From *Penn Central* to *United Artists’ I & II*: The Rise to Immunity of Historic Preservation Designation from Successful Takings Challenges

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I. INTRODUCTION

The historic preservation movement has an extensive history stretching from eighteenth century Europe to the present day. That history includes both the efforts of many private individuals as well as those of local and national governments. In the United States, the preservation movement was initially fueled by private individuals wishing to instill a sense of patriotism and further the idea of a national community in the mid-nineteenth century. By the early- to mid-twentieth century, public entities had begun to fuel the preservation movement with local, state, and even the federal government furthering these patriotic preservation objectives through the passage of legislation designed to protect formally designated historic landmarks. Thus, by the 1960s, the preservation of American historical sites had become a primary concern of both private citizens, as well as legislative bodies.

Most recently, however, the American historic preservation movement has received its strongest and most significant endorsement, that of the judiciary. Specifically, the United States Supreme Court, in its 1978 decision in *Penn Central Transportation Co. v. City of New York,*¹ conclusively established that state and local governments may enact regulations which further the goals of historic preservation. Over the past fifteen years, the effect of this decision has been to

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prevent private individuals who own historically designated properties from successfully challenging the designations as takings under the federal Constitution or the applicable state constitution. In this way, historic designations in the United States have become immune from constitutional takings challenges. This constitutional immunity is the subject of this Comment.

Section II of this Comment traces the historical development of the preservation movement from its early days in Western Europe to its spread to the United States and development there in the nineteenth century. Section III discusses the modern development of historic preservation laws in the United States through both legislation and ground-breaking Supreme Court decisions in the twentieth century. Section IV provides an overview of the United States Supreme Court’s opinion in *Penn Central Transportation Co. v. New York City*, the strongest endorsement of historic preservation legislation to date. Section V discusses the one and only challenge to the *Penn Central* doctrine, the Pennsylvania Supreme Court’s 1991 decision in *United Artists’ Theater Circuit, Inc. v. City of Philadelphia*. Section VI discusses the Pennsylvania Supreme Court’s reversal of its decision within just two years in *United Artists’ Theater Circuit, Inc. v. City of Philadelphia II*. Finally, Section VII analyzes the Pennsylvania Supreme Court’s sudden reversal of opinion in the second *United Artists*’ decision and argues that such reversal demonstrates the proposition that historic preservation laws have become immune from constitutional takings challenges.

II. HISTORICAL DEVELOPMENT

A. Europe

In order to adequately trace the development of the historic preservation movement, a brief look at the European experience is necessary. Prior to the late eighteenth century, historic preservation did not exist in any structured form. Rather, it was an activity carried out by select individuals for any number of reasons, including aesthetics or tradition.² It was not until after the French Revolution that the movement in Europe officially began in France and subsequently spread to England.

² See G. BALDWIN BROWN, THE CARE OF ANCIENT MONUMENTS 12-13 (1905) (providing a history of early historic preservation).
In 1794, the revolutionary government in France proposed a response in opposition to a forthcoming policy of destroying all traces of Latin inscriptions on French monuments. That response was an effort to save works of art from the iconoclasm of the French Revolution. The response was led by Henri Gregoire, known as the Abbe Gregoire, a member of the French revolutionary government who subsequently produced several reports arguing for the preservation of ancient monuments. These reports are regarded as the first formal statements in favor of preservation and remain the basis for public policy in this area today.

In 1830, the head of the French government, King Louis Phillippe, took a formalized interest in several French historic sites and created an office known as the Inspector of Historic Monuments. This office included a commission which was responsible for an inventory of older buildings in France. The inventory was ultimately used as a means of protecting these older buildings from both alteration and destruction.

In contrast to the French experience, the British preservation movement did not begin to take shape until the mid-to-late nineteenth century when private organizations took the initiative to preserve old buildings. The British movement was led by two preservationists, John Ruskin and William Morris. The ideas of these two Englishmen focused primarily on the premise that preservation should prevail over restoration since the latter "changed" the structure, and therefore the mystique, of the original building.

The most significant development in the early British preservation movement, however, came in the public, not private, sphere of British society. In February, 1873, a bill was introduced in the House of Commons by Sir John Lubbock, a member of the House, entitled, "A Bill to Provide for the Preservation of Ancient National Monuments." The objective of this bill was to establish a commission with

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5 Sax, supra note 3, at 1143-44.
6 See id. at 1144.
8 Id.
9 Id.
10 Id. at 24.
11 See id. In 1877, an organization known as the Society for the Protection of Ancient Buildings was founded by the followers of Ruskin. Id.
12 BROWN, supra note 2, at 152–54.
the authority to designate specific structures as ancient monuments which in turn meant that any private owner was obligated to notify the commission prior to any modification of the site. After notification, the government could either purchase the structure, or let the owner proceed.

The significance of this bill was that it was the first time in the Anglo-American world that a legal rationale was advanced in favor of historic preservation. The rationale consisted of both the protection of cultural property as a governmental duty, and the concept that public ownership should be forced on private owners who are unwilling to participate. In light of England's strong belief in the private property system during the mid-to-late nineteenth century, the bill, not surprisingly, faced considerable opposition and was ultimately defeated. Despite this defeat, however, Sir John Lubbock's rationale, as exhibited in the following quotation from one debate on the Monuments Bill, still survives today. In that debate, Lubbock noted:

It is again no question of expediency or feeling whether we shall preserve the buildings of past times or not. We have no right whatever to touch them. They are not ours. . . . The dead still have their right in them: that which they labored for . . . we have no right to obliterate . . . still less is the right to the use of what they have left vested in us only. It belongs to all their successors.

At the very least, Lubbock's and Ruskin's beliefs about the importance and necessity of preserving ancient monuments carried over to the United States where a preservation movement of its own had already begun.

B. United States

The mid-nineteenth century development of the historic preservation movement in the United States resulted from both a keen interest in civic education as well as the realization that a common past would further the idea of a national community. Thus, the movement

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13 Sax, supra note 4, at 1547.
14 Id.
15 Id. at 1549.
16 Id.
17 For a detailed discussion of the opposition to the Bill and Lubbock's defense of the Bill, see id. at 1549–54.
18 Id. at 1547 (quoting John Ruskin, The Seven Lamps of Architecture (Everyman's ed., 1966)).
did not merely grow out of an appreciation for aesthetics as some may believe today. Rather, early preservationist efforts focused on inspiring a sense of patriotism in people when they viewed old buildings or pieces of land which at one time were occupied by famous historical figures.

As was the case in England, private individuals were the driving force of the early American preservation movement. These individuals saw themselves as responsible for protecting those historically significant buildings which had not yet been destroyed. In the early stages, and despite efforts by private individuals, state and local governments did little or nothing to support preservation efforts. The federal government limited its activity in this area to the preservation of Civil War battlefields.

Nevertheless, what is widely considered the first preservation activity in the United States—the effort to prevent the destruction of Independence Hall in 1816—was actually a combined effort of private individuals and state government. In that effort, the state government of Pennsylvania had proposed a sale of what was then known as the Old State House in Philadelphia since it had determined that the government no longer had any use for the building. Opposed to this sale, a group of Philadelphia citizens addressed the state legislature in a "Memorial" which contained reasons why the building should not be destroyed. After initially winning a stay of execution, temporarily saving the Old State House from destruction, the citizens persuaded the city of Philadelphia to purchase both the Hall and the square from the state for $70,000. The city subsequently provided renovations and in time, the Old State House was transformed into Independence Hall.

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23 Id. By this time, many historic structures had been destroyed through natural calamities, metropolitan growth, and simple changing of tastes. Id. at 96 n.26.
24 See id. at 29-62 (describing limited state and local preservation efforts).
26 Hosmer, *supra* note 7, at 29-30.
28 See Hosmer, *supra* note 7, at 30-31, for a full account of the debate to preserve Independence Hall.
29 Id. at 30.
The next major American preservation effort did not take place until the 1850s when the struggle to save Mount Vernon occurred.\textsuperscript{31} In the Mount Vernon case, appeals were made to both the state and federal governments to purchase the mansion and grounds, but both levels of government refused due to the exorbitant $200,000 price being sought by its owner, John Washington.\textsuperscript{32} Over time, the physical condition of Mount Vernon rapidly deteriorated and the likelihood that it would ultimately be sold to private investors was increasing.\textsuperscript{33}

Soon thereafter, however, a woman by the name of Ann Pamela Cunningham organized the Mount Vernon Ladies Association, which was chartered by the State of Virginia, to help save the mansion and grounds.\textsuperscript{34} This group, widely considered to be the first nationwide organization dedicated to preservation, came about after a famous open letter Cunningham had written to the "Ladies of the South."\textsuperscript{35} After just six years, the Association purchased the mansion and grounds of Mount Vernon in 1858.\textsuperscript{36}

The efforts of the Association and Cunningham became the model for future organizations wishing to preserve other historic sites.\textsuperscript{37} The patriotic spirit created by this movement, along with the impetus of the Civil War, created an uncontrollable atmosphere for preservation in the late nineteenth century which ultimately spurred the federal government into a larger role.

The federal government was a party to the first preservation-related litigation in the United States. This litigation involved the congressional condemnation of private property for the purpose of establishing a national memorial at the Gettysburgh battlefield site. In \textit{United States v. Gettysburgh Electric Railway Co.},\textsuperscript{38} the United States Supreme Court concluded that the preservation of a historic monument served a legitimate public purpose and thus was within the federal government's condemnation power.\textsuperscript{39} The Court noted in support of its conclusion that:

\begin{quote}
The battle of Gettysburgh was one of the great battles of the world. . . . The existence of the government itself . . . depended
\end{quote}

\begin{thebibliography}{9}
\bibitem{31} J. \textsc{Morrison}, \textsc{Historic Preservation Law} 2–3 (1965).
\bibitem{32} \textit{See} Duerksen & Bonderman, \textit{supra} note 20, at 1.
\bibitem{33} \textit{Id.}
\bibitem{34} \textit{See} Hosmer, \textit{supra} note 7, at 42.
\bibitem{35} \textit{Id.} at 44.
\bibitem{36} \textit{Id.} at 49.
\bibitem{37} \textit{See} Duerksen & Bonderman, \textit{supra} note 20, at 2.
\bibitem{38} 160 U.S. 668 (1896).
\bibitem{39} \textit{Id.} at 681–86.
\end{thebibliography}
on the result . . . Such a use seems necessarily not only a public use, but one so closely connected with the welfare of the republic itself as to be within the powers granted Congress by the Constitution for the purpose of protecting and preserving the whole country.40

The primary significance of this decision is that the Supreme Court, for the first time, recognized that historic preservation was an activity within the powers of the federal government.41

During the early 1900s, local and state governments joined the historic preservation movement. These entities used their police power to amend zoning laws for the purpose of protecting buildings, districts, and landmarks.42 The cities involved in this first “local phase” included Charleston, New Orleans, and San Antonio.43 In the period from 1930 to 1960, similar ordinances were promulgated in many more cities throughout the country.44 The common feature of all of these ordinances was that the vast majority of them protected from destruction entire neighborhoods or districts and not merely individual buildings.45

Thus, by the early- to mid-twentieth century, historic preservation had strong, local legislative support in the form of city ordinances. Not surprisingly, this legislation, along with subsequent federal legislation, ultimately led to a great deal of litigation. The next section will examine the most influential of this litigation.

III. Modern Development of Historic Preservation Laws

A. Supreme Court Jurisprudence

The major impetus for the tremendous development of historic preservation laws in the United States was the Supreme Court’s decision in Village of Euclid v. Ambler Realty Co.46 Euclid involved a challenge to a zoning ordinance adopted by the Cleveland, Ohio suburb of Euclid, which precluded Ambler Realty Co. from using its

40 Id. at 681--82.
42 See id. at 73.
43 Id.; see Morrison, supra note 31, at 129--86 (listing and describing all local ordinances enacted prior to 1966). The Charleston ordinance was passed in 1931; the New Orleans ordinance in 1937; and the San Antonio ordinance in 1939. Duerksen & Bonderman, supra note 20, at 6.
44 Duerksen & Bonderman, supra note 20, at 5--8.
45 See Fein, supra note 41, at 74.
46 272 U.S. 365 (1928).
property for commercial development and, as a result, significantly lowered its value. Ambler Realty argued the ordinance amounted to an unconstitutional taking of private property under the Fifth and Fourteenth Amendments. The Court held that such an ordinance was not an unconstitutional taking, reasoning that its use restrictions were sufficiently related to the public welfare. The Court noted "[t]he ordinance now under review, and all similar laws and regulations, must find their justification in some aspect of the police power, asserted for the public welfare. . . . [If] the validity of the legislative classification . . . be fairly debatable, the legislative judgment must be allowed to control." This decision by the Supreme Court effectively validated zoning restrictions, provided they were reasonable and served the public welfare.

The Supreme Court extended the "public welfare" rationale for historic preservation zoning restrictions to include land-use controls based on aesthetic considerations in the 1954 decision of Berman v. Parker. This decision, though not dealing directly with the constitutionality of historic preservation laws, triggered the most active period for local governments in this area. Berman dealt with the question of whether Congress had the power to condemn a particular area of Washington, D.C. in favor of an urban renewal project for the sole purpose of improving the aesthetics of the neighborhood. The Court held that the revitalization of urban areas and the provision of a beautiful place for residents to live were within the definition of "public welfare." The Court emphasized the significance of aesthetic objectives as an important aspect of the public welfare that states could promote pursuant to their police powers.

The Court stated:

47 Id. at 384–85. The Fifth Amendment to the United States Constitution reads, in relevant part: "No person shall be . . . deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation." U.S. Const. amend. V. Similarly, the Fourteenth Amendment to the United States Constitution reads, in relevant part: "nor shall any State deprive any person of life, liberty, or property, without due process of law." U.S. Const. amend XIV, § 1.
48 Euclid, 272 U.S. at 395.
49 Id. at 387–88 (emphasis added).
50 See Duerksen & Bonderman, supra note 20, at 5. But see Pennsylvania Coal v. Mahon, 260 U.S. 393, 415 (1922) ("The general rule is . . . that while property may be regulated to a certain extent, if regulation goes too far, it will be recognized as a taking.").
52 See Fein, supra note 41, at 74.
54 Id. at 33.
55 Id. at 32.
The concept of the public welfare is broad and inclusive. . . . The values it represents are spiritual as well as physical, aesthetic as well as monetary. It is within the power of the legislature to determine that the community should be beautiful as well as healthy, spacious as well as clean. . . . If those who govern the District of Columbia decide that the nation's Capital should be beautiful as well as sanitary, there is nothing in the Fifth Amendment that stands in the way.\textsuperscript{56}

The Court's ringing endorsement of the legitimacy of aesthetic objectives in \textit{Berman} gave any state desiring to pass or justify a historic preservation law the necessary justification: such laws fall clearly within a state's police power.\textsuperscript{57} Not surprisingly, this endorsement proved to be the turning point for the American preservation movement as a growing number of localities began to adopt more preservation ordinances than ever before.\textsuperscript{58}

\section*{B. Significant Historic Preservation Legislation Following Berman v. Parker}

In 1965, New York City became the first major American city to enact a comprehensive landmark and historic district plan.\textsuperscript{59} New York City's Landmarks Preservation Law ("Landmarks Law"), passed pursuant to a state enabling statute,\textsuperscript{60} has the enunciated purpose of "preserving cities and districts special to the city's cultural, social, economical, political and architectural history."\textsuperscript{61} The Act functions by way of a Landmarks Preservation Commission consisting of eleven commissioners\textsuperscript{62} who have the power, within set guidelines, to designate structures or districts as landmarks.\textsuperscript{63} Once a designation has occurred,\textsuperscript{64} a property owner may not destroy, alter, or even restore the structure without the permission of the Landmarks Commis-

\begin{itemize}
\item \textsuperscript{56} Id. at 33.
\item \textsuperscript{58} See Duerksen & Bonderman, supra note 20, at 7.
\item \textsuperscript{59} See Fein, supra note 41, at 74–75; NEW YORK, N.Y. CHARTER & ADMIN. CODE ANN. vol. 2, ch. 8-A §§ 2.05-1.0, 2.07-1.0 to 21 (Williams 1976 & Supp. 1984).
\item \textsuperscript{60} Historic Preservation Enabling Act of 1965, N.Y. GEN. MUN. LAW § 96-a (McKinney 1977) (empowering the state's municipalities to protect and preserve buildings and places of "historical or aesthetic interest or value").
\item \textsuperscript{61} NEW YORK, N.Y. CHARTER & ADMIN. CODE ANN. vol. 2, ch. 8-A, § 2.05-1.0(b) (Williams 1976 & Supp. 1984).
\item \textsuperscript{62} NEW YORK, N.Y. CODE § 534(2)(a) (1985).
\item \textsuperscript{63} Id. at § 534.
\item \textsuperscript{64} Ordinary maintenance is permissible. NEW YORK CITY, NEW YORK ADMIN. CODE § 25-302R (1985).
\end{itemize}
sion. \(^{65}\) Finally, the Landmarks Law also provides for interested or affected parties to comment on designation proposals with procedures for modification, disapproval, or rescission of designation orders. \(^{66}\)

Congress followed New York City's lead in 1966 when it passed the National Historic Preservation Act of 1966 (NHPA). The NHPA remains the basic federal preservation statute today. \(^{67}\) Earlier congressional attempts at preservation, such as the Historic Sites, Buildings and Antiquities Act of 1935 \(^{68}\) and the National Trust for Historic Preservation in 1949, \(^{69}\) had failed. On the whole, the NHPA, with its subsequent amendments, has been successful in achieving national preservation goals. \(^{70}\)

In short, the NHPA is the principal legislative authority for any or all federal historic preservation programs. \(^{71}\) The Act contains four major provisions: 1) the National Register of Historic Places; \(^{72}\) 2) a matching fund for states willing to carry out the purposes of the Act; \(^{73}\) 3) the Advisory Council to the President and Congress on historic preservation; \(^{74}\) and 4) the section 106 duty imposed on federal agencies to seek the Advisory Council's comments on any actions taken on affected properties or those properties eligible for the National Register of Historic Places. \(^{75}\) These four provisions make up the core of the NHPA.

Not surprisingly, the enactment of more state and local preservation ordinances followed the enactment of the NHPA. Over the past half-century or so, all fifty states have adopted some form of legisla-

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\(^{65}\) Id. at § 25-305.

\(^{66}\) Id. at § 25-308.


\(^{70}\) See generally, ADVISORY COUNCIL ON HISTORIC PRESERVATION, TWENTY YEARS OF THE NATIONAL HISTORIC PRESERVATION ACT (1986).

\(^{71}\) See Duerksen & Bonderman, supra note 20, at 210–46.

\(^{72}\) 16 U.S.C. § 470a(a) (1988). The National Register of Historic Places is an official listing of the nation's properties and resources that are significant in American history, architecture, and culture. Id.

\(^{73}\) Id. § 470a(d). The National Historic Preservation Fund encourages the development of state historic preservation programs by providing 50% matching grants to those who wish to participate in such programs by following federal standards and criteria. Id.


\(^{75}\) Id. § 470f (1988 & Supp. IV 1992). Section 106 “review” requires the head of a federal agency to notify the Advisory Council on Historic Preservation before taking any action that would affect a property listed or eligible for listing on the National Register of Historic Places. Id.
tion for the purpose of historical preservation. Nevertheless, despite the adoption of these ordinances, and despite previous holdings by the Supreme Court regarding the "public welfare" justification, the issue of the validity of governmental action solely to protect historic places had still not been tested in court by the mid-1970s. However, as of 1978, the validity of historic preservation ordinances was no longer in doubt after the Supreme Court's decision in *Penn Central Transportation Co. v. City of New York.*

**IV. PENN CENTRAL TRANSPORTATION CO. V. CITY OF NEW YORK: AN OVERVIEW**

In *Penn Central*, the United States Supreme Court affirmatively established historic preservation as a legitimate public purpose within the scope of the government's police power. Specifically, the Court held that the New York City Landmarks Law's restrictions on individual buildings and historic districts did not amount to a taking of the property on which Grand Central Station was situated. In upholding the New York City Landmarks Commission's designation of the Grand Central Terminal as a landmark, the Court explicitly dismissed the idea that aesthetic considerations alone are not a proper basis for the use of the government's police power. The Court noted that states and cities may enact land use restrictions to enhance the quality of life of its citizens by preserving the aesthetic features of a city.

**A. Background of the Penn Central Decision**

In September, 1967, the New York City Landmarks Preservation Commission designated the Grand Central Terminal as a landmark. In 1968, Penn Central leased the air rights above the Terminal to UGP Properties, Inc., a private developer, for the purpose of constructing a high-rise office building on the top of the building. As required by

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76 See Manwaring, *supra* note 57, at 299.
79 *Id.* at 123–38.
80 *See supra* notes 59–66 and accompanying text.
81 *Penn Central*, 438 U.S. at 131, 138.
82 *Id.* at 123–29.
84 See Duerksen & Bonderman, *supra* note 20, at 14. This building would not have violated applicable zoning laws. Marcus, *supra* note 83, at 176.
the Landmarks Law, Penn Central and UGP applied for permission to proceed with the planned alterations of the Terminal, submitting two separate proposals to the Commission.85 The Commission, however, flatly rejected both proposals, terming the entire idea of altering the terminal in the proposed way an "aesthetic joke."86 Rather than appeal the Commission’s decision, Penn Central and UGP chose to file for an injunction barring the city from using the Landmarks Law to prohibit the proposed addition to the terminal in a lower New York trial court.87

In support of their argument for declaratory and injunctive relief, Penn Central and UGP argued that the denial by the Commission of a permit to alter the Terminal amounted to an unconstitutional taking since it effectively precluded the two companies from using their property for profit.88 The trial judge, persuaded by this argument, granted the plaintiffs declaratory and injunctive relief against the city.89 Specifically, the court found that the petitioners had demonstrated the requisite economic damage for the landmark restriction to amount to an unconstitutional taking of their property.90

On appeal by the city, the New York Supreme Court, Appellate Division, reversed.91 In contrast to the lower court’s findings, the Appellate Division concluded that Penn Central and UGP had failed to show that the landmark restrictions deprived them of all “reasonable use” of their property, and, thus, had not shown a “taking.”92 According to the appellate court, the fact that the respondents continued to operate a profitable train station on the site demanded this result under the “reasonable use” standard.93 The Appellate Division’s decision was later unanimously upheld by the New York Court of Appeals.94

85 Marcus, supra note 83, at 179.
87 Marcus, supra note 83, at 179.
88 Duerksen & Bonderman, supra note 20, at 15. For specific figures put forth by Penn Central and UGP, see id.
89 Marcus, supra note 83, at 181. The lower court decision is unreported.
90 Duerksen & Bonderman, supra note 20, at 15–16.
93 Id.
B. United States Supreme Court Decisions

Following their defeat at both the Appellate Division and at the Court of Appeals, Penn Central and UGP sought review by the United States Supreme Court. Once again, however, the petitioners were unsuccessful. In a major victory for preservationists nationwide, a six-justice majority of the Court upheld the restrictions imposed by the New York City Landmarks Commission. In its decision, the Court dismissed what amounted to essentially the same arguments that the petitioners had attempted unsuccessfully in the New York courts. In short, the Court found that the Landmarks Law was an appropriate means of accomplishing the legitimate police power objective of preserving the city's aesthetic features.

The Penn Central Court formulated a three-part balancing test for evaluating takings challenges. The three factors to be considered are: 1) the economic impact of the law on the claimant; 2) the extent to which the law has interfered with distinct investment-backed expectations; and 3) the character of the governmental action. According to the Court, the economic impact on the property is that portion of the original whose value has been destroyed as a result of the applicability of the regulation. The second factor, interference with investment-backed expectations, deals primarily with whether the law still permits the property owner to make reasonable use of his or her property. Finally, under the Court's analysis, the character of the governmental action prong focuses on the justification for the law. Under this factor, laws designed to produce a broad public benefit are likely to be upheld as constitutional.

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56 The petitioners' constitutional challenge was based on three specific claims: the ordinance (1) "took" the "air rights" above the terminal without just compensation; (2) differed from historic district ordinances in that the ordinance singled out certain property owners for unfair treatment and thereby significantly diminished the value of individual properties with no comparable benefit to the property owners; and (3) amounted to a governmental appropriation of a section of the petitioners' property for a public use. See id. at 130-35. The Court systematically rejected all three of these arguments. See id.
97 Id. at 129.
99 See Penn Central, 438 U.S. at 124.
100 See Laitos, supra note 98, at 295.
101 Penn Central, 438 U.S. at 124; see Laitos, supra note 98, at 295-96.
102 Penn Central, 438 U.S. at 124; see Laitos, supra note 98, at 296.
103 See Laitos, supra note 98, at 296.
In applying the three factors to the facts of *Penn Central*, the Court found that the balance weighed heavily in favor of the Landmarks Law.\(^{104}\) The Court reasoned that the petitioners’ original property had not been destroyed in any way, that a reasonable use for the property still existed—namely, the present one—and that the government action was clearly for the benefit of the public-at-large in preserving the historical and aesthetic value of the Grand Central Terminal.\(^{105}\) Although the *Penn Central* decision may not have affirmatively settled every potential preservation issue,\(^{106}\) it clearly did resolve the most important issue for preservationists: a state may constitutionally promote historical preservation goals pursuant to a valid exercise of its police powers because such goals undoubtedly benefit the public welfare.\(^{107}\)

C. *The Impact of Lucas on the Penn Central Takings Analysis*

In 1992, the Supreme Court made its most recent statement on the takings issue in *Lucas v. South Carolina Coastal Council*.\(^{108}\) Though not dealing with historic preservation in any way, *Lucas* seems to have expanded or at least clarified the three-part balancing test enunciated in *Penn Central*.

In *Lucas*, the petitioner had purchased two residential beachfront lots on a barrier island near Charleston, South Carolina.\(^{109}\) Two years later, the state legislature amended its Beachfront Management Act to prohibit certain beachfront property owners, with lots similarly situated to those of the petitioner, from building permanent structures on their lots.\(^{110}\) The state court in South Carolina awarded the petitioner $1.2 million in damages after the petitioner successfully argued that the amended Act made his property worthless.\(^{111}\) However, the South Carolina Supreme Court reversed, stating that the regulation was legitimately designed to prevent harmful uses of property which may become public nuisances.\(^{112}\)

\(^{104}\) *Penn Central*, 438 U.S. at 128–35.

\(^{105}\) See id. at 131.

\(^{106}\) Presumably, historic designations could still be challenged on other constitutional grounds such as due process, equal protection, or under the First Amendment.

\(^{107}\) See *Penn Central*, 438 U.S. at 123–36.


\(^{109}\) Id. at 2889.

\(^{110}\) Id.


\(^{112}\) Id. at 901–02. The Supreme Court did not deal with the question of whether or not the land was worthless. *Lucas v. South Carolina Coastal Council*, 112 S. Ct. 2893, 2895 (1992).
On appeal, the United States Supreme Court reversed the state supreme court, holding that regulations which deny all economically viable uses of property constitute a taking requiring just compensation, regardless of the public interest advanced.\textsuperscript{113} Applied to the historic preservation context, the three-part analysis from \textit{Penn Central} would no longer be applicable in those cases where a preservation ordinance renders a particular piece of property or structure valueless.\textsuperscript{114}

Although the \textit{Lucas} rationale has not yet been applied to a historical preservation situation, it would probably affect only those cases in which a property owner was able to demonstrate that his or her property is worthless due to the regulation. At the very least, then, the \textit{Penn Central} rationale remains the standard for the vast majority of historic preservation takings challenges.

V. STATE CHALLENGE TO \textit{PENN CENTRAL: UNITED ARTISTS' THEATER CIRCUIT, INC. V. CITY OF PHILADELPHIA} (1991)

Until July of 1991, the \textit{Penn Central} rationale remained essentially unchallenged by any state or federal court decision. However, in a case substantially similar to the facts of \textit{Penn Central}, the Pennsylvania Supreme Court held that sections of Philadelphia's Historic Preservation Act unconstitutionally deprived property owners of an ownership interest in their property without just compensation in violation of Article I, Section 10 of the Pennsylvania Constitution.\textsuperscript{115}

In \textit{United Artists'}, the then owner of the Boyd Theater in Philadelphia, Sameric Corporation, was notified by the Philadelphia Historic Commission ("the Commission") in 1986 that it was going to consider a proposed designation of the theater as "historic" at a public meeting.\textsuperscript{116} Acting pursuant to a city ordinance,\textsuperscript{117} the Commis-

\textsuperscript{113} \textit{Lucas}, 112 S. Ct. at 2895.

\textsuperscript{114} See id.

\textsuperscript{115} United Artists' Theater Circuit, Inc. v. City of Philadelphia, 595 A.2d 6, 13–14 (Pa. 1991), rev'd, 635 A.2d 612 (Pa. 1993); Article I, Section 10 of the Pennsylvania Constitution reads, in relevant part: "Nor shall private property be taken or applied to public use, without authority of law and without just compensation being first made or secured." \textit{PA. CONST. art. I, § 10.}

\textsuperscript{116} \textit{United Artists'}, 595 A.2d at 7. Prior to the decision by the Pennsylvania Supreme Court in \textit{United Artists'}, the Boyd Theater was sold by the Sameric Corporation to United Artists' Theater Circuit, Inc. The later remains the current owner of the theater as of the date of this writing.

\textsuperscript{117} \textit{PHILADELPHIA, PA. CODE} § 14-2007, relating to historic buildings, structures and other items of historical significance, lists the following purposes, in relevant part:

(1) preserve buildings, structures, sites and objects which are important to the education, culture, traditions and economic values of the city. . . .

(3) encourage the restoration and rehabilitation of buildings, structures, sites and
sion, after numerous public hearings and attempts by the Sameric Corporation to prevent the designation, voted to designate the Boyd Theater as a historic building.

The designation of the theater as a historic building placed numerous restrictions on the owner's use of the property. First, any application by the property owner for a permit to alter or demolish the building would involve forwarding it to the Commission for its review. Secondly, the Commission had the power to force the property owner to conduct an evaluation, if it deemed one necessary, of whether or not the structure might have alternative uses "consistent with its preservation." Finally, under the Historic Preservation Act, the owner incurred an obligation to maintain the structure in good repair, which would include both the exterior and interior, at his or her own expense and would be subject to a substantial fine or imprisonment if the obligation was breached.

Following the designation, the Sameric Corporation sought both a preliminary injunction to eliminate the restrictions on the property as well as a declaratory judgment stating that the Commission's actions were beyond the scope of its power. A dismissal of the suit by a Pennsylvania trial court was affirmed by the Commonwealth Court. Subsequently, however, the Pennsylvania Supreme Court granted an appeal to determine whether the property owner's claim of ultra vires action by the Commission was valid.

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118 PHILADELPHIA, PA. CODE § 14-2007(4)(a), provides that the mayor shall appoint a Historical Commission with the power to "[d]esignate as historic those buildings, structures, sites and objects which the Commission determines, pursuant to the criteria set forth . . . are significant to the City." Id.

119 United Artists', 595 A.2d at 7-8.

120 Id. at 11.

121 Id. at 10.

122 Id.

123 Id. at 11 n.7.

124 Id. at 8.

125 Id.


127 United Artists', 595 A.2d at 7.
The primary focus of the Pennsylvania Supreme Court's opinion, written by Justice Larsen, was the level of intrusiveness of the Philadelphia ordinance on the property owner's rights. The most striking example of the severity of the intrusiveness, the court noted, came from the testimony at a hearing by the counsel for the property owner.\textsuperscript{128} The court stated:

At a hearing on April 2, 1987, counsel for the owner stated that he was informed that in Philadelphia the only changes or improvements a property owner can lawfully do without a permit is paint and paper. Thus, after historic designation, any work other than painting and paper would require the Commission's approval . . . the owner would be legally obligated to obtain permission from the commission to move a mirror from one wall to another. No one on the Commission disputed counsel's observation.\textsuperscript{129}

As a result of this high level of intrusiveness, the court held that regulations, like the one at issue, which impose public burdens on an individual property owner and not on neighboring property owners, amount to a taking of private property in violation of the Pennsylvania Constitution.\textsuperscript{130} To this end, the court reasoned that the property owner was unjustly being forced to bear the burden, individually, of enhancing the quality of life for the public as a whole.\textsuperscript{131}

In addition to its holding, the court implied that in a takings case, the focus of the "intrusiveness" analysis should be on the value of the property taken away by the restriction, rather than on the remaining value of the property as was held in \textit{Penn Central}.\textsuperscript{132} Despite the similarities between the Fifth Amendment of the United States Constitution and the applicable provision of the Pennsylvania Constitution, the court distinguished the \textit{Penn Central} analysis on the ground that Pennsylvania, under its own Constitution, has never recognized either mere "aesthetics reasons or the stabilization of economic values" as valid exercises of the police power.\textsuperscript{133}

Justice Cappy, along with Chief Justice Nix and Justice McDermott, concurred in the result, but on a much narrower basis.\textsuperscript{134} In Justice Cappy's opinion, the court did not need to reach the takings issue since it was clear that the Commission had no authority to

\textsuperscript{128} See id. at 11.
\textsuperscript{129} Id. at 11 (emphasis added).
\textsuperscript{130} Id. at 11-12.
\textsuperscript{131} Id.
\textsuperscript{132} Id. at 12-14.
\textsuperscript{133} Id. at 12 (citing Redevelopment Auth. of Oil City v. Woodring, 445 A.2d 724, 727 (Pa. 1982)).
\textsuperscript{134} See generally id. at 14 (Cappy, J., concurring).
regulate the interior of the theater, but rather, merely the exterior.\textsuperscript{135} According to the plain meaning of the ordinance, Justice Cappy concluded that any designation of the interior of the theater was clearly beyond the scope of the Commission's statutory authority and, thus, was invalid.\textsuperscript{136} Finally, Justice Cappy clearly disagreed with the majority's disregard for the \textit{Penn Central} decision, noting that the language of the two constitutional provisions was so similar that it was doubtful that Pennsylvania law would lead to a different result.\textsuperscript{137}

The majority opinion in \textit{United Artists'} was an unexpected development in American historical preservation law. Despite the majority's attempt to distinguish \textit{Penn Central}, its decision clearly contradicted the Supreme Court's takings jurisprudence, a jurisprudence which had not been challenged in the fifteen years since \textit{Penn Central}. This state challenge to the pronouncements of \textit{Penn Central}, however, was short-lived.

\section*{VI. \textit{United Artists'} Theater Circuit, Inc. v. City of Philadelphia II}

Following the decision in \textit{United Artists'}, the City of Philadelphia filed a petition pursuant to Rule 2543 of the Pennsylvania Rules of Appellate Procedure requesting the Pennsylvania Supreme Court to grant reargument.\textsuperscript{138} Such relief was granted on August 23, 1991, and on October 23, 1991, the parties reargued the takings issue under the Pennsylvania Constitution.\textsuperscript{139}

On November 9, 1993, the Supreme Court of Pennsylvania reversed its earlier decision in the original \textit{United Artists'} case, and in \textit{United Artists'} II, concluded that under the Pennsylvania Constitution the designation of a building as historic without the consent of the owner was not a taking that required just compensation.\textsuperscript{140} This abrupt reversal by the Pennsylvania Supreme Court represented the end of any short-lived challenge to the ultimate authority of \textit{Penn Central} on historic preservation taking challenges.

At the outset of the \textit{United Artists'} II opinion, the court acknowledged the supreme authority of the \textit{Penn Central} decision in federal takings jurisprudence.\textsuperscript{141} The court noted that if the issue in \textit{United

\begin{footnotesize}
\begin{itemize}
\item[135] \textit{Id}. at 14.
\item[136] \textit{Id}.
\item[137] \textit{Id}.
\item[138] \textit{United Artists' Theater Circuit, Inc. v. City of Philadelphia, 635 A.2d 612, 614 (Pa. 1993)}.
\item[139] \textit{Id}.
\item[140] \textit{Id}.
\item[141] \textit{See id}.
\end{itemize}
\end{footnotesize}
Artists' II had required an examination under the federal Constitution, the rationale of Penn Central would control. Putting that aside, the court then began an analysis of the Pennsylvania Constitution to determine whether its applicable provisions demanded the same result as would be arrived at under the federal Constitution or whether the rights of private property owners were "more expansive" under the Pennsylvania Constitution than under the federal Constitution.

The court's analysis of whether the Pennsylvania Constitution afforded greater rights than the federal Constitution was based on a four-part test developed in a previous Pennsylvania case, Commonwealth v. Edmunds, consisting of the following factors: 1) an examination of the text of Pennsylvania's constitutional takings provision; 2) an examination of the historical evolution of the court's interpretation of the provision, including the applicable takings case law; 3) an examination of related case law from other states; and 4) an examination of state and local policy considerations. In addition, the court noted that an examination of related federal precedent would be useful as a form of "guidance" to the state constitutional analysis.

A. Text

In its analysis of the first factor, the court concluded that the text of Article I, Section 10 of the Pennsylvania Constitution is virtually identical to that of the Fifth Amendment to the United States Constitution for purposes of the court's analysis. The court had little trouble reaching this conclusion in light of the strikingly similar language of the two provisions.

B. History

The court spent considerably more time in its analysis of the second factor, the history of the state constitutional provision. At the outset of its examination of the historical evolution of Pennsylvania takings law, the court noted that it had continually looked to federal precedent for guidance in its takings jurisprudence, and indeed had adopted the

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142 Id. at 615.
143 See id.
145 See United Artists', 635 A.2d at 615–16.
146 Id. at 615.
148 See United Artists', 635 A.2d at 615.
149 See id. at 616–19.
analysis used in federal jurisprudence in several previous Pennsylvania takings cases.\textsuperscript{150} Specifically, the court enunciated the evolution of its analysis for determining whether a particular regulation of private property is "unduly oppressive" and thus in violation of the Pennsylvania Constitution.\textsuperscript{151} According to the court, the test in these prior cases was taken in large part from the three-part analysis recited in \textit{Penn Central}.\textsuperscript{152}

After deciding to follow precedent, the court stated that in order for a governmental action \textit{not} to constitute a taking under the Pennsylvania Constitution, three conditions must be met:

1) the interest of the general public, rather than a particular class of persons, must require governmental action;
2) the means must be necessary to effectuate the purpose;
3) the means must not be unduly oppressive upon the property holder, considering the economic impact of the regulation, and the extent to which the government physically intrudes upon the property.\textsuperscript{153}

The court then applied this three-prong takings analysis within its larger four-part examination of whether the historical designation was not a taking under the Pennsylvania Constitution even if it would be such under the federal Constitution. With regard to the first element, the court noted that, by virtue of the city ordinance providing for historic preservation in Philadelphia, the citizens themselves empowered the government to act in areas of exclusively historic concern for the purpose of preserving historic landmarks.\textsuperscript{154} Thus, under the court's analysis, the "interest of the general public" prong of the test had clearly been satisfied.

In its analysis of the second element, necessary means, the court found that it too was clearly satisfied. The court flatly rejected the argument that the government should purchase the historic properties rather than designate them as "historic" without compensation to the property owner.\textsuperscript{155} The court emphasized the many disadvantages of public ownership\textsuperscript{156} and concluded that historic preservation

\textsuperscript{150} \textit{Id.} at 616.
\textsuperscript{151} \textit{Id.} at 616–19.
\textsuperscript{152} \textit{Id.} at 617–18. The two-part test developed in \textit{Penn Central} consists of an examination of: 1) the economic impact of the regulation on the private property owner; and 2) the character and intrusiveness of the government action. See \textit{Penn Central Transp. Co. v. City of New York}, 438 U.S. 104, 124 (1978).
\textsuperscript{153} \textit{United Artists'}, 635 A.2d at 618.
\textsuperscript{154} \textit{Id.}
\textsuperscript{155} \textit{Id.}
\textsuperscript{156} See \textit{id.}.
legislation was the only "practical", and therefore the only necessary, means to accomplish the public interest in preserving historic landmarks.\textsuperscript{157}

Finally, regarding the unduly oppressive element of the three-part takings analysis, the Pennsylvania Supreme Court attempted to analyze the economic impact of the regulation in question, as well as the degree of physical intrusion it required.\textsuperscript{158} From this analysis, the court concluded:

\begin{quote}
[we do] not see the possibility that the owner is wholly deprived of any profitable use [citations omitted]. Nor do the parties allege that there is any physical intrusion on the property itself. Thus, the action not being "unduly oppressive," historic designation does not fulfill the elements for a "taking" requiring just compensation.\textsuperscript{159}
\end{quote}

Thus, in concluding that the designation of the theater satisfied all three prongs of the "non-taking" test, the court strongly implied that based on historical and precedential interpretations of the Pennsylvania takings provision, the government's use of historic preservation legislation to protect historic landmarks was not foreclosed.\textsuperscript{160}

\section*{C. Case Law}

The court found that the third factor used by the Pennsylvania Supreme Court in determining the applicability of the federal takings standard, an examination of related case law, favored the court's use of the \textit{Penn Central} standard.\textsuperscript{161} In its brief analysis of this factor, the court found extremely persuasive the fact that \textit{no other state had broken with the} \textit{Penn Central decision} in the fifteen years since that decision.\textsuperscript{162} Thus, the court concluded, the widespread acceptance of the \textit{Penn Central} decision as the standard for historic preservation takings cases weighed heavily against the Pennsylvania state courts' rejection of the \textit{Penn Central} analysis for purposes of interpreting the Pennsylvania constitutional provisions, which is nearly identical to the relevant federal constitutional provision.\textsuperscript{163}

\begin{thebibliography}{9}
\bibitem{157} Id.
\bibitem{158} See id. at 618.
\bibitem{159} Id. at 618–19.
\bibitem{160} See id. at 616–19.
\bibitem{161} Id. at 619.
\bibitem{162} Id.
\bibitem{163} See id. at 619.
\end{thebibliography}
D. Policy

Lastly, the court in United Artists' II analyzed the fourth factor of whether the Pennsylvania Constitution afforded private property owners greater protection of their rights than the federal Constitution, state and local policy concerns. With regard to state policy, the Pennsylvania Supreme Court noted that Article I, Section 27 of the Pennsylvania Constitution, known as the "Environmental Rights Amendment," clearly exhibits a strong state policy favoring the preservation of historic and aesthetic resources. The court further noted that historic preservation was clearly favored at the local level as well, in light of the declaration by the City of Philadelphia regarding the preservation of historic resources. In short, both state and local policy, according to the court, strongly endorsed historic preservation.

E. The Holding

At the conclusion of the above four-part analysis, the Supreme Court of Pennsylvania concluded that the similarity between the Fifth Amendment of the federal Constitution and Article I, Section 10 of the Pennsylvania Constitution did not warrant a finding that the Pennsylvania Constitution afforded greater protection of property owners' rights than did the federal Constitution. The court flatly concluded that "the designation of a privately owned building as historic without the consent of the owner is not a taking under the Constitution of this Commonwealth." As previously noted, this holding represented a complete and total reversal of the court's prior decision just two years earlier in United Artists' I. This decision put Pennsyl-
vania back in line with the United States Supreme Court's strong endorsement of the validity of historic preservation laws in *Penn Central*.

Despite the detailed analysis of the takings issue, however, the Supreme Court of Pennsylvania, in *United Artists' II*, ultimately rested its holding on its finding that the designation of the Boyd Theater was an illegitimate government activity. Specifically, the court found, in line with the concurring opinion in *United Artists' I*, that the Philadelphia Historical Commission had exceeded its authority under the preservation law by designating the interior of the theater as historic. Thus, the court concluded that the designation must be vacated.\(^\text{169}\)

In its analysis of the Commission's statutory authority, the court noted that there was no language in the statute which explicitly authorized the designation of the interior of the building as "historically or aesthetically significant."\(^\text{170}\) The only mention of the interior in the ordinance, the court stated, was in the section of the ordinance dealing with the property owner's duty of care in maintaining the designated building.\(^\text{171}\) From this reading of the ordinance, the Pennsylvania Supreme Court concluded that "[the] plain meaning of this ordinance is that the interior must be maintained physically (and not aesthetically) for the express purpose of supporting the exterior of the building... There is no 'clear and unmistakable' authority to designate the interior of a building. Therefore, the Commission possesses no such power."\(^\text{172}\)

The only possible authority for the Commission's alleged ability to regulate the interior of buildings would be if the interior supported the historically controlled exterior. Since the parties had not presented any evidence to the court regarding which portions of the theater's interior were used to support its exterior, the court vacated the entire designation order.\(^\text{173}\) Thus, having concluded that the Historic Commission exceeded its authority under the city ordinance, the

\(^{169}\) *Id.* at 621–22.

\(^{170}\) *Id.* at 621–22. The court specifically rejected a previous finding of the Commonwealth Court in Pennsylvania which concluded that the city council had clearly intended the word "building" in the ordinance to include both the interior and exterior areas. *Id.* at 622; see Sameric Corp. v. City of Philadelphia, 558 A.2d 155, 157 (Pa. Commw. Ct. 1989); see also Manwaring, *supra* note 57, at 319–22 (arguing that there is, in effect, little difference between designation of interiors and exteriors of buildings because both designations are reasonable means of accomplishing legitimate historic preservation objectives and thus should be validated by the courts).

\(^{171}\) *United Artists'*, 635 A.2d at 622. The applicable section of the ordinance states, in part, that "[t]he exterior of every historic building... shall be kept in good repair as shall the interior portions of the building." PHILADELPHIA, PA. CODE § 14-2007(8)(c).

\(^{172}\) *United Artists'*, 635 A.2d at 622.

\(^{173}\) *Id.*
Pennsylvania Supreme Court was able to achieve two ends through its decision in United Artists' II: it was able to eliminate a historic designation which it clearly felt was unreasonably intrusive on a property owner's rights; and, simultaneously, it was able to place Pennsylvania takings jurisprudence back in line with Penn Central.

VII. THE RISE TO TAKINGS IMMUNITY

The decisions by the Pennsylvania Supreme Court in United Artists' I and United Artists' II demonstrate the proposition that since the Penn Central decision, historic preservation designations have become immune from successful constitutional takings challenges. As the law stands today, a property owner is essentially powerless to successfully challenge a historic designation as a taking. The only possible exception might be the application of Lucas to the unlikely circumstance that a designation renders a property completely valueless. Notwithstanding this unlikely circumstance, however, so long as the Penn Central takings rationale remains the supreme law of the land in this area, this immunity will continue to survive. 174

A. Takings Immunity From Penn Central

The aforementioned immunity from takings challenges stems directly from the three-part balancing test formulated by the Supreme Court in Penn Central. 175 Under this test, it is difficult to see how any

174 In Dolan v. City of Tigard, 114 S. Ct. 2309 (1994), decided June 24, 1994, the Supreme Court held that the city's requirement that a landowner dedicate a portion of her property lying within a flood plain for improvement of the storm drainage system and dedicate property adjacent to the flood plain for a bicycle/pedestrian pathway as a condition for receiving a building permit allowing for expansion of the landowner's personal property did not satisfy the Fifth Amendment's "reasonable relationship" requirement; that is, that the city had failed to show a "reasonable relationship" between its requirements and the impact of the proposed development and, thus, that the imposition of such requirements amounted to a taking under the Fifth Amendment. Id. at 2319. The Court defined this newly created "reasonable relationship" test as requiring the city to "make some sort of individualized determination that the required dedication of the property [at] [issue] is related in both nature and extent to the impact of the proposed development" in order for such dedication to comply with the Fifth Amendment. Id. at 2319-20.

The impact, if any, of this decision on the Penn Central takings' rationale in historic preservation cases is unclear as of the date of this writing. Though one could argue that the decision suggests the likelihood of increased protection of the rights of private property owners by the Court in future takings cases, the precise effect on historic preservation takings jurisprudence, if any, can not be accurately measured until the next historic preservation takings case is decided by the Court. Until then, the Penn Central rationale remains the standard for historic preservation takings cases.

175 See supra text accompanying notes 95–107.
reasonable\textsuperscript{176} historic designation could be found to be a taking in light of the strong bias in favor of the constitutionality of designations inherent in the Court's analysis.

The first prong of the test, the economic impact on the property, focuses on that portion of the original property whose value has been destroyed as a result of the applicability of the particular ordinance.\textsuperscript{177} As was the case in \textit{Penn Central}, the vast majority of historic designations are not going to destroy property value, but rather, may in fact either increase the value of a particular piece of property or may merely prevent a dramatic increase in its value. Thus, unless a designation effectively renders the property in question totally worthless, a court will find this first factor to favor the constitutionality of the designation. In short, the economic impact factor of the \textit{Penn Central} balancing test clearly weighs heavily in favor of historic preservation designations.

The second prong of the \textit{Penn Central} test—whether the particular ordinance still permits the property owner to make reasonable use of his or her property—also clearly favors the constitutionality of historic preservation designations.\textsuperscript{178} A historic designation is unlikely to deprive a private property owner of all reasonable uses of the property. Indeed, the designation will probably not even affect the property's current use, as was the case in \textit{Penn Central}.\textsuperscript{179} Thus, in most cases, this second factor will weigh in favor of a private property owner's takings challenge.

Finally, the character of the government action, the third prong of the \textit{Penn Central} balancing test, arguably weighs most heavily in favor of the constitutionality of historic preservation designations.\textsuperscript{180} Under this factor, the focus is on the justification for the particular ordinance, namely, whether or not the ordinance is designed to confer a broad public benefit.\textsuperscript{181} Since \textit{Penn Central} stands for the proposition, at least in part, that historic preservation is, in and of itself, specifically for the benefit of the public-at-large, it is difficult to imagine a situation in which a particular historic designation would be found not to have been made for the public benefit. In short, the third

\textsuperscript{176} A "reasonable" historic designation would seem to include any designation which does not significantly or completely destroy the property's value. See Laitos, \textit{supra} note 98, at 295.

\textsuperscript{177} Id.

\textsuperscript{178} See \textit{supra} text accompanying notes 98–107.

\textsuperscript{179} See Laitos, \textit{supra} note 98, at 295.

\textsuperscript{180} See id.

factor of the *Penn Central* balancing test also favors the constitutionality of historic preservation designations.

In addition, though it has not yet been applied to the historical preservation context, the *Lucas* rationale, which requires courts to find a taking where the applicability of a particular regulation renders the subject property valueless, has no real negative effect on the current immunity of preservation designations from takings challenges. As previously noted, the *Lucas* rationale would apply only to a historical preservation designation in which a property owner was able to demonstrate that his or her property was completely worthless due to the applicability of the regulation. Again, since this phenomenon is highly unlikely to occur in the historic preservation designation context, the *Lucas* rationale would seem to have little or no effect on the current state of immunity from takings challenges in American historical preservation jurisprudence.

In sum then, what emerges from an analysis of the *Penn Central* three-part balancing test is the view that the analysis contains a strong inherent bias favoring the constitutionality of historic preservation designations. This inherent bias, as clearly evidenced in the *United Artists' II* decision, has made it nearly impossible for a private property owner to successfully challenge a historic designation of his or her property as an unconstitutional taking.

**B. United Artists' I & II**

The unequivocal reversal of opinion by the Pennsylvania Supreme Court in the *United Artists'* cases provides evidence of the proposition that historical preservation laws have become immune from successful constitutional takings challenges since the United States Supreme Court's decision in *Penn Central*. In *United Artists*, the Pennsylvania Supreme Court found a taking of private property under the Pennsylvania Constitution through the use of a level of "intrusiveness" test. Put simply, the court concluded that the designation of the Boyd Theater, and all of the public obligations which accompany such designation, rose to an impermissible level of "intrusiveness" and thus amounted to an unconstitutional taking. However, the Pennsylvania Supreme Court soon realized that although the designation of the Boyd Theater "intruded" on a private property

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182 See *supra* text accompanying notes 113–14.
184 See *supra* text accompanying notes 128–31.
owner's rights, mere intrusion was not sufficient to find an unconstitutional taking under the mandates of Penn Central. Moreover, the Pennsylvania Supreme Court also recognized that the Pennsylvania Constitution did not warrant a result that afforded private property owners greater rights than did the federal Constitution in the same factual scenario. Thus, in United Artists' II, the court reached the opposite result.

Not surprisingly, the test used by the Pennsylvania Supreme Court in United Artists' II to determine whether or not the designation was a taking under the Pennsylvania Constitution was strikingly similar to the test used in Penn Central. As such, the United Artists' II test also contains an inherent bias favoring the constitutionality of historic designations. The adoption and use of this strongly biased takings analysis by the Pennsylvania Supreme Court provides compelling evidence for the proposition that historic designations have become immune from successful constitutional takings challenges when they are analyzed under tests based on rationales similar to those in Penn Central. Moreover, due to similarity between the Fifth Amendment and corresponding provisions in state constitutions, it is unlikely that a state court would adopt a historical preservation takings analysis markedly different from the test adopted by the Supreme Court in Penn Central.

The first prong of the Pennsylvania takings analysis adopted by the court in United Artists' II, focuses on the need for a general public interest to justify the government action. As was the case in Penn Central, it is unlikely that this factor would weigh against the constitutionality of a historic designation. Both Penn Central and United Artists' II assert that such designations are generally for the purpose of benefiting the public-at-large. Thus, it is hard to imagine a situation in which a historic designation would not satisfy the "public interest" prong of either the Penn Central or the United Artists' II analysis.

The second prong of the Pennsylvania takings analysis—the means chosen must be necessary to effectuate the purpose—also weighs heavily in favor of the constitutionality of historic preservation designations. By concluding that historical designation was the only "practical" means and, therefore, the only necessary means, of accomplish-

185 Compare supra text accompanying notes 98–107 with text accompanying note 114.
ing the public interest in preserving landmarks, the Pennsylvania Supreme Court implied that historical designations will generally satisfy this second prong.\textsuperscript{188}

Finally, the third prong of the Pennsylvania takings analysis attempts to analyze the economic impact of the regulation at issue, as well as the degree of physical intrusion it requires.\textsuperscript{189} As was the case in \textit{Penn Central}, the \textit{United Artists' II} court determined that the designation destroyed little or none of the Boyd Theater's property value and that any physical intrusion was minimal.\textsuperscript{190} Since, as previously noted,\textsuperscript{191} any significant or total destruction of a property's value\textsuperscript{192} as a result of a historic designation is highly improbable, this third factor also weighs heavily in favor of the constitutionality of historic preservation designations.

Thus, the above analysis of the Pennsylvania Supreme Court's unequivocal reversal of opinion in \textit{United Artists' II} reveals strong evidence for the general proposition that historic preservation designations have become immune from successful constitutional takings challenges since the \textit{Penn Central} decision. Primarily, this evidence is derived from the fact that the \textit{United Artists' II} court, like the Court in \textit{Penn Central}, adopted a takings analysis heavily skewed in favor of the constitutionality of historic preservation designations.

Furthermore, the Pennsylvania Supreme Court's invalidation of the Commission's historical designation of the Boyd Theater as beyond the scope of the Commission's authority has no real effect on the proposition that historical designations have become immune from successful takings challenges. If, in fact, the ordinance in question had empowered the Commission to designate portions of the interior of structures as historical, under the court's three-part analysis, it is difficult to see how the property owner's takings challenge in \textit{United Artists' II} could have been successful. In short, under both the \textit{Penn Central} and the \textit{United Artists'} rationales, a successful takings litigant, regardless of whether he or she is challenging an interior or exterior designation, still will have to satisfy a standard skewed heavily in favor of the constitutionality of historic preservation designations.

\textsuperscript{188} See id. at 618.
\textsuperscript{189} See id. at 618–19.
\textsuperscript{190} Id.
\textsuperscript{191} See supra text accompanying notes 113; discussion supra part VII.
\textsuperscript{192} The court noted that the designation of property as historic could constitute a taking "due to the extreme financial hardship resulting from such designation," but that "[n]o such facts had been presented in this case ... nor need the court decide here what level of financial hardship would meet this test." \textit{United Artists'}, 635 A.2d at 618 n.3.
For example, assuming that the Philadelphia ordinance in the *United Artists’* cases had allowed the Commission to designate portions of the interior of the Boyd Theater as historic, these designations would have survived a takings challenge under the Pennsylvania Supreme Court’s three-part test. First, under the general public interest prong of the analysis, there is no logical reason why the designation of an interior, as opposed to the exterior, of a structure would not be in the interest of the general public. Further, under the second prong of the test—the means chosen must be necessary to effectuate the purpose sought—the Pennsylvania Supreme Court’s conclusion that historic designation is the only practical means available to accomplish the applicable public interest objectives sought clearly makes no distinction between the interiors and exteriors of structures.

Finally, a designation of the interior of the theater would also satisfy the third prong of the court’s analysis, the economic impact and extent of physical intrusion on the property. Though there would arguably be some degree of physical intrusion on the theater’s interior, the economic impact of the designation would not be such as to deprive the property owner of all profitable uses of the theater.\(^{193}\) In this way, any designation of portions of the interior of the theater would not be found to be “unduly oppressive”,\(^{194}\) and thus this third prong of the court’s takings analysis also would favor the constitutionality of this type of historical designation.

In short then, the Pennsylvania Supreme Court’s invalidation of the historic designation of the Boyd Theater arguably has no effect on the proposition that these designations have become immune from takings challenges since the *Penn Central* decision. The inherent bias favoring the constitutionality of historic preservation designations found in both the *United Artists’ II* and *Penn Central* rationales does not distinguish between the interiors and exteriors of structures. Thus, whether challenging an interior or exterior designation, a successful takings litigant still faces the nearly insurmountable task of satisfying a constitutional standard skewed heavily in favor of the validity of historic preservation designations.

**VIII. Conclusion**

Over the past fifteen years, the Supreme Court’s ringing endorsement of historic preservation goals in the *Penn Central* decision has remained essentially unchallenged. Not only did *Penn Central* con-

\(^{193}\) See id. at 618–19.

\(^{194}\) Id. at 619.
clusively establish the constitutional validity of historic preservation legislation, it did so through the adoption of a takings standard which clearly favors the constitutionality of this type of legislation. The effect of the Court's adoption of this inherently biased standard for use in cases involving takings challenges to historical designations, as exhibited in the United Artists' cases, has been to prevent private individuals who own historically designated properties from successfully challenging the designations as takings under the applicable state or the federal Constitution. This "immunity" from successful takings challenges will undoubtedly continue to survive so long as the Penn Central rationale remains the supreme law of the land in this area.