



# Taking Sides on Takings Issues: Public and Private Perspectives

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Editor

## Chapter 9

Do Partial Regulatory Takings Exist?

by

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# DO PARTIAL REGULATORY TAKINGS EXIST?

# 9

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## § 9.0 *Introduction*

The term “partial taking” appears in no majority Supreme Court opinion involving a regulatory takings challenge to a restriction on the use of private property. The Court has never found a taking when a regulation only limits the use of property but allows some economically beneficial use of the property to proceed. And the Court has never applied the multifactor *Penn Central*<sup>1</sup> test—which ostensibly provides the legal framework for evaluating partial takings claims—to uphold a claim that a regulatory restriction effects a taking.

Notwithstanding this record, there is great interest and concern about the subject of “partial regulatory takings”—as confirmed, for example, by the editor’s decision to include three chapters on the subject in this book. Furthermore, some members of the U.S. Court of Appeals for the Federal Circuit and the U.S. Court of Claims have championed the idea, as exhibited in the seemingly endless series of decisions in the case of *Florida Rock Indus., Inc. v. United States*.<sup>2</sup> More significantly, the Supreme Court in the recent case of *Palazzolo v. Rhode Island*<sup>3</sup> rejected a total taking claim under *Lucas v. South Carolina Coastal Council*,<sup>4</sup> but remanded for consideration of a claim under the separate, possibly “partial” test of *Penn Central*. The court on remand in *Palazzolo* as well as other courts trying to make sense of



*Palazzolo* will have to grapple with the potential existence of a partial taking claim. This chapter seeks to anticipate some of the complexities they will encounter.

The chapter is divided into four parts. The first part focuses on defining terms, trying to make sense of the term total taking and its apparent analog, partial taking. It discusses how a partial taking might potentially be identified and examines the possible alternative remedies in the event of a finding of a partial taking. The second part discusses the backhanded origin of the ostensible *Penn Central* test for partial takings and raises some questions about how it fits into the architecture of takings law. The third part critiques the *Penn Central* test as a possible standard for evaluating partial takings claims. The fourth part collects what appear to be the strongest arguments against the partial taking idea, especially its most expansive versions.

### § 9.1 *Defining Terms*

It is important to understand the relevant terminology. Following is a review of key terms.

#### § 9.1(a) *What Is a Total Taking?*

The Supreme Court has defined a “total” or “categorical” taking with fair precision. In *Lucas*, the trial court found that the regulation rendered Mr. Lucas’s two beachfront lots literally “valueless,”<sup>5</sup> and the Supreme Court had no difficulty concluding that this constituted a “denial of all economically beneficial use” sufficient to constitute a total taking. By contrast, in *Palazzolo*, the opportunity to construct at least one single-family house on the owner’s 20-odd acres, consisting of wetlands and a small area of uplands, meant that the property had a market value of at least \$200,000. This highly restricted but valuable use was sufficient, the Supreme Court ruled, to take the case out of the *Lucas* category. The Court said that the government could not avoid a *Lucas* taking by demonstrating that the owner “is left with a token interest,”<sup>6</sup> but treated the \$200,000 value as more than token. In sum, the *Lucas* rule applies only in those “extraordinary circumstances”<sup>7</sup> when a regulation eliminates essentially all of a property’s uses and value. What, then, is a partial taking?

#### § 9.1(b) *Different Kinds of Partial Restrictions*

As a threshold matter, a regulation can be said to partially restrict the use of property in several different senses. First, a regulation can restrict the intensity at which a property might be used. The



large-lot zoning at issue in *Agins v. City of Tiburon*<sup>8</sup> represents an example of this type of restriction. Agricultural or forest zoning provides another example.

Second, a regulation can partially restrict use of property because it eliminates or severely restricts the opportunity to use some geographical portion of the property but does not restrict (at least to the same degree) other portions of the property. The *Palazzolo* case is an example of this type of partial restriction. So too is the *Penn Central* case, where the company could continue to use the property for a railroad terminal but was barred from developing the airspace above.

This latter type of restriction raises a partial taking issue, but it also can be viewed as raising the “parcel as whole” question. In *Palazzolo*, the claimant’s primary argument was that the restrictions on the use of the entire 20-acre parcel were so severe that they amounted to a taking. Before the Supreme Court, however, plaintiff’s counsel also argued that there was a taking because the claim should have been analyzed by focusing on the wetlands and disregarding the uplands. The Court ruled that the parcel issue had been raised too late and had been waived. But in other cases, the partial taking theory and the parcel approach will represent alternative potential approaches for analyzing restrictions that apply to part of the property. At least to date, the Court has insisted on addressing a claimant’s taking claim in relation to the property as a whole, rather than by focusing on the specific portion of the property affected by regulation.<sup>9</sup>

The potential parcel argument as applied to property in a geographical sense has an analog in the argument that a taking claimant should be permitted to claim a taking of one or more distinct legal sticks in the bundle of property rights. The claim in *Andrus v. Allard*<sup>10</sup> that the government effected a taking by prohibiting the sale of eagle feathers represents an example of this type of segmentation. So too, in a sense, was the unsuccessful claim in *Penn Central* that there was a taking of the company’s legally distinct air rights. Consistent with the established parcel as a whole approach, the Court generally has rejected this argument for subdividing a property holding in order to maximize the possibility of a taking recovery.<sup>11</sup>

*Florida Rock*, which probably involves the most well-known example of an alleged partial taking, actually involved a partial claim of a rather unusual type. The Army Corps of Engineers denied the owner permission to fill 98 acres of wetlands in Florida. The owner’s primary interest in acquiring the property was to mine the underlying limestone. But the denial of the fill permit effectively denied the owner permission to make any economic



use of the property. The government defended on the ground that, even though there were no immediate permitted uses of the property, the property retained significant economic value in the marketplace, because speculators would be willing to pay a non-trivial price for the property in the hope that the regulatory restrictions might someday be lifted. In a 1994 ruling, the Federal Circuit credited this argument with precluding the possibility of a “total” taking under *Lucas*, but permitted the case to go forward on the partial taking theory.

This type of partial taking claim raises a number of issues and concerns. First, it is decidedly odd for the government to defend a regulation against a taking claim on the ground that the public may decide to abandon the regulation in the future. According to this logic, the more persuasively the government can show that the public will not back a regulation over the long term, the greater the chances of defeating the claim. Also, market value based on the possibility that some use of the property will be allowed in the future seems distinguishable from market value derived from a permitted, current use of the property, which intuitively provides a more solid basis for rejecting a taking claim. Finally, the restrictions at issue in *Florida Rock* appear similar to the absolute prohibition on development at issue in *Lucas*, which, of course, supported a finding of a “total” taking. It is likely that speculators might have paid at least something for Mr. Lucas’s coastal lots; indeed, several Justices expressed skepticism about the trial court finding that the property was “valueless.”<sup>12</sup> If speculative value based on possible changes in the rules is sufficient to defeat a total taking claim, it is difficult to see how any total taking claim could be sustained.

**§ 9.1(c) Part of What?**

A total taking claim naturally focuses on the question of what value or use remains as of the date of the alleged taking. However, in the case of an alleged partial taking, the question arises: part of what? Two potential answers point in very different directions.

One alternative is to ask what proportion of the market value or use rights the owner retains under the challenged regulatory regime, as compared to the market value or use rights if the restrictions were not enforced. This question should logically be answered based on estimates of market value as of the date of the alleged taking.

The other alternative is to start with the claimant’s original investment in the property and compare that value to the market value of the property subject to the regulatory restrictions. In

some cases the value of the restricted property will be less than the original investment, in some cases more, and in some cases the value will be unchanged.

A recent case before the U.S. Court of Federal Claims, *Walcek v. United States*,<sup>13</sup> provides an instructive set of facts. In 1971, plaintiffs paid approximately \$117,731 for 14.5 acres of property along the Delaware shore; 13.2 acres were wetlands subject to federal regulatory control. In 1993, the Army Corps of Engineers denied the plaintiffs permission to fill the wetlands in order to develop the entire property. The plaintiffs then sued claiming a taking under the Fifth Amendment. The government defended on the ground that the regulatory restrictions were not so onerous that they rose to the level of a taking. To support its position, the Army Corps contended that it likely would have granted permission for a more limited development that entailed destruction of 2.2 acres of relatively low-value wetlands.

To assess the economic impact of the Army Corps' decision, the court asked the "part of what" question in both ways. First, the court compared the market value based on the plaintiffs' development proposal (\$1,485,000) with the value of the property subject to the restrictions the Army Corps intended to impose (\$597,000), resulting in an estimated diminution in market value of 59.8 percent. Second, the court compared the plaintiffs' investment in the property (\$291,969, based on the \$117,731 purchase price augmented by cash outlays to maintain the property) with the value of the property if developed in accordance with the Army Corps' restrictions (\$597,000). This calculation indicated that the plaintiffs could more than double their original investment. The court also performed an alternative calculation taking into account the fact that some of the plaintiffs' maintenance expenses yielded tax benefits. This calculation generated a \$169,701 figure for the plaintiffs' investment, meaning that the plaintiffs would receive a "profit" of \$427,299 under the Army Corps plan, or a 335 percent increase in their original investment.

In sum, the court concluded that the plaintiffs received a profit based on the original investment approach and suffered a loss based on the current market value approach. Weighing the results of both of these calculations along with other facts and circumstances, the court concluded that the plaintiffs had not established a taking. (As this book goes to press, the *Walcek* ruling is on appeal to the Federal Circuit.)

The *Walcek* case also raises an additional wrinkle. While the court adjusted the plaintiffs' original investment to include holding costs, it decided not to make an adjustment to the original



purchase price to account for inflation.<sup>14</sup> By contrast, Judge Loren Smith, former chief judge of the Court of Federal Claims, in his latest decision on remand in *Florida Rock*, adjusted the claimant's original investment based on the Consumer Price Index, without explanation.<sup>15</sup> The court in *Walcek* reasoned that an adjustment for inflation is not ordinarily made in calculating the value of an investment for other purposes (such as taxes), that it is unreasonable to assume that the value of an investment will increase in value in lockstep with inflation, and that such an adjustment would raise a whole range of technical complexities.

While the issue of adjusting the original investment based on inflation may seem trivial, it can have an enormous impact on the ultimate resolution of a case. In *Walcek*, factoring in inflation would have eaten up most of the plaintiffs' estimated profit on their original investment. In *Florida Rock*, on the other hand, including inflation accounted for all or most of the plaintiff's supposed loss on its original investment.<sup>16</sup>

Finally, it is noteworthy that the divergence between these two potential measures of economic impact can become enormous if the property has been held for a long time. Real estate prices have escalated rapidly over the last several decades, with some of the most dramatic increases occurring in coastal and other ecologically sensitive areas. In many cases, even highly restricted areas are likely to have market values that far exceed the owners' original investments. Assuming claimants do not benefit from a stepped-up basis based on inflation (at a modest rate of 3 percent, the value of an investment doubles in 24 years), measuring economic impact relative to the owner's original investment will frequently show little if any harm. In a recent case, the Maine Supreme Court rejected a taking claim by an owner denied permission to construct a home on a lot with a market value for development of \$100,000.<sup>17</sup> The owner had purchased the property several decades earlier for only \$10,000, and the property had value for private, undevelopable open space of \$50,000.

At the same time, given the general run-up in real estate values and the tighter restrictions on development in ecologically sensitive areas, the apparent diminutions in property value caused by regulatory restrictions relative to the property's potential unrestricted value are likely to be large. Environmental restrictions have helped preserve the amenity values that make development in environmentally sensitive areas attractive and have restricted the supply of developable land, thereby increasing the value of remaining development opportunities. Thus, calculations based on hypothetical scenarios in which the taking claimant is free



from all regulatory restraints are likely to yield misleadingly large estimates of diminutions in market value. In sum, the choice of the benchmark for evaluating the economic impact of regulation means, if not everything in the partial taking analysis, then a very good deal.

**§ 9.1(d) *What Would Be the Remedy for a Partial Taking?***

The final preliminary question, assuming for the sake of argument that a partial taking exists, is what the remedy for such a taking would be. Under one view, a taking is an all-or-nothing proposition. A finding of a taking, whether total or partial, means that the government must pay compensation for the taking and will receive full title to the property in return. Thus, although a regulation might fall somewhat short of eliminating all of the property's economic value or use, if it rises to the level of a taking, the entire property has been taken.

Under the alternative view, if a taking is only partial, then the government should only pay compensation for the part affected and should only obtain title to a partial interest. In the *Penn Central* case, for example, under a partial taking theory, the government would only pay just compensation for the airspace and in exchange would receive some kind of easement prohibiting development of the airspace. In *Florida Rock*, the Court of Claims concluded that a finding of a partial taking would lead to government acquisition of some type of "negative easement" prohibiting the filling of the wetlands for mining or other development purposes.<sup>18</sup>

At least in principle, theories of partial regulatory takings could be constructed that would accommodate either type of remedial approach. Nonetheless, the answer to the remedy question is closely related to the issue of the potential scope of the partial taking theory. If the partial taking theory were designed to accommodate only regulatory burdens that, although not eliminating all economic use and value, at least eliminate *substantially* all economic use and value, then the all-or-nothing approach would be entirely practical. Under this view, takings doctrine is confined to cases where government action has effectively appropriated or destroyed private property, and it is reasonable to require the government to acquire the affected property outright.

On the other hand, if partial takings were an expansive concept, the all-or-nothing approach would make less sense. For example, using the *Palazzolo* case as an example, if the coastal restrictions effected a partial taking, would the government acquire the entire 20 acres or only the restricted wetlands? The first



option comports with the more traditional approach. But, on the other hand, it seems nonsensical to suppose—assuming Mr. Palazzolo wishes to develop the one upland site and the government is willing to approve it—that the government, based on the wetlands restrictions alone, must acquire the entire property including the upland area.

One obvious concern is that once one accepts partial acquisition as a remedy for a partial taking, there is no principled stopping point. What would distinguish the actual *Palazzolo* case from another case in which the 20 acres were divided into 15 upland acres and five wetlands acres? If a finding of a partial taking is appropriate in the real case, why not the hypothetical one? The obvious judicial interest in avoiding this slippery slope may weigh strongly in favor of finding no taking in *Palazzolo* and similar cases.

One argument for the partial acquisition remedy, and for the idea of partial regulatory takings in general, is that regulatory takings should be analogized to permanent physical takings. In the case of a permanent physical occupation, subject to some qualifications, a court will always find a taking, no matter how small the portion of the property affected by the occupation. By the same token, when a physical-occupation taking takes place, the government logically acquires only the rights in the occupied area, not the entire property. In *Loretto v. Teleprompter Manhattan CATV Corp.*, the finding that Mrs. Loretto's property was physically invaded as a result of the physical placement of a cable television box on her property did not mean that either the government or the cable company obtained ownership of her entire apartment building. Whether the concept of a physical taking supports the idea of a partial regulatory taking depends upon whether the rules governing physical takings can properly be transplanted to the regulatory sphere, a topic I shall address in section 9.2.

## § 9.2 *The Problematic Penn Central Test*

Perhaps one of the strongest practical supports for the partial taking theory is the apparent availability of the so-called *Penn Central* multifactor balancing test to evaluate such claims. As with baseball fields amid rows of corn, if the Supreme Court builds a partial regulatory taking doctrine, then partial taking claims apparently must inevitably come.

The *Penn Central* test is based on language from the Court's 1978 decision. The Court began by observing that "[t]he question of what constitutes a 'taking' . . . has proved to be a problem of considerable difficulty," and that "this Court, quite simply, has



been unable to develop any ‘set formula’ for determining when ‘justice and fairness’ require that economic injuries caused by public action be compensated by the government, rather than remain disproportionately concentrated on a few persons.”<sup>19</sup> The Court continued, “We have frequently observed that whether a particular restriction will be rendered invalid by the government’s failure to pay for any losses proximately caused by it depends largely ‘upon the particular circumstances [in that] case.’” The Court then proceeded to identify “several factors that have particular significance” in “engaging in these essentially ad hoc, factual inquiries”:

The economic impact of the regulation on the claimant and, particularly, the extent to which the regulation has interfered with distinct investment-backed expectations are, of course, relevant considerations. So, too, is 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.

This language self-evidently provides a slender reed for a determinative takings test. The Court’s words, rather than defining an actual test, seem to acknowledge the impossibility of doing so. The Court simply identified several factors that have particular relevance in takings analysis.

Certainly there is no indication the Court was seeking to articulate standards that would govern partial claims. The Court made no mention of any distinction between total and partial takings. Moreover, while Justice Brennan’s opinion is notoriously opaque and confusing, it contains strong language rejecting “the proposition that diminution in property value, standing alone, can establish a taking.” This seems to contradict, for example, the conclusion by the Court of Federal Claims in *Florida Rock* that a 73 percent diminution in the value of property is sufficient to establish a taking.<sup>20</sup>

*Penn Central* emerged as the governing standard for partial claims in a decidedly backhanded fashion. Prior to the 1990s, the Court’s taking decisions contained no suggestion that regulatory taking doctrine might contain two distinct tiers for analyzing use restrictions.<sup>21</sup> Rather, the issue was always simply whether the regulation resulted in a taking. In 1992, in the *Lucas* case, the Court broke new ground by defining what it called a “total” or

“categorical” taking. The Court’s novel use of this terminology implied that there was something else that might be labeled a “non-total” or “non-categorical” taking. In a footnote, Justice Scalia reinforced this implication by observing, if “an owner might not be able to claim the benefit of our [new] categorical formulation, . . . we have acknowledged time and again [that] ‘[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 analysis generally,” citing *Penn Central*.<sup>22</sup> Thus was launched the *Penn Central* partial takings test.

The Court’s apparent creation of a two-tier takings analysis in *Lucas* was plainly dictum. The case involved a regulation that eliminated all of the economic value and use of the property and, therefore, plainly met the threshold of economic impact necessary to find a taking under prior Court rulings. There was no need for the Court in *Lucas* to address whether, or according to what test or tests, a taking might be found when a regulation does *not* eliminate all economic value and use. In any event, as a matter of historical fact, the *Lucas* decision represented the spark for the partial regulatory taking idea, including providing the foundation for the Federal Circuit’s (in?)famous 1994 *Florida Rock* opinion outlining an expansive theory of partial regulatory takings.<sup>23</sup>

The *Palazzolo* decision reinforces the *Lucas* dictum. In a brief summary of takings doctrine, the Court describes *Lucas* as providing the governing test when a regulation “denies all economically beneficial or productive use of land.” The Court then goes on to state that the *Penn Central* test applies “where a regulation places limitations on land use that fall short” of the *Lucas* standard.<sup>24</sup> Significantly, no Justice writing separately took issue with this description of the basic architecture of takings law.

It also fair to observe, however, that *Palazzolo* did not require the Court to address the substance or scope of the *Penn Central* partial takings test or explain how it fits (or does not fit) into takings doctrine. The litigation centered on the *Lucas* claim, which was the focus of the plaintiff’s case, and none of the parties raised any fundamental question about the *Penn Central* test. The Rhode Island Supreme Court rejected the *Lucas* and *Penn Central* claims on the ground that the owner’s advance notice of regulatory restrictions barred the claims. The U.S. Supreme Court reversed on the ground that pre-acquisition notice cannot be treated as a categorical bar to a taking claim (whether under *Lucas* or *Penn Central*). After resolving the notice issue, the Supreme Court determined that the *Lucas* claim failed because the case did not

involve a denial of all economically beneficial use. The Court then remanded the case for consideration of the remaining issues, including the *Penn Central* claim. In a sense, therefore, apart from the notice issue, the *Penn Central* claim passed through the Supreme Court proceedings largely unobserved and unexamined.

While both *Lucas* and *Palazzolo* support an expanded, two-tier version of takings law, there also is a great deal of Supreme Court precedent, some of it in tension with the language in *Lucas* and *Palazzolo*, indicating that takings doctrine remains quite narrow. In a decision issued the year after *Lucas*,<sup>25</sup> the Supreme Court cited with approval decisions rejecting takings challenges to restrictions leading to economic losses as high as 92.5 percent<sup>26</sup> and 75 percent.<sup>27</sup> The rejection of these kinds of “partial” takings claims is consistent with prior Court pronouncements emphasizing the narrowness of regulatory takings doctrine in general, including:

- The basic issue in a regulatory taking case is whether the regulation “has very nearly the same effect for constitutional purposes as appropriating it or destroying it”;<sup>28</sup>
- Legitimate takings claims are confined to “extreme circumstances”;<sup>29</sup>
- “[M]ere diminution in the value of property, however serious, is insufficient to demonstrate a taking”;<sup>30</sup> and
- “Loss of future profits—unaccompanied by any physical property restriction—provides a slender reed upon which to rest a takings claim.”<sup>31</sup>

At least in the immediate aftermath of *Palazzolo*, there is no indication from the lower courts that they view the decision as having worked a major change in the scope of regulatory takings doctrine. Indeed, post-*Palazzolo*, several of the states’ highest courts have reaffirmed their established, narrow reading of the Takings Clause. For example, the North Dakota Supreme Court recently rejected a taking claim, describing the operative legal standard as follows: “Governmental regulation constitutes a taking for public use only when it deprives the owner of all or substantially all reasonable uses of the property.”<sup>32</sup> Similarly, the New Jersey Supreme Court recently rejected a taking claim, in part on the ground that the owner “retained some economically beneficial use of its property.”<sup>33</sup>

What, then, is one to make of the ostensible *Penn Central* partial regulatory takings test? First, it was not—and arguably still is not—a necessary conclusion that the architecture of takings doctrine must accommodate two separate tiers. As discussed,



the *Penn Central* decision strongly implied that only a severe economic burden would result in a taking. In numerous subsequent cases the Court had suggested that, at least where the claim focuses on economic burden, a regulation will be found to effect a taking only if it “denies an owner economically viable use of his land.”<sup>34</sup> *Lucas* arguably represented the exceptional case that proved this rule. Both *Lucas* and *Palazzolo*, while undoubtedly supporting a separate *Penn Central* test, do not grapple with the questions about the legitimacy of the test. Most important, the dictum in *Lucas* and *Palazzolo* notwithstanding, the Court has never applied the multifactor *Penn Central* test to uphold a finding that a restriction on the use of property effects a taking.<sup>35</sup>

Furthermore, assuming some independent *Penn Central* test does exist alongside the *Lucas* test, the test may not focus primarily, if at all, on the problem of partial diminutions in the value of property. The Court has, for example, invoked the *Penn Central* test in cases involving restrictions on the right to devise property,<sup>36</sup> those decisions appear to turn largely on the special nature of the property interest at stake rather than the magnitude of the economic burden. The closest the Court has actually come to using *Penn Central* to conclude that a regulatory statute effected a taking was in *Eastern Enterprises v. Apfel*.<sup>37</sup> In that case, a plurality of the Court applied the *Penn Central* factors to argue that the retroactive effects of the Coal Act amounted to a taking. This suggests that *Penn Central* could have particular application in the context of retroactive legislation. In addition, the *Lucas* rule is apparently confined to real property. Thus, the *Penn Central* analysis might turn out to have primary relevance in personal property claims.

In sum, the very existence and possible scope of the ostensible *Penn Central* test remain open questions.

### § 9.3 *The Incoherence of the Penn Central Test*

Apart from its problematic origins and uncertain scope, there are also substantial grounds for questioning whether the *Penn Central* multifactor test represents a coherent standard for evaluating whether regulations amount to takings. It appears, in light of recent Supreme Court pronouncements, that there is something called a *Penn Central* test. It nonetheless seems useful and important to ask whether there is any there there—both for the long term and to provide some comfort to members of the bar baffled by their inability to make sense of this area of the law.

As discussed, the standard formulation of the *Penn Central* test identifies three relevant factors: character, economic impact,



and reasonable investment-backed expectations. I will examine each factor in turn to analyze whether these factors demarcate a meaningfully distinct test for so-called partial takings.

**§ 9.3(a) Character**

Character is the most opaque and confusing of the *Penn Central* factors. In *Penn Central* itself, the Court used the term to refer to whether the government action effected a kind of physical occupation of the property. In light of subsequent Supreme Court precedent, however, this interpretation appears nonsensical. In 1982, in *Loretto v. Teleprompter Manhattan CATV Corp.*,<sup>38</sup> the Court established a per se rule that permanent physical occupations, subject to certain narrow exceptions, always result in takings. If the character of a regulation as a physical occupation generally mandates a finding of a taking, then the character factor, at least as originally defined in *Penn Central*, cannot play any role in a multifactor balancing test.

In an attempt to restore some meaning to the “character” factor, some Justices and some judges have interpreted it as requiring consideration of the value or importance of what the government seeks to accomplish. There is some support for this idea. In *Penn Central*, the Court rationalized rejecting the taking claim in part on the basis that the “restrictions imposed are substantially related to the promotion of the general welfare.”<sup>39</sup> In addition, in *Lucas* the Court described a “total taking” as being “compensable without case-specific inquiry into the public interest advanced in support of the restraint”;<sup>40</sup> this statement obviously implies that weighing the public interest served by a regulation ordinarily *would* be appropriate in other types of cases.

Notwithstanding this support, the interpretation that the character factor relates to the value or importance of the public objective is ultimately implausible. It contradicts the Court’s longstanding understanding that a taking claim seeks financial compensation for an “otherwise proper” government action.<sup>41</sup> Stated differently, a viable taking claim presupposes that the government is seeking to advance a legitimate, valuable public purpose. If a taking claim presupposes that the government is acting for a legitimate public purpose, the public purpose served by the government action cannot logically be a factor, to be weighed along with other factors, in deciding whether or not compensation is due under the Takings Clause.

This conclusion also is supported by common sense. The government’s liability for a classic exercise of the power of eminent domain obviously does not vary with the importance or value of the public objective. For example, it would be absurd to sup-



pose that the government could deny its obligation to pay compensation when it takes land for a school on the ground that it seeks to meet an important educational need. Moreover, the Takings Clause must have the same basic meaning whether the government initiates a condemnation or an owner brings an inverse condemnation action.<sup>42</sup> If the importance of the public purpose being served cannot be considered in deciding whether payment is due in an eminent domain proceeding, it also makes no sense to consider it in a regulatory taking case.<sup>43</sup>

Indeed, the logic of regulatory takings doctrine suggests that the importance of the public purpose should weigh in favor of paying compensation, not against it. If the government is pursuing an objective that actually succeeds in generating substantial benefits for the public, then the courts, everything else being equal, should logically be more rather than less inclined to shift the burdens imposed by the action to the public.

It seems unlikely that the Supreme Court, when it ultimately decides the question, will embrace the illogical notion that the character factor refers to the value or importance of the public objective. Apart from its bad fit with takings law generally, this interpretation would convert the Takings Clause into a freewheeling tool for judicial reweighing of essentially legislative judgments. It would not comport with the traditional judicial role, for example, for judges to decide wetlands takings cases by balancing the regulation's economic burdens on certain landowners against the water pollution and other harms avoided by preventing wetland destruction. Furthermore, such a test would be essentially standardless, violating the conviction of at least some of the Court's justices that the law should rely on categorical rules rather than balancing tests.<sup>44</sup> In *Palazzolo*, Justice O'Connor embraced a relatively freewheeling version of the *Penn Central* test. There may be some significance in the fact that the rest of the justices did not join in her opinion and did not venture independent efforts to make sense of the *Penn Central* test.

### § 9.3(b) *Economic Impact*

Turning to the economic impact factor, *Lucas* established that a regulation that eliminates all of a property's economic value and use amounts to a presumptive or "categorical" taking. The partial regulatory taking idea suggests that a regulation with less severe economic impact also can support a finding of a taking. It is possible that this type of economic impact, combined with some other factor, may be sufficient to establish a taking. But it is difficult, at a minimum, to rationalize the conclusion that this



type of lesser economic impact can have determinative significance. As discussed, the Court has repeatedly insisted that diminution in property value, standing alone, is insufficient to demonstrate a taking. Recently a unanimous Supreme Court reaffirmed this principle: “[m]ere diminution in the value of property, however serious, is insufficient to demonstrate a taking.”<sup>45</sup> The Supreme Court might be willing to repudiate this long-standing principle, but absent a radical change in the law, the economic impact factor does not support a second-tier, partial takings analysis.

§ 9.3(c) **Reasonable Investment Expectations**

The preceding analysis leaves the entire weight of distinguishing between *Lucas* total takings and *Penn Central* partial takings on the reasonable investment-backed expectations factor. This factor is not adequate to support this weight.

It can be contended that the use the owner actually intended to make of the property, in light of the regulatory restrictions in place at the time he made the investment, should be irrelevant in a *Lucas* case but relevant in a *Penn Central* case. This is the conclusion that can be drawn from Justice Scalia’s dictum, on behalf of the Court, in *Lucas*.<sup>46</sup> In *Palazzolo*, however, Justice Scalia, in a separate concurring opinion, advanced an even more radical position—that investment expectations should not matter in either a *Lucas* case or a *Penn Central* case; in other words, in his view, whether the owner knew about the regulatory restrictions at the time he acquired the property should be irrelevant in any type of takings case. As made obvious by Justice O’Connor’s concurring opinion in *Palazzolo*, a majority of the Justices have rejected this view, affirming that preacquisition notice matters, at least, in a *Penn Central* case.<sup>47</sup> For several reasons, given the Court’s position on investment expectations in a *Penn Central* case, it is likely that the Court will also conclude that investment expectations can matter in a *Lucas* case.

First, Justice O’Connor, probably expressing the views of a majority of the Justices, voiced the concern that if preacquisition notice were not a relevant factor, claimants could reap unfair windfalls at public expense. The concern about windfalls is legitimate because investors typically purchase property at a price that reflects current regulatory restrictions; ignoring investment expectations would allow investors to buy low in the private marketplace and sell high in a subsequent taking action against the government. If windfalls are a concern in a *Penn Central* case, however, they should be an even greater concern in the context of an alleged total taking, because the investor may well have bought



the property at an even greater discount and may well be seeking an even larger windfall.

Second, Justice Kennedy, who authored the majority opinion in *Palazzolo*, appears to have gone out of his way to preserve the argument that investment-backed expectations, including preacquisition notice, should matter in a total takings case. In *Lucas*, Kennedy wrote a concurring opinion asserting that background principles of state property and nuisance law do not provide the only grounds for defending against a total taking claim. “Where a taking is alleged from regulations which deprive the property of all value,” he said, “the test must be whether the deprivation is contrary to reasonable investment-backed expectations.”<sup>48</sup> In *Palazzolo* the Court had no need to directly address whether investment expectations might be relevant in a *Lucas*-type case. Nonetheless, Justice Kennedy, speaking for the Court and using carefully chosen language, stated that “we have observed, with certain qualifications . . . that regulation which ‘denies all economically or productive use of land’ will require compensation under the takings clause.” In support of this statement he cited, among other things, his concurring opinion in *Lucas*. At least in the mind of Justice Kennedy, a likely swing vote on this issue, the Supreme Court has not barred consideration of investment expectations in a *Lucas* case.

Finally, it is implausible that preacquisition notice would be relevant in a *Penn Central* case but irrelevant in a *Lucas* case, because investors could so easily manipulate their property holdings in order to evade the first rule and take advantage of the second. If an investor wished to acquire 20 acres of property, including ten acres of uplands and ten acres of wetlands, could the investor avoid the notice rule simply by buying the two pieces in the names of separate corporations? Alternatively, if an investor originally purchased the 20 acres as a unit but wished to manufacture a taking claim with respect to the ten acres of wetlands, could the owner form an independent corporation and convey the ten acres of wetlands to the new corporation? Or, could the investor sell the property to a new purchaser who, hypothetically armed with the legal rule that advance notice of restrictions does not matter, would be willing to pay full market price in the expectation that he could pursue a successful total takings claim? These hypotheticals suggest the implausibility of an absolute rule that advance notice does not matter in a total taking case.



In sum, it is difficult, if not impossible, at least within the confines of existing takings doctrine, to define meaningful legal



lines that demarcate a *Lucas* taking claim from the ostensible *Penn Central* claim. The absence of a coherent, independent *Penn Central* test hardly demonstrates that partial regulatory takings do not exist, but it does eliminate one of the major props for this expansive reading of the Takings Clause.

#### § 9.4 *Seven Brief Arguments Against the Partial Regulatory Takings Theory*

Despite the confused origins of the ostensible *Penn Central* partial taking test, and the apparent incoherence of that test based on existing takings precedents and principles, is some type of partial regulatory takings standard nonetheless justified? This section presents seven brief arguments against the partial regulatory taking idea.

##### § 9.4(a) *Original Understanding*

First, the partial takings theory would lead takings jurisprudence far afield from the original understanding of the Takings Clause. As a result, it would breach the bounds of plausible constitutional interpretation, especially for those justices and judges committed to relying on the drafters' original intentions as a lodestar for constitutional interpretation.

There is virtual consensus that the regulatory taking doctrine has no foundation in the original understanding. No less a supporter of property rights than Justice Scalia has acknowledged the narrow scope of the Takings Clause as a matter of historical fact; as he stated in *Lucas*, “[e]arly constitutional theorists did not believe the Takings Clause embraced regulations of property at all.”<sup>49</sup> This conclusion is supported by numerous scholarly investigations including, for example, those by Professor William Michael Treanor<sup>50</sup> and John F. Hart.<sup>51</sup> Noted conservative Robert Bork, while expressing sympathy with the political agenda that would be furthered by Professor Epstein’s libertarian rewrite of the Takings Clause, has observed that Epstein’s conclusions “are not plausibly related to the original understanding of the takings clause.”<sup>52</sup>

As the studies of the original understanding explain, there is no direct evidence of the drafters’ intentions in including the Takings Clause in the Bill of Rights. The provision was drafted by James Madison and included in the Bill of Rights at his instigation with no recorded debate. As a result, interpreters of the Takings Clause have been forced to interpret its meaning by investigating historical antecedents in colonial charters, the North-



west Ordinance, and various state constitutions, as well as by studying contemporary understandings of the scope of government regulatory authority. The basic conclusion of this research has been that “the Takings Clause was originally intended and understood to refer only to the appropriation of property.”<sup>53</sup>

Since the early part of this century and the Supreme Court’s decision in *Pennsylvania Coal Co. v. Mahon*,<sup>54</sup> it has been clear that, notwithstanding the original understanding, some regulations are so economically burdensome that they will be deemed takings. Thus, the Court has already abandoned strict adherence to the original understanding. Nonetheless, unless *Mahon* can be read as a license to completely ignore the original understanding, the evidence about the original understanding must be treated as a powerful argument against the partial taking theory. It is one thing to recognize, as the Court did in *Mahon*, that a regulation can effect a taking if it “has very nearly the same effect for constitutional purposes as appropriating or destroying it”;<sup>55</sup> it would be quite another to divorce takings law from the original understanding altogether and conclude that a regulation that leaves an owner some economic value and use constitutes a compensable taking.

#### § 9.4(b) *Judicial Deference to Elected Branches*

The partial regulatory taking theory would improperly aggrandize judicial power at the expense of the other branches of government, undermining the system of separation of powers and weakening the authority of the people’s elected representatives in addressing environmental, land use, and other matters touched by the Takings Clause.

The Supreme Court has long recognized that an expansive reading of the Takings Clause threatens to intrude on the legislative function. As Justice Oliver Wendell Holmes famously remarked, “Government hardly could go on if to some extent values incident to property could not be diminished without paying for every such change in the general law.”<sup>56</sup> In another case, the Supreme Court expanded on this theme: “[G]overnment regulation—by definition—involves the adjustment of rights for the public good. Often this adjustment curtails some potential for the use or economic exploitation of private property. To require compensation in all such circumstances would effectively compel the government to regulate by purchase.”<sup>57</sup>

Thus, the partial regulatory taking theory conflicts with the general presumption in favor of the constitutionality of legislative action, a presumption rooted in the doctrine of separation of



powers and the general rule that matters of social policy should be decided by government representatives directly elected by the people. Justice Scalia recently described the dangers of what he termed an “imperial judiciary” rendering constitutional decisions on the abortion issue based on “philosophical predilections and moral intuitions” properly left to the political process:

[B]y foreclosing all democratic outlet for the deep passions this issue arouses, by banishing the issue from the political forum that gives all participants, even the losers, the satisfaction of a fair hearing and an honest fight, by continuing the imposition of a rigid national rule instead of allowing for regional differences, the Court merely prolongs and intensifies the anguish.<sup>58</sup>

These concerns also apply with full force to judicial interpretation of the Takings Clause. The partial taking theory cannot be squared with the traditional function of the judicial branch under our system of separation of powers.

#### § 9.4(c) *Givings Matter*

A third rationale for rejecting the partial regulatory takings idea is the pervasiveness of governmental “givings.” The basic argument for takings liability is that regulated property owners are subjected to economic burdens that, in all fairness, should be compensated by the public that benefits from the regulation. Givings illustrate that the premise of this argument is highly problematic. In fact, property owners subject to stringent regulation are frequently better off in economic terms than they would be in the absence of the regulation. Furthermore, even if certain regulations impose economic burdens, other government projects and programs confer uncompensated givings; there is no obvious rationale for evaluating the effect of a regulation in isolation as opposed to evaluating the net effect of all the different government activities that affect property values.

A taking claimant typically focuses on the effect of a regulation on the claimant’s property, ignoring the fact that the regulation may apply to some or many others in the community. The consequence is that a taking claim tends to highlight the adverse effects of the regulation on the claimant while ignoring the positive effects. A regulation that applies to many owners not only restricts what an owner can do with her property, it also benefits her by restricting what her neighbors can do with their property. In economic terms, a regulated property owner can benefit from



the application of regulations to her neighbors in two different ways. First, restrictions on the use of other properties in the community can protect the property from neighboring uses that would detract from its value, for example, by causing pollution or flooding, or by undermining the amenity values in the community as a whole. Second, regulatory restrictions can limit the available development opportunities and thereby increase the scarcity, and hence the value, of remaining development opportunities.<sup>59</sup>

The Supreme Court has pointed to the phenomenon of “reciprocity of advantage” in explaining why takings challenges to zoning regulations, for example, face an uphill battle. As the Court said in *Agins*, land owners subject to a zoning regulation:

share with other owners the benefits and burdens of the city’s exercise of its police power. In assessing the fairness of the zoning ordinances, these benefits must be considered along with any diminution in market value that the [owners] might suffer.<sup>60</sup>

The same reasoning applies to a variety of land use and environmental laws that apply to a significant cross-section of the community. Over the long term, a rough “reciprocity of advantage” is secured for all. Looking at government regulatory activity generally, the obligation to comply with any particular regulation can be seen as “a burden borne to secure the advantage of living and doing business in a civilized society.”<sup>61</sup>

The concept of reciprocity of advantage has particular salience in a partial regulatory taking case where the claimant is severely restricted in his use of the property but can obtain permission to conduct some development. In that case there is likely to be direct, tangible evidence of the countervailing benefits of regulation. In *Palazzolo*, for example, the evidence showed that the owner could sell the property for development for 15 to 20 times what he paid for it 30 years earlier, even though there was only a single developable lot on the property. The land’s high value was attributable to both the scarcity effect of the coastal regulations and the amenities preserved by protecting wetlands on Palazzolo’s property and on adjacent properties. What Palazzolo’s property might have been worth in the absence of any regulation applicable to him and his neighbors is unknown and essentially unknowable. The land might have been more valuable, but it also might have been less valuable.

In *Lucas*, the Court explained its new categorical rule in part by observing that reciprocity of advantage was relatively difficult to detect in a total taking case. When a regulation eliminates



“all economically beneficial use,” the Court said, “it is less realistic to indulge our usual assumption that the legislature is simply adjusting the benefits and burdens of economic life in a manner that secures an average reciprocity of advantage to everyone concerned.”<sup>62</sup> If, in fact, the “usual assumption” in a non-total taking case is that there is a rough reciprocity of advantage, that would leave very little room for the supposed partial taking doctrine.

In addition to the phenomenon of reciprocity of advantage, direct governmental “givings” also should be factored into the equation. Publicly funded roads, sewers, and other public facilities, agricultural and other subsidies, and other government tax and spending programs contribute significantly to the value of land. Many empirical studies have documented the large size of these givings.<sup>63</sup> Many givings are, of course, paid for by general tax revenues and provide benefits to society as a whole. It is also true, however, that luck and skillful political activity routinely result in the benefits of givings being concentrated on a small number of landowners. There is no reason to believe that landowners are any more likely to be singled out to bear the burdens of regulatory action than they are to be singled out to be the beneficiaries of governmental givings. If anything, as the country’s agricultural policies and flood insurance programs suggest, the opposite is more likely to be accurate. The economic fairness of the burdens allegedly imposed by government cannot be accurately appraised without taking into account the givings as well. Once givings are taken into account, the fairness argument for partial takings appears weak and, at best, uncertain.

**§ 9.4(d) *The Analogy to a Physical Occupation Is Flawed***

A frequent argument on behalf of the partial regulatory taking theory relies on an analogy to physical occupation-type takings. When a physical taking is alleged, it is irrelevant whether the physical occupation affects the entire property or only a small portion of it. Advocates of the partial taking idea maintain that a regulatory use restriction should likewise be held to be a taking without regard to the property’s remaining value for other, unrestricted uses. As stated by Judge Jay Plager, “The fact that the source of any particular taking is a regulation rather than a physical entry should make no difference—the nature of the legal interests defining the property affected remains the same.”<sup>64</sup>

A straightforward doctrinal answer to this argument is that the Supreme Court has never suggested that the Takings Clause applies in interchangeable fashion to use restrictions and to physical occupations. The Court has characterized the physical occupation rule as a “very narrow”<sup>65</sup> principle designed to deal with a special



set of circumstances where government has physically invaded, or at least authorized the physical invasion of, private property. Since articulating this special rule, the Court has repeatedly distinguished it from the rule(s) governing takings challenges to use restrictions.

The more fundamental answer is that the per se rule governing physical occupations represents a generous constitutional standard that arguably overcompensates the owner at public expense. There is no disputing the constitutional necessity of complying with the just compensation standard when it applies. But, absent a clear constitutional mandate to extend this standard to so-called partial regulatory takings, an appeal based on fairness and similar treatment of these different types of cases is not compelling.

The just compensation standard requires the government to deal with a citizen subject to a taking on the same basis as would another citizen—that is, by requiring payment of just compensation as measured by the fair market value of the property. If the government were simply another actor in the marketplace, this approach would not be problematic. But the government relates to individual citizens in a distinctive fashion, because it interacts with any individual citizen in myriad ways over the long term. As discussed above, through regulatory and spending programs, the government contributes to the public welfare and supports private property values in a host of ways. When the government takes private property and pays just compensation, a significant amount of the compensation paid represents publicly created value. In short, the just compensation standard, when it applies, requires the taxpayer to overpay for what it is taking.

It is obviously permissible, indeed constitutionally mandated, for the public to overpay when a taking is actually found. On the other hand, something more than the rough comparability of physical occupations and use restrictions is required to justify inventing a new law of regulatory takings that would extend to the regulated community the same kind of public generosity that applies in the case of physical takings. At least to date, the Court's regulatory takings jurisprudence has tended in the opposite direction, emphasizing the "reciprocity of advantage" conferred by government regulations as a reason for not triggering the just-compensation standard. It is possible that the over-generosity reflected in the law governing physical takings is, in a sense, counterbalanced by a similar under-generosity in the case of use restrictions. A more plausible explanation may be that the reciprocal effects of regulatory actions are so pervasive that awarding compensation for every partial restriction would be extravagantly

and unreasonably generous to property owners. In any event, the simple fact that a physical occupation, no matter how modest, generally requires payment of compensation does not logically support the conclusion that every restriction on the use of property should be similarly compensated.

**§ 9.4(e) *A Decline in Property Value Is Not a Taking***

A further difficulty with the partial regulatory taking idea is the impossibility of translating a reduction in the value of a particular property asset into a constitutional violation. Diminution in market value as a result of regulation, it turns out, provides only an opaque window on the issue of a regulation's fundamental fairness.

First, as a practical matter, the value the property would have in the absence of regulation is virtually impossible to calculate with accuracy. In a typical taking case, the unregulated value of the property is estimated based on the market value the property would have if the challenged regulation were lifted for the owner's property. This approach plainly overestimates the market value of the property, because it gives the owner the benefit of not having to comply with the regulation while simultaneously crediting him with the economic benefit of some or all of his neighbors' compliance with the same regulation. A more accurate assessment of a regulation's actual economic impact would model the effect of not applying the regulation to the owner or to any of his neighbors. Unfortunately, this type of analysis is enormously complex and time-consuming, and would obviously be impossible to perform on a routine basis in every taking case. Thus, litigators and judges are generally left with a comparison between the property's market value if unregulated and its market value if regulated. This approach readily yields an answer, but it is the answer to the wrong question.

There is a more fundamental problem with relying on estimated changes in market value of property to identify compensable takings. The basic justification for any regulatory program is that prices set by the marketplace do not reflect the true economic value of goods and services not effectively supplied or priced by the market. Market failure occurs, according to the standard economic account, because private economic activity generates "externalities" that are not captured by market prices. The very purpose of regulation is to alter the prices that various goods and services would otherwise command in the market. Hence, relying on the market price of property in a hypothetically unregulated state in order to evaluate losses due to regula-



tory action is caught up in a contradiction; the reason for the regulation itself is the failure of the market and the resulting inaccuracy of price signals.

Finally, it is questionable, based on some of the Court's most recent precedent, whether a reduction in economic value can be equated to an actual taking of property. In *Eastern Enterprises v. Apfel*,<sup>66</sup> Justice Kennedy, joined by four other Justices, rejected the idea that economic loss can be equated with a taking. He observed that the Coal Act imposed a "staggering financial burden"<sup>67</sup> on the plaintiff firm, but nonetheless concluded that it did not create the kind of burden that falls within the scope of the Takings Clause. A properly framed taking claim, he said, challenges a regulation or other government action "as being so excessive as to destroy, or take, a specific property interest."<sup>68</sup> Justice Breyer agreed: "The 'private property' upon which the clause traditionally has focused is 'a specific interest in physical or intellectual property.'<sup>69</sup> When squarely faced with the question, the Supreme Court is likely to confirm that an adverse effect on the value of a property asset is not equivalent to an actual taking of the property itself.

The difficulty of identifying what the government would obtain if it effected a taking based on diminution in value also supports this analysis. A taking claim presupposes that if a taking is actually found, the government will pay compensation and will receive (or at least have the opportunity to receive) title to the property it has taken. Thus, a regulatory taking claim requires identification of some specific property interest to be conveyed to the government in exchange for compensation.<sup>70</sup> However, if the only thing taken is value, it is obviously difficult to know what, if anything, the government has acquired.

**§ 9.4(f) *Partial Takings Liability Would Unreasonably Chill Government Action***

A striking literary flourish in some recent regulatory takings cases is to compare the actions of the government to the actions of a "thief"<sup>71</sup> or a killer.<sup>72</sup> On the surface, the most remarkable aspect of this vocabulary is the notion that government officials should be compared to violent malefactors. On second thought, however, the greater significance lies in the notion that the government is comparable to a private actor. Indeed, it is central to the current effort to invigorate the Takings Clause that the government be made liable on the same basis as a private person. Just compensation, according to the advocates of the takings agenda, much like a private tort damages remedy, seeks to provide redress for harms inflicted and to deter future harms.



For several reasons, the comparison of government officials to private malefactors is misleading. Thieves and killers do not build highways, operate schools, or run sewage control systems; however, governments do these things and much much more. For the reasons discussed, these value-enhancing aspects of government have to be considered to arrive at a balanced interpretation of the Takings Clause. The most critical point for present purposes, however, is that the comparison of government officials to private actors serves to obscure how severely expansive takings liability would chill reasonable and necessary government action.

The principal law and economics argument for subjecting government to expansive liability under the Takings Clause relies on an analogy to the incentives created for private firms by the tort law system. A private factory may discharge pollutants into a river, resulting in harm to public health or the environment. In a competitive economy, a profit-maximizing firm will have little or no incentive to consider these external costs in its internal business accounting. Absent some legal constraint, the factory will continue to pollute despite the fact that this result is not economically optimal for society as a whole. According to standard economic theory, if the firm is required to pay monetary damages to those adversely affected by its operations, it will be compelled to internalize the external costs and total social welfare will be enhanced.

According to some, these ideas can be transferred wholesale into the takings arena. The argument starts from the premise that government “operates with an incentive structure similar to that of a similarly situated private enterprise.”<sup>73</sup> The argument also posits that government regulatory actions create costs by imposing economic burdens on certain property owners. Liability under the Takings Clause, the argument continues, would “prevent[] the government from overusing . . . [its regulatory] power.”<sup>74</sup>

Contrary to this viewpoint, as a number of scholars have demonstrated, extensive assessments of financial liability against the government under the Takings Clause would not necessarily increase total social welfare. In fact, expansive takings liability could so severely chill government action that it would lead to net declines in total social welfare.

Most important, the argument for extensive takings liability based on cost internalization suffers from a fatal asymmetry.<sup>75</sup> The cost-internalization argument proceeds on the assumption that the costs of government action must be monetized and internalized in order to influence government decision-making. But the benefits of government action represent the other side of the economic equation. Government produces a variety of benefits



through regulation, from a safe food supply to nonpolluted air and water to public safety. If the costs of regulatory programs have to be internalized through monetary payments, as taking advocates assert, then the benefits of regulatory programs would have to be internalized in monetary terms as well in order to create balanced incentives. Otherwise, the government calculus would be consistently skewed in favor of minimizing costs, and government decision-making would tend to produce inefficient outcomes.

The reality, of course, is that the benefits of government regulatory action generally are not internalized by government. Furthermore, it is difficult as a practical matter to see how internalization could be accomplished on a broad scale. Thus, a broad takings liability rule would inevitably result only in internalization of costs and would tend to foster government decision-making that does not maximize total social welfare.<sup>76</sup>

**§ 9.4(g) *The Limitations on the Judicial Role of Counsel Against the Partial Taking Theory***

Finally, the partial regulatory taking theory should be rejected because of the need for the law to draw clear and predictable lines in order for the rule of law to be able to function at all. The generally accepted rule that a regulation must eliminate all or substantially all of a property's value and use satisfies this need because it identifies a relatively discrete and easily identified set of cases. If the law were otherwise, and if a taking could be established merely by showing a significant diminution in value, the law of takings would be a highly unpredictable morass for landowners and government officials alike.

Professor Frank Michelman's seminal article, "Property, Utility, and Fairness: Comments on the Ethical Foundations of 'Just Compensation' Law,"<sup>77</sup> spoke powerfully and eloquently to the need for takings doctrine to include clear legal rules. In his article, which probably has been cited more frequently by the Supreme Court than any other work on this subject, Michelman surveyed at great length the various factors that he thought relevant in analyzing the fairness issues at the heart of a taking case. In the concluding section of his article, however, Professor Michelman cautioned that a freewheeling analysis based on fairness was unlikely to supply a suitable judicial standard. He wrote:

Our question about fairness as an apt standard for judging thus reflects not a suspicion that judicial personnel are less able than other men to understand or apply the



content of the standard, but doubt stemming from a judicial predilection—one which we normally applaud because we deem it healthily responsive to limits we wish to keep in place around the judicial province—to seek an articulate doctrinal packaging for all judgments. The problem is that fairness resists being cast into a simple, impersonal, easily stated formula.

This is not to say that courts cannot usefully be put to work deciding at least some compensability issues; rather it is to suggest abandonment of any idea that courts can or will decide each compensability case directly in accordance with the precept of fairness. Hence, we need to search instead for some workable, impersonal rule believed to approximate in a useful proportion of cases the same result that fairness would dictate. But if that is our choice (or our preferred description of what actually takes place), it is of the utmost importance that we clearly and frankly acknowledge it. The danger here is one of behaving as if courts were doing the whole job when the truth is that they are attentive only to “hardcore” or “automatic” cases. To illustrate: a utilitarian approach to the problem might suggest a judicial rule that compensation is due only when there has been either (a) a physical occupation or (b) a nearly total destruction of some previously crystallized value that did not originate under clearly speculative or hazardous conditions. Such a rule would be workable; it would be internally consistent; and it would be ethically inoffensive as far as it goes. True, its cutoff points are arbitrary, and it completely disregards some significant but less discussable dimensions of fairness. But these attributes in the rule would merely reflect its function as a rule for courts to use in the partial performance of a task for which judicial capabilities are not fully adequate.

### § 9.5 *Conclusion*

The foregoing analysis has hopefully served to demonstrate that the partial regulatory taking idea poses at least as many questions as answers. One of the more interesting questions for the future is to what extent courts will assess the economic impact of regulation by comparing the regulated value to the value of the original investment, on the one hand, and/or to the present unregulated value of the property, on the other. These different calculations



may be useful to courts in sorting out whether the alleged “loss” is really disappointment at not achieving a hoped-for appreciation in a speculative investment or whether the regulation has actually resulted in a significant diminution in value. If the regulated value is greater than the original purchase price, even if it is less than the current unregulated value, there is likely a basis for concluding that a good deal of the alleged “loss” in value actually represents the owner’s failure to reap a windfall.

Does either approach have a preferred status based on first principles? To the extent the goal of the Takings Clause is to protect the security of investments, the original investment approach seems most sensible. However, if the goal of the Takings Clause is to police redistributions of wealth, the current market-value approach has something to recommend it. Arguably both calculations are relevant and potentially useful.

Another interesting question for the future is how the courts address the question of the remedy for an alleged partial taking. The *Florida Rock* case illustrates some of the problems courts may confront in attempting to award partial relief for partial takings. The Federal Circuit recognized that a finding of taking would entitle the United States to obtain title to the property taken, suggesting that the property interest might be a kind of “negative easement.” The court apparently meant that the owner should retain the underlying fee, subject to a prohibition on filling the property for mining or for other development. But what would be the duration of this type of easement? According to the logic of the court’s partial takings analysis, which was based on the notion that the property had a positive value based on some possible future use, the easement would presumably be terminable when the owner’s (or some subsequent purchaser’s) speculative bet paid off and the property became available for development. But this type of easement seems totally incapable of precise definition, as well as an invitation to extraordinary abuse. Would the easement endure for some minimum number of years, or would it simply terminate if and when the regulatory climate shifted, a change in which the landowner would obviously have a major interest and over which it might be able to exercise some influence? Is it possible that an owner could receive compensation for 73 percent of the value of the property and then five years later develop the property or sell it for development, quite possibly at a higher price than the original purchase price? Alternatively, ten or 20 years following the payment of compensation for the taking, and assuming that the regulatory taking climate had not changed, could an owner renew the taking claim on the theory

that the speculative bet had, in a sense, matured, but the owner was still being denied the opportunity to develop the property? Under this reasoning, could an owner bring an endless series of takings actions for as long as he held the underlying fee to the property?

Partial regulatory takings, if they exist at all, apparently remain very much a work in progress.

### Notes

1. *See* Penn Central Transp. Co. v. City of New York, 438 U.S. 104 (1978).
2. *See* Florida Rock Indus., Inc. v. United States, 8 Cl. Ct. 160 (1985), *rev'd and remanded*, Florida Rock Indus., Inc. v. United States, 791 F.2d 893 (Fed. Cir. 1986), *cert. denied*, 479 U.S. 1053 (1987), *on remand*, Florida Rock Indus., Inc. v. United States, 21 Cl. Ct. 161 (1990), *vacated and remanded*, Florida Rock Indus., Inc. v. United States, 18 F.3d 1560 (Fed. Cir. 1994), *cert. denied*, 513 U.S. 1109 (1995), *on remand*, Florida Rock Indus., Inc. v. United States, 45 Fed. Cl. 21 (1999). In the fall of 2001, the parties reportedly settled the entire case for a payment of \$21 million.
3. 121 S. Ct. 2448 (2001).
4. 505 U.S. 1003 (1992).
5. *Id.* at 1006.
6. 121 S. Ct. at 2464.
7. *Lucas*, 505 U.S. at 1017.
8. 447 U.S. 255 (1980).
9. In *Palazzolo*, the Court indicated that “we have at times expressed discomfort with the logic of this rule, . . . a sentiment echoed by some commentators.” 121 S. Ct. at 2465. It remains to be seen whether anything significant develops from this suggestive remark.
10. 444 U.S. 51 (1979).
11. A notable exception to this rule is the right to devise property, which the Supreme Court has treated as properly divisible from the rest of an owner’s property. *See* *Babbitt v. Youpee*, 519 U.S. 234 (1997); *Hodel v. Irving*, 481 U.S. 704 (1987). These exceptional cases are generally viewed as resting on the special status of the right to pass on property to one’s heirs.
12. *See* 505 U.S. at 1024 (Kennedy, J., concurring in the judgment); *id.* at 1076 (Souter, J., statement).
13. 49 Fed. Cl. 248 (2001).
14. *See id.* at 265-66.
15. *See* 45 Fed. Cl. at 37.
16. Judge Smith calculated that the plaintiff lost about one-half the value of its investment, because the value of the property for speculative investment was \$2,822 per acre, whereas the “economic basis” in the property was approximately \$6,000 per acre, based on “actual expenditures for purchase price, acquisition interest, and property taxes adjusted for inflation using the consumer price index.” 45 Fed. Cl. at 37. But the actual purchase price was only approximately \$1,900 per acre, *id.* at 38, meaning that the market value, even with all development prohibited (but not taking into account holding costs), was 50 percent greater than the original investment.
17. *See* *Wyer v. Board of Env'tl. Protection*, 747 A.2d 192 (Me. 2000).
18. *See* 45 Fed. Cl. at 42 n.13.



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19. 438 U.S. at 123-24.
20. See 45 Fed. Cl. at 40-41.
21. Cf. *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982) (establishing a special per se rule for regulations that effect a permanent physical occupation of private property).
22. 505 U.S. at 1019 n.8.
23. See Victoria Sutton, *Constitutional Taking Doctrine—Did Lucas Really Make a Difference?* “18 PACE ENVTL. L. REV. 505 (2001) (providing a similar account of the evolution of takings doctrine post-*Lucas*).
24. 121 S. Ct. at 2457.
25. See *Concrete Pipe & Prods. of Calif., Inc. v. Construction Laborers Pension Trust*, 508 U.S. 602, 645 (1993).
26. See *Hadacheck v. Sebastian*, 329 U.S. 394, 405 (1915).
27. See *Village of Euclid v. Ambler Realty*, 272 U.S. 365, 384 (1926).
28. *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 414 (1922).
29. *United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121, 126 (1986).
30. *Concrete Pipe*, 508 U.S. at 645.
31. *Andrus v. Allard*, 444 U.S. 51, 62 (1979).
32. *Braunagel v. City of Devil’s Lake*, 629 N.W.2d 567, 572 (N.D. 2001).
33. *Pheasant Bridge Corp. v. Township of Warren*, 2001 WL 868015, at 8 (N.J., Aug. 2, 2001).
34. *Agins v. City of Tiburon*, 447 U.S. 255, 260 (1980); see also *Keystone Bituminous Coal Ass’n v. DeBenedictis*, 480 U.S. 470, 485 (1987) (applying the *Agins* test).
35. See *District Intown Props. Ltd. P’ship v. District of Columbia*, 198 F.3d 874, 886 (D.C. Cir., 1999) (Williams, J., concurring in the judgment), *cert. denied*, 531 U.S. 812 (2000).
36. See note 11, *supra*.
37. 524 U.S. 498 (1998).
38. 458 U.S. 419 (1982).
39. 438 U.S. at 138.
40. 505 U.S. at 1015.
41. See *First English Evangelical Lutheran Church v. County of Los Angeles*, 482 U.S. 304, 315 (1987).
42. See *First English*, 482 U.S. at 315.
43. The view that the value or importance of a regulation can defeat a taking claim arguably is consistent with the view, supported by language in certain Supreme Court decisions, that a regulation that fails to “substantially advance a legitimate government interest” should be deemed to effect a taking. If a regulation serves a valuable, legitimate public purpose, it logically must substantially advance a legitimate government interest. As I have argued elsewhere, the “substantially advance” takings test is best viewed as raising a due process issue, not a taking issue. See John D. Echeverria, *Does a Regulation That Fails to Advance a Legitimate Governmental Interest Result in a Regulatory Taking?*, 29 ENVTL. L. 853 (1999). The position advanced here that the value or importance of the government action cannot legitimately help defeat a taking claim is consistent with the view that the “substantially advance” test is not a legitimate takings test. The substantially advance test has run into strong headwinds in recent Supreme Court cases, and there may be some significance to the fact that the Supreme Court omitted any reference to this ostensible takings test in *Palazzolo*.

44. See Antonin Scalia, *The Rule of Law as a Law of Rules*, 56 U. CHI. L. REV. 1175 (1989).
45. See *Concrete Pipe & Prods. of Calif., Inc. v. Construction Laborers Pension Trust*, 508 U.S. 602, 645 (1993).
46. Compare 505 U.S. at 1027 (discussing analysis under categorical test) with *id.* at 1019 (discussing analysis under *Penn Central*).
47. See John D. Echeverria, *A Preliminary Assessment of Palazzolo v. Rhode Island*, 31 ENVTL. L. RPTR. 11,112 (2001).
48. See 505 U.S. at 1034. See also *id.* at 1015 (“The State should not be prevented from enacting new regulatory initiatives in response to changing conditions, and courts must consider all reasonable expectations whatever their source. The takings clause does not require a static body of state property law; it protects private expectations to ensure private investment.”).
49. 505 U.S. at 1028 n.15.
50. See *The Original Understanding of the Takings Clause and the Political Process*, 95 COLUM. L. REV. 782 (1995).
51. See *Land Use Law in the Early Republic and the Original Meaning of the Takings Clause*, 94 NW. U. L. REV. 1099 (2000); *Colonial Land Use Law and Its Significance for Modern Takings Doctrine*, 109 HARV. L. REV. 1252 (1996).
52. THE TEMPTING OF AMERICA: THE POLITICAL SEDUCTION OF THE LAW 230 (1990).
53. Hart, 94 NW. U. L. REV. at 1103.
54. 260 U.S. 393 (1922).
55. *Id.* at 414.
56. *Id.* at 413.
57. *Andrus v. Allard*, 444 U.S. 51, 64 (1979).
58. *Planned Parenthood of S.E. Pa. v. Casey*, 505 U.S. 833, 1002 (1992) (dissenting).
59. See generally C. Ford Runge, *The Congressional Budget Office’s Regulatory Takings and Proposals for Change: One-Sided and Uninformed*, 7 ENVTL. L. & PRAC. 5 (1999).
60. 447 U.S. at 262.
61. *Andrus v. Allard*, 444 U.S. 51, 67 (1979). See also *Keystone Bituminous Coal*, 480 U.S. at 491 (“While each of us is burdened somewhat by . . . [the] restrictions [on the uses individuals can make of their property], we, in turn, benefit greatly from the restrictions that are placed on others.”).
62. 505 U.S. at 1017-18.
63. See C. Ford Runge, *supra* note 59 (collecting the available empirical evidence).
64. *Florida Rock*, 18 F.3d at 1572.
65. *Loretto*, 458 U.S. at 441.
66. 524 U.S. 498 (1998).
67. *Id.* at 540.
68. *Id.* at 542.
69. *Id.* at 554.
70. See *Causby v. United States*, 328 U.S. 256, 267 (1946) (“[A]n accurate description of the property taken is essential, since that interest vests in the United States.”).
71. *Osprey Pac. Corp. v. United States*, 41 Fed. Cl. 150, 157 (1998).
72. *Florida Rock*, 45 Fed. Cl. at 23.
73. RICHARD A. POSNER, *ECONOMIC ANALYSIS OF THE LAW* 58 (4th ed. 1992).
74. See generally William A. Fischel & Perry Shapiro, *Takings, Insurance, and*



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*Michelman: Comments on the Economic Interpretations of "Just Compensation" Law*, 17 J. LEGAL STUDIES 269, 270 (1992) (arguing that expansive takings liability would serve to "disciplin[e] the power of the state, which would otherwise overexpand unless made to pay for the resources that it consumes").

75. See generally Daryl J. Levinson, *Making Government Pay: Markets, Politics, and the Allocation of Constitutional Costs*, 67 U. CHI. L. REV. 345, 355-57 (2000).

76. Just as extensive takings liability would chill reasonable government conduct, it also would create a "moral hazard" leading to overinvestment by those who disregard the risk that government regulations might be enacted to shift property to a higher economic use. As stated by Professor Darryl Levinson, "Just as the generous disaster relief for flood victims encourages overbuilding on flood plains, and International Monetary Fund bailouts encourage too much borrowing and fiscal irresponsibility by debtor nations, full indemnification for takings condemnees encourages overinvestment in property." *Id.* at 390.

77. 80 HARV. L. REV. 1196 (1967).

