

Takings Law Today: A Primer for the Perplexed

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INTRODUCTION

This is a risky venture. Any effort to distill a body of case law as sprawling as that construing the Fifth Amendment Takings Clause¹ is sure to leave some unsatisfied. Nonetheless, the complexities of this jurisprudence make the need evident, for today all but the most experienced practitioners in the area may from time to time be at a loss.² This Primer is an attempt to comprehensively set out the highlights of current substantive takings law as succinctly as possible. Takings mavens may find it useful as a checklist for missed arguments. This Primer does not follow the typical law review format; rather than developing a thesis, it seeks chiefly to describe the case law, flagging key issues along the way. A brief appendix is attached providing nutshell summaries of all Supreme Court takings decisions since 1978.

Takings law flows from eminent domain: the inherent power of the sovereign to take private property, as principally constrained by the “public use” and “just compensation” prerequisites of the Takings Clause.³ Until the late nineteenth century, eminent domain was invoked almost exclusively in the context of “direct condemnation” suits. In such actions, the government-plaintiff explicitly acknowledges it is using eminent domain against the property being taken, and the property owner typically disputes chiefly the amount of just compensation required. In the 1870s, however, the Supreme Court began to give systematic imprimatur to a very different kind of suit.⁴ When the sovereign brought about certain interferences with private property, the Court recognized that the property had been “taken” per the Takings Clause just as surely as if the sovereign had formally condemned. That being so, it concluded, the property owner had a right to sue the government, seeking recovery of the value of the property alleged to have been “taken.” The owner could, in other words, assert an unacknowledged exercise of eminent domain. In these suits, in contrast with direct condemnations, there are typically two key issues: Was the property taken, and, if so, how much compensation should the property owner receive?

The owner-plaintiff in such a “taking” or “inverse condemnation”⁵ suit generally seeks compensation rather than invalidation of the government act, because the Takings Clause “does not prohibit the

1. U.S. CONST. amend. V (“[N]or shall private property be taken for public use, without just compensation.”).

2. For that matter, “[e]ven the wisest lawyers would have to acknowledge great uncertainty about the scope of this Court’s takings jurisprudence.” *Nollan v. Cal. Coastal Comm’n*, 483 U.S. 825, 866 (1987) (Stevens, J., dissenting).

3. *United States v. Carmack*, 329 U.S. 230, 241–42 (1946).

4. *See, e.g., Pumpelly v. Green Bay Co.*, 80 U.S. (13 Wall.) 166 (1871).

5. *United States v. Clarke*, 445 U.S. 253, 257 (1980).

taking of private property, but instead places a condition on the exercise of that power”⁶—namely, the payment of just compensation. Takings claims take two forms. As-applied claims contend that regardless of whether the government action effects a taking as to other property, it took the plaintiff’s property owing to that property’s particular circumstances. Facial claims, which are more difficult to prove, assert that the action took the property even without an inquiry into its circumstances, because under any conceivable scenario there was a taking. Plaintiffs may also assert either temporary or permanent takings.

Takings suits, as this Primer makes clear, are difficult to win, at least where none of the special-situation *per se* rules applies. The central demand of the Takings Clause—that the property be “taken”—is held unsatisfied by the overwhelming majority of government actions vis-a-vis private property. Probably for that reason, some states have recently adopted *statutory* routes by which landowners may obtain compensation or regulatory relief from government restrictions.⁷ These alternative avenues generally erect lower hurdles—often *much* lower hurdles—than the constitutional one, where they apply. In such instances, one supposes that the constitutional takings law set out in this Primer will be infrequently invoked.

An overarching principle endlessly quoted in the cases should be highlighted at the outset. The Takings Clause, says the Supreme Court, “was designed to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole.”⁸ While of little substance, this famous phrase is at least a caution to counsel and court not to rely solely on the mechanical invocation of takings rules. In addition, it should seem fair and just—within the universe of the Takings Clause’s concerns—that one side or the other wins.

The scope of this Primer is limited in three ways. First, it includes only the law of the Fifth Amendment Takings Clause, not that of the takings clauses in nearly all the state constitutions. This is less of a constraint than it sounds, since the federal clause applies to the states and their political subdivisions,⁹ setting a universal floor on property rights protection. Moreover, state takings clauses are often construed to have

6. *First English Evangelical Lutheran Church v. County of Los Angeles*, 482 U.S. 304, 314 (1987).

7. The chief examples thus far: ARIZ. REV. STAT. § 12-1134 (2006) (adopted 2006 by citizen initiative), FLA. STAT. ANN. § 70.001 (2007), OR. REV. STAT. § 197.352 (2006) (adopted 2004 by citizen initiative), and TEX. GOV’T CODE §§ 2007.021–2007.026 (Vernon 2006).

8. *Armstrong v. United States*, 364 U.S. 40, 49 (1960).

9. *Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528, 536 (2005) (citing *Chicago, B. & Q. R.R. Co. v. Chicago*, 166 U.S. 226 (1897)).

the same meaning as their federal counterpart.¹⁰ To be sure, however, consistency does not always obtain,¹¹ and roughly half the state takings clauses include extra verbiage requiring compensation for government impacts other than takings—almost always “damage” to property.¹² Second, this Primer covers only substantive jurisprudence—the analytical framework applied by courts in an inverse condemnation action to answer the central question: “Is there a taking on the facts presented?” Thus, the many procedural and jurisdictional hurdles confronted by the taking plaintiff—statutes of limitation, ripeness prerequisites, federal-court abstention, sovereign immunity, and so on—are left out.¹³ Nor are remedies covered. Third, the footnotes cite only the most important, most recent, or most helpful case authorities. There is a tilt in the citations toward the decisions of the U.S. Court of Federal Claims (CFC), which is the trial court with exclusive jurisdiction over almost all takings claims against the United States seeking more than \$10,000,¹⁴ and the U.S. Court of Appeals for the Federal Circuit. By virtue of the large number of takings claims handled by these courts and the federal nature of the defendant, their takings jurisprudence is more fully evolved than in other courts and has had nationwide influence.

Part One covers the substantive threshold hurdles a taking plaintiff must surmount after procedural and jurisdictional conditions are satisfied. These can easily abort the case before the court reaches the takings tests proper and include, most importantly, the question of whether the plaintiff asserts a property interest cognizable under the Takings Clause. The remainder of the Primer lays out the tests courts use to assess the four principal types of takings claims. Part Two sets out the tests for total and partial regulatory takings claims, which assert that a regulation so limits the use of private property as to work a taking, even though the government has not appropriated or physically occupied the property. Part Three lays out the criteria for physical takings, the first category of takings to be recognized and still the conceptual benchmark for the other three. Part Four summarizes the tests for exaction takings,

10. Assertions of apparently complete congruence between state and federal takings law are found in, among other cases, *Byrd v. City of Hartsville*, 620 S.E.2d 76, 79 n.6 (S.C. 2005), *San Remo Hotel L.P. v. City & County of San Francisco*, 41 P.3d 87, 100–01 (Cal. 2002), and *Littman v. Gimello*, 557 A.2d 314, 318 (N.J. 1989).

11. See, e.g., *Manufactured Hous. Cmty. of Wash. v. State*, 13 P.3d 183 (Wash. 2000) (government action constituting “public use” under federal Takings Clause may be prohibited private use under state constitution).

12. The extra verbiage is not necessarily significant to analysis of the taking issue. See, e.g., *Customer Co. v. City of Sacramento*, 895 P.2d 900, 906–07, 909–12 (Cal. 1995) (explaining that “damaged” is limited to eminent domain and public improvements).

13. However, the table of cases in the Appendix does touch on many of these procedural issues.

14. 28 U.S.C. §§ 1346(a)(2), 1491(a)(1) (2007). See *E. Enters. v. Apfel*, 524 U.S. 498, 520 (1998).

which are applied to the special conditions governments impose on development approvals so that the developer contributes to offsetting the impacts that the proposed development will impose on the community. Finally, Part Five offers some parting thoughts.

Woven into the discussion of these commonly encountered types of takings are a handful of specialized tests that have evolved separately from the basic four and are still generally articulated without any mention of them. An example is the “confiscatory” rate standard for government-prescribed utility and common-carrier rates.¹⁵

I. SUBSTANTIVE THRESHOLD HURDLES

A. *Takings Versus Other Legal Theories*

At the outset, a taking plaintiff may confront a government argument that she is suing under the wrong legal theory. This argument may also have procedural consequences. For example, when suing the United States in the CFC, a determination that the claim sounds in a non-money-mandating legal theory, like due process, or in tort, deprives the court of jurisdiction.¹⁶ In some other courts, when a plaintiff invokes a nontaking theory but a taking analysis would also fit, the government may contend that the latter preempts the former.¹⁷

1. *Substantive Due Process*

Substantive due process, often invoked in challenges to land use controls, “prevents government power from being used for purposes of oppression, or abuse of government power that shocks the conscience, or action that is legally irrational in that it is not sufficiently keyed to any legitimate state interest.”¹⁸ Until 2005, a plaintiff attacking government action on some of these grounds was often able to proceed on a taking theory as well.¹⁹ Indeed, in *Agins v. City of Tiburon*, the Supreme Court said that government actions constitute takings when they fail to “substantially advance legitimate state interests”²⁰—a means-end, due process-like test.

15. See *infra* text accompanying notes 2024–205.

16. 28 U.S.C. § 1491(a)(1). See, e.g., *Crocker v. United States*, 125 F.3d 1475, 1476 (Fed. Cir. 1997) (CFC lacks jurisdiction under 28 U.S.C. § 1491(a)(1) over due process claims).

17. See *infra* text accompanying notes 24–30.

18. *Torromeo v. Town of Fremont, N.H.*, 438 F.3d 113, 118 (1st Cir. 2006).

19. See, e.g., *Kavanau v. Santa Monica Rent Control Bd.*, 941 P.2d 851, 857 (Cal. 1997) (for price regulation, some courts treat due process and takings as a single constitutional protection).

20. 447 U.S. 255, 260 (1980).

In 2005, the Supreme Court greatly reduced the overlap between takings law and substantive due process in *Lingle v. Chevron U.S.A. Inc.*²¹ There, the Court expunged its “substantially advance” test from takings law as inconsistent with that body of law’s focus on the magnitude, character, or distribution of the government action’s impact on the property.²² *Lingle* goes a long way toward eliminating one traditional area of confusion between takings and due process, but certainly not all of them. In particular, some overlap between the amorphous “character” factor of the *Penn Central* test²³ and substantive due process remains.

For some federal circuits, a taking analysis, if appropriate, preempts the use of substantive due process as an alternative theory.²⁴ Other circuits disagree, at least with categorical preemption, either by express statement²⁵ or implicitly by analyzing both the substantive due process and taking claims in the case.²⁶ Preemption of due process claims is premised on *Graham v. Connor*, which held that when another constitutional provision provides explicit protection from the conduct complained of, the more general protection of due process may not be used.²⁷ The rule that a taking theory, if applicable, preempts substantive due process persists, despite the Supreme Court’s differentiation in *Eastern Enterprises v. Apfel*,²⁸ in concurring and dissenting opinions, between the concerns of takings law and substantive due process law.²⁹ But the rule seems less likely to outlive the Court’s emphatic and unanimous differentiation between the two theories in *Lingle*.³⁰

2. Equal Protection

When the thrust of the landowner’s complaint is unequal treatment, as opposed to severe economic impact, equal protection may be an

21. 544 U.S. 528 (2005).

22. *Id.* at 542.

23. See *infra* text accompanying notes 149–54.

24. See, e.g., *S. County Sand & Gravel Co., Inc. v. Town of S. Kingston*, 160 F.3d 834, 835 n.2 (1st Cir. 1998); *Armendariz v. Penman*, 75 F.3d 1311 (9th Cir. 1996).

25. See, e.g., *John Corp. v. City of Houston*, 214 F.3d 573, 582–83 (5th Cir. 2000).

26. See, e.g., *Villas of Lake Jackson, Ltd. v. Leon County*, 121 F.3d 610 (11th Cir. 1997).

27. 490 U.S. 386 (1989). Preclusion per *Graham v. Connor* does not obtain, however, when both constitutional provisions address specific harms. Thus, the fact that a landowner may have a taking claim does not deprive her of a Fourth Amendment unreasonable seizure claim. *Presley v. City of Charlottesville*, 464 F.3d 480, 484–87 (4th Cir. 2006).

28. 524 U.S. 498 (1998).

29. *Esplanade Props., L.L.C. v. City of Seattle*, 307 F.3d 978, 982–83 (9th Cir. 2002) (explaining that *Eastern* did not overturn the holding in *Armendariz* that a taking claim, if appropriate, preempts use of substantive due process as an alternative theory).

30. See, e.g., *Consol. Waste Sys., L.L.C. v. Metro Gov’t of Nashville & Davidson County*, No. M2002-02582-COA-R3-CV, 2005 WL 1541860 (Tenn. Ct. App. June 30, 2005) (unreported) (rejecting preemption of due process claim, chiefly on basis of *Eastern Enterprises* and *Lingle*).

appropriate theory.³¹ The distribution of a regulatory burden, however, also remains a proper concern of takings analysis,³² so the two theories are not entirely distinct. A desire to circumvent the ripeness requirements of takings law can tempt plaintiffs in federal court to recast their takings claims as sounding in equal protection, though courts may be alert to this ruse.³³

3. *Tort*

The takings-tort blur typically arises with physical, rather than regulatory, interferences with private property. If a taking claim alleges the unlawfulness or unreasonableness of a government act, a court may discern a tort.³⁴ And when a governmental invasion of property is short-lived, not sufficiently intrusive, and/or unlikely to recur, it may fall short of a taking and merely amount to a tort such as trespass.³⁵ The fact that the property injury was not deliberate may also relegate it to tort status.³⁶

The Federal Circuit uses a two-part inquiry for distinguishing physical takings from possible torts. First, a taking results only when the government intends to invade a property interest or the invasion is the direct, natural, or probable result of an authorized activity, as opposed to an incidental or consequential injury.³⁷ Second, the invasion must secure a benefit to the government at the expense of the property owner, or at least preempt the owner's right to enjoy his property for an extended period.³⁸ The case law is split on whether the same facts can give rise to both takings and tort claims. Answering yes, a recent CFC decision states: "While not all torts are takings, every taking that involves invasion or destruction of property is by definition tortious."³⁹

31. See *Vill. of Willowbrook v. Olech*, 528 U.S. 562 (2000); *Nollan v. Cal. Coastal Comm'n*, 483 U.S. 825, 835 n.4 (1987). Equal protection applies not only to groups, but to individuals who constitute a "class of one." *Olech*, 528 U.S. at 564.

32. *Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528, 542 (2005).

33. See, e.g., *Patel v. City of Chicago*, 383 F.3d 569 (7th Cir. 2004).

34. See, e.g., *Thune v. United States*, 41 Fed. Cl. 49 (1998) (at best a tort, not a taking); *Arreola v. Monterey County*, 122 Cal. Rptr. 2d 38 (Ct. App. 1922) (both a tort and a taking).

35. See, e.g., *Barnes v. United States*, 538 F.2d 865, 870 (Ct. Cl. 1976); *Morris v. Douglas County Bd. of Health*, 561 S.E.2d 393 (Ga. 2002).

36. See, e.g., *Knutson v. City of Fargo*, 714 N.W.2d 44 (N.D. 2006); *Dallas, Garland & N.E. R.R. v. Hunt County*, 195 S.W.3d 818, 821 (Tex. App. 2006).

37. Note the similarity of this inquiry to the foreseeability element of the causation requirement for takings claims. See *infra* text accompanying notes 102–03.

38. *Ridge Line, Inc. v. United States*, 346 F.3d 1346, 1355–56 (Fed. Cir. 2003); *Banks v. United States*, 69 Fed. Cl. 206 (2006).

39. *Hansen v. United States*, 65 Fed. Cl. 76, 101 (2005) (collecting cases on both sides of issue).

4. *Breach of Contract*

Because contract rights often are held to be property, a claim of governmental breach of contract sometimes is joined by a claim that the government has taken a property right. The CFC and Federal Circuit, where many such combined actions are litigated, prefer to resolve them under the more specific breach of contract theory.⁴⁰ Takings claims are also disfavored because when the government enters into contracts, it acts in its commercial or proprietary, rather than sovereign, capacity.⁴¹ Nor is anything taken where the plaintiff, as is typical, retains the full range of breach of contract remedies.⁴²

The preference for breach of contract in the CFC and Federal Circuit takes two inconsistent forms: the majority view, under which the taking claim may be dismissed at the outset,⁴³ and the minority view, under which both theories may be pled and argued, but the taking claim falls by the wayside if the contract claim succeeds.⁴⁴ The implication of the minority view is that if the breach of contract claim fails, just compensation may be awarded under a taking theory. The minority view has been roundly rejected in some decisions.⁴⁵ Of course, the taking and breach of contract claims may be pursued simultaneously if the property rights asserted arise independently of the contract.⁴⁶

Parenthetically, when government action affects performance under contracts *to which it is not a party*, courts generally agree that a takings theory is available. However, takings are rarely found, except where the government seeks to “stand in the shoes” of a contract party or to block performance by one party after the other has performed.⁴⁷ For example, when the government imposes liability beyond that specified in a private contract, the taking claim “gains nothing” from the fact that the contract party was protected by the contract from additional liability.⁴⁸ Similarly, when legislation not targeting the private contract in question merely

40. See, e.g., *Hughes Commc'ns Galaxy, Inc. v. United States*, 271 F.3d 1060, 1070 (Fed. Cir. 2001); *Sun Oil Co. v. United States*, 572 F.2d 786 (Ct. Cl. 1978). For a contracts-theory preference outside the Federal Circuit, see *Mid-American Waste Systems, Inc. v. City of Gary*, 49 F.3d 286, 289 (7th Cir. 1995).

41. *Hughes Commc'ns Galaxy*, 271 F.3d at 1070; *Sun Oil Co.*, 572 F.2d at 818.

42. *Castle v. United States*, 301 F.3d 1328, 1342 (Fed. Cir. 2002).

43. See, e.g., *Hughes Commc'ns Galaxy*, 271 F.3d at 1070.

44. See, e.g., *Consol. Edison Co. of N.Y. v. United States*, 67 Fed. Cl. 285, 291 (2005).

45. See, e.g., *Pac. Gas & Elec. Co. v. United States*, 70 Fed. Cl. 766, 780 n.14 (2006).

46. *Allegre Villa v. United States*, 60 Fed. Cl. 11, 18 (2004); *Westfed Holdings, Inc. v. United States*, 52 Fed. Cl. 135, 152 (2002).

47. See, e.g., *Brooks-Scanlon Corp. v. United States*, 265 U.S. 106 (1924) (requisition by United States of purchase contract put United States in contract holder's shoes, thereby effecting taking of contract rights).

48. *Concrete Pipe & Prods. of Cal., Inc. v. Constr. Laborers Pension Trust*, 508 U.S. 602, 642 (1993) (quoting *Connolly v. Pension Benefit Guar. Corp.*, 475 U.S. 211, 223–24 (1986)).

frustrates incidentally the performance of the contract, no taking occurs.⁴⁹ Even when legislation does target contracts, courts typically find no taking.⁵⁰

B. The Concept of “Property”

1. Basics

The Takings Clause is not implicated unless the government conduct affects “property” cognizable under the clause.⁵¹ Thus, whether the plaintiff has alleged a Takings Clause–recognized property interest is the key threshold substantive inquiry in a taking case.⁵² Unilateral expectations and abstract needs are not property entitled to protection.⁵³ Merely because a government action ends an economically beneficial circumstance that plaintiff would *like* to continue does not mean that “property” has been affected. To be property, an economic advantage must have “the law back of [it].”⁵⁴

Property interests are not created by the Constitution itself, “[r]ather they are created and their dimensions defined by existing rules or understandings that stem from an independent source such as state law,”⁵⁵ or, less commonly, federal law.⁵⁶ Concepts that define the bounds of a property interest—the sticks in the “bundle of rights”—include the law creating it, existing rules and understandings, and “background principles” of nuisance and property law existing when the property was acquired.⁵⁷ In modern usage, the term “property” is said to refer to the rights inhering in the person’s relationship to some thing, not the thing itself⁵⁸—though this principle is often honored in the breach by judicial references to a parcel of land as “the property.”

49. *Omnia Commercial Co. v. United States*, 261 U.S. 502 (1923); *Cienega Gardens v. United States*, 331 F.3d 1319, 1335 (Fed. Cir. 2003).

50. *See, e.g., McAndrews v. Fleet Bank of Mass.*, 989 F.2d 13 (1st Cir. 1993); *Consol. Rail Corp. v. Metro-N. Commuter R.R. Co.*, 638 F. Supp. 350 (Regional Rail Reorg. Ct. 1986).

51. *See, e.g., Am. Pelagic Fishing Co., L.P. v. United States*, 379 F.3d 1363, 1372 (Fed. Cir. 2004), *cert. denied*, 545 U.S. 1139 (2005).

52. *See, e.g., Colvin Cattle Co., Inc. v. United States*, 468 F.3d 803, 806 (Fed. Cir. 2006).

53. *Webb’s Fabulous Pharms. v. Beckwith*, 449 U.S. 155, 161 (1980).

54. *Kaiser Aetna v. United States*, 444 U.S. 164, 178 (1979) (quoting *United States v. Willow River Power Co.*, 324 U.S. 499, 502 (1945)).

55. *Webb’s Fabulous Pharms.*, 449 U.S. at 161.

56. *See, e.g., Conti v. United States*, 291 F.3d 1334, 1340 (Fed. Cir. 2002).

57. *See, e.g., Members of Peanut Quota Holders Ass’n, Inc. v. United States*, 421 F.3d 1323, 1330 (Fed. Cir. 2005), *cert. denied*, 126 S. Ct. 2967 (2006). The background principles concept is discussed *infra* II.E., closer to the “total taking” test with which it is associated. Logically, however, it constitutes a threshold question as to the nature of plaintiff’s property interest and belongs here.

58. *Ruckelshaus v. Monsanto*, 467 U.S. 986, 1003 (1984).

The latitude that governments, including courts, have to shape and redefine property concepts is a recurring issue. If this discretion is left unrestrained, Takings Clause protections plainly would be vitiated. Thus, the “government’s power to redefine . . . property [is] necessarily constrained by constitutional limits,”⁵⁹ and “a State, by *ipse dixit*, may not transform private property into public property without compensation.”⁶⁰ On the other hand, and key to the issue’s complexity, notions of property obviously evolve over time. Thus, new environmental awareness “shapes our evolving understanding of property rights.”⁶¹ Further complexity arises when it is unclear whether the government is merely clarifying what a property rule has always been, or is announcing a new rule.⁶²

2. *Takings Property Versus Due Process Property*

The Takings and Due Process Clauses occupy the same amendment, such that “property” is twice invoked in immediately adjacent text. Moreover, phrases used in Supreme Court definitions of property for takings purposes are used to define property in the Court’s due process decisions.⁶³ Notwithstanding, courts almost universally hold that the term “property” is narrower for takings than for due process purposes.⁶⁴ The reason is rarely stated—presumably it stems from the different remedy demands of the two clauses: compensation versus adequate procedures. In any event, a wide range of statutory entitlements—including welfare payments, unemployment compensation, and public employment—are not covered by the Takings Clause even though they are covered by due process procedural safeguards.⁶⁵

59. *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1014 (1992).

60. *Webb’s Fabulous Pharms., Inc. v. Beckwith*, 449 U.S. 155, 164 (1980).

61. *Lucas*, 505 U.S. at 1069–70 (Stevens, J., dissenting).

62. Beginning with dicta in *Hughes v. Washington*, 389 U.S. 290, 296–97 (1967) (Stewart, J., concurring), a few decisions have flirted with the idea that a *court* may effect a taking, as by announcing a new common law property rule that destroys existing property interests. Research reveals no decision (not vacated) to actually find such a “judicial taking.”

63. *Compare, e.g., Webb’s Fabulous Pharms., Inc. v. Beckwith*, 449 U.S. 155, 161 (1980) (takings case noting that “a mere unilateral expectation . . . is not a property interest entitled to protection”) with *Bd. of Regents v. Roth*, 408 U.S. 564, 577 (1972) (to have a property interest in a benefit for procedural due process purposes, a person “must have more than a unilateral expectation of it.”).

64. *See, e.g., Corn v. City of Lauderdale Lakes*, 95 F.3d 1066, 1075 (11th Cir. 1996); *Pittman v. Chi. Bd. of Educ.*, 64 F.3d 1098, 1104 (7th Cir. 1995); *Zealy v. City of Waukesha*, 153 F. Supp. 2d 970, 977 (E.D. Wis. 2001); *Bronco Wine Co. v. Jolly*, 29 Cal. Rptr. 3d 462, 494 (Ct. App. 2005), *cert. denied*, 126 S. Ct. 1169 (2006).

65. *Compare, e.g., Bowen v. Gilliard*, 483 U.S. 587 (1987) (no property right for takings purposes to continued welfare benefits at same level) with *Goldberg v. Kelly*, 397 U.S. 254, 262 & n.8 (1970) (termination of welfare benefit triggers procedural due process protection; “may be realistic today to regard welfare entitlements as more like ‘property’ than a ‘gratuity.’”).

3. *Land*

Almost all interests in land are recognized as “property” under the Takings Clause, from fee simples to leaseholds, easements, liens, life estates, and some future interests.⁶⁶ The case law is inconsistent, however, as to some of the more insubstantial interests in land, such as options to purchase, restrictive covenants, and rights of first refusal, though the recent trend favors property status.⁶⁷ Equitable as well as legal interests are recognized.⁶⁸

Water rights, though often of a qualified nature, are generally held to be property,⁶⁹ as are mineral rights⁷⁰ and usable airspace up to the floor of public airspace.⁷¹ Owners of land abutting public highways enjoy a right of reasonable ingress and egress, in the nature of an easement.⁷²

4. *Personal Property*

The Takings Clause covers personal property, both tangible and intangible. Generally held to be property under the clause are franchises,⁷³ money,⁷⁴ debts of a lender,⁷⁵ liens,⁷⁶ most contract rights,⁷⁷ patents⁷⁸ and copyrights,⁷⁹ trade secrets,⁸⁰ unpatented mining claims,⁸¹ and

66. *See, e.g.*, *United States v. Gen. Motors Corp.*, 323 U.S. 373, 382 (1945) (leaseholds); *United States v. Welch*, 217 U.S. 333 (1910) (easements); *United States v. 403.15 Acres of Land*, 316 F. Supp. 655, 656–57 (C.D. Tenn. 1970) (life estates).

67. *See, e.g.*, *Forest Props., Inc. v. United States*, 39 Fed. Cl. 56, 70 (1997) (option to purchase recognized as property); *Daniels v. Area Plan Comm’n*, 306 F.3d 445, 459 (7th Cir. 2002) (restrictive covenant recognized as property); *Manufactured Hous. Cmty. of Wash. v. State*, 13 P.3d 183 (Wash. 2000) (right of first refusal recognized as property).

68. *See, e.g.*, *Forest Props.*, 39 Fed. Cl. at 70 (under California law, exercise of option to purchase creates equitable ownership that is compensable).

69. *United States v. Gerlach Live Stock Co.*, 339 U.S. 725 (1950) (riparian doctrine rights); *Hensley v. City of Columbus*, 433 F.3d 494 (6th Cir. 2006) (groundwater rights); *Walker v. United States*, 69 Fed. Cl. 222 (2005) (appropriation doctrine rights). *See generally* *Hansen v. United States*, 65 Fed. Cl. 76, 123–24 (2005).

70. *Pa. Coal Co. v. Mahon*, 260 U.S. 393 (1922).

71. *United States v. Causby*, 328 U.S. 256 (1946); *McCarran Int’l Airport v. Sisolak*, 137 P.3d 1110 (Nev. 2006) (collecting cases), *cert. denied*, 127 S. Ct. 1260 (2007).

72. *See, e.g.*, *Hardin v. S.C. Dep’t of Transp.*, No. 26262, 2007 S.C. LEXIS 52, at *9 (S.C. Feb. 12, 2007); *Regency Outdoor Adver., Inc. v. City of Los Angeles*, 139 P.3d 119, 127 (Cal. 2006) (collecting cases).

73. *Monongahela Navigation Co. v. United States*, 148 U.S. 312, 345 (1883).

74. *Phillips v. Wash. Legal Found.*, 524 U.S. 156, 160 (1998); *Webb’s Fabulous Pharms., Inc. v. Beckwith*, 449 U.S. 155, 164–65 (1980).

75. *Bowen v. Pub. Agencies Opposed to Soc. Sec. Entrapment*, 477 U.S. 41, 55 (1986).

76. *Armstrong v. United States*, 364 U.S. 40 (1960) (materialmen’s lien).

77. *See, e.g.*, *Concrete Pipe & Prods. of Cal., Inc. v. Constr. Laborers Pension Trust*, 508 U.S. 602, 642 (1993) (quoting *Connolly v. Pension Benefit Guar. Corp.*, 475 U.S. 211, 223–24 (1986)); *United States Trust Co. v. New Jersey*, 431 U.S. 1, 19 n.16 (1977). The status of contract rights as property rights supports that status in bonds, liens, mortgages, options to purchase, etc.

78. *Hartford-Empire Co. v. United States*, 323 U.S. 386, 415 (1945).

79. *Boyle v. United States*, 200 F.3d 1369 (Fed. Cir. 2000).

causes of action once reduced to final, unreviewable judgment.⁸² Generally held *not* to be property for takings purposes, sometimes because the rights involved are insubstantial or highly conditional, are permits and licenses if nontransferable and revocable,⁸³ government benefits unless contractual,⁸⁴ uses or access dependent on government authorization,⁸⁵ access to public services,⁸⁶ and the mere ability to conduct a business, as something separate from the business' assets.⁸⁷ Value alone does not confer property status.⁸⁸

The retention of some species of property, such as patents and unpatented mining claims, is conditional *ab initio* on the payment of maintenance fees or other actions by the property holder. No taking results from the loss of such property interests owing to nonperformance, since no property interest existed apart from satisfying the conditions imposed.⁸⁹

The Supreme Court has suggested in dictum that personal property receives less Takings Clause protection than other types of property, "at least if the property's only economic use is sale or manufacture for sale."⁹⁰

5. "Fundamental" Property Interests

The Supreme Court holds out a few property rights as being of a particularly fundamental nature. The right to physically exclude others is certainly the prime example, resulting in a rule that permanent physical occupations by the government are *per se* takings, even when the space occupied and the economic impact are minimal.⁹¹ The right to pass on

80. Ruckelshaus v. Monsanto, 467 U.S. 986, 1003–04 (1984).

81. Kunkes v. United States, 78 F.3d 1549 (Fed. Cir. 1996).

82. Iletto v. Glock, Inc., 421 F. Supp. 2d 1274, 1299 (C.D. Cal. 2006).

83. Mobile Relay Assocs. v. FCC, 457 F.3d 1 (D.C. Cir. 2006); Conti v. United States, 291 F.3d 1334, 1340 (Fed. Cir. 2002); Bronco Wine Co. v. Jolly, 29 Cal. Rptr. 3d 462, 494 (Ct. App. 2005), *cert. denied*, 126 S. Ct. 1169 (2006). *Contra* State Bd. of Educ. v. Drury, 437 S.E.2d 290 (Ga. 1993) (license to engage in profession); Pre-Need Family Servs. v. Bureau of Prof'l & Occupational Affairs, 904 A.2d 996, 1003 (Pa. Commw. Ct. 2006) (same).

84. Bowen v. Gilliard, 483 U.S. 587, 604 (1987) (welfare payments); Members of Peanut Quota Holders Ass'n, Inc. v. United States, 421 F.3d 1323 (Fed. Cir. 2005) (quotas are property in the nature of revocable statutory benefits, hence noncompensable), *cert. denied*, 126 S. Ct. 2967 (2006).

85. Air Pegasus of D.C., Inc. v. United States, 424 F.3d 1206, 1217–18 (Fed. Cir. 2005) (access to public airspace).

86. *See, e.g.*, Neifert v. Dep't of Env't, 910 A.2d 1100 (Md. 2006) (sewer services).

87. Coll. Sav. Bank v. Fla. Prepaid Postsecondary Educ. Expense Bd., 527 U.S. 666, 675 (1999).

88. *See, e.g.*, Palm Beach County v. Cove Club Investors Ltd., 734 So. 2d 379, 387 n.12 (Fla. 1999).

89. *See, e.g.*, Michels v. United States, 72 Fed. Cl. 426, 430–31 (2006).

90. Lucas v. S.C. Coastal Council, 505 U.S. 1003, 1027–28 (1992).

91. Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419 (1982). *See infra* text accompanying notes 3578–3656.

property to one's heirs appears to be another fundamental property interest, resulting in the Court's assumption that at least where the interference is total or substantial, the remedy can be invalidation rather than the usual compensation.⁹²

C. Sufficiency of Link Between Government Action and Harm to the Property Interest

1. Necessity of Direct Causation

A taking claim can succeed only when the adverse impact on the property was caused *directly* by the challenged government conduct. Indirect, or "consequential," injuries are without Takings Clause remedy.⁹³ Thus, a government action increasing or decreasing the allowed uses on A's parcel, causing harm to neighbor B, usually gives B no taking claim. Causation is little discussed in regulatory takings cases, either separately or in the context of a standing analysis, because typically it is plain that the challenged government action directly caused the impact. When it is addressed, the standard is variously stated: the harm must be "proximately caused" by the government,⁹⁴ or be more than the "incidental result" of the challenged regulation.⁹⁵ The regulation must be the "direct and natural" cause of the impact.⁹⁶ The owner must show a "substantial cause-and-effect relationship, excluding the probability that other forces *alone* produced the injury."⁹⁷ (The rule is similar for takings-based section 1983 actions.⁹⁸) A minority view is that a "but for" standard applies.⁹⁹

Actions of the plaintiff herself may be seen as the legal cause of the property harm, exonerating the government—as when the plaintiff's

92. *Babbitt v. Youpee*, 519 U.S. 234 (1997); see *E. Enters. v. Apfel*, 524 U.S. 498, 521 (1998).

93. *Omnia Commercial Co. v. United States*, 261 U.S. 502, 510 (1923); *Air Pegasus of D.C., Inc. v. United States*, 424 F.3d 1206 (Fed. Cir. 2005); *Harms v. City of Sibley*, 702 N.W.2d 91 (Iowa 2005).

94. *Penn Cent. Transp. Co. v. New York City*, 438 U.S. 104, 124 (1978).

95. *Christy v. Hodel*, 857 F.2d 1324, 1335 (9th Cir. 1988). This "more than the incidental result" rule may explain the Supreme Court's remark that a law destroying the value of land without being aimed at land "perhaps" cannot be a taking. *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1027 n.14 (1992).

96. *Cooper v. United States*, 37 Fed. Cl. 28, 43 (1996).

97. *Akins v. State*, 71 Cal. Rptr. 2d 314, 340 (Ct. App. 1998) (emphasis in original). See also *Alost v. United States*, 73 Fed. Cl. 480, 495 (2006) (must be "direct and proximate cause").

98. *Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency*, 216 F.3d 764, 783 (9th Cir. 2000) (plaintiff must establish both causation in fact and proximate causation), *aff'd on other grounds*, 535 U.S. 302 (2002).

99. *Bowles v. United States*, 31 Fed. Cl. 37, 49 (1994).

tardiness,¹⁰⁰ inadequate permit applications, or decision to litigate prematurely¹⁰¹ result in loss of property use.

2. *Foreseeability and Intent*

In the physical takings cases, causation in fact is sometimes held to be a necessary, but not sufficient, condition for establishing takings liability. In addition to causation in fact, says the Federal Circuit, “an inverse condemnation plaintiff must prove that the government should have predicted or foreseen the resulting injury.”¹⁰² Thus, an unforeseeable intervening cause may exonerate the government from liability for subsequent harm.¹⁰³

3. *Liability for Third Party Conduct*

a. *Private Third Parties*

The government has no takings liability for the acts of a private third party,¹⁰⁴ unless the government has a direct and substantial involvement with the party.¹⁰⁵ Direct and substantial involvement may be discerned where the defendant-government directed or authorized third-party conduct with specific reference to the plaintiff’s type of property.¹⁰⁶ Alternatively, liability may be imputed to the government because the third party is deemed to have acted as its agent.

On the other hand, merely because the government *allows* a third-party landowner to act in a manner harmful to the plaintiff’s land, as by issuing a permit or rezoning, does not make the government liable for any taking, because “[o]therwise, the government might be liable for any

100. See, e.g., *United States v. Locke*, 471 U.S. 84, 107 (1985) (failure of unpatented mining claim holder to meet filing deadline in statute, not the filing statute, caused claim to be extinguished).

101. *Walcek v. United States*, 44 Fed. Cl. 462, 468 (1999) (most of delay in issuing permit was caused by inadequacy of plaintiff’s applications and plaintiff’s opting early to litigate taking claim), *aff’d on other grounds*, 303 F.3d 1349 (Fed. Cir. 2002).

102. *Moden v. United States*, 404 F.3d 1335, 1343 (Fed. Cir. 2005). *Accord* *City of Keller v. Wilson*, 168 S.W.3d 802, 808 (Tex. 2005) (owner of flooded land must show that city intentionally flooded property, or the city was substantially certain that flooding would result). *But see* *San Antonio v. El Dorado Amusement Co.*, 195 S.W.3d 238, 245 (Tex. Ct. App. 2006) (regulatory taking plaintiff “was not required to allege that the State knew the act would cause an identifiable harm.”).

103. See, e.g., *Thune v. United States*, 41 Fed. Cl. 49 (1998) (destruction of hunting camp when forest fire deliberately set by the United States shifted direction is not a taking, due in part to unforeseeable wind change).

104. See, e.g., *Colvin Cattle Co., Inc. v. United States*, 468 F.3d 803, 809 (Fed. Cir. 2006).

105. See, e.g., *Casa de Cambio v. United States*, 291 F.3d 1356, 1361 (Fed. Cir. 2002).

106. See, e.g., *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982) (state liable for physical taking, even though state-authorized activity carried out by private company).

damage caused by a government-regulated actor.”¹⁰⁷ In one case, the court carved out an exception to this rule when there is government malfeasance.¹⁰⁸

b. Government Third Parties

The third party whose actions impinge on private property is often another government, posing the question of which government, if any, is the taker. The cases arise chiefly where the third-party government participates in a program of the defendant-government. When, in so doing, the third-party government is deemed an agent or instrumentality of the defendant—as when a state acts under federal authority or direction—takings liability will be imputed.¹⁰⁹ Agent or instrumentality status has been rejected, though, when the state acted solely to qualify for federal money, and the federal program left considerable discretion to the state.¹¹⁰ Whether state environmental programs operated under delegated federal authority can give rise to federal takings liability appears not to have been addressed.

The mere fact that the other government acted only after encouragement by the United States is insufficient to shift any takings liability to the United States.¹¹¹ Nor is there imputation of takings liability to the United States when the state’s action is merely a logical consequence of federal activity—that is, there is no federal-state interaction pursuant to a federal program.¹¹²

4. Ownership as of the Date of the Alleged Taking

Until *Palazzolo v. Rhode Island* in 2001,¹¹³ a property owner generally could maintain a taking claim only if he owned the property as of the date of the alleged taking. The right to compensation, said the

107. *Clark v. City of Anchorage*, No. Civ.A. 04-677-C, 2006 WL 288647, at *1 (W.D. Ky. 2006) (issuance of permit). *Accord* *Harms v. City of Sibley*, 702 N.W.2d 91 (Iowa 2005) (rezoning); *Benson v. State*, 710 N.W.2d 131, 156 (S.D. 2006) (decriminalizing conduct).

108. *See Swartz v. Beach*, 229 F. Supp. 2d 1239 (D. Wyo. 2002) (issuance of permit together with alleged government malfeasance states taking claim based on permitted activity).

109. *See, e.g., Hendler v. United States*, 952 F.2d 1364 (Fed. Cir. 1991) (Superfund program); *Toews v. United States*, 376 F.3d 1371, 1381–82 (Fed. Cir. 2004) (rails-to-trails program).

110. *See B&G Enters. v. United States*, 220 F.3d 1318 (Fed. Cir. 2000) (federal substance-abuse block grant); *Adolph v. Fed. Emergency Mgmt. Agency*, 854 F.2d 732, 736 (5th Cir. 1988) (federal flood insurance program); *see also Griggs v. Allegheny County*, 369 U.S. 84, 89 (1962) (county, not United States, liable for taking of air easement near county airport, even though airport was funded by United States based on compliance with federal regulations).

111. *Langenegger v. United States*, 756 F.2d 1565 (Fed. Cir. 1985); *Davis v. United States*, 35 Fed. Cl. 392 (1996); *Blue v. United States*, 21 Cl. Ct. 359 (1990).

112. *Applegate v. United States*, 35 Fed. Cl. 406, 422 (1996).

113. 533 U.S. 606 (2001).

courts, is not passed to a subsequent purchaser.¹¹⁴ This is the primary standing-to-sue rule of takings law.

Palazzolo reaffirmed this rule for direct condemnations and physical invasions, but seemed to abandon or at least limit it for regulatory takings actions.¹¹⁵ Even if the old rule has lost some force, however, the post-taking acquirer faces an uphill climb in demonstrating reasonable investment-backed expectations under the *Penn Central* test applicable in the large majority of takings cases.¹¹⁶

D. Invalid Government Actions

1. Courts Other Than CFC and Federal Circuit

For some courts, the erroneous or unauthorized aspect of the government action is *irrelevant* to the takings analysis.¹¹⁷ Other cases hold that an invalid government action *cannot* be a taking, a view to which the Supreme Court has given some support.¹¹⁸ A third logical possibility is that the invalidity of the government act means it *must* be a taking, though this rule has the poorest prospect of judicial adoption.¹¹⁹

In several cases, the courts have held that the erroneous government action (including court challenges thereto) was only a normal administrative delay in passing upon a development application. Under

114. *United States v. Dow*, 357 U.S. 17, 20 (1958) (direct condemnation case); *Norman v. United States*, 38 Fed. Cl. 417, 423–24 (1999) (regulatory taking case). Not addressed here is the circumstance where the property owner seeks to *formally* transfer any right to takings compensation to the buyer.

115. *Palazzolo*, 533 U.S. at 628. See *Machipongo Land & Coal Co., Inc. v. Commonwealth*, 799 A.2d 751, 761–63 (Pa. 2002).

116. See *infra* text accompanying 150, 216–21.

117. See, e.g., *Harris County Flood Control Dist. v. Adam*, 56 S.W.3d 665, 668–69 (Tex. Ct. App. 2001); *Eberle v. Dane County*, 595 N.W.2d 730 (Wis. 1999).

118. See, e.g., *Pheasant Bridge Corp. v. Township of Warren*, 777 A.2d 334, 343 (N.J. 2001) (invalid zoning ordinance is not the “otherwise proper [governmental] interference” that the Takings Clause presupposes) (quoting *First English Evangelical Lutheran Church v. County of Los Angeles*, 482 U.S. 304, 315 (1987)); see also *E. Enters. v. Apfel*, 524 U.S. 498 (1998) (in separate opinions, majority of justices say that Takings Clause assumes that challenged government conduct is “legitimate,” *id.* at 554 (Breyer, J., dissenting), or constitutionally valid, *id.* at 545) (Kennedy, J., concurring in the judgment and dissenting in part). This view arguably received a boost in *Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528 (2005), which twice quoted the “otherwise proper” language in *First English*, 544 U.S. at 537, 543, and stated that “if a government action is found to be impermissible . . . that is the end of the inquiry.” *Id.* at 543.

119. First, its key rationale is that an invalid government action cannot advance a legitimate government interest, and thus fails the *Agins* rule, see *infra* note 120, that to avoid effecting a taking, such action must “substantially advance legitimate state interests.” That rule has now been eliminated by *Lingle*. 544 U.S. 528. Second, even prior to *Lingle*, the invalidity-as-taking view lacked judicial imprimatur. See *Landgate, Inc. v. Cal. Coastal Comm’n*, 953 P.2d 1188, 1196–97 (Cal. 1998) (“government land use regulations . . . which, despite their ultimately determined statutory defects, are part of a reasonable regulatory process designed to advance legitimate government interests, are not takings . . .”).

an oft-cited Supreme Court footnote, normal delays during the process of government decision making are not takings.¹²⁰

2. CFC and Federal Circuit

In the CFC and Federal Circuit, “unauthorized” acts of federal agencies or their employees cannot be the basis of takings claims against the United States. A taking plaintiff implicitly concedes that the government action was authorized. Thus, she cannot seek return of the property—only compensation.¹²¹ Not all invalid government acts are deemed unauthorized, however—only those that are “*ultra vires*, *i.e.*, . . . either explicitly prohibited or . . . outside the normal scope of the government officials’ duties.”¹²² By contrast, agency conduct that is the natural consequence of congressionally approved measures or the result of an exercise of discretion granted to an official is not unauthorized, even if invalid. Such conduct does *not* preclude a taking claim.¹²³ One justification stated for the unauthorized acts rule is that a federal officer acting without authority “will not . . . represent the United States.”¹²⁴ Another is that allowing the obligation of federal funds based on unauthorized federal conduct “would strike a blow at [Congress’] power of the purse.”¹²⁵

The unauthorized acts rule was applied in takings challenges to an FDA regulation severely limiting where cigarette vending machines could be installed. While the cases were pending, the Supreme Court repudiated FDA’s authority to regulate cigarettes as having been expressly disallowed by Congress.¹²⁶ As a result, the CFC held that the unauthorized acts rule required dismissal of the takings claims.¹²⁷

Invalid government action cannot be the basis of a taking suit where the claim is that the invalidity *itself* is the taking.¹²⁸

120. *Agins v. City of Tiburon*, 447 U.S. 255, 263 n.9 (1980). *See, e.g., Landgate*, 953 P.2d at 1197 (agency’s mistaken assertion of jurisdiction over development was “part of the development approval process,” hence not a taking); *Sea Cabins on the Ocean IV Homeowners Ass’n v. City of North Myrtle Beach*, 548 S.E.2d 595 (S.C. 2001).

121. *Del Rio Drilling Programs, Inc. v. United States*, 146 F.3d 1358 (Fed. Cir. 1998).

122. *Id.* at 1363.

123. However, neither the CFC nor the Federal Circuit has yet addressed the implications of *Lingle*. *See supra* note 118.

124. *Hooe v. United States*, 218 U.S. 322, 335 (1910).

125. *NBH Land Co. v. United States*, 576 F.2d 317, 319 (Ct. Cl. 1978).

126. *Food & Drug Admin. v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120 (2000).

127. *See, e.g., A-1 Cigarette Vending, Inc. v. United States*, 49 Fed. Cl. 345 (2001), *aff’d on other grounds sub nom. Brubaker Amusement Co., Inc. v. United States*, 304 F.3d 1349 (Fed. Cir. 2002).

128. *Lion Raisins, Inc. v. United States*, 416 F.3d 1356 (Fed. Cir. 2005).

E. Absence of Power to Condemn

Takings are frequently viewed as unacknowledged exercises of eminent domain (condemnation) power. Does this logically require that to be subject to a taking claim, an agency must have condemnation authority in the circumstance giving rise to the alleged taking? Courts split on this question. Those courts answering yes emphasize the symmetry of demanding condemnation authority in both instances.¹²⁹ Courts answering no point to the irrelevance of the authority issue to the compensatory concerns of the Takings Clause, and note that requiring condemnation authority invites government manipulation to skirt the requirements of the Takings Clause.¹³⁰

F. Public Use

A taking must be for a “public use.” If it is not, the government act is void regardless of whether compensation is paid. The invalidity of takings for private purposes flows either from the Takings Clause itself or from substantive due process.¹³¹ Thus, lower courts have wrestled with which theory applies when a plaintiff alleges that a government infringement of property rights, stated to be for a public purpose, was really for private benefit.¹³² The question of whether a government action furthers a public use almost always arises in direct, not inverse, condemnation cases.¹³³

The public use hurdle in the federal constitution is a low one. Since the turn of the twentieth century, the Supreme Court has abandoned the narrow view that “public use” requires that the public have actual access to the property once taken. Rather, the Court has said that it is enough that the taking be for a “public purpose.” A series of Supreme Court decisions since 1954,¹³⁴ arising from direct condemnations, has solidified

129. See, e.g., *Clajon Prod. Corp. v. Petera*, 70 F.3d 1566, 1575 (10th Cir. 1995); *State v. Mill*, 809 P.2d 434, 439 (Colo. 1991) (en banc); *Envtl. Indus., Inc. v. Casey*, 675 A.2d 392 (Pa. Commw. Ct. 1996). The last two decisions seem to be based solely on statutory, rather than constitutional, grounds.

130. See, e.g., *Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency*, 911 F.2d 1331, 1341–42 (9th Cir. 1990); *Fountain v. Metro. Atlanta Rapid Transit Auth.*, 678 F.2d 1038 (11th Cir. 1982); *Manning v. Energy, Minerals & Natural Res. Dep't*, 144 P.3d 87, 91–92 (N.M. 2006); *Mowrer v. Charles County Park & Recreation Comm'n*, 605 S.E.2d 563 (S.C. Ct. App. 2004).

131. See, e.g., *Haw. Hous. Auth. v. Midkiff*, 467 U.S. 229, 245 (1984) (from Takings Clause).

132. Compare *Theodorou v. Measel*, 53 Fed. App'x 640, 642 (3d Cir. 2002) (substantive due process applies) with *Daniels v. Area Plan Comm'n of Allen County*, 306 F.3d 445, 458 n.14 (7th Cir. 2002) (Takings Clause applies).

133. Instances of courts invalidating inverse condemnations as lacking a public use include *Daniels*, 306 F.3d 445 (vacation of restrictive covenant was taking for private purpose; lacking legislative guidance, commission's findings as to public purpose were not entitled to deference), and *Armendariz v. Penman*, 75 F.3d 1311 (9th Cir. 1996) (aggressive enforcement of building code to prompt sale of parcel to another private entity violates public use prerequisite).

134. *Berman v. Parker*, 348 U.S. 26 (1954).

this expansive interpretation—going so far as to find a public purpose in any government act sanctioned by the police power. The most recent is *Kelo v. City of New London*,¹³⁵ which held in 2005 that even condemnation of private property for conveyance to private developers for economic development can be a public use, in the proper circumstances.

Kelo sparked a nationwide backlash leading to state legislative enactments and initiatives on numerous state ballots to rein in state and local use of eminent domain for economic development. Important here, the property rights movement assiduously sought to broaden the public's *Kelo* concerns to also include government *regulation* of private property, building on the pre-*Kelo* adoption in Oregon of Measure 37, a ballot initiative requiring compensation for regulatory restraints on land use.¹³⁶ As a result, *Kelo*-responsive initiatives on the 2006 ballots in Arizona, California, and Idaho also included measures requiring compensation for certain land use regulations that reduce property values, or, in the case of Arizona and Idaho, allowing the government to instead waive the regulation.¹³⁷

G. Government Assertion of Private (Nonsovereign) Rights

No taking issue is raised when the government asserts its own property rights without invoking sovereign powers.¹³⁸ Since a private property owner cannot effect a taking, courts reason that the government acting as landowner should be in the same position. If the government's assertion of its rights proves unfounded, however, there may be a tort.

H. Miscellaneous Exclusions

In a few situations, government actions that look like obvious appropriations of property are deemed outside the cognizance of takings law. One example is forfeiture, both criminal and civil. Courts have consistently denied compensation for forfeitures under a variety of rationales, even when the property is ultimately returned to its owner because the government elected not to pursue forfeiture proceedings or

135. 545 U.S. 469 (2005).

136. OR. REV. STAT. § 197.352 (2006).

137. A fourth regulatory compensation measure appeared on the Washington ballot unpaired with any *Kelo* proposal. Of the four measures, only the one in Arizona was adopted. See *supra* note 7.

138. See, e.g., *Janicki Logging Co. v. United States*, 36 Fed. Cl. 338 (1996) (no taking where government complied with contract terms and never asserted more than proprietary rights), *aff'd*, 124 F.3d 226 (Fed. Cir. 1997) (table entry); *DSI Corp. v. United States*, 228 Ct. Cl. 299 (1981) (government's prosecution of its lien claim before a court in an equal contest of ownership was not a taking), *cited with approval in* *Ultimate Sportsbar, Inc. v. United States*, 48 Fed. Cl. 540, 549 (2001).

the owner prevailed, or the property was damaged while in the government's custody, or the plaintiff was but an innocent co-owner (if the forfeiture proceeding was in rem).¹³⁹

Another categorical exclusion, not yet widely established in the case law, is that government imposition of generalized monetary liability cannot be a taking.¹⁴⁰ Perhaps related, though of a much older vintage, is the rule that money paid in taxes is not deemed to be taken, unless the tax is so arbitrary as to be "confiscatory."¹⁴¹

II. REGULATORY TAKINGS TESTS

Sections A–F in this Part address regulations that are prospectively *permanent*. The fact that a restriction is thought at the outset to be permanent, but is later rescinded or otherwise becomes temporary, affects only the nature of the property interest allegedly taken, not the applicable takings test. Section G of this Part deals with the special considerations attending regulations of prospectively *temporary* duration, such as moratoria, and administrative delays.

A. Overview

Until 1922, the Supreme Court recognized only two types of government actions that triggered, under the Takings Clause, a government duty to compensate: formal appropriation of property and physical invasion thereof. In that year, the notion of the "regulatory taking" was born. In *Pennsylvania Coal Co. v. Mahon*, the Court declared that when government regulation of property use goes "too far," a taking may result despite the absence of formal appropriation or physical invasion.¹⁴² Beginning in the late 1970s with the seminal *Penn Central Transportation Co. v. New York City* decision,¹⁴³ the Court initiated an effort, continuing today, to articulate a coherent body of rules or guidelines for determining which government regulations require compensation under the Takings Clause and which do not. As this Part and the following parts show, this jurisprudence is a mix of per se rules and balancing tests, with an ample amount of ambiguity thrown in.

139. See *Acadia Tech., Inc. v. United States*, 458 F.3d 1327, 1331–33 (Fed. Cir. 2006) (collecting cases).

140. See *infra* text accompanying notes 243–246.

141. *Branch v. United States*, 69 F.3d 1571, 1576–77 (Fed. Cir. 1995) (collecting cases).

142. 260 U.S. 393 (1922).

143. 438 U.S. 104 (1978).

1. Lucas “Total Taking” Rule

In *Lucas v. South Carolina Coastal Council*, the Supreme Court held that government regulation *completely* eliminating the economic use (and seemingly value, too) of land is a per se “total taking.”¹⁴⁴ Though described by the Court as one of its two categorical takings rules, along with the *Loretto* permanent physical occupation rule,¹⁴⁵ this rule contains a big exception. Despite complete elimination of use and/or value, a restriction is not a taking if it merely duplicates what could have been achieved under “background principles of the State’s law of property and nuisance” existing when the plaintiff acquired the land.¹⁴⁶ Such background principles limit the rights that the plaintiff acquired in the property. Plainly, there can be no taking when a government restriction eliminates a right the landowner never had.

Lucas reasonably may be read as confined to government regulation of land, in contrast with personal property.¹⁴⁷ It also has been largely limited to land use restrictions of prospectively permanent, or at least prospectively indefinite, duration. Thus, its application to complete eliminations of economic use during prospectively time-limited restrictions, such as moratoria of reasonable duration, has been rejected.¹⁴⁸

2. Penn Central “Partial Regulatory Taking” Test

When the *Lucas* test is inapplicable—that is, when the government interference falls short of completely eliminating use and/or value—courts use the test announced in *Penn Central*.¹⁴⁹ Unlike the categorical *Lucas* rule, the *Penn Central* test involves multifactor balancing; to determine whether a partial regulatory taking has occurred, the court examines the government action for its (1) economic impact on the property owner, (2) degree of interference with the owner’s reasonable investment-backed expectations, and (3) character.¹⁵⁰ These factors are

144. 505 U.S. 1003, 1015, 1029 (1992).

145. *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982). See *infra* text accompanying notes 3578–3656.

146. See *infra* text accompanying notes 3023–3278.

147. *Lucas* makes numerous references to the total elimination of the economic use of land. Dicta make plain that the economic value of personal property receives less Takings Clause protection. 505 U.S. at 1027–28. See, e.g., *Hawkeye Commodity Promotions, Inc. v. Vilsack*, 2007 WL 1189449, *7 (8th Cir. Apr. 24, 2007) (“it appears that *Lucas* protects real property only”). Undeterred, the Federal Circuit applied *Lucas* to personal property in *Maritrans v. United States*, 342 F.3d 1344 (Fed. Cir. 2003), but found no categorical taking.

148. *Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg’l Planning Agency*, 535 U.S. 302, 332 (2002). See *infra* text accompanying notes 3367–3412.

149. 438 U.S. 104 (1978).

150. *Id.* at 124. To be precise, the second *Penn Central* factor was stated in that decision as interference with “distinct,” rather than “reasonable,” investment-backed expectations. The

mere guideposts, with (so far) only modest content—as much an analytical framework as a “test.” Nor are they necessarily exhaustive. The Court stresses that a partial regulatory taking analysis is not governed by “set formula,” but rather is an “essentially ad hoc, factual inquir[y].”¹⁵¹

In almost all instances, a court’s invocation of the *Penn Central* test leads to its evaluation of all three factors. However, each factor can, in compelling circumstances, be conclusive that a taking exists, thereby dispensing with the need to examine the other two. *Lucas* makes this point for the “economic impact” factor, at least in the view of those courts that see no place for investment-backed expectations in a total taking analysis.¹⁵² For the “interference with investment-backed expectations” factor, the emblematic case is *Ruckelshaus v. Monsanto*, where the government acted contrary to an explicit statutory guarantee.¹⁵³ For the “character” factor, the point is made by the *Loretto* “permanent physical occupation” rule.¹⁵⁴

3. *Removal of Restriction Following Taking Holding*

A judicial finding of a taking in no way limits the government’s ability to rescind or amend the offending restriction.¹⁵⁵ Thus, a plaintiff cannot force the government to pay for a permanent taking if the government is willing to eliminate the restriction. On the other hand, once a taking has been found, nothing the government does can undo that fact—it must at least pay for the temporary taking while the restriction was effective.¹⁵⁶

B. *Lucas Test Issues*

Plaintiffs are far more likely to win if the court accepts a *Lucas* total taking argument than if it relegates plaintiff to the *Penn Central*

term “reasonable” is used here and in following discussion because the majority of Supreme Court takings decisions since *Penn Central* use that term. The Court has never explained its alternations between the two terms. Some commentators saw the original “distinct” version as strengthening the hand of takings plaintiffs by focusing on the impact of the regulation. “Distinct” suggests a subjective standard. “Reasonable,” as the following discussion shows, redirected the inquiry toward the appropriateness of the plaintiff’s expectations, particularly in the context of the regulatory landscape at the time the property was acquired. “Reasonable” suggests an objective standard. See *infra* text accompanying notes 212–231.

151. *Id.*

152. See *infra* text accompanying notes 166–171.

153. 467 U.S. 986, 1005 (1984) (“force of this factor is so overwhelming . . . that it disposes of the taking question”).

154. See *infra* text accompanying notes 3578–3656.

155. *First English Evangelical Lutheran Church v. County of Los Angeles*, 482 U.S. 304, 321 (1987).

156. *Id.*

balancing test. This is an incentive for plaintiffs to claim a total taking, if not a physical taking, whenever possible.

1. *Use or Value, or Both?*

The *Lucas* test is ambiguous as to whether plaintiff must show a total loss of both economic use *and value*. *Lucas* itself left the inclusion of value unclear, since many of its references were to residual use. As a result, plaintiffs have since argued that development prohibitions cause a *Lucas* taking even where significant value remained in the parcel. The importance of total loss of value was underscored, however, in *Palazzolo* in 2001¹⁵⁷ and *Tahoe-Sierra* in 2002.¹⁵⁸

Today, most courts in defining the *Lucas* test simply refer to “economic,” “beneficial,” or “productive” use and fail to mention value. The Federal Circuit uses the two measures interchangeably.¹⁵⁹ An early Federal Circuit decision blurs the distinction further, holding that a parcel barred from development under current law may still have an economic use in being held for sale to speculators willing to gamble that restrictions will be lifted someday.¹⁶⁰

2. *How Total Is “Total”?*

How “total” must the “total taking” of use and/or value be for a *Lucas* claim? A property owner left with a mere “token interest” qualifies.¹⁶¹ More than a token interest remaining, however, and the owner must look to *Penn Central*. In *Lucas* itself, the Court acknowledged that an owner “whose deprivation is one step short of complete”—giving 95 percent value loss as an illustration—would not fall within the total taking rule, though there might be a *Penn Central* taking.¹⁶² *Lucas* spoke of the total taking situation as “extraordinary” and “relatively rare.”¹⁶³ And the Court has held that a landowner restricted to building a single residence on an eighteen-acre parcel retained enough

157. 533 U.S. 606, 631 (2001).

158. 535 U.S. 302, 330 (2002) (*Lucas* taking occurs when a regulation “wholly eliminated the *value*” or results in “the permanent ‘obliteration of the *value*’ of a fee simple estate” (emphasis added)).

159. See, e.g., *Maritrans, Inc. v. United States*, 342 F.3d 1344, 1351 (Fed. Cir. 2003).

160. *Fla. Rock Indus., Inc. v. United States*, 791 F.2d 893, 901–03 (Fed. Cir. 1986).

161. *Palazzolo*, 533 U.S. at 631.

162. 505 U.S. 1003, 1019 n.8 (1992).

163. *Id.* at 1017–18.

use and value to fall outside *Lucas*.¹⁶⁴ *Tahoe-Sierra* spoke of the “obliteration” of the parcel’s value.¹⁶⁵

Because the *Lucas* test requires *total* elimination of use and/or value on the plaintiff’s parcel as a whole, its successful use by fee owners of land has been rare. Even a parcel on which one cannot build at all likely retains value as private open space for a neighbor, or for speculation that the restriction someday will be lifted. This raises the issue whether *Lucas* applies to less-than-fee interests in land, where total elimination of use or value may more realistically occur.

3. Role of Expectations

Does the expectations factor of *Penn Central* play a role in *total* takings? The *Lucas* majority opinion offers conflicting signals,¹⁶⁶ though to be sure, the Court’s opinion did not include any discussion of plaintiff’s expectations. Justice Kennedy, in concurrence, found that a role for expectations in total takings analysis was essential.¹⁶⁷ *Palazzolo* and *Tahoe-Sierra* left the question open.

The question assumed prominence through a spat between two Federal Circuit panels. In 1999, one panel found, in what appears to be a holding, that the absence of investment-backed expectations defeats the total taking claim.¹⁶⁸ The following year, a different panel held to the contrary that *Lucas* bars any role for investment-backed expectations in a total taking analysis, dismissing the earlier pronouncement as dictum and inconsistent with the law of the circuit.¹⁶⁹ Later CFC and Federal Circuit decisions unanimously endorsed the no-role-for-expectations view, almost always without discussion.¹⁷⁰ Other courts, in broad prefatory descriptions of the takings tests, appear to assume the absence of a role for expectations in the total takings context.¹⁷¹

164. *Palazzolo*, 533 U.S. 606, 631 (2001).

165. *See supra* note 158; *see also* Appolo Fuels, Inc. v. United States, 381 F.3d 1338, 1347 (Fed. Cir. 2004) (92 percent value loss in one part of relevant parcel and 78 percent in another insufficient for *Lucas* claim), *cert. denied*, 543 U.S. 1188 (2005).

166. *Lucas*, 505 U.S. at 1015–16.

167. *Id.* at 1034.

168. *Good v. United States*, 189 F.3d 1355, 1361 (Fed. Cir. 1999).

169. *Palm Beach Isles Assocs. v. United States*, 231 F.3d 1354, 1362–63 (Fed. Cir. 2000).

170. An exception, containing extensive discussion, is *Cane Tennessee, Inc. v. United States*, 62 Fed. Cl. 703, 711–16 (2004).

171. *See, e.g.*, *Philip Morris, Inc. v. Reilly*, 312 F.3d 24, 36 (1st Cir. 2002) (en banc); *Glenn v. City of Grant City*, 69 S.W.3d 126 (Mo. Ct. App. 2002). *But see* *McQueen v. S.C. Coastal Council*, 580 S.E.2d 116, 119 n.5 (S.C. 2003) (dictum asserting continued confusion on this issue).

4. Possibility of Temporary Total Takings

The United States has argued that there is no such thing as a temporary *Lucas* taking “because by its very nature a temporary taking allows a property owner to recoup some measure of its property’s value.”¹⁷² This conclusion appears to be incorrect. *Tahoe-Sierra*, properly read, rejected *Lucas*’ application only as to development moratoria—that is, land use regulation known to be temporary at the outset—in contrast with prospectively permanent regulation that later becomes temporary when rescinded.

C. Penn Central Test Issues

The *Penn Central* test has rarely been invoked successfully in the Supreme Court, except where a special feature of the challenged regulation, such as physical invasion, total taking, or interference with a fundamental property interest, triggered categorical analysis. This situation led some observers during the 1990s to suggest that only the Court’s categorical takings tests—those for total takings and physical occupations—retained vitality. Since 2000, however, no fewer than three decisions of the Court have made clear that outside the “relatively narrow” per se rule situations,¹⁷³ *Penn Central* reigns triumphant.¹⁷⁴ Thus, when falling short of a *Lucas* total wipeout, a plaintiff still may have suffered a partial regulatory taking under *Penn Central*.¹⁷⁵

Notwithstanding the Court’s recent reinvigoration of the *Penn Central* test, it has shed little light on the content of the test’s three factors, or on how to balance them. Each factor raises “vexing subsidiary questions.”¹⁷⁶ Commentators on property owner and government sides alike have harshly criticized the lack of definition in the factors, particularly now that the Court has had more than a quarter-century to illuminate them. Meanwhile, some state courts have elaborated the *Penn Central* factors into lists of ten or more factors.¹⁷⁷

172. *Seiber v. United States*, 364 F.3d 1356, 1368 (Fed. Cir. 2004).

173. *Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528, 538 (2005).

174. *Id.* See also *Tahoe-Sierra Pres. Council v. Tahoe Reg’l Planning Agency*, 535 U.S. 302 (2002); *Palazzolo v. Rhode Island*, 533 U.S. 606 (2001).

175. See, e.g., *Gove v. Zoning Bd. of Appeals*, 831 N.E.2d 865, 873 (Mass. 2005) (“Recent Supreme Court opinions have emphasized that almost all regulatory takings cases involve the ‘essentially ad hoc inquiries’ described in *Penn Central* . . .”).

176. *Lingle*, 544 U.S. at 539.

177. See, e.g., *Kavanau v. Santa Monica Rent Control Bd.*, 941 P.2d 851, 860 (Cal. 1997).

1. *Economic Impact*

The *Penn Central* inquiry “turns in large part, albeit not exclusively” on the economic impact factor and the degree of interference with property interests.¹⁷⁸

a. *Use or Value?*

Penn Central stated no preference for whether economic impact is to be measured in terms of remaining economic use or remaining market value. Just as in the *Lucas* total takings analysis, many courts today focus on remaining economic use.¹⁷⁹ The most consistent proponents of a market-value focus are the CFC and Federal Circuit.¹⁸⁰

b. *Degree of Loss Required*

The Supreme Court has never given us definite numbers—it has never said that a value loss less than a specified percentage of pre-regulation value precludes a regulatory taking, or that one greater than some threshold (short of a total taking) points strongly toward a taking.¹⁸¹ The Court *has* said several things, however, indicating that the economic impact generally must be very substantial, or arguably severe, where the other *Penn Central* factors are not determinative.

Perhaps most cogent as to the need for substantial loss, the Court said in *Lingle* that the regulatory taking inquiry asks at bottom whether the restriction is the functional equivalent of a physical occupation or appropriation of the land.¹⁸² It is difficult to argue that small to moderate economic impacts are the functional equivalents of appropriations or ousters. The functional equivalency standard of *Lingle* might be the most useful direction we have yet received from the Court as to the meaning of the economic impact and other *Penn Central* factors. Also pointing to a substantial-loss prerequisite, the Court remarked that land use regulation may “under extreme circumstances” result in a taking.¹⁸³ Somewhat less

178. *Lingle*, 544 U.S. at 540. A specialized test has been applied to land devoted to charitable or religious purposes, since economic impact there is less relevant. Applying *Penn Central* to such parcels, “the constitutional question is whether the land-use regulation impairs the continued operation of the property in its originally expected use.” *St. Bartholomew’s Church v. City of New York*, 914 F.2d 348, 356 (2d Cir. 1990).

179. See, e.g., *Coast Range Conifers, L.L.C. v. State*, 117 P.3d 990 (Or. 2005).

180. See, e.g., *Fla. Rock Indus., Inc. v. United States*, 18 F.3d 1560, 1567 (Fed. Cir. 1994).

181. See, e.g., *Cienega Gardens v. United States*, 331 F.3d 1319, 1340, 1345 (Fed. Cir. 2003).

182. *Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528, 539 (2005) (*Loretto*, *Lucas*, and *Penn Central* tests “[e]ach aim[] to identify regulatory actions that are functionally equivalent to the classic taking in which government directly appropriates private property or ousts the owner from his domain.”). The principle long predates *Lingle*. See, e.g., *Williamson County Reg’l Planning Comm’n v. Hamilton Bank*, 473 U.S. 172, 199 (1985).

183. *United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121, 126 (1983).

useful as to the required degree of economic impact, the Court says that mere diminution in property value, short of a total wipeout, cannot by itself establish a taking, citing cases in which value diminutions upwards of 75 percent were upheld.¹⁸⁴ Most broadly, the Court tells us that “[g]overnment hardly could go on if to some extent values incident to property could not be diminished without paying for every such change in the general law.”¹⁸⁵ And that being deprived of a parcel’s most profitable use (“highest and best use”) is not, without more, a taking.¹⁸⁶

The CFC generally has relied on value losses “well in excess of 85 percent” in finding takings;¹⁸⁷ only a handful of cases in that court have produced decisions finding takings based on lower percentages.¹⁸⁸ At the other end of the spectrum, several decisions of the CFC and Federal Circuit have found value losses of up to 60 percent to tip against a taking.¹⁸⁹ Many state court decisions also have required a high degree of economic impact,¹⁹⁰ though some others have not.¹⁹¹

The Court has said that a property right may be taken even when it has no value to the owner, or when infringement of the right arguably *increased* the value of the property.¹⁹² This is so, the Court explained, because property also consists of the rights that the owner exercises in his dominion of the physical thing, such as the right to possess, use, or dispose of the thing. A follow-up decision, however, reminds us that a complete Takings Clause violation consists of both a taking *and* a denial of compensation, and the latter cannot occur without a decrease in value.¹⁹³

184. *Concrete Pipe & Prods. of Cal., Inc. v. Constr. Laborers Pension Trust*, 508 U.S. 602, 645 (1993).

185. *Pa. Coal Co. v. Mahon*, 260 U.S. 393, 413 (1922).

186. *Penn Cent. Transp. Co. v. New York City*, 438 U.S. 104, 125 (1978).

187. *Brace v. United States*, 72 Fed. Cl. 337, 357 & n.32 (2006) (collecting cases).

188. *Fla. Rock Indus., Inc. v. United States*, 18 F.3d 1560, 1567 (Fed. Cir. 1994) (if value loss is 62.5 percent, taking might be found), *on remand*, 45 Fed. Cl. 21 (1999) (finding 73.1 percent value loss to support a taking); *Yancey v. United States*, 915 F.2d 1534, 1539 (Fed. Cir. 1990) (taking found with 77 percent value loss).

189. *Brace*, 72 Fed. Cl. at 357 n.33 (collecting cases).

190. *See, e.g., Animas Valley Sand & Gravel, Inc. v. Bd. of County Comm’rs*, 38 P.3d 59, 67 (Colo. 2001) (*Penn Central* test requires claimant to show that “it falls into the rare category of landowners whose land has a value slightly greater than de minimis.”); *K&K Constr., Inc. v. Mich. Dep’t of Env’tl. Quality*, 705 N.W.2d 365 (Mich. Ct. App. 2005) (67 percent value loss fails to show taking under *Penn Central*), *review denied*, 713 N.W.2d 268 (Mich. 2006) *and cert. denied*, 75 U.S.L.W. 3529 (Apr. 2, 2007).

191. *See, e.g., San Antonio v. El Dorado Amusement Co.*, 195 S.W.3d 238, 247 (Tex. Ct. App. 2006) (40 percent loss in rental income from rezoning supports taking), *petition for review filed*, No. 04-04-0638-CV (Tex. June 12, 2006).

192. *Phillips v. Wash. Legal Found.*, 524 U.S. 156, 170 (1998).

193. *Brown v. Legal Found. of Wash.*, 538 U.S. 216, 240 (2003).

c. Meaning of “Economic Use”

The term “economic use” embraces more than use that returns a profit—such as commercial construction. Rather, it refers to any use for which a significant number of people would be willing to buy the property, making it commercially marketable.¹⁹⁴ Plainly, this sense of “economic use” blurs use and value, and court decisions often use the two terms interchangeably. As in land valuation generally, remaining economic uses of the property asserted by the government defendant must meet a showing of “reasonable probability that the land is both physically adaptable for such use and that there is a demand for such use in the reasonably near future.”¹⁹⁵ Of course, uses not considered economic in one circumstance may be considered so in another.¹⁹⁶

d. Calculating Value Loss

When courts assess the economic impact factor by percentage value loss, the calculation is often said to be based on a comparison of the market value of the property immediately before the government restriction was imposed with the market value immediately afterward.¹⁹⁷ Market value is based on the property’s “highest and best use”—that is, the reasonably probable and legal use of a tract that is physically possible and results in the greatest value. The dominant approach for determining market value before and after imposition of the regulation is the comparable sales approach, where sales of parcels similar to the one alleged to have been taken exist.¹⁹⁸ Otherwise, as often happens with income-producing properties, courts may use an income capitalization approach, which computes the present value of the property from reasonably anticipated future earnings, discounted for risks and other variables stemming from future occurrence.¹⁹⁹ Trial courts are not

194. See, e.g., *Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency*, 34 F. Supp. 2d 1226, 1243 (D. Nev. 1999), *aff'd in part, rev'd in part on other grounds*, 216 F.3d 764 (9th Cir. 2000), *aff'd*, 535 U.S. 302 (2002).

195. *Walcek v. United States*, 49 Fed. Cl. 248, 262 (2001) (quoting *Loveladies Harbor, Inc. v. United States*, 21 Cl. Ct. 153, 158 (1990)), *aff'd*, 303 F.3d 1349 (Fed. Cir. 2002).

196. See, e.g., *Fla. Rock Indus., Inc. v. United States*, 791 F.2d 893 (Fed. Cir. 1986) (in superheated real estate market near Miami, ability to sell development-prohibited wetland for substantial value to speculators willing to gamble that restrictions might someday be lifted was an economic use); *Wyer v. Bd. of Env'tl. Prot.*, 747 A.2d 192 (Me. 2000) (parcel's proximity to recreational beach meant that its use for parking and picnics imparted sufficient value to defeat taking claim).

197. See, e.g., *Cane Tenn., Inc. v. United States*, 71 Fed. Cl. 432, 435 (2005), *aff'd*, 214 Fed. Appx. 978 (Fed. Cir. 2007); see also *Forest Props., Inc. v. United States*, 177 F.3d 1360, 1367 (Fed. Cir. 1999).

198. See generally *Cane Tenn.*, 71 Fed. Cl. at 439.

199. *Id.*

confined to any single method of valuation and may combine methods, as circumstances dictate.²⁰⁰

The CFC has held that a parcel's before-value may reflect use restrictions previously imposed by a government other than the defendant, thus reducing the calculated economic impact of the defendant's restriction, as long as the two governments are acting independently.²⁰¹

e. Reasonable Return

Some decisions note the importance of leaving the plaintiff with a "reasonable return" on equity compared to what he would have earned without the regulation. This element tends to be mentioned in takings decisions involving already existing property uses.²⁰² A close cousin of reasonable return is percentage loss of profits.²⁰³ In the utility and common-carrier rate-setting cases, reasonable ("nonconfiscatory") return generally is the *only* standard applied; *Penn Central* is not invoked.²⁰⁴ The government-prescribed rates need only be reasonable in their overall effect; the Supreme Court holds that it is irrelevant whether individual components of the rate scheme provide a reasonable return.²⁰⁵

f. Recoupment of Cost Basis

Another element of economic impact, cited regularly by the CFC and Federal Circuit but rarely by other courts, is plaintiff's ability to recoup his cost basis (for unimproved land, purchase price) in the property under the challenged regulation.²⁰⁶ This element is likely to

200. *Id.*

201. *City Nat'l Bank of Miami v. United States*, 33 Fed. Cl. 759 (1995) (local restriction *unrelated* to federal wetlands permit program was properly reflected in before-value used in taking analysis of later federal permit denial).

202. *See, e.g.*, *Penn Cent. Transp. Co. v. New York City*, 438 U.S. 104, 136 (1978) (historic preservation ordinance); *Kavanau v. Santa Monica Rent Control Bd.*, 941 P.2d 851, 855 (Cal. 1997) (rent control law).

203. *See, e.g.*, *Rose Acre Farms, Inc. v. United States*, 373 F.3d 1177, 1190 (Fed. Cir. 2004) (remanding for determination whether economic impact of egg-sale restrictions on chicken farm is best measured by value decline or profitability decrease), *cert. denied*, 545 U.S. 1104 (2005). On remand, the trial court in *Rose Acre Farms* found the latter metric more appropriate for measuring the economic impact on a "going business concern." 75 Fed. Cl. 527, 533 (2007) (quoting *Rose Acre Farms*, 373 F.3d at 1188-89). *See also* *Cienega Gardens v. United States*, 331 F.3d 1319, 1342-43 (Fed. Cir. 2003) (government's action forced plaintiff to continue with minuscule rate of return 96 percent less than otherwise obtainable, hence points to taking).

204. *See, e.g.*, *Duquesne Light Co. v. Barasch*, 488 U.S. 299, 307-08 (1989).

205. *Id.*

206. *See, e.g.*, *Fla. Rock Indus., Inc. v. United States*, 791 F.2d 893, 905 (Fed. Cir. 1986) ("[i]n determining . . . economic impact, the owner's opportunity to recoup its investment . . . cannot be ignored."); *Walcek v. United States*, 49 Fed. Cl. 248, 266-67 (2001), *aff'd*, 303 F.3d 1349 (Fed. Cir. 2002).

weigh in the government's favor for any parcel long held by the plaintiff, owing to appreciation, though the CFC generally invokes it only to bolster the court's preexisting disposition to find no taking based on comparison of before-value and after-value. Inability to recoup may not be invoked by plaintiff when he overpaid for the property.²⁰⁷ The plaintiff's cost basis is not adjusted for inflation.²⁰⁸

g. Offsetting Direct Benefits

When regulatory programs provide benefits directly to the property owner, courts may offset them against the economic impact. In *Penn Central*, the Court held that transferable development rights conferred on the landowner "mitigate whatever financial burdens the law has imposed . . . and . . . are to be taken into account in considering the impact of regulation."²⁰⁹ Thus, it seems that direct benefits may offset economic impacts even though they do not relate to the remaining economic uses of the parcel on which the taking is alleged to have occurred.²¹⁰

The alternative to considering a direct benefit in the taking analysis would be to confine it to, at most, the calculation of compensation once a taking was found. The argument is that where benefits do not relate to the remaining uses of the parcel, they are outside the proper concern of the taking determination. Moreover, the argument continues, including benefits in the taking analysis allows the government to deflect takings claims on the cheap, since even a small direct benefit may confer enough economic value to result, under *Penn Central*, in a no-taking holding. This issue surfaced in the three-Justice concurrence in *Suitum v. Tahoe Regional Planning Agency*, which, citing the foregoing arguments, called for limiting consideration of transferable development rights to the calculation of just compensation, where a taking is discerned.²¹¹

2. Reasonable Investment-Backed Expectations

This factor has been castigated by the property rights bar as introducing a psychological element into the extent of a constitutional protection, but the Supreme Court shows no sign of demoting it. The

207. *Cane Tenn., Inc. v. United States*, 57 Fed. Cl. 115, 123 (2003).

208. *Walcek*, 303 F.3d 1349.

209. *Penn Cent. Transp. Co. v. New York City*, 438 U.S. 104, 137 (1978). Transferable development rights are also logically relevant to assessing a *Lucas* total taking claim. *See, e.g., Good v. United States*, 39 Fed. Cl. 81, 108 (1997), *aff'd*, 189 F.3d 1355 (Fed. Cir. 1999).

210. Outside the land use context, see the pre-*Penn Central* decision in *Noble State Bank v. Haskell*, 219 U.S. 104 (1911) (benefit conferred on bank through mutual protection scheme is sufficient compensation for correlative burden).

211. 520 U.S. 725, 745-50 (1997).

analysis is often seen as having two steps: (1) Did the claimant have *actual* investment-backed expectations? and (2) Were those expectations *objectively reasonable*?²¹² As to the second step, a reasonable investment-backed expectation must be more than a unilateral expectation or abstract need.²¹³ The expectations factor figured prominently in *Ruckelshaus v. Monsanto*, in which the Supreme Court found a taking when the government frustrated statutorily created expectations that trade secrets submitted to the government would be kept confidential.²¹⁴ As introduced by *Penn Central*, this factor appeared to refer only to the property owner's expectations at the time of his investment. Later decisions indicate that post-investment events, including the owner's failure to seek development approval as new regulations came into being, may be relevant.²¹⁵

a. Pre-Acquisition Regulation ("Notice Rule")

During the 1990s, several state supreme courts and a few federal circuits adopted, at least arguably, an absolute notice rule. Under this rule, no regulatory taking claim could be entertained on the basis of a government land use restriction imposed pursuant to laws or regulations existing when the land was acquired by the plaintiff—or the adoption of which after acquisition was foreseeable. Courts based the rule on either the investment-backed expectations factor of *Penn Central* or the background principles concept of *Lucas*.

In 2001, the Supreme Court in *Palazzolo v. Rhode Island* struck down the absolute version of the notice rule, but left undecided whether the preexisting regulatory regime still plays some less-than-dispositive role in the takings analysis.²¹⁶ Justice O'Connor's concurrence argued that it does have a role,²¹⁷ and the following year *Tahoe-Sierra* embraced the O'Connor concurrence in dicta.²¹⁸ Her concurrence has proved influential: post-*Palazzolo* decisions, principally in the Federal Circuit, continue to give substantial weight to pre-acquisition regulatory schemes.²¹⁹ These decisions often cite three factors: (1) Is it a highly regulated industry or activity? (2) Was plaintiff aware of the problem that

212. See *Cienega Gardens v. United States*, 331 F.3d 1319, 1346 (Fed. Cir. 2003).

213. *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 1005 (1984).

214. *Id.*

215. The leading decision is *Good v. United States*, 189 F.3d 1355 (Fed. Cir. 1999).

216. 533 U.S. 606 (2001).

217. *Id.* at 632.

218. 535 U.S. 302, 336 (2002).

219. See, e.g., *Appolo Fuels, Inc. v. United States*, 381 F.3d 1338 (Fed. Cir. 2004), *cert. denied*, 543 U.S. 1188 (2005); *Rith Energy, Inc. v. United States*, 270 F.3d 1347 (Fed. Cir. 2001); *Cane Tenn., Inc. v. United States*, 57 Fed. Cl. 115 (2003). All of these cases involved the federal surface mining statute.

spawned the regulation when the property was acquired? and (3) Could the regulation have been reasonably anticipated?²²⁰ A pre-acquisition regulatory scheme is a particular obstacle for takings plaintiffs, such as land developers, who have experience with the scheme prior to acquiring the property, on the theory that they are especially “on notice.”²²¹

b. “Heavily Regulated Field”

Those who voluntarily enter a “heavily regulated field” find regulatory takings claims especially difficult to maintain. Such entities are said to lack a reasonable expectation that the legislature will not enact new requirements from time to time that buttress the regulatory scheme. The list of human activities labeled by courts as heavily regulated fields continues to grow.²²² Since 2001 the Federal Circuit also has incorporated the “heavily regulated field” factor into its determination of the weight to be given pre-acquisition regulatory schemes. But not *all* expectations are unreasonable in a heavily regulated field; if the new law departs sufficiently from the pre-acquisition pattern of legislation, a taking may still be found.²²³ It appears that no court has yet said that land use generally is a heavily regulated field, with all that determination would entail for landowners seeking to establish takings.

c. Buyer Knew, or Should Have Known, that Economic Prospects Were Particularly Uncertain

This factor plainly undermines the reasonable investment-backed expectations of the land buyer, cutting against a later regulatory taking claim. Examples include a person who acknowledges at the time of purchase that regulatory approvals will be hard to obtain,²²⁴ who is or should be aware at such time of government planning affecting economic

220. See, e.g., *Appolo Fuels*, 381 F.3d at 1349. For a state court decision, see *LaSalle Nat'l Bank v. City of Highland Park*, 799 N.E.2d 781, 797 (Ill. App. Ct. 2003).

221. *K&K Constr., Inc. v. Dep't of Envtl. Quality*, 705 N.W.2d 365 (Mich. Ct. App. 2005), *rev. denied*, 713 N.W.2d 268 (Mich. 2006), *and cert. denied*, 75 U.S.L.W. 3529 (Apr. 2, 2007). See also, e.g., *Appolo Fuels*, 54 Fed. Cl. 717 (2002), *aff'd*, 381 F.3d 1338 (Fed. Cir. 2004), *cert. denied*, 543 U.S. 1188 (2005).

222. See, e.g., *Concrete Pipe & Prods. of Cal., Inc. v. Constr. Laborers Pension Trust*, 508 U.S. 602, 645–46 (1993) (employee pension plans); *Appolo Fuels*, 381 F.3d at 1349 (coal mining); *Branch v. United States*, 69 F.3d 1571, 1581 (Fed. Cir. 1995) (banking); *People's Super Liquor Stores, Inc. v. Jenkins*, 432 F. Supp. 2d 200, 215 (D. Mass. 2006) (liquor stores); *Burlington N. R.R. Co. v. United Transp. Union*, 822 F. Supp. 797, 802 (D.D.C. 1991) (railroad labor disputes), *aff'd on other grounds*, 987 F.2d 784 (D.C. Cir. 1993); *Hawkeye Commodity Promotions, Inc. v. Vilsack*, 486 F.3d 430, 442 (8th Cir. 2007) (gambling); *McCrothers Corp. v. City of Mandan*, 728 N.W.2d 124, 141 (N.D. 2007) (adult entertainment establishments).

223. See, e.g., *Cienega Gardens v. United States*, 331 F.3d 1319 (Fed. Cir. 2003).

224. *Good v. United States*, 189 F.3d 1355 (Fed. Cir. 1999).

prospects,²²⁵ or who pays substantially less for the parcel than its unregulated value.²²⁶

d. Initially Limited Intentions of Property Buyer

Those who buy land with limited economic intentions, and who keep the parcel in low-intensity use for years, may be barred from asserting a taking when later regulations thwart the owner's expanded development desires.²²⁷

e. "Primary" Expectations

Regulations interfering with the "primary use" of a parcel are said to particularly interfere with owner expectations. By primary use, courts have meant, for example, the use at the time a restriction was imposed, particularly where that use is a longstanding economic one,²²⁸ or the sole commercial purpose for which the property was purchased.²²⁹

f. Acquisition Without Investment

Do persons who acquire property by gift or inheritance—i.e., without *investment-backed* expectations—receive less Takings Clause protection? In her *Palazzolo* concurrence, Justice O'Connor said: "We . . . have never held that a takings claim is defeated simply on account of the lack of a personal financial investment by a postenactment acquirer of property, such as a donee, heir, or devisee."²³⁰ This statement, of course, does not preclude the absence of investment from being a less-than-determinative factor in the government's favor.²³¹

3. Character of Government Action

This is the *Penn Central* test's most elastic factor. When first announced, the Court explained it only as meaning that takings "may more readily be found when the interference with property can be characterized as a physical invasion by government . . . than when interference arises from some public program adjusting the benefits and

225. *Avenal v. United States*, 100 F.3d 933, 937 (Fed. Cir. 1996).

226. *Gazza v. N.Y. Dep't of Envtl. Conservation*, 679 N.E.2d 1035 (N.Y. 1997).

227. *See, e.g., State Dep't of Envtl. Prot. v. Burgess*, 772 So. 2d 540 (Fla. Dist. Ct. App. 2000); *Mayhew v. Town of Sunnyvale*, 964 S.W.2d 922 (Tex. 1998) (zoning laws adopted after parcel was acquired did not frustrate any investment-backed expectations, since parcel was purchased for ranch use and so used for four decades).

228. *Penn Cent. Transp. Co. v. New York City*, 438 U.S. 104, 136 (1978); *San Remo Hotel L.P. v. City & County of San Francisco*, 41 P.3d 87, 109 (Cal. 2002).

229. *Fla. Rock Indus., Inc. v. United States*, 45 Fed. Cl. 21, 38–39 (1999).

230. 533 U.S. 606, 635 (2001).

231. *See Gove v. Zoning Bd. of Appeals*, 831 N.E.2d 865, 874–75 (Mass. 2005).

burdens of economic life to promote the common good.”²³² This physical/regulatory distinction remains the most important element of the character factor,²³³ though the Court has since added others. Still other considerations listed here, while not yet formally categorized under “character,” are arguably character-like.

Lingle suggests that the character factor, or at least a part of it, is to be given less weight than the previous two *Penn Central* factors.²³⁴ By this suggestion, *Lingle* may be referring to its finding that takings law looks to the degree, character, and distribution of the government action’s *impacts*, with the implication that the nature of the underlying government purpose, part of the character factor, has been downgraded in the regulatory takings calculus.²³⁵

a. *Balancing of Public Interest and Private Burden*

From time to time, courts assert that regulatory takings analysis (outside the total taking context) includes a balancing of the public interest advanced by the government measure against the burden on the property owner.²³⁶ After misconstruing *Lucas* to excise such balancing from the character factor of *Penn Central* and substitute a nuisance inquiry,²³⁷ the Federal Circuit has now corrected itself.²³⁸ The pendulum may swing yet again, however, if *Lingle*, as noted, is construed to minimize the importance of the government interest being furthered.

Balancing, when it occurs at all, tends to characterize the government purpose only in broad terms. For example, courts consistently refuse to find regulatory (but not physical) takings based on government countermeasures in the broad realms of war, emergencies, and national security.²³⁹ Public health and safety purposes may also be

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

233. The fact that a minimal physical occupation having no economic impact is a per se taking while a 60 percent loss in a property’s value due to regulation is likely not to be a taking amply illustrates the point.

234. *Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528, 538–39 (2005) (noting that “primary” among the *Penn Central* factors are economic impact and interference with investment-backed expectations, and then that the character factor “may be relevant”).

235. *See, e.g., City of Coeur d’Alene v. Simpson*, 136 P.3d 310, 318 n.5 (Idaho 2006) (inquiry into “relative goodness” of government action not part of character factor after *Lingle*); *Mansoldo v. State*, 898 A.2d 1018, 1024 (N.J. 2006) (fact that prohibited land uses posed danger has no bearing on takings analysis under *Lingle*).

236. *See, e.g., Keystone Bituminous Coal Ass’n v. DeBenedictis*, 480 U.S. 470, 488, 492 (1987); *Phillip Morris, Inc. v. Reilly*, 312 F.3d 24 (1st Cir. 2002) (en banc) (fact that publication of cigarette manufacturers’ trade secrets “could” protect public health is not government interest sufficiently compelling to offset private loss caused).

237. *Loveladies Harbor, Inc. v. United States*, 28 F.3d 1171 (Fed. Cir. 1994).

238. *Bass Enters. Prod. Co. v. United States*, 381 F.3d 1360 (Fed. Cir. 2004).

239. *See, e.g., United States v. Cent. Eureka Mining Co.*, 357 U.S. 155, 168 (1958) (temporary wartime shutdown of gold mines not a taking, since “[w]ar . . . demands the strict

generically cited by courts in tilting against a taking. By contrast, courts tend not to closely dissect the value of the government action in the particular circumstance before them and rank that value within the larger category. For example, it is improbable that a court would assess whether a particular wetland is of low or high ecological value as part of balancing the wetland's loss against the burden on the wetland owner of barring its development.

b. Benefit Creation Versus Harm Avoidance

According to a classic litmus test, a government restriction viewed as creating a public benefit (e.g., a park) is compensable, while a restriction seen as averting a public harm (e.g., pollution) is not. In 1992, *Lucas* criticized this benefit-creation/harm-avoidance dichotomy, branding it as value-laden and easily manipulated.²⁴⁰ But while less invoked by courts in situations susceptible to both characterizations, the distinction still appears to influence courts *sub silentio* in other contexts, and is even cited explicitly on occasion.²⁴¹ As a result, exercises of the police power that directly protect public health and safety, such as preventing pollution of a community's water supply, remain unlikely to be a taking under *Penn Central*.²⁴²

c. Need for Specific Property

The character factor demands that the government's conduct target *specific* property, according to the concurring justice and four dissenters in *Eastern Enterprises v. Apfel*.²⁴³ Under this view, a taking claim may arise when the government appropriates money from a specifically identified fund.²⁴⁴ But a statute imposing a generalized monetary

regulation of nearly all resources."); *Block v. Hirsh*, 256 U.S. 135, 157 (1920) (wartime rent controls are not a taking, in part because "[a] limit in time, to tide over a passing trouble, well may justify a law that could not be upheld as a permanent change.").

240. 505 U.S. 1003, 1024–25 (1992) (citing wetlands preservation).

241. See, e.g., *Gahagan v. United States*, 72 Fed. Cl. 157, 162 (2006); *Fla. Rock Indus., Inc. v. United States*, 45 Fed. Cl. 21, 40 (1999) (wetlands preservation).

242. See, e.g., *Appolo Fuels, Inc. v. United States*, 381 F.3d 1338, 1350–51 (Fed. Cir. 2004), *cert. denied*, 543 U.S. 1188 (2005); *Bass Enters.*, 381 F.3d 1360; *First English Evangelical Lutheran Church v. County of Los Angeles*, 258 Cal. Rptr. 893 (Ct. App. 1989). A rare exception is *Rose Acre Farms, Inc. v. United States*, 75 Fed. Cl. 527, 536 (2007) ("despite government's attempt to ensure the public's health and safety [by controlling salmonella], a compensable taking occurred"), still subject to appeal.

243. 524 U.S. 498 (1998). Classification of the specific-property prerequisite under the character factor was suggested in Justice Kennedy's concurrence, *id.* at 542 (Kennedy, J., concurring), but it could also be considered a threshold issue.

244. See, e.g., *Brown v. Wash. Legal Found.*, 538 U.S. 216 (2003) (interest on lawyers' trust accounts); *Webb's Fabulous Pharms., Inc. v. Beckwith*, 449 U.S. 155 (1980) (interest on interpleader fund). Both of these decisions used an appropriation analysis and did not balance *Penn Central* factors.

liability—e.g., that A pay B out of unspecified funds—is not a taking, though it may offend substantive due process. Lower courts have endorsed this principle,²⁴⁵ though it is hardly settled law as yet. Note that if a taking claim must be based on specific property, this calls into question whether special assessments, such as for road improvements, can be takings.²⁴⁶

d. Average Reciprocity of Advantage

This inquiry looks at whether a restriction not only burdens the landowner, but also benefits him indirectly by subjecting other similarly situated landowners to the same sort of restriction. The paradigmatic example is zoning: a homeowner is required to forego, say, commercial use of his property, but benefits from others in the area being restricted in the same way. The Supreme Court most famously stated the average reciprocity factor in *Pennsylvania Coal Co. v. Mahon*,²⁴⁷ and has cited it several times since.²⁴⁸ *Penn Central* makes clear that the burdens and benefits accruing to the plaintiff from the regulatory program need not be equal, and that the other similarly restricted properties do not have to be in the immediate area.²⁴⁹

The word “average” suggests that any “reciprocity” between burdens and benefits be assessed with reference to the entire affected group of property owners, not each individual.²⁵⁰ But the concept, properly understood, should be limited to the regulatory program at issue. Thus the Supreme Court was arguably misguided when it seemed to interpret average reciprocity as applying to the universe of *all* land use restrictions.²⁵¹

245. See, e.g., *Commonwealth Edison Co. v. United States*, 271 F.3d 1327, 1338–40 (Fed. Cir. 2001) (en banc); *Smith v. Cortes*, 879 A.2d 382 (Pa. Commw. Ct. 2005), *aff'd*, 901 A.2d 980 (Pa. 2006).

246. See *Creason v. City of Washington*, 435 F.3d 820, 825 (8th Cir. 2006) (matter is “somewhat unclear”).

247. 260 U.S. 393, 415 (1922).

248. See, e.g., *Tahoe-Sierra Pres. Council v. Tahoe Reg'l Planning Agency*, 535 U.S.302, 341 (2002) (development moratorium); *Agins v. City of Tiburon*, 447 U.S. 255, 262 (1980) (density zoning). A lower court illustration of average reciprocity is *First English Evangelical Lutheran Church v. County of Los Angeles*, 258 Cal. Rptr. 893, 905 (Ct. App.1989) (construction moratorium).

249. 438 U.S. 104, 133–35 (1978).

250. See *Keystone Bituminous Coal Co. v. DeBenedictis*, 480 U.S. 470, 491 n.21 (1987); *San Remo Hotel L.P. v. City & County of San Francisco*, 41 P.3d 87, 108 (Cal. 2002).

251. *Keystone*, 480 U.S. at 491.

e. Direct Benefits for Government

It is the deprivation of the property owner rather than the sovereign's gain of a right or interest that constitutes the taking.²⁵² Thus, it is not a takings prerequisite that the government action resulted in benefits to the government.²⁵³ But significant governmental benefits, when present, plainly tip the balance toward the plaintiff in suggesting government bias or bad faith. An example is when local jurisdictions restrict the use of private land to allow future government acquisition, as for a roadway, at a lower price than would otherwise obtain.²⁵⁴

f. Primary Purpose of Government Action Was to Help Property Owner

Where the plaintiff was the intended beneficiary of the government action, the taking claim usually will be rejected, even though there are incidental government benefits as well.²⁵⁵

g. Governmental Bad Faith

Takings law is based, courts repeatedly say, on "fairness and justice."²⁵⁶ Hence, it is unsurprising that when the government is seen as having acted in bad faith, courts tilt toward the plaintiff. This Primer cites examples,²⁵⁷ and Supreme Court decisions offer further illustrations.²⁵⁸ Of course, substantive due process is an alternate theory.

h. Voluntariness

The fact that plaintiff subjected himself *voluntarily* to the government act can be an effective government defense, often invoked with regard to rent or price controls. For example, rent control is less likely to work a taking if "[t]here is no requirement that the apartments in question be used for purposes which bring them under the [rent

252. *United States v. Gen. Motors Corp.*, 323 U.S. 373, 378 (1944).

253. *United States v. Sec. Indus. Bank*, 459 U.S. 70, 78 (1982).

254. *See, e.g., Joint Venture, Inc. v. Dep't of Transp.*, 563 So. 2d 622 (Fla. 1990).

255. *YMCA v. United States*, 395 U.S. 85 (1969) (no taking due to occupation of buildings by U.S. troops seeking to protect them from rioters); *Belk v. United States*, 858 F.2d 706 (Fed. Cir. 1988) (no taking when U.S. terminated claims of American hostages against Iran to secure their release).

256. *Armstrong v. United States*, 364 U.S. 40, 49 (1960).

257. *See, e.g., infra* text accompanying notes 342–3551.

258. *Tahoe-Sierra Pres. Council v. Tahoe Reg'l Planning Agency*, 535 U.S. 302, 333 (2002) (were it not for findings below that agency acted in good faith, "[the Court] might have concluded that the agency was stalling" and found a taking) (citing *City of Monterey v. Del Monte Dunes at Monterey, Ltd.*, 526 U.S. 687, 698 (1999) (involving city's repeated rejections of development plans after each of five progressively scaled-back proposals accommodating city's demands)).

control] Act.”²⁵⁹ Also illustrative are cases attacking limits on health-care service charges, or limiting reimbursement to the care provider.²⁶⁰ But how far can the voluntariness defense be pushed, in the sense that many legally voluntary human activities are not voluntary in fact?²⁶¹ In contrast, a business that is legally compelled to operate, such as a common carrier or electric utility, has a forceful taking claim if government-prescribed rates do not allow a reasonable rate of return.²⁶²

i. “Singling Out” Property Owner Versus General Application

The fact that a government action “singles out” the plaintiff from similarly situated landowners is often said to raise a taking (and equal protection) issue.²⁶³ The rationale appears to be that singling out offends “fairness and justice” and suggests bad faith,²⁶⁴ or points to an absence of average reciprocity of advantage.²⁶⁵ Similarly, when the government seeks to remedy a widespread social ill not attributable to any particular group, concentrating the remedial burden on such a group (particularly when there are alternatives) may tip the character factor toward supporting a taking.²⁶⁶

D. Parcel-as-a-Whole Rule

Under *Penn Central*, a court must assess the economic loss to the property owner and the degree of interference with her expectations, and

259. *Bowles v. Willingham*, 321 U.S. 503, 517 (1944).

260. *Compare* *Garellick v. Sullivan*, 987 F.2d 913 (2d Cir. 1993) (though regulations limited anesthesiologists’ charges to Medicare patients in hospitals, anesthesiologists did not have to work in hospitals) *with* *Methodist Hosps. v. Indiana*, 860 F. Supp. 1309 (N.D. Ind. 1994) (Medicaid reimbursement rates might effect taking, since hospital’s emergency room was obliged to treat all patients, including Medicaid patients).

261. For example, the *Garellick* anesthesiologists, *supra* note 260, claimed that not working in hospitals would cause economic hardship.

262. *See, e.g.*, *Reg’l Rail Reorg. Act Cases*, 419 U.S. 102 (1974) (recognizing possibility of “erosion taking” if statute compels rail operations at a loss), and the common-carrier rate cases generally.

263. *See* *Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528, 542–44 (2005); *Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg’l Planning Agency*, 535 U.S. 302, 341 (2002); *Nollan v. Cal. Coastal Comm’n*, 483 U.S. 825, 835 n.4 (1987); *Penn Cent. Transp. Co. v. New York City*, 438 U.S. 104, 133–34 n.30 (1978); *Maritrans v. United States*, 342 F.3d 1344 (Fed. Cir. 2003) (fact that double-hull requirement for oil tankers applies across entire industry cuts against taking); *K&K Constr., Inc. v. Dep’t of Env’tl. Quality*, 705 N.W.2d 365 (Mich. Ct. App. 2005) (fact that state wetlands program applied to all similarly situated landowners provided average reciprocity of advantage and cut against taking), *rev. denied*, 713 N.W.2d 268 (Mich. 2006), *and cert. denied*, 125 S. Ct. 1928 (2007). *But see* *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1027 n.14 (regulation specifically directed at land use does not acquire takings immunity “by plundering landowners generally.”).

264. *See supra* Section II.C.3.g.

265. *See supra* Section II.C.3.d.

266. *Cienega Gardens v. United States*, 331 F.3d 1319, 1338–39 (Fed. Cir. 2003).

under *Lucas*, at least the former. Critically, this inquiry focuses on the *proportionate* rather than absolute size of the loss—that is, it compares what the government action took from the property owner with what the owner still has.²⁶⁷ To assess what the owner still has, the court must define the extent of the plaintiff’s property to be included in the analysis. This quantum of property is called the “parcel as a whole” or “relevant parcel.” Not surprisingly, the property owner wants the relevant parcel defined narrowly so as to enhance the proportionate impact of the government action, while the government wants it defined broadly so as to diminish the proportionate impact. A court’s determination of the parcel as a whole may easily decide the case. While state law is often key to defining which interests are afforded federal Takings Clause protection as property, it is federal law that determines how those interests are aggregated for purposes of determining the relevant parcel.²⁶⁸

The parcel-as-a-whole concept has three dimensions: spatial (most commonly at issue), functional, and temporal.

1. *Spatial Dimension*

Takings law, says the Supreme Court, “does not divide a single parcel into discrete segments and attempt to determine whether rights in a particular segment have been entirely abrogated.”²⁶⁹ Rather, the Court focuses “both on the character of the action and on the nature and extent of the interference with rights in the parcel as a whole.”²⁷⁰ This rule applies both horizontally (which acreage) and vertically (air rights, timber and crops, and mineral rights).

a. *But What Is the “Parcel as a Whole”?*

The Court’s formulation leaves much room for interpretation. At a minimum, the Court plainly means that one may not exclude acreage from the relevant parcel solely to isolate the regulated portion of plaintiff’s property, and thereby maximize the relative effect of the government action.²⁷¹ Thus, for example, a court will usually find no taking when the owner of a development-restricted wetland fails to show that economic use of the unrestricted upland portion of the parcel is

267. *Keystone Bituminous Coal Ass’n v. DeBenedictis*, 480 U.S. 470, 497 (1987) (“[O]ur test for regulatory taking requires us to compare the value that has been taken from the property with the value that remains in the property . . .”).

268. *Seiber v. United States*, 364 F.3d 1356, 1369 (Fed. Cir. 2004).

269. *Tahoe-Sierra Pres. Council v. Tahoe Reg’l Planning Agency*, 535 U.S. 302, 327 (2002) (quoting *Penn Central Transp. Co. v. New York City*, 438 U.S. 104, 130 (1978)).

270. *Id.*

271. *See, e.g., id.* at 331 (“[D]efining the property interest taken in terms of the very regulation being challenged is circular.”).

infeasible. But simply saying that a parcel cannot be defined in terms of the challenged regulation allows owners to argue for whittling down the relevant parcel based on a host of other factors, noted below.

b. Current Approach

Most courts use an ad hoc approach to define the parcel as a whole. The effort, said the CFC, “should be to identify the parcel as realistically and fairly as possible, given the entire factual and regulatory environment.”²⁷² Similarly, the Federal Circuit has urged “a flexible approach, designed to account for factual nuances.”²⁷³ In practice, the pattern has been to include contiguous plaintiff-owned land in the relevant parcel unless there is good reason to exclude it.²⁷⁴ That pattern is arguably affirmed in dictum from *Tahoe-Sierra*: “[a]n interest in real property is defined [in the parcel-as-a-whole context] by the metes and bounds that describe its geographic dimensions. . . .”²⁷⁵ *Tahoe-Sierra* thus seems to disfavor the thesis of Professor John Fee,²⁷⁶ cited by the Court one year earlier²⁷⁷ and adopted by a few lower courts,²⁷⁸ under which the relevant-parcel inquiry should be whether the acreage whose inclusion is in question could be independently developed in an economically viable way. If so, argues Professor Fee, it should fall outside the relevant parcel.

Owners have contended, with limited success, that portions of their acreage should be excluded from the relevant parcel because it is separated by a road, subdivided as different lots, owned by a different entity (e.g., principals of the plaintiff partnership in their individual capacity), in a different zoning or tax assessment status, acquired at a different time or through a different transaction, financed separately, beyond the scope of the permit being sought, economically viable in its own right, and so on.²⁷⁹ Inclusion in the relevant parcel is particularly favored by courts when the plaintiff-developer has treated the tracts as a

272. *Ciampitti v. United States*, 22 Cl. Ct. 310, 319 (1991).

273. *Loveladies Harbor, Inc. v. United States*, 28 F.3d 1171, 1181 (Fed. Cir. 1994).

274. *See Giovanella v. Conservation Comm’n of Ashland*, 857 N.E.2d 451 (Mass. 2006) (collecting cases) cert. denied, 127 S. Ct. 1826 (2007). *Compare* *Dist. Intown Props. Ltd. P’ship v. Dist. of Columbia*, 198 F.3d 874 (D.C. Cir. 1999) (contiguous parcel purchased and long treated as a single unit by owner is relevant parcel, not individual lots into which it was eventually subdivided), *with* *E. Cape May Assocs. v. New Jersey*, 777 A.2d 1015 (N.J. Super. Ct. App. Div. 2001) (excluding acreage based on five supporting factors).

275. *Tahoe-Sierra*, 535 U.S. at 331. *See* *Walcek v. United States*, 303 F.3d 1349, 1356 (Fed. Cir. 2002) (*Tahoe* “reaffirmed that regulatory takings analysis properly analyzes . . . the landowner’s entire parcel.”).

276. John E. Fee, *Unearthing the Denominator in Regulatory Takings Claims*, 61 U. CHI. L. REV. 1535 (1994). For an update by Prof. Fee, see John E. Fee, *Of Parcels and Property*, in *TAKING SIDES ON TAKINGS ISSUES* (Thomas Roberts ed., 2002).

277. *Palazzolo v. Rhode Island*, 533 U.S. 606, 631 (2001).

278. *See generally* *City of Coeur d’Alene v. Simpson*, 136 P.3d 310, 323 (Idaho 2006).

279. *See Giovanella*, 857 N.E.2d 451 (collecting cases).

single income-producing unit for purposes of financing, planning, or development.²⁸⁰ Indeed, unified treatment by the owner has trumped noncontiguity with the regulated tract, normally a factor that leads to exclusion.²⁸¹ An individual subdivided lot, owned by a developer in combination with others within a development project, is invariably rejected as a parcel as a whole.²⁸²

Though the relevant-parcel factors are a bit different in takings cases not involving real estate, the issue must still be resolved.²⁸³ Where no unique attribute inheres in the restricted portion of non-land property, the relevant “parcel” rule has been said to apply “with even greater force” than to real property.²⁸⁴

c. Sold-Off Property Interests

A recurring relevant-parcel issue has been whether to include land sold off prior to a certain date. The government has argued that inclusion is required to forestall “strategic behavior”: land conveyances motivated by the owner’s desire to place himself in an advantageous position in the event he files a taking action. The paradigmatic example is selling off acreage on which development is likely to be approved in order to enhance the proportionate economic impact should development be barred on the remaining portion. Perhaps with the goal of averting strategic behavior, the Federal Circuit asserts that a key factor in whether the sold-off property should be included in the relevant parcel is whether the land was “developed or sold before the regulatory environment existed.”²⁸⁵

Courts occasionally note a relevant-parcel issue when the plaintiff is the holder of the *sold-off* parcel or interest—rather than, as above, the

280. See, e.g., *Appolo Fuels, Inc. v. United States*, 381 F.3d 1338, 1346 (Fed. Cir. 2004), *cert. denied*, 543 U.S. 1188 (2005); *Forest Props., Inc. v. United States*, 177 F.3d 1360, 1365 (Fed. Cir. 1999); *K&K Constr., Inc. v. Dep’t of Natural Res.*, 575 N.W.2d 531 (Mich. 1998).

281. See, e.g., *Cane Tenn., Inc. v. United States*, 62 Fed. Cl. 481 (2003); *Town of Jupiter v. Alexander*, 747 So. 2d 395 (Fla. Dist. Ct. App. 1998).

282. See, e.g., *Dist. Intown Props. Ltd. P’ship v. Dist. of Columbia*, 198 F.3d 874, 880 (D.C. Cir. 1999); *Tabb Lakes Ltd. v. United States*, 10 F.3d 796, 802 (Fed. Cir. 1993).

283. See, e.g., *Concrete Pipe & Prods. of Cal., Inc. v. Constr. Laborers Pension Trust*, 508 U.S. 602, 643–44 (1993).

284. *Rose Acre Farms, Inc. v. United States*, 373 F.3d 1177, 1190 (Fed. Cir. 2004) (holding that because restriction on sale of eggs due to salmonella concerns applied to each farm as a whole, relevant “parcel” is eggs from three salmonella-restricted farms combined), *cert. denied*, 545 U.S. 1104 (2005).

285. *Loveladies Harbor, Inc. v. United States*, 28 F.3d 1171, 1181 (Fed. Cir. 1994). *Accord K&K Constr.*, 575 N.W.2d at 584 n.9. *But see Palm Beach Isles Assoc. v. United States*, 208 F.3d 1374, 1381 (Fed. Cir. 2000) (though statute was in place when uplands portion was sold, other factors tip against its inclusion in relevant parcel).

owner of the tract from which the interest was carved.²⁸⁶ As in the previous paragraph, these decisions show judicial aversion to strategic behavior—here, to a landowner’s paring off a smaller parcel or fractional interest designed to be rendered without economic use, and thus “taken,” by likely regulation.

d. Vertical Parcel as a Whole

Penn Central, the decision that debuted the relevant-parcel rule, was itself a vertical case: the Supreme Court held that plaintiff’s air rights could not be considered separately from the land rights beneath. The Court reaffirmed the vertical parcel-as-a-whole concept in *Keystone Bituminous Coal Ass’n v. DeBenedictis* with regard to a plaintiff who owned both a surface and mineral estate—despite state-law recognition of mineral estates as a separate property interest.²⁸⁷

2. Functional Dimension

The functional aspect of the parcel-as-a-whole doctrine focuses on the property owner’s residual rights following the government action. “[W]here an owner possesses a full ‘bundle’ of property rights, the destruction of one ‘strand’ of the bundle is not a taking because the aggregate must be viewed in its entirety.”²⁸⁸ Neither the Supreme Court nor the lower courts always follow this holistic edict, however. Rather, they have occasionally accepted that abrogation of a single right can be a taking despite plaintiff’s retention of other rights in the same property.²⁸⁹ Why the functional parcel-as-a-whole rule did not apply in these cases is clear with respect to those property rights deemed so fundamental as to tolerate little or no infringement.²⁹⁰ For other property rights, the reasons are debatable.

286. *Regency Outdoor Adver., Inc. v. City of Los Angeles*, 139 P.3d 119, 128 (Cal. 2006) (landowner facing imminent regulation cannot manufacture taking by leasing to plaintiff a narrow interest as to which regulation removes all economic use); *Adams Outdoor Adver., Inc. v. City of E. Lansing*, 614 N.W.2d 634, 639 (Mich. 2000) (similar); *City of Coeur d’Alene v. Simpson*, 136 P.3d 310, 320 (Idaho 2006) (circumstances as to plaintiff’s purchase of parcels from larger tract are relevant to whether larger tract might be relevant parcel).

287. 480 U.S. 470 (1987). *Accord* *Machipongo Land & Coal Co., Inc. v. Commonwealth*, 799 A.2d 751 (Pa. 2002). *But cf.* *State ex rel. R.T.G., Inc. v. State*, 780 N.E.2d 998 (Ohio 2002) (coal rights are several for regulatory taking analysis under *state* constitution).

288. *Andrus v. Allard*, 444 U.S. 51, 66 (1979), *cited in* *Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg’l Planning Agency*, 535 U.S. 302, 327 (2002).

289. *See, e.g., Hodel v. Irving*, 481 U.S. 704, 716 (1987) (fundamental right to pass on property to one’s heirs); *Daniels v. Area Plan Comm’n of Allen County*, 306 F.3d 445 (7th Cir. 2002) (right to enforce restrictive covenant on nearby parcels); *Manufactured Hous. Cmty. of Wash. v. State*, 13 P.3d 183 (Wash. 2000) (mobile-home park owner’s unencumbered right to sell, abrogated by statutory grant of right of first refusal to tenants).

290. Prime examples are the rights to exclude others and to pass on property to one’s heirs.

One consequence of the functional parcel-as-a-whole rule is that a regulatory taking claim is more likely to succeed when the plaintiff owns only a narrow, fractional property interest, such as a mineral estate, rather than a fee simple. The wide range of economic uses available to the typical fee owner will almost always allow the government to point to sufficient residual use and value to avoid a taking.

3. *Temporal Dimension*

The temporal parcel-as-a-whole rule bars divvying up the period during which plaintiff's property interest runs (indefinitely in the case of a fee simple absolute). A court may not look at only the period during which the restriction was in effect, which might well trigger the *Lucas* test, but must factor in economic use of the property by the plaintiff both before and after, which likely consigns the claim to a *Penn Central* analysis.

Though formally embraced by the Supreme Court only recently, in *Tahoe-Sierra* for land use moratoria,²⁹¹ the temporal parcel-as-a-whole rule has hoary case law antecedents. But while land use moratoria pose a "can't use the land now, but can use it later" situation, the precedent derives from the temporal reverse. One such antecedent involves the newly imposed zoning scheme that allows nonconforming uses to continue for a while. Courts have long said that such an amortization period, allowing owners continued use for a period to recoup their investments and earn a reasonable, if temporary, economic return, deflects a taking claim.²⁹² A related example stems from billboard prohibitions, where the key issue is whether the owner has been given a reasonable period before the billboards must be taken down.²⁹³

Similarly, the Federal Circuit rejected a company's argument that in assessing its taking claim based on mining permit revocation, the court should ignore the period before its permit was revoked, when it mined profitably.²⁹⁴ "In measuring the regulatory burden . . . it is appropriate to look at the extent to which [the company] was able to exploit its leases throughout the permitting period."²⁹⁵ Thus, there was no total taking and *Penn Central* applied. A later Federal Circuit decision reaffirmed this insistence on looking at pre-restriction use and explicitly linked it to

291. See *infra* text accompanying notes 3367–3556.

292. See, e.g., 801 Conklin Street Ltd. v. Town of Babylon, 38 F. Supp. 2d 228, 249 (E.D.N.Y. 1999).

293. See, e.g., Tahoe Reg'l Planning Agency v. King, 285 Cal. Rptr. 335, 351–52 (Ct. App. 1991); Village of Valatie v. Smith, 632 N.E.2d 1264 (N.Y. 1994).

294. Rith Energy, Inc. v. United States, 247 F.3d 1355 (Fed. Cir. 2001).

295. *Id.* at 1362.

Tahoe-Sierra's temporal parcel-as-a-whole rationale for why land development moratoria generally do not effect takings.²⁹⁶

4. *Concerns of the Conservative Justices*

As often as the Supreme Court has reaffirmed the relevant-parcel rule, the conservative Justices have signaled concern.²⁹⁷ In 1992, Justice Scalia discussed relevant-parcel doctrine in *Lucas*,²⁹⁸ even though it was not an issue in that case. In *Palazzolo* dicta, Justice Kennedy referred to it as a “difficult, persisting question” and noted that “we have at times expressed discomfort with the logic of this rule.”²⁹⁹ *Tahoe-Sierra* revealed shadings among the Court's conservatives—Justices Kennedy and O'Connor signed on to the majority opinion, with its ringing endorsement of the parcel-as-a-whole rule, while Justices Thomas and Scalia referred in dissent to “this questionable rule.”³⁰⁰

Query whether there are now five votes on the Court supporting some shrinkage of the parcel-as-a-whole rule. *Lingle*, by stressing the functional equivalence between regulatory and physical takings, may prompt the conservative Justices to question whether the hallowed position of the parcel-as-a-whole rule in the regulatory takings framework can be reconciled with its complete absence from analysis of physical occupation takings claims. Moreover, parcel-as-a-whole doctrine is not well developed in Supreme Court (in contrast with CFC and Federal Circuit) decisions, so the Court could pare it down without upsetting its own precedent. Standing in the way of any relaxation of parcel-as-a-whole doctrine is the stress that *Tahoe-Sierra* placed on the “longstanding distinction” between physical takings, involving “per se rules,” and regulatory takings, where “ad hoc, factual inquiries” prevail.³⁰¹ Owing to this distinction, it is “inappropriate,” said the Court, to treat physical takings decisions as controlling precedent in regulatory takings cases, and vice versa.³⁰² *Lingle* and *Tahoe-Sierra* are not easily reconciled on this point.

E. *Background Principles*

The *Lucas* “total taking” rule, as earlier noted, contains a big exception. A land use restriction cannot be a taking if it merely makes

296. *Maritrans, Inc. v. United States*, 342 F.3d 1344 (Fed. Cir. 2003).

297. *See Machipongo Land & Coal Co., Inc. v. Commonwealth*, 799 A.2d 751, 767–68 (Pa. 2002).

298. 505 U.S. 1003, 1016 n.7 (1992).

299. 533 U.S. 606, 631 (2001).

300. 535 U.S. 302, 355 (2002) (Thomas, J., dissenting).

301. *Id.* at 323–26.

302. *Id.* at 323.

explicit what could have been prohibited under “background principles of the State’s law of property and nuisance” existing when the property was acquired.³⁰³ As presented in the *Lucas* majority opinion, the heart of the background principles exception is common law nuisance—both public and private.³⁰⁴ Thus, for example, no taking results when a state denies a septic permit, even though denial renders the lot unbuildable, since installing a septic system in the circumstances presented would create a nuisance as a threat to public health.³⁰⁵

Much ink has been spilled over what qualifies as a background principle, beyond the certainty that common law nuisance is included. The stakes are high: as a threshold issue, finding that a government restriction merely embodies a background principle ends the taking analysis then and there. And unlike the exceedingly narrow scope of *Lucas*’ total taking rule, the decision’s “logically antecedent inquiry” into background principles applies to *all* takings claims. Background principle status immunizes a restriction not only from being a total taking but a partial taking as well—either the plaintiff has a protected property interest or she does not.³⁰⁶ Further, it would seem that federal and state defendants should each be able to invoke background principles established under the other’s law.³⁰⁷

The debate immediately after *Lucas* turned on whether “background principles” include (1) statutory law, as opposed to just common law; (2) recently enacted law, as opposed to just vintage law rooted in age-old legal tradition; and (3) federal law, as opposed to just state law. From the text of *Lucas* alone, however, it seems plain enough that the common-law-of-nuisance-only view is incorrect because it ignores the explicit “property” term in “background principles . . . of *property* and nuisance,” and that the state-law-only view is incorrect because it ignores *Lucas*’ explicit mention of the federal navigation servitude.³⁰⁸

Bear in mind that a pre-acquisition statute that is *denied* background-principle status remains relevant to assessing the reasonableness of investment-backed expectations under *Penn Central*,

303. *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1029 (1992).

304. Government prohibition of common law nuisances had previously been recognized by the Court as an absolute exception from takings liability without the *Lucas*-created “background principles” rubric. *Keystone Bituminous Coal Ass’n v. DeBenedictis*, 480 U.S. 470, 491 n.20 (1987). Even further back, a nuisance exception was always implicit in the ancient rule that no person has a right to use his property in a way that harms others.

305. *Neifert v. Dep’t of Env’t*, 910 A.2d 1100, 395 Md. 486 (Md. 2006).

306. See, e.g., *Appolo Fuels, Inc. v. United States*, 381 F.3d 1338, 1347 (Fed. Cir. 2004), *cert. denied*, 543 U.S. 1188 (2005); *M & J Coal Co. v. United States*, 47 F.3d 1148, 1153 (Fed. Cir. 1995); *Mutschler v. City of Phoenix*, 129 P.3d 71, 75 (Ariz. Ct. App. 2006).

307. See, e.g., *Rith Energy, Inc. v. United States*, 44 Fed. Cl. 366 (1999), *aff’d on other grounds*, 247 F.3d 1355 (Fed. Cir. 2001).

308. *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1029 (1992).

per Justice O'Connor's concurring opinion in *Palazzolo* and its endorsement by *Tahoe-Sierra*.³⁰⁹ The pre-acquisition status of the statute simply becomes one among several takings factors, rather than, as with background principles, necessarily dispositive.³¹⁰

1. *Post-Lucas Interpretation by Supreme Court*

The Supreme Court has not spoken at length on the meaning of background principles since *Lucas*. Its most extended remarks came in *Palazzolo*, in which it said that "a regulation . . . is not transformed into a background principle . . . by mere virtue of the passage of title," thereby holding that the background-principles concept cannot support an absolute notice rule.³¹¹ Background principles reflect "common, shared understandings of permissible limitations derived from a state's legal tradition."³¹² These comments appear to contemplate the possibility that some statutes and regulations will qualify as background principles, though it is unclear how far such laws can go beyond simply mirroring the common law of nuisance.

2. *Lower Court Interpretation*

a. *Courts Other than the CFC and Federal Circuit*

These courts often interpret "background principles" broadly. State courts have held background principles to subsume statutes, whether or not they codify common law,³¹³ and recently enacted laws, not just ancient ones.³¹⁴ Query whether all these decisions survive *Palazzolo*'s insistence that background principles embody "common, shared understandings."³¹⁵

The background-principle status of some common law property principles has been made explicit. One example is the public trust doctrine.³¹⁶ Some argue that expanded, non-tidal versions of the public trust doctrine exceed the concept of background principles by going beyond *Lucas*' common law sense of background principles, but *Lucas*

309. See *supra* text accompanying notes 2126–231.

310. *Id.*

311. 533 U.S. 606, 629–30 (2001).

312. *Id.*

313. *Kim v. City of New York*, 681 N.E.2d 312 (N.Y. 1997); *City of Virginia Beach v. Bell*, 498 S.E.2d 414, 418 (Va. 1998).

314. *Hunziker v. State*, 519 N.W.2d 367, 371 (Iowa 1994) (state statute enacted ten years before acquisition); *Annello v. Zoning Bd. of Appeals*, 678 N.E.2d 870 (N.Y. 1997) (ordinance enacted two years before property acquisition).

315. See *supra* text accompanying note 3112.

316. See, e.g., *Esplanade Props., L.L.C. v. City of Seattle*, 307 F.3d 978 (9th Cir. 2002); *McQueen v. S.C. Coastal Council*, 580 S.E.2d 116, 119 n.5 (S.C. 2003).

did suggest that background principles can evolve.³¹⁷ Other examples of explicit anointment as background principles are the doctrine of custom, as related to recreational beach access,³¹⁸ and certain water law limitations.³¹⁹ Limited case law suggests that the historical responsibility of states for wildlife protection, including the state ownership doctrine, may also qualify as a background principle.³²⁰

b. CFC and Federal Circuit

Several earlier decisions of these courts take the narrow view that background principles generally include only state common law of nuisance and state or federal statutes that reflect that common law.³²¹ Recent decisions, however, indicate an easing of this constraint, recognizing pre-acquisition federal statutes with strong historical roots as background principles—subsequent to *Palazzolo*.³²² And in more specialized contexts, the Federal Circuit has recognized as background principles the federal navigation servitude,³²³ public ownership of the navigable airspace,³²⁴ and the practices of international law.³²⁵

3. “Cases of Actual Necessity”

Lucas' discussion of background principles explicitly embraced one body of law in addition to nuisance law: “litigation absolving the State (or private parties) of liability for the destruction of ‘real and personal property, in cases of actual necessity, to prevent the spreading of a fire’ or to forestall other grave threats to the lives and property of others.”³²⁶ Along the same lines is incidental destruction of property as part of police efforts to apprehend suspects,³²⁷ and deliberate government destruction of property to prevent its capture by an advancing enemy.³²⁸

317. 505 U.S. 1003, 1031 (1992).

318. *Stevens v. City of Cannon Beach*, 854 P.2d 449, 456 (Or. 1993).

319. *See, e.g., W. Maricopa Combine, Inc. v. Ariz. Dep’t of Water Res.*, 26 P.3d 1171, 1180 (Ariz. Ct. App. 2001).

320. *See New York v. Sour Mountain Realty, Inc.*, 714 N.Y.S.2d 78, 84 (App. Div. 2000).

321. *See, e.g., Preseault v. United States*, 100 F.3d 1525, 1538 (Fed. Cir. 1996) (en banc plurality opinion) and its progeny.

322. *See, e.g., Am. Pelagic Fishing Co., L.P. v. United States*, 379 F.3d 1363, 1379 (Fed. Cir. 2004) (recognizing federal fisheries statute as background principle, because “consistent with the historical role played by the sovereign . . . with respect to its waters.”), *cert. denied*, 545 U.S. 1139 (2005).

323. *Palm Beach Isles Assocs. v. United States*, 208 F.3d 1374, 1384 (Fed. Cir.), *aff’d on rehearing*, 231 F.3d 1354 (Fed. Cir. 2000).

324. *Air Pegasus of D.C., Inc. v. United States*, 424 F.3d 1206 (Fed. Cir. 2005).

325. *Abraham-Youri v. United States*, 139 F.3d 1462 (Fed. Cir. 1997).

326. 505 U.S. 1003, 1029 n.16 (1992) (quoting *Bowditch v. Boston*, 101 U.S. 16, 18–19 (1880)).

327. *See, e.g., Customer Co. v. Sacramento*, 895 P.2d 900, 909–12 (Cal. 1995).

328. *United States v. Caltex*, 344 U.S. 149 (1952).

E. Penn Central and Retroactivity

In *Eastern Enterprises v. Apfel*, a four-Justice plurality of the Court made clear that while “Congress has considerable leeway to fashion economic legislation,” there are limits.³²⁹ Applying *Penn Central*, the plurality announced a specialized rule for retroactive legislation: such legislation might effect a taking “if it imposes severe retroactive liability on a limited class of parties that could not have anticipated the liability, and the extent of that liability is substantially disproportionate to the parties’ experience.”³³⁰ The plurality then proceeded to find a taking based on a federal statute making companies retroactively liable for coal miner health benefits owing to their involvement in the industry decades earlier. In separate opinions, however, five Justices held takings analysis inappropriate in this circumstance, opting instead for a substantive due process approach.

The fractured opinions in *Eastern* led some courts to confine its application to substantially similar facts.³³¹ Others have applied it more generally, but still have found that the retroactivity in question effected no taking.³³² These decisions are among several unsuccessful post-*Eastern* takings challenges to the retroactive application of the coal miner health benefits statute and the Superfund Act.

F. Demise of “Substantially Advance” Test

The Supreme Court announced in *Agins v. City of Tiburon* that a regulatory taking results when a government action does not substantially advance legitimate state interests³³³—seemingly a freestanding takings test. It was immediately apparent, however, that this new test was an awkward fit with the rest of takings law. The substantially advance test was concerned with the means-end fit of the challenged measure, while takings law generally was concerned with the nature, degree, and distribution of the measure’s impact on the property owner. For this reason, the Court in *Lingle v. Chevron U.S.A. Inc.* unanimously abandoned the substantially advance test in 2005, after a quarter-century run.³³⁴

Lingle does not seem to simply move the substantially advance inquiry into some other takings framework, such as the “character” factor in *Penn Central*. The fundamental due process–like thrust of “substantially advance,” *Lingle* indicates, makes it inappropriate as a

329. 524 U.S. 498, 528 (1998).

330. *Id.* at 528–29.

331. *See, e.g.*, *United States v. Alcan Aluminum Corp.*, 315 F.3d 179 (2d Cir. 2003).

332. *See, e.g.*, *United States v. Vertac Chem. Corp.*, 453 F.3d 1031, 1047–48 (8th Cir. 2006).

333. 447 U.S. 255, 260 (1980).

334. 544 U.S. 528 (2005).

consideration anywhere in takings law. In addition, the substantially advance test appears not to have been shifted over to substantive due process, as some sort of alternative standard of review.³³⁵ The companion question, however, to whether *Lingle* transported “substantially advance” somewhere else is whether it will ultimately purge the character factor of *Penn Central* of means-end type inquiries that have always been there. Means-end analysis also remains in the picture through state court holdings that exercises of the police power are not takings if “reasonable”—defined as having a substantial relation to the accomplishment of a legitimate state objective.³³⁶

G. Regulation of Prospectively Temporary Duration

This section deals chiefly with planning moratoria, but also nuisance-abatement moratoria, environmental moratoria, and permitting delays. The issue in each instance is whether the fact that a use restriction is known *at the outset* to be temporary cuts against compensability when the same restriction, understood at the outset to be of indefinite duration, but unexpectedly turning out to be temporary, would be compensable.

1. Moratoria

In *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency*, the Supreme Court held that a land use planning moratorium, notwithstanding its elimination of all economic use of a parcel for its duration, does *not* trigger the *Lucas* per se rule for total takings.³³⁷ Rather, moratoria, even when they eliminate all economic use while in effect, are generally to be tested under the multifactor *Penn Central* test.

This holding affirmed the majority view in the lower courts, which generally had applied *Penn Central* in takings claims against planning moratoria and rarely found takings.³³⁸ When applying *Penn Central*, *Tahoe-Sierra* said that the duration of the moratorium and the complete elimination of economic use are but two of the factors to be examined, though duration is “one of the important” factors.³³⁹ Of course, where

335. See, e.g., *id.* at 548 (Justice Kennedy’s concurrence noting that inquiry remains whether regulation “might be so arbitrary or irrational as to violate due process.”); *Gove v. Zoning Bd. of Appeals*, 831 N.E.2d 865, 870 (Mass. 2005) (*Lingle* renders a zoning ordinance valid under the federal Constitution unless its application bears no “reasonable relation to the State’s legitimate purpose.”).

336. See, e.g., *Jacobs Ranch, L.L.C. v. Smith*, 148 P.3d 842, 856 (Okla. 2006).

337. 535 U.S. 302 (2002).

338. A post-*Tahoe-Sierra* decision rejecting *Lucas* and applying *Penn Central* to a land use moratorium, and finding no taking, is *Leon County v. Gluesenkamp*, 873 So. 2d 460 (Fla. Dist. Ct. App. 2004).

339. 535 U.S. at 342.

economic use continued throughout the moratorium period, the appropriateness of the *Penn Central* test instead of the *Lucas* per se rule was never in question.³⁴⁰ The *Tahoe-Sierra* ruling against categorical analysis of expressly temporary regulations does not lessen the possibility of temporary categorical takings arising from expressly permanent or indefinite regulations that are unexpectedly terminated.

a. *Tahoe-Sierra's Caveats*

While a powerful endorsement of planning moratoria, *Tahoe-Sierra* suggests some cautions. For example, it states: “[I]t may well be true . . . that any moratorium that lasts for more than one year should be viewed with special skepticism.”³⁴¹ *Tahoe-Sierra* also suggests that moratoria imposed in bad faith may still raise a takings issue, as may a succession of moratoria tacked end-to-end (“rolling moratoria”). Finally, given the temporal parcel-as-a-whole rationale undergirding the *Tahoe-Sierra* holding, persons having time-limited property interests, such as leaseholds expiring before the moratorium expires, may still be able to assert *Lucas* takings.

b. *Tahoe-Sierra's Rationale and Dicta*

More important than *Tahoe-Sierra's* holding are its broad rationale and extensive dicta. These (1) endorse planning moratoria generally as a tool of land use planning; (2) negate the Court's temporary physical occupation cases as controlling precedent for assessing moratoria; (3) greatly limit *Lucas's* relevance to the *expressly temporary* total taking; and (4) assert that the moratorium period cannot be evaluated in isolation, ignoring the land's restored use and value at moratorium's end. This last item explicitly created the temporal parcel-as-a-whole doctrine.

c. *Nuisance Abatement Moratoria*

Overly aggressive moratoria on use of real property following persistent nuisance activity there, such as drug use or prostitution, have

340. See, e.g., *W.R. Grace & Co.-Conn. v. Cambridge City Council*, 779 N.E.2d 141 (Mass. App. Ct. 2002) (no taking under *Penn Central* where preexisting economic use continued throughout twenty-three months of no-development moratorium).

341. *Tahoe-Sierra*, 535 U.S. at 341. This one-year threshold for judicial suspicion appears not to have been picked up by other courts. See, e.g., *Wild Rice River Estates v. City of Fargo*, 705 N.W.2d 850 (N.D. 2005) (21-month building moratorium to develop flood plain management plan is neither *Lucas* nor *Penn Central* taking). *Tahoe-Sierra* itself noted that the six-year moratorium in *First English* was held not a taking, 535 U.S. at 342 n.36. Once extreme durations are reached, however, a taking may be found. See, e.g., *Boise Cascade Corp. v. Bd. of Forestry*, 935 P.2d 411, 421 (Or. 1997) (denial of economic use “so long lived as to make any present economic plans for the property impractical” may be taking).

been held takings, though the reported cases were all decided prior to *Tahoe-Sierra*.³⁴²

2. *Administrative Delays*

In 1980, *Agins v. City of Tiburon* said that absent “extraordinary delay,” mere fluctuations in property value during the process of governmental decision making are not takings.³⁴³ “Normal delays” in obtaining building permits, variances, etc., are not takings.³⁴⁴ Today, whether a temporary taking results from an administrative delay of property development often is resolved under the *Agins* “extraordinary delay” test.³⁴⁵ Despite many court decisions, however, research reveals no administrative delay that has been held to satisfy this criterion.³⁴⁶

Whether a delay is extraordinary depends on all relevant circumstances, of which the length of the delay is but one.³⁴⁷ Another relevant circumstance is the danger threatened by the proposed activity.³⁴⁸ Also, “[g]overnmental agencies that implement complex permitting schemes should be afforded significant deferences” a principle often cited by the government to defend delays in environmental permitting.³⁴⁹ As elsewhere in takings law, government bad faith cuts in favor of a taking.³⁵⁰ Indeed, the Federal Circuit has called it “the rare circumstance that we will find a taking based on extraordinary delay without a showing of bad faith.”³⁵¹

342. See, e.g., *Keshbro, Inc. v. City of Miami*, 801 So. 2d 864 (Fla. 2001) (temporary closing of apartment complex under nuisance abatement statute was a taking, in light of separability of nuisance activity from lawful activity and denial of all economic use during closure period).

343. 447 U.S. 255, 263 n.9 (1980).

344. *Tahoe-Sierra Pres. Council v. Tahoe Reg'l Planning Agency*, 535 U.S. 302, 335 (2002). Nor does the bald requirement that a landowner obtain a permit before undertaking a use of his land effect a taking, since the permit may be granted. *United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121, 126–27 (1985).

345. See, e.g., *Appollo Fuels, Inc. v. United States*, 381 F.3d 1338, 1351 (Fed. Cir. 2004), *cert. denied*, 543 U.S. 1188 (2005).

346. See, e.g., *Sunrise Corp. of Myrtle Beach v. City of Myrtle Beach*, 420 F.3d 322, 330 (4th Cir. 2005) (three-year-plus delay); *Appollo Fuels*, 381 F.3d 1338 (18-month delay); *Bass Enters. Prod. Co. v. United States*, 381 F.3d 1360 (Fed. Cir. 2004) (45-month delay); *Wyatt v. United States*, 271 F.3d 1090 (Fed. Cir. 2001) (seven-year delay).

347. See, e.g., *Bass Enters.*, 381 F.3d at 1366–67.

348. *Id.* at 1367.

349. See, e.g., *Wyatt*, 271 F.3d at 1098.

350. *Compare Landgate, Inc. v. Cal. Coastal Comm'n*, 953 P.2d 1188 (Cal. 1998) (taking might result where agency delay was so prolonged as to support inference that government was only putting off project) *with Bio Energy, L.L.C. v. Town of Hopkinton*, 891 A.2d 509 (N.H. 2005) (no taking where town's cease-and-desist order was based on reasonable misreading of variance terms).

351. *Wyatt*, 271 F.3d at 1098. *Accord Wild Rice River Estates v. City of Fargo*, 705 N.W.2d 850, 859 (N.D. 2005).

One Federal Circuit ruling states that if the delay is extraordinary, the existence of a temporary regulatory taking is determined by the *Penn Central* test.³⁵² This suggestion of a *two-stage* inquiry appears to be unique, however, even in the Circuit. Another link between the two tests, according to the Federal Circuit, is that where a *permanent* restriction would not be a permanent taking, “it would be strange to hold that a temporary restriction imposed pending the outcome of the regulatory decision-making process requires compensation.”³⁵³

Procedures ancillary to agency processing of development applications have been viewed as a normal part of the administrative process, and thus not grounds for a delay-based taking, if reasonable. For example, when an agency avails itself of a statutory opportunity to relax application of regulations to a parcel to avoid a taking, the added delay causes no taking.³⁵⁴ Similarly, delay resulting from a landowner’s successful challenge (judicial or otherwise) to an administrative error is not compensable if the agency’s position was reasonable. A regulatory mistake causing delay does not by itself result in a taking, but rather is a normal part of the administrative process.³⁵⁵ *Tahoe-Sierra* suggests that moratoria and ordinary permit delays should be treated the same for takings purposes.³⁵⁶

III. PHYSICAL TAKINGS TESTS

When the government physically occupies or invades private property, or causes or authorizes other persons or things to do so, judicial suspicion that a taking has occurred is greatly enhanced. The reason is that the right to exclude others, including the government, is deemed “one of the most treasured strands in an owner’s bundle of property rights.”³⁵⁷

A. *Permanent Physical Occupations*

If the government-caused physical invasion amounts to a “permanent physical occupation,” the rule is categorical: permanent physical occupations of property are per se takings. This is often called

352. *Appollo Fuels, Inc. v. United States*, 381 F.3d 1338, 1351 (Fed. Cir. 2004).

353. *Id.* at 1352.

354. *Griffith v. State Dep’t of Env’tl. Prot.*, 775 A.2d 54 (N.J. Super. Ct. App. Div. 2001).

355. *See, e.g., Landgate, Inc. v. Cal. Coastal Comm’n*, 953 P.2d 1188, 1195 (Cal. 1998); *Loewenstein v. City of Lafayette*, 127 Cal. Rptr. 2d 79 (Ct. App. 2002); *Pheasant Bridge Corp. v. Township of Warren*, 777 A.2d 334 (N.J. 2001).

356. 535 U.S. 302, 337 n.31 (2002).

357. *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 435 (1982). *Accord* *Kaiser Aetna v. United States*, 444 U.S. 164, 176, 179–80 (1979); *John R. Sand & Gravel Co. v. United States*, 457 F.3d 1345, 1356–57 (Fed. Cir. 2006) (collecting cases) cert. granted, 75 U.S.L.W. 3474 (U.S. May 29, 2007) (No. 06-1164).

the “*Loretto* rule,” after the Supreme Court decision in *Loretto v. Teleprompter Manhattan CATV Corp.* that made it explicit.³⁵⁸ Classic examples of permanent physical occupations are continuous or recurring flooding caused by a government dam, regular and low overflights by government airplanes,³⁵⁹ and government installation of relatively permanent structures such as concrete-anchored fencing or groundwater monitoring wells.

Takings claims based on permanent physical occupations are neat and clean. In contrast to regulatory takings, the magnitude of the intrusion, the economic impact on the property owner, and the importance of the government interest advanced are all immaterial. Also in contrast to regulatory takings claims, there is no parcel-as-a-whole rule for permanent physical occupations: a permanent occupation of only a small part of a tract will be held a taking—as it was in *Loretto*. The sharp distinctions between these two types of takings claims make it “inappropriate” to treat decisions involving either type of taking as controlling precedent for claims involving the other.³⁶⁰

A permanent occupation does not require that the occupying persons or things be constant over time.³⁶¹ In addition, the *Loretto* rule is not confined to real property; personal property can be physically taken too.³⁶² But the occupation must be by the government or a third party: government demands for installation of smoke detectors, fire

358. 458 U.S. 419 (1982).

359. In *United States v. Causby*, 328 U.S. 256, 266 (1946), the Supreme Court articulated a specialized test for overflight takings under which a taking occurs when flights over private land “are so low and so frequent as to be a direct and immediate interference with the use and enjoyment of the land.” State courts applying this test often do not demand that the flights be directly over the plaintiff’s property, as they were in *Causby*, while federal courts generally do require direct overflights. In the Federal Circuit, where overflight cases have been a staple for decades, an exception from the direct overflights prerequisite recently has been recognized for a “peculiarly burdensome pattern of activity.” *Argent v. United States*, 124 F.3d 1277, 1284 (Fed. Cir. 1997). Similarly, the floor of public navigable air space is often the line of demarcation in the CFC and Federal Circuit between direct overflights that are takings (below said floor) and those that are not (above said floor)—except in unusual circumstances. *Id.* at 1281 (collecting cases). See also *Biddle v. BAA Indianapolis, L.L.C.*, 860 N.E.2d 570, 578–80 (Ind. 2007). In sum, as applied today, *Causby* is not purely a physical invasion by the aircraft test—particularly in the state courts and on occasion in the CFC and Federal Circuit.

360. *Tahoe-Sierra Pres. Council v. Tahoe Reg’l Planning Agency*, 535 U.S. 302, 323 (2002). *But see supra* text accompanying notes 2967–3012 (emphasis in *Lingle* on functional equivalence between regulatory and physical takings).

361. *Nollan v. Cal. Coastal Comm’n*, 483 U.S. 825, 832 (1987) (permanent physical occupation occurs “where individuals are given a permanent and continuous right to pass to and fro”); *Kaiser Aetna v. United States*, 444 U.S. 179 (1979).

362. See, e.g., *Brown v. Legal Found. of Wash.*, 538 U.S. 216, 235 (2004) (interest on lawyers’ trust accounts for client funds); *Nixon v. United States*, 978 F.2d 1269, 1284–85 (D.C. Cir. 1992) (presidential papers).

extinguishers, fences, etc., by the landowner himself do not fall under *Loretto*.³⁶³

When the extent of the physical occupation evolves gradually, the taking claim accrues only when the situation has “stabilized.” The case announcing this rule, *United States v. Dickinson*,³⁶⁴ has been limited to gradual physical processes such as flooding, in contrast to the evolving economic impact of a regulatory action.³⁶⁵

The Court often characterizes physical takings as a subset of regulatory takings—that is, as a special case of *Penn Central* where the character of the government action is determinative without resort to the other factors.³⁶⁶ Perhaps this view of physical takings is appropriate where a regulatory act authorized the occupation, but whether physical takings are viewed this way makes little analytical difference.

B. Lesser Physical Invasions

Physical encroachments that fall short of permanent physical occupations are known as “temporary physical invasions” and are examined under the *Penn Central* three-factor test.³⁶⁷ Thus, they are much less likely than their permanent-occupation brethren to be held takings.³⁶⁸

The permanent-occupation/temporary-invasion boundary—often the line between taking and non-taking—is fact dependent and largely divorced from everyday semantics.³⁶⁹ According to an early Federal Circuit decision, a permanent occupation need not in every instance be exclusive, or continuous and uninterrupted,³⁷⁰ and “permanent does not mean forever, or anything like it.”³⁷¹ More counterintuitively, a government occupation is said to be “permanent” when it is a “substantial physical occupancy” of private property.³⁷² “Temporary,” on

363. *Loretto*, 458 U.S. at 440; *Herzberg v. City of Plumas*, 34 Cal. Rptr. 3d 588 (Ct. App. 2005).

364. 331 U.S. 745 (1947).

365. *See, e.g., Fallini v. United States*, 56 F.3d 1378, 1381 (Fed. Cir. 1995) (Supreme Court has “more or less limited [*Dickinson*] to the class of flooding cases to which it belonged”).

366. *See, e.g., Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528, 538 (2005) (one category of “regulatory action” deemed a per se taking is “where government requires an owner to suffer a permanent physical invasion.”); *Loretto*, 458 U.S. at 426, 432.

367. *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982); *Boise Cascade Corp. v. United States*, 296 F.3d 1339, 1353 (Fed. Cir. 2002).

368. *See, e.g., Benson v. State*, 710 N.W.2d 131, 151–53 (S.D. 2006) (rules limiting when shooting over private land can occur must be analyzed under *Penn Central*; no taking under that test).

369. *See generally John R. Sand & Gravel Co. v. United States*, 457 F.3d 1345, 1357 (Fed. Cir. 2006).

370. *Hendler v. United States*, 952 F.2d 1364, 1377 (Fed. Cir. 1991).

371. *Id.* at 1376.

372. *Id.* at 1377.

the other hand, refers to government occupation “that is transient and relatively inconsequential.”³⁷³ The Circuit later explained these remarks as not doing away with a duration requirement for the per se test (as one subsequent Federal Circuit decision supposed), but rather as clarifying that “permanent” depends not only on duration, but also on the nature of the government intrusion.³⁷⁴ Apparently, the more significant the intrusion (as when the government asserts dominion or control), the shorter the duration needed for permanent status. Thus, government seizure and operation of a coal mine for five-and-one-half months is a permanent occupation,³⁷⁵ as is its taking possession of a warehouse, after breaking and entering, for nine months.³⁷⁶ In contrast, five months of brief incursions by government owl surveyors is not.³⁷⁷ At the short-duration end of the spectrum, physical invasions may blur into torts, particularly trespass.

C. Defenses and Exceptions

First, a physical invasion or occupation to which the plaintiff consented cannot be a taking,³⁷⁸ though the line between consent and government compulsion is highly nuanced.³⁷⁹ Second, no physical taking occurs when the plaintiff voluntarily entered a highly regulated field in which there was no reasonable expectation of being free of invasion when certain events occur.³⁸⁰ Third, the concept of background principles, though announced in a regulatory taking case, has been held to apply also to claims of physical takings.³⁸¹ This is unsurprising, given that the background principles analysis goes to the threshold determination

373. *Id.*

374. *Boise Cascade Corp. v. United States*, 296 F.3d 1339, 1356 (Fed. Cir. 2002).

375. *United States v. Pewee Coal Co., Inc.*, 341 U.S. 114 (1951). The Supreme Court has repeatedly cited *Pewee* in its post-*Loretto* decisions as an example of a per se physical taking. *See, e.g., Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528, 537 (2005).

376. *Skip Kirchdorfer, Inc. v. United States*, 6 F.3d 1573 (Fed. Cir. 1993).

377. *Boise*, 296 F.3d 1339.

378. *Yee v. City of Escondido*, 503 U.S. 519 (1992); *Fed. Commc'ns Comm'n v. Fla. Power Corp.*, 480 U.S. 245 (1987). *But see Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 439 n.17 (1982) (possibility that landlord could avoid physical occupation by ceasing to rent building does not defeat taking claim).

379. *See, e.g., Cwynar v. City & County of San Francisco*, 109 Cal. Rptr. 2d 233 (Ct. App. 2001).

380. *Cal. Hous. Sec. v. United States*, 959 F.2d 955 (Fed. Cir. 1992) (government occupation and seizure of failed savings and loan is not taking, given absence of “historically rooted expectations” of compensation in such circumstances).

381. *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1028–29 (1992) (preexisting federal navigation servitude bars physical taking); *John R. Sand & Gravel Co. v. United States*, 60 Fed. Cl. 230, 235 (2004) (endorsing general application of background principles to physical takings), *vacated on other grounds*, 457 F.3d 1345 (Fed. Cir. 2006), cert. granted, 75 U.S.L.W. 3474 (U.S. May 29, 2007) (No. 06-1164); *Kim v. City of New York*, 681 N.E.2d 312, 318 (N.Y. 1997) (preexisting duty of lateral support bars physical taking claim).

whether the plaintiff had the property right alleged to have been taken, and so seems logically appropriate to both regulatory and physical claims. Finally, one Supreme Court decision suggests that the vaunted right to exclude underlying the *Loretto* rule may, on occasion, have to accommodate other sacrosanct rights, such as free speech.³⁸²

D. *Blur Between Regulatory and Physical Takings*

The Court's decisions using per se physical taking analysis, both before and after *Loretto*, typically involve physical invasions in the literal sense—invasions by aircraft, flood waters, the boating public, government personnel, cable boxes, and mobile-home-park tenants. But in some factual contexts, noted below, physical and regulatory takings have proved difficult to keep separate.

The tendency to blur the two is enhanced by the powerful incentives plaintiffs have to urge a physical, versus regulatory, theory in a case. First, there is the lesser showing needed for plaintiff to win on a permanent physical occupation claim: no analysis of economic impact is needed, nor does the parcel-as-a-whole rule apply, and so on. Second, *Palazzolo* and *Tahoe-Sierra* emphasize the extremely narrow range of application for the *Lucas* total taking test, leaving the physical occupation rule as the only per se rule left to plaintiff in many cases. Many courts have rejected plaintiffs' efforts to characterize rather straightforward regulatory cases as physical takings.³⁸³

1. *Hybrid Government Actions*

In contrast with spurious efforts to recast regulatory takings as physical invasions, some regulatory programs genuinely fall close to the dividing line. Plainly, a regulatory program can bring about a physical invasion. For example, wildlife protection statutes have prompted landowners to claim physical takings of their private property based on the presence of animals that the statute bars the owner from harming, or based on the depredations of protected animals (e.g., eating crops). Such claims generally fail, often on the theory that the government is not liable for the actions of wild animals.³⁸⁴

382. Compare *Prune Yard Shopping Center v. Robins*, 447 U.S. 74 (1980) (finding no taking in a state prohibition on a shopping center's exclusion of persons seeking to exercise free speech, despite indefinite duration) with *Kaiser Aetna v. United States*, 444 U.S. 164 (1979) (finding taking in asserted public right of access to private pond made accessible through private funds).

383. See, e.g., *Stearns v. United States*, 396 F.3d 1354 (Fed. Cir. 2005), cert. denied, 126 S. Ct. 385 (2005); *Machipongo Land & Coal Co., Inc. v. Commonwealth*, 799 A.2d 751, 763 (Pa. 2002).

384. See, e.g., *Colvin Cattle, Inc. v. United States*, 468 F.3d 803, 809 (Fed. Cir. 2006); *Christy v. Hodel*, 857 F.2d 1324, 1335 (9th Cir. 1988); *Moerman v. State*, 21 Cal. Rptr. 2d 329 (Ct.

Regulatory controls on a landlord's ability to evict tenants also give rise to arguments that the landlord is being forced to suffer a physical occupation. The Supreme Court, however, generally has been unreceptive to physical taking claims here. In *Yee v. City of Escondido*, the Court rejected a physical taking challenge to a mobile-home statute that limited evictions, citing the fact that the owner's decision to put his property to mobile-home rental use had been voluntary.³⁸⁵ However, the Court held that the taking claim was "perhaps within the scope of our regulatory taking cases."³⁸⁶ Dicta in *Tahoe-Sierra* says that "government regulation that merely prohibits landlords from evicting tenants unwilling to pay a higher rent . . . does not constitute a categorical taking."³⁸⁷

2. *Nonphysical Government Actions*

In other cases, the government program causes no physical invasion, but affects the property owner in a way more or less akin to an appropriation.³⁸⁸ Here, the takings analysis may go either way—regulatory or physical. The issue played out at length in cases involving state demands that small interest amounts on lawyers' trust accounts be paid to a state-run program funding legal services for the poor, and was ultimately resolved as a physical-type taking.³⁸⁹ By contrast, government fees are not physical takings—and likely cannot be regulatory takings either, if payable from any funds the plaintiff possesses.³⁹⁰

App. 1993) (finding no physical taking notwithstanding that the elk had been relocated by the state near the property owner's ranch); *Coast Range Conifers, L.L.C. v. State*, 117 P.3d 990 (Or. 2005) (noting also that rules that prevent property owner from altering natural condition of land differ from rules that authorize a third person to occupy it).

385. 503 U.S. 519 (1992).

386. *Id.* at 527. The Court declined to address the regulatory taking claim because it was not included in the question on which the Court granted certiorari. *Id.* at 533.

387. 535 U.S. 302, 322–23 (2002).

388. Courts often blend their discussion of physical occupations and appropriations, presumably because both represent extreme forms of government intervention with private property and hence are per se takings. An appropriation, however, need not have a physical manifestation.

389. *Compare* *Wash. Legal Found. v. Tex. Equal Access to Justice Found.*, 270 F.3d 180 (5th Cir. 2001) (state program's use of interest on lawyers' trust accounts to support legal services for indigents should be analyzed as per se physical-like taking) *with* *Wash. Legal Found. v. Legal Found. of Wash.*, 271 F.3d 835 (9th Cir. 2001) (en banc) (same to be analyzed as regulatory taking), *aff'd*, *Brown v. Legal Found. Of Wash.*, 538 U.S. 216 (2003). On appeal of the latter decision, the Supreme Court found that the interest transfer was more akin to the physical occupation in *Loretto*, possibly giving impetus to use of physical-taking arguments in future borderline cases. *Brown*, 538 U.S. at 235.

390. In *United States v. Sperry Corp.*, 493 U.S. 52, 62 n.9 (1989), the Court held that government fees do not constitute a physical appropriation because "money is fungible." A decade later, a majority of justices in *Eastern Enterprises v. Apfel*, 524 U.S. 498 (1998), opined that generalized monetary liability cannot be a regulatory taking. *See supra* text accompanying notes 243–246.

Another instance of regulatory/physical confusion has been water delivery under contracts between government water projects and irrigation districts, when the amount of water delivered is cut back to comply with the federal Endangered Species Act. One decision finding that such restrictions should be viewed as a physical taking of a water right has been pointedly criticized.³⁹¹ Moreover, the judge reversed himself as to the physical taking characterization in a later, factually similar case.³⁹² Assuredly, however, physical taking analysis applies when the government physically diverts water for its own consumption.³⁹³

3. *Direct Benefits*

In contrast to regulatory takings, the apparent pattern with physical takings (or at least permanent physical occupation takings) is to exclude from the liability phase consideration of any benefits afforded the property owner by the challenged government conduct. Rather, such benefits are limited to offsetting the compensation due, if a taking is found.³⁹⁴

IV. EXACTION TAKINGS TESTS

One regulatory/physical hybrid is the exaction condition on a government land use approval. Here, the government allows the landowner to develop, but with a big “if” — *if* the landowner agrees to dedicate a portion of his tract for a public purpose such as a road, school, daycare center, etc. In a common variation, the government may allow the property owner instead to pay an “in lieu fee” (in lieu of a dedication) or “impact fee” keyed to the costs imposed on the community by the development.³⁹⁵ The Supreme Court’s exaction cases seek to determine when such exactions constitute takings.

It is immaterial to the exactions tests that the landowner’s development proposal could be denied outright without effecting a taking. That is, the government cannot defend an exactions-taking claim by arguing that since outright denial would not be a taking, a more

391. The decision finding a physical taking is *Tulare Lake Basin Water Storage Dist. v. United States*, 49 Fed. Cl. 313, 319 (2001). For criticism of *Tulare’s* physical taking label, see *Klamath Irrigation Dist. v. United States*, 67 Fed. Cl. 504, 537–38 (2005) and *Allegretti & Co. v. County of Imperial*, 42 Cal. Rptr. 3d 122, 129–32 (Ct. App. 2006).

392. *Casitas Mun. Water Dist. v. United States*, 76 Fed. Cl. 100 (2007).

393. See, e.g., *Dugan v. Rank*, 372 U.S. 609, 625–26 (1963).

394. See, e.g., *Hendler v. United States*, 175 F.3d 1374 (Fed. Cir. 1999) (benefit to landowner from government-conducted Superfund monitoring outweighed value of easements taken to allow monitoring access; hence, while physical taking occurred, no compensation is owed).

395. See generally *B.A.M. Development, L.L.C. v. Salt Lake County*, 128 P.3d 1161, 1169 (Utah 2006).

permissive government response—offering a conditional approval—logically cannot be one either.³⁹⁶

A. *The Tests and Their Rationale*

The takings test for exaction conditions, arguably confined to the land-use realm,³⁹⁷ has two prongs: “essential nexus” and “rough proportionality.” Together, they are often referred to as “heightened scrutiny” or “intermediate scrutiny.” The prongs appear to be disjunctive; a condition failing either one is deemed a taking.

The “essential nexus” prong speaks to the *nature* of the exaction, and debuted in *Nollan v. California Coastal Commission*.³⁹⁸ To avoid being a taking, a condition on development permission must substantially advance a government purpose that would allow denial of the permit. Otherwise, the exaction may be just “out-and-out . . . extortion” by the government.³⁹⁹ The “rough proportionality” test speaks to the *extent* of the exaction, and was announced in *Dolan v. City of Tigard*.⁴⁰⁰ To avoid being a taking, the burden imposed on the landowner by the exaction must be no greater than roughly proportional to the burden that the landowner’s proposed development would impose on the community.

The rough proportionality standard in *Dolan* was the Court’s rephrasing of the “reasonable relationship” standard used by some state courts for dedication conditions on development. In a departure from the usual rule for land use regulation, however, the burden of proof for demonstrating rough proportionality was placed on the government rather than requiring the plaintiff to show lack of rough proportionality. As another new burden for the government, *Dolan* instructed that the demonstration of both rough proportionality and essential nexus must involve “some sort of individualized determination.”⁴⁰¹ The Court offered two rationales for these departures. First, *Dolan* concerned an adjudicative decision on a single parcel, whereas ordinary land use regulation involves “essentially legislative determinations classifying entire areas of the city . . .”⁴⁰² Second, *Dolan* concerned a requirement that the landowner actually deed portions of her parcel to the city, whereas ordinary land use regulation merely restricts use. Following *Dolan*, debate broke out as to whether these two rationales—adjudicative imposition and physical dedication—were formal prerequisites for

396. *Nollan v. Cal. Coastal Comm’n*, 483 U.S. 825, 837 (1987).

397. *City of Monterey v. Del Monte Dunes at Monterey, Ltd.*, 526 U.S. 687, 702 (1999); *Consumers Union of U.S., Inc. v. State*, 840 N.E.2d 68, 83 (N.Y. 2005).

398. 483 U.S. 825 (1987).

399. *Id.* at 837.

400. 512 U.S. 374 (1994).

401. *Id.* at 391.

402. *Id.* at 385.

application of the *Dolan* test. These issues have been extensively litigated in the lower courts with no clear consensus, as discussed below.⁴⁰³

B. Legislatively Imposed Conditions

Authority on whether legislatively imposed exactions are subject to *Dolan* is split. Compare, for example, *Parking Association of Georgia v. Atlanta*,⁴⁰⁴ holding that *Dolan* does not apply to a development exaction imposed through the legislative process, rather than through individualized determinations,⁴⁰⁵ with *Amoco Oil Co. v. Village of Schaumburg*,⁴⁰⁶ holding that *Dolan* does apply to legislatively imposed development exactions.⁴⁰⁷ The confusion is multiplied because there are countless intermediate exactions that are not clearly legislative and not clearly adjudicative, such as where the exaction or fee is legislatively fixed within a range, leaving some discretion for the individualized proceeding. The 2005 *Lingle* decision conceivably may be read to support a restriction of the *Nollan/Dolan* test to adjudicatively imposed conditions, so it will be interesting to see whether post-*Lingle* case law continues to be divided.⁴⁰⁸

C. Nondedication Conditions, and Dedication Conditions Not Requiring Public Access

In the dreams of government attorneys, the *Nollan/Dolan* test would apply solely to physical dedication conditions of the type involved in *Nollan* and *Dolan*. Property rights advocates, in contrast, hope that the test applies to most any development condition.⁴⁰⁹ The Supreme Court leans toward the government's side, stating in dicta in *Del Monte Dunes*, for example, that "we have not extended the rough-proportionality test of *Dolan* beyond the special context of exactions—land-use decisions

403. See *Rogers Mach. v. Wash. County*, 45 P.3d 966 (Or. Ct. App. 2002) (collecting cases).

404. 450 S.E.2d 200 (Ga. 1994).

405. See *Town of Flower Mound v. Stafford Estates Ltd. P'ship*, 135 S.W.3d 620, 640 (Tex. 2004) ("[A]s far as we can tell, all courts of last resort to address the issue" have limited *Dolan* to adjudicative decisions).

406. 661 N.E.2d 380 (Ill. App. Ct. 1995).

407. See generally *B.A.M. Development, L.L.C. v. Salt Lake County*, 128 P.3d 1161, 1170–71 (Utah 2006); *Parking Ass'n of Ga. v. Atlanta*, 515 U.S. 1116 (1995) (Thomas, J., dissenting from denial of certiorari).

408. See, e.g., *Wis. Builders Ass'n v. Wis. Dep't of Transp.*, 702 N.W.2d 433, 448 (Wis. Ct. App. 2005) (noting that both *City of Monterey* and *Lingle* emphasize that the *Nollan/Dolan* test is not to be extended beyond the specific context of those cases, e.g., adjudicative imposition).

409. A bill in the 109th Congress, for example, sought to redefine statutorily the *Nollan/Dolan* test so as to extend to all conditions, whether in the form of exactions or not. See H.R. 4772, 109th Cong. §§ 5–6 (2006); H.R. REP. NO. 109-658, at 8 (2006).

conditioning approval of development on the dedication of property to public use.”⁴¹⁰

1. Monetary Exactions

Arguably, the *Del Monte Dunes* quote’s focus on exactions leaves open whether *monetary* exactions, such as impact fees, are covered by *Nollan* and *Dolan*.⁴¹¹ Again the cases are split. “Some courts have declared, seemingly categorically, that *Dolan* is limited to dedications of property and does not extend to nonpossessory exactions, such as the payment of fees. Other courts have rejected that view, holding that *Dolan* can potentially extend to monetary exactions, at least in some circumstances.”⁴¹² A leading example of the latter view, from California, holds that fees imposed on an individual, discretionary basis are subject to the *Nollan/Dolan* test, but legislatively imposed fees are subject to a more deferential standard.⁴¹³ The more deferential standard is that the legislative fee bear a “reasonable relationship” to the impact of the proposed development—that is, it may not be “arbitrary and extortionate.”⁴¹⁴

Two arguments now exist against applying the *Nollan/Dolan* test to monetary exactions, though neither has been ruled on by a high court. First, there is the view of five Justices in *Eastern Enterprises v. Apfel*⁴¹⁵ that the Takings Clause does not extend to government-imposed generalized monetary liability.⁴¹⁶ Second, *Lingle* in 2005 described *Nollan* and *Dolan* as each “[beginning] with the premise that had the government simply appropriated the easement in question, this would have been a per se physical taking.”⁴¹⁷ If limited to physically invasive conditions, *Nollan* and *Dolan* arguably would not apply to monetary exactions.⁴¹⁸

410. *City of Monterey v. Del Monte Dunes at Monterey, Ltd.*, 526 U.S. 687, 702 (1999).

411. Distinct from fees, which are paid to the government, a condition that a developer expend funds to improve property owned by the public (e.g., roads) has been held in the nature of a dedication (of the funds), and thus subject to the *Nollan/Dolan* test. *Town of Flower Mound v. Stafford Estates Ltd. P’ship*, 135 S.W.3d 620 (Tex. 2004).

412. *Rogers Mach. v. Wash. County*, 45 P.3d 966, 976 (Or. Ct. App. 2002).

413. *Ehrlich v. City of Culver City*, 911 P.2d 429 (Cal. 1996).

414. *San Remo Hotel L.P. v. City & County of San Francisco*, 41 P.3d 87, 105–06 (Cal. 2002).

415. 524 U.S. 498 (1998).

416. *See supra* text accompanying notes 243–246.

417. 544 U.S. 528, 546 (2005).

418. *See United States v. Sperry Corp.*, 493 U.S. 52, 62 n.9 (1989) (fee requirements are not to be considered physical occupations).

2. *Dedications Without Public Access*

The New York high court has held 4-3 that the *Nollan/Dolan* test does not apply where even though the development condition took the form of dedicating a conservation easement, the easement involved no public access and merely restricted use.⁴¹⁹ The dissenters argued for a broader reading of public use not dependent on physical access by the public, such as in the eminent domain (direct condemnation) cases. However, the stress placed by *Lingle* on the “per se physical taking” basis of *Nollan* and *Dolan* buttresses the majority view.⁴²⁰

V. FINAL THOUGHTS

Only three decades ago, prior to *Penn Central*, takings law consisted of but a small handful of principles—chiefly that regulation must eliminate all or substantially all economic use to be a taking, and that physical occupations are takings. Broad considerations such as the nature of the regulatory objective and the suitability of the permitted uses to the particular parcel also played a role.⁴²¹ But the jurisprudence was overwhelmingly ad hoc; the Supreme Court, for its part, had not developed regulatory takings jurisprudence beyond the original “goes too far” standard of *Pennsylvania Coal*.⁴²²

Today the question whether a government interference with private property has worked a taking can at least be answered with an educated guess. Close analysis reveals that contemporary courts issue more or less predictable rulings in several areas of takings law. Of course, guesswork is minimal when the government action fits within one of the several official and unofficial per se rules of takings jurisprudence—as for physical occupations, total takings, unrelated or disproportionate exactions,⁴²³

419. *Smith v. Town of Mendon*, 822 N.E.2d 1214 (N.Y. 2004). *See also* *Wis. Builders Ass’n v. Wis. Dep’t of Transp.*, 702 N.W.2d 433, 502–03 (Wis. Ct. App. 2005) (setback restrictions cannot be analogized to easements in *Nollan* and *Dolan*; former do not eliminate right to exclude).

420. *Lingle* also noted that *Nollan* and *Dolan* involved “government demands that a landowner dedicate an easement allowing public access. . . .” 544 U.S. at 546.

421. *See generally* F. BOSSELMAN, DAVID CALLIES & JOHN BANTA, *THE TAKING ISSUE* 197–207 (1973).

422. *Pa. Coal Co. v. Mahon*, 260 U.S. 393, 415 (1922) (“The general rule at least is, that while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking.”).

423. Some might argue against labeling the *Nollan/Dolan* test for exaction conditions as a per se rule, even an unofficial one. It seems incontrovertible, however, that the test offers a much clearer line of demarcation between takings and nontakings than does *Penn Central*. Nor, in requiring evaluation of the factual circumstances, is the test distinguishable from the Supreme Court-recognized per se rules for total takings and permanent physical occupations. Recall, for example, that the line between permanent physical occupations, which are per se takings, and lesser physical invasions, which may or may not be takings, can require a careful weighing of the facts surrounding the physical interference. *See supra* text accompanying notes 3669–3767.

interference with rights of descent and devise, and imposition of generalized monetary liability (not yet settled law). But even outside these relatively clear-cut circumstances, there is at least a framework for analysis: the resurgent *Penn Central* test. Concededly, the Court itself still speaks of the *Penn Central* test as ad hoc and case by case, but the ad hocery now is not your father's ad hocery. We know from decades of decisional law that a *Penn Central* claim is a difficult sell—i.e., that the economic impact factor in most courts is not that much laxer than the total taking standard, and that the legal landscape at the time of property acquisition is often pivotal, whether or not background principles are involved. The Court's recent reaffirmation of the view that *Penn Central*, just as *Lucas*, seeks to identify government actions that are the functional equivalent of physical ousters or appropriations⁴²⁴ underscores the high economic impact threshold, and suggests that in most cases, takings plaintiffs must allege a physical occupation, appropriation, or something comparable. There is also less guesswork, absence of categorical rules notwithstanding, in several areas where the case law is now voluminous and the pattern of outcomes consistent; we know, for example, that regulatory takings claims based on wartime and emergency measures are extremely unlikely to succeed, as are those based on administrative delays.

Assuredly, contemporary takings jurisprudence will continue to be the butt of charges by commentators that it is “muddled” or “incoherent”—favorite epithets used in the law reviews. And it is very likely that the Supreme Court will resist taking a pure *Penn Central* case—i.e., one not allowing the Court to escape to the *terra firma* of categorical analysis. The holding would be too fact-bound. But there is still no mistaking that substantive takings law has gone well beyond its first baby steps.

APPENDIX: SUPREME COURT TAKINGS DECISIONS 1978–2005

This appendix begins with the *Penn Central* decision in 1978 because it was that decision which marked the Supreme Court's rediscovery of the regulatory taking issue after a long hiatus and which triggered its sustained effort, continuing today, to build a coherent takings jurisprudence. There are, however, many Supreme Court takings decisions from before 1978.

Case	Action attacked	Holding/rationale
<i>Penn Central Transportation Co. v. New York</i>	City's use of historic preservation ordinance to block	No taking. Generally, there are three factors of “particular significance” in a takings determination: (1) economic impact of

424. *Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528, 539 (2005).

City, 438 U.S. 104 (1978)	construction of office tower atop designated historic landmark	regulation on property owner; (2) extent to which regulation interferes with distinct investment-backed expectations; and (3) "character" of government action (meaning principally that regulation of use is less likely to be taking than physical invasion). Here, landmark owner may earn adequate return from building as is, and more modest additions to building still might be approved. City's offering of transferrable development rights to building owner also weighs against a taking. Finally, building owner cannot segment air rights over building from remainder of property and claim that all use of air rights was taken.
Andrus v. Allard, 444 U.S. 51 (1979)	Federal ban on sale of eagle parts or artifacts made therefrom, as applied to stock lawfully obtained before ban	No taking. Denial of one traditional property right (selling) does not necessarily amount to taking, even if it is most profitable use of property. Plaintiff retained right to possess, pass on, or exhibit for an admission price, the affected inventory.
Kaiser Aetna v. United States, 444 U.S. 164 (1979)	Federal order that owners of exclusive private marina, made navigable by private funds, grant access to boating public	Taking occurred. Infringement of marina owner's right to exclude others, particularly where there is an investment-backed expectation of privacy, goes beyond permissible regulation. Federal navigational servitude does not grant government absolute immunity from takings claims.
United States v. Clarke, 445 U.S. 253 (1980)	Municipalities' entering into physical possession of land without bringing condemnation action	Federal statute providing that allotted Indian lands may be "condemned" under state law does not allow cities to take land by physical possession in absence of formal condemnation proceeding. Term "condemned" refers only to filing of condemnation by government, not filing of "inverse condemnation" action by landowner.
Prune Yard Shopping Center v. Robins, 447 U.S. 74 (1980)	State constitutional mandate that persons be allowed to engage in political expression in private shopping center	No taking. Will not unreasonably impair value or use of property as a shopping center, since facility is open to public at large, and owner may restrict time, place, and manner of expression.
Agins v. City of Tiburon, 447 U.S. 255 (1980)	Municipal rezoning under which owners could build between one and five houses on their land	No facial taking; as-applied claim not ripe. Zoning law effects taking if it does not substantially advance legitimate state interests or denies owner economically viable use of his land. Thus, no facial taking here because: enactment of ordinance is rationally related to legitimate public goal of open-space preservation, ordinance benefits property owners as well as public, and owners may still be able to build up to five houses on lot. As-applied challenge is premature, since owners never submitted development plan for approval under the new zoning.

United States v. Sioux Nation of Indians, 448 U.S. 371 (1980)	1877 statute abrogating Sioux Nation's rights to Black Hills, granted in 1868 treaty with tribe	Taking occurred. In giving tribe rations until they became self-sufficient, 1877 statute did not effect a mere change in the form of investment of Indian tribal property (land to rations) by the federal trustee. Rather, it effected a taking of tribal property set aside by the 1868 treaty. This taking implied an obligation by the United States to make just compensation to the Sioux.
Webb's Fabulous Pharmacies, Inc., v. Beckwith, 449 U.S. 155 (1980)	County court declaration that interest on interpleader fund deposited by litigants with the court belonged to county	Taking occurred. On facts presented, interest could not be viewed simply as fee to cover court costs. State may not take interest simply by calling a deposited fund "public money."
San Diego Gas & Electric Co. v. San Diego, 450 U.S. 621 (1980)	City's adoption of open-space plan	No final judgment by state court below as to whether a taking had occurred, hence no Supreme Court jurisdiction under 28 U.S.C. § 1257.
Hodel v. Virginia Surface Mining & Reclamation Ass'n, 452 U.S. 264 (1981)	Demand in federal act that surface miners restore steep slopes to original contour, and surface mining prohibitions therein	No taking. Plaintiffs failed to allege that any specific property was taken. Mere enactment of statute was no taking, since challenged provisions do not on their face deny landowners all economic use of affected land. In any event, taking claim is not ripe, since plaintiffs never used avenues for administrative relief in act—e.g., variance from original-contour requirement.
Hodel v. Indiana, 452 U.S. 314 (1981)	Restrictions in federal statute on surface mining of prime farmlands	No taking. Plaintiffs failed to allege that any specific property was taken. Mere enactment of statute was no taking, since prime farmland provisions do not on their face deny landowners all economic use of such land—e.g., do not restrict non-mining uses.
Dames & Moore v. Reagan, 453 U.S. 654 (1981)	President's nullification of attachments on Iranian assets in United States, during hostage crisis	No taking. Attachments were revocable and subordinate to President's power under International Emergency Economic Powers Act. Hence, there was no property in the attachments such as would support claim for compensation. Also, possibility that suspension of claims against Iranian assets may effect taking makes ripe the question whether there is Tucker Act remedy here. Tucker Act remedy is available.
Texaco, Inc. v. Short, 454 U.S. 516 (1982)	State statute extinguishing severed mineral estates unused for long time unless owner filed statement within prescribed period	No taking. It is the owner's failure to use the mineral estate or timely file a statement, not the state's imposition of reasonable conditions on estate retention, that causes the property right to lapse.

Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419 (1982)	State statute requiring landlords to allow installation of cable TV equipment on premises, for one-time payment of one dollar	Taking occurred. Where as here government causes a "permanent physical occupation" of property, it is a per se taking—no matter how important the public interest served or how minimal the economic impact. In contrast, temporary physical invasions must submit to balancing of factors under <i>Penn Central</i> .
United States v. Security Industrial Bank, 459 U.S. 70 (1982)	Retroactive use of bankruptcy statute to avoid liens on debtor's property that attached before statute was enacted	Statute will not be applied retroactively to property rights established before enactment date, in absence of clear congressional intent. There is substantial doubt whether retroactive destruction of liens comports with Takings Clause, and statutory reading raising constitutional issues should be avoided where possible.
Kirby Forest Industries, Inc. v. United States, 467 U.S. 1 (1984)	Filing of condemnation action by United States to acquire land for national park	No taking. Mere act of filing leaves landowner free, during pendency of condemnation action, to make any use of property or to sell it (but loss in market value from such action is not compensable).
Ruckelshaus v. Monsanto Co., 467 U.S. 986 (1984)	Public disclosure and other use by EPA of industry-generated trade-secret data submitted with application for pesticide registration	Taking occurred. Trade secrets are property, but only those submitted 1972–78, when federal pesticide statute contained a confidentiality guarantee, were taken. Before and after this period, there was no investment-backed expectation of confidentiality, hence no taking. Tucker Act remedy (right to seek money from United States in Court of Federal Claims) was not withdrawn by pesticide act. Pesticide act reveals no such intention, and withdrawal would amount to disfavored repeal by implication of Tucker Act. Also, federal pesticide act sets up exhaustion of agency remedies as precondition to any Tucker Act claim.
United States v. Locke, 471 U.S. 84 (1985)	Federal statute voiding unpatented mining claims when claim holder fails to make timely annual filings	No taking. Loss of claim could have been avoided with minimal burden. No taking when property can continue to be held through owner's compliance with reasonable regulations. <i>Texaco, Inc., v. Short</i> , found controlling.
Williamson County Regional Planning Commission v. Hamilton Bank, 473 U.S. 172 (1985)	County's rejection of developer's subdivision plat	Not ripe. Taking claim against state/local government in federal court is not ripe unless (1) there is final and authoritative decision by government as to type and intensity of development allowed, and (2) avenues for obtaining compensation from state forums have been exhausted. Here, developer failed to seek variances following initial denial, thus has not received a final decision. Nor did developer use an available state procedure for obtaining compensation. Absence of exhaustion requirement in 42 U.S.C. § 1983 distinguished.

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United States v. Riverside Bayview Homes, Inc., 474 U.S. 121 (1985)	Army Corps of Engineers' assertion of dredge and fill jurisdiction over certain freshwater wetlands	Not ripe. Mere assertion of regulatory jurisdiction by Corps is not taking; only when permit is denied so as to bar all beneficial use of property is there a taking. Also, fact that broad construction of statute might yield more takings is not reason to construe statute narrowly, since taking is unconstitutional only if no means to obtain compensation exists. Such a means does exist here, since Tucker Act authorizes compensation for federal takings.
Connolly v. Pension Benefit Guaranty Corp., 475 U.S. 211 (1986)	Federal act requiring that employers who withdraw from a multi-employer pension plan pay a fixed debt to the plan	No taking. Taking does not occur every time law requires one person to use his assets for benefit of another. Nor can statute be defeated by preexisting contract provision protecting employers from further liability.
Bowen v. Public Agencies Opposed to Social Security Entrapment, 477 U.S. 41 (1986)	Statutory repeal of provision in federal-state agreements allowing states to end social security coverage of state and local employees	No taking. Repealed provision is not "property," since Congress reserved right to amend agreements in enacting governing statute, and clause was not a debt or obligation of United States.
MacDonald, Sommer & Frates v. Yolo County, 477 U.S. 340 (1986)	County's rejection of developer's first-submitted subdivision plat	Not ripe. Developer must first obtain "final and authoritative determination" of the type and intensity of development that will be permitted. County's rejection of first-submitted plat does not preclude possibility that submissions of scaled-down version of project might not be approved. Also, a court cannot determine whether compensation is "just" until it knows what compensation state or local government will provide.
FCC v. Florida Power Corp., 480 U.S. 245 (1987)	Federal regulation requiring that utility greatly reduce the rent charged to cable television company for attaching its cables to utility's poles	No taking. Per se rule in <i>Loretto</i> applies only when permanent physical occupation is coerced, unlike here where utility voluntarily entered into contract with cable company. New rent ordered by FCC was not confiscatory, hence not a taking.
Keystone Bituminous Coal Ass'n v. DeBenedictis, 480 U.S. 470 (1987)	State regulation requiring that at least 50 percent of underground coal be left in place, where mining coal might cause subsidence damage to surface structures	No taking. Unlike similar anti-subsidence law held a taking in <i>Pennsylvania Coal Co.</i> , the statute here has a broad public purpose and does not rule out profitable mine operation.
Hodel v. Irving, 481 U.S. 704 (1987)	Federal statute declaring that small interests in allotted Indian land may not descend by intestacy or devise, but must escheat to tribe	Taking occurred. Statute amounts to complete abrogation, rather than regulation, of right to pass on property—a right which, like the right to exclude others, is basic to the concept of property.

First English Evangelical Lutheran Church v. County of Los Angeles, 482 U.S. 304 (1987)	Interim ordinance prohibiting construction of any structures in flood zone	If a regulation is held to have taken property, Takings Clause requires compensation for the time during which regulation was in effect—i.e., until date of repeal or judicial invalidation. Mere invalidation of regulation is not a constitutionality sufficient remedy. (Existence of taking assumed by Court owing to posture of case.)
Bowen v. Gilliard, 483 U.S. 587 (1987)	Amendments to federal welfare program resulting in lower benefits and assignment of child support payments to entire family	No taking. Family has no property right to continued welfare benefits at same level. Child receiving support payments suffers no substantial economic impact, since payments were likely used for entire family before amendments.
Nollan v. California Coastal Comm'n, 483 U.S. 825 (1987)	State's grant of building permit on condition property owners record easement allowing public to traverse beach on property	Taking occurred. Permit condition (recording easement) did not substantially advance a government purpose that would justify denial of permit (ensuring visual access to beach). Where such linkage exists, however, no taking occurs even if outright appropriation of the property infringement (here, the easement) would be a taking.
Pennell v. City of San Jose, 485 U.S. 1 (1988)	Rent control ordinance allowing rent increases of greater than set percentage only after considering economic hardship caused to tenants	Not ripe. There was no evidence that hardship provision had in fact ever been relied upon to limit a rent increase. Also, ordinance did not require rent limit in event of tenant hardship, only that hardship be considered.
Duquesne Light Co. v. Barasch, 488 U.S. 299 (1989)	State agency's refusal to allow inclusion of cost of canceled nuclear plants in utility's rate base	No taking. Under the circumstances, overall impact of preventing amortization of such costs was small, and not shown to be unjust or confiscatory.
United States v. Sperry Corp., 493 U.S. 52 (1989)	Statutory 1.5 percent deduction from awards of Iran-United States Claims Tribunal as reimbursement to United States for expenses incurred in the arbitration	No taking. 1.5 percent deduction is a reasonable "user fee" intended to reimburse United States for its costs in connection with tribunal. Amount of fee need not be precisely tailored to use that party makes of government services. Fee here is not so great as to belie its claimed status as a user fee.
Preseault v. Interstate Commerce Commission, 494 U.S. 1 (1990)	Federal "rails-to-trails" statute, under which unused railroad rights of way are converted to recreational trails notwithstanding reversionary property interests under state law	Premature for Court to evaluate taking challenge to statute, because even if it causes takings of reversionary interests, compensation is available under Tucker Act (authorizing suits against United States for compensation), and nothing in statute suggests the "unambiguous intention" to withdraw Tucker Act remedy which this Court requires. For example, Congress' expressed desire that program operate at "low cost" might merely reflect its rejection of a more ambitious federal program, rather than withdrawal of Tucker Act remedy.

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Yee v. City of Escondido, 503 U.S. 519 (1992)	Mobile-home rent-control ordinance, combined with state law forcing mobile home park owner to accept purchasers of mobile homes in park as new tenants	No physical taking occurred. Neither state nor local law on its face requires landowner to dedicate his land to mobile home rentals, nor overly limits his ability to terminate such use. Per se rule in <i>Loretto</i> applies only when permanent physical occupation is coerced. Claim that procedure for changing use of park is overly burdensome is not ripe, since plaintiff has not gone through procedure. Regulatory taking claim is not properly before Court, since not subsumed by questions in petition for certiorari.
Lucas v. South Carolina Coastal Council, 505 U.S. 1003 (1992)	Development ban imposed on vacant lots under state's beachfront management statute	Government regulation of land that completely eliminates economic use is a per se taking, even when the legislature asserts a prevention-of-harm purpose. There is a prior inquiry, however, as to whether proposed use is inherent in landowner's title under "background principles of the state's law of property and nuisance" existing when land was acquired. If not, there is no taking, since regulation does not take anything owner ever had.
Concrete Pipe & Products, Inc. v. Construction Laborers Pension Trust, 508 U.S. 602 (1993)	Federal statute requiring that employer who withdraws from multi-employer pension plan pay a fixed debt to plan	No taking. Taking claim is not aided by fact that collective bargaining agreement predating statute protected employer from liability to plan beyond specified contributions. Three-factor <i>Penn Central</i> test does not point to taking: (1) government action merely adjusted benefits and burdens of economic life; (2) withdrawal liability was not disproportionate; and (3) given longstanding federal regulation in pension field, employer lacked reasonable expectation it would not be faced with liability for promised benefits.
Dolan v. City of Tigard, 512 U.S. 374 (1994)	Conditions imposed by city for granting building permit, requiring applicant to dedicate public greenway along stream and adjacent bike/pedestrian pathway	Taking occurred. While greenway dedication condition rationally advanced a purpose of permit scheme (flood prevention), requiring landowner to allow public access to greenway did not. Hence, latter violated "nature of the permit condition" taking criterion in <i>Nollan</i> . City did not show that its other condition, that pathway be dedicated, imposed a burden on applicant that was "roughly proportional" to impact of applicant's proposed project on community. Hence, it violates the "degree of burden" taking criterion that Court announces here. Burden of proof is on government to demonstrate "rough proportionality."
Bennis v. Michigan, 516 U.S. 442 (1996)	Forfeiture of car, owned jointly by plaintiff and her husband, because of husband's illegal sexual activity in car	No taking (of wife's joint interest in car). To be sure, wife had no prior knowledge of husband's planned use of car. But government may not be required to compensate an owner for property which it has already lawfully acquired under authority other than eminent domain. Then, too, the cases authorizing forfeiture are "too firmly fixed" to be now displaced.

Babbitt v. Youpee, 519 U.S. 234 (1997)	Federal statute's ban on descent or devise of small interests in allotted Indian land—as ban was narrowed by amendment	Taking occurred. The 1984 amendment did not cure taking that <i>Hodel v. Irving</i> found in pre-amendment version of statute. Amendment narrowed ban only as regards income-producing ability of the land, not its value. More importantly, amendment's allowance of devise to current owners in same parcel still offends <i>Hodel</i> by continuing to “severely restrict[]” Indian's right to direct descent of his property.
Suitum v. Tahoe Regional Planning Agency, 520 U.S. 725 (1997)	Agency's ban on new land coverage in “Stream Environment Zones,” under which plaintiff was barred from building home on residential lot	Taking claim is ripe despite plaintiff's failure to apply for TRPA approval of her sale of transferrable development rights (TDRs). “Final decision” ripeness requirement of <i>Williamson County</i> does not embrace such TRPA approval, since parties agree on TDRs to which plaintiff is entitled and no discretion remains for TRPA. TDRs' value here is simply an issue of fact, which courts routinely resolve without benefit of a market transaction.
Phillips v. Washington Legal Foundation, 524 U.S. 156 (1998)	State's use of interest earned on small or short-lived deposits of lawyers' clients' funds to support legal services for the poor—under Interest on Lawyers' Trust Accounts (IOLTA) program	Interest is property of clients, not state. Despite fact that interest would not exist but for IOLTA program, state's rule that “interest follows principal” must be followed. Nor can interest be regarded as mere government-created value. Remanded for decision on whether taking occurred.
Eastern Enterprises v. Apfel, 524 U.S. 498 (1998)	Federal statute requiring company to fund health benefits of miner who worked for it decades earlier, where company left mining business before promise of lifetime benefits in collective bargaining agreements became explicit in 1974	Coal Industry Retiree Health Benefit of 1992 is unconstitutional as applied to Eastern. In opinion accompanying judgment, four justices find taking because statute imposes severe retroactive liability on a limited class of parties that could not have anticipated the liability, and the extent of liability is substantially disproportionate to the company's experience in mining field. This points to a taking under <i>Penn Central</i> test. Also, remedy for taking based on generalized monetary liability is invalidation rather than compensation, supporting jurisdiction in district court rather than in Court of Federal Claims. Remaining Justice supporting judgment sees instead a substantive due process violation.
City of Monterey v. Del Monte Dunes at Monterey, Ltd., 526 U.S. 687 (1999)	City's failure to approve property owner's development plans after five progressively scaled-back proposals accommodating city's progressively lower development caps	Issue of whether city was liable for taking, raised through claim under 42 U.S.C. § 1983, was in this case an essentially fact-bound one, and thus properly submitted by district court to jury. Suit for legal relief under section 1983 is action at law sounding in tort, and is thus within jury guarantee in Seventh Amendment. Also “rough proportionality” standard of <i>Dolan</i> is not appropriate takings test. It was designed to address exactions on development permits, not, as here, denials of development.

Palazzolo v. Rhode Island, 533 U.S. 606 (2001)	State denials rejecting developer's proposals to fill in all or most of predominantly wetland lot adjacent to coastal pond	Taking claim is ripe. Given state's interpretation of its regulations, there was no ambiguity as to extent of development (none) allowed on wetlands portion of lot. Similarly, value of uplands portion, where a single home may be built, was also settled. Hence, lot owner need not make further applications to satisfy "final decision" requirement of ripeness doctrine. On the merits, a taking claim is not barred by fact that property was acquired after effective date of state regulation. And, a regulation permitting a landowner to build a substantial house on an 18-acre parcel is not a total taking under <i>Lucas</i> but must instead be evaluated under the <i>Penn Central</i> test.
Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency, 535 U.S. 302 (2002)	Building moratoria imposed 1981–84 until bi-state agency could formulate new regional land use plan—plus freeze on building permits from 1984 to 1987 under court injunction against 1984 plan, plus restrictions under 1987 plan	1981–84 moratoria are not per se takings. Rejects argument that a moratorium prohibiting all economic use of a property, no matter how briefly, is a per se taking. Rather, such moratoria generally are to be analyzed under the ad hoc balancing test of <i>Penn Central</i> . Neither <i>First English</i> nor <i>Lucas</i> support the per se taking argument. The "parcel-as-a-whole" rule bars segmentation of a parcel's temporal dimension, precluding consideration of only the moratorium period. Finally, "fairness and justice" and the need for informed land use planning support an ad hoc approach here. (Post-1984 restrictions not addressed.)
Verizon Communications, Inc. v. Federal Communications Commission, 535 U.S. 467 (2002)	FCC regulations under Telecommunications Act of 1996 providing that rates charged by incumbent local exchange carriers to new competitors are to be based on forward-looking cost methodology, rather than historical costs	Argument that historical costs should be used to avoid the possibility of takings does not present a serious question. Incumbents do not argue that any particular rate is so unjust as to be confiscatory, but general rule is that any question about the constitutionality of ratesetting is raised by rates, not ratesetting methods. Nor is FCC's action placed outside this rule by any clear signs that takings will occur if the forward-looking cost methodology is allowed.
Brown v. Legal Found. of Washington, 538 U.S. 216 (2003)	State's use of interest earned by small or short-lived deposits of title company's clients' funds to support legal services for the poor—under Interest on Lawyers' Trust Accounts (IOLTA) program	IOLTA program satisfies "public use" requirement of Takings Clause, given the compelling interest in providing legal services for the poor. Court assumes taking occurred under a per se test like that in <i>Loretto</i> . But there is still no constitutional violation. The Takings Clause proscribes takings <i>without compensation</i> . IOLTA mandates use of the interest only when it could generate no net interest for the client, owing to administrative costs. Thus, the compensation owed is zero.

<p>Lingle v. Chevron U.S.A. Inc., 544 U.S. 528 (2005)</p>	<p>State statute limiting rent that oil companies may charge service station operators who lease stations owned by oil companies, in order to hold down retail gasoline prices</p>	<p>No taking. Rule announced in <i>Agins</i>, that government regulation of private property is a taking if it “does not substantially advance legitimate state interests,” is not a valid takings test. Takings law looks at the <i>burdens</i> a regulation imposes on property. Thus, the physical taking, total taking, and <i>Penn Central</i> tests each aims to identify government actions that are “functionally equivalent” to a direct appropriation. In contrast, the “substantially advances” test focuses on the regulation’s <i>effectiveness</i>, a due-process-like inquiry. Moreover, assessing the efficacy of regulations is a task to which courts are ill-suited.</p>
<p>San Remo Hotel, L.P. v. City & County of San Francisco, 545 U.S. 323 (2005)</p>	<p>City requirement that hotelier pay \$567,000 fee for converting residential rooms to tourist rooms, under ordinance seeking to preserve supply of affordable rental housing</p>	<p>Federal full faith and credit statute (barring relitigation of issues that have been resolved by state courts of competent jurisdiction) admits of no exception allowing relitigation in federal court of takings claims initially litigated in state court pursuant to “state exhaustion” ripeness prerequisite of <i>Williamson County</i>. Court rejects argument that whenever claimant reserves his federal taking claim in state court, federal courts should review the reserved federal claim de novo, regardless of what issues the state court decided.</p>