make a confident prediction about how such claims would come out. In general, we feel that it is more likely than not that temporary restrictions will not result in compensable takings. Temporary restrictions will almost certainly not trigger the categorical rule from *Lucas*, because not all of the interests in the property will be taken. While arguments can be made on both sides of the balancing test, courts will likely find that because of the remaining interests in the property, and because the

restrictions do not amount to physical occupations of land, the balance does not weigh far enough in plaintiffs' favor for compensable takings to be found.

In some ways, cases involving permanent restrictions are more difficult still. On the one hand, a permanent restriction on development would seem to greatly diminish the value of the property in question, perhaps effecting a taking either under the *Lucas* rule or the *Penn Central* balancing test. Here, we have highlighted a number of interesting defenses government defendants can make use of in trying to defend against regulatory takings claims. It is difficult to say how successful such defenses would be. For our part, we feel the balance is tilted slightly in favor of private property owners, both because of their strong investment backed expectations in being able to live and/or develop on their property, and because there does not seem to be an average reciprocity of advantage. That is to say, arguably, property owners do not seem to receive much benefit from the government regulations. Still, permanent restrictions may be necessary to protect and uphold public safety and welfare, and the government can argue that exercising its police power for those reasons cannot effect compensable takings. It will certainly be interesting to see how courts handle such issues, and if they are able to handle them in a consistent and fair way.