Private Property and Public Rights: Constitutional Limits on Physical and Regulatory Takings

A. Eminent Domain Condemnations
B. Inverse Condemnation: a Constitutional Tort?
C. Challenges to Regulations as “Invalid Takings”

Physical appropriations by government—eminent domain condemnations where a government agency takes a right of possession and pays just compensation—can be environmentally harmful and difficult to resist. Government regulatory actions at all levels, uncompensated, are part of the fabric of all modern societies; regulations play a huge part in environmental protection and continually are subject to critical analysis and resistance. Property rights-based cases arise in three main settings. In the eminent domain setting, environmental law presents substantive challenges to questionable physical condemnations (Section A). “Inverse condemnation” imposes property rights liability on governments for nuisance-like physical invasions (Section B). Arguments that environmental rules are “invalid regulatory takings” of private property (Section C), are a pervasive themes in environmental regulation and politics, reflecting fundamental clashing concepts of democratic governance. Although the inverse condemnation label is now sometimes used in claims against regulations as well as against physical acts by government, its application in the regulatory setting follows the tests for regulatory takings.

How far can government go in imposing public values and requirements upon the private property rights of corporations and individuals? That intensely political question, a central issue of democratic governance, lies latent or explosively obvious within a vast number of environmental issues. Whether by physical appropriations or regulatory restrictions on individual and corporate behavior, the imposition of public values and needs upon private property and private actions sets up political confrontations of constitutional proportions.

Local, state, and federal governments each functionally possess the coercive “police power” as a basic and necessary attribute of sovereignty,¹ the power in

¹The police power resides in all state governments by definition, from which it is broadly delegated to local governments for various health, safety, and welfare purposes. The federal government does not possess a general police power, but exercises a similar
appropriate cases to force anyone within their jurisdiction to do or not to do things that the government believes would affect the health, safety, or general welfare of its citizens. The police power includes both physical condemnation and regulatory powers. Government can prohibit you from dumping pollutants or filling a wetland, force you to sell your land for a public park or airport, or regulate your use of wilderness areas and wildlife.

The constitutional tensions between public rights and private property rights are based on the language of the Fifth Amendment to the U.S. Constitution (as incorporated in the Fourteenth Amendment for state actions and substantially replicated in corresponding provisions in most state constitutions):

No person shall be...deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

The Five Basic Police Power Inquiries. Virtually all challenges to governmental mandates, whether federal, state, or local, can be subjected to the same five inquiries of constitutional scrutiny, the first four sounding in substantive due process (with “takings,” the fourth, often separated out as a special inquiry), and the fifth in procedural due process. These five inquiries are discernible throughout the case law, and encompass virtually all substantial nonstatutory questions typically raised in judicial review of governmental actions.

FIVE BASIC TESTS OF THE VALIDITY OF GOVERNMENT ACTIONS:

1. Authority?
2. Proper Public Purpose? (and no “poison purpose”?)
3. Means Reasonably Related to Ends?
4. Excessive Burden Imposed on Individual?
5. Procedural Due Process?

1. Authority. A challenger to a zoning decision can assert the government’s lack of general or specific authority to act. Such a challenge presents the ultra vires (“beyond the authorized powers”) question, a constitutional issue. Ultra vires challenges involve substantive constitutional inquiry because they dispositively

range of powers through its commerce, national defense, property, and other delegated authorities, and its exercises of these powers are also at times referred to as “police power” actions.

review the foundation of the right by which the government constrains private interests in the possession, use, and enjoyment of an individual parcel of property.

2. Proper Public Purpose. The second category of challenges addresses proper public purpose in regulatory actions as well as condemnations. Until *Euclid v. Ambler*, 272 U.S. 365 (1926), for example, zoning laws were attacked as not fitting within the “general welfare” component of the police power’s classic triad of basic regulatory purposes: health, safety, and welfare. Narrower “poison purpose” allegations have included, with varying degrees of success, claims that regulations were “purely aesthetic,” were for “purely private purposes,” were motivated by a desire to drive down land prices for future condemnation, were racially exclusionary or otherwise invidiously intended to discriminate, or, like some motorcycle helmet prohibitions, impermissibly protected individuals against their own rugged wills. The proper public purpose inquiry is a threshold question, testing the propriety of the governmental objective rather than the nature of the actual decision itself.

3. Merits Review: Means Rationally Related to Ends. The third category of challenges involves attacking a governmental action on its merits for lack of rational relationship of the chosen means to accomplishment of the proper purposes. Even if the purposes of challenged governmental actions are perfectly proper, the design of an ordinance or the factual reasoning supporting a decision may nevertheless be insufficiently, illogically, or erroneously related to achieving those purposes. Analytically, moreover, this third means-end inquiry may also incorporate “least drastic means” and equal protection review, and can be widely discerned in judicial declarations that governmental determinations and classifications must “have reasonable relation to a proper legislative purpose, and [be] neither arbitrary nor discriminatory [to satisfy] the requirements of due process,” and must “rationally advance…a reasonable and identifiable governmental objective.”

4. Excessive Private Burden. Because compensation is automatically owed in condemnation cases, in eminent domain the fourth inquiry is less a balancing than an evaluation of the appropriate amount of governmental payment to compensate burdened individuals for property rights taken. But especially when applied to government regulations—challenged as “invalid regulatory takings”—the fourth inquiry, the degree of burden imposed on the individual, is often the emotional heart of substantive review and a particular tactical focus. Its most common manifestation is the allegation of “confiscatory” takings burdens in regulatory cases, asking a question basic to justice and

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4Schweiker v. Wilson, 450 U.S. 221, 235 (1981). The latter part of the quotation is clearly directed at establishing a proper public purpose.
democracy: How far can the collective power of the majority erode the property of the individual for the sake of public well-being? A common approach in regulatory takings cases is some form of “residuum” or “diminution” takings test: property owners lose value from regulatory restrictions but must be left with a “reasonable” remaining benefit of their regulated property. The various versions of a diminution test usually do not explicitly weigh public harms avoided, but if implicit or explicit balancing of potential public harms against private property losses is included, the hybrid offers a workable and philosophically defensible test, for application far beyond the field of environmental and land use regulations.

5. Procedural Due Process. Courts also apply procedural due process requirements. One form considers a contextual balance whether government has given enough process—questions of notice, opportunity to contest issues at a hearing, the quantity of hearing procedures available, the clarity of legal standards to be applied, and the opportunity to obtain review of the application of a law to a particular case. The constitutional procedural balance is nicely set out in Mathews v. Eldridge.1 A second form of procedural requirements is owed to the courts themselves. As in Overton Park, in order for courts to fulfill their judicial review functions government processes must produce a meaningful reviewable record, showing the basis of official actions and that officials have considered all relevant factors in reaching determinations.

These five diagnostic categories are not carved in stone but offer a useful analytical organization that can be applied to the often complex and confusing controversies surrounding the imposition of public power upon private property, as noted in the following materials of this chapter. Governmental actions that violate Inquiries Number 1, 2, and 3 often are declared “void on their face,” while violations of the fourth and fifth usually are voided “as applied” to that particular land.

A. EMINENT DOMAIN CONDEMNATIONS

1. The Domain of Deference

The power of the public to appropriate private property via condemnation is clearly necessary to the functioning of all governments—taking land from unwilling individuals for highways, airports, public hospitals, flood control

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1 Mathews v. Eldridge, 424 U.S. 319 (1976) — a court reviewing how much procedure an agency must constitutionally give a claimant should weigh (1) the hardship to the claimant in not receiving additional process, (2) the hardship to the government in having to provide additional process, and (3) the risk of error in not having particular additional procedures apply. The last of these is the key argument.
constructions, and many more public enterprises. As a result, governmental eminent domain decisions in the U.S. have generally received a most respectful reception in courts, both state and federal. Given that the government concedes that it will pay just compensation for a taking, many courts in effect declare that they have no further questions. As the Supreme Court held in Berman v. Parker, the government’s assertions of condemning authority, proper public purpose, and rational choice of means are, in practice, “well-nigh unassailable.” Berman v. Parker, 348 U.S. 26, 35 (1954), is the Supreme Court’s classic eminent domain case, upholding a condemnation for private corporate urban renewal economic development.

The usual eminent domain case is cut and dried. The condemning entity files a complaint in court against a parcel of land; the “remedy” requested is a court order transferring title. For the condemnation to succeed, the court need only be convinced that—

1. the condemning entity, which is normally either a unit of government or a public utility, has the power of eminent domain under the applicable statutes and follows the necessary procedures for its exercise;
2. the condemnation is for a stated proper public purpose;
3. the condemnation decision is not “arbitrary and capricious” (or, in some states, whether the condemnation is “necessary,” usually an inquiry at the level of “are highways necessary?” rather than “is this particular land essential if a highway is to be built?”);
4. appropriate just compensation will be paid, and
5. all required procedures were followed.

The location, amount of land to be taken, and ecological effects of condemnations normally are not open to question. Thus in the vast majority of cases the opponents of condemnation can only stand and fight on the amount of compensation, a jury award, trying to make the taking more expensive. This tack

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6See Kohl v. U.S., 91 U.S. 367, 371-372 (1875), where the Court assumed for the first time that the federal government had inherent eminent domain authority.

7The general invulnerability of eminent domain appears to exist irrespective of which level of condemning authority is involved—federal, state, or local government, or public utility corporation. Analytically, as well, there are no meaningful differences between these condemners. Each must have a proper grant of authority and must satisfy the other three categories of police power tests. Judicial review of the rationality of the condemnner’s site-selection choice is typically very deferential. In most cases, condemnnees cannot require a specific showing why a particular site was not chosen. The Colorado Supreme Court, however, has suggested that public utility condemnations may deserve more scrutiny than governmental takings. Ariz.-Colo. Land & Cattle Co. v. Dist. Ct., 511 P.2d 23, 24-25 (Colo. 1975).
is practically useless for environmentalists when they oppose a condemnation but don’t own the subject property. And it is not very satisfying anyway, since money is small comfort for the unnecessary loss of a beautiful marsh or forest.

2. Challenging an Eminent Domain Condemnation

Over the decades since Berman v. Parker, most significant challenges to eminent domain takings have been political rather than legal. As in the highly publicized case noted below, Kelo v. New London, the political rhetoric reflects a gut reaction standoff. Private property groups and talk radio argue that government should keep its hands off private property, sometimes asserting the illegitimacy of all eminent domain. Government agencies argue that whatever they propose is strict public necessity. Politicians and legislatures may react in their spheres, but the constitutional validity of most takings is matter-of-factly upheld in court.

Environmentalists involved in eminent domain controversies in some cases support condemnations: There wouldn’t be a Central Park in New York City or most national parks if eminent domain wasn’t used. More frequently, however, they are found in opposition to projects that may not take sufficient account of environmental values—cutting highways through wilderness, building publicly owned office towers in low-income neighborhoods, siting regional trash dumps or power plants, creating development parks in bucolic areas to attract industry, or (through delegation of power to private companies), condemning rights of way for power lines, pipelines, ditches, and drains, or taking private lands so that mining companies can operate strip mines. In many such cases, environmentalists raise legal as well as political issues. The wonder is that eminent domain condemnation has been subjected to so little active judicial scrutiny on substantive rationality grounds, beyond the usual reviews of how much compensation is owed.8

The primary target of substantive environmental challenges to eminent domain is the question of rationality or arbitrariness. If a court allows property owners a serious hearing on their claim of irrationality, and weighs that defense according to the standard tests of arbitrariness applied in other administrative law settings, substantive challenges can be credible.9

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8The reason that relatively few condemnations are challenged, though they would appear to present attractive targets for “conservative” opposition, may be that condemnations typically are levied for “establishment” initiatives such as airports and industrial development projects, and the design plans for what property will be taken often avoid land parcels where owners are likely to be able to mount substantial legal defenses.

9Some state courts matter-of-factly allow defenses alleging that a particular taking is “unnecessary.” See Plater & Norine, Looking Glass, 16 B.C. Envtl. Aff. L. Rev. at 689-693. Another approach is available where property owners can claim that their land serves
Two hypothetical cases\(^\text{10}\) help to set out the legal basis for serious substantive review of condemnation decisions.

Quasi-public environmental purposes. When one government tries to condemn another governmental entity’s property, courts determine the winner under the “paramount public use” balance. Several courts have extended this defense to private lands. See *Tex. E. Transmission Co. v. Wildlife Preserves*, 225 A.2d 130 (N.J. 1966); *Merrill v. Manchester*, 499 A.2d 216 (N.H. 1985) (the court weighed the “recreational, scenic and ecological importance” of the private land dedicated to open space preservation, against a proposed town industrial park taking); *Oxford County Agric. Soc’y v. Sch. Dist.*, 211 A.2d 893 (Me. 1965); *Middlebury Coll. v. Cent. Power Corp.*, 143 A. 384 (Vt. 1928).

\(^{10}\)These are set out at greater length in Plater & Norine, Looking Glass, 16 B.C. Envtl. Aff. L. Rev. at 671-677.
A Means-Ends Factual Implausibility Case. Assume that a federal agency with an express statutory mandate to “promote regional economic development” decides to condemn 38,000 acres of farmland to build a regional industrial park for future corporate tenants. The 300 farm families who own the land typically would respond by making a barrage of complaints—that this is a “land-grab,” a taking of private land to be turned over to other private interests, a taking of “excess” land, a “socialistic” governmental land speculation, and so on. Defense attorneys in eminent domain cases turn these verbal complaints into defensive legal arguments—most focusing on the alleged improper “private use,” not “public use” as the Fifth Amendment — and as in Kelo, all such regularly lose where there is a valid public purpose.

FIGURE 21-1: This slide shows the area condemned by the Tennessee Valley Authority for their “Timberlake New Town” development project, a key element in the agency’s justification for its Tellico Dam (see Chapter 10). The black area is the flooded lake; the rest of the area taken by or under threat of eminent domain—300 farms, almost 40 square miles—was taken for the model-city and associated development. After the Boeing Corp. pulled out of the project, the city was never built.

Assume, however, that the agency previously had used exactly the same rationale to condemn a total of more than 200 square miles of farmland for other

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11 This hypothetical is, in fact, the case of TVA’s Columbia and Tellico Dam projects. See Chapter 10. By acquiring more than 60 square miles for the Tellico project, only 16,000 acres of which would be flooded, TVA projected that it could resell up to 35 square miles of condemned farmlands to a hypothetical industrial city to be called Timberlake, theoretically to be built by the Boeing Corporation with congressional subsidies. The speculative resale income and the future economic activity value were key economic underpinnings of the project, without which it would have failed to have a benefit-cost ratio in excess of 1:1.

12 Berman v. Parker, 348 U.S. 26, 35 (1954), declared that government can condemn private property to give to private redevelopers even where the land was not derelict, so long as the redevelopment served public purposes. This effectively killed the strict “public use” interpretation as a matter of constitutional law, though condemnees and politicians continue to argue it, and some state legislatures have statutorily modified it.
industrial development projects, and virtually no development occurred. The condemnation defendants realistically cannot argue that industrial development is not a proper public policy or public purpose, but they have a further argument: that they should be allowed to try to prove that condemnation of their lands is not rationally related to the accomplishment of the agency’s expressed public purpose. Whereas a court initially could well have deferred to the agency on its first industrial development projects, now that the factual record clearly shows their implausibility, private property owners must be allowed at least a practical chance to allege the arbitrariness of such condemnations in court. Based on this factual record, no governmental official could reasonably believe that the governmental choice of means—condemnation of these lands—would achieve the avowed governmental ends of industrial development. Under the deferential standard of review applied in condemnation takings, however, most courts today would not undertake even this first step. Normally agencies’ discretion and the rationality of their decisions to condemn, short of lunacy, are supported in court by the strongest presumption of constitutionality.13

A Rational Alternatives Case. The second paradigm requires the reviewing court to apply the rationality rule in a contextual setting, reviewing how an agency has chosen between several competing alternatives that admittedly would each achieve a public purpose but are irrational when viewed in context. Poletown Neighborhood Council v. City of Detroit illustrates this paradigm:14

Assume that a federal redevelopment agency, working through the auspices of a city government, decides to encourage the construction of a new job-creating, manufacturing plant within city limits. It decides to condemn and raze an urban neighborhood of 50 square blocks that contains 1100 homes, 144 businesses, 16 churches (including 2 cathedrals), 2 schools, and a hospital. The project would cause a substantial amount of personal and commercial distress, all in order to turn over the 500-acre parcel to a major automobile manufacturer

13Some state courts allow review of the rationality of condemnation decisions, though most have followed the federal courts’ extremely deferential example. Use of the federal APA §706 and its state corollaries could help open up such judicial review in the future.

14See 304 N.W.2d 455 (Mich. 1981) (per curiam); see also Crosby v. Young, 512 F. Supp. 1363, 1374 (E.D. Mich. 1981). For a factual chronicle of Poletown, see Poletown, 304 N.W.2d at 464-471 (Ryan, J., dissenting). See J. Wylie, Poletown: Community Betrayed (1989); Bukowczyk, The Decline and Fall of a Detroit Neighborhood: Poletown vs. GM and the City of Detroit, 41 Wash. & Lee L. Rev. 49 (1984); Poletown Lives (documentary film), Information Factory, 3512 Courville St., Detroit MI 48224. General Motors, despite the desperate efforts of property owners and Ralph Nader, successfully induced a federally funded redevelopment condemnation project to give the corporation land in Poletown, a stable, mixed-race, low-income neighborhood of Detroit, to build a Cadillac plant.
for construction of a Cadillac assembly plant.

The property owners might, as usual, attack the taking as based on an improper public purpose—a “private use,” for example—and, as usual, would lose. They might argue further that condemnation payments will never provide sufficient funds for replacement of their homes and businesses at relocated sites, but, in the absence of special statutory provisions, this argument also fails because just compensation is assessed according to the market value of what is taken with no guarantee of relocation or replacement costs.

Assume further, however, that at the time the officials decided to condemn and raze the neighborhood at least four other empty industrial sites of 500 acres each are available within city limits with equivalent access to rail, highways, and utilities. The landowners may now make a further argument: that, given the drastic burden imposed upon them, and the available alternative sites that cannot be rationally distinguished from their neighborhood’s site (except that they are less expensive to develop given the cost of condemnation to the city), no official could rationally have chosen to condemn their homes and businesses rather than go to one of the other four open sites.\(^\text{15}\)

\(^{15}\)The Poletown environmental impact statement identified nine potential sites for the Cadillac factory, but, from the beginning, General Motors’ site criteria were so particular to the Poletown site that only it would fit. The company demanded “an area of between 450 and 500 acres; a rectangular shape (3/4 mile by 1 mile); access to a long-haul railroad line; and access to the freeway system.” 304 N.W.2d at 460 (Fitzgerald, J., dissenting). Never clarified in the legal battle was the fact that others of the nine potential sites were basically “greenfield” sites empty of houses, churches, and small businesses and thus available without the massive disruption of Poletown; but they all were rejected at GM’s insistence. Was shape a critical or a superficial requirement? When Detroit’s planning office staffers inquired informally of GM, they were told that the corporation was insisting on a rectangle so that it could use the same blueprint layout of parking lots and assembly units as at an existing GM plant in Oklahoma. GM adamantly refused to consider a parking structure or shifting the parking lot layout at Poletown. One of the GM attorneys said they couldn’t figure out why their CEO was insisting on the Poletown location, except that he wanted to see the new Cadillac plant, and that was the only site visible from his office. See Plater & Norine, Looking Glass, 16 B.C. Envtl. Aff. L. Rev. at 675 n.37.
FIGURE 21-2. Detroit’s Poletown area, before and after. General Motors and the city used eminent domain powers to eliminate everything standing on the 465 acres of this integrated low-income residential-commercial neighborhood – the homes of 4,200 people, 144 local businesses, 16 churches, 2 schools, and a hospital – in order to build a Cadillac assembly plant, despite the existence of alternative undeveloped industrial park sites in the area. Photo credit: David Turnley, Detroit Free Press

Such an argument is not a means-end argument that the condemnation of Parcel A will not in fact or logic serve the avowed public purpose of industrial development, but rather that, viewed in the factual context of drastic social costs
and available alternative sites at B, C, D, and E, no rational official could have picked A. This version of rationality review is analytically more complex and difficult, dealing not with basic factual implausibility but with a judicial cost-benefit-alternatives review. In effect, it involves judicial acknowledgment of a “less-drastic-means” inquiry in review of some governmental condemnation actions. Deference to governmental decisions is an even greater consideration here, but the fundamental question remains: If to serve the legitimate, expressed public purpose of industrial development a site must be chosen, but in light of the disproportionate private and public burdens no rational official could have thought that Parcel A was preferable for that legitimate purpose, doesn’t a defendant have the right to ask a court to scrutinize the substance of the condemnation decision and rescind it if it fails the test?

These two paradigms present instances in which private property owners would want at least the opportunity to go forward with the burden of proving that a governmental decision is not rational, in terms showing that a rational official could not so have decided. In both these cases, however, the “arbitrary and capricious” standard would be honored in the breach. Federal courts currently do not take on a particularized rational basis scrutiny of governmental condemnation decisions, but instead defer in general terms to the exercise of official discretion, leaving condemnation defendants with no practical substantive review of takings decisions.

The paradigms are admittedly rather extreme examples of eminent domain condemnation, but such cases permit clearer insights into condemnation review. Lest they be thought hyperbolic, moreover, remember that both have actually occurred and may well occur again.

COMMENTARY & QUESTIONS

1. Legal bases for more active substantive review: Midkiff. In the two paradigms above, the theoretical basis for substantive review can be seen in the Supreme Court decision upholding Hawaii’s land reform act. The decision provided a substantive due process test for eminent domain decisions: In order to meet constitutional requirements it must be shown that “the Legislature rationally could have believed that the [Act] would promote its objective.” Hawaii v. Midkiff, 467 U.S. 229, 242 (1984) (O’Connor, J., emphasis in original). It is a high burden for challengers to shoulder, but it at least allows challenges drawing on precedents of administrative law. Under administrative procedure acts courts review and occasionally rescind government agency actions found to be “arbitrary and capricious.” 5 U.S.C. §706(a)(2). Administrative law interprets that test more rigorously than eminent domain case law’s general deference to agencies, so the door is open for administrative law challenges of ill-considered agency and public utility condemnations.

2. Legal bases for more active substantive review: Kelo and Hathcock. In the Poletown case, the unsuccessful constitutional arguments made in court for the neighborhood were based on challenges to the public purpose—that giving land to a
private corporation was not a “public use.” In *Kelo v. New London*, 545 U.S. 469 (2005), the U.S. Supreme Court likewise upheld a challenge to an economically depressed city’s attempt to revive itself with a waterfront-oriented economic renewal project based on transfer of condemned land to a private development corporation.

**FIGURE 21-3.** The New London CT area focused upon for economic development. The porkchop-shaped parcel below the arrow is the Pfizer ex-World Headquarters intended to provide customers for the planned harborside park, restaurants, stores and other development reinvestments. The aerial photo arrow marks Susette Kelo’s house. One of the flags on the home says “Don’t Tread on Me”; a sign on the front of the house says “Not For Sale.” The house, pink in color, was in good condition before condemnation.

3. *Kelo* aroused renewed arguments that transfers of condemned private property to private corporations violated the Public Use Clause of the Fifth Amendment. But even the strenuous dissenting opinion by Justice O’Connor did not resurrect the “public use” test. She reaffirmed the prior holdings in *Berman* and *Midkiff*: “Because each taking directly achieved a public benefit, it did not matter that the property was turned over to private use…. A public purpose was realized when the harmful use was eliminated.” 545 U.S. at 500 (emphasis added). She said the taking was unjustified because Susette Kelo’s house was not a harmful blighted property. (Mr. Berman had proved exactly the same thing in 1948, but lost to an expressed need for area-wide renewal.) The significance of *Kelo*, however, was that the swing vote, Justice Kennedy, shared the conviction that condemnations transferring title to a private corporation deserved greater scrutiny of their fairness. Justice Kennedy gave heightened scrutiny to the city’s taking, but concluded that it was not irrational:

A court applying rational-basis review,…confronted with a plausible accusation of impermissible favoritism to private parties should treat the objection as a serious one and review the record to see if it has merit, though with the presumption that the government’s actions were reasonable…. Here, the trial court…considered testimony from government officials and
corporate officers; awareness of New London’s depressed economic condition and evidence corroborating the validity of this concern; the substantial commitment of public funds by the State to the development project before most of the private beneficiaries were known; evidence that respondents reviewed a variety of development plans and chose a private developer from a group of applicants rather than picking out a particular transferee beforehand. This case, then, survives the meaningful rational basis review that in my view is required under the Public Use Clause. 545 U.S. at 491-492.17

Justice Kennedy’s concurrence echoed the heightened-scrutiny logic of the Michigan Supreme Court in Wayne County v. Hathcock, 684 N.W.2d 765 (Mich. 2004), reversing their prior holding in Poletown. In Hathcock an airport buffer zone was not allowed to transfer private lands to private commercial uses. Hathcock stated three somewhat jumbled tests to be satisfied in such takings. The Michigan court said for such takings to be valid—

First [they must involve] public necessity of the extreme sort [for]...enterprises generating public benefits...[needing] land that can be assembled only by the coordination...government alone is capable of achieving....

Second...the private entity remains accountable to the public in its use of that property....

Finally...the property must be selected on the basis of “facts of independent public significance.”...684 N.W.2d at 781-784.

In Justice Kennedy’s take, did the facts in Kelo pass the Michigan Hathcock test?

4. The politics of eminent domain. On one hand, eminent domain is a longstanding rhetorical bugbear of “conservatives.” On the other, as in the Poletown case, private corporate interests often stand foursquare with government in favor of condemnation, opposing private property owners. Indeed, as in Poletown, the company appears to have initiated and controlled the government’s exercise of eminent domain from the start.

Although it was a relatively straightforward application of prior law, Kelo was seized upon by a national coalition of antiregulatory interests, backed by nascent Tea Party organizations, as a focused issue for stirring anti-governmental popular wrath. In the political turmoil that followed, a number of state

17Ironically, the hopes for New London’s public development initiative were cast into doubt by the decision of Pfizer, the city’s prime “anchor enterprise” on the waterfront, to close its headquarters offices there in the wake of economic downturn. Susette Kelo angrily accepted compensation for her house and moved away.
legislatures were prompted to pass statutes forbidding condemnations for economic development, for unblighted parcels, for transfer to private parties, and the like. Several bills also tacked on provisions requiring property owners to be compensated for regulations that lowered market values. Though Kelo did not alter the constitutional law of eminent domain, the Kelo backlash has clearly served anti-governmental agendas.

**B. INVERSE CONDEMNATION: A CONSTITUTIONAL TORT?**

At first glance, inverse condemnation scarcely resembles eminent domain. The facts in physical inverse condemnation cases—governmental actions resulting in noise, vibrations, smells, and general disruptions to the neighboring environs—resemble tort cases, not constitutional law.

Why then make these into constitutional cases? The simple answer is: to get around sovereign immunity. If the federal, state, or local government performing a governmental function hasn’t consented to be sued, the immunity doctrine is a defense to tort actions.\(^{18}\) The right to challenge government action on constitutional grounds, however, remains available.

Why call it “inverse” condemnation? In an ordinary condemnation case, the government decides it wants someone’s property and sues to get it, as a plaintiff willing to pay just compensation. But what if, instead of suing to get the property, the government in effect simply goes ahead and takes it physically? In that case, the victim of the taking usually cannot sue in tort because of sovereign immunity. It can file a constitutional suit for compensation, however, effectively saying, “The government has in reality condemned my property by physically taking it, without admitting it, so I want to sue them in court to make them exercise eminent domain against me and pay compensation.” Hence inverse condemnation, or “reverse condemnation,” is defined by the reversal of roles.

As in the following case, the government is doing something, such as running an airport, without acknowledging its significant physical appropriation of private property uses. In the usual eminent domain case, the amount of compensation is usually the dominant issue. In inverse condemnation cases, however, there is a prior threshold issue: Was there a taking at all?

**Thornburg v. Port of Portland**

376 P.2d 100 (Or. Sup. Ct. 1962)

GOODWIN, J. The issues in their broadest sense concern rights of landowners adjacent to airports and the rights of the public in the airspace near the ground.

\(^{18}\)The availability and extent of governmental liability, short of constitutional claims, depends on the vagaries of statutory and common law exceptions to immunity.
Specifically, we must decide whether a noise-nuisance can amount to a taking.

The Port of Portland owns and operates the Portland International Airport. It has the power of eminent domain. It has used this power to surround itself with a substantial curtilage, but its formal acquisition stopped short of the land of the plaintiffs. For the purposes of this case, the parties have assumed that the Port is immune from ordinary tort liability.

The plaintiffs own and reside in a dwelling house located about 6,000 feet beyond the end of one runway and directly under the glide path of aircraft using it. Their land lies about 1,500 feet beyond the end of a second runway, but about 1,000 feet to one side of the glide path of aircraft using that runway. The plaintiffs contend that flights from both runways have resulted in a taking of their property. Their principal complaint is that the noise from jet aircraft makes their land unusable. The jets use a runway the center line of which, if extended, would pass about 1,000 feet to one side of the plaintiffs’ land. Some planes pass directly over the plaintiffs’ land, but these are not, for the most part, the civilian and military jets which cause the most noise.

FIGURE 21-4. The Port of Portland airport. The white line indicates schematically the area overtly taken by eminent domain for the airport, with adjacent privately-owned areas not purchased by the Port Authority, but impacted by overflights; the white square is a schematic representation of the Thornburg property’s location.

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their land unusable. The jets use a runway the center line of which, if extended, would pass about 1,000 feet to one side of the plaintiffs’ land. Some planes pass directly over the plaintiffs’ land, but these are not, for the most part, the civilian and military jets which cause the most noise.

The plaintiffs’ case proceeded on two theories: (1) Systematic flights directly over their land cause a substantial interference with their use and enjoyment of that land. This interference constitutes a nuisance. Such a nuisance, if persisted in by a private party, could ripen into a prescription. Such a continuing nuisance, when maintained by government, amounts to the taking of an easement, or, more precisely, presents a jury question whether there is a taking. (2) Systematic flights which pass close to their land, even though not directly overhead, likewise constitute the taking of an easement, for the same reasons, and upon the same authority.

The Port of Portland contends that its activities do not constitute the taking of easements in the plaintiffs’ land. The Port argues: (1) The plaintiffs have no right to exclude or protest flights directly over their land, if such flights are so high as to be in the public domain, i.e., within navigable airspace as defined by federal law.19 (2) The plaintiffs have no right to protest flights which do not cross the airspace above their land, since these could commit no trespass.... Accordingly, the Port contends, there is no interference with any legally protected interest of the plaintiffs and thus no taking of any property for which the plaintiffs are entitled to compensation....

The trial court proceeded as if the rights of the plaintiffs were limited by the imaginary lines that would describe a cube of airspace exactly 500 feet high and bounded on four sides by perpendicular extensions of the surface boundaries of their land. The trial court thus in effect adapted the law of trespass to the issues presented in this case, and held that unless there was a continuing trespass within the described cube of space there could be no recovery. The trial court [held] that...a nuisance could not give rise to a taking....

Since U.S. v. Causby, 328 U.S. 256 (1946), and particularly since Griggs v. Allegheny County, 369 U.S. 84 (1962), we know that easements can be taken by repeated low-level flights over private land...[and] compensation must be paid to the owners of the lands thus burdened....

It is not so well settled, however, that the easements discussed in the Causby and Griggs cases are easements to impose upon lands near an airport a servitude

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19See Civil Aeronautics Act, 49 U.S.C. §551(a)(7) (1952). One FAA rule fixed 500 feet as the minimum safe altitude over persons, vehicles, and structures. 14 C.F.R. §60.107. Congress has, during all material times, denominated the airspace 500 feet above any person, vessel, vehicle or structure in other than congested areas as navigable airspace which is subject to a public right of transit.
of noise.... It must be remembered that in both the Causby and Griggs cases the flights were virtually at tree-top level. Accordingly, both decisions could perhaps be supported on trespass theories exclusively.... The Tenth Circuit...held...that there must be a trespass before there can be a taking. Batten v. U.S., 306 F.2d 580 (10th Cir. 1962). As pointed out in a dissent by Chief Judge Murrah, the interference proven was substantial enough to impose a servitude upon the lands of the plaintiffs, and under the Causby and Griggs cases equally could have constituted a taking.... We believe the dissenting view in the Batten case presents the better-reasoned analysis of the legal principles involved....

In cases of governmental nuisance as a matter of law, there is a question, in each case, as a matter of fact, whether or not the governmental activity complained of has resulted in so substantial an interference with use and enjoyment of one’s land as to amount to a taking of private property for public use. This factual question...is equally relevant whether the taking is trespassory or by a nuisance....

The plaintiffs concede that single-instance torts...are not compensable. Inverse condemnation, however, provides the remedy where...the continued interference amounts to a taking for which the constitution demands a remedy....

If we accept...that a noise can be a nuisance; that a nuisance can give rise to an easement; and that a noise coming straight down from above one’s land can ripen into a taking if it is persistent enough and aggravated enough, then logically the same kind and degree of interference with the use and enjoyment of one’s land can also be a taking even though the noise vector may come from some direction other than the perpendicular.

If a landowner has a right to be free from unreasonable interference caused by noise, as we hold that he has, then when does the noise burden become so unreasonable that the government must pay for the privilege of being permitted to continue to make the noise? Logically, the answer has to be given by the trier of fact....

Logically, it makes no difference to a plaintiff disturbed in the use of his property whether the disturbing flights pass 501 feet or 499 feet above his land.... Whether a plaintiff is entitled to recover should depend upon the fact of a taking, and not upon an arbitrary rule. The ultimate question is whether there was a sufficient interference with the landowner’s use and enjoyment to be a taking.... Congress may very properly declare certain airspace to be in the public domain for navigational purposes, but it does not necessarily follow that rights of navigation may be exercised unreasonably.... There is a point beyond which such power may not be exercised without compensation....

PERRY, J., DISSenting.... I am unable to find any evidence that would support a judgment of a taking, based on interference with the plaintiffs’ use and enjoyment of the land by airplane flights above the 500-foot level.... The majority rely upon the law of nuisance.... Trespass of property which, as has been pointed
out, effects a taking in a constitutional sense, comprehends a physical invasion of
the property either by the person or by causing a physical object to enter upon or
over the property of another.... Therefore, it is the taking of an owner’s
possessory interest in land as compared with interfering with an owner’s use and
enjoyment of his land that distinguishes a trespass which is a “taking” from a
nuisance, which is not.... A nuisance takes none of the title in the property....

COMMENTARY & QUESTIONS

1. Physical easements taken: beyond trespasses? Should substantial physical
burdens on neighbors, beyond physical trespasses, be compensated by the government
as a cost of doing business? The majority and dissent agree that a plane’s physical trespass
constitutes the compensable taking of a servitude (more properly labeled an
“easement”). They were split over the rather technical point of whether nuisance-like
impacts can likewise give rise to prescriptive easements. Today a well-established line
of cases holds that nuisances can create prescriptive easements to pollute, so airport
inverse condemnation cases can apparently be based on noise and vibration nuisance
effects even where planes don’t physically penetrate plaintiffs’ airspace.

2. Extending physical inverse condemnation theories. The inverse condemnation
cause of action can potentially be applied far beyond airports in cases where tort claims
are barred by sovereign tort immunity (because federal and state laws waiving
sovereign tort immunity are quite narrow).

Highway and railroad noise? The agency in Thornburg argued that "plaintiffs must
endure the noise of the nearby airport with the same forbearance that is required of
those who live near highways and railroads." Could the inverse condemnation remedy
extend to highways and railroads? Compensation has been ordered for loss of access
(where a public road was converted to a limited-access highway) and loss of light and
air (where a bridge or overpass was built alongside a house), even though no part of the
plaintiffs’ land or airspace was physically invaded. The court notes “the forbearance that
is required of those who live near highways and railroads,” likewise facing dust, noise,
vibrations, flashing lights, and severe losses in property value. Should these be
compensable now? If so, the costs could bankrupt public transit programs.

Intentional or negligent flooding? In the Arkansas Game & Fish Commission case, 133 S.
Ct. 511 (2012), the Court held that flood control actions that cause temporary
downstream flooding are compensable in the event that they meet the usual tests
applied in cases alleging physical takings. After the Katrina hurricane, New Orleans
plaintiffs argued that the U.S. Army Corps’ negligent maintenance of the MR-GO ship
channel caused an inverse condemnation taking by pouring flood waters into the city,

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2 The dissent’s argument echoed a principle of eminent domain compensation
where, as in highway corridor condemnations, if government physically takes any piece
of your real property, however tiny, payment for all resulting “consequential” damages
must be made, but if no bit of land is taken, no compensation will be paid for the
sometimes huge loss of adjacent property values caused by the new highway.

Wildlife? Inverse condemnation claims can also arise in the wild. Can’t it be argued that the government takes an easement in my property without compensation when it forbids me from fencing out the antelope that want to eat my grass (giving the antelope an easement of access over my land), or when I am forbidden to shoot the endangered grey wolf that still thinks my property is her territory and eats one of my calves, or when the USFS adopts a “let-burn” policy for national forests so that my private trees and vacation cabin are destroyed by fire?20

Challenging non-physical government actions? Inverse condemnation is now also often used in challenges to non-physical “regulatory takings” (as in the next section). Do you see the legal and political advantages produced for those attacking government regulations if the constitutional test is considered the same for physical and non-physical government actions? Should all regulatory reductions of property use require compensation as takings of an “easement”? That would practically end all government regulation. So even when inverse condemnation claims are used to challenge regulations, the tests of validity for physical and non-physical government actions are necessarily substantially different.

C. CHALLENGES TO REGULATIONS AS “INVALID TAKINGS”

1. Regulatory Takings

“The ‘crazy-quilt pattern’ of Supreme Court doctrine has effectively been acknowledged by the Court itself, which has developed the habit of introducing its uniformly unsatisfactory opinions in this area with the understatement that ‘no rigid rules’ or ‘set formula’ are available to determine where [valid] regulation ends and [invalid] taking begins.”21

Sweeping attacks against government regulation have become a major characteristic of modern politics, arising in virtually all areas of governance. Private property rights-based attacks on environmental protection rules have frequently played a major role. It’s a fundamental question of democracy: Where


do you draw the line? How far can the collective power of the majority intrude upon an individual’s property rights, especially where compensation is not paid? Takings challenges, claiming that a governmental regulatory action has taken private property for public use without compensation in contravention of the Fifth Amendment, can be significant in all areas of government, but nowhere more pressingly and vividly than in the field of environmental protection. The Supreme Court’s decisions continue to be vague and erratic, but recent environmental cases present a slow movement toward clarity.

The politics and rhetoric of regulatory takings debates are intense. When a state prohibits development in wetlands, when the federal government prohibits billboards on interstate highways, when a local town council prohibits junkyards, when the EPA imposes a new tough pollution standard or restricts sale of a commodity, when post-strip mining reclamation standards are imposed, or when government entities propose to regulate any of a host of other concerns whereby property values and profits are restricted, in each case the “invalid takings” argument is likely to be heard loudly in the legislative, administrative, and ultimately in the judicial process. These complaints about government high-handedness are sometimes coupled with a dire warning from lobbyists that if the restriction is passed, those who vote for it as well as the agency regulators may find themselves personally liable for damages for violating the regulatees’ civil rights. Because the legal lines for judging the validity of regulations have been so poorly defined, often the mere threat of a lawsuit raising a takings challenge is enough to dissuade legislators and city councils from passing environmental measures, even where the proposed regulation clearly would comply with judicial takings tests.

When a restriction is actually challenged in court, the argument typically begins with allegation of economic loss, the fourth area of constitutional inquiry. (The first three areas of police power tests are relevant but usually in effect conceded.) The attack alleges that even though the restriction does not take physical possession of all or part of the private property (which in virtually all cases would clearly require eminent domain compensation), it so excessively restricts property rights that it amounts to a taking under the due process clause and eminent domain clause of the Fifth Amendment and their state corollaries. The test classically turned in some manner on the amount of property loss, viewed in a vacuum.

If a court finds a restriction excessive or confiscatory, the regulating agency can accept an equitable remedy nullifying the law as applied to the subject property, or agree to pay damages for the invalid taking (these cases are often confusingly filed as “inverse condemnation” or “eminent domain” actions,
focusing on monetary relief).  

Paradoxically, although courts go to extraordinary lengths to defer to and uphold eminent domain actions, as seen earlier in this chapter, the judicial approach to regulatory acts has been discernibly more critical, especially in the past three decades of the political Right’s marked ascendancy. In recent years, courts—when presented with losses of property value, a frequent occurrence in most police power settings—often have shifted the burden to government, ignoring the usual presumption of constitutionality for governmental acts.

_Pennsylvania Coal_, the classic takings decision that follows, is cited in almost all regulatory takings cases since 1922. It is the very first case in the history of the Republic in which the 1789 constitutional prohibition on uncompensated _physical_ takings was extended to _non_-physical regulatory actions.  

As the commentary and questions that follow _Pennsylvania Coal_ will note, the decision raises but doesn’t resolve many of the issues already encountered in environmental cases. Like its author Oliver Wendell Holmes, the decision is both eminent and enigmatic. It purports to set out a “general rule”; but does it?

**Pennsylvania Coal Company v. Mahon**

260 U.S. 393 (U.S. Sup. Ct. 1922)

_HOLMES, J._ This is a bill in equity brought by the defendants in error to prevent the Pennsylvania Coal Company from mining under their property in such way as to remove the supports and cause a subsidence of the surface and of their house. The [homeowner’s] deed conveys the surface but in express terms reserves the right to remove all the coal under the same and the grantee takes the premises with the risk and waives all claim for damages that may arise from mining out the coal. But the plaintiffs say that whatever may have been the Coal Company’s rights, they were taken away by an Act of Pennsylvania, approved May 27, 1921 (P. L. 1198), commonly known there as the Kohler Act. The statute forbids the mining of anthracite coal in such a way as to cause the subsidence of, among other things, any structure used as a human habitation [preventing coal companies nearing the end of mining in underground coal seams from quarrying away parts of the supportive “pillars” of coal that are kept

22 The _remedies_ sought in regulatory challenges can be the same as in inverse condemnation and eminent domain cases: damages for the taking or injunctions to block the government action. But the substantive elements of the claims are very different in the regulatory and the physical taking settings.

28 The Founding Fathers quite clearly did not think that regulations could ever be compensable takings. See F. Bosselman, D. Callies & J. Banta, The Taking Issue (1973). This fact of constitutional history is often ignored by individuals on the Right who are otherwise strict “original intent” constructionists.
in place to hold up the ceilings of working mines if there were homes, public buildings, roads, lakes, or streams above]..... As applied to this case the statute is admitted to destroy previously existing rights of property and contract. The question is whether the police power can be stretched so far.

Government 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. As long recognized some values are enjoyed under an implied limitation and must yield to the police power. But obviously the implied limitation must have its limits or the contract and due process clauses are gone. One fact for consideration in determining such limits is the extent of the diminution. When it reaches a certain magnitude, in most if not in all cases there must be an exercise of eminent domain and compensation to sustain the act. So the question depends upon the particular facts. The greatest weight is given to the judgment of the legislature but it always is open to interested parties to contend that the legislature has gone beyond its constitutional power....

This is a case of a single private house.... The extent of the public interest [in the statute] is not justified as a protection of personal safety. That could be provided for by notice. Indeed the very foundation of this bill is that the defendant gave timely notice of its intent to mine under the house. On the other hand the extent of the taking is great. It purports to abolish what is recognized in Pennsylvania as an estate in land—a very valuable estate—and what is declared by the Court below to be a contract hitherto binding the plaintiffs. If we were called upon to deal with the plaintiffs’ position alone we should think it clear that the statute does not disclose a public interest sufficient to warrant so extensive a destruction of the defendant’s constitutionally protected rights.
FIGURE 21-5: Photograph from Scranton, Pennsylvania, showing coal mine subsidence cave-ins caused by removal of coal pillars beneath the city. The photo above, taken shortly before 1920, was presented to the state legislature as part of the city’s case for passage of the 1921 Kohler Act, which was declared unconstitutional in Pennsylvania Coal. The bottom photograph was taken in the first decade of the 20th century. The residents of the home, Mr. & Mrs. Buckley, escaped safely by ladder up to the surface from their attic window.

But the case has been treated as one in which the general validity of the act
should be discussed.... It is our opinion that the Act cannot be sustained as an exercise of the police power, so far as it affects the mining of coal under streets or cities in places where the right to mine such coal has been reserved. As said in a Pennsylvania case, “For practical purposes, the right to coal consists in the right to mine it.” What makes the right to mine coal valuable is that it can be exercised with profit. To make it commercially impracticable to mine certain coal has very nearly the same effect for constitutional purposes as appropriating or destroying it. This we think that we are warranted in assuming that the statute does.

The protection of private property in the Fifth Amendment...provides that it shall not be taken for [public] use without compensation. A similar assumption is made in the decisions upon the Fourteenth Amendment. When this seemingly absolute protection is found to be qualified by the police power, the natural tendency of human nature is to extend the qualification more and more until at last private property disappears. But that cannot be accomplished in this way under the Constitution of the United States.

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. It may be doubted how far exceptional cases, like the blowing up of a house to stop a conflagration, go—and if they go beyond the general rule, whether they do not stand as much upon tradition as upon principle. In general it is not plain that a man’s misfortunes or necessities will justify his shifting the damages to his neighbor’s shoulders. We are in danger of forgetting that a strong public desire to improve the public condition is not enough to warrant achieving the desire by a shorter cut than the constitutional way of paying for the change. As we already have said this is a question of degree—and therefore cannot be disposed of by general propositions. But we regard this as going beyond any of the cases decided by this Court. We assume, of course, that the statute was passed upon the conviction that an exigency existed that would warrant it, and we assume that an exigency exists that would warrant the exercise of eminent domain. But the question at bottom is upon whom the loss of the changes should fall. So far as private persons or communities have seen fit to take the risk of acquiring only surface rights, we cannot see that the fact that their risk has become a danger warrants the giving to them greater rights than they bought. Decree reversed.

BRANDEIS, J., dissenting.... The right of the owner to use his land is not absolute. He may not so use it as to create a public nuisance, and uses once harmless may, owing to changed conditions, seriously threaten the public welfare. Whenever they do, the Legislature has power to prohibit such uses without paying compensation.... If by mining anthracite coal the owner would necessarily unloose poisonous gases, I suppose no one would doubt the power of the state to prevent the mining without buying his coal fields. And why may not the state, likewise, without paying compensation, prohibit one from digging so deep or excavating so near the surface, as to expose the community to like dangers? In
the latter case, as in the former, carrying on the business would be a public
nuisance.

It is said that one fact for consideration in determining whether the limits of
the police power have been exceeded is the extent of the resulting diminution in
value, and that here the restriction destroys existing rights of property and
contract. But values are relative. If we are to consider the value of the coal kept in
place by the restriction, we should compare it with the value of all other parts of
the land. That is, with the value not of the coal alone, but with the value of the
whole property. The rights of an owner as against the public are not increased by
dividing the interests in his property into surface and subsoil. The sum of the
rights in the parts cannot be greater than the rights in the whole.... For aught that
appears the value of the coal kept in place by the restriction may be negligible as
compared with the value of the whole property, or even as compared with that
part of it which is represented by the coal remaining in place and which may be
extracted despite the statute.

COMMENTARY & QUESTIONS

1. The various contested elements of regulatory takings cases. How to define the
limit beyond which government regulations on private property must be compensated?
When government authority physically appropriates private property, the line normally
is passed, a distinction reaffirmed in the 1978 Loretto case where a regulation forcing
apartment buildings to allot physical space to TV cable boxes required compensation.29
And it has been well established that property uses that are nuisances or noxious uses
can be abated without compensation.30 But where the regulatory impact on private
property is not physical, clarity disappears and a welter of complex issues arises.

There are at least eight major questions that regularly arise or lie latent within regulatory
takings challenges:

• Does the property rights diminution go “too far”? What is the ultimate

29 Loretto v. Teletanchor Manhattan CATV Corp., 458 U.S. 419 (1982). Even this line on
physical taking is not consistent. Justice Holmes acknowledged “exceptional cases, like
the blowing up of a house to stop a conflagration,” 216 U.S. at 416, and upheld
regulations requiring nuisance properties such as diseased cattle or trees to be physically
appropriated or destroyed without compensation. See Miller v. Schoene, 276 U.S. 272
(1928).

30 “Since no individual has a right to use his property so as to create a nuisance or
otherwise harm others, the State has not ‘taken’ anything when it asserts its power to
enjoin...nuisance-like activity.” Stevens, J., in Keystone Bituminous Coal Ass’n v.
(1887), and Hadacheck v. Sebastian, 239 U.S. 394 (1915).
legal standard of takings validity? In most takings cases courts cite Justice Holmes’s dictum that “the extent of the diminution” of private property rights is highly significant, and if it goes “too far” the regulation will be an invalid taking. But this standard, though it comports with common sense, is impossible to apply objectively. Asking whether the property owner retains a “reasonable remaining use or value,” also a common phrasing of the standard of takings validity, likewise invites subjective judgments. Only recently have the standards been somewhat clarified.

- **Setting the physical baseline for the judicial inquiry into property value diminution: the parcel as a whole?** Since virtually all agree with Holmes that diminution (the degree of private loss caused by a regulation) is relevant to determining regulatory validity, on what physical property baseline is the degree of loss to be calculated—on the property as a whole as Brandeis argued (presumably the entire coal field, not just the restricted pillars) or just on the regulated pillar portion as Holmes’ majority held? The latter perspective, a divide-and-conquer definition, dramatically increases the prospects for invalidity. After *Keystone Bituminous*, noted below, the law now generally adopts Brandeis’ dissenting view of the conceptual baseline rather than that of Holmes.

- **The time baselines:** There are two timing issues: retrospective economic accounting and time-of-purchase notice estoppel. In *Pennsylvania Coal*, the mining company had made huge profits prior to the date that the regulation prohibiting removal of support pillars was passed. Can the reviewing court take the *past economic returns* from the company’s investment into account when weighing the regulation’s validity (see the next paragraph on IBEs)? Second, if property owners buy regulated land knowing that it is restricted (therefore often paying less for it) (ditto), are they thereafter estopped from turning around and seeking to overturn the regulation because it lessens their full potential property value?

- **Investment-backed expectations (IBEs).** To what extent does constitutional fairness require consideration of the property owner’s IBEs? When the Pennsylvania Coal Company originally bought the mine, it based its investment on overall profits from the entire mine, not on the last marginal coal left in the support pillars. Today, weighing the property-owners’ original IBEs can on one hand reinforce property owners’ challenges by emphasizing when reasonable expectations are unfairly frustrated, and on the other hand support challenged regulations by defining the physical and time baselines

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32The IBE phrase comes from Michelman, Property, Utility, and Fairness: Comments on the Ethical Foundations of Just Compensation Law, 80 Harv. L. Rev. 1165, 1192 (1967), and was not originally intended as a constitutional test, although as noted in this chapter IBEs have potential utility for both attackers and defenders of regulations.
broadly, according to the property owners’ original overall investment planning, and weighing whether the property-owner had bought with notice of the restrictive regulation, therefore creating a “self-imposed hardship.”

- **Measuring land value or active use?** In virtually all takings reviews, the courts must consider how much economic diminution the private interest has suffered. Generally this measure looks not to how much has been lost but to how much was gained or remains. There is an issue, however, whether this residuum private interest is to be measured in terms of land value (if an undevelopable wetland, for instance, nevertheless has market value of $2000 an acre as a buffer, or for aesthetics), or whether there must remain an ability to make active commercial use of the land, as Justice Scalia has sometimes insisted.\(^3\) The distinction, only recently clarified—it’s value—obviously can make a great difference in takings outcomes.

- **To balance or not to balance?** In the twentieth century some takings decisions validated regulations by considering only whether government restrictions had been passed with proper authority. Others instead looked only at the impact on private property, making gestalt judgments of whether the restrictions went “too far.” Over the years, with occasional departures like the *Lucas* case’s exceptional “categorical” rule noted below, the commonsense conviction has grown that constitutional determinations of takings validity require a balancing of both the public rights and the private rights implicated in a case.\(^4\)

- **How to weigh public rights?** Even if we achieve consensus that takings tests require balancing, how to do so can never be a completely objective technical process. It is far easier to quantify private market value impacts than public interests. As considered below, in weighing this balance do all public benefits of a regulation weigh in its favor, or only those that represent the prevention of harms to the public, and how are these to be measured? Ultimately it will make a great difference which party bears the burden of proof. If properly promulgated government regulations are presumed valid unless the presumption is successfully overridden, they will tend to survive. If private rights are presumed dominant, or the presumption of governmental validity is rebuttable merely by showing economic loss, then regulations often will fail, unless compensation can be paid. The takings issue tends to force us all to define what we consider to be the proper character and role of government.


\(^4\) See, e.g., the third prong of the test announced by *Penn Central Transp. Co. v. City of N.Y.*, 438 U.S. 104 (1978) which is described in the following materials.
• **If a regulation is found to be invalid, what remedy?** If a decision is reached that a regulation impacts too greatly upon private property, further decisions must be made about what form of relief to issue for the excessive taking. One remedy is declaratory or injunctive nullification of the regulation on its face, or as applied to the property. Another is the payment of compensation by government, as an inverse condemnation, while keeping the regulation in force. The government defendant usually has the choice. (A further possibility, noted in *First English* below, is that even if the regulation is voided, government may have to pay “interim damages” for the economic losses suffered during the time that the invalid regulation was on the books.) Compensation remedies also raise complex issues of valuation.

2. **“Diminution”—what does it mean?** A continuing quandary begun by Justice Holmes is how diminution of private property interests by regulations is to be measured, before a court asks whether it has gone “too far.” Most courts take evidence of market values—with and without the regulation—as well as of “reasonable remaining use.” Market value is the highest price a willing buyer would pay a willing seller for title to a piece of property today. It is usually determined by asking several real estate appraiser witnesses to estimate that price by analyzing “comps”—recent sales of comparable pieces of property in the same vicinity. (Some attorneys and courts mistakenly ask for valuation of the “highest and best use,” a planning and development concept that is not the same as market value.) The *Pennsylvania Coal* diminution principle does not require compensation for every regulatory deflation of a parcel’s market value, but only when that reduction goes too far. In practice, that has required proof of quite dramatic private losses, as noted below.

3. **The baseline game: setting a baseline in takings cases—“the parcel as a whole.”** Note the games that can be played in determining the “baseline” against which to weigh property value diminution in order to measure whether there is a reasonable remaining use. Justice Brandeis in *Pennsylvania Coal*, suggested that judicial review should weigh the regulations’ effect on the plaintiffs’ contiguous property as a whole, not merely the regulated portion. Not coincidentally, a focus on the regulated portion alone in wetland cases (and many other environmental settings) typically reveals that the regulation has eliminated virtually all economic value, while a focus on the property owner’s parcel as a whole often reveals a substantial profit that has been made in the past or may be made in the future on the property as a whole, rendering the regulation valid. The question of what to consider as the property baseline for judicial review of

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takings (or the “denominator” of the diminution fraction) can be critical.

4. Balancing? In wetlands cases, as for example in the Palazzolo coastal wetlands case that follows, judges typically are not oblivious to ecological values. (Recent coastal flooding, where protective barrier island wetlands had been destroyed, may expand recognition of eco-system services—how economics and wetland ecology go together.) In many cases, however, the courts note the value of protecting wetlands only as a basis for establishing that the act served a proper public purpose. Having done so, they then focus exclusively on the private loss, without any process of constitutional balancing that would take some account of the public rights in the environmental context. Courts have found it easy to recognize the costs “externalized” onto private property by regulation, but less obvious that there should be a weighing of harms externalized onto the public by private action. For example, the “loss” to the landowner of flood plain zoning limitations that prevent property development can be measured with comparative ease, but the potential cost to the public of development in the flood plain is far more difficult to evaluate. Taking it a step further and introducing what the late Professor Joseph Sax described as the nibbling phenomenon, the cost externalized by a single parcel may be slight, and thus not figure weightily in a balance. That calculation, however, is true for all parcels, but taken together cumulatively their development would lead to massive additional damage during flood events. Not knowing how to account properly for the harm to the public, many courts focus primarily on private diminution of value, the market loss figure, and miss the full constitutional context. In Palazzolo, below, Justice O’Connor lays the groundwork for a more overt weighing of public as well as private rights.

5. Regulations that “physically take” or take title—Loretto and the Horne raisin case. The Loretto case makes it clear that regulations imposing direct physical impact on private property require compensation. (The New York regulation had required owners of apartment buildings to provide physical space for TV cable companies to install their cable boxes in order to encourage public Internet access.) In Horne v. U.S. Dep’t of Agriculture, a rather antiquated Depression-era law artificially raised prices of raisins by restricting the amount of raisins on the market. Producers were required to transfer to a government agency the title for their excess raisins above their allotted (restricted) amounts.

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The Hornes, raisin farmers, argued that this reserve was the equivalent of a physical taking of their excess raisins, necessitating compensation for those excess raisins at fair market value. Citing Loretto, the Court unanimously agreed.

2. The U.S. Supreme Court’s Classic Takings Cases: An Emerging Consensus on Takings Balancing?

Here follow brief summaries of some of the most important environmental regulatory takings cases in the Supreme Court:

**JUDICIAL POLITICS IN TAKINGS**

For 50+ years after Penn Coal, Supreme Court justices avoided virtually all takings cases. Since the 1970s, takings attacks on regulation, often spearheaded by Justices Rehnquist & Scalia, have been frequent.

• Pennsylvania Coal,\(^{36}\) above, in 1922 was the first Court case to hold a regulation invalid as a taking, basing its holding on property value diminution, focusing on the virtual elimination of the market value of each individual coal pillar.

• The Penn Central Triad: Penn Central,\(^{37}\) 1978, likewise weighed the amount of private diminution loss, but viewed “the parcel as a whole,” defining the baseline denominator as plaintiffs’ entire property (Grand Central Station, which the Landmark Commission had designated a historic landmark, prohibiting construction in the air space above the terminal) as in Justice Brandeis’s dissent in Pennsylvania Coal, not just the regulated portion (the air space). The Court’s three balancing considerations upholding the restrictions have become totemic in modern takings cases—judicially weighing (1) the economic impact on the property owner (i.e. diminution), (2) the property owner’s IBEs, and (3) the character of the governmental action—The Penn Central Triad.

• Keystone Bituminous,\(^{38}\) 1987—on almost exactly the same facts as Pennsylvania Coal, the Court without saying so effectively overruled the way Pennsylvania Coal had framed the baseline diminution denominator. Justice Stevens’s majority opinion viewed the private loss within the context of the entire coalfield, not just

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\(^{36}\)Pennsylvania Coal Co. v. Mahon, 260 U.S. 393 (1922).


the regulated pillars, “the parcel as a whole,” as in Justice Brandeis’s dissent in Pennsylvania Coal, and upheld the law. Keystone Bituminous also explicitly assumed that takings reviews must go beyond a focus on individual loss, in addition incorporating a balancing of public interests through consideration of public harms, “noxiousness,” a “nuisance exception,” and the like.

• In Lucas v. South Carolina Coastal Council,39 1992, Justice Scalia struck down a South Carolina coastal protection act’s prohibition of building on barrier beach lots, based on the trial court’s finding that the restriction rendered the land completely “valueless.” He asserted a “categorical rule” requiring compensation for regulatory wipeout where no economic value remains.

“[As to] regulations that prohibit all economically beneficial use of land: Any limitation so severe cannot be newly legislated or decreed (without compensation), but must inhere in the title itself, in the restrictions that background principles of the State’s law of property and nuisance already place upon land ownership;...in other words do no more than duplicate the result that could have been achieved in the [state’s] courts. 505 U.S. at 1018, 1027-1029.

Lucas may have been narrow on its facts, but its forceful rhetoric and attractive clarity invited a subsequent series of antiregulatory decisions in the lower courts, and a number of unsophisticated courts took Lucas as authority to strike down regulations, requiring compensation not only for “wipeouts” but also for regulations that eliminated profitability. (We note later how this “categorical” rule allowed exceptions for regulations of nuisance-like public harms, and for situations where private property rights are limited, for instance by the Public Trust Doctrine.)

• In Palazzolo,40 2001, the notable case studied below, a property owner proposed to build between 70-90 small homes, or alternatively a beach club, on a coastal marsh. Both requests were turned down under a state wetlands regulation. The Court held that Mr. Palazzolo had standing to attack the regulation even if he had taken title to the land knowing it was restricted, but refused to apply Lucas’s “categorical” rule because the land still retained more than “token” value and remanded for a judicial balancing of public and private interests—establishing the Penn Central balance as the presumptive legal test to be applied in all takings cases other than total wipeouts. Justice O’Connor’s concurrence significantly clarified the constitutional balance by noting that Penn Central’s “character of the

governmental action” required courts to weigh private diminution in light of the public purpose for which the law was passed. On remand the Rhode Island court found that the public harms of putting houses in a coastal marsh outweighed the private property loss.

- **Tahoe-Sierra Preservation Council,** 41 2002, arose from longstanding governmental attempts to protect the purity of Lake Tahoe from the effects of prolific development in the crater area around the lake. In *Tahoe-Sierra*, landowners brought suit against the Tahoe Regional Planning Agency, claiming that temporary moratoria on development (a total of 32 months) constituted an uncompensated regulatory taking on its face. Extensively quoting Justice O’Connor’s concurrence in *Palazzolo*, noted below, Justice Stevens’s majority opinion refused to apply the harsh *Lucas* test. The 32 months were not a 100% taking of a 32-month “lease,” but rather the basis for an overall *Penn Central* balance of a sort of parcel [of time]-as-a-whole. The Court dismissed the takings suit, holding that the time baseline, like the physical baseline, should be viewed overall, not focusing merely upon the regulated time portion. The Court also limited the categorical *Lucas* compensation rule to cases where land value was *totally* wiped out—which virtually never occurs—and that the measure of post-regulation private rights is to be made in terms of land’s remaining market value, not a requirement that it retain active market uses.

- **Stop the Beach Renourishment, Inc. v. Florida** 42 the Court unanimously rejected coastal property-owners’ taking challenge to a Florida law that allowed the public to use sand beach areas created by governmental beach reconstruction efforts after hurricanes. The Court deferred to the Florida Supreme Court’s application of “core principles” of Florida property law including the public trust doctrine (PTD). Justice Scalia’s plurality opinion, however, asserted a novel theory that when judges define new limitations on private property, the changing of prior law might require compensation as an unconstitutional “judicial taking.”

The following classic regulatory takings case arose on the interior wetlands of an Atlantic coast barrier beach; it not only presents a modern array of takings issues, but also potentially marks a significant turning point in our understanding of constitutional balancing in these situations, and beyond.9

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42*Stop the Beach Renourishment v. Florida*, 560 U.S. 702 (2010).
8 For more on the “judicial takings” theory, see below.
9 For a detailed chronology of the *Palazzolo* setting, see Cole, *An Analytical Chronology of Palazzolo v. Rhode Island*, 30 B.C. Envtl. Aff. L. Rev. 171 (2002), and the *Palazzolo*
KENNEDY, J. Petitioner Anthony Palazzolo owns a waterfront parcel of land in the town of Westerly, Rhode Island. Almost all of the property is designated as coastal wetlands under Rhode Island law. After petitioner’s development proposals were rejected by respondent Rhode Island Coastal Resources Management Council (Council), he sued in state court, asserting the Council’s application of its wetlands regulations took the property without compensation in violation of the Takings Clause of the Fifth Amendment, binding upon the State through the Due Process Clause of the Fourteenth Amendment… In 1959 petitioner…and associates…purchased the property, [eighteen-plus acres, as “Shore Gardens, Inc., “SGI”; and in 1960] petitioner bought out his associates and became the sole shareholder…. Most of the property was then, as it is now, salt marsh subject to tidal flooding. The wet ground and permeable soil would require considerable fill -- as much as six feet in some places -- before significant structures could be built....
Mr. Palazzolo, with roughly 90 lots. To the north, the property borders upon Winnapaug Pond, a salty embayment lying behind the barrier beach; on the south the property faces Atlantic Avenue and beachfront homes abutting it on the other side, and beyond that, the dunes and the ocean beach. Lot #19, indicated by an arrow, is the small “upland portion” that might be developed. The beach community was completely destroyed by a 1938 hurricane; since then many seasonal homes have been reconstructed along the beach road.

SGI’s proposal, submitted in 1962 to the Rhode Island Division of Harbors and Rivers, sought to dredge from Winnapaug Pond and fill the entire property. The application was denied…. In 1971, Rhode Island enacted legislation creating the Council, an agency charged with the duty of protecting the State’s coastal properties, [which] designated salt marshes like those on SGI’s property as protected "coastal wetlands."… In 1978 SGI’s corporate charter was revoked for failure to pay corporate income taxes; and title to the property passed, by operation of state law, to petitioner as the corporation’s sole shareholder. In 1983 petitioner, now the owner,... requested permission... to fill the entire marshland area. The Council rejected the application, [finding] that "the proposed activities will have significant impacts upon the waters and wetlands of Winnapaug Pond." [A 1985 permit request was likewise denied.]

Petitioner filed an inverse condemnation action in Rhode Island Superior Court, asserting that the State’s wetlands regulations, as applied by the Council to his parcel, had taken the property without compensation in violation of the Fifth and Fourteenth Amendments. The suit alleged the Council’s action deprived him of "all economically beneficial use" of his property, resulting in a total taking requiring compensation under Lucas [and] sought damages in the amount of $3,150,000, a figure derived from an appraiser’s estimate as to the value of a 74-lot residential subdivision. The... Superior Court ruled against petitioner; the Rhode Island Supreme Court affirmed..., reciting multiple grounds for rejecting petitioner’s suit. The court held, first, that petitioner’s takings claim was not ripe; second, that petitioner had no right to challenge regulations predating 1978, when he succeeded to legal ownership of the property from SGI; and third, that the claim of deprivation of all economically beneficial use was contradicted by undisputed evidence that he had $200,000 in development value remaining on an upland parcel of the property, [Lot #19; and] could not recover under the more general test of Penn Central....

We disagree with the Supreme Court of Rhode Island as to the first two of these conclusions; and, we hold, the court was correct to conclude that the owner is not deprived of all economic use of his property because the value of upland portions is substantial. [The Court then holds that the issue was ripe for review.]

We turn to the second asserted basis for declining to address petitioner’s takings claim on the merits. When the Council promulgated its wetlands regulations, the disputed parcel was owned not by petitioner but by the corporation of which he
was sole shareholder. When title was transferred to petitioner by operation of law, the wetlands regulations were in force. The state court held the postregulation acquisition of title was fatal to the claim for deprivation [as a standing estoppel, because he took title with notice and thus is] barred from claiming that it effects a taking.... The State may not put so potent a Hobbesian stick into the Lockean bundle.... Were we to accept the State’s rule, the postenactment transfer of title would absolve the State of its obligation to defend any action restricting land use, no matter how extreme or unreasonable....

The state court must address, however, the merits of petitioner’s claim under *Penn Central*. That claim is not barred by the mere fact that title was acquired after the effective date of the state-imposed restriction. In Justice Holmes’ well-known, if less than self-defining, formulation, "while property may be regulated to a certain extent, if a regulation goes too far it will be recognized as a taking."... We hold that the court was correct to conclude that the owner is not deprived of all economic use of his property because the value of upland portions is substantial. We remand for further consideration of the claim under the principles set forth in *Penn Central*.

**O’CONNOR, J., concurring.** ...As the Court holds,...petitioner’s claim under *Penn Central* "is not barred by the mere fact that title was acquired after the effective date of the state-imposed restriction."... [However,] today’s holding does not mean that the timing of the regulation’s enactment relative to the acquisition of title is immaterial to the *Penn Central* analysis. Indeed, it would be just as much error to expunge this consideration from the takings inquiry as it would be to accord it exclusive significance....

The concepts of "fairness and justice" that underlie the Takings Clause, of course, are less than fully determinate. Accordingly, we have eschewed "any ‘set formula’ for determining when ‘justice and fairness’ require that economic injuries caused by public action be compensated by the government.... The outcome instead "depends largely ‘upon the particular circumstances [in that] case.’" *Penn Central*. We have "identified several factors that have particular significance" in these "essentially ad hoc, factual inquiries." *Penn Central*. Two such factors are "the economic impact of the regulation on the claimant and, particularly, the extent to which the regulation has interfered with distinct investment-backed expectations." Another is "the character of the governmental action." The purposes served, as well as the effects produced, by a particular regulation inform the takings analysis.... Regulatory takings cases "necessarily entail complex factual assessments of the purposes and economic effects of government actions."
The Rhode Island Supreme Court concluded that, because the wetlands regulations predated petitioner’s acquisition of the property at issue, petitioner lacked reasonable investment-backed expectations and hence lacked a viable takings claim. The court erred in elevating what it believed to be "[petitioner’s] lack of reasonable investment-backed expectations" to "dispositive" status.... Evaluation of the degree of interference with investment-backed expectations instead is one factor that points toward the answer to the question whether the application of a particular regulation to particular property "goes too far."... Our decision today does not remove the regulatory backdrop against which an owner takes title to property from the purview of the Penn Central inquiry. It simply restores balance to that inquiry. Courts properly consider the effect of existing regulations under the rubric of investment-backed expectations in determining whether a compensable taking has occurred.

SCALIA, J., concurring. I write separately to make clear that my understanding of how the issues discussed in [the prior notice portion] of the Court’s opinion must be considered on remand is not Justice O'Connor’s. The principle that underlies her separate concurrence [i.e. as to buyers’ knowledge of prior-existing regulatory restrictions] is that it may in some (unspecified) circumstances be "unfair" and produce unacceptable "windfalls" to allow a subsequent purchaser to nullify an unconstitutional partial taking.... The polar horrible, presumably, is the situation in which a sharp real estate developer, realizing (or indeed, simply gambling on) the unconstitutional excessiveness of a development restriction that a naive landowner assumes to be valid, purchases property at what it would be worth subject to the restriction, and then develops it to its full value (or resells it at its full value) after getting the unconstitutional restriction invalidated. This can, I suppose, be called a windfall.... There is something to be said (though in my view not much) for pursuing abstract "fairness" by requiring part or all of that windfall to be returned to the naive original owner, who presumably is the "rightful" owner of it. But there is nothing to be said for giving it instead to the government—which not only did not lose something it owned, but is both the cause of the miscarriage of "fairness" and the only one of the three parties involved in the miscarriage (government, naive original owner, and sharp real estate developer) which acted unlawfully—indeed unconstitutionally. Justice O’Connor would eliminate the windfall by giving the malefactor the benefit of its malefaction. It is rather like eliminating the windfall by giving the thief the benefit of its theft.

The Palazzolo case was remanded to the Rhode Island courts, presumably only on the Penn Central diminution question of whether there was sufficient remaining value after the regulation (particularly the Lot #19 “upland portion”) to avoid a finding of an excessive regulatory taking requiring compensation. In the remand decision below, however, note how far the court goes, perhaps at
Justice O’Connor’s invitation, beyond simple diminution.

**Anthony Palazzolo v. State of Rhode Island**


Superior Court of Rhode Island, Filed July 5, 2005

Gale, J. This case is back before the Superior Court on remand…. The United States Supreme Court found the case ripe for decision,…and remanded the case for the purpose of a *Penn Central* analysis. The Rhode Island Supreme Court entered an Order remanding the case to the Superior Court with express guidelines…for the purpose of determining “the claim of Anthony Palazzolo for monetary damages against the State of Rhode Island for an alleged regulatory taking of his property by analyzing his reasonable investment-backed expectations in accordance with the principle enunciated in [the *Penn Central* case].”…

The 446 acre Winnapaug Pond is a shallow, tidal pond used for fishing, boating and shell fishing. Its size and shallow depth make it a particularly fragile ecosystem. The adjacent salt marsh provides, inter alia, a valuable filtering system regarding water runoff containing pollutants and nitrogen from adjacent land. The ISDS systems from the proposed subdivision would add significant nitrogen to the pond. Filling of the Palazzolo site would result in 12% less salt marsh and a reduction of pollutant and nitrogen filtering by the pond’s salt marsh ecosystem. The effect of the denigration of the natural purifying salt marsh is viewed by experts as significant. Loss of the marsh filtering effect, together with the loss of wildlife habitat which would occur if Plaintiff’s planned subdivision was constructed, was previously found by this Superior Court to constitute a nuisance. Moreover, there can be no doubt that the pond and its surroundings, particularly the undeveloped salt marsh, have an amenity value to both the land owners in the area as well as the entire vacation/recreation community in Westerly. This Court likewise finds that the evidence is to the effect that not only has there never been a subdivision near Winnapaug Pond which rivals the scope of that proposed by Palazzolo, but none exists anywhere on the Rhode Island shore.

Prior to discussing Plaintiff’s takings claim in the context of a *Penn Central* analysis, it is necessary to consider certain background legal principles which bear on the extent of plaintiff’s property interest. *Lucas v. South Carolina*, makes clear that, for purposes of takings analysis,… the government need not

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10 Eds.: ISDS is an acronym for individual sewerage disposal systems, i.e. septic tanks.
compensate the property owner if the regulated or prohibited use was “not part of his title to begin with.”

The State contends that this Court’s [prior] conclusion…that Plaintiff’s proposed development would constitute a public nuisance, precludes a Plaintiff’s verdict on his takings claim…. The State also contends that a strong Public Trust Doctrine in Rhode Island must result in a finding that the subject parcel is not capable of being developed economically. This is because, the State maintains, approximately one-half of Plaintiff’s property lies below the mean high water mark and is, therefore, not Plaintiff’s to develop, at least in contravention to the wishes of the state.

In the case at bar, Palazzolo’s proposed development has been shown to have significant and predictable negative effects on Winnapaug Pond and the adjacent salt water marsh. The State has presented evidence as to various effects that the development will have including increasing nitrogen levels in the pond, both by reason of the nitrogen produced by the attendant residential septic systems, and the reduced marsh area which actually filters and cleans runoff. This Court finds that the effects of increased nitrogen levels constitute a predictable (anticipatory) nuisance which would almost certainly result in an ecological disaster to the pond. Both water quality and wildlife habitat would be substantially harmed. Nor is the proposed high density subdivision suitable for the salt marsh environs presented here. This Court agrees with the first trial justice. Because clear and convincing evidence demonstrates that Palazzolo’s development would constitute a public nuisance, he had no right to develop the site as he has proposed. Accordingly, the State’s denial to permit such development cannot constitute a taking….

A second significant issue is to what extent the Public Trust Doctrine would have limited the title originally acquired by Plaintiff…. After receiving voluminous evidence on the issue, this Court finds that Winnapaug Pond is a tidal body of water [and] almost exactly 50% of Plaintiff’s property is below mean high water. Thus, the pond and Plaintiff’s adjacent property are subject to the Public Trust Doctrine…. The Public Trust Doctrine dictates that, “the state holds title to all land below the high-water mark in a proprietary capacity for the benefit of the public.”…. Although the Public Trust Doctrine cannot be a total bar to recovery as to this takings claim, it substantially impacts Plaintiff’s title to the parcel in question and has a direct relationship to Plaintiff’s reasonable investment-backed expectations.….
Penn Central Analysis

This Court now turns to the focus of the Rhode Island Supreme Court’s remand and the United States Supreme Court’s mandate, to consider whether or not Plaintiff has proved a compensable taking under the three part analysis set forth in Penn Central. The factors which provide the framework for analysis under Penn Central are (1) the economic impact of the action on the claimant, (2) the extent to which the action interfered with the claimant’s reasonable investment-backed expectations, and (3) the character of governmental action.

This Court is mindful that the analysis requires an ad hoc consideration of a number of other relevant factors often unique to the case at hand, including the temporal relationship between Plaintiff’s acquisition of title and the regulations giving rise to the takings claim. Palazzolo, (O’Connor, J., concurring).

In conducting the takings analysis, this Court must focus on the “parcel as a whole.” The denominator or “parcel as a whole” is that property in which Palazzolo invested that is subject to the regulations.

Plaintiff asserts that he has lost a profit of over three million dollars as a result of the State’s denial of his planned development.... Palazzolo’s monetary claim is based upon the premise that he is entitled to be compensated based upon the highest and best use of his property.... The testimony of the State’s engineering expert cast grave doubt on the viability of Plaintiff’s [development] proposals.... The expert concluded that for a 50-lot subdivision, development costs would be $3,893,750.... The ultimate conclusion is that Plaintiff will be better off financially by selling the site in its current undeveloped state, knowing that a single residence will be allowed to be built on the upland area near the pond shoreline.... Site development costs unique to the parcel in question would result in an economic loss to Plaintiff if he were to build either of the high density residential developments he has proposed. Thus, as to Palazzolo’s claim, the regulations complained of do not have an adverse economic impact....

Moreover, although Plaintiff is entitled to compensation based upon the highest and best use of the subject property if there is a taking, diminution of property value, standing alone can not establish a taking.... Determination of the takings issue depends in large part on Plaintiff’s reasonable investment-backed expectations, and whether or not the property owner has been unfairly economically impacted. “Pecuniary loss or diminution in value is not controlling on the issue of confiscation because a property owner does not have a vested property right in maximizing the value of his property.”

This Court now turns to...consideration of Plaintiff’s reasonable, investment-
backed expectations…. In the words of Plaintiff, he acquired an interest in “the worst of them [lots], what’s left.” Thus, even from the time of his initial investment, Palazzolo had doubts about the value of the remaining property. While Palazzolo hoped that some variation of the 74 lot subdivision would eventually be approved, the [investment-backed expectations] prong of the Penn Central analysis clearly requires a determination of realistically achievable economic goals…. Massive filling of the site was required and permission of the state would be needed for such filling. These problems were known, or reasonably should have been known, by Palazzolo as early as his initial investment and must be factored into any determination of “reasonable investment-backed expectations.” … This Court finds that Plaintiff’s investment-backed expectations were not realistically achievable; accordingly he fails to satisfy [that] prong of the Penn Central test…. Despite wishful thinking on Palazzolo’s part, he paid a modest sum to invest in a proposed subdivision that he must have known from the outset was problematic at best…. Constitutional law does not require the state to guarantee a bad investment.

Regarding the character of the governmental action, this is clearly neither a categorical physical takings case nor a regulatory takings case in which a statutory scheme has taken all “economically beneficial use” of the subject property…. It is all too obvious that government need not compensate a property owner each and every time it enacts regulations which are designed to promote the health, safety, and welfare of the people. In fact, the legitimacy of the regulatory scheme at issue here militates against a finding that a taking has occurred….

In sum, Plaintiff has failed to prove by a preponderance of the evidence that there has been a regulatory taking of his property.

**COMMENTARY & QUESTIONS**

1. **An expansive remand!** Note that the Palazzolo Supreme Court majority clearly thought that the remand to Rhode Island would simply apply the diminution inquiry from Penn Central, only looking to see if the Lot #19 “upland portion” would provide sufficient economic value. The remand barely noted that, and instead weighed an array of other factors as noted in the following paragraphs, including a heavy emphasis on investment-backed expectations, explicitly citing the O’Connor concurrence as authoritative. Could the remand court’s expansive view be partly explained by the fact that the “upland” Lot #19 was probably unbuildable due to sewerage difficulties? Did Justice O’Connor’s pointed concurrence help set up a more expansive remand balancing?

2. **Some clarifications from Palazzolo: notice estoppel and investment-backed**
expectations. The majority opinion forcefully rejected the state’s argument that Anthony Palazzolo lacked standing to challenge the regulation because he’d taken title with notice of the land’s restrictions. As Justice Scalia fumed, a citizen always has the right to challenge the constitutionality of a rule; there’s no notice estoppel against constitutional rights. But note how Justice O’Connor’s concurrence blunted the force of the majority’s words: she agreed that a property-owner’s knowledge of land restrictions before purchasing doesn’t absolutely block a challenge, but she insisted it was nevertheless a substantial consideration in determining fairness—and she used the familiar logic of investment-backed expectations to say that prior knowledge of restrictions should weigh in the takings balance. Despite Justice Scalia’s argument that this favored the government as “thief,” note how the state court on remand defined O’Connor’s investment-backed expectation phrasing as its primary Penn Central focus. Is Scalia’s “thief” characterization accurate? After the coastal devastation to the over-built New York and New Jersey coasts that accompanied Super Storm Sandy, it should be clear that wetland regulation is a bulwark that prevents imprudent (albeit highly profitable) building by private parties, construction that externalizes the costs of such storms in the form of increased damage to others. Is government stealing when it proscribes actions that harm others?

3. Some loopholes in Lucas. Justice Scalia’s “categorical” rule in Lucas, the Palazzolo Court held, applied only where restrictions left the property owner with merely “a token interest”—an extremely rare situation with any regulation—so the default test, Penn Central, applied instead. His Lucas opinion also served here as a basic validation of the Palazzolo regulation, as Judge Gray on remand examined whether the wetland development would be a tort, and a violation of the public trust, thus using the Justice’s own words to undercut any “categorical rule” requiring compensation. And Justice Scalia’s Lucas initiative was cast further into marginality by the clear adoption of the “parcel as a whole” baseline. “Conceptual severance,” as Professor Margaret Radin labeled it—viewing only the restricted part of the property in order to increase the chances of finding excessive diminution was firmly rejected.

4. Balancing the expanded third prong of Penn Central. The most intriguing aspect of the Palazzolo case can also be traced to a few more words in Justice

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48On remand, Palazzolo’s attorneys had tried to narrow the baseline to the regulated portion of the property alone, instead of the whole investment parcel. “Conceptual severance” the divide-and-conquer antiregulatory strategy of defining narrowed baselines, was coined in Radin, The Liberal Conception of Property: Cross Currents in the Jurisprudence of Takings, 88 Colum. L. Rev. 1667, 1676 (1988).
O’Connor’s concurrence. The Court majority had declared the three-pronged Penn Central balancing test to be the canonic methodology for reviewing regulatory takings challenges. It had never been clear, however, how public and private interests in wetlands are to be weighed against one another in a Penn Central balancing. Penn Central’s first two prongs are quite tangible—diminution, and its corollary IBE, both focused on the private party. But what is the third prong, “the character of the government action”? Penn Central merely noted whether the government action was a physical taking or not.

But the third prong of Penn Central could be an invitation to weigh public values against the private regulatory loss, and Justice O’Connor provided the small but significant clarifying key. Quoting Penn Central extensively in addressing “the character of the governmental action,” she wrote, “The purposes served...by a particular regulation,...as well as the effects produced,...inform the takings analysis. Regulatory takings cases “necessarily entai[l] complex factual assessments of the purposes and economic effects of government actions.” 533 U.S. at 633-634, commenting on Penn Central, 438 U.S. at 124. (emphasis added.)

This latter statement, overlooked in Justice Scalia’s fiery Palazzolo opinion, provides the first explicit acknowledgment in a Court opinion that the constitutional balances in regulatory takings cases must conscientiously weigh not only the private market value loss from restrictions, but also the public purposes (typically various impending harms) that had prompted the legislature to authorize those regulations in the first place. It makes no sense to ignore the public harms that a regulation is intended to prevent when weighing whether regulated private property is unconstitutionally burdened.11

This express invitation to balance public concerns against private diminution goes far beyond the “nuisance exception” noted in some takings cases and incorporated in Lucas’s “categorical rule.” Consider: Could most regulatory protection settings in the environmental field be practically litigated as nuisance

11 Some courts, however, have been surprisingly avoidant in acknowledging public harms in the balance. See Dooley v. Fairfield, 226 A.2d 509 (Conn. 1967, striking down floodplain restrictions where a developer planned to put 300 homes in coastal lowlands repeatedly hit by hurricane flooding). In First English, Justice Rehnquist even posited that a flood hazard ordinance would be an unconstitutional confiscation where it eliminated the economic value of a canyon parcel used as a riverside camp for handicapped children. This amounted to saying that because the land’s market valuation ignored the dangers, the property owner had a constitutional right to house 200 children in the path of recurring floods where ten people had recently been drowned, or be compensated fully for the banning of that use. On remand, the California Supreme Court seemed astonished by that premise, noting that the lives of children surely weighed more heavily constitutionally than the loss of property value. 210 Cal.App.3d 1353 (1989). See also Plater, “The Takings Issue in a Natural Setting: Floodlines and the Police Power,” 52 Tex. L. Rev. 201, 244-252 (1974).
torts? The most challenging problem facing would-be-plaintiffs victimized by increased harm is likely to be proving causation: linking each landowner’s action in developing their parcel to the harm the victim has suffered. Does the relaxed causation standard used in joint tortfeasor cases such as Velsicol (Chapter 3) make that proof any more feasible? If the goal is to avoid the potentially devastating harm rather than suffer it and seek compensation, would a court, as in Wilsonville, (Chapter 3) be likely to grant an injunction seeing the building activity as an anticipatory nuisance? If not, isn’t it valid government regulation, or nothing?

The Palazzolo remand incorporates an explicit balance of public harms against the petitioner’s private rights. The court emphasizes the many public harms for which wetlands were restricted, including the wetland’s ecosystem services that would be lost—the loss of marsh filtration, shellfish mortality, drainage effects on public health, and other public concerns that would occur absent the restrictions—a number of which could never practically be litigated as torts.12

4. A Takings Role for the Public Trust Doctrine?

In Lucas, Justice Scalia held that where property values were fully wiped out, “any limitation so severe...must inhere in the title itself, in the restrictions that background principles of the State’s law of property and nuisance already place upon land ownership.”13 But to Justice Scalia’s undoubted dismay, as in Palazzolo on remand, that phrasing has operated to validate rather than restrict governmental regulations. Did Justice Scalia inadvertently open the door to additional consideration of public rights (and perhaps even of the “natural economy”) against private marketplace rights by allowing the PTD into the takings balance?

Shortly after Lucas, Professor Babcock prophesized that the public trust doctrine, as a property law principle, like nuisance law, was likely to circumvent Justice Scalia’s “categorical” compensation rule. “Public trust principles may well be employed by government regulators in their attempts to justify their actions under the Lucas takings rule.... The PTD helps to harmonize the laws of nature and the law of property, bringing the expectations of landowners into harmony with the needs of nature,...infusing an ecological perspective into property law.... The doctrines of custom and public trust [underscore] the public’s superior right to access and use certain resources, but this is not as destabilizing as it sounds because both common law doctrines are a reflection of public

12 The remand opinion closely tracked but didn’t cite Prof. Parenteau’s anticipatory article, Unreasonable Expectations: Why Palazzolo Has No Right to Turn a Silk Purse into a Sow’s Ear, 30 B.C. Envtl. Aff. L. Rev. 101 (2002).

13 Lucas v. S.C., 505 U.S. at 1029.
expectations.”

Professor Sax likewise has emphasized that the public trust fits into takings balances as part of a society’s fairness expectations:

The essence of property law is respect for reasonable expectations. The idea of justice at the root of private property protection calls for identification of those expectations which the legal system ought to recognize. We all appreciate the importance of expectations as an idea of justice, but our concern for expectations has traditionally been confined to private owners.... The central idea of the public trust is preventing the destabilizing disappointment of expectations held in common but without formal recognition such as title. The function of the public trust as a legal doctrine is to protect...public expectations against destabilizing changes, just as we protect conventional private property from such changes.

Sax also argued that a society’s expectations about what are unfair impositions on private property change over time. In Sanderson v. Penn Coal, a coal company was mining and dumping its wastes in a river, and a downstream landowner objected, claiming traditional riparian rights and protections under nuisance law. The court agreed with the company that “the law should be adjusted to the exigencies of the great industrial interests of the Commonwealth and that the production of an indispensable mineral...should not be crippled and endangered by adopting a rule that would make colliers answerable in damages for corrupting a stream.” In 1886, this assertion of marketplace needs did not

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62 Sax, Liberating the Public Trust Doctrine from Its Historical Shackles, 14 U.C. Davis L. Rev. 185, 186-194 (1980). A 1988 Supreme Court public trust case turned upon whether a state’s assertion that it owned certain tidal wetlands upset “settled private expectations.” Philips Petroleum Co. v. Miss., 484 U.S. 469 (1988), decided that it did not, in an opinion emphasizing the traditional role of the states in defining their public trust; see also, e.g., Shively v. Bowlby, 152 U.S. 1, 26 (1894).


15 The court held:

We are of opinion that mere private personal inconvenience...must yield to the necessities of a great public industry, which...suberves a great public
arouse a horrified reaction in defenders of private property rights, but it surely would today. Indeed, the same court that decided Sanderson repudiated it early in the age of heightened environmental awareness: “[W]e find that even with regard to the facts of Sanderson, the legal doctrine enunciated in that case is no longer viable.” 16

Since Palazzolo, as in the remand in that case, a number of courts have used the public trust doctrine to validate regulations even where they substantially eliminate market value.17

4. Can governmental negligence be an unconstitutional taking? In the aftermath of Hurricane Katrina’s devastation of New Orleans and much of the adjacent Gulf coast, it has appeared that a substantial portion of the causation of flooding in the city was attributable to the U.S. Army Corps of Engineers, negligent design and amaintenance of MR GO, the Mississippi River Gulf Outlet, a channel that accelerated the storm surge’s race up into the city.18 When the Fifth Circuit rejected tort claims against the Corps on the basis of sovereign immunity, plaintiffs filed an inverse condemnation takings claim against the Corps in the U.S. Federal Court of Claims, which awarded compensation. As Professor Peter Byrne wrote—

The...decision of the U.S. Court of Federal Claims in the St. Bernard Parish case19 may provide “just” compensation to the residents harmed by the Army Corps’ negligent design and maintenance of the MRGO, but it also marks a troubling expansion of takings liability for the government.... Government liability for takings through flooding have been based on deliberate government action that had the foreseeable effect of flooding the plaintiff’s land. Pumpelly v. Green Bay Co., 13 Wall. 166 (1872). In St. Bernard, the Corps did not construct MRGO in the 1950s and ‘60s with

interest. To encourage the development of the great natural resources of a country, trifling inconveniences to particular persons must sometimes give way to the necessities of a great community. 6 A. at 459.


17 The Supreme Court of South Carolina found that a prohibition on filling tideland below the MHW issued by the state Coastal Council was not a taking, despite the uncontested fact that the land retained no value as a result of the prohibition. The Lucas background principles of South Carolina’s public trust property law preserving marine life, water quality, and public access absolved the state from having to compensate the plaintiff. McQueen v. S.C. Coastal Council, 580 S.E.2d 116 (S.C. 2003).

18 The facts are laid out in In re Katrina Breaches Consolidated Litigation, 647 F. Supp. 2d 644 (E.D. La. 2009), rendered irrelevant by the eventual decision of the Fifth Circuit applying the Corps’ statutory immunity from tort claims. In re Katrina Breaches Litigation, 674 F. 3d 436 (5th Cir. 2012).

the intent or even expectation that it would flood the plaintiffs’ property. What the Court found was that by 2004-05, before Katrina, the Corps had recognized that MRGO, now tripled in width due to erosion, created a serious risk of flooding that should be addressed. At that point the risk of harm from a major storm was foreseeable. Nothing was done. That inaction in the face of risks exacerbated by the defendants conduct sounds on tort, but how can it amount to a taking? Takings generally involve authorized and permissible government action that so invades the defendant’s property that the government can proceed only by paying compensation…. It is hard to see how the negligent design and lack of a response to erosion 40 years later could be the kind of government action that could be held a taking under prior doctrine. We seem to have entered [Prof. Christopher] Serkin’s imaginative world of “Passive Takings,” where government inaction can create takings liability. 113 Mich. L. Rev. 345 (2014)…. It may be that the MRGO is one of a kind, given its notoriety and the appalling losses from Katrina…. I suppose the government will push back hard to preserve the distinction between tort and takings. And the Takings Clause continues to be fashioned into a general tool for judicial control of government.20

This expansion of governmental takings liability could become a tangible constraint on a number of environmental protection efforts.

5. Justice Scalia’s endeavor to assert “judicial takings.” The most controversial aspect of the Stop the Beach case noted above21 arises in the plurality opinion of Justice Scalia (joined by Roberts, Thomas, and Alito) novelly hypothesizing the availability of “judicial taking” claims—that the state judges themselves can violate the Fifth and Fourteenth Amendments by defining new applications of legal doctrines like the public trust doctrine. The littoral owners had argued that the state supreme court had redefined, or made a sudden, unpredictable, major change in, common law rights. They cited language in Justice Scalia’s Lucas opinion constraining state courts’ ability to recast evolving common law property rules, and parts of a concurring opinion by Justice Stewart in a different beach accretion setting.60 Justice Scalia said there was no judicial

20 Post by Prof. Peter Byrne, Univ. of Oregon Environmental Professors Listserv, May 7, 2015; used with permission.
60 In Hughes v. Washington, 389 U.S. 290, 295-297 (1967), the Stewart concurrence had said “To the extent that the decision of the [state] Supreme Court on [the property issue in dispute] arguably conforms to reasonable expectations, we must of course accept it as conclusive. But to the extent that it constitutes a sudden change in state law, unpredictable in terms of the relevant precedents, no such deference would be appropriate.” (emphasis added.) The Framers would have been astonished by the judicial takings theory, as they
taking, in the Stop the Beach setting, but used the plurality opinion to plant his notion that "judicial takings" could be found in the future if challengers showed that a court-modified right had been "well established" under state law; his new test of invalidity would not require showing "sudden or unpredictable" change. Justices Kennedy and Sotomayor said this case did not require a discussion of principles for evaluating "judicial taking" claims; Justices Breyer and Ginsburg concurred, noting the problems posed if federal judges oversee state court pronouncements of state law. Not noted was how judges would be forced to pay, and how chilling that prospect might be to their judicial judgments.

5. Other Property Regulation Issues: Remedies, Exactions & Innocent Landowner Liability

a. Remedies: If Regulations Are Held to Be Invalid Takings

In the First English case, the U.S. Supreme Court announced important dicta on the question of what remedies were theoretically available if a takings challenge succeeds, although on remand to the California Supreme Court the challenged land use regulations were ultimately held valid without compensation. The majority opinion stated that if a regulation is ultimately determined to be an invalid taking, two remedy options are generally available: (1) an equitable injunction or declaration that the regulation is void on its face or as applied to that particular parcel, or (2) payment by the government for the taking under the rubric of "inverse condemnation" applied to regulatory takings. Governments have the choice: to pay compensation while continuing to apply a regulation that has been found to go too far, or to accept its nullification as to the challenger’s property, thereby avoiding the need to pay (although temporary interim damages might be assessed).

Governments only rarely will choose to buy off a regulated property owner if regulation has been found to be a taking. If it does so, it is not clear how compensation should be measured. Take a zoning example, with regard to a parcel that would have a full fee simple market value of $100,000 if unregulated. Assume that a court is willing to make especially precise findings of fact, and determines that market value after zoning is $20,000 and that is too little, and hence unconstitutional, but that a remaining value of $60,000 would have been constitutional. How much would government have to pay, if it is not taking possession but only maintaining the regulation? $80,000? $40,000?


Even tougher is the question of valuing temporary takings, where the state decides to give up and suspend the regulation’s application to the parcel, but the landowner, using the further element of First English’s majority decision, demands compensation for the “temporary” taking between the time the regulation was applied and the time that it is suspended. What should the measure of such temporary damages be? If it is the difference in market value, that often will have increased between the time of the initial regulation and the time the regulation is released. Some courts have argued that “rent,” or even “lost profits,” must be paid by the government. These latter figures could become huge, thereby chilling the exercise of the police power from the start, which may be the deregulatory result desired in some quarters in the first place. What local government wants to undertake an environmental regulation when affected property owners can argue that it confiscates their property and can then force payment of millions in lost profits if a court agrees with them? Does the result in Sierra Tahoe, focusing on the temporary moratorium in relation to the longer run value of a parcel and finding no taking, diminish the likelihood that temporary taking damages are less likely to be awarded and, if awarded, be for a more limited amount?

b. Amortization, and Offset Alternatives?

One way governments can attempt to secure regulations against takings challenges is by providing a period of delay before enforcement, to allow the property owner to “amortize” and recoup her investment before it is shut down. If state or local governments wish to ban billboards, for example, they may provide a four-year amortization period. The billboard industry, one of the strongest lobbies in the nation, is sure to challenge the ban as a regulatory taking. How is amortization, which has been upheld in a wide variety of other property land use regulations, likely to fare against billboards? See New Castle v. Rollins Outdoor Adver., 459 A.2d 541 (Del. 1983) (three years insufficient); Village of Skokie v. Walton, 456 N.E.2d 293 (Ill. App. 1983) (seven years OK). Is it relevant that a billboard company has long since written off the billboard in depreciation credits on its tax books for the IRS? Nat’l Adver. Co. v. County of Monterey, 464 P.2d 33 (Cal. 1970) (tax depreciation can be considered); Art Neon v. Denver, 488 F.2d 118 (10th Cir. 1973) (amortization need not await depreciation); Modjeska Sign Studios v. Berle, 373 N.E.2d 255 (N.Y. 1977) (same).

Another possibility is a takings compensation offset. If, for example, the state and federal governments created thousands of acres of private agricultural land out of Florida swamps by channelizing the Kissimmee River at public expense, must they now, many years later, pay full dryland market value when they

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65In Almota Farmer’s Elevator & Warehouse Co. v. U.S., 409 U.S. 470 (1973), rental value was used as the measure of damages in a physical appropriation case.
decide that groundwater levels must be raised, returning some of the lands to wetlands (because the loss of marshes turned out to cause massive pollution effects in downstream water supplies and Lake Okeechobee)? Can a state condemning a billboard agree to pay its fair market value minus an offset amount attributable to public expenditures, i.e., excluding all value attributable to the highway? See *U.S. v. Cors*, 337 U.S. 325 (1949) (government expropriating a vessel need not pay higher values attributable to demand caused by government program); *U.S. v. Miller*, 317 U.S. 369 (1943).

In the *Horne* raisin case noted above, the Supreme Court majority declined to use the logic of offsetting in setting compensation for the federal government’s quasi-physical taking of title. The Agricultural Marketing Agreement Act of 1937 artificially raised prices of raisins by restricting the amount of raisins sold on the market, taking title to the excess raisins in a reserve that would dispose of them off-market. When the Court unanimously held that taking title to the excess raisins was the equivalent of an invalid physical taking of their excess raisins that required compensation for those excess raisins, it gave the Hornes the full market value of their raisins, refusing to discount the Hornes’ compensation by the amount which the government itself had created by stabilizing the artificially high market value of those raisins. Was it logical, in economic terms, to fail to subtract the rule-enhanced value as an offset against the compensation price, given that all the Hornes’ raisins clearly would have had a lower market value but for the regulation that they attacked?

**c. Exactions: Nollan, Dolan, and Koontz.**

Physical appropriations by the public, as opposed to mere regulatory prohibitions, are virtually always a taking. See *Loretto*. In many so-called “exaction” cases, however, government regulations have been upheld when they have required regulated landowners to provide free property for public parks, public schools, roadways, and the like for public ownership and use—in return for the privilege of getting development permits, as in subdivision regulation and urban “linkage” programs.

In *Nollan v. California Coastal Comm’n*, 483 U.S. 825 (1987), the California Coastal Commission had denied the owners of a one-tenth acre lot permission to expand their seashore cabin into a three-bedroom home unless they allowed members of the public using the beach to walk alongside the Nollans’ seawall. The Commission said it needed this right-of-way easement exaction for pedestrian passage along the rocky coastline, because without it beachgoers would not have a “visual access” visibly linking public sandy beaches north and

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south of the Nollans’ property.66

Exaction cases are not regulatory takings cases. Instead they turn on the question of exactions’ substantive due process validity when a regulation is otherwise clearly valid as a takings matter. The Supreme Court struck down the Nollan exaction. But it held that exactions in general are valid if they (a) occur in a case where an outright denial of the entire permit application would not be an invalid taking,67 and (b) if there is a sufficient nexus relationship between the exaction and the regulation—in effect, to assure that the exaction is not arbitrary extortion. The definition of this latter “sufficient relationship” was and is the difficult part. Writing for the Court, Justice Scalia did not question the first step; the Commission apparently could validly have prohibited the application outright because the Nollans had a reasonable remaining use of the cabin as it was. But he rejected the second step:

The evident constitutional propriety disappears…if the condition substituted for the prohibition utterly fails to further the end advanced as the justification for the prohibition. When that essential nexus is eliminated, [the exaction is void]…. Unless the permit condition serves the same governmental purpose as the development ban, the building restriction is not a valid regulation of land use but “an out-and-out plan of extortion…. ” It is quite impossible to understand how a requirement that people already on public beaches be able to walk across the Nollans’ property reduces any obstacles to viewing the beach created by the new house…. 483 U.S. at 837–838.

Justice Scalia indicated that if the exaction had been to require an easement of visual access across Nollan’s property to the beach from the shore road, that might well have been sufficiently related and acceptable. But the exaction apparently must have a nexus to the burdens that would be directly created and imposed upon the public by the proposed development.

In Dolan v. City of Tigard, 512 U.S. 374 (1994), Justice Rehnquist tightened the terms of how much nexus had to be shown in exactions. The city, acting through its Land Use Board of Appeals, gave petitioners a special permit to double the size of their electric and plumbing supply store and to create a small shopping mall, but required exaction conditions: (a) dedication of a narrow strip of land within the 100-year floodplain for a low-density “greenway” to protect against

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66This is as hard to visualize as it was to litigate. Apparently the state commission argued that, lacking a declared easement, beachgoers looking along the shore to the next beach would see only private cabins, seawalls, and rocks coming down to the edge of the sea, and would not realize that there was actually an existing narrow path through the rocks on public property (below the MHW) along the shore linking the two beaches. By opening up a declared easement, the implied visual barrier would be eliminated.

67“The Commission argues that a permit condition that serves the same legitimate police-power purpose as a refusal to issue the permit should not be found to be a taking if the refusal to issue the permit would not constitute a taking. We agree.” 483 U.S. at 836.
flooding that might be caused by the new structure’s closeness to a creek and (b) dedication of an additional 15-foot strip of land adjacent to the floodplain as a pedestrian/bicycle pathway as an alternative route to alleviate some of the car traffic that the new shopping area would cause. Writing for the majority, Justice Rehnquist said the city had to show more than a causal nexus:

We think a term such as “rough proportionality” best encapsulates what we hold to be the requirement of the Fifth Amendment,...some sort of individualized determination that the required dedication is related both in nature and extent to the impact of the proposed development.... We conclude that the findings upon which the city relies do not show the required reasonable relationship between the floodplain easement and the petitioner’s proposed new building...[and] the city has not met its burden of demonstrating that the additional number of vehicle and bicycle trips generated by the petitioner’s development reasonably relate to the city’s requirement for a dedication of the pedestrian/bicycle pathway easement.... 512 U.S. 389-396.

The 2013 case of Koontz v. St. Johns River Water Management District24 was a Florida land use case scrutinizing the quite common management agency practice of attaching required mitigating “offsets,” “exactions,” or other specific or general conditions as part of the permitting process in which government agencies approve or deny private development requests. Mr. Koontz wanted to develop a small mall on 3½ acres of a 14-acre mostly wetland parcel.25 The water district agency probably could have denied the permit outright—and it wouldn’t have been an invalid taking—because, as in Palazzolo, there was a buildable upland portion of the property. But the agency instead gave the owner four exaction options that would allow him to fill and develop part of the wetlands:

The agency said Mr. Koontz (1) could develop one acre if he restricted the remainder for water management, (2) could fill 3.7 acres of wetland if he restricted the remainder and paid for fixing a water-blocking culvert off-site, four miles away, (3) could fill 3.7 acres of wetland if he restricted the remainder and paid for fixing a water-blocking ditch off-site, seven miles away, or (4) could fill 3.7 acres if he could propose any other exaction that the agency believed would mitigate the loss of water-retaining wetlands. Koontz objected and went to court.26

On this record, the Florida Supreme Court held there was no constitutional violation, and said that Nollan-Dolan did not apply. On appeal the U.S. Supreme

25 The property is sited at 28°33’46.69” N x 81°11’16.46” W.
26 The two proposed off-site mitigation exactions are located at the Hal Scott Preserve, four miles from the Koontz property and the Little Big Econlockhatchee State Forest seven miles away, in the same watershed.
Court majority reversed on the Nollan-Dolan point, holding that Nollan-Dolan did apply, and remanded the case back to the Florida courts. Justice Alito was noticeably dubious about the Koontz situation, in part because either of the off-site 3.7 acre exaction proposals clearing water-blocking obstructions would improve the wetland conditions of roughly 50 acres—an amount that for him strained the idea of “proportionality.” As to the “nexus” requirement of Nollan-Dolan, the Koontz property is sited at 28°33’46.69” North x 81°11’16.46” West—and viewing a satellite image of that area on Google Earth reveals the water-vegetation corridors that make the Koontz parcel a wetland property, and the locations of the two off-site exaction options, are all parts of a larger contiguous portion of the St. Johns River watershed drainage area.

At publication time Koontz has not been resolved, but the case is nevertheless instructive. The Alito majority allowed the challenge to proceed despite the fact that the agency had never made a final demand for an exaction—an unusual ripeness holding. The Court held that it was appropriate to apply the Nollan-Dolan unconstitutional conditions inquiry to monetary exactions, a conclusion bitterly contested by Justice Kagan and the dissenters but quite consistent with the Eastern Enterprises case noted below. Both the majority and the dissenters agreed that a straight-out denial of Mr. Koontz’s request to fill his 3.7 acres would not involve Nollan-Dolan. It would be handled as a straight takings question under the Penn Central takings test. And each agreed that Nollan-Dolan is an “unconstitutional conditions” case, not a case of excessive regulatory diminution of private property value.

Both the Alito and the Kagan opinions, however—and this is a critical semantic and analytical flaw in both—also framed the concept of “unconstitutional conditions” into the rubric of “takings” tests, thereby bolluxing their reasoning, as noted in the following commentary and questions.

**COMMENTARY & QUESTIONS**

1. **Nollan-Dolan is the test—but what exactly is the Nollan-Dolan test?** After these three cases it’s clear that the Nollan-Dolan nexus/proportionality inquiry is the authoritative test for determining the validity of exactions, offsets, and “unconstitutional conditions.” The nexus part of the test from Nollan is relatively straightforward. More complicated is the Dolan issue, how much nexus is required? “Rough proportionality” is a concept that will require a good deal of further judicial elaboration. Does validity of an exaction require proof that public harms caused by a permitted action are roughly proportional to the property

27 The Court didn’t make clear whether or when proposed potential offsetting exaction conditions constitute a sufficient governmental “demand” to be tested if a negotiated agreement was never achieved.
owner’s costs attributable to the exaction—or rather that the benefits of the exaction are roughly proportional to the harms attributable the permitted action? A further question is who has the burden of proving their case? The presumption of constitutionality typically casts the burden on private parties attacking government, but the Rehnquist opinion in Dolan attempts to shift the burden, holding that at least in that case it was up to the government to show rough proportionality. He justified the shift by saying the city’s negotiated exaction decision was “adjudicative,” for which more evidence was necessary.\(^6\) The vast majority of governmental regulatory actions (e.g., permits) are informal “adjudications.” If indeed Dolan marked a shift toward putting the burden of proof of constitutionality upon regulatory government, its consequences could substantially change the administrative process.

After Koontz applied the Nollan-Dolan test to exactions, some commentators considered it an unprecedentedly tragic imposition on land use managers; others considered it an appropriate process already quite familiar in the analogous judicial review of land development fees.\(^2\) Faced with the difficulties of defending negotiated conditions against Nollan-Dolan challenges, however, will some agencies just deny permits outright, forswearing the negotiation flexibility and adjustments previously available under exactions law?

2. Severability. An interesting severability question deserves further study: Should land use permits be considered null-and-void if the exactions which induced them are struck down as unconstitutional conditions? When a component provision of a legal document like a permit is stricken as illegal or unconstitutional, reviewing courts are supposed to analyze the document’s authors’ intent: would the drafters have considered the stricken provision essential to the survival of the permit, or would they intend the remaining provisions to remain valid even if the faulty provision was severed?\(^2\) In Nollan and Dolan, without analyzing the question, Justices Rehnquist and Scalia held the

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\(^6\) Justice Rehnquist appeared to be applying a distinction made by the Oregon Supreme Court in Fasano v. Bd. of County Comm’rs of Washington County, 507 P.2d 23 (Or. 1973), which was later overruled by the same court. Neuberger v. Portland, 607 P.2d 722 (Or. 1980).


\(^2\) Permit-issuing agencies, when including exactions, might well consider phrasing the permit as “No, unless…” rather than “Yes, if…,” to make clear whether exactions are to be considered severable from the permit in general.
exactions severable, so that the permits were automatically treated as valid authorizations to build in spite of the loss of the exactions.

3. The takings/substantive due process jumble. The Due Process Clause offers a general protection of property, and includes the Takings Clause as a particularized incorporated inquiry. But courts repeatedly conflate the takings test—which focuses on the diminution of property-owner’s value, balanced against the regulatory purpose—with quite different considerations of substantive due process.

There is a fundamental distinction between cases making a “takings test” review of the validity of government actions—based on property value diminution under Pennsylvania Coal and Penn Central—and cases addressing other due process considerations like the causative nexus inquiries in Nollan, Dolan, and Koontz. Those latter cases, and Eastern Enterprises which follows below, are not regulatory takings cases, instead they turn on substantive due process considerations.

In a 1980 takings decision, Agins v. City of Tiburon, the Court had added a new element—whether a regulation actually “substantially advanced a legitimate state interest”—to its takings test diminution analysis holding an ordinance constitutionally valid. “Substantially advanced…” was quite clearly a nexus-like substantive due process inquiry. In 2005, Lingle v. Chevron clarified that whether a statute actually “substantially advanced a legitimate state interest” was not a valid judicial inquiry for identifying invalid regulatory takings. For a unanimous Court Justice O’Connor declared the statutory restriction was not a regulatory taking because there had not been a showing of an excessive diminution of Chevron’s property value.

On occasion, a would-be doctrinal rule or test finds its way into our case law through simple repetition of a phrase, however fortuitously coined. A quarter century ago, in Agins, the Court declared that government regulation of private property “effects a taking if it does not substantially advance legitimate state interests”... Through reiteration in a half dozen or so decisions since Agins, this language has been ensconced in our Fifth Amendment takings jurisprudence.... This case requires us to decide whether the “substantially-advances” formula announced in Agins is an appropriate test for determining whether a regulation effects a Fifth Amendment taking. We conclude that it is not.... This formula prescribes an inquiry in the nature of a due process, not a takings, test, and that it has no proper place in our takings jurisprudence.... The Due Process Clause is intended, in part, to protect the individual against the exercise of power without any reasonable

justification in the service of a legitimate governmental objective. But such a test is not a valid method of discerning whether private property has been ‘taken’ for purposes of the Fifth Amendment.” 544 U.S. at __.

And as to substantive due process inquiries, Justice O’Connor added, “Nollan and Dolan cannot be characterized as applying the ‘substantially advances’ test..., and our decision should not be read to disturb these precedents.” The Nollan and Dolan exactions decisions both called themselves “ takings” cases because they were decided after Agins and before Lingle.

The semantic conflation has continued after Lingle, as many court decisions like Koontz apply the “ takings” label to cases challenging regulatory actions on grounds other than property value diminution. In Koontz, the Alito opinion acknowledged that the case’s facts did not present a taking. “Where the permit is denied and the [putatively unconstitutional] condition is never imposed, nothing has been taken,” but then goes on to say that “the unconstitutional conditions doctrine recognizes that this burdens a constitutional right” posing a test of what he labeled “ per se takings.” The Lingle case should have broadly clarified the semantic “ takings” conflation reflected in the Nollan and Dolan exaction decisions, but it didn’t.

The remedy issue illustrates problems in conflating takings with the other due process tests. If a court strikes down a regulation as an invalid taking, the remedy is either monetary just compensation or injunction against applying the restriction. If a court strikes down a permit’s exaction as an unconstitutional condition, presumably there has been no loss of property rights and no just compensation owed, and a severability question of whether the basic permit is rendered void or is still valid. Even farther from takings jurisprudence, what remedy makes sense if a merely-discussed condition later adjudged to violate Nollan-Dolan was discussed prior to a permit denial as in Koontz?

4. Substantive Due Process and the Innocent Landowner— n.b. Eastern Enterprises. In a variety of environmental situations, regulations apply heavy burdens on defendants who can say that they themselves did not cause the problem. This often occurs in the case of toxic contamination of land. Should courts acknowledge the legitimacy of substantive due process tests of fairness in such situations? For years conventional wisdom had been that the courts should not apply substantive due process to strike down legislation,72 though the courts

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72 Aversion to express recognition of substantive due process arises from the reversal of a regressive run of cases where anti–New Deal judges used economic due process to void federal economic recovery legislation. See Ferguson v. Skrupa, 372 U.S. 726, 731, (1963) (noting “our abandonment of the use of the ‘vague contours’ of the Due Process Clause to nullify laws which a majority of the Court believed to be economically unwise”); see also Williamson v. Lee Optical of Okla., 348 U.S. 483, 488 (1955) (“The day is gone when this Court uses the Due Process Clause...to strike down...laws, regulatory of
nevertheless continually have utilized substantive due process in latent fashion (e.g. “rational basis,” “arbitrary & capricious,” “ultra vires”).

Does the imposition of severe toxic cleanup burdens on innocent landowners, especially on those who lack an industry nexus to the original dumping, trigger substantive due process concerns? The appropriate test would seem to require some consideration of causation or the lack thereof, evoking the “rational relationship” police power test, rather than testing whether the takings burden is excessive, viewed in the context of public harms. To make non-causative innocent landowners liable for massive cleanup costs presents an obvious fairness problem that, given the heritage of the American bench and bar, should probably on its own terms be litigatable.

*Eastern Enterprises*, a case on coal miners’ illness compensation established a substantive due process analysis: Eastern Enterprises, a utility company with a subsidiary that was involved in coal mining prior to passage of the Coal Industry Retiree Health Benefit Act of 1992, challenged the Act’s imposition of retroactive liability for payments to former employee coal miners and their families suffering the effects of black lung disease (pneumoconiosis) and associated work-related illnesses. Liability could total between $50 and $100 million. Eastern Enterprises business and industrial conditions, because they may be unwise, improvident, or out of harmony with a particular school of thought”.

There is an implicit “recognition that substantive due process inquiry is not anathema; it is an established component of the courts’ constitutional jurisdiction. Substantive due process occurs in present-day reviews of public purposes, authority, and bad faith, as well as in [reviews of] arbitrariness.” Plater & Norine, Exploring the “Arbitrary and Capricious” Test and Substantive Rationality Review of Governmental Decisions, 16 B.C. Envtl. Aff. L. Rev. 661, 697 (1986).


There are a number of situations where burdens are imposed on non-causative parties without recourse. In an acid mine pollution case, *Commonwealth v. Barnes & Tucker Co.*, 371 A.2d 461 (Pa. 1977), the mining company proved that virtually all of the acid mine water draining from its mine came from the past wrongful activities of neighboring coal mines now abandoned. The court nevertheless held the defendant liable to pay for the entire cleanup, perhaps under some sort of theory of “enterprise liability,” an approach that has been followed by other courts. A similar situation occurs with the forfeiture of private property used in crimes, even where the property owners are totally innocent, as in *Bennis v. Mich.*, 516 U.S. 442 (1996), although many consider such cases grossly unfair. Professor Laitos has pioneered this inquiry into the constitutional invalidity of liability without fault. See Laitos, Causation and the Unconstitutional Conditions Doctrine: Why the City of Tigard’s Exaction Was a Taking, 72 U. Denver L. Rev. 893 (1995).

objected—on the ground that the miners had been employed in the distant past, when there was no expectation that companies would have to cover lifetime health effects—and claimed that the law was (a) an invalid regulatory taking and (b) a violation of substantive due process. The company won but, as so often, Justice Kennedy tilted the vote: Justices Rehnquist, Scalia, Thomas, and O’Connor said it was an invalid taking, but Justice Kennedy, joined by the four dissenters, said it wasn’t an issue of a regulatory takings diminution of value, but rather whether there was a sufficient rational nexus between the company and the long latent illnesses. He said there wasn’t; the four dissenters said there was. Accordingly, given the five-vote alignment, *Eastern Enterprises* has stood for the proposition that the nexus inquiry is not a takings issue, but rather is a substantive due process inquest, a clarification and application of doctrine that should be applicable in cases brought by innocent owners of contaminated land, those subjected to exactions, and beyond.