Through a Glass Clearly: Predicting the Future in Land Use Takings Law

David L. Callies*

I. INTRODUCTION

The subject of takings—the government taking of an interest in real property, either through eminent domain or through the exercise of the police power—has been the subject of continuous litigation for nearly a century. The past ten years have been particularly fruitful, as litigants struggle with the meaning and extent of the Fifth Amendment’s Public Use Clause and the extent to which the overzealous exercise of the police power can sufficiently deprive a landowner of rights in property so that the property has been “taken” by regulation, ever since Justice Holmes opined in Pennsylvania Coal Co. v. Mahon\(^1\) that a regulation that goes “too far” is a constitutionally-proscribed taking. Thus, in the area of physical taking, we have the expansion of public use—use by the public—to include public purpose (Kelo v. City of New London\(^2\) and Hawaii Housing Authority v. Midkiff\(^3\)), leaving very little room for landowner defense unless the physical taking can be proven "pretextual."\(^4\)

But it is in the area of regulatory taking that courts have added exponentially to the common law of takings, after breaking a near half-century of silence following Pennsylvania Coal during which state courts had chipped away at the doctrine nearly rendering it meaningless.\(^5\) Although arguably commencing with its bizarre April Fools Day decision in Village of Belle Terre v. Boraas,\(^6\) the United States Supreme Court fully engaged the regulatory taking doctrine in 1978 with its historic preservation decision in Penn Central

---

* FAICP, Benjamin A. Kudo Professor of Law, William S. Richardson School of Law, The University of Hawai‘i. B.A., Depauw University, J.D., University of Michigan, LL.M., Nottingham University, Life Member, Clare Hall, Cambridge. The author thanks Judge (retired) Peter Buchsbaum, Dwight Merriam, Michael M. Berger, and Ed Sullivan for helpful comments on earlier drafts of this article, and for their able and thorough research assistance, Derek Simon and Ian Wesley-Smith, both second-year law students at the law school.

1. 260 U.S. 393 (1922).
Transportation Co. v. City of New York,\textsuperscript{7} in which it established the doctrine of partial regulatory takings, depending upon the landowner’s economic loss (and in particular the extent of interference with distinct, and later reasonable, investment-backed expectations) and the character of the regulation—regulatory or physical. Fifteen years later, the court established the so-called “per se” or categorical rule on “total” regulatory takings: If a regulation left a landowner with no economically beneficial use, then the regulation must be treated as an exercise of eminent domain, unless the regulation codified the applicable law of nuisance, or a background principle of a state’s law of property such as public trust or customary law.\textsuperscript{8} In between, the Court turned back several regulatory takings challenges on the ground the controversy was not “ripe” and so the Court could not undertake the traditional balancing test called for in Penn Central—a set of rulings that until recently has become a virtually insurmountable barrier to bringing regulatory takings challenges.\textsuperscript{9} Finally, the United States Supreme Court established a “constitutional conditions” doctrine that forbids the application of land development conditions—impact fees and exactions, in-lieu fees, and mandatory dedications of land for things like schools and parks—to a land development project.\textsuperscript{10} This is so regardless of whether the exaction is monetary or an interest in land.\textsuperscript{11}

This article explores some of the recent case law in these areas of takings, both physical and regulatory, and makes some predictions about the direction of takings law, bearing in mind Professor Lawrence Tribe’s admonition that those who attempt to thus use a crystal ball may run the risk of later having to eat ground glass. Based on these trends and the author’s 40 years of commentary, review, and analysis in this ever-fascinating field, I suggest that:

(1) Land development conditions will continue to come under even more strict scrutiny for nexus and proportionality to the problems and needs generated by the development/developer so charged. This is particularly true with respect to affordable, workforce housing exactions—so-called “inclusionary zoning”—where the connection to market-priced housing projects has always been virtually non-existent. Only commercial developments generating a demonstrated need for low-income workers will successfully generate such mandatory housing set-asides.

(2) Courts will continue to be confused by the difference, if any, between legislative and administrative/quasi-judicial exactions in the application of Nollan-Dollan-Koontz. If this last unresolved land development conditions

\textsuperscript{7} 438 U.S. 104 (1978).
issue reaches the United States Supreme Court, the Court is likely to find the distinction irrelevant.

(3) There will be more use of consensual tools like the development agreement to resolve exaction issues. Such agreements take the exaction issue out of the Nollan-Dolan-Koontz context altogether.

(4) Until the U.S. Supreme Court re-examines its five-to-four decision in \textit{Kelo}, government—and especially redevelopment agencies—will continue to take private property on the flimsiest of public use premises, despite the temporary lull following the huge public outcry after its 2005 decision. I also predict the Court will soon re-examine that decision when an appropriate case arises.

(5) Courts will continue to wrestle with exceptions to per se government takings liabilities, including so-called “background principles,” such as the public trust doctrine, customary law, and established statutes. Like the nuisance exception, the exceptions will be selectively approved.

(6) It is also virtually certain that government will increasingly endeavor to fit land use regulations under the doctrines of public trust and custom, so as to insulate especially categorical, per se, or total regulatory taking from a compensation remedy.

(7) The Court will cut back the application of its ripeness rule, and particularly its second “state litigation” prong, following the lead of several federal circuit courts which have had quite enough of government regulatory taking and successfully reduce the impact of the ripeness doctrine by emphasizing its prudential—rather than jurisdictional—reach.

(8) The result will be more partial takings cases decided on the merits, but with mixed results for landowners. Finding a partial taking will continue to be a challenge for landowners.

(9) The lowering of the ripeness barrier will likely result in more successful landowner challenges when local regulation deprives a landowner of all economically beneficial use, as in open space and preservation districts and classifications. The result will be more conservation easements, whether negotiated or through eminent domain, in order to preserve private property for public enjoyment.

(10) The Court needs to, and will, resolve the so-called “relevant parcel” or denominator issue, both with respect to partial and total regulatory takings.

II. LAND DEVELOPMENT CONDITIONS AFTER KOONTZ

Academic literature has been filled with comment, criticism, and prediction following the summer 2013 \textit{Koontz} decision. Virtually all land development triggers a need for public facilities to serve that development, immediately implicating the Nollan-Dolan (and now Koontz) requirements of nexus and proportionality: the close and proportionate connection to the
proposed development of the impact fee, exaction, or dedication of land required as a condition for government development approval. What follows is a summary of what Koontz adds (and what it does not add) to the Nollan-Dolan nexus and proportionality requirements.

A. Ramifications of Koontz

On June 25, 2013, the U.S. Supreme Court rendered its long-anticipated decision in Koontz v. St. Johns River Water Management District, ending the considerable speculation about what the Court would do after taking the case up for review. Writing for a five-Justice majority, Justice Alito held that: (1) a government’s demand for money or land from a land use permit applicant must satisfy the nexus and proportionality requirements of the Court’s previous Nollan-Dolan requirements even when it denies the permit, and (2) the government’s demand for property from a land use permit applicant must satisfy these Nollan-Dolan requirements even if the demand is for money—like impact fees, in-lieu fees, and other monetary exactions—rather than a dedication of an interest in real property, like an easement. What the Supreme Court clearly decided:

(1) Questions of Timing. After Koontz, state and local governments will obviously be required to consider both nexus and proportionality when placing conditions on land development permits, whether or not such conditions require the dedication of interests in land or exactions of money. This is true whether the condition is precedent (agree to the condition, or no permit) or subsequent (here’s your permit, but only on the following conditions). This is the one portion of the holding upon which the Court was unanimous. How this will play out in practice is not yet clear. Some commentators suggest either that state and local governments will simply stop negotiating entirely on land use permitting matters or will leave it to a landowner to offer sweeteners like workforce housing, oversized water and sewer pipes, and community recreational facilities to facilitate their permitting and rezoning requests. The latter option would convert the land development permitting process into something akin to Virginia’s infamous “proffer” system, which virtually requires such offers.

(2) Mitigation Fees. As the facts of Koontz dealt with a mitigation fee

---

and the Court specifically rejected the distinction between money and real property interests in applying the *Nollan-Dolan* nexus and proportionality standards, the decision clearly applies to mitigation fees charged to ameliorate the environmental effects of a proposed land development project. Proportionality in particular will be important here. There will be more use of such fees in place of land dedication requirements because the former will be more easily constitutionally-tailored to a development-driven need. Thus, for example, where a landowner is converting two acres to dry land, the fee should compensate for no more than those two acres.\textsuperscript{15} Requiring a fee for the creation of a multi-acre wetland park would almost certainly be disproportionate.

(3) **In-Lieu Fees.** Clearly the nexus and proportionality requirements of *Nollan* and *Dolan* are now applicable to fees often charged by local government in lieu of a dedication of a property interest per se. The Court specifically singled out such in-lieu fees in its opinion. Thus, for example, where local government charges a road-building fee as a condition for approving a residential subdivision rather than requiring dedication of road and street easements, the fee, like the easements, will have to bear a nexus to the need for roads generated by the subdivision, and the fee will have to be proportional to that generated need as well.

(4) **Impact Fees.** The decision by its terms also applies to impact fees imposed by government to pay for public facilities such as schools, public parks, and wastewater treatment plants. There is no reasonable distinction among in-lieu fees, mitigation fees, and impact fees, since all are fees charged by government as a condition for land development approval (as distinguished from charges such as user fees and taxes, discussed below). All are embraced by the Court’s term “monetary exaction,” and thus all are now subject to the nexus and proportionality requirements of *Nollan* and *Dolan*.

(5) **Other “Exactions” vs. Taxes and User Fees.** The dissent in *Koontz* makes much of the confusion between impact fees, on the one hand, and property taxes and user fees, on the other, that will become more significant as a result of the decision. However, as the Court majority rightly observes, the two are fundamentally different and based on fundamentally different legal theories. Land development conditions such as impact fees and other monetary exactions find their authority and roots in government exercise of the police power. Property taxes, on the other hand, are rooted in government authority to raise revenue—the power to tax, which requires no demonstration of nexus and proportionality to any activity by the taxpayer. User fees are merely charges levied on users for services rendered by the charging government, like building permit fees. While it is always conceivable that the decision could be interpreted as an attempt to apply intermediate scrutiny to all public finance

\textsuperscript{15} Jessica Owley, *Late to the Game: Koontz and whether you can have a takings claim without an actual takings*, LAND USE PROF BLOG (July 1, 2013), available at http://lawprofessors.typepad.com/land_use
decisions, there has been no such broader scrutiny in the twenty-seven states already using stricter, intermediate scrutiny for monetary exactions. The dissent is probably better read as a concern that the distinction cannot be made on the ground and that confusion will reign about whether taxes and fees are also subject to stricter scrutiny. On the other hand, perhaps the dissent would like to subject all public finance to stricter scrutiny and is using the _Koontz_ dissent as a vehicle for commencing just that.\(^\text{16}\)

(6) Legislative vs. Non-Legislative Conditions. A key remaining issue with respect to land development conditions is whether different standards apply if the land development condition is legislatively, rather than administratively or quasi-judicially, imposed. While at least one sitting Justice on the Court has opined in a certiorari petition denial dissent that there is no defensible difference, other judges have suggested that deference to legislative determinations should lower the level of scrutiny applied to such legislative exactions as compared with administrative or quasi-judicial, one-off exactions.

The Court has not yet addressed the question of whether _Nollan, Dolan_, and now _Koontz_ apply to these more generalized types of exactions—in fact, it has expressly distinguished them. For example, Chief Justice Rehnquist’s opinion for the Court in _Dolan_ draws a sharp line between “essentially legislative determinations classifying entire areas of the city” and “an adjudicative decision to condition petitioner’s application for a building permit on an individual parcel.”\(^\text{17}\) The Court has had no occasion to decide whether the latter category of cases also requires review under the “essential nexus” and “rough proportionality” tests of _Nollan_ and _Dolan_. Until it reaches this question, it is likely that government entities will endeavor to adopt more generalized exactions that look like legislation. These government bodies will also try to persuade courts that exactions that are actually challenged by landowners are more legislative in nature than adjudicative, and thus not subject to the heightened _Nollan-Dolan_ standard.

The Court in _Koontz_ did, however, suggest that it was aware of this distinction and attached some significance to it. The opinion notes that _Nollan_ and _Dolan_ apply “when [property] owners apply for land-use permits” and acknowledges that owners “are especially vulnerable to [this] type of coercion” during the permitting process.\(^\text{18}\) It closes by noting “the special vulnerability


\(^{17}\) _Dolan_ v. City of Tigard, 512 U.S. 374, 385 (1994); see also _Lingle_ v. _Chevron U.S.A. Inc._, 544 U.S. 528, 546 (2005) (“Both _Nollan_ and _Dolan_ involved Fifth Amendment takings challenges to adjudicative land-use exactions—specifically, government demands that a landowner dedicate an easement allowing public access to her property as a condition of obtaining a development permit.”). Justice Kagan, in her _Koontz_ dissent, seemed uncertain of the Court’s present view on this point, noting, “[m]aybe today’s majority accepts that distinction; or then again, maybe not.” _Koontz_, 133 S. Ct. at 2608 (Kagan, J., dissenting).

\(^{18}\) _Koontz_, 133 S. Ct. at 2594.
of land use permit applicants to extortionate demands for money." 19 This language is not, of course, conclusive. 20

There is a split of authority in the lower courts as to whether to apply the Nollan and Dolan tests to legislative determinations. 21 In his dissent to the denial of certiorari in Parking Association of Georgia, Inc. v. City of Atlanta, 22 Justice Thomas noted that "[t]he lower courts are in conflict over whether Dolan's test for property regulation should be applied in cases where the alleged taking occurs through an Act of the legislature." 23 In Dolan where the Court added a second requirement to evaluating the constitutionality of governmental exactions, it left unclear what distinction, if any, exists between adjudicative and legislative exactions.

While the Court has not conclusively settled the issue of whether legislative exactions are subject to Nollan-Dolan analysis, many courts have ruled that the Dolan test does not apply to legislative decisions. For instance, in Home Builders Association of Central Arizona v. City of Scottsdale, 24 the Supreme Court of Arizona held that "[b]ecause the Scottsdale case involves a generally applicable legislative decision by the city, the court of appeals thought Dolan did not apply. We agree, though the question has not been settled by the Supreme Court." 25 The Supreme Court of Georgia adopted similar reasoning in rejecting a Dolan analysis of a legislatively enacted barrier and landscaping zoning requirement. 26 In Krupp v. Breckenridge Sanitation District, 27 the Supreme Court of Colorado also held that the Nollan-Dolan test did not apply, because the impact fee exacted was based on legislation. 28 In Ehrlich v. City of Culver City, 29 a case often cited on these issues, the Supreme Court of California noted that:

19. Id. at 2603.
20. Some state courts have been more willing to treat exactions found in legislation more like ad hoc administrative exactions. For example, the Texas Supreme Court has stated: We are not convinced. While we recognize that an ad hoc decision is more likely to constitute a taking than general legislation, we think it entirely possible that the government could "gang up" on particular groups to force extractions that a majority of constituents would not only tolerate but applaud, so long as burdens they would otherwise bear were shifted to others.
23. Parking Ass'n of Ga., Inc., 515 U.S. at 1117.
25. Id. at 1000.
27. 19 P.3d 687 (Colo. 2001).
28. Id. at 695-96.
it is not at all clear that the rationale (and the heightened standard of scrutiny) of Nollan and Dolan applies to cases in which the exaction takes the form of a generally applicable development fee or assessment—cases in which the courts have deferred to legislative and political processes to formulate “public program[s] adjusting the benefits and burdens of economic life to promote the common good.”

Other jurisdictions, however, have applied the Nollan-Dolan test in the context of legislative exactions, both physical and monetary. In Schultz v. City of Grants Pass, the Oregon Court of Appeals applied the Dolan test to a city ordinance requiring the dedication of rights-of-way for street widening purposes. The court reasoned that:

the character of the restriction remains the type that is subject to the analysis in Dolan. In drawing its distinction between the legislative land use decisions that are entitled to a presumption of validity and the exactions that are not, the Supreme Court noted that what triggers the heightened scrutiny of exactions is the fact that they are “not simply a limitation on the use” to which an owner may put his or her property, but rather a requirement that the owner deed portions of the property to the local government.

In Dakota, Minnesota & Eastern Railroad v. South Dakota, the United States District Court for the District of South Dakota considered a state statute requiring railroad companies to dedicate an easement in order to obtain development permits. The court held that the legislative nature of the exaction “does not mean that a regulatory taking analysis is the wrong framework for this case.”

Finally, Justice Thomas, in his dissent from the Court’s denial of certiorari in Parking Association of Georgia v. City of Atlanta noted above, questioned the legislative/adjudicative distinction in the context of exactions:

It is hardly surprising that some courts have applied Dolan’s rough proportionality test even when considering a legislative enactment. It is not clear why the existence of a taking should turn on the type of governmental entity responsible for the taking. A city council can take property just as well as a planning commission can. Moreover, the general applicability of the ordinance

32. Id.; see also J.C. Reeves Corp. v. Clackamas Cnty., 887 P.2d 360 (Or. Ct. App. 1994).
33. Schultz, 884 P.2d at 573, (citing Dolan v. City of Tigard, 512 U.S. 374, 385 (1994)).
34. 236 F. Supp. 2d 989 (D.S.D. 2002), aff’d in part, 362 F.3d 512 (8th Cir. 2004).
35. Id. at 1026.
36. Sparks v. Douglas Cnty., 904 P.2d 738 (Wash. 1995) (en banc) (holding a road dedication requirement reviewable under Dolan); Amoco Oil Co. v. Vill. of Schaumburg, 661 N.E.2d 380 (Ill. App. Ct. 1995) (applying Nollan-Dolan analysis to a legislative land dedication requirement); see also Town of Flower Mound v. Stafford Estates, L.P., 135 S.W.3d 620, 641 (Tex. 2004) (suggesting, without so holding, that the court also favors applying the Nollan-Dolan test to legislatively-imposed exactions). In Town of Flower Mound the court stated that:

We think that the Town’s argument, and the few courts that have accepted it, make too much of the Supreme Court’s distinction in Dolan. By the same token, we need not risk error in the opposite direction by undertaking to decide here in the abstract whether the Dolan standard should apply to all ‘legislative’ exactions—whatever that really means—imposed as a condition of development.

Id.
should not be relevant in a takings analysis. . . . The distinction between sweeping legislative takings and particularized administrative takings appears to be a distinction without a constitutional difference. 37

One repercussion—implicit in the Court’s opinion and raised squarely by the dissent and by the Florida Supreme Court 38—is whether Koontz increases the incentives for municipal entities to deny requests for permits outright rather than negotiate with applicants. All of the Justices appear to agree that the St. Johns River Water Management District would not have faced the heightened standard of Nollan and Dolan, if it had simply denied Koontz’s permit application outright. 39 If government bodies therefore become unwilling to negotiate, then Koontz will generate a “lose-lose” outcome: Landowners willing to trade away a property right (or money) in exchange for a permit will be unable to reach that agreement with government bodies otherwise willing to issue a permit in exchange for the owner’s voluntary relinquishment of a property right. A desirable exchange, benefiting the landowner, the government entity, and presumably the greater community, will fail to occur because of the government’s fear that its offer, even if rejected, will attract the heightened scrutiny that Koontz now requires.

(7) Decisions Post-Koontz. While several courts have rendered land development conditions opinions following Koontz, an appellate court has yet to be confronted with a question squarely challenging any of Koontz’s significant holdings: that in the land development context (1) Nollan-Dolan apply to fees as well as interests in property, (2) Nollan-Dolan apply even if the permit is ultimately denied, or (3) that there is no distinction between conditions precedent and subsequent.

Koontz has been often cited for its restatement of the Supreme Court’s

38. The Court raises this issue somewhat obliquely, noting, “[e]ven if respondent would have been entirely within its rights in denying the permit for some other reason, that greater authority does not imply a lesser power to condition permit approval on petitioner’s forfeiture of his constitutional rights.” Id. at 2596. The dissent is more direct, with Justice Kagan stating, “[i]f a local government risked a lawsuit every time it made a suggestion to an applicant about how to meet permitting criteria, it would cease to do so; indeed, the government might desist altogether from communicating with applicants.” Id. at 2610 (Kagan, J., dissenting). She continues by observing, “if each idea or proposal offered in the back-and-forth of reconciling diverse interests . . . triggered Nollan-Dolan scrutiny . . . no local government official with a decent lawyer would have a conversation with a developer.” Id. at 2610 (Kagan, J., dissenting). The Florida Supreme Court also raised this concern: [A]gencies will opt to simply deny permits outright without discussion or negotiation rather than risk the crushing costs of litigation. Property owners will have no opportunity to amend their applications or discuss mitigation options because the regulatory entity will be unwilling to subject itself to potential liability. Land development in certain areas of Florida would come to a standstill. St. Johns River Water Mgmt. Dist. v. Koontz, 77 So. 3d 1220, 1231 (Fla. 2011).

The rule applied in Dolan . . . was not designed to address, and is not readily applicable to, the much different questions arising where, as here, the landowner’s challenge is based not on excessive exactions but on denial of development. We believe, accordingly, that the rough-proportionality test of Dolan is inapposite to a case such as this one.
unconstitutional conditions doctrine. For example, in *Powell v. County of Humboldt,* the Court of Appeals of California relied upon *Koontz*'s reiteration (in *Lingle v. Chevron USA, Inc.*) "that the unconstitutional conditions doctrine 'protects the Fifth Amendment right to just compensation for property the government takes when owners apply for land-use permits.'" The case resulted from a landowner's challenge of the constitutionality of a county general plan requirement that they provide an aircraft overflight easement as a condition for obtaining a building permit, asserting that such requirement constituted a taking of their property without just compensation. The court held that the easement requirement would not constitute a total taking under *Lucas v. South Carolina Coastal Council,* a permanent physical invasion under *Loretto v. Teleprompter Manhattan CATV Corp.,* or a partial taking under *Penn Central,* or a permanent physical invasion under *Loretto v. Teleprompter Manhattan CATV Corp.* As a result, the court rejected the landowners' takings claim for its failure to satisfy the threshold determination that the condition would rise to the level of a compensable taking under the Fifth Amendment if it had occurred outside of the permitting process.

In *Horne v. United States Department of Agriculture,* the Ninth Circuit Court of Appeals held that a farmer, who was deemed to have violated a marketing order and was subsequently fined, could bring a takings claim subject to *Nolan-Dollan* analysis. The court reasoned that, although imposition of penalties and fines does not run afoul of the Taking Clause, the penalties in *Horne* were directly linked to a specific governmental action—the reserve requirement—which the Hornes alleged constituted a taking. As a result, the court found *Koontz* to be instructive because it addresses the issue of how to analyze a takings claim when a monetary exaction, rather than a specific piece of property, is subject to the claim. The court ultimately concluded that the reserve requirement had both a sufficient nexus and proportionality and therefore was not a taking.

In *Moongate Water Co. v. City of Las Cruces,* the New Mexico Court of Appeals rejected a landowner's argument that, under *Koontz,* awarding costs to the government after a failed inverse condemnation challenge "impermissibly
chills a property owner’s exercise of the right to seek just compensation for a claimed taking of his or her property." Moongate had brought a regulatory taking action challenging the City’s annexation of several undeveloped tracts of land, which removed the tracts from Moongate’s certified service area, bringing them within an area the city had committed itself to servicing. After the Supreme Court of New Mexico held that Moongate’s loss of the right to serve was not a compensable taking, the City was awarded costs. The sole question before the Court of Appeals was “whether the Eminent Domain Code . . . permits costs to be taxed against a property owner who exercises the constitutional or statutory right to seek just compensation for a taking of private property.” In answering the question in the affirmative and distinguishing the case at bar from Koontz, the court observed that Koontz “was clearly concerned with coercive and ‘extortionate’ government conduct in the context of land-use permitting” and that the case before it was simply a question about “whether a prevailing defendant in an inverse condemnation action may recover its litigation costs pursuant to a rule of procedure expressly incorporated into the statute that governs those proceedings.”

Courts have cited Koontz for its restatement of the Supreme Court’s position that “it is beyond dispute that ‘[t]axes and user fees . . . are not takings’” and Koontz therefore “does not affect the ability of governments to impose property taxes, user fees, and similar laws and regulations that may impose financial burdens on property owners.” Also relevant to the Court’s discussion on taxes, Koontz has been relied upon for the Court’s remarks that “we have repeatedly found takings where the government, by confiscating financial obligations, achieved a result that could have been obtained by imposing a tax.”

Courts have also cited Koontz for a variety of other reasons not specifically related to land development condition, such as the continued strength of private property rights under the federal constitution, and that water districts are among the government entities from which the takings clause is designed to protect citizens.

49. Id. at 733.
50. Id. at 728.
51. Id. at 733.
52. See Hotze v. Sebelius, No. 4:13-CV-01318, 2014 WL 109407, at *13 (S.D. Tex. Jan. 10, 2014) (rejecting employer and employee’s challenge of the Patient Protection and Affordable Care Act (ACA) mandate as a taking on the grounds that the Supreme Court already determined that the mandate constituted a tax and therefore it was not a taking.); see also Russo v. Township of Plumsted, 2014 WL 3459066, at *8 (2014); Fitchburg Gas & Elec. Light Co. v. Department Of Public Utilities, 7 N.E.3d 1045, 1055 (Mass. 2014).
53. Cerajeski v. Zoeller, 735 F.3d 577, 580 (7th Cir. 2013).
B. Development by Agreement

A way out of the constitutional peril in which government finds itself over land development conditions after Koontz is the development agreement. Indeed, there is evidence such agreements are likely to see more use. Development agreements are essentially statutorily-authorized bilateral constraints between local governments and landowners for the guidance of a multiphase land development project. Authorized by statute in thirteen states—most prominently Hawaii and California—the development agreement is designed to accomplish several purposes:

1. Permit local government to require public facilities and improvements beyond those that it may legally require as generated by a proposed land development project.

2. Permit local government greater flexibility in regulating large, multiphase projects extending over many years.

3. Strengthen the public planning process and encourage public and private participation in comprehensive planning.

4. Reduce the economic cost of development and allow for the orderly planning of public facilities and services and the allocation of costs.

For example, these and other public purposes are all set out in Hawaii’s Development Agreement Statute which, according to its purpose clause, finds that:

The lack of certainty in the development process can result in a waste of resources, escalate the cost of housing and other development to the consumer, and discourage investment in and commitment to comprehensive planning. Predictability would encourage maximum efficient utilization of resources at the least economic cost to the public.

All of this is due to the increasing sophistication and number of land use regulations and the expenditure of “considerable sums of money” in the land development approval process. Together with the opinion of the Hawaii Supreme Court in County of Kauai v. Pacific Standard Life Insurance Co., (colloquially known as the Nukolii case), it is these reasons that persuaded the Hawaii State Legislature in the mid-1980s to make the above findings and pass a development agreement statute.

Hawaii is far from alone in enacting such laws in response to local government need for public facilities guarantees and landowner need for a measure of legally vested rights. In 1980, California passed a similar development agreements statute in response to its own state Supreme Court

58. Id. § 46-121 (2014).
59. 653 P.2d 766 (Haw. 1982). The Court made it difficult for a landowner to obtain a legal right to proceed with a project without expending vast sums of money before obtaining a “last discretionary permit” for land development. Id. at 775.
holding that a landowner lacked vested rights even after spending millions of dollars in land improvements. 60 So popular is the development agreement as a vehicle for guiding planning and development, particularly of multi-stage projects, that by the early 1990s over half the local governments in California had negotiated and executed more than 700 such agreements. 61 Moreover, not a single reported case has found fault with a development agreement. Indeed, it was not until 2000 that California courts were confronted with a direct challenge to such statutorily authorized development agreements, and a court of appeals soundly upheld them. 62 Virtually all commentary on development agreements is uniformly positive, from its early inception 63 to the present. 64

C. Mandatory Affordable Housing Conditions: A Subset of Koontz

Because linkage fees for affordable or workforce housing are a form of exaction, they are subject to the "essential nexus" takings test of Nollan. 65 Under Nollan, "a permit condition that serves the same legitimate police-power purpose as a refusal to issue the permit should not be found to be a taking if the refusal to issue the permit would not constitute a taking." 66 In addition, under Nollan, the government bears the burden of proving this nexus. 67 Linkage fees satisfy this test "only if the municipality can show that development contributes to the housing problem" 68 the linkage exaction is intended to remedy. 69

Most attempts at mandatory set-asides suffer from several defects. First, they often "exact" the workforce or affordable housing increments at premature and unconstitutional stages in the land development process: rezoning. The

---

66. Nollan, 483 U.S. at 836 (emphasis added).
68. DANIEL R. MANDELKER, LAND USE LAW, § 9.23 (5th ed. 2003). A "housing problem" is the typical interest which the counties of Hawai'i identify as a legitimate state interest in their ordinances. See, e.g., MAUl, HAW., CODE § 2.94.010 (2007) ("The council finds that there is a critical shortage of affordable housing in the county."); HAWAI'I, HAW., CODE § 11-2(5) (2010) (setting forth the objective of requiring "large resort and industrial enterprises to address related affordable housing needs as a condition of rezoning approvals, based upon current economic and housing conditions"). In Association of Owners v. City and Cnty of Honolulu, the Intermediate Court of Appeals of Hawai'i acknowledged the legitimacy of this interest in the context of the challenge to a condominium declaration, stating that "affordable housing and public parking for downtown Honolulu were important to the welfare of the community." 742 P.2d 974, 985 (Haw. Ct. App. 1987).
69. MANDELKER, supra note 68, at § 9.23.
premise upon which any and all legal land development conditions—exactions, dedications, impact fees, in lieu fees—rests is that they are development driven; the contemplated project will require public facilities for which the landowner or developer must contribute a fair share.

It is generally agreed that the law applicable to impact fees, exactions, and in lieu fees, as well as to compulsory dedications, is similar, given that they all represent land development conditions levied at some point in the land development process, such as subdivision plat approval, shoreline management permit application, building permit application, occupancy permit application, or utility connection.%

Rezoning, while it may be a necessary precedent to land use and development, neither creates nor drives the need for public facilities, including affordable housing. It is therefore unconstitutional to require exactions of any kind as a condition for change of use by means of zoning map amendments (rezoning):

Finally, we note again that such land development conditions—whether dedications, exactions, or impact fees—are development driven. Without a demonstrable and relatively immediate need for such facilities it is unconstitutional to "charge" them. Therefore, levying such land development conditions on rezoning alone is almost certainly unconstitutional. The fees and other conditions should be levied or charged at some development permit or subdivision approval step, rather than as conditions for land reclassification.

Second, unless the local government can demonstrate a clear rational and proportional nexus between market price development and the imposition of below-market cost housing set-asides, it may not require these set-asides at any stage in the land development process. What scant precedent exists for imposing such exactions on residential developments does so only when the local government requiring such exactions provides sufficient incentive to offset all or a substantial portion of the cost of the mandatory affordable housing set-asides. As to the imposition of such costs on non-residential development, the local government must demonstrate that the development generates a need for such housing, generally of the workforce variety, and that the amount to be set aside is proportionate to that need. As one commentator recently noted in the commercial housing set-aside context:

A number of cities have adopted exaction programs that require downtown office and commercial developers to provide housing for lower-income groups or contribute to a municipal fund for the construction of such housing. [Such] programs satisfy the nexus test only if the municipality can show that downtown development contributes to the housing problem the linkage exaction is intended to remedy.

As previously noted, Nollan's nexus test, or a close equivalent, applies to

70. Callies, supra note 64, at 6 (emphasis added); see also Mandelker, supra note 68, at § 9.11.
72. Mandelker, supra note 68, at § 9.23 (emphasis added).
linkage fees. For example, in *Commercial Builders of Northern California v. City of Sacramento*, the Ninth Circuit Court of Appeals held that an ordinance, which imposed a linkage “fee in connection with the issuance of permits for nonresidential development of the type that will generate jobs,” (in other words, a workforce affordable housing requirement) was constitutional under *Nollan*.

Plaintiffs challenged the ordinance directly on *Nollan* grounds: lack of nexus or connection between the development and the affordable housing condition. First, the court addressed the holding of *Nollan*: that where there is no evidence of a nexus between the development and the problem that the exaction seeks to address, the exaction cannot be upheld.

The court then explained that “the [o]rdinance was implemented only after a detailed study revealed a substantial connection between development and the problem to be addressed.”

The Court related at some length what the City of Sacramento did to establish the “substantial connection between the development and the problem” of affordable housing.

The study estimated the percentage of new workers in the developments that would qualify as low-income workers and would require housing. The study also calculated fees for development. Also as instructed, however, in the interest of erring on the side of conservatism in exacting the fees, it reduced the final calculation by about one-half. Based upon this study, the City of Sacramento enacted the Housing Trust Fund Ordinance [which included the finding that nonresidential development is a major factor in attracting new employees to the region] and that the influx of new employees creates a need for additional housing in the City. Pursuant to these findings, the Ordinance imposes a fee in connection with the issuance of permits for nonresidential development of the type that will generate jobs.

Consequently, the court found “that the nexus between the fee provision here at issue, designed to further the city’s legitimate interest in housing, and the burdens caused by commercial development is sufficient to pass constitutional muster.”

Even courts that decline to apply heightened scrutiny to legislatively imposed fees in the affordable housing context nonetheless apply some form of *Nollan*’s essential nexus test. For instance, in *San Remo Hotel L.P. v. City and...*
County of San Francisco, although the California Supreme Court reaffirmed that legislatively imposed, ministerial impact fees are not subject to the tests of Nollan-Dolan, the court nonetheless required that there "be a 'reasonable relationship' between the fee and the deleterious impacts for mitigation of which the fee is collected." Similarly, in Holmdel Builders Association v. Township of Holmdel, even though the Supreme Court of New Jersey concluded that legislative fees are not subject to the heightened scrutiny of its "but-for," "rational-nexus" test, it still required some relationship between the development and the harm caused. The court essentially explained that the "relationship between the private activity that gives rise to the exaction and the public activity to which it is applied," must be "founded on [an] actual, albeit indirect and general, impact."

The California Court of Appeals echoed the decision in San Remo by denying the Nollan-Dolan strict scrutiny test to a legislatively enacted ordinance but still requiring a reasonable relationship between the ordinance’s means and ends. In Building Industrial Association of Central California v. City of Patterson, the city entered into a development agreement that provided for an affordable housing in-lieu fee of $734 per market rate unit to be paid by the developer to the city with a caveat that allowed for a "reasonably justified" increase in the fee based on the findings of an updated affordable housing fee analysis. In accordance with the updated analysis, the city raised the affordable housing fee from $734 to a whopping $20,946 per market rate unit. The court held that the development agreement’s increased affordable housing in-lieu fee was not "reasonably justified" because the fee had no reasonable relationship to the "deleterious public impact" the planned subdivision would have on affordable housing.

In developing the affordable housing in-lieu fee, the city examined subsidies that would bridge the affordability gap between moderate-, low-, and very low-income households and the price of market rate units. The city calculated the total subsidy that would be required to bridge the affordability gap based on the requirement of 642 units of affordable housing allocated to the city by the 2001 to 2002 Regional Housing Needs Assessment for Stanislaus

81. 41 P.3d 87 (Cal. 2002).
82. Id. at 102–03.
83. Id. at 103.
85. Id. at 288.
86. Id.
88. 90 Cal. Rptr. 3d 63 (Cal. Ct. App. 2009).
89. Id. at 66.
90. Id. at 65.
91. Id. at 65, 72. "The level of constitutional scrutiny applied by the court in San Remo must be applied to City's affordable housing in-lieu fee and is one of the legal requirements incorporated into the Development Agreement." Id. at 73.
County. This total subsidy of $73.5 million was spread over the 3,507 unentitled units left to be constructed according to the city’s general plan. Although this calculation has a direct relationship to the city’s overall need for affordable housing, it has no relationship to the effects of a new development on that need.

While the court never comments on the constitutionality of the original fee, in concluding that the increased fee violated the development agreement, the court clearly finds that even outside of the development agreement context, the new in-lieu housing fee is impermissible; “the fee calculations . . . do not support a finding that the fees to be borne by Developer’s project bore any reasonable relationship to any deleterious impact associated with the project.”

Only one court has rejected the application of either a nexus or reasonable relationship test. In California Building Industry Association v. City of San Jose, the California Court of Appeals overturned the trial court, which had applied a nexus standard to strike down a mandatory affordable housing requirement imposed by the City on a residential development. According to the Court of Appeals, the standard is whether the housing set-aside requirement was justified under the general welfare clause of the City’s police power—like a traditional zoning ordinance—not whether there was a nexus or reasonable relationship of the housing requirement to any need or problem generated by the market-price housing development. The court looked to California’s Housing Accountability Act, which recognizes lack of housing as a critical problem and requires local government to address regional housing needs through implementing housing elements in a community general plan. The City of San Jose responded by passing the challenged inclusionary housing ordinance, with “incentives” for affordable housing constructed on-site and waivers if there was no reasonable relationship between the impact of the proposed residential development and the affordable housing set-asides required by the ordinance. This case is at odds with City of Patterson and virtually every other case passing on development exactions, where, as discussed above, another California Court of Appeals found no reasonable relationship between a large affordable housing mitigation fee and a market price residential development, and also arguably with the Ninth Circuit’s decision in Commercial Builders, which found such set-asides valid for workforce housing generated by the commercial development. Remarkably, the case does not cite Commercial Builders at all.

In sum, there are practically no instances of courts countenancing naked

---

92. City of Patterson, 90 Cal. Rptr. 3d at 67–68 (discussing where the affordable housing fee would be used as leverage with the federal government to receive grants and loans).
93. Id. at 73–74.
95. See generally City of Patterson, 90 Cal. Rptr. 3d 63.
96. Commercial Builders of N. Cal. v. City of Sacramento, 941 F.2d 872 (9th Cir. 1991).
linkage or affordable housing set-aside requirements on residential developments without substantial bonuses, usually consisting of significant density increases. Indeed, a recent report from nonprofit coalitions on housing in California concludes that most California local governments with inclusionary affordable housing programs provide a range of substantial density bonuses and other advantages to developers who are required to provide affordable housing, and the average percentage of such housing requirements is closer to ten percent, with twenty percent being at the high end of the spectrum. This experience is replicated in surveys of other jurisdictions.

As to workforce housing exactions or set-asides on commercial development, the principal—indeed virtually only—federal case approving such set-asides did so only after the local government requiring such set-asides engaged in thorough and detailed studies of the workforce jobs required and generated by the proposed commercial development, which requirements were then cut in half. If the government wishes to enact such an ordinance mandating affordable housing set-asides or fees on commercial development (not zoning, but actual development), despite evidence of marginal success in actively providing affordable housing, then it should consider the basis upon which the Ninth Circuit Court of Appeals upheld such an ordinance passed by the City of Sacramento and:

1. undertake a detailed study of the precise need for workforce housing;
2. on a project by project basis;
3. calculate the precise fee or set-aside each project requires;
4. cut that fee in half before applying it to a given project; and
5. provide meaningful density bonuses, expedited permitting and grants.

Thus, provided the set-asides or fees are (1) applied to developments which drive a need for affordable housing and (2) set low enough to survive a proportionality challenge, this may then produce a percentage—although likely not a large one—of the affordable, low income, workforce housing needs of the community.

III. CONDEMNATION: EMINENT DOMAIN AND THE PUBLIC USE REQUIREMENT

The U.S. Constitution's public use requirement is virtually always decided in favor of the government in eminent domain challenges, unless the
determination is “pretextual” as was the case in *C. & J. Coupe,*\(^\text{101}\) and noted in Justice Kennedy’s concurrence in *Kelo,* affirming that public use and public purpose are one and the same for government condemnation purposes. Only the value of the condemned property or interest in property remains as a major issue.\(^\text{102}\) The backlash over *Kelo* has been considerable and there is apparently some sentiment on the Court to revisit the public use/public purpose issue.\(^\text{103}\)

### A. Public Use Under *Kelo* v. City of New London

While the definition of public use has not changed significantly in the past twenty years, public perception of that change has. The federal rule, anticipated in *Berman v. Parker,*\(^\text{104}\) was established in *Hawaii Housing Authority* ("HHA") v. *Midkiff,*\(^\text{105}\) and holds that so long as a public use (redefined as public purpose) is conceivable and possible, even if it never comes to pass, federal courts will accept it. The U.S. Supreme Court simply reiterated that rule in the 2005 *Kelo* case, adding that economic revitalization was a sufficient public purpose to justify the taking of a non-blighted single family home under local eminent domain statutes.\(^\text{106}\) A number of state courts had established a more stringent test than the Supreme Court of Connecticut, (which the Court affirmed in *Kelo*), which, of course, the states may do since further protecting property rights beyond the minimum under federal law is a matter for the states, as indeed the Supreme Court noted in *Kelo.* Nevertheless, the decision set off a firestorm of criticism, leading to legislation and constitutional amendments in two-thirds of the states to establish a more strict public purpose test to avoid results such as that in *Kelo.*

### B. The State of the Federal Law on Public Use Before *Kelo:*

*Berman v. Parker and HHA v. Midkiff*

The members of the Court expressed different views on the historical antecedents of public use and how far back to go in deriving an appropriate definition to apply in *Kelo.*\(^\text{107}\) Nevertheless, all (except perhaps Justice


\(^\text{106}\) *Kelo*, 545 U.S. 469 at 469.

\(^\text{107}\) See generally id. Justice Thomas’ dissent included a lengthy historical analysis, which suggests he would have the Court return to the original meaning of the eighteenth century in which most eminent domain cases appear to require actual use by the public. *Id.* at 506–14 (Thomas, J., dissenting). Justice Stevens reads some of the same history quite differently by choosing other cases from that period upon which to rely—which
Thomas) agree that the most relevant precedents are the decisions of the Court in *Berman* and *Midkiff*. In both decisions, the Court wrote expansively about the public use requirement of the Fifth Amendment.

In *Berman*, the Court dealt with the condemnation of a thriving department store contained in a large parcel condemned by a redevelopment agency for the statutory (congressional in this case) purpose of eliminating blight, all in accordance with a required redevelopment plan. Justice Douglas for the majority commenced by observing famously that a community could decide to be attractive as well as safe, and that, in thus justifying eminent domain to accomplish these goals, "[w]e deal, in other words, with what traditionally been known as the police power," a controversial joining of the two powers that has affected definitions of public use ever since by obviating any need for the public to actually use the property condemned so long as it furthered a public purpose. The landowners pointed out that their land would simply be turned over to another private owner. No matter, said Douglas:

> But the means of executing the project are for Congress and Congress alone to determine, once the public purpose has been established. The public end may be as well or better served through an agency of private enterprise than through a department of government—or so the Congress might conclude. We cannot say that public ownership is the sole method of promoting the public purposes of community redevelopment projects.

To the landowners' argument that their particular parcel was unblighted, and that therefore its condemnation violated the Fifth Amendment's Public Use Clause, Justice Douglas responded that if experts concluded the area must be planned as a whole in order to prevent reversion to a slum, so be it. Despite this broad language, many interpreted the decision to apply largely to redevelopment projects, and in particular, those that were well-planned in accordance with clear statutory mandates. Not so after *Midkiff*.

In 1967, the Hawaii State Legislature passed a land reform act, the principal purpose of which was to eliminate a perceived oligopoly in available residential land which was thought to adversely affect the price and availability of housing for its citizens. Eminent domain was the means chosen to solve the problem. The act authorized a state agency—the Hawaii Housing Authority—to condemn the fee simple interest in land, which was leased to individual homeowners, for the purpose of conveying that interest to some other private owner, usually the existing owner’s lessee who owned the house on the land. The main target of the legislation was the Bishop Estate (as it was then

Justice O'Connor also uses in her dissent. *Id.* at 472–90; *id.* at 494–505 (O'Connor, J., dissenting).

109. *Id.* at 32.
110. *Id.* at 31.
111. *Id.* at 33–34.
112. *Id.* at 34–35.
114. *Id.* at 233.
known), a charitable trust created by Princess Bernice Pauahi Bishop, a
descendent of King Kamehameha the Great and whose large landholdings she
eventually inherited. The Estate challenged the Act’s condemnation process as
a taking without the public use required by the U.S. Constitution’s Fifth
Amendment. While the Federal District Court upheld the statute, the Ninth
Circuit Court of Appeals held that the statute essentially provided for a “naked”
transfer from one private individual to another, and therefore lacked the
requisite public use.

In a unanimous decision, the U.S. Supreme Court reversed the Ninth
Circuit, citing Berman for the proposition that once a legislative body had
declared a public purpose, it was not for federal courts to interfere unless that
purpose was “inconceivable” or an “impossibility.” The means were
irrelevant; this was simply a mechanism or process to accomplish the
legislatively declared public purpose. Indeed, it would make no difference, said
Justice O’Connor writing for the Court, if that public purpose never came to
pass, so long as the legislature could reasonably have thought it would when
enacting the statute. Note the opinion frequently uses “public purpose”
rather than “public use.” These words would come back to haunt Justice
O’Connor in Kelo, as appears below.

C. Kelo v. City of New London: Midkiff, Berman and a Requiem for Public
Use

The Court in Kelo simply extended the reasoning in Berman and Midkiff
to the economic revitalization condemnations that are increasingly common
throughout urban areas in the United States. Indeed, the majority was
singularly unimpressed with extreme uses of eminent domain for the purposes
of providing employment and bettering the local tax base as the parties brought
to its attention: “A parade of horribles is especially unpersuasive in this context
since the Takings Clause largely ‘operates as a conditional limitation permitting
the government to do what it wants so long as it pays the charge.’”

The facts in Kelo are straightforward. In order to take advantage of a
substantial private investment in new facilities by Pfizer, Inc., in an
economically depressed area of New London along the Thames River, the City
reactivated the private non-profit New London Development Corporation
(“NLDC”) to assist in planning the area’s economic development.

115. Id. at 234–35.
116. Id. at 235.
117. Id. at 239–40.
118. Id. at 244.
545 (1998)). There are numerous examples of such “horribles.” See Dana Berliner, Public Power, Private
120. Kelo, 545 U.S. at 473–74.
Authorized and aided by grants totaling millions of dollars, NLDC held meetings and eventually "finalized an integrated development plan focused on [ninety] acres of the Fort Trumbull area."\textsuperscript{121} The NLDC successfully negotiated the purchase of most of the real estate in the ninety-acre area, but its negotiations with the owners of fifteen properties failed.\textsuperscript{122} When the NLDC initiated condemnation proceedings, the landowners sued.\textsuperscript{123} Among them was Susette Kelo, who had lived in the Fort Trumbull area since 1997,\textsuperscript{124} and who made extensive improvements to her house, which she prized for its water view.\textsuperscript{125} There was also Wilhelmina Dery, who was born in her Fort Trumbull house in 1918 and had lived there her entire life.\textsuperscript{126} Although there was no allegation that any of these properties were blighted or otherwise in poor condition, they were nevertheless condemned with the others "because they happen to be located in the development area."\textsuperscript{127}

On these facts, petitioners claimed that the taking of their property violated the public use restriction in the Fifth Amendment.\textsuperscript{128} A trial court agreed as to the parcel containing the Kelo house, but a divided Supreme Court of Connecticut reversed, holding that all of the City’s proposed takings were constitutional.\textsuperscript{129} Noting that the proposed takings were authorized by the state’s municipal development statute and in particular the taking of even developed land as part of an economic development project was for a public use and in the public interest, the court relied on Berman and Midkiff in holding that such economic development qualified as a public use under both federal and state constitutions.\textsuperscript{130} The U.S. Supreme Court granted certiorari "to determine whether a city’s decision to take property for the purpose of economic development satisfies the ‘public use’ requirement of the Fifth Amendment."\textsuperscript{131}

The Court’s answer: an unequivocal yes. While the Court noted that the state may "not take the property of A for the sole purpose of transferring it to another private party B . . . it is equally clear that a State may transfer property from one private party to another if future ‘use by the public’ is the purpose of the taking."\textsuperscript{132} The question, then, is what constitutes sufficient use by the

\textsuperscript{121} Id.
\textsuperscript{122} Id. at 475.
\textsuperscript{123} Id.
\textsuperscript{124} Id.
\textsuperscript{125} Id. However, it now seems that some of the condemned parcels owned by plaintiffs were in fact in the path of proposed new streets and roads—which, of course, would have always qualified them for public purpose takings. See George Lefcoe, Redevelopment Takings After Kelo: What’s Blight Got To Do With It?, 17 S. CAL. REV. L. & SOC. JUST. 803, 808 (2008).
\textsuperscript{126} Kelo, 545 U.S. 469 at 475.
\textsuperscript{127} Id.
\textsuperscript{128} Id.
\textsuperscript{129} See id. at 476.
\textsuperscript{130} Id. at 476–77.
\textsuperscript{131} Id. at 477.
\textsuperscript{132} Id.
public. Three factors appear to be important in reaching the conclusion that economic revitalization in New London constitutes such use: a rigorous planning process, the Court's precedents embodied in *Berman* and *Midkiff*, and deference to federalism and state decision making.

The Court commenced its analysis by reiterating that private-private transfers alone are unconstitutional and any pretextual public purposes meant solely to accomplish such transfers would fail the public use test. However, the Court observed that the governmental taking before it was meant to "revitalize the local economy by creating temporary and permanent jobs, generating a significant increase in tax revenue, encouraging spin-off economic activities and maximizing public access to the waterfront" all in accordance with a "carefully considered" and "carefully formulated" development plan in accordance with a state statute "that specifically authorizes the use of eminent domain to promote economic development." Therefore, the "record clearly demonstrates that the development plan was not intended to serve the interests of Pfizer, Inc., or any other private entity." Indeed, the Court was particularly impressed by "the comprehensive character of the plan [and] the thorough deliberation that preceded its adoption." Although little in the plan demonstrated any actual use by the public, the Court observed that it had embraced a broader and more "natural" interpretation of public use as public purpose at least since the end of the nineteenth century and "we have repeatedly and consistently rejected that narrow [use by the public] test ever since."

Next, the Court observed that this broad definition of public use accorded with its "longstanding policy of deference to legislative judgments in this field." The Court then discussed its decisions in *Berman* and *Midkiff* as demonstrations of such legislative deference, quoting heavily from the language in *Berman* about "the power of the legislature to determine that the community should be beautiful as well as healthy, spacious as well as clean, well-balanced as well as carefully patrolled." The Court concluded that its "jurisprudence has wisely eschewed rigid formulas and intrusive scrutiny in favor of affording legislatures broad latitude in determining what public needs justify the use of the takings power."
The Court rejected any suggestion that it formulate a more rigorous test. 144 Thus, for example, to require the government to show that public benefits would actually accrue with reasonable certainty or that the implementation of a development plan would actually occur would take the Court into factual inquiries already rejected earlier in the term when the Court rejected the "substantially advances a legitimate state interest" test for regulatory takings in Lingle. 145 Similarly, the Court declined to second-guess the city's determinations as to what lands it needed to acquire in order to facilitate the project. 146

Lastly, the Court rejected the invitation by some amici to deal with the appropriateness of compensation under the circumstances. While the Court acknowledged the hardships which the condemnations might entail in this case, "these questions are not before us in this litigation" even though members of the Court itself raised the adequacy of compensation during oral argument. 147 In a nod to federalism and states' rights, the Court closed by leaving to the states any remedy for such hardships posed by the condemnations in New London: "We emphasize that nothing in our opinion precludes any State from placing further restrictions on its exercise of the takings power. Indeed, many states already impose 'public use' requirements that are stricter than the federal baseline." 148

There was very little left of the Public Use Clause—at least in federal court—even before the Kelo decision. While a growing handful of state (and federal decisions applying state law on property) decisions found economic revitalization public purposes invalid on constitutional grounds, 149 an equal number of decisions agreed with the Connecticut Supreme Court that this was a valid public use. Clearly this is the view of hundreds of state and local revitalization and redevelopment agencies. 150 Whether one reads the Court's previous jurisprudence on public use broadly, as Justice Stevens does for the Court's majority, or more narrowly, as does the dissent, it is difficult to argue with the conclusions reached separately by Justices O'Connor and Thomas: the Public Use Clause is virtually eliminated in federal court. What yellow light of

---

144. Id. at 487–88.
146. Kelo, 545 U.S. at 488–89.
147. Id. at 490 n.21. Other countries provide a measure of extra compensation where, as here, it is a private residence which is condemned and the landowner has a demonstrable emotional attachment to the improved land. See, e.g., the Australian concept of solatium, amounting to up to ten percent additional compensation beyond fair market value in such circumstances, briefly noted (among other compensation issues). See Adam Mossoff, The Death of Poletown: The Future of Eminent Domain and Urban Development After County of Wayne v. Hathcock, 2004 Mich. St. L. Rev. 837, 841 (2004); see also Kotaka and Callies (ed) TAKING LAND: COMPULSORY PURCHASE AND LAND USE REGULATION IN ASIAN-PACIFIC COUNTRIES 27–74 (Tsuyoshi Kotaka & David L. Callies eds., 2002).
148. Kelo, 545 U.S. 469 at 489.
149. See Mossoff, supra note 147 at 3; Sw. Ill. Dev. Auth. v. Nat'l City Envtl., 768 N.E.2d 1, 11 (Ill. 2001).
150. See Berliner, supra note 119 at 18.
caution the handful of recent cases signaled has now turned back to green, and government may once more acquire private property by eminent domain on the slightest of public purpose pretexts unless such a use is inconceivable or involves an impossibility, as in the tests following *Midkiff* in 1984. In other words, it’s now all about process, and process only. There is no doubt that state and local governments will do much good in terms of public welfare and public benefits flowing from economic revitalization under such a relaxed standard, as they have often done in the past. They will do so with increased attention to carefully drafted plans and procedures guaranteeing maximum public exposure and participation, both emphasized in the majority opinion. Moreover, members of the Court during oral argument suggested rethinking how to calculate and award “just” compensation in extenuating circumstances such as those in *Kelo* now that the Public Use Clause is a mere procedural hurdle.\(^\text{151}\)

Only Justice Kennedy’s concurrence suggests some small role yet for federal courts in determining that a particular exercise of eminent domain might fall short of the required public use requirement: “There may be private transfers in which the risk of undetected impermissible favoritism of private parties is so acute that a presumption (rebuttable or otherwise) of invalidity is warranted under the Public Use Clause.”\(^\text{152}\) In other words, if the taking is “pretextual,” it will fail the public fee or purpose test. This is, however, largely a due process argument rather than a Fifth Amendment argument, and in any event, continued Kennedy: “This demanding level of scrutiny, however, is not required simply because the purpose of the taking is economic development.”\(^\text{153}\)

Pretextuality became the basis of a successful appeal in Hawaii. The County of Hawaii sought to condemn property owned by C&J Coupe Family Limited Partnership to build a public highway bypass.\(^\text{154}\) The bypass was to alleviate traffic conditions caused by the Oceanside Partners’ development of the Hokuli’a subdivision.\(^\text{155}\) Oceanside entered a development agreement with the County to construct the bypass,\(^\text{156}\) where upon completing the bypass, Oceanside would dedicate it to the County.\(^\text{157}\) The County would then assume responsibility for the bypass.\(^\text{158}\) The Coupe family, which owned land through


\(^{152}\) *Kelo*, 545 U.S. 469 at 493 (Kennedy, J., concurring).

\(^{153}\) Id.


\(^{155}\) Id.

\(^{156}\) Id.

\(^{157}\) Id. at 621.

\(^{158}\) Id.
which the bypass would pass, refused to sell the strip of land required for part of its construction, then objected to the condemnation of the strip on the ground that the road would serve to connect other oceanside property to a public road, and so it was “pretextual,” even though the public would make use of the bypass to alleviate traffic congestion.

In addressing whether the government’s stated public purpose was pretextual, the Court relied on *Kelo*. The court stated that the *Kelo* majority opinion, being consistent with its prior decisions, “allows courts to look behind an eminent domain plaintiff’s asserted public purpose under certain circumstances.” The court further explained that Justice Stevens’s opinion was informative because this case, like *Kelo*, involved the transfer of condemned property from one private party to another.

The court concluded that the public purpose of the bypass was evident from its nature as a public road. The court provided, based on its precedents and *Kelo*, that:

> it appears that the stated public purpose in this case ... comports with the public use requirements of both the Hawai’i and United States constitutions. The *Kelo* decision confirms that the fact that the condemned property is transferred from one private owner to another does not ... invalidate the taking.

Other recent physical takings cases raise the odd use issue. Thus, the U.S. Supreme Court recently decided a case involving the temporary flooding of state woodland preserves by the U.S. as part of a flood control project which resulted in the damaging of large areas of state forest. Among the issues which could have been decided is whether the Fifth Amendment applies if one government damages by inverse condemnation land owned by another government, since the Fifth Amendment provides on its face a shield against the taking of private property, and says nothing about public property. The Court simply held that such a temporary flooding could be a taking and remanded the case back to the lower court to decide if in fact there had been a taking in this instance. The government’s position, which the Court rejected, is that such temporary flooding could never be a constitutionally-protected taking.

Is avoiding severance litigation a “public use” sufficient to satisfy the Fifth Amendment? In *Utah Department of Transportation (“UDOT”) v. Carlson*, the Supreme Court of Utah presided over an action brought by a property owner challenging the agency’s condemnation of two adjoining parcels totaling fifteen acres when only 1.2 acres was required for the project. The landowner objected

---

159. Id. at 638.
160. Id.
161. Id. at 639.
162. Id. at 643.
163. Id.
165. 332 P.3d 900 (Utah 2014).
to the excessive condemnation on the grounds that (1) the UDOT lacked the statutory authority to do so and (2) UDOT lacked a legitimate public use in taking the excess property in violation of the Fifth Amendment.

The court dismissed Carlson's statutory authority claim, rejecting the argument that the agency's power to exercise eminent domain is limited to the public uses specifically enumerated in the statute. However, the court remanded the case on Carlson's public use argument, framing the issue as "whether UDOT's condemnation of excess property satisfies the 'public use' element of the federal and state constitutions." The court found remand necessary to develop a more complete record on the issue, noting that the question of public use is far from settled at both the state and federal level. The court also pointed out that, although Utah's statute permitted the taking of property in excess of what is needed, there "is a lack of any clearly articulated 'public use' proffered by UDOT on the record before us."167

IV. REGULATORY TAKINGS

The concept of regulatory taking is deceptively simple: if a land use or environmental regulation goes too far, it may result in so limiting the use of the relevant parcel or other interest in private property that a constitutionally-protected taking results.168 After stating the regulatory taking doctrine in 1923, the U.S. Supreme Court did not again address the issue in any meaningful sense for half a century, leading many commentators and most state courts to regard the issue as having faded into insignificance. However, in a series of cases decided in the last quarter of this past century, the Court recognized and set out tests for determining partial regulatory takings, total or categorical regulatory takings, and at what point such disputes about regulatory takings are "ripe" for decision.

A. Categorical "Total" Takings

A land use regulation totally takes property when it leaves the landowner without "economically beneficial use" of land. The land may still have value. It may even have some limited "salvage" uses, such as for walking or picnicking. But if no economically beneficial use remains, then the government must pay for the land as if it had condemned it, or lift the offending regulation and potentially pay for the time during which the unconstitutional regulation affected the use of the land. These are the rules of First English Evangelical

---

166. Id. at 906.
167. Id. at 907.
168. See generally Pa. Coal Co. v. Mahon, 260 U.S. 393 (1922); and, for extensive comment, see supra Benson at 5; Bosselman, Callies and Banta, The Taking Issue (1973) and ROBERT MELTZ ET AL., THE TAKINGS ISSUE: CONSTITUTIONAL LIMITS ON LAND USE CONTROL AND ENVIRONMENTAL REGULATION (1999).
Lutheran Church of Glendale v. County of Los Angeles\textsuperscript{169} and Lucas v. South Carolina Coastal Council. But it is a rare case in which a landowner can demonstrate that a regulation has deprived the subject property of all economically beneficial use.

In practice, it is very difficult for landowners to successfully pursue categorical taking claims. The hurdle that landowners face in demonstrating a total taking is illustrated by the fact that appellate courts have frequently reversed trial courts that applied the Lucas "denial of economically beneficial use" test. These appellate courts often hold that a partial taking analysis under Penn Central is more appropriate.\textsuperscript{170}

In Collins v. Monroe County,\textsuperscript{171} a Florida appellate court reversed a trial court that found multiple "facial" takings under Lucas\textsuperscript{172} when property owners subject to the County's new Comprehensive Plan successfully obtained Beneficial Use Determinations ("BUDs") from the Board of County Commissioners that declared their properties unbuildable. After declaring the taking claim at issue to be an "as-applied" challenge under Penn Central, the court held that, while the BUDs functioned as final determinations from the County to satisfy ripeness requirements under Williamson County Regional Planning Commission v. Hamilton Bank of Johnson City,\textsuperscript{173} they did not suffice to determine whether the properties were actually deprived of all economically beneficial use, which the court suggested was far from apparent. Instead, the case was remanded for application of the Penn Central test.

Distinguishing "facial" from "as-applied" regulatory taking claims was likewise an issue in Shands v. City of Marathon,\textsuperscript{174} where the same Florida appellate court again reversed a trial court's choice of Lucas over Penn Central. The Court noted that the transferrable development rights available under the City's Comprehensive Plan, as well as the opportunity to apply for a variance for a single-family home, defeated any claim that the city's designation of plaintiff's 7.9 acres in the Florida Keys as a conservation zone had deprived the property of all economically beneficial use.

In Cummins v. Robinson Township,\textsuperscript{175} an appellate court in Michigan reversed the decision below because the trial court had incorrectly applied Lucas instead of Penn Central when considering a case in which the Township had required property owners to employ flood-resistant construction in rebuilding several homes destroyed by a flood in a flood zone. Plaintiffs argued

\textsuperscript{169} 482 U.S. 304 (1987).
\textsuperscript{171} 999 So. 2d 709 (Fla. Dist. Ct. App. 2008).
\textsuperscript{172} Id. at 711 (explaining that Lucas applied to "facial" takings, whereas Penn Central applied to "as applied" challenges).
\textsuperscript{173} 473 U.S. 172 (1985).
\textsuperscript{174} 999 So. 2d 718 (Fla. Dist. Ct. App. 2008).
\textsuperscript{175} 770 N.W.2d 421 (Mich. Ct. App. 2009).
that they suffered a categorical taking under *Lucas* because the Township required them "to either abandon their home or rebuild it at costs far exceeding its value, which essentially deprived them of all its economically beneficial use."176 The court disagreed, holding that "[t]he Takings Clause does not guarantee property owners an economic profit from the use of their land."177

Using the same basic rationale, the Court of Federal Claims in *McGuire v. United States*178 found the application of a total regulatory taking test inappropriate and remanded for the case to proceed under *Penn Central* after the Bureau of Indian Affairs demolished a bridge linking two portions of property leased by a farmer from the Colorado River Indian Tribes. The Plaintiff claimed inverse condemnation, alleging that the "removal of the bridge caused his lease to have a negative market value because the southern portion was destined to fail to generate enough crop and resulting income to make the lease payment."179 Strictly applying the *Lucas* rule, the court asserted that "[a] total deprivation of 'all economically beneficial or productive use['] of a property must occur."180 The fact that the plaintiff might be upside-down on his lease was insufficient.

Recall that Justice Scalia’s majority opinion repeatedly stressed land use, not land value, as the measure of a categorical taking, expressly equating “sacrifice all economically beneficial uses” to “leav[ing] . . . property economically idle."181 That the land retains some market value or that non-economic, “salvage” uses still exist is extraneous to the analysis.182

As *McGuire v. United States* demonstrates, courts have set a high bar for plaintiffs who seek to demonstrate that their property has been deprived of all economically beneficial use. A Texas appellate court, in *Walton v. City of Midland*,183 affirmed a trial court’s rejection of the argument that a categorical per se taking had occurred when the City granted a drilling permit to the lessee of the oil and gas rights beneath the plaintiff’s property. In addition to holding that the City merely gave the lessee permission to do what the title allowed, the court—arguably in conflict with *Lucas*’s emphasis on use over value—concluded that the plaintiff had not stated a viable claim because:

> evidence indicated that his property had a value of at least $3,000 per acre after [the lessee] drilled the well. Accordingly, the granting of the permit did not

---

176. Id. at 443.
177. Id. at 448 (citing Paragen Props. Co. v. City of Novi, 550 N.W.2d 772, 776 n.13 (Mich. 1996)).
179. Id. at 440.
180. Id.
deprive him of all economically beneficial use of the property to the extent that he was only left with a token interest.\textsuperscript{184}

More recently, in \textit{Scot Netherlands, Inc. v. State Department of Environmental Protection},\textsuperscript{185} a New Jersey appellate court affirmed a trial court in finding that the state’s denial of a landowner’s application for a wetland fill permit did not constitute a categorical taking. The court held that the landowner, although barred from developing twenty-two acres of property in Atlantic City, enjoyed an economically beneficial use of the property because he collected rent from an existing billboard.

However, the \textit{Lucas} test is not entirely without teeth. Courts in a handful of cases are occasionally willing to find that a government action amounts to a categorical taking. In \textit{Resource Investments, Inc. v. United States},\textsuperscript{186} the Court of Federal Claims confronted the issue of “whether applying \textit{Lucas} to plaintiffs’ temporary regulatory takings claim would violate \textit{Tahoe-Sierra Pres. Council, Inc. v. Tahoe Regional Planning Agency} and the ‘parcel as a whole’ rule.”\textsuperscript{187} Plaintiffs owned and leased a large parcel that, due to its hydrogeology, was well-suited to landfill use and little else. The U.S. Army Corps of Engineers (“COE”) denied a dredge and fill permit allegedly required because wetlands had been discovered on the property. Distinguishing \textit{Tahoe-Sierra}, the court noted that the regulation was not expressly temporally limited, but rather prospectively permanent; therefore, there was no severance of the parcel into temporal slices. Moreover, unlike in \textit{First English}, the resolution of the temporary taking in this case was the result of a Ninth Circuit decision that found the COE had exercised improper jurisdiction over the site, not because the government had withdrawn the regulations. As the court put it:

that plaintiffs eventually regained economically viable use of their property is not \textit{ipso facto} fatal to their categorical takings claim. But in order to determine whether the denial effected a categorical taking as a matter of law, this court must now inquire whether plaintiffs lacked any economically viable use of their property after the Corps denied plaintiffs’ permit.\textsuperscript{188}

Ultimately, the court denied plaintiffs’ motion for summary judgment on their \textit{Lucas} claim, but only for lack of proof of causation, which the court suggested could be demonstrated in further proceedings.

In \textit{Lost Tree Village Corp. v. United States}\textsuperscript{189} (on remand from the Court of Appeals for the Federal Circuit) the Court of Federal Claims found that the COE had deprived a property of all economically beneficial use by denying the

\begin{flushleft}
\textsuperscript{184} Id. at 932.
\textsuperscript{186} 85 Fed. Cl. 447 (2009).
\textsuperscript{187} Id. at 469 (citing 535 U.S. 302 (2002)). In \textit{Tahoe-Sierra}, the court held that temporary regulations that deprive property of all economically viable use are to be analyzed under \textit{Penn Central}, \textit{not Lucas}, because the deprivation is only to a temporal segment of the parcel. \textit{Tahoe-Sierra}, 535 U.S. at 331.
\textsuperscript{188} \textit{Resource Invs., Inc.}, 85 Fed. Cl. at 485.
\textsuperscript{189} 115 Fed. Cl. 219 (2014).
\end{flushleft}
landowner’s application for a wetland fill permit. Although the court arguably confused “land use” with “land value,” it rejected the government’s attempt to define the economic value lost as the difference between the value of the property the moment before the permit was denied (“thus encompassing the uncertainty of whether a permit would be granted”), and the value of the property without a permit. Instead, the court determined the economic loss by considering the difference between the property’s fair market value at its “highest and best use,” and the property’s value following the permit denial. Accordingly, the court found that the permit denial constituted a categorical taking under Lucas because the property had suffered a diminution in value of 99.4%.

1. The Lucas Exceptions

The U.S. Supreme Court set out two exceptions to its categorical rule—situations in which the proscribed use interests would not be a part of the owner’s title to begin with: nuisance and background principles of a state’s law of property. The exceptions provide the only safe haven for state and local government when a land use regulation takes all economically beneficial use from a parcel of land. Although recent appellate opinions have addressed relatively few takings cases that have turned primarily on nuisance abatement as a defense, background principles—chiefly, variations of the public trust doctrine and, to a lesser extent, customary law—have seen increasing action and, in some jurisdictions, considerable extension. Ironically, whereas Lucas has generally been viewed as a victory for property rights, the courts have tended to construe the “denial of economically beneficial use” test very narrowly, while deployment of “the background principles defense has proved to be a fertile ground for government defendants.”

a. The Nuisance Exception

If the law of the jurisdiction would allow neighbors or the state to prohibit
the proposed uses of land because they would constitute either public or private nuisances, then government can prohibit them by regulation without providing compensation. This is because nuisances are always unlawful and are never part of a landowner’s title to begin with, so prohibiting them does not deprive a landowner of a property right. The Court in *Lucas* gave as examples laws that would prevent the construction of a nuclear power plant on an earthquake fault line, or the filling of lakefront land so as to raise the water level and flood neighboring land.196

Courts have generally applied most nuisance exceptions in mining cases197 and actions involving the demolition of private structures that do not meet housing codes.198 However, at least one (sharply divided) court has upheld the denial of a permit to construct a marina even if the owner were left with no economically beneficial use, on the ground that the additional traffic generated would constitute a nuisance, and therefore represent an exception to the categorical rule.199 An Arizona appellate court affirmed summary judgment in favor of the City of Phoenix when the City closed a “swingers’ club” featuring live sex acts because the “business clearly fell within the type of conduct that could have been abated at common law as a public health hazard[,]” although the court corrected the trial court’s erroneous use of *Penn Central* instead of *Lucas* as the relevant takings test.200

The Florida Supreme Court has also extended “nuisance exception” status to the closing of a motel used for prostitution and drug dealing, although not to the closing of an apartment used occasionally for drug transactions, in *Keshbro, Inc. v. City of Miami*.201 To the same effect, a federal district court recently dismissed a facial challenge to a Florida ordinance that authorized year-long closures of properties that were used for the sale of drugs, finding that the ordinance was constitutional under the Fifth Amendment Takings Clause because “[a] person has no legitimate property right in a nuisance, and the City need not compensate when a nuisance is ordered abated.”202 However, the Supreme Court of Ohio arrived at the opposite conclusion in *State v.*


197. See, e.g., Rith Energy, Inc. v. United States, 44 Fed. Cl. 366 (Fed. Cl. 1999); Machipongo Land & Coal Co., Inc. v. Commonwealth, 799 A.2d 751 (Pa. 2002) (holding that the danger to public waterways from mining pollution constituted a public nuisance); Kinross Copper Corp. v. Oregon, 98 P.2d 833 (Or. App. 2001). But see Placer Mining Co. v. United States, 98 Fed. Cl. 681 (2011) (noting that the rule that “a landowner has no right to maintain a nuisance on his property . . . is based on a rule derived from regulatory takings cases, particularly *Lucas*” while “the rule’s applicability to physical takings is far from settled”).


201. 801 So.2d 864, 874 (Fla. 2001).

Rezcallah, and held that the padlocking of property for one year as a result of drug activity was not a nuisance exception and not substantially advancing a legitimate state interest in curtailing the use and sales of drugs.

Some courts have recognized the potential for government abuse of the nuisance exception. In Noell v. City of Carrollton, a Texas Appellate Court considered a due process claim arising from the City of Carrollton’s declaration that a private airport was a nuisance, an act that closed the airport and destroyed easements held by shareholders. The Court held that although a city:

has the power to abate nuisances, it does not have the power to declare or define them, at least to the extent it seeks to utilize a nuisance determination to destroy property rights. In other words, the State may not by declaration transform private property into public property under the police power.

Similarly, the nuisance abatement defense to inverse condemnation failed in Department of Agriculture & Consumer Services v. Bogorff. In Bogorff, a class-action involving roughly 50,000 plaintiffs, a Florida appellate court affirmed the trial court’s finding that the Department of Agriculture had taken over 100,000 healthy citrus trees when it destroyed them as part of a citrus canker eradication program. The Department claimed that the trees, likely already exposed to the disease, would have eventually fallen victim to the canker, and thus were valueless. The only way to stop the canker, argued the Department, was to destroy the trees. The court found those contentions both pretextual and illogical, stating:

It is apparent . . . that [the Department] destroyed these privately owned healthy trees not because they were really “imminently dangerous” to anybody but instead to benefit the citrus industry in Florida. . . . To be a public nuisance, property must cause “inconvenience or damage to the public generally.” If trees are destroyed not to prevent harm but instead to benefit an industry, it is difficult to understand how [the Department] can argue on appeal that the trees legally constituted a nuisance without any value. Property with any value cannot be deemed a nuisance, the nature of which perforce lacks that redeeming quality.

Again, in Cebe Farms, Inc. v. United States, the Court of Federal Claims held that the government must establish, not simply declare, the presence of a nuisance in order to utilize the nuisance exception. In Cebe, the United States Department of Agriculture raised the nuisance abatement defense to an inverse condemnation claim that plaintiffs brought after the Department destroyed their unique chicken breeds during an outbreak of Exotic Newcastle Disease (“END”) in Southern California. The Department moved for summary judgment, arguing that the government did not owe compensation because it destroyed the diseased chicken flocks pursuant to its power to abate nuisances.

203. 702 N.E.2d 81 (Ohio 1998).
205. Id. at 697.
206. 35 So.3d 84 (Fla. App. 2010).
207. Id. at 89.
The court held that the Department could not rely on the nuisance abatement defense without first definitively establishing that Cebe Farms' chicken flocks were actually infected with END. The court declared that it would not allow the Department to circumvent the Fifth Amendment "by resorting to the circular logic that by conceding the legality of the government's action in order to maintain a takings claim, plaintiff must also concede that the government was correct in all of it's determinations." 209

In Bailey v. United States, 210 the Court of Federal Claims again interpreted the nuisance exception narrowly. The plaintiff, seeking to residentially develop his lakefront wetland property, was denied two permits, one by the state of Minnesota, and one by the COE. The state denied the first permit based on the finding that the "ISTS" sewer system proposed by the plaintiff would constitute a nuisance under state law. Meanwhile, the COE denied the second permit on the grounds that any construction on the property would irreparably damage the wetland environment—a denial that effectively prevented the plaintiff from pursuing any residential development on the lakefront. In the ensuing inverse condemnation action, the United States moved for summary judgment, arguing that the COE's permit denial did not constitute a taking because the proposed development had already been declared a nuisance under Minnesota law by the state's denial of the first permit. Thus, the United States argued, "neither plaintiff, nor any other owner, could possess a stick in their bundle of property rights that would allow them to locate residential development on the lake front lots at issue in this case." 211 The court disagreed, stating:

[t]his evidence establishes that plaintiff is prohibited by Minnesota's background principles of nuisance law from developing Sunny Beach into residential lots using the proposed plan and using a mound ISTS. But it is far from clear that plaintiff has no right under Minnesota law to develop Sunny Beach into residential lots. 212

b. The Background Principles Exception

As with nuisance, if a regulation were consistent with a background principle of a state's law of property, again there would be no deprivation of a cognizable right in property. While the Court in Lucas gave no examples of a background principle, customary rights and land held subject to public trust are emerging as such background principles in several jurisdictions—and, occasionally, an old statute. 213

209. Id. at 201.
211. Id. at 318.
212. Id. at 321.
i. The Public Trust Doctrine as a Background Principle

Broadly stated, the public trust doctrine provides that a state holds public trust lands, waters, and living resources in trust for the benefit of its citizens, establishing the right of the public to fully enjoy them for a variety of uses and purposes. Implied in this definition are limitations on the private use of waters and lands that are impressed with the public trust, as well as limitations on how the state may transfer interests in such land and water, particularly if the transfer will prevent public use. These definitions and duties analytically flow from the dual nature of title in public trust lands and water. On the one hand, the public has the right to use and enjoy the land and water—the res of the public trust—for such activities as commerce, navigation, fishing, bathing, and related public purposes. This is the so-called jus publicum. On the other hand, since one-third of public trust property is reportedly in private hands rather than public, private property rights coexist with public rights in much land and water subject to the public trust doctrine—the jus privatum.

The issue, of course, is the extent to which the public trust doctrine can legally eliminate private property rights without the compensation required by the U.S. Constitution’s Fifth Amendment. To the extent that public trust rights are recognized, they constitute a diminution of the fee simple, much like the recognized private limitations on fee simple such as leaseholds, easements, and the burdens of covenants running with the land. These are interests held by strangers to the basic title of the landowner, and are therefore not “part of his title to begin with.” In the same fashion, if public trust rights are valid, then these also represent interests in private land that are not part of the owner’s title to begin with—a valid background principle of property law that is an exception to the per se categorical regulatory takings rule.

The issue of regulatory taking in connection with public trust arises most frequently when a state court or legislature “reaffirms” the public’s trust “rights” on private property. This occurs when a state: (1) imposes restrictions on privately-held trust lands; (2) requires public access across private land or access to trust lands or water; or (3) expands the scope of public activities permitted under the guise of public trust rights. Most public trust lands are submerged, tidal, or water-flowed. However, some courts expand the application of public trust doctrine to “dry-sand” and other more useable and


216. Id.
developable areas.\textsuperscript{217} Many courts find the public trust doctrine applies at least to submerged and tide-flowed lands. Thus, in the landmark case of \textit{Illinois Central Railroad Co. v. Illinois},\textsuperscript{218} the U.S. Supreme Court held that the Illinois legislature could not transfer land in fee simple under Lake Michigan because that land was held in public trust for the people of the state. However, the state could sell small parcels of public trust land, the use of which would promote the public interest—for example, docks, piers, and wharves—so long as this did not impair the public interest in the lake and the remaining submerged land. In \textit{Phillips Petroleum Co. v. Mississippi},\textsuperscript{219} the Court extended the public trust to all lands under waters influenced by the ebb and flow of the tides.

Some jurisdictions have drastically expanded their public trust doctrines. Perhaps the biggest extension of the public trust doctrine is represented by \textit{Matthews v. Bay Head Improvement Association},\textsuperscript{220} extending the public trust doctrine of New Jersey to private dry sand beach areas for both access to and limited use of the ocean and foreshore. The court held that the public rights to the water would be meaningless unless the public were guaranteed both access and a place to rest intermittently. A trial court in California held that the state’s public trust doctrine could be used to regulate the extraction of groundwater from private property, if such extraction had a “damaging” effect on nearby navigable waterways.\textsuperscript{221} In doing so, the court declined to declare that the public trust extended to groundwater, but held that groundwater could be regulated so far as it affected public trust waters. The Supreme Court of Hawaii has declared that \textit{all} water in the state is subject to the public trust,\textsuperscript{222} and has imposed heightened duties to protect and manage the public trust on all county government agencies.\textsuperscript{223} The Colorado Supreme Court recently allowed a proposed ballot initiative, which would amend the state’s Constitution to create an expansive public trust over “Colorado’s environment, meaning ‘clean air, pure water, and natural and scenic values,’ ” to survive a technical legal challenge.\textsuperscript{224} The Supreme Court of Wisconsin even extended the public trust doctrine to a wetland, which became a bird sanctuary, created by the property owner in the course of development in \textit{R. W. Docks & Slips v. Wisconsin}.\textsuperscript{225}

Courts have also confirmed that the public trust doctrine can impose

\textsuperscript{217} E.g., Craig, \textit{A Comparative Guide to the Eastern Public Trust Doctrines}, supra note 214, at 19 (noting that New Jersey has recognized “public trust rights to use the dry sand (above the high tide line) portions of both public and private beaches”).

\textsuperscript{218} 146 U.S. 387 (1892).

\textsuperscript{219} 484 U.S. 469 (1988).

\textsuperscript{220} 471 A.2d 355 (N.J. 1984).


\textsuperscript{222} \textit{In re Water Use Permit Applications}, 9 P.3d 409, 490 (Haw. 2000).

\textsuperscript{223} Kuaii Springs, Inc. v. Planning Comm'n of Ku'ai, 324 P.3d 951, 984 (Haw. 2014).

\textsuperscript{224} \textit{In re Title, Ballot Title, & Submission Clause for 2013–2014 #89}, 328 P.3d 172, 175 (Colo. 2014).

\textsuperscript{225} 628 N.W.2d 781 (Wis. 2001).
severe limitations on the rights of property owners. 226 A recent example is *Public Lands Access Association v. Board of County Commissioners of Madison County,* 227 where the Supreme Court of Montana considered a case in which a landowner asserted that the Montana public trust doctrine had taken his right to exclude the public from his privately owned streambed. The court held that the private landowner, who owned both sides of the river as well as the streambed, could not prevent the public from using a county road that ran through his land and over the river as a bridge (which was acquired by the public from the previous owner by prescription), as an access point for recreation in the river. The Supreme Court of Montana affirmed the trial court in finding that “where a county road intersects state waters, the portion of each which is congruent with the other creates two overlapping public rights of way.” 228 The court explained that no taking had occurred because no right had been extracted from the landowner, as the public had “no interest at all in the private streambed per se, but only in the publically-owned surface waters that traverse the streambed.” 229 The concurring opinion made clear that the landowner had never had the right to exclude the public because the public trust was the law of Montana at the time that the landowner acquired title to the streambed. 230

Building upon the growing body of law finding that private land impressed with a public trust may be regulated with impunity specifically as a “background principles” exception is *McQueen v. South Carolina Coastal Council.* 231 McQueen purchased two noncontiguous lots adjacent to man-made canals in the early 1960s, but left them unimproved until the early 1990s, by which time neighboring lots were improved with bulkheads and retaining walls, while McQueen’s had “reverted” to tidelands. When McQueen applied to the appropriate state authority for permission to backfill his lots and build his own bulkhead, the state denied the requisite permit on the ground that it would destroy the “critical environment” on those lots. Both a special master and the court of appeals agreed that the denial left the lots without any economically beneficial use, which resulted in a total taking under *Lucas.* 232 Initially, the state supreme court denied relief because it found “confusion” over whether the “investment-backed expectations” standard—a “partial takings” standard as appears below—applied to total takings. 233 After the U.S. Supreme Court

228. Id. at 51.
229. Id. at 53.
230. Id. at 67–68.
vacated and remanded\textsuperscript{234} for further consideration in light of \textit{Palazzolo v. Rhode Island},\textsuperscript{235} the South Carolina Supreme Court denied compensation on the ground that South Carolina holds "presumptive title" to land below the high water mark\textsuperscript{236} and "wetlands created by the encroachment of navigable tidal water belong to the state."\textsuperscript{237} Moreover, the state also has "exclusive right to control land below the high water mark for the public benefit and cannot permit activity that substantially impairs the public interest in marine life, water quality, or public access."\textsuperscript{238} The court then held that so much of McQueen's lots as had "reverted to tidelands" were "public trust property subject to control of the State.\textsuperscript{239}

In \textit{Stop the Beach Renourishment, Inc. v. Florida Department of Environment Protection},\textsuperscript{240} a group of coastal property owners claimed a taking of their littoral rights after the state, under a shore protection statute, fixed their seaward boundaries with an erosion-control line and sea wall that followed the mean high-water line. The state then restored seventy-five feet of beach and pronounced the new land to be state property, thus depriving the formerly-littoral owners of that status as well as any future addition to the beach by accretion. The landowners' rights of access to the ocean, however, were preserved. The U.S. Supreme Court affirmed the Florida Supreme Court, holding that the statute did not deprive the owners of property rights because the land reclaimed by the state was in the public trust area and, at common law, land created by avulsion—even purposefully by the state—goes to the state. Because "[t]wo core principles of Florida property law intersect[ed] in this case" in favor of the state, the court held that "[t]he Florida Supreme Court decision before us is consistent with . . . background principles of state property law[,]" and therefore no taking had occurred.\textsuperscript{241}

Not all courts have been quick to accept extensions of the public trust doctrine, and even those that accept it within its traditional limits often permit limited private use of public trust resources. Thus, in \textit{Kootenai Environmental

\textsuperscript{234} McQueen v. S.C. Dep't of Health and Envtl. Control, 533 U.S. 943 (2001), granting cert. to, vacating, and remanding McQueen, 580 S.E.2d 116 (S.C. 2003).

\textsuperscript{235} 533 U.S. 606 (2001). In \textit{Palazzolo}, an owner of coastal wetlands denied fill permits for construction of a private beach club successfully appealed in part a Rhode Island Supreme Court decision that his takings claims were unripe, that his title never included the right to fill the wetlands because he acquired the property after the regulations preventing the same had been adopted, and that he had not met the tests of either \textit{Lucas} or \textit{Penn Central}. The U.S. Supreme Court held that the claims were ripe, that regulations could not "put an expiration date on the Takings Clause," and that the remaining use value in the uplands portion of the property for a single-family residence foreclosed a \textit{Lucas} claim, but the court remanded for consideration under \textit{Penn Central}. Id. at 608, 626–27, 630–31.

\textsuperscript{236} McQueen v. S.C. Coastal Council, 580 S.E.2d 116, 119 (S.C. 2003).

\textsuperscript{237} \textit{Id}. at 120.

\textsuperscript{238} \textit{Id}. (citations omitted).

\textsuperscript{239} \textit{Id}.

\textsuperscript{240} 560 U.S. 702 (2010), affg Walton Cnty. v. Stop the Beach Renourishment, 998 So. 2d 1102 (Fla. 2008).

\textsuperscript{241} \textit{Id} at 730–31.
Alliance, Inc. v. State Board of Land Commissioners\textsuperscript{242} the Idaho Supreme Court approved the leasing of state lands impressed with a public trust to a private club for the construction, maintenance, and use of private docking facilities on a bay in a navigable lake, on the grounds that such lease and use was "not incompatible" with the public trust imposed on the property. Also, the Maine Supreme Court in Bell v. Town of Wells Beach\textsuperscript{243} held that attempts to cross private land to reach public land for recreational purposes in accordance with the state's Public Trust and Intertidal Land Act resulted in a taking of private property without compensation. The Massachusetts Supreme Court refused to expand statutory declarations of public trust to permit access across private land to reach inter-tidal lands, in Opinion of the Justices:\textsuperscript{244} The permanent physical intrusion into the property of private persons, which the bill would establish, is a taking of property within even the most narrow construction of that phrase possible under the Constitutions of the Commonwealth and of the United States. . . . The interference with private property here involves a wholesale denial of an owner's right to exclude the public.\textsuperscript{245}

To the same effect, the New Hampshire Supreme Court in Opinion of the Justices (Public Use of Coastal Beaches)\textsuperscript{246} held that a new statute providing for access to tide-flowed public trust shoreline across abutting private land was a taking:

When the government unilaterally authorizes a permanent, public easement across private lands, this constitutes a taking requiring just compensation. . . . Because the bill provides no compensation for the landowners whose property may be burdened by the general recreational easement established for public use, it violates the prohibition contained in our State and Federal Constitutions against the taking of private property for public use without just compensation. Although the State has the power to permit a comprehensive beach access and use program by using its eminent domain power and compensating private property owners, it may not take property rights without compensation through legislative decree.\textsuperscript{247}

The same court drove home these advisory points when five years later it considered an actual case and controversy\textsuperscript{248} in which forty beachfront property owners sued the state on regulatory taking grounds when the state moved a public trust lands boundary line inland from the mean high water mark:

Having determined that New Hampshire common law limits public ownership of the shorelands to the mean high water mark, we conclude that the legislature went beyond these common law limits by extending public trust rights to the highest high water mark. . . . Because [the statute] unilaterally authorizes the taking of private shoreland for public use and provides no compensation for

\textsuperscript{242} 671 P.2d 1085 (Idaho 1983).
\textsuperscript{243} 557 A.2d 168 (Me. 1989).
\textsuperscript{244} 313 N.E.2d 561 (Mass. 1974).
\textsuperscript{245} Id. at 568.
\textsuperscript{246} 649 A.2d 604 (N.H. 1994).
\textsuperscript{247} Id. at 611.
landowners whose property has been appropriated, it violates [the State
Constitution] and the Fifth Amendment of the Federal Constitution against the
taking of property for public use without just compensation . . . . Although it may
be desirable for the State to expand public beaches to cope with increasing
crowds, the State may not do so without compensating the affected
landowners. 249

More recently, in Severance v. Patterson, 250 the Supreme Court of Texas
answered questions certified from the federal court of appeals and reversed a
line of state appellate court decisions dating from 1979 251 on so-called “rolling
easements,” holding that:

when a beachfront vegetation line is suddenly and dramatically pushed landward
by acts of nature, an existing public easement on the public beach does not “roll”
inland to other parts of the parcel or onto a new parcel of land. . . . In those
situations, when changes occur suddenly and perceptibly to materially alter
littoral boundaries, the land encumbered by the easement is lost to the public trust,
along with the easement attached to that land. 252

The Court thus rejected the state’s attempt to declare an expansive public
right to private land under the guise of the public trust doctrine, and clarified
that the “division between public and private ownership remains at the mean
high tide line in the wake of naturally occurring changes, and even when
boundaries seem to change suddenly.” 253

Following its decision in Severance, the Supreme Court of Texas vacated
a Texas appellate court’s holding that rolling easements had extended state and
public ownership to a privately owned beach front parcel (complete with a
beach house) after storms pushed the vegetation line landward of the house. 254
On remand, the homeowners asserted an inverse condemnation claim in light
of Severance, while an intervening environmental group urged a narrow
reading of the opinion. 255 The appellate court, faced with a new round of
briefings, remanded the case back to trial court.

Finally, in an unusual opinion, a California trial court recently held that
the Public Trust doctrine did not extend to tidelands along a privately owned
California beach. 256 Martin’s Beach, accessible only by a path through private
property, was a popular recreational area until the new owner of the property
installed a gate to block the public from the beach. An organization called
Friends of Martin’s Beach sued to regain access. The court found that Martin’s
Beach was ceded by Mexico to the United States in the 1850 Treaty of

249. Id. at 447.
250. 370 S.W.3d 705 (Tex. 2012).
252. Severance, 370 S.W.3d at 708, 724.
253. Id. at 725.
256. Friends of Martin’s Beach v. Martin’s Beach 1, LLC, No. CV-517634, slip op. at 2 (Super. Ct. San
Guadalupe Hidalgo. Pursuant to the treaty, Martin’s Beach had gone straight into private ownership through a land patent granted by the Board of California Land Commissioners, which made no mention of a public trust interest. Relying on a string of U.S. Supreme Court cases, the court found that the “State’s public trust easement only exists over lands to which the State acquired title by virtue of its sovereignty upon admission to the United States”, and that the land patent granted by the Board of California Land Commissioners to defendant’s predecessor in interest operated as a “quitclaim deed from the Government of the United States to the claimant relinquishing all interests in the land that might be possessed by the United States or its people including the people of the State of California.” Therefore, the court reasoned, California had never possessed any interest in the privately owned tidelands of Martin’s Beach before or after admission into the United States, and accordingly did not hold it in public trust.

ii. Customary Law as a Background Principle

Customary rights in land usually arise when a group or class of persons can show a right to do a particular thing or practice upon land that they neither own nor otherwise possess the right to do the activity in question, based upon past and unchallenged practice extending back over some time. In other words, the claimant to the custom would be a trespasser on the land of another but for the custom. The reception of customary law in the United States was originally chilly despite its common, although restricted, use in England. The reasons had much to do with the limitations on use resulting from the application of the doctrine, and the difficulties in terminating a custom, once found or declared. The former has much to do with the source of customary law in the United States: Blackstone’s Commentaries. Designed to limit the intrusion of custom into common law generally, in his section on customary law Blackstone spells out several limitations on customary laws, including the need for ancient origin, and sharp restrictions on land area and possession to which a customary right could accrue. Several of those limitations make their way into U.S. case law. The latter issue was of particular concern to the legendary John Chipman Gray, of future interests and the rule against perpetuities fame, who cautioned against the establishment of yet another collection of perpetual interests in property: “Especially it should be remembered that they cannot be released, for no inhabitant, or body of inhabitants, is entitled to speak for future inhabitants. Such rights form perpetuities of the most objectionable character.”

258. Friends of Martin’s Beach, No. CIV517634 slip op. at 10.
259. Id. at *11.
An early nineteenth century court put it well in *Ackerman v. Shelp*, in which a custom was alleged to permit inhabitants of a town an easement to reach a riverbank:

> [I]f [this] custom . . . is to prevail according to the common law notion of it, these lots must lie open forever to the surprise of unsuspecting owners, and to the curtailing [of] commerce, in its more advanced state, of the accommodation of docks and wharves, when perhaps a tenth part of the lots now open would be all sufficient as watering places; a principle of such extensive operation ought not to be strained beyond the limits assigned to it in law. If [the] public convenience requires high ways to church, school, mill, market or water, they are obtainable in a much more direct and rational manner under the statute than by way of immemorial usage and custom.

Despite this admonitory background concerning the problems associated with custom, modern courts in the United States have declared public rights or rights of a huge class of strangers to cross private land based exclusively on some version of customary law. Perhaps the most famous of these is *State ex rel. Thornton v. Hay*, in which the plaintiffs sought to prevent the Hays from constructing improvements on the dry-sand beach portion of their lot between the high water line and the upland vegetation line. Rejecting the proffered bases of prescriptive rights and easements, the court decided in favor of the plaintiffs, *sua sponte* extending customary rights to virtually the entire population of Oregon along its entire coastline:

> Because many elements of prescription are present in this case, the state has relied upon the doctrine in support of the decree below. We believe, however, that there is a better legal basis for affirming the decree. The most cogent basis for the decision in this case is the English doctrine of custom. Strictly construed, prescription applies only to the specific tract of land before the court, and doubtful prescription cases could fill the courts for years with tract-by-tract litigation. An established custom, on the other hand, can be proven with reference to a larger region. Ocean-front lands from the northern to the southern border of the state ought to be treated uniformly.

Lest the reach of custom be misunderstood in a *per se*, total regulatory takings context under *Lucas*, the same court in *Stevens v. City of Cannon Beach* responded to a takings claim over the refusal of local government to grant a seawall permit on customary rights interference grounds, and held that the customary law of Oregon preventing such construction was a background principle of state property law and therefore an exception to the categorical total takings rule when a property owner was left with no economically beneficial use of his land.


261. 8 N.J.L. 125 (N.J. 1825).
262. *Id. at 130–31.*
263. 462 P.2d 671 (Or. 1969).
264. *Id. at 676.*
265. 854 P.2d 449 (Or. 1993).
Beaches, custom, and the public trust doctrine intersected in Florida in Trepanier v. County of Volusia, an inverse condemnation action where a state appellate court clarified the standard for establishing a customary right and rejected any Oregon-style creation of state-wide rights as in State ex rel. Thornton v. Hay. The plaintiffs owned littoral parcels which, under Florida's public trust doctrine, included fee title to the mean high tide line in an area of New Smyrna Beach where the public, as regulated by the county, regularly drove and parked on the beach. Between the roadway and the sand dunes, the county maintained a thirty-foot habitat conservation zone ("HCZ") for the protection of endangered sea turtles. Before 1999, the roadway and the marked HCZ were in the public trust area outside plaintiffs' platted lots, but a series of avulsive events (i.e., hurricanes and other storms) moved the mean high water line to within a few feet of plaintiffs' sea walls. The county gradually moved the roadway and HCZ inland along with it to occupy plaintiffs' dry sand beach. The trial court initially granted summary judgment to the county, holding that the public had a "superior claim to possession and use" of the dry sand beach by virtue of custom, prescription, and dedication and proclaimed that such applied to all beaches in the county.

The appellate court, however, reversed and remanded. After distinguishing custom from the public trust doctrine—the public trust area migrates with the changing shoreline but the same is not necessarily true of privately-owned areas subject to customary right—the court held that the county not only needed to prove the elements of custom for the specific area subject to the alleged customary right but also that the right customarily migrated with the high tide line. While the court found clear proof that there had never been any intent to dedicate the land, it concluded that genuine issues of material fact existed with respect to the county's counterclaims of prescription and custom, with the court characterizing the latter as the county's best argument. According to the court:

[i]n addition to the temporal requirement of "ancient" use, three other key elements must be shown: peaceableness, certainty and consistency. Finally, the customary use must be shown to be "reasonable." While some may find it preferable that proof of these elements of custom be established for the entire state by judicial fiat in order to protect the right of public access to Florida's beaches, it appears to us that the acquisition of a right to use private property by
custom is intensely local and anything but theoretical. 276

Sidestepping the awkward notion that any use of an automobile could be considered “ancient,” the court remanded for presentation of specific evidence. 277

After redefining “ancient” to be “historic” and asserting that one hundred years of substantially uninterrupted use qualified as such, the trial court ultimately held the custom proved and that the customary right had migrated inland after avulsive events. 278 Although concluding that the plaintiff had not proved the elements of inverse condemnation, the court made it clear that any takings claim would have been defeated by the customary right. 279

Other jurisdictions have refused to recognize that customary law can create a right of public access to private property. In Almeder v. Town of Kennebunkport, 280 the Supreme Court of Maine vacated a trial court’s finding that the public enjoyed an easement by custom to engage in recreational activities on privately owned portions of a beach. Goose Rocks Beach, a two mile stretch of beach bordered by 110 privately owned parcels, was widely used by the public via five public beach access points and 179 public parking spots on two neighboring roads. 281 The Town of Kennebunkport had continuously passed regulations concerning the beach since the 1700s, including more recent prohibitions concerning pets and open fires. 282 Moreover, the town had provided a lifeguard from 1950 until 1994, when the lifeguard services were discontinued and “replaced . . . with a police officer dedicated to serv[ing] the Beach.” 283 The public enjoyed a similarly long history of beach use stretching back to colonial times. More recently, the public “regularly use[d] the full length of the Beach year-round to walk, play in tidal pools, collect sand dollars, play softball, ride horses, and cross-country ski, and to access the water for boating, water-skiing, windsurfing, kayaking, snorkeling, rafting, paddleboarding, and tubing.” 284

In 2009 the beachfront parcel owners sued the town and any other party claiming any title or right to use the beach, seeking:

(1) a declaratory judgment affirming his or her ownership and exclusive right to use that portion of the Beach abutting his or her parcel down to the mean low-water mark, ‘subject only to the public rights of usage in the Intertidal Property established by the Colonial Ordinance of 1647,’ and (2) to quiet title to his or her claimed Beach property. 285

276. Id. at 289.
277. Id. 282, 293.
278. Id. at 282.
279. Id. at 283, 293.
281. Id. at *1.
282. Id. at *2.
283. Id.
284. Id.
285. Id. at *1.
The town filed counterclaims alleging its "ownership of the [b]each and the public's right to use the [b]each," while the state of Maine intervened to protect the public's rights pursuant to the public trust doctrine.\textsuperscript{286} Of relevance to this section, the town asserted that the public had obtained an easement by custom to the beach by virtue of the undisputed centuries of public use.\textsuperscript{287} The trial court held a bifurcated trial, the first portion of which dealt exclusively with use-related claims.\textsuperscript{288} At this first trial the court found that the public had acquired rights to Goose Rock Beach through prescription, the public trust doctrine, and custom.\textsuperscript{289}

The Supreme Court of Maine reversed the trial court's findings in their entirety. The court held that the presumption of permissive use defeated the claim that the public had gained rights to the beach by prescription,\textsuperscript{290} and that findings relating to the public trust were premature.\textsuperscript{291} Significantly, the court also vacated the trial court's finding of a public easement by custom and clarified Maine's position on the use of custom as a source of public rights. In a single unambiguous paragraph, the court characterized customary law as "largely a dead doctrine in the United States," and declared that an easement by custom was not, and never had been, a viable cause of action in Maine.\textsuperscript{292}

Similarly, in \textit{Severance v. Patterson}, the Supreme Court of Texas found that customary law could not establish a public right to "rolling easements" (discussed above in the public trust section) along the coast of Texas.\textsuperscript{293} The Court summarized its objection to customary law as a background principle of state property law:

\begin{quote}
The State's position and the dissents suffer from the same fundamental flaw. They all fail to cite any authority for the proposition that background principles of Texas property law preclude private beachfront property owners from ever having had the right to exclude strangers from their land, as other Texas property owners do. The Texas appellate opinions discussed, being at most a few decades old, are not authority going back to 'time immemorial' and they do not cite any authority for such an ancient, inherent limitation.\textsuperscript{294}
\end{quote}

iii. Statutes as Background Principles

More troubling is the occasional case finding background principles in preexisting statutes, which would broaden the exception considerably—and is likely contrary to the implications of \textit{Lucas} which, after all, did involve the application of a statute. Thus, for example, the Supreme Court of New

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{286} Id.
\item \textsuperscript{287} Id.
\item \textsuperscript{288} Id.
\item \textsuperscript{289} Id. at *3.
\item \textsuperscript{290} Id. at *5–8.
\item \textsuperscript{291} Id. at *9.
\item \textsuperscript{292} Id.
\item \textsuperscript{293} \textit{Severance v. Patterson}, 370 S.W.3d 705, 708 (Tex. 2012).
\item \textsuperscript{294} Id. at 730.
\end{itemize}
\end{footnotesize}
Hampshire held that a “positive law” could be construed as a background principle if it were passed prior to the landowner’s acquisition of the subject parcel. Similarly, the federal circuit, drawing an analogy to the Lucas nuisance exception, noted that an existing bankruptcy statute could “inhere” in the plaintiffs’ franchise contract and thereby limit plaintiffs’ cognizable property interest and ability to recover compensation for certain takings. In a strange twist on the law of background principles exceptions, a court of appeals in Arizona denied a takings claim by a landowner over whose property flowed (by state permit) water for another landowner whose use of property (underground water storage) depended upon flowing water via his private stream. The court held that the doctrine of prior appropriation, upon which the permit was based, was a background principle of Arizona’s water law, rendering such a takings claim impossible under a Lucas exception.

Finally, in 1256 Hertel Ave. Associates, LLC v. Calloway, the Second Circuit extended the Lucas “background principle” status to New York’s homestead exemption statute. In force since 1850, the homestead statute allowed debtor homeowners to exempt portions of their home equity from money judgments during bankruptcy proceedings. In line with a long history of raising the exempted amount to adjust for inflation, New York increased the homestead exemption from $10,000 to $50,000 in 2005, and to $75,000 in 2010. In 2003, 1256 Hertel Ave. Associates, LLC (“Hertel”) obtained a judgment lien on Calloway’s home, while another creditor obtained a second lien on the property in 2008. In 2009 Calloway filed for bankruptcy, and moved to “avoid the judgment liens against her residence pursuant to New York’s homestead exemption.”

In bankruptcy court, Calloway argued that her $25,000 in home equity was protected under the $50,000 exemption provided for at the time that she filed for bankruptcy. Hertel agreed that the homestead exemption did apply, but contended that the applicable exemption was the $10,000 provided for at the time that the lien was perfected in 2003. Moreover, Hertel argued that retroactive application of the 2005 homestead exemption amendment to its 2003 lien would constitute a taking without compensation. The bankruptcy court found that Calloway’s home equity was exempted up to $50,000, and dismissed Hertel’s taking claim because “under New York law, judgment liens
are not vested property interests."^306 A district court affirmed.\(^ {307} \)

The Second Circuit engaged in statutory construction and ultimately determined that the New York legislature intended for the 2005 amendment to apply retroactively.\(^ {308} \) The court next held that liens were a protected property interest under the Fifth Amendment,\(^ {309} \) but that Hertel’s taking claim nevertheless potentially failed for several reasons. First, it arguably applies only to interests in land.\(^ {310} \) Second, Calloway might have had less than $10,000 worth of equity in her home at the time of the 2003 judgment lien, in which case Hertel’s distinct investment-backed expectations were not harmed by retroactive application of the amendment because Calloway’s home equity was always protected by the homestead exemption amount.\(^ {311} \)

Ultimately, the court decided to reject Hertel’s taking claim by concluding that New York’s homestead exemption constituted a background principle of the state’s property law:

New York’s homestead exemption is of a [early] vintage—from a time if not quite immemorial, then at least nearly so. Hertel obtained its judgment lien against a backdrop of New York law that has continuously provided a homestead exemption for more than 150 years. Dating from 1850, New York’s homestead exemption has now become a “background principle of the State’s law of property.”\(^ {312} \)

The court held that the homestead exemption, as necessarily adjusted for inflation, inhered in all judgment liens perfected within the state.\(^ {313} \) Therefore, the 2005 amendment did not effect a taking.\(^ {314} \) In a footnote to the opinion, the court further explained:

[Although we do not here attempt to delineate a precise division between “background” and “foreground” laws, after more than 150 years, New York’s homestead exemption qualifies as part of ‘those common, shared understandings of permissible limitations derived from a State’s legal tradition.’\(^ {315} \)

\(B.\) Partial Takings

A partial taking occurs whenever a land use regulation deprives a landowner of sufficient use and value but stops short of depriving the landowner of all economically beneficial use. Partial takings by regulation are far more common than total takings, and the standard is not so easy to apply.

In \textit{Penn Central Transportation Co. v. City of New York},\(^ {316} \) the Court set

\(^{306}\) \textit{ld.} at 256.
\(^{307}\) \textit{ld.}
\(^{308}\) \textit{ld.} at 257-61.
\(^{309}\) \textit{ld.} at 262-63.
\(^{310}\) \textit{ld.}
\(^{311}\) \textit{ld.} at 265.
\(^{312}\) \textit{ld.} at 266 (quoting \textit{Lucas v. S.C. Coastal Council}, 505 U.S. 1003 (1992)).
\(^{313}\) \textit{ld.}
\(^{314}\) \textit{ld.} at 267.
\(^{315}\) \textit{ld.}
out the rules for partial takings. The Court upheld New York City's Landmarks Preservation Law, which effectively prohibited Penn Central from constructing a fifty-five story office building in the air rights above Grand Central Station, a designated landmark under the law. 317 Penn Central claimed both the designation and the prohibition constituted a facial- and applied-taking of its property under the Fifth and Fourteenth Amendments. 318 The Court held that "landmarking" itself was broadly constitutional and that the individual application of the law to Grand Central Station left sufficient remaining use of the property so as to be neither a total nor a partial taking. 319 Before reaching the merits of the case, however, the Court discussed in some detail the standards that applied in partial takings cases. The Court suggested "several factors" that have "particular significance" when it engages in "these essentially ad hoc, factual inquiries:" 320

(1) The economic impact of the regulation on the claimant and, particularly, the extent to which the regulation has interfered with distinct investment-backed expectations (later also "reasonable expectations of the claimant").

(2) The character of the governmental action. A "taking" 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. 321

A number of cases pick up this theme of "investment-backed expectations"—including the Lucas decision discussed above. 322 While largely devoted to answering the blistering barrage directed at the Court by the dissent (for example, the dissent's opening salvo is: "Today the Court launches a missile to kill a mouse," 323), the Lucas notes demonstrate a clear intention to allow compensation for taking of less than all economic use if and when such a taking is before the Court. In Lucas footnote eight, the Court responds to a dissent criticism that compensation for regulatory taking of all economic use is not consistent with lack of compensation for regulatory taking of, say, ninety-five percent of economic use:

This analysis errrs in its assumption that the landowner whose deprivation is one step short of complete is not entitled to compensation. Such an owner might not

317. See id. at 115-16, 138.
318. See id. at 128-29.
319. See id. at 128-38.
320. See id. at 123-28.
321. Id. at 124 (citations omitted).
323. Lucas, 505 U.S. at 1036 (Blackmun, J., dissenting).
be able to claim the benefit of our categorical formulation, but, as we have acknowledged time and again, "[t]he economic impact of the regulation on the claimant and . . . the extent to which the regulation has interfered with distinct investment-backed expectations" are keenly relevant to takings and analysis generally.324

This "frustration of investment-backed expectations" standard, which the Court chose not to apply in Lucas because it characterized the regulatory taking as total, is clearly not rejected. Indeed, one concurring member of the Court in Lucas (Justice Kennedy) would have applied it.325

C. The Relevant Parcel

In Agins v. City of Tiburon,326 the U.S. Supreme Court rejected a Takings Clause challenge to a zoning ordinance that required that property be used for single family homes rather than multiple family dwellings so that the owners could not build apartment buildings. Notwithstanding that the ordinance would substantially reduce the value of the property, the Court concluded that there was not a taking because the owner still had reasonable economically viable use of the property. Later in Lingle v. Chevron U.S.A. Inc., the U.S. Supreme Court eliminated that part of the Fifth Amendment Agins rule, which required that a regulation "substantially advance a legitimate state interest."327 In an earlier footnote, the Court had already alluded to the utility of the "reasonable expectations standard," though in a slightly different context—that of deciding how thin to slice property interests (or, alternatively, how many sticks in the Holfeldian bundle) for purposes of deciding whether property has been taken: regrettably, the rhetorical force of our "deprivation of all economically feasible use" rule is greater than its precision, since the rule does not make clear the "property interest" against which the loss of value is to be measured. When for example, a regulation requires a developer to leave ninety percent of a rural tract in its natural state, it is unclear whether we would analyze the situation as one in which the owner has been deprived of all economically beneficial use of the burdened portion of the tract, or as one in which the owner has suffered a mere diminution in value of the tract as a whole.

Footnote eight also criticizes that portion of the New York state court's decision in Penn Central Transportation Co. v. City of New York, which suggested nearby property of the owner could be amalgamated with that portion he claimed was unusual in deciding whether a taking by regulation had occurred.

324. Id. at 1019 n.8 (alteration in original) (quoting Penn Cent. Transp. Co. v. City of New York, 438 U.S. 104, 124 (1978)).
325. Id. at 1032-36. (Kennedy, J., concurring).
327. Lingle v. Chevron U.S.A. Inc., 544 U.S. 528, 540 (2005). The Court held that the "substantially advances" test is appropriately part of a Fourteenth Amendment, not the Fifth Amendment takings inquiry. Id. at 540-541.
The answer to this difficult question may lie in how the owner's reasonable expectations have been shaped by the state's law of property—i.e., whether and to what degree the state's law has accorded legal recognition and protection to the particular interest in land with respect to which the takings claimant alleges a diminution in (or elimination of) value.328

In *Lost Tree Village Corporation v. United States*,329 the U.S. Court of Appeals for the Federal Circuit ruled that the court below improperly aggregated parcels of property for the purpose of determining the "relevant parcel" (the so-called denominator issue) in taking might occur under a *Penn Central* analysis, holding that merely holding title to contiguous parcels was not by itself sufficient to include defined parcels as part of the parcel as a whole, a critical determination in deciding whether permitted development on such additional parcels should figure into the calculus of deciding when a landowner's distinct, investment-backed expectations have been frustrated by a land use regulation. In this instance, the landowner was denied a dredge and fill permit by the Army Corps of Engineers for a small parcel, rendering it economically undevelopable. The lower court had held that distinct adjacent parcels should be considered in deciding the issue of economic developability. The Court of Appeals held only the one undevelopable parcel should be considered. Contrast that case with the decision of the South Carolina Supreme Court in *Dunes West Golf Club v. Town of Mount Pleasant*,330 which held that the landowner had not carried its burden of separating out an undeveloped parcel for regulatory takings treatment. The owner had only made that argument recently and had changed its views several times during the course of the litigation.331

V. RIPENESS

The question of when a regulatory takings claim is "ripe" for review arises because of certain tests that the U.S. Supreme Court has articulated in deciding such claims. Unless a court can determine the extent of economic loss (whether partial or total), it cannot decide whether a regulatory taking has occurred. Moreover, particularly when the claimant sues under the U.S. Constitution's Fifth Amendment, the issue of monetary loss to the landowner is critical since the amendment does not bar takings, but only takings without compensation. These considerations underlie the so-called "ripeness doctrine," which is set out in the discussion of the Court's *Williamson County* decision below. Ever since,


329. 707 F.3d 1286 (Fed. Cir. 2013).


this “prudential” inquiry has become a virtually insuperable barrier to bringing regulatory takings claims, particularly as some courts converted the two part test into a jurisdictional, rather than a prudential doctrine. Moreover, the application of the test has become a dilemma for plaintiff landowners because of the element of preclusion that is introduced. Fortunately, a new wave of decisions appear to be restoring some sanity to the application of the ripeness rule, making it again “prudential,” which allows courts to refuse to apply in particularly egregious circumstances in which the plaintiff landowner has spent years in court simply attempting to get to the merits of a takings claim.

It all began with *Williamson County Regional Planning Commission v. Hamilton Bank of Johnson City*. In *Williamson County*, the Court barred Hamilton Bank, the owner of a parcel that was denied development approval by Williamson County, from bringing a regulatory taking claim in federal court because the claim was not “ripe.” Ripeness, according to the Court, required that the landowner (1) obtain a “final decision” from the relevant state or county agencies on its application for development (in that case, subdivision approval) and (2) seek and fail to obtain compensation for the regulatory taking in state court. Noting that the property owner had sought neither a variance nor similar land use exception for its project, nor compensation for the alleged taking, the Court held that Hamilton Bank failed on both “prongs” of the ripeness test and so could not bring a substantive takings challenge in federal court. Both the final decision rule and the compensation requirement raise considerable barriers to the bringing of regulatory takings challenges to land use controls.

The subsequent U.S. Supreme Court decision in *San Remo Hotel, L.P. v. City and County of San Francisco* demonstrates indirectly the efforts of applying the ripeness doctrine to regulating takings disputes. However, the *San Remo* decision deals directly with neither prong, but rather with the preclusion problem created for litigants whom federal courts direct to first seek relief in state court under either or both prongs of *Williamson County*. Such litigants that dutifully bring their claims in state court are denied relief, and return to federal court, only to find that they are then precluded from “relitigating” the takings claims in the original federal court.

332. *Id.* at 186–94.
333. *Id.* at 194–97.
The San Remo decision is important as much for what the Court addresses as for what it does not. Carefully noting what of the petition for certiorari it chooses to address, Justice Stevens, writing for five justices, set out the narrow question before the court: "This case presents the question whether federal courts may craft an exception to the full faith and credit statute, 28 U.S.C. § 1738, for claims brought under the Takings Clause of the Fifth Amendment." The correctness or continued validity of the Williamson County ripeness test was not addressed. The Court dealt only with the narrow question of a remedy for preclusion under the full faith and credit statute.

Petitioners owned and operated a three-story, sixty-two unit hotel in San Francisco as a bed and breakfast inn. While the hotel housed "dislocated individuals, immigrants, artists, and laborers" after the 1906 earthquake, it housed primarily tourists by 1979, when San Francisco passed an ordinance instituting a moratorium on the conversion of residential hotel units into tourist units. The ordinance required a permit for such conversion, obtainable only if an applicant constructed new units, rehabilitated old ones, or paid an "in lieu" fee into a city fund for such construction or rehabilitation. Unfortunately, an employee of petitioner erroneously reported the hotel's units as "residential," thereby triggering the aforesaid requirements for a permit. In 1993 the City Planning Commission granted petitioners the permit, but only upon the condition that petitioners pay a $567,000 in lieu fee.

A number of administrative and court appeals followed in both state and federal court, in which the petitioners claimed a regulatory taking, and both won and lost appeals on the claim that the fee failed a nexus and proportionality test under the U.S. Supreme Court's decisions in Nollan v. California Coastal Council and Dolan v. City of Tigard. At least one (federal district) court held that because petitioners had not sought and been denied just compensation in state court, the claim was unripe under Williamson County. It was here that the preclusion issue before the U.S. Supreme Court became relevant. Petitioners reserved some of their claims in federal court and then went to state court as directed, where eventually the California Supreme Court decided against Petitioners on their substantive takings claims (by applying, not an intermediate standard of review, but only a reasonable relationship standard, and so finding the in lieu fee reasonable). When Petitioners then returned to federal court, having satisfied their Williamson County ripeness obligation, the federal district court held that 28 U.S.C. § 1738—the full faith and credit statute—required federal courts to give preclusive effect to any state court judgment that would,

337. San Remo, 545 U.S. 323 at 326.
338. Id. at 352 (Rehnquist, C.J., concurring). Neither was it addressed by the federal courts below nor raised before the Court by the parties, as correctly noted by Chief Justice Rehnquist in his concurring opinion. Id.
339. Id. at 327.
in turn, have preclusive effect under the laws of that state. Therefore, because California courts had interpreted the relevant substantive state takings law at the same time as federal takings law (although petitioner had expressly reserved some of its federal claims), petitioners’ federal claims were the same as those already resolved in state court. It followed that petitioners were thus precluded from re-litigating those claims in federal court. The Ninth Circuit Court of Appeals affirmed, and so the narrow issue made its way to the U.S. Supreme Court.

After reviewing the history of the full faith and credit statute following its adoption in 1790 and finding that it implemented the U.S. Constitution’s Full Faith and Credit Clause, the Court noted that “This statute has long been understood to encompass the doctrines of res judicata, or ‘claim preclusion’ and collateral estoppel, or ‘issue preclusion.’” The Court then observed that in the case’s present posture, the Court had “only one narrow question to decide: whether we should create an exception to the full faith and credit statute” in order to “provide a federal forum for litigants who seek to advance federal takings claims that are not ripe” under Williamson County. The Court held that it should not.

After disposing of the narrow full faith and credit issue, the Court declared that Petitioners overstated the reach of Williamson County by suggesting that they were required to raise facial challenges in state court under the rule of that case. First, since facial takings challenges request relief “distinct from the provision of ‘just compensation,’” the Court said that petitioners could have raised them directly in federal court without needing to first raise them in state court. Alternatively, petitioners could have reserved their facial claims while pursuing their as-applied claims. Second, the Williamson County requirement that aggrieved property owners must seek compensation through state procedures did not preclude state courts from hearing simultaneously a claim that, in the alternative, the denial of compensation would violate the Fifth Amendment. As a result, there was “scant precedent” for such litigation in federal court. Indeed, the Court observed that most of the cases in its takings jurisprudence had come to the Court on writs of certiorari from state courts of last resort that “undoubtedly have more experience than federal courts do in resolving the complex factual, technical, and legal questions related to zoning and land-use regulations.” In sum, whether or not it is “unfair to give preclusive effect to state-court proceedings that are not chosen, but are instead

340. San Remo Hotel, L.P. v. San Francisco City & Cnty., 364 F.3d 1088 (9th Cir. 2004).
341. San Remo Hotel, L.P. v. City & Cnty. of S.F., 545 U.S. 323, 336 (2005). The statute provides in relevant part: “judicial proceedings . . . shall have the same full faith and credit in every court within the United States and its Territories and Possessions as they have by law or usage in the courts of such State . . . .” Id. (internal quotations omitted).
342. Id.
343. Id. at 337.
344. Id. at 347.
required in order to ripen federal takings claims” the Court was not free to disregard the full faith and credit statute solely to preserve the availability of a federal forum. 345

In sum, the Court in San Remo narrowly ruled that federal courts may not carve out an exception to the federal full faith and credit statute, particularly for regulatory taking cases, unless Congress so allows, either explicitly or implicitly. Therefore a petitioner in San Remo Hotel’s posture is precluded from raising issues litigated in federal court that it previously litigated in state court, even though forced into state court in order to “ripen” the case under the rule of Williamson County. The language elsewhere in the opinion makes it likely that the majority would permit preclusion under other circumstances as well, although a five-justice opinion of the Court is perhaps a slender reed upon which to rely for much beyond the holding itself. In any event, the Court makes it clear that there is no right to hear a regulatory taking claim in federal court, whether a landowner is forced into state court under preclusion principles or not. It is also clear that the Williamson County ripeness barrier to bringing regulatory takings claims remains intact—at least for now. Clearly Chief Justice Rehnquist would have liked to have revisited at least the second—state compensation—prong, and he wrote for four concurring members of the Court.

As discussed below, a number of federal appeals courts appear to agree with the late Chief Justice.

The Supreme Court has yet to explicitly revisit Williamson County. However, the Court has, in recent decisions, used language that highlights the fact that Williamson County is “a discretionary, prudential ripeness doctrine.” 346 For example, in the 2010 decision of Stop the Beach Renourishment Inc. v. Florida Dept. of Environmental Protection, the Supreme Court considered a case in which beachfront landowners alleged an inverse condemnation after the state undertook a beach re-nourishment project that deprived them of their littoral rights and rights to accretion. 347 The Court made short work of the respondents’ attempt to argue that the taking claim was not ripe because the petitioners had not sought just compensation in state court, holding that the ripeness objection was not brought in the writ for certiorari, was not jurisdictional, and was therefore waived. 348 In the 2013 decision of Horne v. U.S. Department of Agriculture, 349 the Court again clarified that “prudential ripeness” is “not, strictly speaking, jurisdictional.” 350 In a footnote

345. Id.
347. Id. at 729–30. This case is discussed in greater detail in the “public trust Lucas background principles” section of this paper. See supra note Part IV.A.1.
348. Stop the Beach Renourishment, Inc., 560 U.S. at 729.
349. 133 S. Ct. 2053 (2013). This case is discussed in greater detail in the development conditions section of this Article. See supra Part X.
350. Horne, 133 S. Ct. at 2062.
to the opinion, the Court further explained that a "[c]ase or [c]ontroversy exists once the government has taken private property without paying for it. Accordingly, whether an alternative remedy exists does not affect the jurisdiction of the federal court." Commentators speculate that the Supreme Court, by emphasizing the prudential nature of the doctrine, has paved the way for lower federal courts to relax the ripeness requirements.

Given the direction of a number of Federal Circuits following San Remo, Stop the Beach, and Horne, it is clear that the Williamson County ripeness rule has in fact been substantially diluted, at least with respect to the state litigation exhaustion requirement. First, many courts are recasting the ripeness doctrine as mostly prudential rather than jurisdictional. Second, courts are increasingly loath to apply at least the second state action prong, at least in part to avoid lengthy delays in getting to the merits of a regulatory taking claim. Presumably these trends are likely to continue, and one can logically expect the U.S. Supreme Court to confirm these directions, taking the late Chief Justice Rehnquist's suggestion that the rule be reviewed, changed, and clarified.

A. Prong Two: The State Litigation Requirement

The federal circuits are in some disarray over the application of the ripeness doctrine with respect to prong two (the state compensation remedy litigation requirement). J. David Breemer recently summarized the present state of the law, such as it is, for a symposium held at the Touro Law School in the fall of 2013. The breakdown, updated to reflect subsequent developments, is as follows:

The Second, Fourth, Fifth, Sixth, and Ninth Circuits consider the state litigation requirement to be prudential and not jurisdictional. An excellent example of the trend towards "prudential" ripeness is the Federal Appeals Court of the Fourth Circuit's 2013 decision of Town of Nags Head v. Toloczko. Town of Nags Head, was essentially a coastal zone/state public trust case dealing with the applicability of a local ordinance forbidding construction/reconstruction of private homes on state public trust lands, together with some nuisance issues, following damage to the homes in the Town of Nags Head, on a barrier island (the outer banks) of North Carolina. The Fourth Circuit took a very narrow approach in defining ripeness, a defense raised by the Town in response to plaintiffs' claim that the Town's ordinance constituted a regulatory taking of property under the Fifth Amendment. The Court first reiterated that ripeness is a "prudential rather than a jurisdictional

351. Id. at n.6 (internal quotations omitted).
352. Supra note 346; Breemer at 339 (2014).
353. Id. at 340–41.
354. 728 F.3d 391 (4th Cir. 2013).
rule.\textsuperscript{355} Second, the Court held that a federal court could therefore exercise discretion concerning when to apply it. Third, the Court refused to apply the second prong of the ripeness rule, which requires a regulatory taking claimant to first litigate its claim in state court: "This is a proper case to exercise our discretion to suspend the state-litigation requirement of \textit{Williamson County}. In the interests of fairness and judicial economy, we will not impose further rounds of litigation on the Toloczkos."\textsuperscript{356}

In the closely related decision of \textit{Town of Nags Head v. Sansotta},\textsuperscript{357} the Fourth Circuit dismantled the notorious removal "ripeness trap" by holding that the town automatically waived ripeness arguments when it removed to federal court.\textsuperscript{358} In \textit{Rosedale Missionary Baptist Church v. New Orleans City},\textsuperscript{359} the Fifth Circuit overturned previous decisions that found ripeness to be strictly jurisdictional, holding that "ripeness requirements are merely prudential."\textsuperscript{360} Similarly, the Ninth Circuit considered its complicated history with \textit{Williamson County}'s ripeness requirement, and ultimately determined that ripeness appears to be prudential rather than jurisdictional.\textsuperscript{361} In \textit{Sherman v. Town of Chester},\textsuperscript{362} the Second Circuit reversed its previous stance on the issue, holding, "because \textit{Williamson County} is a prudential rather than a jurisdictional rule, we may determine that in some instances, the rule should not apply and we still have the power to decide the case."\textsuperscript{363}

Most recently, the Sixth Circuit has recognized the prudential nature of the state litigation requirement. In \textit{Wilkins v. Daniels},\textsuperscript{364} the Court considered whether to dismiss an inverse condemnation case in which the appellants had not previously sought compensation in state court:

Ordinarily this would end our inquiry. However, Williamson County Ripeness is a prudential doctrine. The requirement to seek compensation prior to bringing suit will often serve important federalism interests. In regulatory takings cases involving sensitive issues of state policy, or cases that turn on whether the plaintiff has a property interest as defined by state law, ripeness concerns will prevent a federal court from reaching the merits prematurely. But where it is clear that there has been no "taking" an issue of federal constitutional law, no jurisprudential purpose is served by delaying consideration of the issue. If anything, dismissing the case on ripeness grounds does a disservice to the federalism principles embodied in this doctrine as it would require the state courts

\begin{itemize}
  \item 355. \textit{Id.} at 399.
  \item 356. \textit{Id.}
  \item 357. 724 F.3d 533 (4th Cir. 2013).
  \item 358. \textit{Id.} at 544.
  \item 359. 641 F.3d 86 (5th Cir. 2011).
  \item 360. \textit{Id.} at 88-89.
  \item 361. Guggenheim v. City of Goleta, 638 F.3d 1111, 1118 (9th Cir. 2010); \textit{see also} MHC Fin. Ltd. P'ship v. City of San Rafael, 714 F.3d 1118, 1130 (9th Cir. 2013) \textit{cert. denied,} 134 S. Ct. 900 (2014) (holding that "[i]n this case, we assume without deciding that the claim is ripe, and exercise our discretion not to impose the prudential requirement of exhaustion in state court").
  \item 362. 752 F.3d 554 (2d Cir. 2014).
  \item 363. \textit{Id.} at 561.
  \item 364. 744 F.3d 409 (6th Cir. 2014).
\end{itemize}
to adjudicate a claim, already before the federal court, that clearly has no merit. We therefore turn to whether the Act effects a taking.365

Interestingly, the Court appeared to regard the Williamson County ripeness requirements as a beneficial pillar of federalism. To that end, the Court narrowly ruled that the ripeness requirement could be waived in order to strike "clearly" unmeritorious takings claims. However, in doing so, the Court specifically recognized that the prudential ripeness doctrine did not serve as a jurisdictional bar.

The Third, Seventh, and Tenth Circuits have not yet concluded that the state litigation requirement is not a jurisdictional bar, although they have acknowledged that Williamson County is "rooted" in prudential ripeness. The Third Circuit recognized the prudential nature of the doctrine in County Concrete Corp. v. Township of Roxbury,366 yet in subsequent cases has continued to treat Williamson County as jurisdictional.367 To the same effect, the Seventh Circuit, in Peters v. Village of Clifton,368 noted that "Williamson County's ripeness requirements are prudential in nature," but went on to conclude that the "prudential character of the Williamson County requirements do not, however, give the lower federal courts license to disregard them."369

The Seventh Circuit has yet to depart from this interpretation, consistently dismissing takings claims that have not first sought compensation in state court.370 Similarly, in Alto Eldorado Partnership v. County of Santa Fe,371 the Tenth Circuit accepted "the Supreme Court's characterization of the Williamson County requirements as 'prudential,' " but declined "the developers' invitation to ignore the ripeness requirements."372

The Tenth Circuit continues to treat Williamson County ripeness as jurisdictional,373 but at least one federal district court within the circuit has recently treated the requirements as prudential.374

365. Id. at 418 (internal citations omitted).
366. 442 F.3d 159 (3d Cir. 2006). "The ripeness doctrine serves 'to determine whether a party has brought an action prematurely and counsels abstention until such time as a dispute is sufficiently concrete to satisfy the constitutional and prudential requirements of the doctrine.' " Id. at 164.
367. See, e.g., SB Bldg. Assocs., L.P. v. Borough of Milltown, 457 F. App'x 154 (3d Cir. 2012). "Because we conclude that the remedies available under New Jersey law are adequate and the Plaintiffs have failed to exhaust their options in the New Jersey courts, they cannot satisfy the second prong of the test from County Concrete." Id. at 157–58.
368. 498 F.3d 727 (7th Cir. 2007).
369. Id. at 734.
370. See Everson v. City of Weyauwega, 573 F. App'x 599, 600 (7th Cir. 2014); Hendrix v. Plambeck, 420 F. App'x 589, 591–92 (7th Cir. 2011); Waldon v. Wilkins, 400 F. App'x 75, 79 (7th Cir. 2010).
371. 634 F.3d 1170 (10th Cir. 2011).
372. Id. at 1179.
373. Gose v. City of Douglas, 561 F. App'x 723 (10th Cir. 2014). "The Goses could not bring their federal claims until they had exhausted the state inverse condemnation procedures. But, as we previously identified, the Goses cannot cure this jurisdictional defect." Id. at 725.
374. River N. Props., LLC v. City & Cnty. of Denver, No. 13-CV-01410-CMA-CBS, 2014 WL 1247813 (D. Colo. Mar. 26, 2014). Although the Tenth Circuit has more recently held that the Williamson rule is prudential, it has often failed to firmly establish that the rule is exclusively so . . . the Tenth Circuit's imprecise use of language on this issue has created a ripple effect of district court rulings holding that the Williamson
The First, Eighth, and Eleventh Circuits continue to apply the state litigation requirement as strictly jurisdictional. In Snaza v. City of Saint Paul,375 the Eighth Circuit rejected the notion of prudential ripeness, conclusively stating, "we have held that Williamson County is jurisdictional."376 The Eleventh Circuit also treats ripeness as a jurisdictional bar, explaining that ripeness "requires that state courts get the first shot, and the subsequent application of the Full Faith and Credit statute may mean that future plaintiffs are ultimately precluded from then proceeding to federal court."377 Similarly, the First Circuit continues to adhere to the interpretation that the state litigation requirement implicates a federal court ability to exercise jurisdiction.378

Despite the split among Circuits, there is evidence that the overall trend is towards recognition of Williamson County ripeness as a prudential doctrine, particularly with respect to the state litigation requirement. Within the last year the Second Circuit and Sixth Circuit have joined the ranks of federal appellate courts that no longer regard ripeness as a jurisdictional barrier. Circuits that staunchly uphold Williamson County as a jurisdictional rule face pressure from below, as district courts elect to apply the "prudential" interpretation advanced by other Circuits. For example, the District of Colorado in the Tenth Circuit and the District of Massachusetts in the First Circuit have both cited to the prudential nature of the doctrine and chosen to exercise jurisdiction over inverse condemnation actions, despite the arguably binding law to the contrary within their respective Circuits.379 In sum, it is clear that the second prong of the Williamson County ripeness requirement has been considerably weakened in recent years, and that this trend is likely to continue.

B. Prong One- The Finality Requirement

The first prong of the ripeness doctrine has its roots in Williamson County,
where the Supreme Court held that a regulatory taking claim "is not ripe until the government entity charged with implementing the regulations has reached a final decision." 380 The Court reasoned that the economic impacts of the challenged government action on distinct investment-backed expectations could not "be evaluated until the administrative agency has arrived at a final, definitive position regarding how it will apply the regulations at issue to the particular land in question." 381 Therefore, the Court required the respondent to first seek administrative relief in the form of a variance in order to determine whether the government action was final and definitive. Over time, this language has been interpreted and developed by courts into a requirement of "finality"—the first prong of the Williamson County ripeness doctrine. 382

It appears that the first prong of the ripeness doctrine—finality—has not come under attack to the same extent as the state litigation requirement. Many courts regard the finality requirement as serving a legitimate purpose. As the Second Circuit recently reiterated: "The finality requirement . . . helps to develop a full record for review, limits judicial entanglement in constitutional disputes, and gives proper respect to principles of federalism." 383 However, as discussed below, the courts have imposed limitations on this finality requirement, holding that a taking claim is ripe when requiring plaintiffs to pursue further administrative relief would be repetitive, unfair, or futile. Moreover, in practice there is considerable overlap between the two prongs of the ripeness doctrine, 384 so the ongoing dilution of the state litigation requirement may also affect how courts treat the finality prong.

The U.S. Supreme Court brought some clarity to the finality ripeness requirement in Palazzolo v. Rhode Island:

While a landowner must give a land-use authority an opportunity to exercise its discretion, once it becomes clear that the agency lacks the discretion to permit any development, or the permissible uses of the property are known to a reasonable degree of certainty, a takings claim is likely to have ripened. 385

The Court also created an important safeguard against government abuse of the finality ripeness requirement by holding that governments may not "burden property by imposition of repetitive or unfair land-use procedures in order to avoid a final decision." 386 Many saw Palazzolo as restoring a reasoned approach to ripeness issues, assuring fair access to federal courts for takings challenges when the proposed development is reasonably complete and the

381. Id. at 191.
384. See, e.g., § 3532.1.1 Property Taking and Related Claims, 13B FED. PRACT. & PROC. JURIS. § 3532.1.1 (3d ed.).
386. Id. at 620–21.
denial reasonably final. 387

In his 2013 article The Ripeness Game: Why Are We Still Forced to Play?,388 Michael M. Berger identified and explained five distinct “branches” of the finality requirement that courts have tended to apply: (1) the property owner must apply for a specific use, (2) the property owner must make more than one application/there must be a meaningful application for use, (3) the property owner must apply for a variance, (4) the property owner must obtain a final determination of what the government will permit, and (5) the property owner must actually be injured by the application of the regulation.389

Despite its pervasiveness, the finality requirement is not always an insuperable barrier to plaintiffs. Williamson County itself held that the finality requirement did not require that a plaintiff exhaust all administrative remedies.390 Plaintiffs need not resort to clearly remedial administrative procedures, because the finality requirement of ripeness is satisfied when “the initial decisionmaker has arrived at a definitive position on the issue that inflicts an actual, concrete injury.”391

In the same vein, for the last twenty-five years many courts have observed a “futility” exception to the ripeness finality requirement.392 According to the futility exception, “a property owner need not pursue . . . applications when a zoning agency lacks discretion to grant variances or has dug in its heels and made clear that all such applications will be denied.”393 For example, in 1990, the Ninth Circuit held that landowners need not apply for a variance when the city rejected their formal development application, and the city did not dispute that applying for a variance would have been futile since the proposed development did not conflict with the city’s zoning ordinances or its general land use plan.394 Contemporary courts continue to recognize that the finality ripeness requirement is satisfied when pursuing further administrative remedies before proceeding to court would be futile.395

388. See BERGER, supra note 382.
389. See generally id.
391. Id.
392. Id.; Southview Assocs., Ltd. v. Bongartz, 980 F.2d 84, 98 (2d Cir. 1992); Gilbert v. City of Cambridge, 932 F.2d 51, 60-61 (1st Cir. 1991); Eide v. Sarasota Cnty., 908 F.2d 716, 726 (11th Cir. 1990).
393. Murphy v. New Milford Zoning Comm’n, 402 F.3d 342, 349 (2d Cir. 2005).
394. Del Monte Dunes at Monterey, Ltd. v. City of Monterey, 920 F.2d 1496, 1504-06 (9th Cir. 1990).

[Vol. 54]
Moreover, several federal appeals courts have recently cited to *Palazzolo* in holding that the first prong of ripeness is satisfied when requiring the plaintiffs to pursue additional administrative steps to obtain a final decision would be repetitive and unfair. The Second Circuit has characterized the unfair/repetitive exception as related to, but distinct from the futility exception in *Sherman v. Town of Chester*, a case in which a developer brought an inverse condemnation claim, arguing that the town’s endless imposition of red tape on a proposed subdivision project constituted a taking. The court characterized the claim as based on a “death by a thousand cuts” theory, and concluded that a final decision was unnecessary because the town’s obstruction itself was allegedly a taking.

The Town will likely never put up a brick wall in between Sherman and the finish line. Rather, the finish line will always be moved just one step away until Sherman collapses. In essence, the Town engaged in a war of attrition with Sherman. Over ten years, Sherman was forced to spend over $5.5 million on top of the original $2.7 million purchase. As a result, he became financially exhausted to the point of facing foreclosure and possible personal bankruptcy. Moreover, at no point could Sherman force the Town to simply give a final “yay or nay” to his proposal. When asked at argument, the Town’s counsel could not name one way Sherman could have appealed any aspect of the Town’s decade of maneuvers in order to obtain a final decision.

We are mindful that federal courts should not become zoning boards of appeal... Every delay in zoning approval does not ripen into a federal claim. Unfortunately, it is no simple task to distinguish procedures that are merely frustrating from those that are unfair or would be futile to pursue. But when the government’s actions are so unreasonable, duplicative, or unjust as to make the conduct farcical, the high standard is met. And it was met in this case.

VI. CONCLUSION

In sum, while clarification would be useful in areas such as defining the relevant parcel and revisiting ripeness at the U.S. Supreme Court level, the parameters of regulatory taking are relatively clear. A partial regulatory taking is defined by the economic effect on the landowner and in particular that landowner’s distinct or reasonable investment-backed expectations, together with the character of the government action. A total regulatory taking results when a regulation deprives a landowner of all economically beneficial use (not value) of the relevant parcel (whatever that is) unless the regulation codifies a nuisance or consists of a background principle of the relevant state’s law of property, because perpetrating a nuisance or ignoring such a background
principle (public trust, custom, old statutes) is not a part of a landowner’s title to begin with. Ripeness is increasingly recognized as a prudential, rather than a jurisdictional, bar to litigating a regulatory taking dispute. Physical takings law is even clearer, with public use now clearly equated with public purpose. However, the outer limits of public purpose are likely in play, and beyond the mere pretextual defense resulting in a naked transfer of title from one private owner to another. What will or may happen next is set out amply in the introduction to this article. Furthermore deponent sayeth not.