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SUBSTANTIVE TAKINGS LAW: A PRIMER

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SUBSTANTIVE TAKINGS LAW: A PRIMER

by Robert Meltz*

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

Some government interferences with a person’s use, possession, or control of his property are deemed a “taking” of that property under the Fifth Amendment Takings Clause. Most such interferences are not. These materials summarize the case law on how courts make this distinction, and hence when the government must compensate the property owner under the Takings Clause.

A taking lawsuit asserts that a government interference with private property, such as regulation of land use, has effectively “taken” some property interest, even though the government has not formally invoked eminent domain in a “condemnation action.” Because the property owner sues the government, rather than the reverse as in a condemnation action, a taking claim is also known as an “inverse condemnation” claim. *United States v. Clarke*, 445 U.S. 253, 257 (1980). Generally, the taking claimant seeks compensation, rather than invalidation of the government action, because the Takings Clause “does not prohibit the taking of private property, but instead places a condition on the exercise of that power” – namely, payment of just compensation. *First English Evangelical Lutheran Church v. County of Los Angeles*, 482 U.S. 304, 314 (1987).

Though these materials cover only the *federal* Takings Clause, this is scant limitation. The federal Takings Clause applies to both the United States and (through the Fourteenth Amendment) state and local governments. Moreover, takings clauses in state constitutions are usually construed similarly to the federal Takings Clause. Indeed, many state courts assert complete congruence between state and federal substantive takings law. *See, e.g., San Remo Hotel v. San Francisco*, 41 P.3d 87, 100-01 (Cal. 2002); *Hendersonville v. City of Columbus*, 827 N.W.2d 486, 490 (Neb. 2013); *Byrd v. City of Hartsville*, 620 S.E.2d 76, 79 n.6 (S.C. 2005). *Contra, McCarran Int’l Airport v. Sisolak*, 137 P.3d 1110, 1126-27 (Nev. 2006) (state constitution defines *per se* takings more broadly than federal constitution); *Norwood v. Horney*, 853 N.E.2d 1115 (Ohio 2006) (public use requirement in state constitution not met by economic development purpose, contrary to *Kelo* holding regarding federal constitution). Roughly half the state takings clauses apply to property that is either taken or “damaged,” the latter term adding further property protections. But “damaged” is not necessarily relevant to the takings analysis. *See, e.g., Customer Co. v. City of*

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Sacramento, 895 P.2d 900, 906-07, 909-12 (Cal. 1995) (“damaged” limited to eminent domain and public improvements).

Only selected case authorities are cited herein. Also, there is a tilt in the citations toward the U.S. Court of Federal Claims (CFC) and U.S. Court of Appeals for the Federal Circuit, which adjudicate takings claims against the United States, given their more fully evolved takings jurisprudence and nationwide influence on other courts. *See, e.g., Yamagiwa v. City of Half Moon Bay*, 523 F. Supp. 2d 1036, 1098 (N.D. Cal. 2007); *Biddle v. BAA Indianapolis, LLC*, 860 N.E.2d 570, 579-80 (Ind. 2007).

PART ONE: THRESHOLD SUBSTANTIVE HURDLES

I. TAKINGS VERSUS OTHER LEGAL THEORIES

At the outset, an aggrieved property owner should ask whether her state has *statutory* compensation remedies for land use restrictions. Indeed, ripeness requirements for takings claims may demand it. Such state “property rights laws” – principally in Florida, Texas, Oregon, and Arizona – typically set the threshold for compensating the property owner much lower than does the Takings Clause, and alternatively may allow a state to waive the land-use restriction found to be a taking. Other legal theories overlapping with the Takings Clause are as follows.

A. CONSTITUTIONAL THEORIES

Substantive due process. Takings and substantive due process (SDP) historically have been intertwined. Indeed, in *Agins v. City of Tiburon*, 447 U.S. 255, 260 (1980), government actions were said to constitute takings when they fail to “substantially advance legitimate state interests” – a means-end, due-process-like test. This overlap between takings and SDP was greatly reduced by *Lingle v. Chevron USA Inc.*, 544 U.S. 528 (2005). There, the “substantially advance” test was expunged from takings law as means-end oriented – inconsistent, the Court said, with the takings law focus on the government action’s *impact* on the property. Properly read, *Lingle* does not simply transfer the substantially advance inquiry to some other takings test, such as the “character” factor in *Penn Central*. The due-process thrust of “substantially advance,” *Lingle* suggests, makes it inappropriate *anywhere* in takings law. Nor did *Lingle* shift “substantially advance” to property-rights-based SDP challenges, heightening the current rational basis test. *Kentner v. City of Sanibel*, 750 F.3d 1274 (11th Cir. 2014).

Before *Lingle*, some federal circuits held that a takings analysis, if appropriate, preempts SDP as an alternate theory. *See esp., Armendariz v. Penman*, 75 F.3d 1311 (9th Cir. 1996) (en banc). Preemption of due process was premised on *Graham v. Connor*, 490 U.S. 386 (1989), holding that when another constitutional provision provides specific protection from the conduct complained of, the more general protection of due process may not be used. After *Lingle*, *Armendariz* preemption appears unjustified. By removing the “substantially advance” test from takings law, *Lingle* makes it harder to argue that SDP duplicates Takings Clause protections and should be

preempted. *See, e.g., Crown Point Devpmt., Inc. v. City of Sun Valley*, 506 F.3d 851, 852-53 (9th Cir. 2007) (*Lingle* undermines *Armendariz* “to the limited extent that a claim for wholly illegitimate land-use regulation is not foreclosed”). Still, SDP is reserved for the most egregious governmental abuses, such as those that “shock the conscience.” *See, e.g., Rivkin v. Dover Twp.*, 671 A.2d 567 (N.J. 1996).

There are still areas where takings and SDP are competing theories. *See, e.g., Stop the Beach Renourishment, Inc. v. Florida DEP*, 560 U.S. 702 (2010) (plurality and concurring justices differ over whether judicial changes in the law should be assessed as takings or SDP violations).

Equal protection. When the landowner’s complaint is unequal treatment, as opposed to severe economic impact, equal protection may be a viable theory. *See, e.g., Village of Willowbrook v. Olech*, 528 U.S. 562 (2000); *Nollan v. California Coastal Comm’n*, 483 U.S. 825, 835 n.4 (1987). This is especially so given *Olech*’s revival of “class of one” equal protection claims, though courts often require that plaintiff prove government “ill will” to succeed. *See, e.g., 211 Eighth, LLC v. Town of Carbondale*, 922 F. Supp. 2d 1174 (D. Col. 2013). Note that the distribution of a regulatory burden remains a proper concern of takings analysis too, *Lingle*, 544 U.S. at 542, so the two theories are not entirely distinct. For a typical “class of one” land-use equal protection claim, see *Flying J, Inc. v. City of New Haven*, 549 F.3d 538, 547-48 (7th Cir. 2008).

Fourth amendment. The Fourth Amendment’s proscription against “unreasonable seizures” plainly overlaps with some physical takings claims, particularly given the Supreme Court’s broad definition of “seizure.” *See, e.g., Soldal v. Cook County, Ill.*, 506 U.S. 56, 61 (1992). Two federal circuits have explicitly approved the filing of simultaneous seizure and takings claims based on the same facts. *Severance v. Patterson*, 566 F.3d 490, 501-02 (5th Cir. 2009); *Presley v. City of Charlottesville*, 464 F.3d 480, 487 (4th Cir. 2006).

B. TORT

The takings-tort blur typically arises with physical rather than regulatory interferences with property. The possibility of the government action being more appropriately analyzed as a tort arises when (1) a taking claim alleges in essence the unlawfulness or unreasonableness of a government act, *see, e.g., Thune v. United States*, 41 Fed. Cl. 49 (1998); *Arreola v. Monterey County*, 99 Cal. App. 4th 722 (2002); (2) the government invasion of property is short-lived, not sufficiently intrusive, and/or unlikely to recur, *Smith v. Town of Long Lake*, 837 N.Y.S.2d 391, 393 (App. Div. 2007); *Morris v. Douglas County Bd. of Health*, 561 S.E.2d 393 (Ga. 2002); (3) the property injury was not deliberate, *Knutson v. City of Fargo*, 714 N.W.2d 44 (N.D. 2006); or (4) there is no public benefit to the government action, *Textainer Equipment Mgmt. Ltd. v. United States*, 115 Fed. Cl. 708, 718 (2014).

The Federal Circuit uses a two-part inquiry to distinguish physical takings from torts. First, a taking results only when the government intends to invade a property interest or the invasion is the direct, natural, or probable result of an authorized activity, as opposed to an incidental or consequential injury. Second, the invasion must secure a benefit to the government at the expense of the property owner, or at least preempt the owner's right to enjoy his property for an extended period. *Ridge Line, Inc. v. United States*, 346 F.3d 1346, 1355-56 (Fed. Cir. 2003). The first prong

of the *Ridge Line* test is also stated as an element of the required causation between government act and property injury. (See this Part, Section III.B.)

The decisions split on whether the same facts can give rise to both takings and torts, but the trend is toward acknowledging that they can. *See, e.g., Moden v. United States*, 404 F.3d 1335, 1339 n.1 (Fed. Cir. 2005) (noting several Federal Circuit decisions indicating that same facts may give rise to both a taking and a tort, but not reaching issue).

C. BREACH OF CONTRACT

Contract rights often are held to be property. Thus, a claim of governmental breach of contract sometimes is joined by a claim that the government has taken a property right. The CFC and Federal Circuit, where many such combined actions have been filed, prefer to resolve them under the more specific breach-of-contract theory. *Sun Oil Co. v. United States*, 572 F.2d 786 (Ct. Cl. 1978); *Barlow & Haun, Inc. v. United States*, 87 Fed. Cl. 428 (2009). Reasons include that the government, when contracting, is acting in a proprietary capacity, *Hughes Communications Galaxy, Inc. v. United States*, 271 F.3d 1060, 1070 (Fed. Cir. 2001); that the plaintiff retains the full range of breach of contract remedies, so nothing is taken, *Castle v. United States*, 301 F.3d 1328, 1342 (Fed. Cir. 2002); and that resolution of a dispute on a nonconstitutional basis is preferable. For contracts-theory preference outside the Federal Circuit, see *County of Ventura v. Channel Islands Marina, Inc.*, 71 Cal. Rptr. 3d 762, 768-69 (Cal. App. 2008) and *Mid-American Waste Systems, Inc. v. City of Gary*, 49 F.3d 286, 289 (7th Cir. 1995).

The preference for breach of contract in the CFC/Federal Circuit takes two inconsistent forms: the majority view, under which the taking claim may be dismissed at the outset, *see, e.g., Hughes*, 271 F.3d at 1070, and the minority (but growing) view, under which both claims may be argued or at least pled, but the taking claim falls by the wayside only if the contract claim succeeds. The minority view has been expressly rejected in some decisions, *see, e.g., PG & E v. United States*, 70 Fed. Cl. 766, 780 n.14 (2006), but recent endorsements exist. *See, e.g., Stockton East Water Dist. v. United States*, 583 F.3d 1344, 1368-69 (Fed. Cir. 2009) and *Century Exploration New Orleans, Inc. v. United States*, 103 Fed. Cl. 70 (2012). Of course, “a party can obtain only one recovery for a single harm.” *Stockton East*, 583 F.3d at 1369.

Parenthetically, when government action affects performance under contracts *to which it is not a party*, there is no disputing that a takings theory is available. However, takings are almost never found. The government action, if public and general, is seen as merely “frustrating” incidentally, not taking, the thwarted contract right. *Omnia Commercial Co. v. United States*, 261 U.S. 502 (1923); *Huntleigh USA Corp. v. United States*, 525 F.3d 1370 (Fed. Cir. 2008). Even when the enactment “targets” the class of contracts to which plaintiff’s contract belongs, making the *Omnia* rule unavailable as a defense, use of the *Penn Central* test almost always leaves the government without liability. *See, e.g., Concrete Pipe & Products, Inc. v. Construction Laborers Pension Trust*, 508 U.S. 602, 642 (1993). In contrast, a taking does occur when the government seeks to “stand in the shoes” of a contract party, assuming that party’s rights and duties under the contract. *Brooks-Scanlon Corp. v. United States*, 265 U.S. 106 (1924).

II. THE CONCEPT OF "PROPERTY"

A. BASICS

The Takings Clause is not implicated unless the government conduct affects “property” cognizable under the Clause. *See, e.g., Hearts Bluff Game Ranch, Inc. v. United States*, 669 F.3d 1326, 1329 (Fed. Cir.) (“we do not reach [the question of whether a taking has occurred] without first identifying a cognizable property interest”), *cert. denied*, 132 S. Ct. 2780 (2012). Unilateral expectations and abstract needs are not property. *Webb’s Fabulous Pharmacies v. Beckwith*, 449 U.S. 155, 161 (1980). Nor is an economic advantage, unless it has “the law back of [it].” *Kaiser Aetna v. United States*, 444 U.S. 164, 178 (1979) (quoting *United States v. Willow River Power Co.*, 324 U.S. 499, 502 (1945)).

Property interests are not created by the Constitution itself. *Phillips v. Washington Legal Found.*, 524 U.S. 156, 164 (1998). “Rather they are created and their dimensions defined by existing rules or understandings that stem from an independent source such as state law.” *Webb’s*, 449 U.S. at 161. Or, less commonly, federal law. *See, e.g., Kunkes v. United States*, 78 F.3d 1549, 1551 (Fed. Cir. 1996) (unpatented mining claims). Concepts that define the bounds of a property interest – the sticks in the “bundle of rights” – include the law creating it, existing rules and understandings, and “background principles” of nuisance and property law existing when the property was acquired. *See, e.g., Schooner Harbor Ventures v. United States*, 569 F.3d 1359, 1362 (Fed. Cir. 2009). Indicators that an interest will be recognized as property include the ability to sell, assign, transfer, or exclude. *McGuire v. United States*, 707 F.3d 1351 (Fed. Cir. 2013). An interest having value does not, of itself, confer property status. *Reichelderfer v. Quinn*, 287 U.S. 315, 319 (1932).

The term “property” refers to the rights inhering in the person’s relationship to some thing, not the thing itself. *Ruckelshaus v. Monsanto*, 467 U.S. 986, 1003 (1984). A second point of word usage: some courts, in demarcating what the Takings Clause protects, speak not of whether a property right exists, but rather whether it is “vested,” or more than merely “inchoate.”

B. EVOLUTION OVER TIME / JUDICIAL TAKINGS

The latitude that governments have to shape and redefine property concepts over time is a recurring issue. The “government’s power to redefine ... property [is] necessarily constrained by constitutional limits,” *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1014 (1992), and “a State, by *ipse dixit*, may not transform private property into public property without compensation,” *Webb’s Fabulous Pharmacies, Inc. v. Beckwith*, 449 U.S. 155, 164 (1980). On the other hand, and key to the issue’s complexity, notions of property obviously evolve over time. Further complexity arises when it is unclear whether the government is merely clarifying what a property rule has always been, or announcing a new rule.

The clarifying-the-law versus announcing-new-law issue often arises in “judicial taking” cases. A judicial taking claim asserts that when a court makes certain changes in the law so as to divest existing property rights, that may constitute a taking as surely as when statutes or regulations do the same thing. The concept was first broached in a 1967 Supreme Court concurring opinion, *Hughes*

v. Washington, 389 U.S. 290, 296-97 (1967) (Stewart, J.), but was then largely ignored by the Court until 2010. In that year, a four-justice plurality opinion in *Stop the Beach Renourishment, Inc. v. Florida DEP*, 560 U.S. 702 (2010), saw no reason to accord the judicial branch special treatment, proposing that “If a legislature *or a court* declares that what was once an established right of private property no longer exists, it has taken that property.” (Emphasis in original.) In concurring opinions, however, four Justices declined to reach the question of whether judicial takings exist, the Court unanimously having held that the state supreme court decision at issue was a reasonable interpretation of state precedent.

Judicial reaction to *Stop the Beach Renourishment* has been mixed. Compare *Vandevere v. Lloyd*, 644 F.3d 957, 964 n.4 (9th Cir.) (“any branch of state government could, in theory, effect a taking,” citing *STB* plurality), with *Burton v. American Cyanimid Co.*, 775 F. Supp. 2d 1093, 1099 (E.D. Wash. 2011) (defendants cite no authority for proposition there can be a judicial taking; *STB* plurality is not binding precedent). It remains true today that no court has ever actually found a judicial taking in a final decision.

C. “BACKGROUND PRINCIPLES”

A land-use restriction, the Supreme Court announced in *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992), cannot be a taking if it merely makes explicit what could have been prohibited under “background principles of the State’s law of property and nuisance” existing when the property was acquired. *Id.* at 1029. Though *Lucas* was a total taking case, it is now clear that this “background principles” concept, limiting the rights obtained when property is acquired, applies in *all* regulatory takings cases, total and partial, *see, e.g., Appolo Fuels, Inc. v. United States*, 381 F.3d 1338, 1347 (Fed. Cir. 2004); *M & J Coal Co. v. United States*, 47 F.3d 1148, 1153 (Fed. Cir. 1995); *Mutschler v. City of Phoenix*, 129 P.3d 71, 75 (Ariz. App. 2006) – indeed, it would seem, in physical takings cases as well (see Part Three, Section III).

Given the centrality of the background principles concept, *Lucas* said little about its content – beyond including the common law of nuisance, federal navigation servitude, and “doctrine of actual necessity” (Part One, Section VIII) as background principles. Early debate following *Lucas* asked whether background principles include (1) statutory law, as opposed to just common law; (2) statutes enacted not long before the property was acquired, as opposed to just vintage laws rooted in age-old legal tradition; and (3) federal law, as opposed to just state law. From the text of *Lucas* alone, however, it seems plain that the common-law-of-nuisance-only view errs in ignoring the “property” component of “background principles ... *of property* and nuisance,” and that the state-law-only view is incorrect in ignoring *Lucas*’ explicit mention of the federal navigation servitude. Lower courts generally have rejected these constraints on what constitutes “background principles” (see below).

However, courts are not free to conjure up background principles: they must be based on “*objectively reasonable application* of relevant precedents.” *Lucas*, 505 U.S. at 1032 n.18 (emphasis in original). See also, in this regard, Section II.B. Note that a pre-acquisition restriction *denied* background principle status nonetheless remains relevant to assessing what investment-backed expectations are reasonable under *Penn Central*. (See Part Two, Section III.B. – *Regulation predates acquisition*).

Interpretation by Supreme Court. The Supreme Court has not spoken at length about background principles since *Lucas*. Its most extended remarks came in *Palazzolo v. Rhode Island*, 533 U.S. 606, 629-30 (2001), saying that “a regulation ... is not transformed into a background principle ... by mere virtue of the passage of title.” Rather, background principles reflect “common, shared understandings of permissible limitations derived from a State’s legal tradition.” *Id.* These comments appear to contemplate that some pre-acquisition statutes and regulations will qualify as background principles, though it is unclear how far such laws can go beyond simply mirroring the common law of nuisance. More recently, the Court endorsed a state’s common law governing ownership of avulsion lands as background principles in *Stop the Beach Renourishment, Inc.*

Interpretation by courts other than CFC and Federal Circuit. These courts often interpret “background principles” broadly. State courts have held background principles to subsume statutes, whether or not they codify common law, *City of Virginia Beach v. Bell*, 498 S.E.2d 414, 418 (Va. 1998), *Kim v. City of New York*, 681 N.E.2d 312 (N.Y. 1997), and recently enacted laws, not just ancient ones. *Annello v. Zoning Bd. of Appeals*, 678 N.E.2d 870 (N.Y. 1997) (ordinance enacted two years before property acquisition); *Hunziker v. State*, 519 N.W. 2d 367, 371 (Iowa 1994) (state statute enacted ten years before acquisition). Query whether all these decisions survive the *Palazzolo* remarks above. A contrary decision, asserting that background principles derive only from common law, not statutory law, is *Monks v. City of Rancho Palos Verdes*, 84 Cal. Rptr. 3d 75 (Cal. App. 2008).

The background-principle status of some common-law property principles has been made explicit. One example is the public trust doctrine. *See, e.g., McQueen v. South Carolina Coastal Council*, 580 S.E.2d 116, 119 n.5 (S.C. 2003); *Esplanade Properties, LLC v. City of Seattle*, 307 F.3d 978 (9th Cir. 2002). Another is the Oregon doctrine of custom, giving the public recreational access to the “dry sand” beach. *Stevens v. City of Cannon Beach*, 854 P.2d 449, 456 (Or. 1993). Yet another is certain water law limitations. *See, e.g., West Maricopa Combine, Inc. v. Arizona*, 26 P.3d 1171, 1180 (Ariz. App. 2001). Limited case law suggests that the historical responsibility of states for wildlife protection, including the state ownership doctrine, may qualify as a background principle as well, *see, e.g., New York v. Sour Mountain Realty, Inc.*, 714 N.Y.S.2d 78, 84 (2000).

Interpretation by CFC and Federal Circuit. These courts initially took the narrow view that background principles generally include only state common law of nuisance, and statutes that reflect it. *See, e.g., Preseault v. United States*, 100 F.3d 1525, 1538 (Fed. Cir. 1996) (en banc plurality). More recent decisions, however, have endorsed as background principles a wide array of common law and statutes. *See, e.g., Bair v. United States*, 515 F.3d 1323 (Fed. Cir. 2008) (federal law asserting super-priority of federal liens); *American Pelagic Fishing Co, L.P. v. United States*, 379 F.3d 1363, 1379 (Fed. Cir. 2004) (federal fisheries statute); *Air Pegasus, Inc. v. United States*, 424 F.3d 1206 (Fed. Cir. 2005) (public ownership of navigable airspace); and *Abraham-Youri v. United States*, 139 F.3d 1462 (Fed. Cir. 1997) (international law). Most recently, the Federal Circuit stated broadly that “[i]f a challenged restriction was enacted before the property interest was acquired, the restriction may be said to inhere in the title ...,” though noting “[t]his is not always true with respect to land use restrictions” citing *Palazzolo. A & D Auto Sales, Inc. v. United States*, 748 F.3d 1142, 1152 and n.6 (Fed. Cir. 2014).

D. TAKINGS PROPERTY VERSUS DUE PROCESS PROPERTY

The Takings and Due Process Clauses use “property” in adjacent text. Notwithstanding, courts generally hold that “property” is narrower for takings purposes. *Corn v. City of Lauderdale Lakes*, 95 F.3d 1066, 1075 (11th Cir. 1996); *Pittman v. Chicago Bd. of Ed.*, 64 F.3d 1098, 1104 (7th Cir. 1995); *Zealy v. City of Waukesha*, 153 F. Supp. 2d 970, 977 (E.D. Wis. 2001); *Bronco Wine Co. v. Jolly*, 29 Cal. Rptr. 3d 462, 494 (Cal. App. 2005). The reason for the different definitions is rarely stated, though a few courts talk about the different concerns of the two clauses, *Eastern Enterprises v. Apfel*, 524 U.S. 498, 557 (1998) (four-justice dissent asserting that Takings Clause and Due Process Clause have different objectives, permitting difference in how “property” is construed in each), *Bowlby v. City of Aberdeen, Miss.*, 681 F.3d 215, 226-27 (5th Cir. 2012), or their different remedies, *DLC Management Corp. v. Town of Hyde Park*, 163 F.3d 124 (2d Cir. 1998). In any event, a wide range of statutory entitlements (welfare payments, unemployment compensation, public employment) and permits and licenses are not covered by the Takings Clause even though they are covered by due process procedural safeguards.

E. LAND

Almost all interests in land are recognized as “property” under the Takings Clause – from fee simples to leaseholds, easements, liens, life estates, and restrictive covenants. *See, e.g., United States v. Welch*, 217 U.S. 333 (1910) (easements). Equitable as well as legal interests are recognized. The decisions often (but not always) recognize as property even some of the more insubstantial interests in land – *see, e.g., United States v. Petty Motor Co.*, 327 U.S. 372, 381 (1946) (option to renew lease); *El Dorado Land Co., L.P. v. City of McKinney*, 395 S.W.3d 798 (Tex. 2013) (reversionary interest); *MHC of Washington v. State*, 13 P.3d 183 (Wash. 2000) (right of first refusal). Of course, state law treatment of the interest controls. Compare *Forest Properties, Inc. v. United States*, 39 Fed. Cl. 56, 70 (1997) (option to purchase, even unexercised, is property under California law) with *New England Estates v. Town of Branford*, 988 A.2d 229 (Conn. 2010) (unexercised option to purchase property is not a property interest under Connecticut law). Indian lands recognized by treaty are property. *Tee-Hit-Ton Indians v. United States*, 348 U.S. 272 (1955).

Probably the most active area of easement/takings litigation today is the rails-to-trails cases, where conversion of railroad rights of way to recreational trails has led thousands of abutting land owners to claim a taking of their rights of reversion in the right of way. The cases often turn on whether the easement granted to the railroad is broad enough to include travel by recreational hikers and bikers. Another area of prodigious easement/takings litigation is the property access cases. Access to a public road, an easement widely recognized in owners of land abutting such a road, is property for takings purposes. *See, e.g., Davenport Pastures LP v. Morris County Bd. Of County Comm’rs*, 238 P.3d 731, 736 (Kan. 2010). Easements of necessity are also property. *See, e.g., Palmyra Pacific Seafoods, LLC v. United States*, 561 F.3d 1361, 1371 (Fed. Cir. 2009).

Water rights, though often of a qualified nature, are generally held property. *United States v. Gerlach Live Stock Co.*, 339 U.S. 725 (1950) (riparian rights); *Walker v. United States*, 69 Fed. Cl. 222 (2005) (appropriation rights); *Hensley v. City of Columbus*, 433 F.3d 494 (6th Cir. 2006) (groundwater rights); *Edwards Aquifer v. Day*, 369 S.W.3d 814 (Tex. 2012) (groundwater rights). *See generally Hansen v. United States*, 65 Fed. Cl. 76, 123-24 (2005). *But see Walton County v. Stop the Beach Renourishment, Inc.*, 998 So. 2d 1102, 1111 (Fla. 2008) (noting that certain littoral rights

are property in Florida, but mere licenses in Mississippi), *affirmed*, 560 U.S. 702 (2010), and *Mildenberger v. United States*, 643 F.3d 938, 948 (Fed. Cir. 2011) (under Florida law, riparian rights held concurrently with the public are not compensable). Appropriation water rights have been held compensable only to the extent of government interference with *actual* beneficial use. *Casitas Municipal Water Dist. v. United States*, 708 F.3d 1340, 1356 (Fed. Cir. 2013); *Estate of Hage v. United States*, 687 F.3d 1281 (Fed. Cir. 2012). At least in California, there is no property right in use of water that is unreasonable, or harmful to interests protected by the public trust doctrine. *See Light v. State Water Resources Control Bd.*, 173 Cal. Rptr. 3d 200, 210-12 (Cal. App. 2014) (collecting cases).

Also property are mineral rights, *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393 (1922), and even unpatented mining claims, *Kunkes v. United States*, 78 F.3d 1549 (Fed. Cir. 1999). And landowner-usable airspace up to the floor of public airspace. *McCarran Int'l Airport v. Sisolak*, 137 P.3d 1110 (Nev. 2006) (collecting cases).

F. PERSONAL PROPERTY

The Takings Clause covers personal property, both tangible and intangible. *Ruckelshaus v. Monsanto*, 467 U.S. 986, 1003 (1984); *Acceptance Ins. Cos., Inc. v. United States*, 583 F.3d 849, 854 (Fed. Cir. 2009). With regard to intangible property, in the absence of statutory language precluding a property interest one looks to “whether ... the alleged property had the hallmark rights of transferability and excludability.” *Members of Peanut Quota Holders Ass’n, Inc. v. United States*, 421 F.3d 1323, 1330 (Fed. Cir. 2005). Again, value alone does not automatically confer property status, and lack of value does not preclude it. *See Phillips v. Washington Legal Found.*, 524 U.S. 156, 169 (1998).

Held to be property under the Clause are (1) franchises, *Monongahela Navigation Co. v. United States*, 148 U.S. 312, 345 (1883); (2) money, *Phillips v. Washington Legal Found.*, 524 U.S. 156 (1998); (3) interest on principal, *id.*; (4) debts of a lender, *Bowen v. POSSE*, 477 U.S. 41, 55 (1986); (5) liens, *Armstrong v. United States*, 364 U.S. 40 (1960) (materialmen’s lien); (6) certain contract rights, *Concrete Pipe & Products, Inc. v. Construction Laborers Pension Trust*, 508 U.S. 602, 642 (1993); (7) patents, trademarks, and copyrights, *Boyle v. United States*, 200 F.3d 1369 (Fed. Cir. 2000) (copyrights); (8) trade secrets, *Ruckelshaus v. Monsanto*, 467 U.S. 986, 1003-04 (1984); and (9) causes of action once reduced to final, unreviewable judgment, *Ileto v. Glock, Inc.*, 565 F.3d 1126 (9th Cir. 2009).

Held *not* to be property under the Clause are (1) permits and licenses, when nontransferable and revocable, *Mobile Relay Assocs. v. FCC*, 457 F.3d 1 (D.C. Cir. 2006); *Conti v. United States*, 291 F.3d 1334, 1340 (Fed. Cir. 2002); *Bronco Wine Co. v. Jolly*, 29 Cal. Rptr. 3d 462, 494 (Cal. App. 2005); *contra*, *State Bd. of Ed. v. Drury*, 437 S.E.2d 290 (Ga. 1993) (license to engage in profession); *Pre-Need Family Services v. Bureau*, 904 A.2d 996, 1003 (Pa. Cmwlth. 2006) (same); (2) government benefits, unless contractual, *Bowen v. Gilliard*, 483 U.S. 587, 604 (1987) (welfare payments); *Bowers v. Whitman*, 671 F.3d 905, 915 (9th Cir.) (generally), *cert. denied*, 133 S. Ct. 163 (2012); (3) uses/access dependent on government authorization, especially in a context of pervasive government control, *Hearts Bluff Game Ranch, Inc. v. United States*, 669 F.3d 1326 (Fed. Cir.) (participation in wetlands mitigation banking program), *cert. denied*, 132 S. Ct. 2780 (2012); *Air Pegasus of D.C., Inc. v. United States*, 424 F.3d 1206, 1217-18 (Fed. Cir. 2005) (access to public airspace); *Rick’s*

Amusement, Inc. v. State, 570 S.E.2d 155, 158-59 (S.C. 2001) (right to operate video gaming machines); (4) the ability to conduct a business, as distinct from a business' assets, *College Savings Bank v. Florida Prepaid*, 527 U.S. 666, 675 (1999) (a due process decision), particularly when voluntarily entering a pervasively regulated field, *Akins v. United States*, 82 Fed. Cl. 619 (2008) (firearms); and (5) wildlife prior to its being reduced to possession, *Mountain States Legal Found. v. Hodel*, 799 F.2d 1423, 1426 (10th Cir. 1986).

Also, “[n]o person has a vested interest in any rule of law, entitling him to insist that it shall remain unchanged for his benefit.” *New York Central R.R. v. White*, 243 U.S. 188, 198 (1917); *Branch v. United States*, 69 F.3d 1577-78 (Fed. Cir. 1995).

G. “FUNDAMENTAL” PROPERTY INTERESTS

Some property rights are judicially dubbed “fundamental.” The right to physically exclude others is the prime example, resulting in a rule that permanent physical occupations by the government are *per se* takings, even when the space occupied and the economic impact are minimal. See Part III, Sec. I. The right to pass on property to one’s heirs appears to be another, resulting in a rule that at least where the interference is total or substantial, the remedy may be invalidation – rather than the usual compensation. *Babbitt v. Youpee*, 519 U.S. 234 (1997); see *Eastern Enterprises v. Apfel*, 524 U.S. 498, 521 (1998).

III. CAUSATION, ATTRIBUTION, ETC.

A. NECESSITY OF DIRECT CAUSATION

A taking claim can succeed only when the harm to the property interest was caused *directly* by the challenged government action. Indirect, aka "consequential," injuries are without Takings Clause remedy. *Omnia Commercial Co. v. United States*, 261 U.S. 502, 510 (1923); *Air Pegasus, Inc. v. United States*, 424 F.3d 1206 (Fed. Cir. 2005). Thus, government allowing increased use on one parcel or itself constructing a project thereon, causing harm to a neighbor, usually gives the neighbor no taking claim. See, e.g., *Harms v. City of Sibley*, 702 N.W.2d 91 (Iowa 2005) (increasing allowed uses); *E-L Enter., Inc. v. Milwaukee Metro. Sewerage Dist.*, 785 N.W.2d 409 (Wis. 2010) (constructing project). Cf. *Armstrong v. United States*, 364 U.S. 40 (1960) (government’s destruction of lien value *not* merely consequential).

When the causation requirement is addressed, the standard is variously stated. *Penn Central Transp. Co. v. New York City*, 438 U.S. 104, 124 (1978) (passing reference to losses “proximately caused” by government); *Christy v. Hodel*, 857 F.2d 1324, 1335 (9th Cir. 1988) (more than “incidental result” of regulation); *Akins v. State*, 61 Cal. App. 4th 1 (1998) (owner must show a “substantial cause-and-effect relationship, excluding the probability that other forces *alone* produced the injury”) (emphasis in original). See also *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1027 n.14 (1992) (law that destroys value of land without being aimed at land “perhaps” cannot be taking).

Inadequate efforts of the government to prevent property injury from natural disasters, as Hurricane Katrina, usually lead to holdings that it was the natural event, not the government, that caused the injury. See, e.g., *Nicholson v. United States*, 77 Fed. Cl. 605 (2007). Actions of the

plaintiff also may be seen as the cause of the property harm. *See, e.g., United States v. Locke*, 471 U.S. 84, 107 (1985) (failure of unpatented mining claim holder to meet filing deadline in statute, not the filing statute, caused claim to be extinguished); *Novartis AG v. Lee*, 740 F.3d 593 (Fed. Cir. 2014) (similar); *Walcek v. United States*, 44 Fed. Cl. 462, 468 (1999) (delay in issuing permit was caused by inadequacy of plaintiff's applications and his opting early to litigate), *aff'd*, 303 F.3d 1349 (Fed. Cir. 2002).

When property injury is linked to government alteration of a natural process, the causation question may turn on whether a private actor precipitated the injury. *Compare Cotton Land Co. v. United States*, 109 Ct. Cl. 816 (1948) (where government dam slowed upstream flow and increased sand deposition in riverbed, causing flooding, taking occurred) *with Cary v. United States*, 552 F.3d 1373 (Fed. Cir. 2009) (where government forest fire suppression resulted in denser trees and forest fire here being more severe, no taking of fire-destroyed homes occurred because fire was started by hunter's signal fire and was thus not the direct, natural or probable result of government's acts).

Causation is sometimes subsumed within the court's standing inquiry. *See, e.g., Autozone Devpmt. Corp. v. District of Columbia*, 484 F. Supp. 2d 24, 30 (D.D.C. 2007).

B. FORESEEABILITY/ INTENT

Causation in fact is often held a necessary, but not sufficient, condition for establishing takings liability. In addition to causation in fact, "an inverse condemnation plaintiff must prove that the government should have predicted or foreseen the resulting injury." *Moden v. United States*, 404 F.3d 1335, 1343 (Fed. Cir. 2005). *Accord, City of Keller v. Wilson*, 168 S.W.3d 802, 808 (Tex. 2005) (must show city intentionally took property, or was substantially certain that would be result). Thus, an unforeseeable intervening cause may exonerate the government from liability for subsequent harm. *See, e.g., Thune v. United States*, 41 Fed. Cl. 49 (1998) (destruction of hunting camp when forest fire set by U.S. shifted direction is not a taking, due in part to unforeseeable wind change); *Cary*, 552 F.3d at 1378-79 (hunter setting signal fire was unforeseeable intervening cause). A showing of governmental intent to take is not required.

C. ATTRIBUTION: LIABILITY FOR THIRD PARTY CONDUCT

Private third parties. Takings liability for the acts of a private third party may be attributed to a government when it has a "direct and substantial" involvement with the party. *Casa de Cambio v. United States*, 291 F.3d 1356, 1361 (Fed. Cir. 2002). Such involvement may be discerned when the government directed or authorized third-party conduct with specific reference to the plaintiff's property. The standard may be looser, however, when the government authorizes physical invasion by private parties. *See, e.g., Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982). Liability also is imputed to the government when the third party acted as its agent or was effectively coerced. *A&D Auto Sales, Inc. v. United States*, 748 F.3d 1142, 1154 (Fed. Cir. 2014) (asking whether there was effective coercion).

Merely because the government *authorizes* a third party to act in a way harmful to plaintiff's land, as by issuing a permit or rezoning, does not make the government liable for any taking. "Without governmental encouragement or coercion, actions taken by private corporations pursuant to federal law do not transmute into government action under the Fifth Amendment." *Broad v. Sealaska*

Corp., 85 F.3d 422, 431 (9th Cir. 1996). *Accord, Harms v. City of Sibley*, 702 N.W.2d 91 (Iowa 2005) (rezoning); *Benson v. State*, 710 N.W.2d 131, 156 (S.D. 2006) (decriminalizing conduct); *Stanfield v. Glynn County*, 631 S.E.2d 374 (Ga. 2006) (permitting of waste transfer facility); *Berkley v. R.R. Comm'n*, 282 S.W.3d 240 (Tex. App. 2009) (permitting of underground injection). *But see Swartz v. Beach*, 229 F. Supp. 2d 1239 (D. Wyo. 2002) (issuance of permit together with alleged government malfeasance states taking claim based on permitted activity).

Government third parties. The third party whose actions impinge on private property is often another government, posing the question of which government, if any, is the taker. The cases arise chiefly when the third-party government participates in a program of the defendant government. When, in so doing, the third-party government is deemed an agent or instrumentality of the defendant, takings liability will be imputed. *Hendler v. United States*, 952 F.2d 1364 (Fed. Cir. 1991) (superfund program); *Toews v. United States*, 376 F.3d 1371, 1381-82 (Fed. Cir. 2004) (rails-to-trails program); *see generally Lion Raisins*, 416 F.3d at 1363. Agent/instrumentality status has been rejected, though, when the state acted solely to qualify for federal money, and considerable discretion was left to the state. *B&G Enterprises v. United States*, 220 F.3d 1318 (Fed. Cir. 2000) (federal substance-abuse block grant); *Adolph v. FEMA*, 854 F.2d 732, 736 (5th Cir. 1988) (federal flood insurance program). *See also Griggs v. Allegheny County*, 369 U.S. 84, 89 (1962) (county, not U.S., liable for taking of air easement near county airport, even though airport was funded by U.S. based on compliance with federal regulations). Whether state environmental programs operated under delegated federal authority can give rise to federal takings liability appears not to have been addressed.

The mere fact that the U.S. cajoled the other government into taking action is insufficient to shift any takings liability to the U.S. *Langenegger v. United States*, 756 F.2d 1565 (Fed. Cir. 1985); *Davis v. United States*, 35 Fed. Cl. 392 (1996); *Blue v. United States*, 21 Cl. Ct. 359 (1990). Neither is there imputation of takings liability to the U.S. when the state's action is merely a logical consequence of federal activity – that is, there is no formal federal-state interaction pursuant to a federal program. *Applegate v. United States*, 35 Fed. Cl. 406, 422 (1996).

D. OWNERSHIP AS OF THE DATE OF THE ALLEGED TAKING

Generally, a property owner can maintain a taking claim only if she owned the property as of the date of the alleged taking. The right to compensation is not passed to a subsequent purchaser. *United States v. Dow*, 357 U.S. 17, 20 (1958). This is the prime standing-to-sue rule of takings law. *See, e.g., CRV Enterprises, Inc. v. United States*, 626 F.3d 1241, 1249 (Fed. Cir. 2010) (collecting cases).

Palazzolo v. Rhode Island, 533 U.S. 606, 628 (2001), noted that in contrast with direct condemnations and physical occupations, a *regulatory* scheme's impact on a parcel may not be immediately apparent. Thus, an as-applied regulatory taking claim may not ripen – as when a permit application is denied or administrative remedies are exhausted – until the parcel is in different ownership than when the regulatory scheme was enacted. In this circumstance, *Palazzolo* seems to find, it does little violence to the owner-as-of-date-of-taking rule to allow the subsequent owner to bring a regulatory taking claim. *Cf. Guggenheim v. City of Goleta*, 638 F.3d 1111, 1119 (9th Cir 2010) (en banc) (*facial* challenges to pre-acquisition regulations not addressed by *Palazzolo* and thus still precluded by owner-as-of-date-of-taking rule). Some courts, however, appear to read *Palazzolo* as allowing a taking claim to be brought by a property owner despite the fact that the prior owner had a ripe claim, carving out a clear exception to the owner-as-of-date-of-taking rule. *See, e.g., Machipongo*

Land & Coal Co., Inc. v. Commonwealth, 799 A.2d 751, 761-63 (Pa. 2002) (designation of property as unsuitable for surface mining could be challenged by trust acquiring property after designation). This paragraph ties in with Part Two, Section III.B. on takings claims against regulations that predate property acquisition.

IV. INVALID GOVERNMENT ACTIONS

A. COURTS OTHER THAN CFC AND FEDERAL CIRCUIT

For some courts, the erroneous/unauthorized aspect of the government action is *irrelevant* to the takings analysis. See, e.g., *Eberle v. Dane County*, 595 N.W.2d 730 (Wis. 1999); *Harris County Flood Control Dist. v. Adam*, 56 S.W.3d 665, 668-69 (Tex. App. 2001). Other cases hold that an invalid government action *cannot* be a taking. See, e.g., *Pheasant Bridge Corp. v. Township of Warren*, 777 A.2d 334 (N.J. 2001) (invalid zoning ordinance is not, in the words of *First English*, the “otherwise proper [governmental] interference” that the Takings Clause presupposes). See also *Eastern Enterprises v. Apfel*, 524 U.S. 498 (1998) (in separate opinions, majority of justices say that Takings Clause assumes that challenged government conduct is “legitimate,” *id.* at 554, or “valid,” *id.* at 545). This view arguably received a boost in *Lingle v. Chevron USA Inc.*, 544 U.S. 528 (2005), which (1) said that the Takings Clause “presupposes that the government has acted in pursuit of a valid purpose,” *id.* at 543, and (2) twice quoted the “otherwise proper” language in *First English* cited above.

What has been pivotal in several cases is that the erroneous government action (including judicial challenges thereto) was judicially regarded as a normal administrative delay in passing upon a development application. Routine delays during the process of government decisionmaking are not takings. *Agins v. City of Tiburon*, 447 U.S. 255, 263 n.9 (1980). See, e.g., *Sea Cabins on the Ocean IV Homeowners Ass’n v. City of North Myrtle Beach*, 548 S.E.2d 595 (S.C. 2001); *Landgate*, 953 P.2d at 1197 (California agency’s mistaken but reasonable assertion of jurisdiction was “part of the development approval process,” hence not a taking); *Ali v. City of Los Angeles*, 91 Cal. Rptr. 458 (Cal. App. 1999) (denial of demolition permit was arbitrary and capricious, not “normal delay” as in *Landgate*; regulatory taking found).

B. CFC AND FEDERAL CIRCUIT

In these courts, “unauthorized” acts of federal agencies cannot be the basis of takings claims against the United States. A taking plaintiff implicitly concedes that the government action was authorized. Thus, she cannot seek return of the property – only compensation. *Del Rio Drilling Programs, Inc. v. United States*, 146 F.3d 1358 (Fed. Cir. 1998). *Del Rio* clarified that this “unauthorized acts rule” applies only to a subset of invalid government actions: those that are “*ultra vires*, i.e., ... either explicitly prohibited or ... outside the normal scope of the government officials’ duties.” *Id.* at 1363. By contrast, agency conduct that is the natural consequence of congressional measures or an exercise of discretion granted to an official is not “unauthorized,” even if invalid. Such conduct does *not* preclude a taking claim. Query, however, whether the *Lingle* references noted above may prompt these courts to expand the universe of takings-preclusive government actions to all invalid actions. They have not so far.

Justifications stated for the unauthorized-acts rule are: (1) a federal officer acting without authority “will not ... represent the United States,” *Hooe v. United States*, 218 U.S. 322, 335 (1910),

and (2) allowing the obligation of federal funds based on unauthorized federal conduct “would strike a blow at [Congress’] power of the purse.” *NBH Land Co. v. United States*, 576 F.2d 317, 319 (Ct. Cl. 1978).

Illustrative is the takings litigation attacking an FDA regulation limiting where cigarette vending machines could be installed. While the cases were pending, the Supreme Court repudiated FDA’s authority to regulate cigarettes as having been expressly disallowed by Congress. Thus, said the CFC, the unauthorized-acts rule required dismissal of the takings claims. *See, e.g., A-1 Cigarette Vending, Inc. v. United States*, 49 Fed. Cl. 345 (2001), *aff’d*, 304 F.3d 1349 (Fed. Cir. 2002).

V. ABSENCE OF POWER TO CONDEMN

Takings are unacknowledged exercises of eminent domain power. Does this logically require that to be subject to a taking claim, a government agency must have eminent domain (condemnation) authority in the circumstance giving rise to the alleged taking?

Courts split on this question. Those requiring eminent domain authority assume the symmetry of demanding condemnation authority in both instances. *See, e.g., Clajon Prod. Corp. v. Petera*, 70 F.3d 1566, 1575 (10th Cir. 1995); *State v. The Mill*, 809 P.2d 434, 439 (Colo. 1991) (en banc); and *Butchart v. Baker County*, 166 P.3d 537, 545 (Or. App. 2007). Courts answering no point to the irrelevance of the authority issue to the compensatory concerns of the Takings Clause, and note that requiring condemnation authority invites government manipulation to circumvent the Clause. *See, e.g., Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency*, 911 F.2d 1331, 1341-42 (9th Cir. 1990); *Fountain v. Metropolitan Atlanta Rapid Transit Auth.*, 678 F.2d 1038 (11th Cir. 1982); and *Manning v. Energy, Minerals, and Natural Res. Dep’t*, 144 P.3d 87, 91-92 (N.M. 2006). In contrast with government agencies, the cases appear to be in agreement that private entities can be sued in inverse condemnation only when they possess eminent domain power.

VI. "PUBLIC USE"

A taking must be for a “public use.” If it is not, the government act is void regardless of whether compensation is paid. Where the issue whether a government action furthers a public use arises, it is almost always in a direct condemnation case. Instances of courts invalidating *inverse* condemnations as lacking a public use include *Daniels*, 306 F.3d 445 (vacation of restrictive covenant was taking for private purpose; commission’s findings as to public purpose were not entitled to deference), and *Armendariz v. Penman*, 75 F.3d 1311 (9th Cir. 1996) (aggressive enforcement of building code to prompt sale of parcel to another private entity violates “public use” prerequisite). *Cf. Action Apartment Ass’n v. Santa Monica Rent Control Bd.*, 509 F.3d 1020 (9th Cir. 2007) (rent control ordinance satisfies public use requirement).

The “public use” hurdle in the federal constitution is a low one -- it is enough that the taking be “rationally related to a conceivable public purpose.” *Hawaii Housing Authority v. Midkiff*, 467 U.S. 229, 241 (1984). And it is enough that the legislature could have believed this; the statute need not have proved successful. A “public purpose” is any purpose within the government’s police power, and great deference is shown to the legislative judgment. Supreme Court decisions of the past half century, arising from direct condemnations, have solidified this expansive interpretation. The most recent is *Kelo v. City of New London*, 545 U.S. 469 (2005), holding that even condemnation of unblighted

private property for conveyance to private developers can be a public use, given a legitimate economic development purpose. Some state courts, interpreting state constitutions, have refused to construe “public use” this broadly. *See, e.g., Norwood v. Horney*, 853 N.E.2d 1115 (Ohio 2006).

VII. GOVERNMENT PROPRIETARY RIGHTS

Generally, no taking issue is raised when the government simply asserts its own property rights or otherwise acts without invoking sovereign powers. Such occurs when the government (1) transacts in a commercial capacity, *see Pi Electronics Corp. v. United States*, 55 Fed. Cl. 279, 287 (2003); (2) asserts its property rights in a judicial proceeding, *DSI Corp. v. United States*, 228 Ct. Cl. 299 (1981) (government’s prosecution of its lien claim before a court in an equal contest of ownership was not a taking); *Janicki Logging Co. v. United States*, 36 Fed. Cl. 338 (1996) (no taking where government complied with contract terms and never asserted more than proprietary rights), *aff’d*, 124 F.3d 226 (Fed. Cir. 1997) (table entry); or (3) acts in a fiduciary capacity, *Hill v. Vanderbilt Capital Advisers, LLC*, 834 F. Supp. 2d 1228 (D.N.M. 2011).

But if the government, outside of court, uses threats backed by sovereign power to enforce its asserted property rights, takings liability may indeed attach. *Yuba Goldfields v. United States*, 723 F.3d 884, 889 (Fed. Cir. 1983) (notifying plaintiff that its mining of precious metals claimed by government was “prohibited” is sovereign, not proprietary, act; but noting that “resolution of the ‘proprietary-sovereign’ dichotomy is not in itself controlling in just compensation jurisprudence”); *Petro v. United States*, 47 Fed. Cl. 136, 150 (2000) (government order that plaintiff cease and desist mining of sand and gravel claimed by government was sovereign, not proprietary, act).

VIII. MISCELLANEOUS EXCLUSIONS

In a few situations, government actions that look at first blush like appropriations of property are deemed outside the reach of takings law. One example is forfeiture, both civil and criminal, *Acadia Technology, Inc. v. United States*, 458 F.3d 1327, 1331-33 (Fed. Cir. 2006) (collecting cases), *Howell v. State*, 656 S.E.2d 511 (Ga. 2008), even when the property owner is entirely innocent, *Bennis v. Michigan*, 516 U.S. 442 (1996), *Kam-Almaz v. United States*, 682 F.3d 1364, 1371-72 (Fed. Cir. 2012). Another categorical example, in the majority of cases, is incidental destruction of an innocent third person’s property as part of police efforts to apprehend suspects or execute a search warrant. *See, e.g., Customer Co. v. Sacramento*, 895 P.2d 900, 909-12 (Cal. 1995); *Johnson v. Manitowoc County*, 635 F.3d 331 (7th Cir.), *cert. denied*, 132 S. Ct. 112 (2011). Many state cases, however, assess takings claims based on such police activity under case-by-case analysis. *See, e.g., Simmons v. Loose*, 13 A.3d 366, 380-90 (N.J. Super. App. Div. 2011) (finding no taking based on *Penn Central* factors).

Another exclusion is that government imposition of generalized monetary liability cannot be a taking – if such monetary liability does not “operate upon ... an identified property interest.” *Koontz v. St. Johns River Water Mgmt. Dist.*, 133 S. Ct. 2586, 2599 (2013). (See Part Two, Section III.C. – Need for specific property). Perhaps related, though of much older vintage, is the rule that taxes are not takings. *See, e.g., Koontz*, 133 S. Ct. 2600-01 (2013); *County of Mobile v. Kimball*, 102 U.S. 691, 703 (1880); *Branch v. United States*, 69 F.3d 1571, 1576-77 (Fed. Cir. 1995) (collecting cases); *Hotze v. Sebelius*, 991 F. Supp. 864, 885-86 (S.D. Tex. 2014). This does not preclude finding a taking when the government, by confiscating financial obligations, achieves a result that could have been obtained through a tax. *Koontz*, 133 S. Ct. at 2601.

Yet another exclusion from takings liability occurs during public calamities as when, under the “doctrine of necessity,” firemen (or private parties) freely trespass on land and houses may even be destroyed to prevent the fire from spreading. *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1029 n.16 (1992); *TrinCo Investment Co. v. United States*, 722 F.3d 1375, 1377-80 (Fed. Cir. 2013) (reviewing limits to liability exclusion). Closely related is the military necessity doctrine, “which precludes takings liability for property losses caused by the military in wartime” and is not limited to direct combat. *Al-Qaisi v. United States*, 103 Fed. Cl. 439, 443 (2012). Thus no compensation is owed for the destruction of private property to prevent its capture by an advancing enemy. *United States v. Caltex (Philippines), Inc.*, 344 U.S. 149 (1952). The destruction of enemy-owned property is never compensable. *El-Shifa Pharm. Indus. Co. v. United States*, 378 F.3d 1346, 1355 (Fed. Cir. 2004).

Generally, a taking cannot result from government *inaction* – e.g., failure to alleviate property injury or risk thereof. *See, e.g., Hall v. United States*, 84 Fed. Cl. 463, 472 (2008); *State v. Nixon*, 250 S.W.3d 365, 372 (Mo. 2008); *Fromm v. Village of Lake Delton*, 847 N.W.2d 845 (Wis. App. 2014). Two exceptions, arguably, are administrative delays (see Part Two, Section VIII.C.) and condemnation blight.

Preface to remainder of this primer: A takings claim can be “as-applied” or “facial.” An as-applied claim, the more common of the two, argues that as applied to *the plaintiff’s* property, the government action works a taking, though it might not be a taking as applied to other properties. A facial claim is more ambitious, asserting that as applied to *any* property, the government action effects a taking. In most cases, a facial claim is thus a challenge to the mere enactment of legislation, rather than awaiting an administrative act applying it to plaintiff’s property. “Facial takings challenges face an uphill battle since it is difficult to demonstrate that the mere enactment of a piece of legislation deprived the owner of all economically viable use of his property.” *Suitum v. Tahoe Regional Planning Agency*, 520 U.S. 725, 736 n.10 (1997).

PART TWO: REGULATORY TAKINGS TESTS

I. OVERVIEW

In 1922, the Supreme Court announced that a taking could occur even in the absence of any physical invasion or appropriation of property, contrary to its previous decisions. It is enough, the Court said, that government regulation of property “goes too far.” *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 415 (1922). This Part Two distills the tests developed by courts to determine when a regulation “goes too far” – i.e., when a “regulatory taking” occurs. Almost all of this jurisprudential development has occurred in the period beginning with *Penn Central Transp. Co. v. New York City*,

438 U.S. 104 (1978). The current framework is summarized in *Lingle v. Chevron USA Inc.*, 544 U.S. 528 (2005).

Courts repeatedly affirm that the Takings Clause “was designed to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole.” *Armstrong v. United States*, 364 U.S. 40, 49 (1960). While short on specifics, this ubiquitous statement stands as an admonition that takings decisions are to be infused with a sense of what is fair – to the property owner and to the government – under the totality of circumstances. At the same time, the Court’s more recent pronouncement that regulatory takings law seeks to identify regulatory situations that are the “functional equivalent” of appropriation or physical ouster, *Lingle*, 544 U.S. at 539, necessarily constrains the latitude within which the “fairness and justice” principle can operate.

This Part and Part Three show that different types of takings claims have widely varying chances of success. The plaintiff favorite is a physical taking claim (Part Three), because permanent physical occupations are *per se* takings and many types of government interference are easily labeled permanent physical occupations. Less beloved of plaintiffs are regulatory taking claims, covered in this Part. While a *total* regulatory elimination of economic use and value is a *per se* taking (Section I.A. below) just as with permanent physical occupations, showing such total elimination on the whole parcel is rarely achievable. And if a regulation eliminates *less* than all economic use and value, the usual situation, courts turn to the multifactor *Penn Central* test under which takings are rarely discerned (Section I.B. below). Thus plaintiffs tend to argue their claims in a case in the above order.

A. LUCAS "TOTAL TAKING" RULE

In *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1015, 1029 (1992), the Supreme Court ruled that –

Government regulation *completely* eliminating the economic use (and seemingly value, too) of land is a *per se* "total taking."

Because use of this rule requires a total wipeout, *Lucas* speaks of the total taking situation as “extraordinary” and “relatively rare.” *Id.* at 1017-18. Further, though described by the Court as one of its two *per se* takings rules along with the permanent physical occupation rule, both rules contain a big exception. Despite complete elimination of use and/or value, a restriction is not a taking if it merely duplicates what could have been achieved under “background principles of the State’s law of property and nuisance” existing when plaintiff acquired the land. (See Part One, Section II.B.) Such background principles limit the rights plaintiff acquired in the property. Plainly, there can be no taking when a government restriction eliminates a right the landowner never acquired.

Lucas has been largely confined to land-use restrictions of prospectively indefinite duration, as opposed to those known to be temporary at the outset. *Tahoe-Sierra*, 535 U.S. at 332.

B. *PENN CENTRAL* "PARTIAL REGULATORY TAKING" TEST

This “test” applies when the *Lucas* rule is inapplicable – that is, the government regulation falls short of completely eliminating use and/or value. Unlike the *per se Lucas* rule, *Penn Central* requires multifactor balancing –

To determine whether a partial regulatory taking has occurred, examine the government action for its (1) economic impact on the property owner, (2) degree of interference with the owner’s “distinct” (in many later cases, “reasonable”) investment-backed expectations, and (3) “character.”

Penn Central, 438 U.S. at 124. These factors are mere guideposts, with only modest content supplied by the Supreme Court (but more supplied by lower courts). The Court stresses that a partial regulatory taking analysis is not governed by “set formula,” but is an “essentially ad hoc, factual inquir[y].” *Id.* Thus, *Penn Central* is more analytical framework than a true “test.” The fact-intensive nature of *Penn Central* analysis makes it hard to compare two *Penn Central*-based decisions.

A court’s invocation of *Penn Central* generally prompts it to assess all three factors. In a minority of cases a single factor, through either its presence or absence, may be dispositive that a taking does or does not exist. *See, e.g., Mehaffy v. United States*, 499 Fed. Appx. 18 (Fed. Cir. 2012) (collecting cases). For the “economic impact” factor, this point is made by *Lucas*, the special case where the economic impact is a total wipeout. *See also Kafka v. Montana*, 201 P.3d 8 (Mont. 2008) (*absence* of economic impact may require holding of no taking). For the “interference with investment-backed expectations” factor, see *Ruckelshaus v. Monsanto*, 467 U.S. 986, 1005 (1984) (“force of this factor is so overwhelming ... that it disposes of the taking question ...”). For the “character” factor, the point is made by the *Loretto* “permanent physical occupation” rule (Part Three).

C. REMOVAL OF RESTRICTION FOLLOWING TAKING HOLDING

A judicial finding of a regulatory taking in no way limits the government’s ability to rescind or amend the offending restriction. *First English Evangelical Lutheran Church v. County of Los Angeles*, 482 U.S. 304, 321 (1987). Thus, plaintiff cannot force the government to pay for a permanent taking if the government is willing to undo the restriction. On the other hand, once a taking has been found as of when the restriction was imposed, nothing the government does can undo that fact – it must at least pay for the temporary taking while the restriction was in effect. *Id.*

II. *LUCAS* TEST ISSUES

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

A. USE OR VALUE, OR BOTH?

The *Lucas* test is stated above as requiring total loss of both economic use *and value*. Use and value are quite distinct, of course – land stripped of economic use by regulation may still retain value as open space or for speculation that the regulation may be changed. *Lucas* itself, however, left the

inclusion of value unclear, since most of its references were to residual use. Total loss of value was noted as part of the *Lucas* test, however, in *Palazzolo* in 2001, 533 U.S. at 631, and in *Tahoe-Sierra* in 2002, 535 U.S. at 330. A three-justice dissent in *Tahoe-Sierra* took exception on this point, asserting a use-only view of *Lucas*. *Id.* at 350-51. But the Court's last word on the issue endorses both total loss of use and value. *Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528, 538, 539 (2005). Today, most courts in defining the *Lucas* test still refer simply to the elimination of "economic" or "beneficial" or "productive" use, and fail to mention value. Some courts use the two concepts interchangeably. *See, e.g., Maritrans, Inc. v. United States*, 342 F.3d 1344, 1351 (Fed. Cir. 2003).

B. HOW TOTAL IS "TOTAL"?

How "total" must the "total taking" of use and/or value be for a *Lucas* claim? A property owner left with a mere "token interest" may still assert a total taking, says *Palazzolo*, 533 U.S. at 631, holding that a landowner restricted to building a single residence on a 20-acre parcel retained enough use and value to fall outside *Lucas*. More than a token interest, however, and the owner must look to *Penn Central*. In *Lucas* itself, the Court acknowledged that an owner "whose deprivation is one step short of complete" – giving 95% value loss as an illustration – would not come under the total taking rule (though there might be a *Penn Central* taking). 505 U.S. at 1019 n.8. And as mentioned, *Lucas* also characterized total takings as "extraordinary" and "relatively rare," suggesting a very high threshold. *Tahoe-Sierra* described *Lucas* as requiring the "permanent obliteration" of the parcel's value. 535 U.S. at 330.

C. ROLE OF EXPECTATIONS

Does the expectations factor of *Penn Central* play a role in *total* takings? The *Lucas* majority opinion offers conflicting signals, 505 U.S. at 1015-16, though to be sure the Court's opinion did not include any discussion of plaintiff's expectations. Justice Kennedy, in concurrence, found that a role for expectations in total takings analysis was essential. *Id.* at 1034.

The question provoked a spat between two Federal Circuit panels. *Compare Good v. United States*, 189 F.3d 1355, 1361 (Fed. Cir. 1999) (absence of investment-backed expectations defeats total taking claim) *with Palm Beach Isles Assocs. v. United States*, 231 F.3d 1354 (Fed. Cir. 2000) (*Lucas* bars any role for investment-backed expectations in a total taking analysis; *Good* was dictum and violated law of the circuit). Subsequent CFC decisions have followed *Palm Beach Isles* – only *Cane Tennessee, Inc. v. United States*, 62 Fed. Cl. 703, 711-16 (2004), providing any discussion. State court decisions, in broad prefatory descriptions of the takings tests, generally assume the absence of an expectations role in the total takings context. *See, e.g., Philip Morris, Inc. v. Reilly*, 312 F.3d 24, 36 (1st Cir. 2002) (en banc); *Glenn v. City of Grant City*, 69 S.W.3d 126 (Mo. Ct. App. 2002). *But see McQueen v. South Carolina Coastal Council*, 580 S.E.2d 116, 119 n.5 (S.C. 2003) (dictum asserting continued confusion on the issue).

D. APPLICATION TO PERSONAL PROPERTY

Lucas involved an alleged taking of *land*; dicta suggest that the economic value of *personal* property gets less protection from regulatory takings. 505 U.S. at 1027-28. Accordingly, courts have said or at least suggested that *Lucas*' *per se* rule applies only to real property. *Horne v. U.S. Dep't of Agriculture*, 750 F.3d 1128, 1140 (9th Cir. 2014); *Hawkeye Commodity Promotions, Inc. v. Vilsack*, 486 F.3d 430, 441 (8th Cir. 2007); *Unity Real Estate Co. v. Hudson*, 178 F.3d 649, 674 (3^d Cir. 1999).

But see A & D Auto Sales, Inc. v. United States, 748 F.3d 1142, 1151 (Fed. Cir. 2014) (noting that while “other circuits view the *Lucas* test as applying only to land,” this circuit has applied it to tangible non-real property such as tankers and eggs).

E. POSSIBILITY OF TEMPORARY TOTAL TAKINGS

The United States has argued that there is no such thing as a temporary *Lucas* taking “because by its very nature a temporary taking allows a property owner some measure of its property value.” *Seiber v. United States*, 364 F.3d 1356, 1368 (Fed. Cir. 2004). This is incorrect. *Tahoe-Sierra*, properly read, rejected *Lucas*’ application only as to land-use regulation known at the outset to be temporary – not to prospectively permanent regulation that only later becomes temporary when rescinded.

III. PENN CENTRAL TEST ISSUES

Following its debut, the Supreme Court has never applied *Penn Central* in a land-use context and found a taking – outside of situations where a special feature of the challenged regulation (physical invasion, total taking, fundamental property interest) triggered *per se* analysis. Yet three decisions of the Court since 2000 (*Palazzolo*, *Tahoe-Sierra*, and *Lingle*) have made clear that outside the “relatively narrow” *per se* rules for such special features, *Penn Central* is the reigning formula – indeed is the preferred mode of analysis. Thus, when falling short of a *Lucas* total wipeout, plaintiff still may have suffered a partial regulatory taking under *Penn Central*.

Problem is, the Court has shed little direct light on the content of its beloved *Penn Central* factors, or on how to balance them. Each factor raises “vexing subsidiary questions.” *Lingle*, 544 U.S. at 539. Many commentators have harshly criticized the ad hocery of the test, the Court having had 36 years to clarify matters and not done so. Lower courts have leaped into the breach, however, providing some explication. And some state courts have elaborated the *Penn Central* factors into lists of additional, or restated, factors. *See, e.g., Kavanau v. Santa Monica Rent Control Bd.*, 941 P.2d 851, 860 (Cal. 1997).

One thing *is* clear however: *Penn Central* takings are rare because, as noted below, the degree of impact on the parcel taken as a whole must be very substantial, even if not total, and development expectations must be reasonable. Some examples of courts finding *Penn Central* takings, notable for their rarity, are *Florida Rock Indus. v. United States*, 45 Fed. Cl. 21 (1999); *Hageland Aviation Services, Inc. v. Harms*, 210 P.3d 444, 451 n.27 (Alaska 2009); and *Lockaway Storage v. County of Alameda*, 156 Cal. Rptr. 3d 607 (Cal. App. 2013).

A. ECONOMIC IMPACT

The *Penn Central* inquiry “turns in large part, albeit not exclusively” on this factor. *Lingle*, 544 U.S. at 540.

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

Degree of impact required. The Supreme Court has never specified that a value loss less than a set percentage of pre-regulation value precludes a regulatory taking, nor that a value loss greater than a set percentage (but short of 100%) must be a taking. *Accord, Cienega Gardens v. United States*, 331 F.3d 1319, 1340, 1345 (Fed. Cir. 2003). Moreover, similar reductions may lead to different outcomes. The Court *has* said several things, however, indicating that for this factor to cut in favor of a taking, economic impact generally must be very substantial, arguably severe, when other *Penn Central* factors are not determinative.

Most cogent as to the need for severe loss, the Court says that the regulatory taking inquiry asks at bottom whether the restriction is the “functional equivalent” of a physical occupation or appropriation of the land. *Lingle*, 544 U.S. at 539. It is hard to argue that anything less than severe loss is the functional equivalent of physical occupation or appropriation. *See Rose Acre Farms, Inc. v. United States*, 373 F.3d 1177, 1195 (Fed. Cir. 2004) (judicial insistence on “severe economic deprivation” stems from nature of regulatory taking claim as arguing that regulatory interference is so severe as to be tantamount to condemnation or appropriation). The Court has also remarked that land use regulation may “under extreme circumstances” be a taking. *United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121, 126 (1983).

Less useful for divining the required economic impact, the Court says that mere diminution in property value (short of a total wipeout) cannot by itself establish a taking, citing cases in which value diminutions upwards of 75% were upheld. *Concrete Pipe & Products, Inc. v. Construction Laborers Pension Trust*, 508 U.S. 602, 645 (1993). Most broadly, the Court tells us that “[g]overnment hardly could go on if to some extent values incident to property could not be diminished without paying for every such change in the general law.” *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 413 (1922). And that being deprived of a parcel’s most profitable (“highest and best”) use is not, without more, a taking. *Penn Central*, 438 U.S. at 125.

The CFC generally has relied on value losses “well in excess of 85 percent” in finding takings under *Penn Central*. *Warren Trust Co. v. United States*, 107 Fed. Cl. 533, 568 (2012). But a handful of CFC/Federal Circuit decisions have accepted lower percentages as takings. *See, e.g., Florida Rock Indus., Inc. v. United States*, 18 F.3d 1560, 1567 (Fed. Cir. 1994) (value loss of 62.5% might be taking). At the same time, these courts have found value losses less than 60% to tip *against* a taking. *CCA Assocs. v. United States*, 667 F.2d 1239, 1246 (Fed. Cir. 2011) (no case known where value loss of less than 50% held a taking); *Lost Tree Village Corp. v. United States*, 100 Fed. Cl. 412, 437 (2011) (58.4% value loss “ordinarily falls short” of taking), *rev’d on other grounds*, 707 F.3d 1286 (Fed. Cir. 2013).

Many other courts also require severe value loss under *Penn Central*. *See, e.g., MHC Financing Limited Partnership v. City of San Rafael*, 714 F.3d 1118, 1127 (9th Cir. 2013) (81% value loss “not ... sufficient ... to constitute a taking”); *Animas Valley Sand & Gravel, Inc. v. Board of County Comm’rs*, 38 P.3d 59, 67 (Col. 2001) (*Penn Central* requires claimant to show that “it falls into the rare category of landowners whose land has a value slightly greater than de minimis”); *Wyer v. Board of Envtl. Prot.*, 747 A.2d 192, 193 (Me. 2000) (requiring value loss “so substantial as to strip the property of all practical value”); *Noghrey v. Town of Brookhaven*, 852 N.Y.S.2d 220 (App. Div. 2008) (jury instruction that “substantial” value loss is taking is insufficient to convey “one step short of complete” value loss required by *Penn Central*). Some have not. *See, e.g., San Antonio v. El Dorado Amusement Co.*, 195 S.W.3d 238, 247 (Tex. App. 2006) (40% loss in rental income from rezoning supports taking).

Reasonableness may affect the degree of economic impact a court will find tolerable. *Connolly v. PBGC*, 475 U.S. 211, 225-226 (1986); *Lockaway Storage v. County of Alameda*, 56 Cal. Rptr. 607, 624 (App. Div. 2013). See also *Kunkes v. United States*, 78 F.3d 1549 (Fed. Cir. 1996) (fee to retain property interest must be reasonable compared to value of property).

Meaning of “economic use.” “Economic use” embraces more than just use that returns a profit. Rather, it refers to any use that imparts significant market value to the property – e.g., being able to continue living in an already built residence. See, e.g., *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency*, 34 F. Supp. 2d 1226, 1243 (D. Nev. 1999), *aff’d in part, rev’d in part on other grounds*, 216 F.3d 764 (9th Cir. 2000), *aff’d*, 535 U.S. 302 (2002). Plainly, this sense of “economic use” blurs use and value, and court decisions often use the two terms interchangeably.

As in land valuation generally, an economic use must meet a showing of reasonable probability that the land is both physically adaptable for such use and that there will be a demand for such use in the reasonably near future. It follows that uses not considered economic uses in one circumstance may be considered so in another. See, e.g., *Florida Rock Indus., Inc. v. United States*, 791 F.2d 893 (Fed. Cir. 1986) (in superheated real estate market near Miami, holding development-restricted wetland for possible sale to speculators willing to gamble that restrictions might someday be lifted is an economic use); *Wyer*, 747 A.2d 192 (parcel’s proximity to recreational beach meant that its use for parking and picnics imparted sufficient value to defeat taking claim).

Calculating value loss. When courts assess the economic impact factor by percentage value loss, the calculation is often said to be based on a comparison of the market value of the property immediately before and immediately after the restriction was imposed. “Immediately before” calls for a baseline under the legal regime in effect when the property was bought, not its unregulated value. See, e.g., *MHC Financing Ltd. Partnership v. City of San Rafael*, 714 F.3d 1118, 1127 (9th Cir. 2013). What courts *actually* do is more nuanced. The “before value” used often appears to be the parcel’s value in a world in which not only the restriction, but the entire regulatory program under which the restriction was imposed, did not exist – at least as to that property. This seems to be something different from the above-noted “value immediately before,” which in the real world reflects value reduction due to the possibility that permission to develop under the regulatory scheme will be denied. Worse, from the government’s point of view, before-value may implicitly include the added property value stemming from the amenity values and diminished supply of developable real estate caused by application of the regulatory scheme to others.

Market value is based on the property’s “highest and best use”: the reasonably probable and legal use of a tract that is physically possible and results in the greatest value. The dominant approach for determining market value is the comparable sales approach, where sales of parcels similar to the one alleged to have been taken exist. Otherwise, as often happens with income-producing properties, courts may use an income-capitalization approach, which computes the present value of the property from reasonably anticipated future earnings, discounted for risks and other variables stemming from future occurrence. Valuation approaches may be combined.

May before-value reflect use restrictions previously imposed by a government other than the defendant, reducing the calculated economic impact? See *City National Bank of Miami v. United States*, 33 Fed. Cl. 759 (1995) (local restriction *unrelated* to federal wetlands permit program was properly reflected in “before value” used in taking analysis of later federal permit denial).

Reasonable return. Some decisions note the importance of leaving plaintiff with a “reasonable return.” This element tends to be noted in takings decisions involving already existing property uses. *See, e.g., Penn Central*, 438 U.S. at 136 (historic preservation ordinance); *Kavanau v. Santa Monica Rent Control Bd.*, 941 P.2d 851, 855 (Cal. 1997) (rent control law). A close cousin of reasonable return is diminution in return (profit). *See, e.g., Cienega Gardens v. United States*, 331 F.3d 1319, 1342-43 (Fed. Cir. 2003) (96% reduction in rate of return points to taking). *But see Rose Acre Farms v. United States*, 559 F.3d 1260 (Fed. Cir. 2009) (looking only at percentage decrease in profits gives incomplete view; vast majority of takings decisions examine *lost value*). Loss of *future* profits being a matter of speculation, it is “a slender reed upon which to rest a takings claim.” *Andrus v. Allard*, 444 U.S. 51, 66 (1979).

In utility, common carrier, and insurance rate-setting cases, “reasonable” (“nonconfiscatory”) return generally is the *only* standard applied; *Penn Central* is not invoked. *See, e.g., Anthem Health Plans of Maine, Inc. v. Superintendent of Ins.*, 40 A.3d 380, 389 (Me. 2012). The reasonableness of government-prescribed rates is assessed on the actual effect of the rates, not their theory. *Duquesne Light Co. v. Barasch*, 488 U.S. 299, 310 (1989). And such rates need only be reasonable in their *overall* effect, not as to individual components of the rate scheme. *Verizon Communications, Inc. v. FCC*, 535 U.S. 467, 526 n.36 (2002).

Recoupment of cost basis. Another metric for economic impact, cited regularly by the CFC and Federal Circuit but rarely by other courts, is plaintiff’s ability to recoup his/her cost basis in the property under the challenged regulation. *See, e.g., Florida Rock Industries, Inc. v. United States*, 791 F.2d 893, 905 (Fed. Cir. 1986) (“[i]n determining ... economic impact, the owner’s opportunity to recoup its investment ... cannot be ignored”); *Walcek v. United States*, 49 Fed. Cl. 248, 266-67 (2001), *aff’d*, 303 F.3d 1349 (Fed. Cir. 2002); *Putnam County Nat’l Bk. v. City of New York*, 829 N.Y.S.2d 661 (App. Div. 2007). This element is likely to weigh in the government’s favor for any parcel long held by plaintiff, owing to appreciation. In the Federal Circuit, the plaintiff’s cost basis is not adjusted for inflation. *Walcek*, 303 F.3d 1349.

Offsetting direct benefits. When regulatory programs provide benefits directly to the property owner, courts may offset them against the economic impact. In *Penn Central*, the Court made clear that transferrable development rights (TDRs) conferred on the landowner “mitigate whatever financial burdens the law has imposed ... and ... are to be taken into account in considering the impact of regulation.” 438 U.S. at 137. *See also Noble State Bank v. Haskell*, 219 U.S. 104 (1911); *Cienega Gardens*, 503 F.3d at 1282-84.

The alternative to considering a direct benefit in the takings analysis would be to confine it to, at most, the calculation of compensation once a taking was found. The argument is that where benefits do not ameliorate the challenged restriction itself, they are outside the takings analysis. *See, e.g., Cienega Gardens*, 503 F.3d at 1283-84 (government offer of land exchange cannot be considered in takings analysis, but rather as compensation for taking). Moreover, the argument continues, including benefits in the takings analysis allows the government to deflect takings claims on the cheap, since even a small direct benefit may confer enough economic value to preclude a taking. This issue surfaced in a *Suitum v. Tahoe Regional Planning Agency* concurrence, which called for limiting consideration of TDRs to the remedy phase. 520 U.S. 725, 745-50 (1997).

Government refusal to rezone. Properly analyzed, the fact that a municipality’s refusal to rezone leaves value unaffected should mean that no taking has occurred. Some decisions, however,

find takings where government refuses to rezone despite dramatic change in the character of the surrounding land. Decisions also split on whether a taking can be based on refusal to rezone when market forces, rather than physical changes, turn an existing use unprofitable. Compare *Wensmann Realty, Inc. v. City of Eagan*, 734 N.W.2d 623, 635 (Minn. 2007) (taking claim may be maintained) with *Ocean Palm Golf Club Partnership v. City of Flagler Beach*, 139 So. 3d 463 (Fla. App. 2014) (taking claim may not).

Land devoted to charitable or religious uses. Several courts have applied a specialized *Penn Central* test here, since the economic impact factor is less relevant. Said one: “the constitutional question is whether the land-use regulation impairs the continued operation of the property in its originally expected use.” *St. Bartholomew’s Church v. City of New York*, 914 F.2d 348, 356 (2d Cir. 1990). *Contra*, *Franklin Memorial Hosp. v. Harvey*, 575 F.3d 121, 127 n.7 (1st Cir. 2009) (notwithstanding charitable purpose of hospital, “the usual” *Penn Central* analysis applies).

B. INVESTMENT-BACKED EXPECTATIONS

This factor originated in *Penn Central* as “distinct” investment-backed expectations, but in most later Supreme Court opinions morphed, without explanation, into “reasonable” investment-backed expectations. The analysis is often seen as having two steps: (1) Did the claimant have *actual* investment-backed expectations?, and (2) If so, were they *objectively reasonable*? *Cienega Gardens v. United States*, 331 F.3d 1319 (Fed. Cir. 2003). *See also CCA Assocs. v. United States*, 667 F.3d 1239, 1247-48 (Fed. Cir. 2011) (whether plaintiff’s expectations were reasonable requires comparing them to industry as a whole); *Hageland Aviation Services, Inc. v. Harms*, 210 P.3d 444, 451 n.27 (Alaska 2009) (expectations factor establishes objective standard; subjective expectations of plaintiff are irrelevant). A famous use of this factor is *Ruckelshaus v. Monsanto*, 467 U.S. 986 (1984), where a taking was found when the government frustrated statutorily created expectations that submitted trade secrets would be kept confidential.

The reasonableness of expectations was probably intended by *Penn Central* to be assessed under the law existing at the time the property was acquired. *See Mehaffy v. United States*, 499 Fed. Appx. 18, 22 (Fed. Cir. 2013); *Bair v. United States*, 515 F.3d 1323, 1328 n.2 (Fed. Cir. 2008). *Good v. United States*, 189 F.3d 1355, 1361-63 (Fed. Cir. 1999), is not inconsistent in asserting that if the “regulatory climate” at acquisition makes future enactments *foreseeable*, post-acquisition adoption of new statutes and regulations may enter the reasonable expectations analysis.

Regulation predates acquisition (“notice rule”). During the 1990s, several courts appeared to adopt an absolute “notice rule.” Under this rule, no regulatory taking could occur when government restricts a parcel’s use under laws or regulations existing when plaintiff acquired it – or whose adoption after acquisition was foreseeable. Courts based the rule on either the investment-backed expectations factor of *Penn Central* or the background principles concept of *Lucas*. In *Palazzolo v. Rhode Island*, 533 U.S. 606 (2001), the Supreme Court struck down the absolute version of the rule, but left open whether the pre-existing regulatory regime still plays some less-than-dispositive role in the takings analysis. Justice O’Connor’s concurrence argued that it does, and the following year *Tahoe-Sierra* embraced her concurrence. 535 U.S. at 336.

The O’Connor view has prevailed: post-*Palazzolo* case law confirms that the pre-acquisition regime, while not dispositive, still must be accorded weight. *See, e.g., Schooner Harbor Ventures, Inc. v. United States*, 569 F.3d 1359, 1366 (Fed. Cir. 2009). *How much* weight is the question. Some post-

Palazzolo decisions, particularly involving environmental regulation, continue to give almost dispositive importance to pre-acquisition regulatory schemes. See, e.g., *Appollo Fuels, Inc. v. United States*, 381 F.3d 1338 (Fed. Cir. 2004) (federal surface mining statute); and *Rith Energy, Inc. v. United States*, 270 F.3d 1347 (Fed. Cir. 2001) (same). The CFC/Federal Circuit often cite three factors for determining whether plaintiff's expectations are reasonable, all of which allow consideration of the pre-acquisition state of affairs: (1) Is it a highly regulated industry?; (2) Was plaintiff aware of the problem that spawned the regulation when the property was acquired?; and (3) Could the regulation have been reasonably anticipated in light of regulations at time of purchase? See, e.g., *Appollo Fuels*, 381 F.3d at 1349. In addition, *Palazzolo* was construed narrowly in *Guggenheim v. City of Goleta*, 638 F.3d 1111, 1119 (9th Cir. 2010) (en banc) (*Palazzolo* limited to "owner who acquires title to property during the period required for an as-applied regulatory claim [by the prior owner] to ripen").

A pre-acquisition regulatory scheme is a particular obstacle for takings plaintiffs having pre-acquisition experience with it, such as experienced land developers, on the theory that they are especially "on notice." See, e.g., *Appollo Fuels, Inc. v. United States*, 54 Fed. Cl. 717 (2002), *aff'd per above*; *K&K Construction, Inc. v. DEQ*, 705 N.W.2d 365 (Mich. App. 2005).

"Heavily regulated field." Those who voluntarily enter a "heavily regulated field" find regulatory takings claims particularly difficult to maintain. Such entities are said to lack a reasonable expectation that the legislature will not enact new requirements from time to time that buttress the regulatory scheme. The list of human activities labelled as heavily regulated fields continues to grow. See, e.g., *Concrete Pipe & Products v. Construction Laborers Pension Trust*, 508 U.S. 602, 645-46 (1993) (employee pension plans); *Hawkeye Commodity Promotions, Inc. v. Vilsack*, 486 F.3d 430, 442 (8th Cir. 2007) (gaming); *Thykkuttathil v. United States*, 88 Fed. Cl. 293 (2009) (banking); *Akins v. United States*, 82 Fed. Cl. 619 (2008) (sale of firearms); *People's Super Liquor Stores, Inc. v. Jenkins*, 432 F. Supp. 2d 200, 215 (D. Mass. 2006) (liquor stores); *Franklin Memorial Hosp. v. Harvey*, 575 F.3d 121, 128 (1st Cir. 2009) (hospitals). The Federal Circuit also has incorporated the heavily-regulated-field factor into its determination of the weight to be given pre-acquisition regulatory schemes (see preceding section). But caution: not *all* expectations are unreasonable in a heavily regulated field; if government goes far enough, a taking may still be found. See, e.g., *Cienega Gardens v. United States*, 331 F.3d 1319, 1350 (Fed. Cir. 2003); *Rose Acre Farms, Inc. v. United States*, 559 F.3d 1260, 1276 (Fed. Cir. 2009), *cert. denied*, 130 S. Ct. 1501 (2010).

No court has yet said that land use generally is a heavily regulated field, with all that would entail for landowners seeking to establish takings.

Initially limited intentions of property buyer. Those who buy land with limited economic intentions and keep it in low-intensity use for years may be barred from asserting a taking when regulations thwart the owner's belated desire for more intensive development. See, e.g., *Mayhew v. Town of Sunnyvale*, 964 S.W.2d 922 (Tex. 1998) (zoning laws adopted after parcel was acquired did not frustrate any investment-backed expectations, since parcel was purchased for ranch use and so used for four decades); *Rural Water Co. v. Zoning Bd.*, 947 A.2d 944, 956-57 (Conn. 2008). A taking claim was allowed to proceed, however, in a case where post-acquisition development desires arose from the initial use becoming unprofitable. *Wensmann Realty v. City of Eagan*, 734 N.W.2d 623 (Minn. 2007) (purchase of restricted tract, intending only existing use, does not preclude taking claim when that use becomes unprofitable and city declines to permit other uses). *Wensmann* raises the troubling prospect of the government being forced to act as insurer of market risk.

Buyer's awareness that obtaining permit might be difficult / low price paid for parcel. This factor undermines the reasonable investment-backed expectations of the land buyer, cutting against a later regulatory taking claim. *See, e.g., Good v. United States*, 189 F.3d 1355 (Fed. Cir. 1999) (buyer's development expectations undercut by his acknowledgment at time of purchase that state and federal regulatory approvals would be hard to obtain). *Gazza v. New York DEC*, 679 N.E.2d 1035 (N.Y. 1997) (owner who paid \$100,000 for designated wetland worth \$396,000 if unregulated cannot complain of taking when development permit is denied).

"Primary" expectations or uses. Regulation interfering with the "primary use" of a parcel are said to particularly interfere with owner expectations. Conversely, regulations leaving the primary use intact are less likely to be a taking. By "primary use," courts often have meant the use at the time a restriction was imposed, where a longstanding economic one. *Penn Central*, 438 U.S. at 136; *San Remo Hotel, L.P. v. San Francisco*, 41 P.3d 87, 109 (Cal. 2002). In *Florida Rock Indus., Inc. v. United States*, 45 Fed. Cl. 21, 38-39 (2000), the primary use was the sole commercial purpose for which the land was purchased.

Acquisition without investment. Should those who acquire property by gift or inheritance – i.e., without *investment-backed* expectations – have less Takings Clause protection? In her *Palazzolo* concurrence, Justice O'Connor said: "We have never held that a takings claim is defeated simply on account of the lack of a personal financial investment by a postenactment acquirer of property, such as a donee, heir, or devisee." 533 U.S. at 635. This statement does not preclude absence of investment being a less-than-determinative factor in the government's favor. *See Gove v. Zoning Bd. of Appeals*, 831 N.E.2d 865, 874-75 (Mass. 2005).

C. "CHARACTER" OF GOVERNMENT ACTION

This is the *Penn Central* test's most elastic factor. When debuted, the Court explained it only as meaning that takings "may more readily be found when the interference with property can be characterized as a physical invasion by government ... than when interference arises from some public program adjusting the benefits and burdens of economic life to promote the common good." 438 U.S. at 124. Since then, the Court has added other elements to the character factor.

In 2005, *Lingle* suggested that aspects of the character factor may be less important than the previous two *Penn Central* factors. 544 U.S. at 538-39. *Lingle* teaches that takings law looks only at the government action's *impacts on the property owner* and their *distribution*. Hence, it is arguable that certain aspects of the character factor have been downgraded, if not deleted, in the *Penn Central* analysis. See, most prominently, the following section: Balancing of public interest and private burden.

Balancing of public interest and private burden. From time to time, courts say regulatory takings analysis (outside of total takings) includes a balancing of the public interest advanced by the government measure against the burden on the property owner. *See, e.g., Keystone Bituminous Coal Ass'n v. DeBenedictis*, 480 U.S. 470, 488, 492 (1987). After misconstruing *Lucas* to excise such balancing from the character factor of *Penn Central* and substitute a nuisance inquiry, *Loveladies Harbor, Inc. v. United States*, 28 F.3d 1171 (Fed. Cir. 1994), the Federal Circuit has now corrected itself. *Bass Enterprises Prod. Co. v. United States*, 381 F.3d 1360 (Fed. Cir. 2004). As noted directly above, however, the pendulum may swing yet again if *Lingle* is construed to minimize the importance of the government purpose. The large majority of post-*Lingle* decisions have been oblivious to this implication, *see, e.g., Warren Trust v. United States*, 107 Fed. Cl. 533 (2012) (character factor requires examination

of “purpose of the regulation and its desired effects”), or have rejected it outright, *Rose Acre Farms, Inc. v. United States*, 559 F.3d 1260, 1281 (Fed. Cir. 2009). A few decisions, however, endorse it. See, e.g., *City of Coeur d’Alene v. Simpson*, 136 P.3d 310, 318 n.5 (Idaho 2006) (inquiry into “relative goodness” of government action not part of character factor after *Lingle*); *Mansoldo v. State*, 898 A.2d 1018, 1024 (N.J. 2006) (fact that prohibited land uses posed danger has no bearing on takings analysis under *Lingle*).

Public/private balancing has prompted courts to consistently refuse to find regulatory (but not physical) takings based on government measures to address war, emergencies, and national security. See, e.g., *United States v. Central Eureka Mining Co.*, 357 U.S. 155, 168 (1958) (temporary wartime shutdown of gold mines not a taking, since “[w]ar ... demands the strict regulation of nearly all resources”); *Block v. Hirsh*, 256 U.S. 135, 157 (1920) (wartime rent controls not a taking, in part because “[a] limit in time, to tide over a passing trouble, well may justify a law that could not be upheld as a permanent change”).

Benefit creation versus harm avoidance. A government restriction viewed as creating a public benefit (e.g., a park) is likely to be held compensable, while a restriction seen as averting a public harm (e.g., pollution) is likely not. This benefit-creation/harm-avoidance dichotomy was criticized in *Lucas* in 1992, which saw it as value-laden and easily manipulated. 505 U.S. at 1024-25 (citing wetlands preservation). But it is still occasionally used. See, e.g., *Florida Rock*, 45 Fed. Cl. at 40 (wetlands preservation); *Husband v. United States*, 90 Fed. Cl. 29, 36 (2009). Exercises of the police power that directly protect public health and safety remain unlikely, even after *Lingle*, to be a taking under *Penn Central*. See, e.g., *Rose Acre Farms, Inc.*, 559 F.3d at 1281; *1766-68 Associates, LP v. City of New York*, 937 N.Y.S.2d 33, 34-35 (App. Div. 2012).

Need for specific property. The character factor demands that the government conduct target *specific* property, according to the concurring justice and four dissenters in *Eastern Enterprises v. Apfel*, 524 U.S. 498 (1998). Thus, a taking claim may arise when government appropriates money from a specifically identified fund of money. See, e.g., *Brown v. Washington Legal Found.*, 538 U.S. 216 (2003) (interest on lawyers’ trust accounts); *Webb’s Fabulous Pharmacies, Inc. v. Beckwith*, 449 U.S. 155 (1980) (interest on interpleader fund). But a statute imposing a generalized monetary liability – e.g., that A pay B out of unspecified funds – is not a taking, though it may offend substantive due process. Lower courts have endorsed this principle. See, e.g., *Commonwealth Edison Co. v. United States*, 271 F.3d 1327, 1338-40 (Fed. Cir. 2001) (en banc); *West Virginia CWP Fund v. Stacey*, 671 F.3d 378, 386 (4th Cir. 2011); *Empress Casino Joliet Corp. v. Giannoulis*, 896 N.E.2d 277 (Ill. 2008).

In *Koontz v. St. Johns River Water Management Dist.*, 133 S. Ct. 2586 (2013), the Supreme Court qualified the *Eastern Enterprises* rule, finding it inapplicable to monetary exactions imposed as conditions on development approvals. Even though such exactions are payable out of unspecified funds, a 5-justice majority explained that they nonetheless “operate upon ... an identified property interest”: the parcel for which development approval is sought. *Koontz*’ relevance to the very different analytical framework for regulatory takings is unclear, however, especially since in discussing *Eastern Enterprises* *Koontz* distinguished exactions and regulatory takings. *Id.* at 2600.

“Average reciprocity of advantage.” This inquiry looks at whether a restriction not only burdens the landowner, but also benefits him indirectly by subjecting other similarly situated landowners to the same sort of restriction. The paradigmatic example is zoning: a homeowner is required to forego, say, commercial use of his property, but benefits from others in the area being restricted in the same way. The Supreme Court most famously stated the average reciprocity factor in *Pennsylvania Coal Co. v. Mahon*,

260 U.S. 393, 415 (1922), and has cited it (or something similar) a few times since. *See, e.g., Tahoe-Sierra*, 535 U.S. at 341 (development moratorium); *Agins v. City of Tiburon*, 447 U.S. 255, 262 (1980) (density zoning). *Penn Central* makes clear that the burdens and benefits accruing to the plaintiff from the regulatory program need not be equal, and that the other similarly restricted properties do not have to be in the immediate area. 438 U.S. at 133-35.

The word “average” suggests that any “reciprocity” between burdens and benefits be assessed with reference to the entire affected group of property owners, not individuals. *See Keystone Bituminous Coal Co. v. DeBenedictis*, 480 U.S. 470, 491 n.21 (1987); *San Remo Hotel L.P. v. City and County of San Francisco*, 41 P.3d 87, 108 (Cal. 2002). Moreover, these decisions read average reciprocity of advantage quite broadly as not limited to the regulatory program at issue, but rather applying to the universe of *all* land use restrictions. *Keystone*, 480 U.S. at 491; *San Remo Hotel*, 41 P.3d at 108-109.

Direct benefits for government. Whether there is a taking turns on what the property owner has lost, not on what the government gained. *United States v. General Motors Corp.*, 323 U.S. 373, 378 (1945). Thus, it is not a takings prerequisite that the government action resulted in benefits to the government. But governmental benefits, when present, may tip the balance toward the plaintiff. An example is when local jurisdictions restrict the use of private land to allow future acquisition, as for a roadway, at a lower price than would otherwise obtain. *See, e.g., Joint Venture, Inc. v. Dep’t of Transportation*, 563 So. 2d 622 (Fla. 1990).

Governmental bad faith. Takings law is based, courts repeatedly say, on “fairness and justice.” *Armstrong v. United States*, 364 U.S. 40, 49 (1960). Hence, it is unsurprising that when government acts in bad faith, courts tilt toward the plaintiff. Examples are cited throughout these materials (*see, e.g.,* this Part, Section VIII.C. – Administrative delays). Another example is *Tahoe-Sierra*, 535 U.S. at 333 (were it not for findings below that agency acted in good faith, “we might have concluded that the agency was stalling” and found a taking), *citing City of Monterey v. Del Monte Dunes at Monterey, Ltd.*, 526 U.S. 687 (1999) (involving city’s repeated rejections of development plans after each of five progressively scaled-back proposals accommodating city’s demands). Of course, substantive due process is an alternate theory.

Voluntariness. The fact that plaintiff subjected himself *voluntarily* to the government act is usually fatal to a taking claim, obviating further *Penn Central* analysis. *See, e.g., Bowles v. Willingham*, 321 U.S. 503, 519 (1992) (rent control cannot be taking of premises if “[t]here is no requirement that the apartments be used for purposes which bring them under the [rent control] Act”). In contrast, a business that is legally compelled to operate, such as a common carrier or electric utility, has a taking claim if government-prescribed rates do not allow a reasonable rate of return. *See, e.g., Regional Rail Reorganization Act Cases*, 419 U.S. 102 (1974) (recognizing “erosion taking” if statute compels rail operations at a loss), and the common-carrier rate cases generally.

Also illustrative are cases attacking limits on health-care service charges, or limiting reimbursement to the care provider. *Compare Garelick v. Sullivan*, 987 F.2d 913 (2d Cir. 1993) (though regulations limited anesthesiologists’ charges to Medicare patients in hospitals, anesthesiologists did not have to work in hospitals) and *Franklin Memorial Hosp. v. Harvey*, 575 F.3d 121, 129-30 (1st Cir. 2009) *with Methodist Hospitals v. Indiana*, 860 F. Supp. 1309 (N.D. Ind. 1994) (Medicaid reimbursement rates might effect taking, since hospital’s emergency room was obliged to treat all patients, including Medicaid patients).

How far can the voluntariness defense be pushed, given that many nominally voluntary human activities have economic compulsion behind them? *See, e.g., Philip Morris v. Harshberger*, 159 F.3d 670, 679 (1st Cir. 1998) (cigarette maker was effectively compelled to participate in regulatory scheme where state statute imposed Hobson's choice of either disclosing trade secrets or ending business operation in major market); *Franklin Memorial Hosp.*, 575 F.3d at 130 (suggesting that a "coercive financial incentive" can undercut voluntariness); and *A&D Auto Sales, Inc. v. United States*, 748 F.3d 1142 (Fed. Cir. 2014) (where US' condition on granting bailout funds to auto companies is argued to effect taking, whether government's influence was coercive or merely persuasive is pivotal).

"Singling out" property owner. Regulation that "singles out" the plaintiff, or a narrow group of plaintiffs, is often said to suggest a taking. The rationale appears to be that singling out offends "fairness and justice" or suggests bad faith or points to an absence of average reciprocity of advantage – three factors noted previously. *See, e.g., Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528, 542-44 (2005); *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency*, 535 U.S. 302, 341 (2002); *Penn Central*, 438 U.S. at 133-34 n.30; *Maritrans v. United States*, 342 F.3d 1344 (Fed. Cir. 2003) (fact that double-hull requirement for oil tankers applies across entire industry cuts against taking); *K&K Construction, Inc. v. DEQ*, 705 N.W.2d 365 (Mich. App. 2005) (similar holding for wetland owners). Holding that the regulations in question applied narrowly enough that the character factor pointed to a taking is *Cienega Gardens v. United States*, 331 F.3d 1319, 1338-39 (Fed. Cir. 2003) (regulations promoting housing affordability by burdening owners of low-income apartments). No clear criteria have emerged for when narrow becomes too narrow, though the availability of publicly funded alternatives to burdening a category of property owners appears to be one. Spot zoning is another.

Affirmative requirements. The large majority of *Penn Central* cases involve restrictions on property use, rather than affirmative requirements. The cases suggest that the distinction matters little to the analysis. *See, e.g., Concrete Pipe & Products, Inc. v. Construction Laborers Pension Trust*, 508 U.S. 602, 643-46 (1993) (requirement that employer pay sum to pension plan analysed under *Penn Central* with no mention of requirement's affirmative nature); *McClung v. City of Sumner*, 548 F.3d 1219, 1227 (9th Cir. 2008).

IV. PARCEL AS A WHOLE RULE

Under *Penn Central*, a court must assess the economic loss to the property owner and the degree of interference with its expectations, and under *Lucas*, at least the former. This inquiry is not done in isolation -- rather, it compares what was taken from the property owner *with what the owner still has*. *Keystone Bituminous Coal Ass'n v. DeBenedictis*, 480 U.S. 470, 497 (1987). To assess what the owner still has, the court must define the extent of the plaintiff's property to include in the analysis. This is the "parcel as a whole" or "relevant parcel" – also called the "denominator" issue. Not surprisingly, the property owner wants the relevant parcel defined narrowly (enhancing the relative impact of the government action); the government, broadly (diminishing the relative impact). A court's determination of the parcel as a whole may easily decide the case.

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

A. SPATIAL DIMENSION

Takings law “does not divide a single parcel into discrete segments and attempt to determine whether rights in a particular segment have been entirely abrogated. ... [T]his Court focuses rather both on the character of the action and extent of the interference with rights in the parcel as a whole” *Tahoe-Sierra*, 535 U.S. at 327, quoting *Penn Central*, 438 U.S. at 130. But what is the “parcel as a whole”? – the quote leaves much room for interpretation.

The Supreme Court has said that acreage may not be excluded from the relevant parcel solely to isolate the regulated portion of plaintiff’s property. See, e.g., *Tahoe-Sierra*, 535 U.S. at 331 (“defining the property interest taken in terms of the very regulation being challenged is circular”). But it has said little more. This limited explication has left plaintiffs before lower courts with ample room to argue for whittling down the relevant parcel in other ways. Owners have argued, with limited success, that acreage should be excluded from the relevant parcel because it is separated by a road, subdivided as different lots, owned by a different entity, in a different zoning or tax assessment status, acquired at a different time or through a different transaction, financed separately, beyond the scope of the permit being sought, economically viable in its own right, beyond the reach of the regulating authority, etc.

Current approach. Most courts use an ad hoc approach to defining the parcel as a whole. The effort, said the CFC, “must be to identify the parcel as realistically and fairly as possible, given the entire factual and regulatory environment.” *Ciampitti v. United States*, 22 Cl. Ct. 310, 319 (1991). Similarly, the Federal Circuit urged “a flexible approach, designed to account for factual nuances.” *Loveladies Harbor, Inc. v. United States*, 28 F.3d 1171, 1181 (Fed. Cir. 1994). The pattern has been to include in the relevant parcel all contiguous, same-ownership land unless there is good reason to exclude. See, e.g., *District Intown Properties Ltd. Partnership v. District of Columbia*, 198 F.3d 874 (D.C. Cir. 1999) (contiguous parcel purchased and long treated as a single unit by owner is relevant parcel, not individual lots into which it was eventually subdivided). For some rare exclusions of contiguous, same-ownership land, see *Lost Tree Village Corp. v. United States*, 707 F.3d 1286, 1294 (Fed. Cir. 2013) discussed below, and *Vulcan Materials Co. v. City of Tehuacana*, 369 F.3d 882 (5th Cir. 2004) (excluding adjacent acreage because outside city limits). Note that the mere proximity of two parcels is a poor substitute for contiguity. *Lost Tree Village Corp.*, 707 F.3d at 1292-93 (citing *Lucas* note 7).

A *Tahoe-Sierra* dictum states that “[a]n interest in real property is defined [in the parcel as a whole context] by the metes and bounds that describe its geographic dimensions ...” 535 U.S. at 331. See *Walcek v. United States*, 303 F.3d 1349, 1356 (Fed. Cir. 2002) (“*Tahoe* affirmed that regulatory takings analysis properly analyzes ... the land owner’s entire parcel.”). *Tahoe-Sierra* thus disfavors the thesis of John Fee, *Unearthing the Denominator in Regulatory Takings Claims*, 61 U. Chi. L. Rev. 1535 (1994), noted in *Palazzolo*, that the relevant-parcel inquiry should be whether the acreage whose inclusion is in question could be independently developed in an economically viable way. A few courts have adopted a Fee-like test. See *City of Coeur d’Alene v. Simpson*, 136 P.3d 310, 323 (Idaho 2006).

Inclusion in the relevant parcel is particularly favored when the plaintiff-developer has treated the tracts as a single income-producing unit for purposes of financing, planning, or development. See, e.g., *Appolo Fuels, Inc. v. United States*, 381 F.3d 1338, 1346 (Fed. Cir. 2004) (leases purchased as parts of one unified mining plan); *Lost Tree Village Corp.*, 707 F.3d at 1293; *K&K Construction, Inc. v. DNR*, 575 N.W.2d 531 (Mich. 1998). Indeed, unified treatment by the owner has trumped even noncontiguity with the regulated portion, a factor cutting against inclusion. See, e.g., *Cane Tennessee, Inc. v. United States*, 62 Fed. Cl. 481 (2003); *Town of Jupiter v. Alexander*, 747 So. 2d 395 (Fla. App. 1998). In

contrast, how the developer has treated the tracts may also be used to excise land from the relevant parcel despite contiguity and common ownership. *Lost Tree Village*, 707 F.3d at 1293 (“even where contiguous land is purchased in a single transaction, the relevant parcel may be a subset of the original purchase where the owner develops distinct parcels at different times and treats the parcels as distinct economic units”).

The relevant parcel rule applies as well to non-real-estate property. *See, e.g., Concrete Pipe & Products v. Construction Laborers Pension Trust*, 508 U.S. 602, 643-44 (1993). Where no unique attribute inheres in the restricted portion of the non-land property, the relevant parcel rule has been said to apply “with even greater force” than to real property. *Rose Acre Farms, Inc. v. United States*, 373 F.3d 1177, 1190 (Fed. Cir. 2004).

Sold-off property. A recurring relevant-parcel issue has been whether to include land sold off prior to a certain date. One government argument has been that inclusion is required to forestall “strategic behavior”: land conveyances motivated by the owner’s desire to place himself in an advantageous position in the event he files a taking action. The classic example is selling off acreage on which development is likely to be approved, enhancing the economic impact when development is denied on the remaining portion. Perhaps with the goal of averting strategic behavior, the Federal Circuit asserts that a key inclusion factor is whether the land was “developed or sold before the regulatory environment existed.” *Loveladies Harbor*, 28 F.3d at 1181. *Accord, K & K Construction*, 575 N.W.2d at 584 n.9. *But see Palm Beach Isles Assoc. v. United States*, 208 F.3d 1374, 1381 (Fed. Cir. 2000) (though statute was in place when uplands portion was sold, other factors tip against including it in relevant parcel).

Courts occasionally note a relevant parcel issue when the plaintiff is the holder of the *sold-off* parcel or interest – rather than, as above, the owner of the tract from which the interest or acreage was carved. *City of Coeur d’Alene v. Simpson*, 136 P.3d 310, 320 (Idaho 2006) (circumstances as to plaintiff’s purchase of parcels from larger tract are relevant to whether larger tract might be relevant parcel); *Regency Outdoor Advertising, Inc. v. City of Los Angeles*, 139 P.3d 119 (Cal. 2006) (landowner facing imminent regulation cannot manufacture taking by leasing to plaintiff a narrow interest as to which regulation removes all economic use). As in the previous paragraph, these decisions show judicial aversion to strategic behavior – that is, to a landowner’s creating a smaller parcel or fractional interest designed so as to be rendered without economic use, thus “taken,” by likely regulation.

Vertical parcel as a whole. *Penn Central*, the decision that debuted the relevant parcel rule, was itself a vertical case – holding that air rights could not be considered separately from the land rights beneath. The Court reaffirmed vertical parcel as a whole in *Keystone Bituminous Coal Ass’n v. DeBenedictis*, 480 U.S. 470 (1987), with regard to a plaintiff who owned both a surface and mineral estate – despite state-law recognition of mineral estates as a separate property interest. Lower courts have not always followed suit, however, when state law recognizes a separate interest. *See State ex rel R.T.G., Inc. v. State*, 780 N.E.2d 998, 1008-09 (Ohio 2002) (under state constitution, coal rights may be the relevant parcel notwithstanding owner holding surface estate as well, if owner purchased property solely to mine the coal).

B. FUNCTIONAL DIMENSION

“[W]here an owner possesses a full ‘bundle’ of property rights, the destruction of one ‘strand’ of the bundle is not a taking because the aggregate must be viewed in its entirety.” *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency*, 535 U.S. 302, 327 (2002). Courts do not

always follow this holistic edict, however. Rather, they have accepted on occasion that abrogation of a single right can be a taking despite plaintiff's retention of many other rights. *See, e.g., Hodel v. Irving*, 481 U.S. 704, 716 (1987) (fundamental right to pass on property to one's heirs); *Daniels v. Area Plan Comm'n of Allen County*, 306 F.3d 445 (7th Cir. 2002) (right to enforce restrictive covenant on nearby parcels); *MHC of Washington v. State*, 13 P.3d 183 (Wash. 2000) (mobile-home park owner's unencumbered right to sell). Why functional parcel as a whole did not apply in these cases is clear with respect to those property rights deemed so fundamental as to tolerate little or no infringement (*Hodel* and physical occupations). For other property rights, the reasons are debatable.

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

C. TEMPORAL DIMENSION

The temporal parcel as a whole rule bars divvying up the period during which plaintiff's property interest runs (indefinitely in the case of a fee simple absolute). That is, a court may not look at only the period during which the challenged restriction was in effect.

Though endorsed by the Supreme Court only recently (*Tahoe-Sierra*, 2001), the temporal parcel as a whole rule has hoary case law antecedents. One precursor is the newly imposed zoning scheme that allows nonconforming uses to continue. Such an amortization period, allowing owners to recoup their investments and earn a reasonable (if temporary) economic return, deflects a taking claim. A related example is billboard prohibitions, where the key issue in the decisions is whether the owner has been provided a reasonable period of years before the nonconforming billboards must be taken down. *See, e.g., Tahoe Regional Planning Agency v. King*, 285 Cal. Rptr. 335, 351-52 (Ct. App. 1991). From a takings-law perspective, such an amortization period allows the government to argue that the owner has not suffered a *Lucas* total taking. Instead, the program can be seen as one that only partially limits economic return and so falls under *Penn Central*.

Similarly, *Rith Energy, Inc. v. United States*, 247 F.3d 1355, 1362 (Fed. Cir. 2001), rejected a mining company's argument that in assessing its taking claim, the court should ignore the period *before* its mining permit was revoked, when it mined profitably. Thus, there was no total taking and *Penn Central* applied. *See Maritrans, Inc. v. United States*, 342 F.3d 1344 (Fed. Cir. 2003) (reaffirming *Rith* rule and relating it to *Tahoe-Sierra*'s use of temporal parcel as a whole rationale for land-use moratoria). (See this Part, Section VIII). In short, the temporal parcel as a whole rule applies both to the can-use-now/can't-use-later situation and its can't-use-now/can-use-later opposite. Plainly, the rule can thwart takings claims based on prospectively temporary restrictions on long-term property interests. *See, e.g., CCA Assocs. v. United States*, 667 F.3d 1239, 1246-47 (Fed. Cir. 2011), *cert. denied* (2012).

D. CONCERNS OF CONSERVATIVE JUSTICES

As often as the Supreme Court has reaffirmed the relevant parcel rule, the conservative justices have signaled concern. In 1992, Justice Scalia discussed relevant parcel doctrine in the *Lucas* majority opinion even though it wasn't an issue in the case. 505 U.S. at 1016 n.7. In *Palazzolo* in 2001, Justice Kennedy's majority opinion referred in dicta to this "difficult, persisting question" and noted that "we

have at times expressed discomfort with the logic of this rule.” 533 U.S. at 631. *Tahoe-Sierra* in 2002 revealed shadings among the Court’s conservatives – Kennedy and O’Connor signing on to the majority opinion, with its ringing endorsement of parcel as a whole, while Thomas and Scalia noted in dissent “this questionable rule.” 535 U.S. at 355. Query whether there are now five votes on the Court supporting some qualification of the parcel as a whole rule.

V. *PENN CENTRAL* AND RETROACTIVITY

By definition, takings law is limited to retroactive applications; a property interest created *after* a regulatory scheme comes into being is assumed to be conditioned by that scheme and thus unavailable as a basis for a taking claim based on the pre-existing scheme. So the “retroactive” application of a government regulation does not by itself state a taking claim.

Retroactivity can go too far, however. In *Eastern Enterprises v. Apfel*, 524 U.S. 498 (1998), a four-justice plurality said that “while Congress has considerable leeway to fashion economic legislation,” there are limits. Applying *Penn Central*, the plurality said legislation might effect a taking “if it imposes severe retroactive liability on a limited class of parties that could not have anticipated the liability, and the extent of that liability is substantially disproportionate to the parties’ experience.” *Id.* at 528-29. The plurality then found a taking based on a federal statute making companies retroactively liable for coal-miner retiree health benefits based on the companies’ decades-previous involvement in the industry. Justice Kennedy, rejecting takings analysis but finding a substantive due process violation, provided the fifth vote for the Court’s judgment against the constitutionality of the statute’s application to plaintiff.

Eastern’s lack of majority support for its retroactivity/takings analysis led many courts to confine it to similar facts so that retroactivity, unless perhaps egregious, remains an inadequate basis for a taking. All efforts to invoke *Eastern* as authority for a taking based on the retroactive liability in the Superfund Act have been unsuccessful. *See, e.g., United States v. Alcan Aluminum Corp.*, 315 F.3d 179 (2d Cir. 2003); *United States v. Dico, Inc.*, 266 F.3d 864, 880 (8th Cir. 2001). Indeed, attempts to use *Eastern* to find retroactivity takings when the health benefits statute in that very case was applied to other companies have failed. *See, e.g., Anker Energy Corp. v. Consolidation Coal Co.*, 177 F.3d 161, 168 (3d Cir. 1999). The most recent resort to *Eastern*, yet again unavailing, was under the Affordable Care Act. *Vision Processing, LLC v. Groves*, 705 F.3d 551, 557-58 (5th Cir. 2013) (ACA’s retroactive relaxing of showing required by deceased miner’s survivor to obtain black lung benefits).

VI. PROSPECTIVELY TEMPORARY REGULATION

Here we deal with regulations and delays known to be temporary *from the outset*: chiefly land-use planning moratoria, but also nuisance-abatement moratoria, environmental moratoria, permitting delays, and restrictions on product sales after contamination is found or suspected. The issue: does the fact that a use restriction is known at the outset to be temporary cut against a taking – when the same restriction, understood at the outset to be of permanent or indefinite duration, would be a taking? The question arises because other things being equal, the restriction known at the outset to be temporary is easier on the property owner: most obviously, the parcel retains value during the restriction period since opportunity for economic use is assumed to resume in the future. As noted below, however, *Tahoe-Sierra* based its differentiation between the two types of property use restriction on the temporal parcel as a whole rule.

A. PLANNING MORATORIA

In *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency*, 535 U.S. 302 (2002), the Supreme Court held that a planning moratorium, despite eliminating all economic use of a parcel during the moratorium, is not subject to the *Lucas per se* rule for total takings. Rather,

**Moratoria, even when they eliminate all economic use while in effect,
generally are to be tested under the multifactor *Penn Central* test.**

When applying *Penn Central*, the duration of the moratorium and the complete elimination of economic use are but two of the factors to be examined (though duration is “one of the most important,” 535 U.S. at 342). Of course, the *Tahoe-Sierra* ruling against categorical analysis of expressly temporary regulations does not lessen the possibility of temporary categorical takings from expressly permanent regulations that are later rescinded or invalidated. The Federal Circuit has consistently refused to hold that categorical treatment is necessarily inappropriate for temporary takings. See *Resource Investments, Inc. v. United States*, 85 Fed. Cl. 447 (2009) (collecting cases).

Where economic use continues throughout the moratorium period, the appropriateness of the *Penn Central* test, as opposed to *Lucas per se* analysis, was never in doubt. See, e.g., *W.R. Grace & Co.-Conn. v. Cambridge City Council*, 779 N.E.2d 141 (Mass. App. 2002).

Tahoe-Sierra’s caveats. While a powerful endorsement of planning moratoria, *Tahoe-Sierra* suggests some cautions. “[I]t may well be true,” it states, “that any moratorium that lasts for more than one year should be viewed with special skepticism,” 535 U.S. at 341, noting, however, that the six-year moratorium in *First English* was ultimately upheld. And see *Wild Rice River Estates v. City of Fargo*, 705 N.W.2d 850 (N.D. 2005) (21-month building moratorium to develop floodplain management plan is not taking). But see *Boise Cascade Corp. v. Bd. of Forestry*, 935 P.2d 411, 421 (Or. 1997) (denial of economic use “so long lived as to make any present economic plans for the property impractical” may be taking). *Tahoe-Sierra* also suggests that moratoria imposed in bad faith may still raise a takings issue, as may a succession of moratoria tacked end-to-end (“rolling moratoria”). Finally, given the temporal parcel-as-a-whole rationale adopted in *Tahoe-Sierra*, persons having time-limited property interests (e.g., leaseholds expiring before the moratorium expires) may still be able to assert *Lucas* takings.

B. NUISANCE ABATEMENT MORATORIA

Overly aggressive moratoria on use of a property following persistent nuisance activity there (drug use, prostitution) routinely have been held takings, though the known decisions are all pre-*Tahoe-Sierra*. See, e.g., *Keshbro, Inc. v. City of Miami*, 801 So. 2d 864 (Fla. 2001) (temporary closing of apartment complex under nuisance abatement statute was a taking, in light of separability of nuisance activity from lawful activity, and denial of all economic use during closure period).

C. ADMINISTRATIVE DELAYS

“Normal delays” in obtaining building permits, variances, etc., are not takings, *Tahoe-Sierra*, 535 U.S. at 335, but “extraordinary delays” may be, *Agins*, 447 U.S. at 263 n.9. “Extraordinary delay” has become a commonly stated, seemingly independent takings standard, particularly in the Federal Circuit. See, e.g., *Wyatt v. United States*, 271 F.3d 1090, 1098 (Fed. Cir. 2001). Despite many challenges, however, research reveals no administrative delay held to satisfy this criterion. See, e.g., *Bass Enterprises*

Prod. Co. v. United States, 381 F.3d 1360 (Fed. Cir. 2004) (45-month delay); *Appolo Fuels, Inc. v. United States*, 381 F.3d 1338 (18-month delay); *Wyatt v. United States*, 271 F.3d 1090 (Fed. Cir. 2001) (seven-year delay); *Sunrise Corp. of Myrtle Beach v. City of Myrtle Beach*, 420 F.3d 322, 330 (4th Cir. 2005) (three-plus-year delay); *Byrd v. City of Hartsville*, 620 S.E.2d 76 (S.C. 2005) (11-month delay).

Extraordinariness depends on all relevant circumstances, of which the length of the delay is but one. As elsewhere in takings law, government bad faith cuts in favor of a delay taking. See, e.g., *Landgate* (taking might result where agency delay was so prolonged as to support inference that government was only putting off project); *Bio Energy, LLC v. Town of Hopkinton*, 891 A.2d 509 (N.H. 2005) (no taking where town's cease and desist order based on reasonable misreading of variance terms). The Federal Circuit has called it "the rare circumstance that we will find a temporary taking based on extraordinary delay without a showing of bad faith." *Wyatt*, 271 F.3d at 1098. Accord, *Wild Rice River Estates v. City of Fargo*, 705 N.W.2d 850, 859 (N.D. 2005). Also important: "[g]overnment agencies that implement complex permitting schemes should be afforded significant deference ..." – often cited by the government to defend delays in environmental permitting. *Wyatt*, 271 F.3d at 1098.

Some Federal Circuit decisions say that if the delay is extraordinary, the existence of a temporary regulatory taking is determined by the *Penn Central* test. See, e.g., *Appolo Fuels*, 381 F.3d at 1351. This suggestion of a *two*-stage inquiry, where extraordinariness is akin to a ripeness threshold, has been picked up by a few CFC decisions. See, e.g., *Aloisi v. United States*, 85 Fed. Cl. 84, 93 (2008). Several state courts, sometimes using an "unreasonableness" standard, seem to simply make the delay part of a one-step *Penn Central* analysis. See, e.g., *Potomac Devpmt. Corp. v. Dist. of Columbia*, 28 A.3d 531 (D.C. 2011); *Duncan v. Middlefield*, 898 N.E.2d 952, 956 (Ohio 2008); *Byrd v. City of Hartsville*, 620 S.E.2d 76, 81 (S.C. 2005). Another link between the two tests is that where a *permanent* restriction would not be a permanent taking, "it would be strange to hold that a temporary restriction imposed pending the outcome of the regulatory decision-making process requires compensation." *Appolo Fuels*, 381 F.3d. at 1352.

Procedures ancillary to agency processing of development applications have been viewed as a normal part of the administrative process, hence, if reasonable, not grounds for a delay taking. For example, where an agency avails itself of a statutory opportunity to relax application of regulations to a parcel to avoid a taking, the added delay causes no taking. *Griffith v. State DEP*, 775 A.2d 54 (N.J. App. 2001). Similarly, delay resulting from a landowner's successful challenge (judicial or otherwise) to an administrative error is not compensable, if the agency's position was reasonable. A regulatory mistake causing delay, by itself, does not result in a taking, but rather is a normal part of the administrative process. See, e.g., *Pheasant Bridge Corp. v. Township of Warren*, 777 A.2d 334 (N.J. 2001); *Landgate, Inc. v. California Coastal Comm'n*, 953 P.2d 1188, 1195 (Cal. 1998).

Tahoe-Sierra suggests that moratoria and ordinary permit delays should be treated the same for takings purposes. 535 U.S. at 337 n.31.

Not addressed here are the prospectively temporary disabilities imposed de facto on property owners by condemnation blight. Here, a city's delay in carrying out an announced intention to condemn an area (as for urban renewal) leads to neighborhood deterioration and the argument by property owners that a present taking has thereby occurred, in advance of the future condemnation.

PART THREE: PHYSICAL TAKINGS TESTS

When government physically occupies or otherwise invades private property, or causes or authorizes other persons/things to do so, judicial suspicion that a taking has occurred is greatly enhanced. The reason is that the right to exclude others is deemed “one of the most treasured strands in an owner’s bundle of property rights,” *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 435 (1982), and “perhaps the most fundamental of all property interests,” *Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528, 539 (2005). Thus, physical invasions, along with outright appropriations, are the “paradigmatic taking[s].” *Lingle*, 544 U.S. at 537.

I. PERMANENT PHYSICAL OCCUPATIONS

If the government-caused physical invasion amounts to a “permanent physical occupation,” the rule is categorical:

Permanent physical occupations of property are *per se* takings.

This is the “*Loretto* rule,” after the decision that first made it explicit. Like the *per se* rule for total regulatory takings, it is said to be “relatively narrow” and thus but an occasional exception to *Penn Central* balancing. *Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528, 538 (2005). Permanent physical occupations classically stem from continuous or inevitably recurring flooding caused by a government dam, airplane overflights, government installation of structures on private property (e.g., groundwater monitoring wells), and shoreline erosion caused by government water projects (e.g., jetties). For airplane overflights, the “permanent physical occupation” rule is differently stated, probably because it was announced in 1946 before *Loretto* and has yet to be questioned post-*Loretto*. In *United States v. Causby*, 328 U.S. 256 (1946), the Court held that airplane overflights effect a *per se* taking when “so low and so frequent as to be a direct and immediate interference with the use and enjoyment of land.”

Loretto takings claims based on permanent physical occupations are conceptually neat and clean; there is no factor balancing. In contrast with regulatory takings, the magnitude of the intrusion is irrelevant, as is the economic impact on the property owner or the importance of the government interest advanced. Also in contrast with regulatory claims, there is no parcel-as-a-whole rule for permanent physical occupations; a permanent occupation of only a small portion of a tract will be held a taking – as it was in *Loretto*. The sharp distinction between *per se* physical takings and regulatory takings makes it “inappropriate” to treat decisions involving either as controlling precedent for claims involving the other. *Tahoe-Sierra*, 535 U.S. at 323. *Accord, CRV Enterprises, Inc. v. United States*, 626 F.3d 1241, 1246 (Fed. Cir. 2010) (“[d]ecisions of the Supreme Court have drawn a clear line between physical and regulatory takings.”).

A permanent physical occupation does not require that the particular occupying persons or things be constant over time. *Nollan v. California Coastal Comm’n*, 483 U.S. 825, 832 (1987) (permanent physical occupation occurs “where individuals are given a permanent and continuous right to pass to and fro”); *John R. Sand & Gravel Co. v. United States*, 457 F.3d 1345, 1357 (Fed. Cir. 2006), *aff’d*, 552 U.S. 130 (2008). Nor does the occupation have to be exclusive. *Id.*

But *Loretto* does not apply when the occupation, even though commanded by government, is not by either the government or “a third party.” *Loretto*, 458 U.S. at 440. So landlords have no physical taking claim based on requirements that they “comply with building codes and provide utility connections, mailboxes, smoke detectors, fire extinguishers and the like in the common area of a building.” *Id.* Lower courts have taken the view that occupation by the government or a third party comes about either through *ownership* of the required item by other than the property owner, or by loss of property owner *control* of the occupied area through third-party installation and maintenance. *See, e.g., Midwest Retailer Associated, Ltd. v. City of Toledo*, 563 F. Supp. 2d 796 (N.D. Ohio 2008) (if required surveillance cameras are city property, store owner likely to succeed on physical taking claim); *Herzberg v. City of Plumas*, 34 Cal. Rptr. 3d 588 (Cal. App. 2005) (fence to keep out cattle effects no physical taking because installed, owned, sited, and maintained by property owner); and *Flamingo Paradise Gaming LLC v. Chanos*, 217 P.3d 546 (Nev. 2009) (requirement of No Smoking signs does not give control over installation or any portion of private property to third party, hence no physical taking).

Decisions split on whether *Loretto* applies solely to real property, *compare Horne v. U.S. Dep’t of Agriculture*, 750 F.3d 1128, 1139 (9th Cir. 2014) (solely to real property), *pet. for cert. filed* (Sept. 8, 2014), *with Nixon v. United States*, 978 F.2d 1269, 1284-85 (D.C. Cir. 1992) (“*Loretto* makes no mention of a distinction between real and personal property”), but under whatever label non-real property is plainly subject to *per se* takings analysis when confiscated or appropriated. *See* last paragraph of this Section I.

When the extent or permanence of the physical occupation becomes clear only after a while, the taking claim accrues, and the statute of limitations begin to run, only when the situation has “stabilized.” The case announcing this rule, *United States v. Dickinson*, 331 U.S. 745 (1947), has been limited to gradual physical processes set in motion by the government, chiefly flooding and shoreline erosion, as opposed to an evolving series of government intrusions or the evolving economic impact of a regulation. *See, e.g., United States v. Dow*, 357 U.S. 17, 27 (1958); *John R. Sand*, 457 F.3d at 1359-60 (collecting cases). As construed in the CFC and Federal Circuit, the physical taking claim accrues under *Dickinson* when (1) the permanent nature of invasion is evident and (2) the extent of damage is foreseeable (rather than fully realized). *Mildenberger v. United States*, 643 F.3d 938, 946 (Fed. Cir. 2011). Accrual may be delayed by government promises to mitigate harms caused by the gradual physical process. *Id.* at 947.

When the physical invasion occurs by virtue of a government regulation, the Supreme Court characterizes physical takings as a subset of regulatory takings -- i.e., as a special case of *Penn Central* where the character of the government action is determinative. *See, e.g., Loretto*, 458 U.S. at 426, 432; *Lingle*, 544 U.S. at 538 (one category of “regulatory action” deemed a *per se* taking is “where government requires an owner to suffer a permanent physical invasion”). But whether viewed as a free-standing test or as a *Penn Central* special case appears to make little analytical difference.

Given the same *per se* treatment as permanent physical occupations are “appropriations”: government assertions of ownership or absolute dominion over a property interest, whether or not a physical occupation occurs. *See Lingle*, 544 U.S. at 537 (“[t]he paradigmatic taking ... is a direct government *appropriation* or physical invasion of private property”) (emphasis added). *Per se* appropriation takings may be found with both real and personal property. As to the latter, illustrative decisions have discerned *per se* takings when government retains the interest on private funds in the government’s possession, beyond an amount needed to cover government costs, *see, e.g., Webb’s Fabulous Pharmacies, Inc. v. Beckwith*, 449 U.S. 155 (1980), and *Moldon v. County of Clark*, 188 P.3d 76 (Nev. 2008), or when government transfers private money to its own account, *Brown v. Legal Found. of Washington*, 538 U.S. 216, 235 (2004) (interest on lawyers’ trust accounts for client funds).

II. LESSER PHYSICAL INVASIONS

Physical encroachments that fall short of permanent physical occupations are known as “temporary physical invasions.”

Temporary physical invasions are not *per se* takings; rather, they are tested by multifactor balancing, probably including the *Penn Central* factors.

Loretto, 458 U.S. 419; *Boise Cascade Corp. v. United States*, 296 F.3d 1339, 1353 (Fed. Cir. 2002). Thus, temporary invasions are much less likely than their permanent-occupation brethren to be held takings. See, e.g., *National Bd. of YMCA v. United States*, 395 U.S. 85, 93 (1969) (temporary unplanned occupation of building by troops is not a taking); *Benson v. State*, 710 N.W.2d 131, 151-153 (S.D. 2006) (rules on when shooting over private land can occur must be analyzed under *Penn Central*; no taking under that test).

The Supreme Court recently brought temporary government-induced flooding in line with the above rule. In *Arkansas Game & Fish Comm’n v. United States*, 133 S. Ct. 511 (2012), the Court jettisoned the long-accepted view that floods falling short of being continual or even “inevitably recurring” are categorically exempt from takings liability. Rather, the Court held, temporary flooding is to be assessed for takings just as any other temporary physical invasion – under factors similar, but not identical, to the *Penn Central* factors. Query whether the beyond-*Penn Central* factors listed in *Arkansas* for assessing temporary flooding will generalize to non-flooding temporary physical invasions – as they did in *Property Reserve, Inc. v. Superior Court*, 168 Cal. Rptr. 3d 869 (Ct. App.) (geologic and environmental testing of land possibly to be condemned), *review granted and opinion superseded*, 326 P.3d 976 (2014).

The permanent-occupation/temporary-invasion boundary – often, as noted, the line between taking and non-taking – may be elusive. According to the Federal Circuit in 1991, “permanent does not mean forever, or anything like it.” Rather, a government occupation is “permanent” when it is a “substantial physical occupancy” of private property, while “temporary” refers to occupation that is “transient and relatively inconsequential.” *Hendler v. United States*, 952 F.3d 1364, 1376-77 (Fed. Cir. 1991). The Circuit later clarified that “permanent” depends *not only* on duration, but also on the nature of the government intrusion. *Boise Cascade Corp. v. United States*, 296 F.3d 1339, 1356 (Fed. Cir. 2002); *John R. Sand & Gravel Co. v. United States*, 457 F.3d 1345, 1357 (Fed. Cir. 2006) (determination of whether government occupancy is “permanent” is highly fact-specific), *aff’d*, 552 U.S. 130 (2008).

Apparently, the more significant the intrusion – particularly when the government asserts dominion or control – the less critical is duration for establishing “permanent-occupation” status in the Federal Circuit. Compare *Skip Kirchdorfer, Inc. v. United States*, 6 F.3d 1573 (Fed. Cir. 1993) (government taking possession of warehouse, after breaking and entering, for nine months is permanent occupation) with *Boise* (five months of brief incursions by government owl surveyors is not permanent occupation). In accord with *Boise* is *Tennessee Scrap Recyclers Ass’n v. Bredesen*, 556 F.3d 442 (6th Cir. 2009). The relevance of a government assertion of dominion or control for establishing a physical taking was established long before *Loretto* introduced the permanent/temporary distinction. See, e.g., *United States v. Pewee Coal Co.*, 341 U.S. 114 (1951) (federal government “possessed and operated” private coal mine for 5½ months to prevent wartime miners’ strike, hence taking occurred). Government assertion of dominion or control shades into the concept of “appropriation,” discussed above, where even short governmental presence is likely to be found a taking.

At the short-duration end of the spectrum, temporary physical invasions blur into torts, particularly trespass.

III. DEFENSES AND EXCEPTIONS

First, a physical invasion or occupation to which the plaintiff consented cannot be a taking. *Yee v. City of Escondido*, 503 U.S. 519 (1992); *FCC v. Florida Power Corp.*, 480 U.S. 245 (1987); *but see Loretto*, 458 U.S. at 439 n.17 (possibility that landlord could avoid physical occupation by ceasing to rent building does not defeat taking claim). The line between consent and government compulsion may be highly nuanced, however.

Second (and related to the first), there is no physical taking when the plaintiff voluntarily entered a highly regulated field in which there was no reasonable expectation of being free of invasion when certain events occur. *California Housing Securities v. United States*, 959 F.3d 955 (Fed. Cir. 1992) (RTC's occupation and seizure of failed S&L is not taking, given absence of "historically rooted expectations" of compensation in such circumstances).

Third, the concept of background principles, though announced in a regulatory taking case, has been held to apply to physical taking claims. This is unsurprising, given that background principles go to the threshold determination whether the plaintiff had the property right alleged to be taken. *John R. Sand*, 60 Fed. Cl. 230, 235 (2004), *vacated on other grounds*, 457 F.3d 1345 (Fed. Cir. 2006), *aff'd*, 552 U.S. 130 (2008); *Lucas*, 505 U.S. at 1028-29 (preexisting federal navigation servitude bars physical taking); *Kim v. City of New York*, 681 N.E.2d 312, 318 (N.Y. 1997) (preexisting duty of lateral support bars physical taking claim). *But see Placer Mining Co., Inc. v. United States*, 98 Fed. Cl. 681, 685 (2011) (applicability of background principles to physical takings is "far from settled").

Fourth, the right to exclude may, on occasion, have to accommodate other sacrosanct property rights, such as free speech. *Prune Yard Shopping Center v. Robins*, 447 U.S. 74 (1980) (no taking caused by state prohibition on shopping center's exclusion of demonstrators, despite indefinite duration of occupation).

Finally, a physical taking claim may be rejected when the plaintiff was the intended beneficiary of the government invasion, even though there are incidental government benefits as well. *YMCA v. United States*, 395 U.S. 85 (1969) (no taking due to occupation of buildings by U.S. troops seeking to protect them from rioters); *Belk v. United States*, 858 F.2d 706 (Fed. Cir. 1988) (no taking when United States terminated claims of Iranian hostages against Iran to secure their release); *Baugus v. City of Florence*, 985 So. 2d 413 (Ala. 2007) (city's installation of pipes on plaintiff's land, to check for methane from city's landfill, is not taking; was for benefit of landowner). At other times, however, at least under federal law, special benefits conferred on the property owner by the government action go solely to how much compensation is due, not to the prior question of whether a physical taking occurred. *See, e.g., Hendler v. United States*, 175 F.3d 1374 (Fed. Cir. 1999). Under either approach, the result may be zero compensation.

IV. BLUR BETWEEN REGULATORY AND PHYSICAL TAKINGS

The Court's decisions using *per se* physical takings analysis typically involve physical invasions in the literal sense – recall the “classic examples” noted in Section I above. But in some factual contexts, noted below, physical and regulatory takings have proved difficult to keep separate. The tendency to blur the two is enhanced by the powerful incentives plaintiffs have to urge a physical, versus regulatory, takings theory. First, there are fewer ripeness hurdles (e.g., no need to seek variances) and, for permanent physical occupation claims there is a lesser showing on the merits (no analysis of economic impact, no parcel as a whole rule, etc.). Second, there is the extremely narrow scope of the *Lucas* total taking rule, relegating the plaintiff in almost all regulatory cases to the vagaries of *Penn Central* balancing. As a result, many cases have seen courts reject plaintiffs' efforts to characterize a rather straightforward regulatory case as a physical taking. See, e.g., *Stearns v. United States*, 396 F.3d 1354 (Fed. Cir. 2005); *Machipongo Land & Coal Co. v. Commonwealth*, 799 A.2d 751, 763 (Pa. 2002).

A. HYBRID GOVERNMENT ACTIONS

Some regulatory programs indisputably are associated with physical invasions. For example, wildlife protection statutes have prompted landowners to claim physical takings based on the presence on private property of animals that the owner is regulatorily barred from harming, or based on the depredations of protected animals (e.g., eating crops). Such claims generally fail, often on the ground that the government is not liable for the actions of wild animals. See, e.g., *Colvin Cattle, Inc. v. United States*, 468 F.3d 803, 809 (Fed. Cir. 2006); *Seiber v. United States*, 364 F.3d 1356 (Fed. Cir. 2004). *Christy v. Hodel*, 857 F.2d 1324 (9th Cir. 1988); *Coast Range Conifers, LLC v. State of Oregon*, 117 P.3d 990 (Or. 2005) (rules that prevent property owner from altering natural condition of land differ from rules that authorize a third person to occupy it).

Regulatory controls on a landlord's ability to evict tenants also give rise to arguments that the landlord is being forced to suffer a physical occupation by unwanted tenants. The Supreme Court, however, generally has been unreceptive to physical taking claims here. In *Yee v. City of Escondido*, 503 U.S. 519 (1992), the Court rejected a *physical* taking challenge to a mobile-home statute that limited evictions, citing the fact that the owner's decision to put his property to mobile-home rental use had been voluntary. But the taking claim was “perhaps within the scope of our *regulatory* taking cases.” *Id.* at 527 (emphasis added).

B. NON-PHYSICAL-INVASION GOVERNMENT ACTIONS

In other cases, the government program causes no classical physical invasion, but affects the property owner in a way more or less akin to an appropriation. Here, the takings analysis may go either way – regulatory or physical. Compare *Washington Legal Found. v. Texas Equal Access to Justice Found.*, 270 F.3d 180 (5th Cir. 2001) (use of interest on lawyers' trust accounts to support legal services for indigents should be analyzed as *per se* physical-like taking), with *Washington Legal Found. v. Legal Found. of Washington*, 271 F.3d 835 (9th Cir. 2001) (en banc) (same to be analyzed as regulatory taking). On appeal of the latter, the Supreme Court found that the interest transfer was more akin to the physical occupation in *Loretto*. *Brown*, 538 U.S. at 235.

Another regulatory/physical confusion arises from reductions in the amount of federal reclamation project water available for contract users and water rights holders, when demanded by the Endangered Species Act (ESA) to protect listed fish. *Tulare Lake Basin Water Storage District v. United States*, 49

Fed. Cl. 313, 319 (2001), found that reduced water delivery was best analyzed as a *physical* taking. Later, the same judge concluded that the intervening *Tahoe-Sierra* decision required him to analyze as a *regulatory* taking another ESA requirement – that a water district divert water to a fish ladder. *Casitas Municipal Water Dist. v. United States*, 76 Fed. Cl. 100, 106 (2007). The Federal Circuit reversed, however, viewing the physical diversion of water (as opposed to a restriction on the amount used) as a potential *physical* taking of water rights. 543 F.3d 1276 (Fed. Cir. 2008). *CRV Enterprises, Inc. v. United States*, 626 F.3d 1241, 1248 (Fed. Cir. 2010), supports reading *Casitas* as limiting physical takings analysis in the water delivery area to where the government physically removed water.

V. DIRECT BENEFITS

In contrast with regulatory takings, the apparent pattern with physical takings (or at least permanent physical occupation takings) is to exclude from the liability phase consideration of any benefits afforded the property owner by the challenged government conduct. Rather, such benefits are limited to offsetting the compensation due, if a taking is found. *See, e.g., Hendler v. United States*, 175 F.3d 1374 (Fed. Cir. 1999) (benefit to owner from government’s groundwater monitoring on his land outweighed value of easements held to be physically taken; hence, no compensation owed).

PART FOUR: EXACTION TAKINGS TESTS

It is today routine for local governments to allow land owners to develop on the condition they agree to measures that offset the development’s impacts on the community. Such conditions – called “exactions” – often include dedicating a portion of the developer’s tract for a public need created by the development (as for a road, school, daycare center, wildlife preservation, etc.). When no dedication exaction is required, but solely developer expenditures (e.g., widening an existing road or buying mitigation land), the condition is called a “monetary exaction.” In a popular variation, the government may allow the property owner to simply pay an “in lieu fee” or “impact fee” based on the costs imposed on the community by the development. The Supreme Court’s exaction cases seek to fix when such exactions constitute takings – or as explained below, a violation of the doctrine of unconstitutional conditions.

The Court has described exactions as a “special context” for takings analysis, *Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528, 537-38 (2005). Its exaction takings tests answer the question: when may the government impose as a *condition* on development approval, a requirement that *if imposed directly* would require compensation? *Lingle*, 544 U.S. at 546-47. These exaction takings tests, the Court says, involve a special application of the doctrine of unconstitutional conditions: that “the government may not require a person to give up a constitutional right – here the right to receive just compensation when property is taken – in exchange for a discretionary benefit conferred by the government where the benefit has little or no relationship to the property.” *Id.*, quoting *Dolan v. City of Tigard*, 512 U.S. 374, 385 (1994); accord, *Koontz v. St. Johns River Water Mgmt. Dist.*, 133 S. Ct. 2586 (2013). Given this resting of exaction takings jurisprudence on unconstitutional conditions doctrine, some have questioned whether an exactions takings claim is really a takings claim at all, though the Court continues to root them in the Takings Clause. *See, e.g., id.* at 2596.

It is immaterial to the exactions tests that the landowner’s development proposal could be denied

outright without effecting a taking. That is, the government cannot defend an exactions-takings claim by arguing that since *outright denial* would not be a taking, a more permissive government response – offering a *conditional approval* – logically cannot be one either. *See, e.g., Koontz*, 133 S. Ct. at 2596-97.

I. THE TESTS

The takings test for exaction conditions has two prongs: “essential nexus” and “rough proportionality” – together often referred to as “heightened scrutiny.” An exaction condition failing either prong is a taking. Because this test is viewed as more plaintiff-friendly than *Penn Central*, property owners and property rights groups often push for its broad application.

The “essential nexus” prong speaks to the *nature* of the exaction condition, and debuted in *Nollan v. California Coastal Comm’n*, 483 U.S. 825 (1987). To avoid being a taking --

An exaction condition on development permission must substantially advance a government purpose that would justify denial of the permit.

Otherwise, the condition may be just “out-and-out ... extortion” by the government. *Id.* at 837.

The “rough proportionality” prong speaks to the *extent* of the exaction condition, and was announced in *Dolan v. City of Tigard*, 512 U.S. 374 (1994). To avoid being a taking --

The burden imposed on the landowner by the exaction condition must be no greater than “roughly proportional” to the burden that the landowner’s proposed development would impose on the community.

In a departure from the usual rule for land-use regulation, *Dolan* placed the burden of proof for showing rough proportionality on the government, rather than requiring plaintiff to show *lack* of rough proportionality. As a second new burden for the government, *Dolan* instructed that the demonstration of rough proportionality (and essential nexus, too) must involve “some sort of individualized determination,” though “[n]o precise mathematical calculation is required.” *Id.* at 391. For one court’s interpretation of rough proportionality, *see B.A.M. Dvpm. v. Salt Lake County*, 196 P.3d 601 (Utah 2008) (under *Dolan*, court must determine whether cost to community of assuaging impact of development is “about the same” in dollars as the value of land required to be dedicated plus any other costs to developer).

Dolan offered two rationales for the foregoing departures from ordinary land-use regulation. First, ordinary land-use regulation involves “legislative determinations classifying entire areas of the city,” as opposed to (as in *Dolan*) an adjudicative decision on a single parcel. Second, ordinary land-use regulation merely restricts use, as opposed to (as in *Dolan*) a requirement that the landowner deed portions of his property to the city. Following *Dolan*, litigation broke out as to whether these two rationales were formal prerequisites for applying *Dolan*. As discussed below, the third Supreme Court decision in the exactions takings area, *Koontz v. St. Johns River Water Mgmt Dist.*, left the first issue unaddressed (Section II.B. below), but spoke to the second (Section II.D. below).

II. ISSUES AS TO APPLICABILITY OF THE TESTS

A. Conditions unrelated to development impact

The Supreme Court's three exaction taking decisions – *Nollan*, *Dolan*, and *Koontz* – all focused on development conditions imposed to offset the impact of a proposed development. The Court's concern was whether the impact-offsetting rationale was being abused by local governments to “extort” concessions from the land owner that the government otherwise would have to pay for itself. Given this concern, conditions unrelated to a development's impact on the community – such as building code requirements prompted by safety concerns – would seem outside the universe of these decisions. Whether a condition is unrelated to community impact, however, can be unclear. For example, can a requirement that a subdivision include a certain percentage of affordable units be brought under *Nollan/Dolan* on the ground that unavailability of land for affordable housing is an impact of pricier development? A requirement that a town home developer install art in a public area of the project was held similar to other landscaping requirements and not subject to *Nollan/Dolan*. *Ehrlich v. City of Culver City*, 911 P.2d 429, 450 (Cal. 1996).

B. Legislatively imposed conditions

“Legislative exactions” are imposed through broad rules applied to many landowners, in contrast with “adjudicative exactions,” which are imposed in proceedings confined to a specific property. Cases split on whether legislative exactions are subject to *Nollan* and *Dolan*. Compare, for example, *Parking Ass'n of Georgia v. City of Atlanta*, 450 S.E.2d 200 (Ga. 1994), holding that *Dolan* does not apply to a development condition imposed through the legislative process, rather than through individualized determinations (but see dissent from denial of certiorari), with *Amoco Oil Co. v. Village of Schaumburg*, 661 N.E.2d 380 (Ill. App. 1995), holding that *Dolan* does apply to legislatively imposed development conditions. Of course, there are countless intermediate circumstances, such as where the condition or fee is legislatively fixed within a range, leaving some discretion for the individualized proceeding.

The 2005 *Lingle* decision conceivably may be read to restrict *Nollan/Dolan* to adjudicatively imposed conditions – e.g., by twice noting that *Nollan* and *Dolan* were based on adjudicative conditions. However, the Court's recent exactions ruling in *Koontz*, while saying nothing explicit about the legislative/adjudicative distinction, shows impatience with technical constraints on use of *Nollan/Dolan*, see, e.g., 133 S. Ct. at 2599, and arguably calls into question the distinction's viability.

C. Dedication conditions without physical access

Some lower courts read *Nollan* and *Dolan* as limited to dedicated land *open to the public*. See, e.g., *Smith v. Town of Mendon*, 789 N.Y.S.2d 696 (N.Y. 2004) (*Nollan/Dolan* does not apply where even though development condition was dedication of conservation easement, easement involved no physical public access and merely restricted use); *Wisconsin Builders Ass'n*, 702 N.W.2d at 502-03 (setback restrictions cannot be analogized to easements in *Nollan* and *Dolan*; former do not eliminate right to exclude). But see *Isla Verde v. City of Camas*, 990 P.2d 429, 436 n.3 (Wash. App. 1999) (dictum rejecting restriction of *Nolan* to dedications of property to public use), *aff'd*, 49 P.3d 867 (Wash. 2002). Subsequent to these decisions, the Supreme Court noted that *Nollan* and *Dolan* involved “government demands that a landowner dedicate an easement *allowing public access*” *Lingle*, 544 U.S. at 546 (emphasis added). Query whether *Koontz*' extension of *Nollan/Dolan* to monetary exactions (see below) undercuts the

viability of earlier decisions restricting *Nollan/Dolan* examination of dedication exactions to those allowing public access.

D. Monetary exaction conditions

It was initially unclear whether *Nollan/Dolan* applies solely to dedication-type exactions, as were involved in those cases, or to monetary exactions as well. The issue split the lower courts, while the Supreme Court seemed to favor the dedication-conditions-only view. See, e.g., *City of Monterey v. Del Monte Dunes at Monterey, Ltd.*, 526 U.S. 687, 702 (1999). In 2013, the matter was resolved. In *Koontz*, the Supreme Court held 5-4 that *Nollan/Dolan* applies to monetary-exaction conditions on land development, at least when imposed adjudicatively rather than legislatively. 133 S. Ct. 2586. Concluding otherwise, the Court said, would make it easy for land-use permitting officials to “evade” the constraints of *Nollan* and *Dolan*, *id.* at 2599, noting “the special vulnerability of land use permit applicants to extortionate demands for money,” *id.* at 2603.

Koontz also dispensed with the argument that owing to *Eastern Enterprises*, 524 U.S. 498 (1998), government-imposed “generalized monetary liability” – monetary liability payable out of any funds the plaintiff may have – cannot be the basis of a taking claim. (See Part II, Section III.C. Need for specific property) That rule, said *Koontz*, does not apply when the government demand for money “operate[s] upon ... an identified property interest” – such as the tract *Koontz* sought to develop. (Four dissenters found this a misreading of *Eastern Enterprises*.) *Koontz* also rejected the argument that if *Nollan/Dolan* were held to reach monetary exactions, there would be no way to distinguish impermissible land-use exactions from property taxes.

The *Koontz* holding that monetary exaction conditions can be takings if imposed adjudicatively parallels the preexisting California rule announced in *Ehrlich v. City of Culver City*, 911 P.2d 429 (Cal. 1996). In a dubious holding, however, the Ninth Circuit (which includes California) has expanded *Koontz* by asserting that an *administrative penalty* can be viewed as a monetary exaction. As such, the court concluded such a penalty is unlawful under the unconstitutional conditions doctrine when imposed for not complying with a government requirement that is a taking. *Horne v. U.S. Dep’t of Agriculture*, 750 F.3d 1128 (9th Cir. 2014), *pet. for cert. filed* (Sept. 8, 2014).

See Section II.B. above as to whether *Koontz* presages *Nollan/Dolan* coverage for *legislatively imposed* monetary exactions. Also note that *Koontz* involved a monetary exaction payable to private parties (contractors to enhance wetlands on government land), suggesting it is immaterial to *Nollan/Dolan* coverage whether the monetary exaction is payable to the government or a private party.

E. Conditions unrelated to land

Applying *Nollan/Dolan* far from the land-use context, the Ninth Circuit found these cases to supply the test for analyzing a federal requirement that California raisin handlers set aside a prescribed amount of raisins from those they sell on the open market, to stabilize market prices. *Horne*, 750 F.3d 1128. A consequence of this ruling, to the extent it applies, would seem to be the resurrection of the means-end test for takings rejected in *Lingle v. Chevron USA Inc.*, 544 U.S. 528 (2005), in the guise of the *Nollan* nexus requirement.

F. Permit denials following landowner refusal to accept exaction conditions

When a landowner refuses to accept the government's exaction conditions, the government likely will withhold development approval. Hence, the landowner conveys no property interest. Without such conveyance, can the *Nollan/Dolan* test for takings be relevant – or should the property owner be confined to invoking *Penn Central* for the permit denial? Given the greatly reduced prospects for plaintiff success under the latter test, the question is important.

Koontz concluded that despite the absence of a conveyed property interest, *Nollan/Dolan* governs the permit denial in this situation. The dissenters concurred, making the Court unanimous on this point. Since *Nollan/Dolan* rests on the doctrine of unconstitutional conditions, the majority explained, the absence of a conveyance does not thwart a *Nollan/Dolan* claim: “Extortionate demands for property in the land-use permitting context run afoul of the Takings Clause not because they take property but because they impermissibly burden the right not to have property taken without just compensation.” 133 S. Ct. at 2596. In short, the constitutional violation is the imposition of the wrongful conditions, whether or not the property owner accepts them. On the other hand, whether the owner accepts exaction conditions found violative of *Nollan* or *Dolan* is relevant to the *remedy*. The Takings Clause, noted *Koontz*, mandates compensation only for a taking, which does not occur when the permit is denied. Because *Koontz*' claim was brought under a state law cause of action, the Court was able to rely on that as determining the type of remedy and expressly not reach what remedy the federal constitution requires for such a “no taking” transgression of the Takings Clause.

This holding of *Koontz*, bringing permit denials based on refused exaction conditions under *Nollan/Dolan*, has sparked a widespread debate over what measures local governments can take so that their negotiations with prospective land developers do not prompt *Nollan/Dolan* lawsuits.