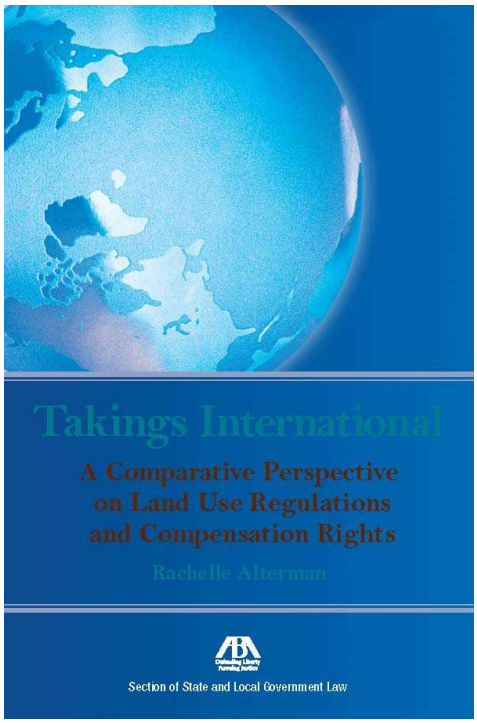


# Takings International

## A Comparative Perspective on Land Use Regulations and Compensation Rights

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**Chapter 11**
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# CHAPTER 11

# The USA

**Despite decades of jurisprudence, US law about "regulatory takings" is characterized by inherent uncertainty. In most states, the determination of compensation rights is dependent on a direct interpretation of the language of the Constitution, unmediated by clear statutory law.**

Thomas E. Roberts*

**Editor's comment:** This brief summary of American takings law was especially written for non-American readers.

This chapter provides a very brief account of a complex area of US constitutional law – the "regulatory takings" issue.

## H1 A brief history

The Fifth Amendment to the United States Constitution provides, in part, that property shall not be taken for public use without just compensation. In 1791, when the Fifth Amendment was adopted, the word “taken” carried a physical connotation and was understood to refer to direct exercises of eminent domain (*Editor's comment*: Non-American readers would recognize this as "expropriation".). In an era when government regulation of land use was not extensive, it is unsurprising that the framers did not concern themselves with the effect of regulations on the value of land. The concept that a valid regulation could be converted by a court into a compensable taking likely would not have occurred to them.[1]

Matters changed in 1922 when the Supreme Court put the police (or regulatory) power on the same continuum as the eminent power. In *Pennsylvania Coal v. Mahon,*[2] the Court held that "while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking." The state of Pennsylvania had enacted a statute prohibiting underground coal mining that would cause subsidence of the surface. Pursuant to that statute, the Mahons sought an injunction against a coal company which threatened to do just that. The coal company argued that an injunction based on the statute would cause an unconstitutional taking of its

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[1] This Chapter draws heavily from Chapter 10, Julian C. Juergensmeyer and Thomas E. Roberts, Land Use Planning and Development Regulation Law (Thomson West, 2nd ed. 2007). Citations to authority have been kept to a minimum. Please consult our book for more detailed discussion of the law discussed here and for complete citations.

[2] 260 U.S. 393.

mineral rights since the company would be prohibited from excavating the coal rights it had expressly reserved to itself in conveying the land to the Mahons' predecessor in title. The statute went "too far," the Court found, since it made it commercially impracticable to mine certain coal that had been expressly reserved by contract.

The *Pennsylvania Coal* opinion gave the regulatory takings doctrine a shaky foundation. Some commentators argued and some lower courts held that the decision did not rest on the Fifth Amendment's takings clause but on the Fourteenth Amendment's due process clause, which requires not only procedural fairness (notice and hearing) but also provides substantive protection against arbitrary government action. To be valid a regulation must rationally promote a legitimate public goal. They suggested that the Supreme Court in *Pennsylvania Coal* spoke metaphorically in referring to a regulation becoming a taking since the Court invalidated the law and did not award compensation.

While the phrase "regulatory taking" entered the legal lexicon after *Pennsylvania Coal,* the issue of whether a regulatory taking was a real taking and, if so, what the appropriate remedy for a regulatory taking was, went undecided for decades. It was not until 1987 that the answer came when, in *First English Evangelical Lutheran Church v. County of Los Angeles*,[3] the Court held that the remedy for a regulatory taking, as with a physical taking, is compensation. In so holding, the Court put to rest the debated issue of whether the "regulatory taking" theory used by the Court in *Pennsylvania Coal* was grounded in the Fifth Amendment's takings clause or in the Fourteenth Amendment's due process clause. The theory was grounded in the Fifth Amendment, said the Court, and compensation was the mandatory, self-executing remedy for a taking.

The law is settled. Regulations with excessive economic impact can be takings under the constitution requiring compensation. The law of takings is judge-made for purposes of determining when a regulation has effected a taking. This is true for interpreting the federal constitution and most state constitutions. A few states, however, have statutory takings laws, which provide tests more favorable to property owners.

## H1 The tests applied

Regulatory takings claims fall into one of three categories: (1) a regulation that deprives an owner of all economically viable use, (2) a regulation that imposes less than total economic loss but where "'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,"[4] or (3) a physical invasion that occurs as a consequence of a regulation. These "tests share a common touchstone," the Court says, which is "to identify regulatory actions that are functionally equivalent to a direct appropriation of or ouster from private property."[5]

A landowner who thinks a regulatory action has effected a taking must initiate suit against the government. Direct appropriations under the power of eminent domain are effected by condemnation proceedings brought by the state against a property owner. These direct condemnation proceedings establish that the taking is for a public use or purpose and assess just

[3] 482 U.S. 304 (1987).

[4] *Armstrong v. United States,* 364 U.S. 40, 49 (1960).

[5] Lingle v. Chevron U.S.A. Inc., 544 U.S. 528, 529 (2005).

compensation to be paid to the owner. In the regulatory takings context, there is no offer of compensation or an action to condemn by the government. The landowner must sue by way of the aptly named action in inverse condemnation.

## H1 Economic Deprivations as Regulatory Takings

A regulation that deprives an owner of all economically viable use is a categorical taking under the rule developed in *Lucas v. South Carolina Coastal Council*.[6] A showing of anything less than a total loss may be taking, but it is subject to the ad hoc, multifactor test established in *Penn Central Transportation Co. v. New York City.*[7]

### H2 Total Economic Deprivations

In *Lucas v. South Carolina Coastal Council*, the owner of two beachfront lots was unable to build due to the application of a setback rule adopted to deter sand dune loss and beach erosion. Accepting the state trial court's finding that the lots subject to the regulation were valueless, the Supreme Court held that a taking occurs where a regulation deprives real property of all economically viable use. The Court qualified the categorical nature of rule, holding that the government will be exempt from paying compensation if it can show that the regulation, despite the total loss, does no more to restrict use than what the state courts could do applying background principles of property law or the law of private or public nuisance. This qualification recognizes that there is no property right for the state to take since no one has a property right to commit a nuisance or to breach other background principles of property law.

To take advantage of the *Lucas* rule, one must show a 100% loss, like that in *Lucas* where the land was found to be valueless, or a loss very close to 100%. In one case, for example, the Court rejected the argument that a 93.7% diminution in value was a categorical *Lucas*-type taking.[8] In another case, the Court said that anything less than a "complete elimination of value" is insufficient to invoke *Lucas*.[9]

As noted, the state can resist paying compensation by showing that the regulation simply reflects limits already in place upon land ownership under background principles of the state's law of property or nuisance. A narrow reading would mean legislatures cannot impose new limitations that cause total economic deprivations unless the state courts could impose the same limit under the common law. The common law, however, is not static. Courts can impose new limitations that are dictated by changed circumstances or newly recognized needs so long as the new rule stems from an "objectively reasonable application of relevant precedents."[10] For example, the Oregon Supreme Court held a state regulation that recognized a public right of

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[6] 505 U.S. 1003 (1992).

[7] 438 U.S. 104 (1978).

[8] Palazzolo v. Rhode Island, 533 U.S. 606 (2001).

[9] *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency*, 535 U.S. 302, 330*** (2002). [Author query: please supply pincite.]

[10] *Lucas*, 505 U.S. at 1032, n.18.

access on private beach property was based on the state's property law of custom, which was an inherent limitation on title. Thus, public entry on to private beaches was not a taking.[11] The Wisconsin Supreme Court held that a state statute prohibiting filling wetlands did not effect a taking, reasoning that under state property law "an owner of land has no absolute and unlimited right to change the essential natural character of his land so as to use it for a purpose for which it was unsuited in its natural state."[12]

The Court has not made clear the role that statutes play as background principles. Some contend that statutes may only qualify as background principles to the extent that they codify judicially developed state common law. Others contend that statutes may reflect newly developed principles responding to changing circumstances. Chief Justice Rehnquist has said that "zoning and permitting regimes are a longstanding feature of state property law,"[13] perhaps intimating that investment-backed expectations should take them into account in some cases.

## H2 Partial Economic Deprivations

If a regulation's economic effect is less than total, a multi-factor test is used to determine whether a taking has occurred. The test arose in the P*enn Central* decision where the Court acknowledged that there was no "'set formula' for determining when 'justice and fairness' require that economic injuries caused by public action be compensated by the government . . . ." The question, said the Court, involved "essentially ad hoc, factual inquiries," listing three factors for consideration: (1) the economic impact on the claimant, (2) the extent to which the regulation interfered with investment-backed expectations, and (3) the character or extent of the government action. The Court did not indicate the relative weight to be given to these factors, choosing instead to speak of an ad hoc factual inquiry.

*Penn Central* involved a case where New York City had declared Grand Central Railroad Station a historic landmark, requiring the owner to seek municipal permission to make changes in the structure. After the designation, the railroad and its lessee sought to put a 55–story office tower atop the station. When the city denied permission, the railroad claimed its inability to build in the airspace above the station was a taking. In weighing the enumerated factors, the Court held that the decision to landmark the station did not effect a taking because (1) the owner of the station was still able to earn a reasonable return from the property, (2) the loss of the anticipated development potential of the airspace was not an interference with investment-backed expectations of the owners, and (3) the character of the action was merely regulatory. In contrast, a physical invasion of property pursuant to regulation was more likely to be a taking.

The economic impact factor, other than where it is shown to be a total diminution in value, is critical to a claim but not determinative. To aid the claimant's case at all, the diminution must be substantial. One lower court found a taking relying primarily on a 73% deprivation in value.[14] Another court found a loss of 60% was not a taking and suggested that diminutions must exceed 85 percent to meet the diminution in value factor of the *Penn Central*

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[11] *Stevens v. City of Cannon Beach*, 317 Or. 131, 854 P.2d 449 (1993), cert. denied, 510 U.S. 1207 (1994).

[12] Just v. Marinette County, 56 Wis.2d 7, 201 N.W.2d 761 (1972).

[13] *Tahoe–Sierra*, 535 U.S. 302, 352 [Author query: please supply pincite] (Rehnquist, C.J., dissenting).

[14] 45 Fed.Cl. 21 (1999).

test. Another court, comparing *Lucas* and *Penn Central,* concluded that the latter provides "an avenue of redress for a landowner whose property retains value that is slightly greater than de minimis… [but the results of cases demonstrate] that the level of interference must be very high."[15]

The Court has not defined "investment-backed expectations," but some guidance as to its meaning can be gleaned from the Court's decisions. In *Penn Central*, the Court found that the railroad's belief that it could use the airspace above the railroad terminal did not qualify as a distinct investment-backed expectation. Looking back to the earlier *Pennsylvania Coal* decision, one can see that expectations played a role there, since the state's anti-subsidence statute abrogated an express contractual reservation of the right to remove coal free from liability for damage to the surface.

A year after *Penn Central*, , the Court found a taking, referring to "reasonable," as opposed to "distinct," investment-backed expectations.[16] There, with government permission a developer dredged a non-navigable pond to create a private marina. Once rendered navigable, the government declared the pond subject to public use. The property owner's expectations of private use based on the initial government consent along with the physical character of the invasion led to the finding of a taking.

Purchase price of land does not qualify as an investment-backed expectation. An example is the case of *Haas & Co. v. City of San Francisco*,[17] where a developer acquired land in San Francisco and proposed to erect two apartment buildings, one of twenty-five stories, the other of thirty-one. The land was zoned to allow high-rises but sat amid low-rise buildings. As the developer should have foreseen, neighbors' objected. Their objections resulted in the city downzoning the land to a forty-foot height limit, consistent with neighboring uses. The land had been purchased for $1.6 million, was worth $2.0 million zoned for high-rises, and valued at $100,000 when zoned at the forty-foot limit. These "disappointed expectations" based on what was paid for the land did not create a taking.

One who owns land also must take into account the regulatory climate surrounding his intended use, and, if it is intensifying, must understand that his development plans may be disallowed. For example, one who buys un- or under-regulated wetlands and waits a few years while public awareness leads to new or tougher restrictions will be treated as having diminished expectations of developing the land after the new law is in place.[18]

If a development is underway when a law is enacted that will prevent the project from proceeding or limit it, the developer may have a vested right under state law. While state laws vary, generally a vested right is acquired by making substantial expenditures in good faith reliance on a permit. A vested right under state law confers a legitimate expectation to continue a project, but this state law right is not binding on courts interpreting the federal constitution. Thus, an action based on state vested right law may result in a court order allowing the project to proceed, but a takings claim for the temporary loss of use while litigating the state law claim may

[15] Animas Valley Sand and Gravel, Inc. v. Board of County Commissioners, 38 P.3d 59 (Colo.2001).

[16] Kaiser Aetna v. United States, 444 U.S. 164 (1979).

[17] 605 F.2d 1117 (9th Cir.1979).

[18] Good v. United States, 189 F.3d 1355 (Fed.Cir.1999), cert. denied, 529 U.S. 1053 (2000).

fail. As noted above, knowledge of the regulatory climate may defeat a takings claim based on reasonable expectations.

Purchasing land with knowledge that it is already restricted does not automatically constitute a waiver of the right to bring a takings claim based on the effect of the regulation. This is true even if the new owner paid a price reflecting the value of the land as regulated. Knowledge of the regulation before purchase, while not a bar, is factor to be taken into account in assessing investment-backed expectations.

According to Professor Dan Mandelker, a leading scholar of the takings issue, a landowner's investment-backed expectations are only reasonable "when government acts suddenly and substantially to interfere with property rights and could have avoided this interference."[19] He gives as an example an unforeseeable and drastic downzoning under circumstances where the government could have avoided the shock to the landowner by adopting a plan showing its future intentions.

The final factor, the "character or extent of the government action," refers at least, and perhaps only, to the Court's greater concern with physical invasions than with regulatory effects. A temporary invasion of airspace by government planes was the example used by the *Penn Central* Court to illustrate application of the factor.

The "character" factor became muddled as courts began using it to inquire into the purpose and importance of the public interest, and weighing the loss against the public gain. In *Agins v. City of Tiburon*, the Court said "[t]he application of a general zoning law to particular property effects a taking if the ordinance does not substantially advance legitimate state interests, or denies an owner economically viable use of his land." It added, "the question [of when a taking has occurred] necessarily requires a weighing of private and public interests."[20] This balancing approach was an unacknowledged divergence from the *Pennsylvania Coal* Court's warning that "a strong public desire to improve the public condition is not enough to warrant achieving it by a shorter cut than the constitutional way of paying for the change." The Court began to speak of the "multifactor balancing" test, and lower courts followed suit.

In 2005, the Court went a long way to clearing up the matter. In *Lingle v. Chevron, USA*, Inc.,[21] the Court overruled *Agins*, admitting that the "substantially advances . . .formula prescribes an inquiry in the nature of a due process, not a takings, test, and that it has no proper place in our takings jurisprudence." The "substantially advances" means-end formula, said the Court, addresses a question that is a condition precedent to a takings claim, which is whether a regulation is effective in achieving a legitimate goal. If a law fails to promote a legitimate end, it is invalid and it makes no sense to proceed to discuss whether compensation is due under the Fifth Amendment. *Lingle*, in overruling the *Agins*' substantially advances test, should eliminate

[19] Daniel R. Mandelker, Investment–Backed Expectations in Takings Law, 27 Urb.Law. 215 (1995).

[20] 447 U.S. 255, 260 (1980).

[21] 544 U.S. 528 (2005).

a balancing of interests in regulatory takings claims.

## H1 Selecting the Relevant Unit of Property Against Which to Measure Loss

Often, the most important issue in a regulatory takings case is selection of the relevant unit of property used to measure the economic loss. A narrow approach focusing on only the portion of land affected by the regulation increases the prospects of a total diminution in value. That, in turn, invokes the *Lucas* categorical takings rule. A broad approach decreases the percentage lost and puts the claim under the *Penn Central* test. The Court has consistently used a broad, or what it calls a "whole parcel," approach.[22]

For example, if one owns 20 acres of land, 18 of which are wetlands undevelopable due to state law, there is likely a total loss of the 18 acres (recreational uses, such as bird watching, are unlikely to count). However, if a court takes into account the value of the developable 2 upland acres, the loss will not be as great. On these facts, in the *Palazzolo* case,[23] the Supreme Court used the landowner's entire 20 acre tract, attributing enough value to the 2 acres to bring the loss down from 100% to 93.7% and preclude the finding of a *Lucas*-type total taking. The Court directed the state court to consider whether the partial economic deprivation and other factors gave rise to a taking under *Penn Central*. The state court found no partial taking.

## H1 Moratoria

The general rule expressed in *Tahoe–Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency*,[24] is that a landowner is guaranteed a reasonable use over a reasonable period of time, and the mere loss of the present right to use land is not a taking. Even where a moratorium permits no use, the overall loss may not be great since the future use of the property upon expiration of the moratorium gives the property value.

Interim development controls that temporarily freeze land development may be, but usually are not, takings. A taking may be found where the freeze is shown to have caused substantial loss and where there is evidence of bad faith or excessive delay. Moratoria falling in the range of one to three years in length almost always survive takings claims. In one case a court held a 9 year delay in granting approval to be unreasonable and to constitute temporary taking. Yet, another court found a 9 ½ year delay was not a taking.

## H1 Physical Occupation Resulting from Regulation

Permanent physical invasions of property by the government often, though not always, constitute takings. State authorized invasions by third parties also may be takings and are

[22] In *Penn Central*, where the "whole parcel" rule originated, the railroad claimed a total economic loss of its airspace above Grand Central Station. The Court rejected this approach saying, '[t]aking' jurisprudence does not divide a single parcel into discrete segments, [but] focuses on the nature and extent of the interference in the parcel as a whole." Viewing the whole parcel, the loss of the airspace still left the railroad with a reasonable use of the existing building.

[23] See n. 7 supra.

[24] 535 U.S. 302 (2002).

typically considered a form of regulatory taking. They are perhaps the most litigated types of regulatory takings claims in the United States since government exactions required as a condition for development permission are quite common.

In *Loretto v. Teleprompter Manhattan CATV Corp*.,[25] the Supreme Court established a categorical or unconditional takings test for permanent physical invasions: a permanent physical occupation of property by a third party pursuant to state authority is a taking, regardless of the scope or economic impact of the intrusion. In *Loretto*, the City of New York required lessors of residential property to permit the installation of cable television facilities on their buildings. When a cable company installed a metal box on the roof of an apartment building and ran cable wires down its side, the owner alleged a physical taking had occurred. Noting that the right to exclude is "one of the most treasured strands in an owner's bundle of property rights," the Court held that the fact that a permanent invasion occurred determined the matter. The strength of the public interest and the overall impact on the property's value was not relevant.

A significant qualification to this so-called categorical rule involves the very common requirement that land developers give, or allow public entry on, land to mitigate anticipated adverse consequences expected to flow from the development. For example, subdivision approvals often call for developers to provide land to be used for streets, parks, sidewalks, and schools that will serve the development. In *Nollan v. California Coastal Commission*,[26] the Court created an exception to the *Loretto* rule: a permanent physical occupation, which would otherwise be a taking, will not be treated as one if government can show that a nexus exists between the anticipated effects of the landowner's proposed development and the land exacted for public use. Importantly, the Court held it would not defer to government's assertion of a nexus, but put the burden on the government to prove the nexus, applying what is known as intermediate scrutiny in judging the government's case.

In *Nollan,* the state coastal commission required the landowners to deed an easement allowing the public to walk along the beachfront side of their ocean lot in return for permission to build a larger house. The commission claimed the requirement was to protect the public's ability to see the beach from the street, prevent congestion on the beach, and to overcome psychological barriers to the use of the beach resulting from increased shoreline development. The Court had no quarrel with the legitimacy of the state's goals, but disagreed that the lateral access easement along the beachfront would promote them. While the essential nexus was found wanting in *Nollan*, the principle rescued many land use controls.

Even if a nexus or causal connection between the adverse impact of the development project and the condition is established, it still must be shown that the amount exacted is proportional to the anticipated impact of the development.[27]

Impact fees, also called monetary exactions, in lieu fees, and linkage fees, may have an

[25] 458 U.S. 419 (1982).

[26] 483 U.S. 825 (1987).

[27] *Dolan v. City of Tigard*, 512 U.S. 374 (1994).

economic impact similar to a physical exaction. Courts differ on whether *Nollan's* intermediate scrutiny should be extended to regulations such as impact fees that do not cause physical invasions. The 2005 *Lingle* decision observed that the *Nollan* nexus doctrine was an exception to the *Loretto* physical takings rule. Without a threatened physical invasion, there is nothing to trigger *Loretto*, and no need for the government to raise the *Nollan* nexus defense. The Court, however, has not specifically addressed whether fees can be takings.

A second reason that monetary charges may not be seen as takings is that nothing is taken for which the state could pay just compensation. If labeled a taking, it would mean the government can take money under its eminent domain power, but only if it pays it back. It makes more sense to examine the monetary charge as a due process matter and ask whether the ordinance employs an irrational means and, if so, declare the fee void. The difference in treatment is significant. The takings test of *Nollan* calls for a court to closely examine the state's reasons for imposing the exaction while the due process test defers to the state. In the former, the burden is on the state; in the latter case, the burden is on the landowner.

## H1 Government Actions Indirectly Diminishing Property Value

Government action directed at one parcel or area may indirectly and adversely affect neighboring land. It may be a government owned airport or a government-licensed, privately owned nuclear power plant. While the directly affected landowner is paid and the government action benefits the public at large, the action may diminish the value of neighboring land.

Generally, no takings action lies for losses sustained from indirect government action, especially where there is no physical invasion. Government authorized flights that invade the immediate airspace of the surface owner have been held to be takings. However, without direct overflights, non-trespassory harm from aircraft noise will not constitute a taking.

Some authority for finding a taking in such cases is *Richards v. Washington Terminal Company,*[28] where a landowner suffering annoyance from the operation of an adjoining railroad track and tunnel sought damages from the railroad. Congress had authorized the building of the tunnel. While general annoyance common to others in the area was not actionable, the Court found that the tunnel had been constructed so that a fanning system forced gases and dust from the tunnel directly onto the plaintiff's land. The Court found the plaintiff could collect damages from the railroad for this "peculiar and substantial harm" that he alone suffered. While the *Richards* Court spoke of the harm to the plaintiff as a taking and the damage due him as compensation, the government was not sued. The case has not subsequently been discussed by the Court and its age suggests it may not be controlling authority for a takings claim today. With some exceptions and despite this early case, US courts have not developed a significant body of law on this aspect of regulatory takings.

### H2 Severance damage in direct condemnations

[28] 233 U.S. 546 (1914).

In direct condemnations, an indirect harm may result to non-condemned land owned by the landowner. Where government condemns only part of a parcel, the owner generally is entitled to recover so-called "severance damages" for the harm to the remainder of her land directly attributable to the taking. For the remainder to qualify for damages, generally it must be contiguous to the parcel taken and have been acquired by the landowner at the same time and by the same instrument as the parcel directly condemned. Others with nearby land, who suffer a loss of value, generally are not entitled to compensation.

## H1 State legislative taking statutes

Dissatisfied with the judicial interpretation of the federal and state constitutional takings clauses, which they regard as insufficiently protecting property rights, several states have enacted takings laws. Such statutes create a new cause of action with a statutory definition of a taking. They do not attempt to define a constitutional taking. That is a question only the courts can answer.

In 1995, Florida enacted the Private Property Rights Protection Act, which allows landowners to sue if governmental regulations "inordinately burden" real property.[29] The question of when the burden reaches the point of being inordinate is judicial. The Florida statutory action is procedurally different from traditional inverse condemnation action. Under the Florida act, if an application for development permission is rejected, a property owner can file a notice of claim. The government must then advise the property owner of the permissible land uses by issuing a so-called ripeness decision. If the government fails to issue such a determination within six months, the matter is deemed ripe. The statute also requires government to initiate a settlement process. Florida's use of the "inordinate burden" standard, rather than a set percentage of lost value, is a major difference from other states' compensation laws.

A Texas statute defines a statutory taking as a market value reduction of 25% of the portion of land affected permanently or temporarily by governmental action.[30] The act has limited application, reaching state agency actions, but covering municipalities, the main governmental land use regulator, only when they are acting extraterritorially. Louisiana provides a cause of action for governmental actions that result in a diminution in value of 20% or more of agricultural or forestry property.[31] A Mississippi statute sets 40% as the triggering loss in value and applies only to forest land.[32]

The most radical statute to date was enacted in Oregon by voter initiative in 2004. Known as Measure 37, it required compensation for the enforcement of a land use regulation which had the effect of causing *any* reduction in value.[33] The law provided an option to the government to waive the law rather than pay. Having inadequate funds to pay claims, waivers

[29] Fla.Stat.Ann. § 70.001 (2).

[30] Vernon's Tex.Stat.Ann. § 2007.002 (5)..

[31] La.Stat. § 3:3602 (11) and § 3:3610.

[32] Miss. Code Ann. §§ 49–33–1 to 49–33–17.

[33] O.R.S. §197.352 et seq.

were common and large subdivisions, big box stores, and strip malls appeared on prime farmland. Concerned that Measure 37 allowed too intensive development, Oregon voters in 2007 significantly amended it. The new law, Measure 49, limits the type of property for which a claim maybe made. Under Measure 37 compensation had been required for any reduction in value of *any land*. Measure 49 now provides that "[i]f a public entity enacts one or more land use regulations that *restrict the residential use of private real property or a farming or forest practice* and that reduce the fair market value of the property, then the owner of the property shall be entitled to just compensation * * *."

## H1 Compensation: Permanent or Temporary Taking, The State's Choice

When a court determines the government has gone "too far" and taken property, the question of how much to pay initially rests with the government. A court cannot compel the government to pay for a permanent taking. The government has the option of keeping the regulation in place and paying compensation for a permanent taking, or rescinding the excessive regulation and paying only for the period of the take. Once the option is made, the court determines the amount due the landowner.

Where the government opts to keep the regulation in place permanently the measure of just compensation is the market value of the property at the time of the taking. Where government elects to rescind the regulation and pay compensation for only a temporary taking, various measures of damages have been used. Rental return is probably the most frequently used. It is assumed that the compensation required by the Fifth Amendment means money, but the Court has not held that to be the case. While unlikely, non-monetary compensation might be adequate in some cases. For example, transferable development rights could conceivably qualify as a constitutional form of compensation.

## H1 Evaluation and future directions

The reputation of the United States and its courts might lead one to expect to find a high degree of protection for private property rights. As far back as 1835, Alexis de Tocqueville found "the love of property . . . keener" in the United States than elsewhere, and observed that Americans "display less inclination toward doctrines that in any way threaten the way property is owned [and, we might add, used.]"[34] The reputation of the United States Supreme Court currently and over the last several decades is of a court that is a jealous guardian of private property rights, with the insinuation that the Court over-protects property to the detriment of the public interest. While perhaps true in comparison to most other countries, in the context of regulatory takings, the reputation often seems exaggerated.

In the late 1980s and early 1990s, the Supreme Court decided several cases that increased protection of private property. The appearance of greater protection, however, proved greater than the reality. In the early years of this century, the Court has refrained, when given the opportunity, from expanding protection. In its three most recent takings cases, *Palazzolo*, *Tahoe-Sierra* and *Lingle,* discussed in this chapter, the Court has narrowed the *Lucas* holding and endorsed P*enn Central's* test. This ad hoc test is the one most likely to be applied in a regulatory takings case. Claims rarely qualify for the more landowner-favorable rule of *Lucas.*

[34] Alexis de Tocqueville, Democracy in America 614 (J. Mayer & M. Lerner, eds.1966).

Not only is *Penn Central* the most likely test to be applied by a court, it is difficult for a property owner to prevail under it. Professor James Ely sums up *Penn Central*'s test by observing that its "indeterminate factors provide little guidance to individuals and, in practice, are heavily balanced in favor of the government and against compensation."[35]

[35] See James W. Ely, Jr., "Poor Relation" Once More: The Supreme Court and the Vanishing Rights of Property Owners, 2005 Cato Sup.Ct.Rev. 39.