CHAPTER 2

THE EVOLUTION OF TAKINGS LAW AND CATEGORIES OF TAKINGS CLAIMS

I. Introduction
II. A Brief History of the Takings Clause
   A. The Birth of Regulatory Takings
   B. Supreme Court Trends in Modern Takings Jurisprudence
III. Overview of Current Takings Law
   A. Physical Occupations and Invasions
      1. Types of Cases
      2. Supreme Court Tests
   B. Required Dedications and Other Development Conditions
      1. Types of Cases
      2. Supreme Court Tests
   C. Regulatory Takings
      1. Types of Cases
      2. Supreme Court Tests
         (a) Parcel-as-a-Whole Rule
         (b) *Lucas v. South Carolina Coastal Council*
            (1) The total wipeout takings rule
            (2) The background-principles defense
         (c) *Penn Central Transportation Co. v. New York City*
            (1) Economic impact of the regulation
            (2) Investment-backed expectations
            (3) Character of government action
         (d) Regulatory Takings Summary

I. Introduction

This chapter provides an overview of the evolution of takings law and the emergence of three categories of takings claims: physical occupation claims, compelled dedication claims, and regulatory takings claims.

Having discussed the narrow text and original understanding of the Takings Clause in the previous chapter, Section II of this chapter describes the evolution from the original meaning to the point we are at today, where developers challenge as takings a wide variety of regulations that simply limit the uses to which property can be put. Although takings jurisprudence now encompasses regulatory takings, courts are still bound by the fundamental notion that a taking occurs only when government action expropriates property or is the functional equivalent of an expropriation.

Section III of this chapter then outlines the three categories courts have established for adjudicating takings claims. This section provides an overview for the rest of the Handbook. It is, in essence, a Handbook roadmap. More importantly, this section explains why it is important for government lawyers faced with a takings claim to ask first: "What type of claim is this?" The answer will determine which precedents govern and how the court will analyze the claim.

The type of claim also frequently determines the outcome. If the developer proves a permanent physical occupation, the government should have its checkbook ready because developers generally prevail in these cases. If the developer challenges a dedication of land required as a condition of a development permit, the developer has some chance of prevailing, depending on the facts of the case. On the other hand, developers lose most pure regulatory takings claims.

II. A Brief History of the Takings Clause

A. The Birth of Regulatory Takings

The notion that the Takings Clause might limit government actions other than the direct expropriation of property emerged gradually through cases where the challenged government action very closely resembled an expropriation. One of the first of these cases, *Pumpelly v. Green Bay Co.*, 80 U.S. (13 Wall.) 166 (1872), involved a state-authorized dam that flooded Pumpelly's property. In requiring compensation, the Court noted:

> It would be a very curious and unsatisfactory result, if in construing a provision of constitutional law . . . it shall be held that if the government refrains from the absolute conversion of real property to the uses of the public it can destroy its value entirely, can inflict irreparable and permanent injury to any extent, can, in effect, subject it to total destruction without making any compensation, because, in the narrowest sense of that word, it has not *taken* for the public use.

Id. at 177-78. To avoid this "curious and unsatisfactory" result, the Court ruled that "where real estate is actually invaded," the Takings Clause might require compensation. *Id.* at 181.

In 1922, more than 130 years after ratification of the Fifth Amendment, the Supreme Court first applied the Takings Clause to government action that did not involve an appropriation or physical invasion of property. In *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393 (1922), the Court addressed the constitutionality of the Kohler Act, a Pennsylvania law that prevented coal companies from mining certain coal that supported land on the surface. Writing for the Court, Justice Holmes emphasized that under state law this support estate was a distinct property interest, and that the Kohler Act purported to abolish this estate. *See id.* at 414. The Court concluded that the

Kohler Act had "very nearly the same effect for constitutional purposes as appropriating [the support estate]." *Id.* at 414. After rejecting the argument that the Act was necessary to protect public safety, the Court obliquely stated that "if regulation goes too far it will be recognized as a taking." *Id.* at 414-15. Because the Kohler Act went too far, the Court ruled for the claimant. *See id.* at 416. Thus, the concept of regulatory takings was born.

Notwithstanding its landmark status, *Mahon* is a relatively limited decision. The *Mahon* Court emphasized 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," and that "some values are enjoyed under an implied limitation and must yield to the police power." *Id.* at 413. It also stressed that regulatory takings analysis "depends on the particular facts" of each case and that "[t]he greatest weight is given to the judgment of the legislature." *Id.* The *Mahon* Court stressed that the surface owners had knowingly acquired the surface rights without the mineral estate and had expressly assumed the risk that mining might damage their property. *See id.* at 412. The Court was unwilling to uphold legislation that reversed the outcome of this specific transaction between the coal company and those "so short sighted as to acquire only surface rights without the right of support" (*id.* at 415), concluding that where persons assume such risks, the government cannot subsequently transfer to them more property than they originally saw fit to purchase. *Id.* at 416. Most important, the *Mahon* Court used actual appropriation as a point of reference to determine whether the challenged land use control effected a taking. *Id.* at 414-15.

To the surprise of many, in 1987 the Supreme Court described large portions of *Mahon* as a mere "advisory opinion." *Keystone Bituminous Coal Ass'n v. DeBenedictis*, 480 U.S. 470, 484 (1987). The Court continues to cite *Mahon*, however, as the cornerstone of its regulatory takings doctrine. *See City of Monterey v. Del Monte Dunes, Ltd.*, 119 S. Ct. 1624, 1644 (1999).[5]

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[5] One scholar argues that *Mahon* is not a Takings Clause case at all and thus should not be viewed as the genesis and foundation of regulatory takings. *See* Robert

B. Supreme Court Trends in Modern Takings Jurisprudence

For the next 50 years after *Mahon*, the Court gave regulatory takings relatively little attention. Most of the action regarding takings challenges to land use regulation during this timeframe occurred in state court. In 1978, Justice Brennan summarized the status of takings law in *Penn Central Transportation Co. v. New York City*, 438 U.S. 104 (1978). He noted that courts generally relied on several factors, including the economic impact of the regulation, the extent to which the regulation interferes with the claimant's "distinct investment-backed expectations," and the character of the government action. *Id.* at 124. The *Penn Central* Court applied this test to reject a takings challenge to a New York historic preservation law.

The three factors examined in *Penn Central* — economic impact, investment-backed expectations, and the character of the government action — continue to inform the Court's takings jurisprudence. *See Concrete Pipe and Prods., Inc. v. Construction Laborers Pension Trust*, 508 U.S. 602, 643-46 (1987). As discussed in more detail later in this chapter, the Court has supplemented the *Penn Central* factors with two bright-line rules, known as *per se* or categorical rules of takings liability.

During the 1970's and much of the 1980's, the Supreme Court usually ruled for the government in takings cases,[6] with some notable

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Brauneis, *"The Foundation of Our 'Regulatory Takings' Jurisprudence": The Myth and Meaning of Justice Holmes's Opinion in Pennsylvania Coal Co. v. Mahon*, 106 Yale L. J. 613 (1996).

[6] *See* Pennell v. City of San Jose, 485 U.S. 1 (1988); Keystone Bituminous Coal Ass'n v. DeBenedictis, 480 U.S. 470 (1987); FCC v. Florida Power Corp., 480 U.S. 245 (1987); MacDonald, Sommer & Frates v. County of Yolo, 477 U.S. 340 (1986); Connolly v. Pension Benefit Guaranty Corp., 475 U.S. 211 (1986); Williamson County Regional Planning Commission v. Hamilton Bank, 473 U.S. 172 (1985); Ruckelshaus v. Monsanto Co., 467 U.S. 986 (1984); Hodel v. Virginia Surface Mining & Reclamation Ass'n, 452 U.S. 264 (1981); San Diego Gas & Electric Co. v. City of San Diego, 450 U.S. 621 (1981); Agins v. City of Tiburon, 447 U.S. 255 (1980); Andrus v. Allard, 444 U.S. 51 (1979).

exceptions.[7] In the 1990's, the trend reversed to some extent, with the Court generally ruling for the property owner,[8] again with some very significant exceptions.[9]

Several of the recent rulings in favor of takings claimants have received significant attention in the press. These rulings, however, have been narrow and tied to the specific facts of the case, and much of this Handbook is devoted to explaining the limits of these cases. Although modern regulatory takings doctrine departs from the original understanding of the Takings Clause (which was limited to actual expropriations), in important ways it remains connected to the text and the original meaning of the Clause. When the Clause is extended beyond actual expropriations, the Supreme Court generally continues to limit its application to government actions that are the functional equivalent of an expropriation. In other words, there has been no sea change or revolution in the law of regulatory takings in recent years. The idea that the Takings Clause is a significant barrier to reasonable land use planning remains a developer-created myth.

III. Overview of Current Takings Law

Having traced the evolution of takings law, this section outlines the law's current status. Doing so requires a brief explanation of the three categories of takings claims: physical occupation, compelled dedications, and regulatory takings. For each category, we first

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[7] *See* First English Evangelical Lutheran Church v. County of Los Angeles, 482 U.S. 304 (1987); Nollan v. California Coastal Comm'n, 483 U.S. 825 (1987); Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419 (1982).

[8] *See* City of Monterey v. Del Monte Dunes, Ltd., 119 S. Ct. 1624 (1999); Eastern Enters. v. Apfel, 524 U.S. 498 (1998) (plurality); Phillips v. Washington Legal Foundation, 524 U.S. 156 (1998); Suitum v. Tahoe Reg'l Planning Agency, 520 U.S. 725 (1997); Dolan v. City of Tigard, 512 U.S. 374 (1994); Lucas v. South Carolina Coastal Council, 505 U.S. 1003 (1992).

[9] *See Concrete Pipe*, 508 U.S. at 643-46; Yee v. City of Escondido, 503 U.S. 519, 527-31 (1992); Preseault v. Interstate Commerce Comm'n, 494 U.S. 1 (1990).

describe the types of claims placed within the category and then provide an overview of the Supreme Court doctrine developed to evaluate such claims. Mirroring the rest of the Handbook, most of this part discusses regulatory takings because this category encompasses the majority of cases and involves the most complex legal analysis.

A. Physical Occupations and Invasions

1. Types of Cases

The first category of claims involves government-authorized physical occupations and invasions of private property. The government invades or occupies property in a variety of contexts, *e.g.*, where the government dams a river and floods upriver parcels, flies planes low and frequently over private property, or authorizes a cable company to install cable boxes and wires on apartment buildings. Claimants also have mounted physical-invasion challenges (generally without success) where government-protected species intrude on private property, where smoke and fumes drift from a railroad onto a neighboring parcel, and in a variety of other instances.

2. Supreme Court Tests

The Supreme Court frequently finds takings in physical occupation cases because physical occupations and actual expropriations are closely linked. The Framers included the Takings Clause in the Constitution to ensure compensation for landowners when the government actually acquires title to land for public use, *i.e.*, for roads, schools, and other public projects. As the Supreme Court observed in its first physical occupation takings case, it would be a "curious and unsatisfying result" if the government could permanently occupy property, short of demanding title, and thereby avoid the need to compensate a property owner. *Pumpelly*, 80 U.S. (13 Wall.) at 177-78. The Supreme Court views government actions that force property owners to submit to a permanent physical occupation of land

as the functional equivalent of expropriations of land. Under *Loretto v. Teleprompter Manhattan CATV Corp.,* 458 U.S. 419 (1982), and its progeny, such permanent physical occupations are *per se* takings "to the extent of the occupation." *Id.* at 434-35. This consideration of only the affected portion of the property stands in marked contrast to regulatory takings cases in which courts consider the impact of the regulation on the parcel as a whole. *See id.* at 440-41.

Even though the Supreme Court is less tolerant of physical occupations and invasions than regulations of use, such occupations are not always takings. The *Loretto* Court termed its *per se* category "very narrow" and applied it only to forced, permanent physical invasions. Courts judge other occupations and invasions by reference to permanent occupations. Lengthy occupations or frequent and continuous invasions are often deemed takings; short-lived occupations and infrequent invasions are generally not. We discuss *Loretto* and other physical invasion takings claims in detail in Chapter 10.

B. Required Dedications and Other Development Conditions

1. Types of Cases

The second category of takings claims consists of cases challenging conditions the government imposes in exchange for issuing development permits. In an era in which local governments are increasingly constrained in the permissible methods of raising revenues, communities rely increasingly on dedications (requirements that landowners grant an easement or a portion of their property to the public), impact fees, and similar charges and conditions. These development charges allow local governments to pass on to developers and new residents or businesses a portion of the infrastructure and other costs associated with their development.

2. Supreme Court Tests

To date, the Supreme Court has addressed only claims challenging required dedications of land. In such cases, the government has used its regulatory power to approve or deny a development permit in order to obtain from the landowner the authority to occupy a portion of the landowner's property. Required dedications thus occupy a middle ground between category one (physical occupations) and category three (use restrictions). The hybrid nature of these claims has led to unique treatment by the Court.

The Supreme Court addressed dedication requirements in *Nollan v. California Coastal Commission*, 483 U.S. 825 (1987), and *Dolan v. City of Tigard,* 512 U.S. 374 (1994). Under the *Nollan* essential nexus test, to justify a permit dedication, government counsel must show that the proposed development causes or exacerbates a community problem and that the dedication demanded would help solve this problem. *See Nollan*, 483 U.S. at 836. Under *Dolan,* government counsel must demonstrate that the dedication is "roughly proportional" to the problem created by the development: while "[n]o precise mathematical calculation is required . . . the city must make some sort of individualized determination that the required dedication is related both in nature and extent to the impact of the proposed development." *Dolan*, 512 U.S. at 391. Together, these cases hold that dedication requirements are permissible only if they are logically related to and roughly proportional to the impacts on the community that were created or exacerbated by the development.

As summarized in Chapter 11, developers have sought expansion of the *Nollan/Dolan* test to virtually every type of land use regulation. However, *Nollan, Dolan* and subsequent cases, including last term's decision in *City of Monterey v. Del Monte Dunes, Ltd.,* 119 S. Ct. 1624 (1999), provide compelling arguments for limiting application of the nexus and rough proportionality tests to required dedications of land. These tests have no application in cases where a local government simply denies a requested permit. Nor should

courts apply *Nollan* and *Dolan* in evaluating claims challenging impact fees and other non-dedication permit conditions, which should be evaluated under the more deferential tests developed by state courts for evaluating permit conditions.

C. Regulatory Takings

1. Types of Cases

Most takings claimants allege neither physical invasions nor dedications tied to a permit application. Rather, they allege a taking due to a regulatory decision that limits the use of their property. Regulatory takings cases have been a challenge for the courts because regulations do not "take" property at all. Regulatory takings are takings only by analogy. Determining when a regulation "goes too far" and should be declared confiscatory has confounded courts since 1922 when the Supreme Court first recognized the possibility of a "regulatory taking" in *Mahon*.

2. Supreme Court Tests

(a) Parcel-as-a-Whole Rule

The single most important distinction between the Court's treatment of physical occupations and regulatory takings is the application of the affected portion rule to alleged permanent physical occupations and the parcel-as-a-whole rule to claims alleging regulatory takings. The parcel-as-a-whole rule, discussed at greater length in Chapter 6, requires consideration of the entire relevant parcel of property. In *Concrete Pipe,* the Court unanimously affirmed the rule, stating that "a claimant's parcel of property could not first be divided into what was taken and what was left for the purpose of demonstrating the taking of the former to be complete and hence compensable." 508 U.S. at 646. The parcel-as-a-whole rule protects the government from a flood of cases challenging workaday land use

controls such as set-back requirements, height limitations, and similar laws that require landowners to leave a portion of their property undeveloped. As the *Concrete Pipe* Court recognized, "[t]o the extent that any portion of property is taken, that portion is always taken in its entirety." *Id.* In regulatory takings cases, "the relevant question . . . is whether the property taken is all, or only a portion of, the parcel in question." *Id.*

(b) *Lucas v. South Carolina Coastal Council*

In *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992), the Supreme Court established two more bright line rules: (1) the total wipeout takings rule and (2) the background-principles defense.

(1) The Total Wipeout Takings Rule

The *Lucas* Court established what it called a "categorical rule" that regulations rendering land valueless are takings. The Court analogized between extreme regulation of property and physical takings, finding that the "total deprivation of beneficial use is, from the landowner's point of view, the equivalent of a physical appropriation." *See id.* at 1017.

The *Lucas* categorical takings rule is discussed in detail in Chapter 7. As described there, courts should apply *Lucas*'s categorical rule only in the exceedingly rare case where a regulation renders land completely valueless. Where land has remaining uses or the potential for sale to a land speculator or an adjacent property owner, and therefore retains value, *Lucas*'s categorical rule does not apply.

(2) The Background-Principles Defense

The *Lucas* Court also outlined a new and important defense to takings liability. Writing for the Court, Justice Scalia explained that

any takings claim, physical or regulatory, could be defeated by a showing that the "proscribed use interests were not part of [the landowner's] title to begin with." *Id.* at 1027. The Court described this defense as an "antecedent inquiry into the nature of the owner's estate" that looks to "background principles" that were in place at the time a landowner purchased the property. *Id.* at 1027, 1029. Such background principles limit the landowner's title. *See id.* at 1027-29. For example, the *Lucas* Court explained that the government could avoid takings liability for a physical occupation if it could show that the landowner purchased the property subject to a navigational servitude in favor of the government. *See id.* at 1028-29. Similarly, the government may demonstrate that background principles of law defeat a challenge to restrictions on the use of property that would otherwise constitute a taking. *See id.*

The scope of this background-principles inquiry occupies most of Chapter 5. As articulated in that chapter, lower courts since *Lucas* generally have been quite receptive to defenses based on background principles, applying the definition broadly to embrace pre-existing federal, state, and local statutes, common law doctrines such as public trust and custom, and state and local nuisance laws. The background-principle inquiry — which involves a careful review of the law in place at the time the landowner purchased the property — thus has emerged as a critical early task for a government attorney facing a takings challenge.

(c) *Penn Central Transportation Co. v. New York City*

Where a regulatory takings claim does not involve a total wipeout and is not barred by the background-principles defense, it usually is evaluated under *Penn Central.* The Supreme Court identified three factors relevant to the proper analysis of a regulatory takings claim in *Penn Central*: (1) the economic impact of the regulation, (2) the extent the regulation interferes with reasonable,

investment-backed expectations, and (3) the character of the governmental action. *See Penn Central*, 438 U.S. at 124.

(1) Economic Impact of the Regulation

The economic impact of a regulation on the claimant's property frequently determines the outcome of a regulatory takings case. To prevail, the landowner must demonstrate that the challenged regulation has a dramatic impact on the value of the property. While there is no simple mathematical cutoff for determining whether a regulation effects a taking, the cases suggest several rules of thumb. First, the Supreme Court and lower federal courts repeatedly have rejected takings claims even where regulations reduce property value by up to 90%.[10] Second, the Court in *Lucas* suggested that a regulation that reduces a property's value in excess of 95% will sometimes, perhaps even frequently, be considered a taking. *See Lucas,* 505 U.S. at 1019 n.8. These cases suggest that the most difficult takings analysis for courts will be instances where the diminution in value is somewhere between 90% and 95%. This issue is discussed at greater length in Chapter 7.

(2) Investment-backed expectations

A landowner must also show that the challenged government action interferes with an investment-backed expectation to use the property. The claimant bears the burden of showing that the expectations were objectively reasonable; "a mere unilateral expectation or abstract need is not a property interest entitled to

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[10] *See* Village of Euclid v. Ambler Realty Co., 272 U.S. 365, 384 (1926) (upholding 75% diminution in value); Hadacheck v. Sebastian, 239 U.S. 394, 405 (1915) (upholding 92.5% diminution in value from $800,000 to $60,000); *see also Concrete Pipe*, 508 U.S. at 644-46 (rejecting a takings claim based on allegations that an employer's withdrawal liability from a multi-employer pension plan required payments of 46% of shareholder equity, on the grounds that "our cases have long established that mere diminution in the value of property, however serious, is insufficient to demonstrate a taking").

protection." *Webb's Fabulous Pharmacies, Inc. v. Beckwith*, 449 U.S. 155, 161 (1980). Where the claimant cannot show such expectations, the claim should fail. *See Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 1005 (1984) (stating that a lack of interference with reasonable expectations may be "so overwhelming . . . that it disposes of the taking question").

(3) Character of Government Action

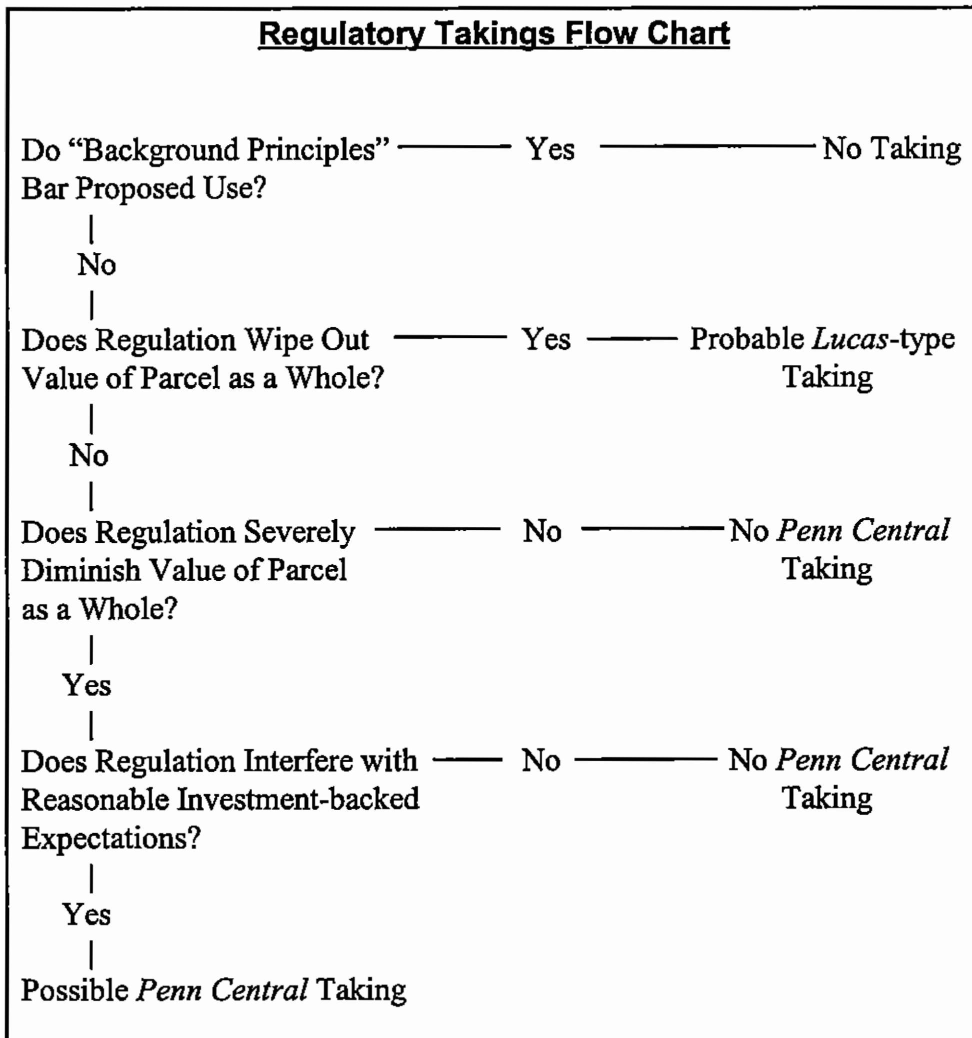
The final *Penn Central* factor concerns the character of the government action. As described above in Category One, if the character of the government action is a permanent occupation, this factor is determinative under *Loretto*. Correspondingly, where the government action is non-invasive, government counsel should argue that this factor weighs in the government's favor.

Although some commentators have suggested that this factor may also have been the doctrinal home of the so-called nuisance exception, as discussed in Chapter 5, *Lucas* effectively replaced the nuisance exception with its "antecedent" inquiry into background principles of law. Nonetheless, harm-prevention rationales continue to resonate strongly with many courts, and government counsel arguing a regulatory takings claim under *Penn Central* should take care to highlight the important public purposes advanced by the regulation, especially those that involve public health and safety.

(d) Regulatory Takings Summary

Government attorneys should start an analysis of a regulatory takings claim with *Lucas*, asking first whether "background principles of law" in place at the time the landowner purchased the property barred the proposed use. Next, government counsel should evaluate whether the claimant has suffered a complete economic wipeout subject to *Lucas's* categorical rule. If the regulation works a complete economic wipeout and the restriction cannot be rooted in background principles of law in place at the time of purchase, most courts would

conclude that a taking has occurred. Conversely, if background principles bar the landowner's proposed use, no taking has occurred. If the claim does not allege a complete economic wipeout and is not eliminated by background principles, most courts would analyze it under the multi-factored analysis of *Penn Central.* To be successful, such claimants generally must demonstrate interference with reasonable, investment-backed expectations and a very severe, near-total diminution in value.



Recommended Reading

Frank I. Michelman, *Property, Utility, and Fairness: Comments on the Ethical Foundations of "Just Compensation" Law*, 80 HARV. L. REV. 1165 (1967).

Frank I. Michelman, *Takings, 1987*, 88 COLUM. L. REV. 1600 (1988).

Joseph L. Sax, *Takings, Private Property and Public Rights*, 81 YALE L. J. 149 (1971).

Joseph L. Sax, *Takings and the Police Power*, 74 YALE L. J. 36 (1964).

Gerald Torres, *Taking and Giving: Police Power, Public Value, and Private Right*, 26 ENVTL. L. 1 (1996).