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An Empirical Study of Implicit Takings

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AN EMPIRICAL STUDY OF IMPLICIT TAKINGS

JAMES E. KRIER* & STEWART E. STERK**

ABSTRACT

Takings scholarship has long focused on the niceties of Supreme Court doctrine, while ignoring the operation of takings law “on the ground”—in the state and lower federal courts, which together decide the vast bulk of all takings cases. This study, based primarily on an empirical analysis of more than 2000 reported decisions over the period 1979 through 2012, attempts to fill that void.

This study establishes that the Supreme Court’s categorical rules govern almost no state takings cases, and that takings claims based on government regulation almost invariably fail. By contrast, when takings claims arise out of government action other than regulation, landowners enjoy modest success. In particular, when government actions are taken by officials who are not politically accountable, state courts are more likely to scrutinize those actions.

This pattern is consistent with what we believe to be the courts’ basic project in this area: to develop doctrine that acknowledges the importance of property rights while also accommodating the needs of an activist state. By and large, political processes, not judicial doctrine, are left to serve as the primary check on government activity.

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INTRODUCTION

When the government sues to condemn private property under its power of eminent domain, taking the property is the admitted purpose of the suit. But as sketched in Part I below, a long line of Supreme Court decisions establishes that takings can also arise from other governmental activities that trigger the protections afforded by the Constitution's Takings Clause,¹ notwithstanding the government's insistence that no taking has occurred. The resulting body of doctrine sets a "constitutional bottom."² States must protect property at least as much as the Court's rules decree, but they are free in principle to protect it more. However, state courts are also able, at least in practice, to protect it less, because the Supreme Court has developed ripeness and preclusion rules that limit the ability of lower federal courts to oversee the work of state courts,³ and because the Court can review only a fraction of takings cases in any event.

An obvious implication of these observations is that the law of takings announced by the Court might significantly differ from the law of takings actually implemented by the states. Yet state implementation has been virtually ignored in the literature, in favor of a preoccupation with Supreme Court doctrine.⁴ A consequence is that

1. The Takings Clause provides "nor shall private property be taken for public use, without just compensation." U.S. CONST. amend. V. Virtually all state constitutions have the same or similar language, but the minimum requirements of the Takings Clause apply to them, in any event, through the Due Process Clause of the Fourteenth Amendment. See *Chi., Burlington & Quincy R.R. Co. v. Chicago*, 166 U.S. 226, 238-39 (1897).

2. We borrow the phrase from John Ferejohn & Barry Friedman, *Toward a Political Theory of Constitutional Default Rules*, 33 FLA. ST. U. L. REV. 825, 853 (2006) (discussing Supreme Court prescriptions that leave room for more rights-protective action by the states).

3. On ripeness and preclusion, see *infra* Part I.F. See also Stewart E. Sterk, *The Federalist Dimension of Regulatory Takings Jurisprudence*, 114 YALE L.J. 203, 238-43 (2004) (discussing the effects of the Court's ripeness and preclusion rules).

4. In our view, the era of modern takings scholarship began with an article by Allison Dunham published in 1962. See generally Allison Dunham, *Griggs v. Allegheny County in Perspective: Thirty Years of Supreme Court Expropriation Law*, 1962 SUP. CT. REV. 63, 64 (analyzing whether the Court's expropriation judgments "reveal a rational plan or only a haphazard accumulation of rules"). We consider the influence of Dunham's contribution later. See *infra* notes 194-200 and accompanying text. For a few recent examples of notable articles that adopt Dunham's lead by focusing on the work of the Supreme Court, see generally Bradley C. Karkkainen, *The Police Power Revisited: Phantom Incorporation and the*

we have little sense of how the law from on high works out in practice on the ground.

Hence Part II of this Article, the first comprehensive analysis of takings decisions by state and lower federal courts.⁵ We studied more than 2000 cases decided over the thirty-three-year period between 1979 and 2012.⁶ Our review indicates that in certain circumstances state courts tend to provide less protection to private property than Supreme Court doctrine requires, though they, and some state legislatures, occasionally provide more. An apt generalization about state court decisions is that they regularly reflect ignorance of—or indifference to—Supreme Court teachings, which in any event place virtually no significant constraints on state activities regarding property.

Part III turns from facts to theory; it aims to explain the pattern of Supreme Court doctrine and state implementation that we observed. It is an exercise in positive theory, as opposed to the

Roots of the Takings “Muddle,” 90 MINN. L. REV. 826 (2006) (tracing the roots of the takings muddle to the Court’s misreading of Fourteenth Amendment substantive due process cases as Fifth Amendment Takings); Eduardo Moisés Peñalver, *Regulatory Takings*, 104 COLUM. L. REV. 2182, 2183 (2004) (employing Court’s taxation jurisprudence to develop a narrower takings doctrine in which “broadly applicable regulations affecting fungible property” receive less scrutiny); Laura S. Underkuffler, *Property and Change: The Constitutional Conundrum*, 91 TEX. L. REV. 2015 (2013) (arguing that the Supreme Court’s inability to reconcile the incompatibility of ideas of property and change resulted in incoherent takings jurisprudence). It would be a pointless task to cite the many hundreds of similar articles produced over the last fifty-some years. On the other hand, it is much to the point to note that we have found only a few studies showing any interest in the actual implementation of Supreme Court doctrine, and each is far more limited in scope and method than the systematic empirical study we have undertaken. See generally Maureen E. Brady, *Property’s Ceiling: State Courts and the Expansion of Takings Clause Property*, 102 VA. L. REV. 1167 (2016) (discussing the nineteenth-century movement to provide compensation for landowners harmed by street regrading); Eric R. Claeys, *Takings, Regulations, and Natural Property Rights*, 88 CORNELL L. REV. 1549 (2003) (limited to nineteenth-century state court takings cases); F. Patrick Hubbard et al., *Do Owners Have a Fair Chance of Prevailing Under the Ad Hoc Regulatory Takings Test of Penn Central Transportation Company?*, 14 DUKE ENVTL. L. & POL’Y F. 121 (2003) (limited to a random selection of cases concerning a single aspect of Supreme Court takings doctrine); Ronald H. Rosenberg, *The Non-Impact of the United States Supreme Court Regulatory Takings Cases on the State Courts: Does the Supreme Court Really Matter?*, 6 FORDHAM ENVTL. L.J. 523 (1995) (limited to examination of state court decisions interpreting three Supreme Court decisions).

5. Our analysis does not include takings decisions that involve an explicit exercise of the condemnation power.

6. For our reasons for selecting this particular period, see *infra* note 75 and accompanying text.

normative theoretical arguments that have characterized the scholarly literature. We suggest that Supreme Court takings doctrine can be understood as the means to maintain and reinforce, in a very particular fashion, the tension between two conflicting commitments that have figured prominently throughout the Nation's history—strong property rights on the one hand, and the imperatives of an activist government on the other. The Court supports property rights with rhetoric of symbolic importance but little, if any, operational significance,⁷ leaving it up to state lawmakers to go beyond the minimal requirements of the constitutional bottom if they wish. State courts, in turn, have mostly relied on state political processes—as opposed to judicial oversight—as the primary check on property rights abuse. State courts are most likely to find takings in cases in which the government actors responsible for harm to landowners are least likely to be politically accountable.

I. SUPREME COURT DOCTRINE

Because our study involves comparing what the states do to what the Constitution requires and permits them to do, we need to have Supreme Court doctrine firmly in mind. Recall that the doctrine examined in this Article concerns takings that arise *outside* the context of eminent domain actions. These are conventionally referred to as “regulatory takings,” but that label is misleading. Many so-called regulatory takings have nothing whatsoever to do with regulation, whether legislative or administrative, and regulation is not treated as a distinctive category of activity in the doctrine developed by the Supreme Court.⁸ In short, takings by government regulation are just one member—although a substantial member—of a general class of all takings that arise outside the context of explicit takings by condemnation. We refer to this class as “implicit

7. See *infra* Part III.B.

8. James E. Krier, *Judicial Takings: Musings on Stop the Beach*, 3 BRIGHAM-KANNER PROP. RTS. CONF. J. 217, 218-19 (2014).

takings.”⁹ When we speak of regulatory takings, we mean those that arise specifically out of government regulation.

The roots of implicit takings doctrine are found in two early Supreme Court cases, one decided in 1872 and the other a half century later in 1922, which extended constitutional takings doctrine beyond explicit takings and formal transfers of title and possession of land to the government. The first, *Pumpelly v. Green Bay Co.*, concerned construction of a government-authorized dam that permanently flooded private land located in Wisconsin, although the submerged land itself was not formally “taken” by the government.¹⁰ The second, *Pennsylvania Coal Co. v. Mahon*, arose from a challenge to state regulation of coal mining that diminished the value of property by requiring certain columns of coal to remain in place to prevent subsidence of the surface.¹¹ In each, the Court held that the consequences visited upon property owners were of such a nature or severity that they could be accomplished only by paying the just compensation required in formal condemnation proceedings.¹²

Over the years, the law of implicit takings introduced by *Pumpelly* and *Mahon* has been considerably elaborated by the Supreme Court. The Court has developed several distinctive techniques to resolve implicit takings—using categorical, or per se, rules in some instances; an ad hoc case-by-case approach in others; and special, tailor-made tests in the particular case of exactions. The

9. *Id.* In a recent article, Tom Merrill acknowledges the implicit takings label but opts to stick to the conventional regulatory takings terminology notwithstanding its malapropos nature. See Thomas W. Merrill, *Anticipatory Remedies for Takings*, 128 HARV. L. REV. 1630, 1637 (2015). In its latest takings decision, the Supreme Court also speaks of regulatory takings, but places the phrase in scare quotes, perhaps suggesting an awareness that the terminology is inapt. See *Horne v. Dep’t of Agric.*, 135 S. Ct. 2419, 2427 (2015).

10. 80 U.S. (13 Wall.) 166, 167 (1871). *Pumpelly* was decided twenty-five years before the Takings Clause was made applicable to the states. See *supra* note 1. But the Wisconsin Constitution had language very similar to that in the U.S. Constitution, and the Court was reviewing a federal circuit court’s interpretation of the state provision. *Pumpelly*, 80 U.S. at 176-77.

11. 260 U.S. 393, 412 (1922).

12. *Id.* at 414-15; *Pumpelly*, 80 U.S. at 182. A number of scholars have argued, with force, that *Mahon* was not a takings case at all, but a substantive due process case. See, e.g., Robert Brauneis, “*The Foundation of Our ‘Regulatory Takings’ Jurisprudence: The Myth and Meaning of Justice Holmes’s Opinion in Pennsylvania Coal Co. v. Mahon*,” 106 YALE L.J. 613, 667-68 (1996) (arguing that the Takings Clause had no place in *Mahon*); William Michael Treanor, *Jam for Justice Holmes: Reassessing the Significance of Mahon*, 86 GEO. L.J. 813, 856 (1998).

Court has also fashioned rules regarding remedies and access to federal judicial oversight of state takings decisions.

A. *Categorical Rules*

The Court has articulated two categorical takings rules. First, government action resulting in permanent physical occupation of private land is always a taking.¹³ *Pumpelly* is probably the origin of the rule, but *Loretto v. Teleprompter Manhattan CATV Corp.* is its most prominent contemporary statement.¹⁴ In *Loretto*, owners of apartment buildings challenged a New York statute permitting cable television companies to install connection facilities on apartment buildings without landlord consent.¹⁵ The Court found a taking notwithstanding the statute's trivial impact.¹⁶ *Horne v. Department of Agriculture* reinforced this rule and extended it to personal property.¹⁷ In *Horne*, raisin growers challenged "marketing orders" requiring them to turn over a percentage of their raisins to the government in order to maintain stable markets for raisins.¹⁸ The Court held that *Loretto's* "reasoning—both with respect to history and logic—is equally applicable to a physical appropriation of personal property."¹⁹

The second categorical rule, established in *Lucas v. South Carolina Coastal Council*, is that government action "den[ying] all economically beneficial or productive use of land" is always a taking.²⁰ The South Carolina legislation involved in *Lucas* had the effect of barring Mr. Lucas from developing any permanent habitable structures on several island lots, and the state trial court found that the

13. See, e.g., *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 421 (1982).

14. *Id.* (finding a taking when a New York statute required landlords to allow cable television companies to install connection facilities on their buildings).

15. *Id.*

16. *Id.* The compensation eventually awarded in the case amounted to one dollar per property. See *Loretto v. Teleprompter Manhattan CATV Corp.*, 446 N.E.2d 428, 434 (N.Y. 1983) (holding that a statutorily created commission, rather than a court, may determine compensation for a taking, and upholding the prior compensation determinations); see also *Loretto*, 458 U.S. at 423-24 (stating the commission determined one dollar to be just compensation).

17. 135 S. Ct. 2419, 2427 (2015).

18. *Id.* at 2424-25.

19. *Id.* at 2427.

20. 505 U.S. 1003, 1015 (1992).

law rendered Lucas's lots "valueless."²¹ This gives rise to an ambiguity in the reach of the categorical rule. The rule could apply in cases in which the government action wipes out "all economically beneficial or productive use of land," or, instead, it could apply only in cases in which the action wipes out literally all market value.²² The precise meaning of the wipeout rule remains unresolved. We refer to all cases using either meaning as "wipeout" cases.

Lucas also states an exception to its categorical takings rule: government regulations that prohibit common law nuisances do not give rise to takings liability, even if landowners are left with no economically productive uses.²³ Moreover, *Lucas* does not apply to temporary wipeouts, as the Court subsequently held in a case involving building moratoria that forestalled building on land around Lake Tahoe for thirty-two months in order to study the impact of development on the lake.²⁴ Similarly, *Loretto* does not apply to physical intrusions that are only temporary.²⁵ Temporary wipeouts and temporary physical intrusions might still amount to takings, however, depending on how they fare under the ad hoc approach to implicit takings used to resolve all cases not settled by the Court's categorical rules.²⁶ This, as it happens, is most cases. As we shall see, the Court itself has acknowledged that *Loretto* and *Lucas* will seldom come into play.

21. *Id.* at 1009.

22. *Id.* at 1009, 1015.

23. *Id.* at 1029. This is one of four categorical no-takings rules developed by the Court. The others are the forfeiture exception permitting government seizure of property used in the commission of crimes; the navigation servitude exception, excluding liability for damages to property caused by federal regulation of navigable waters; and the conflagration exception, excluding liability for damages caused by fire control measures. *See generally* DAVID A. DANA & THOMAS W. MERRILL, PROPERTY: TAKINGS 110-20 (2002) (describing the four categorical no-takings rules developed by the court).

24. *Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency*, 535 U.S. 302, 341-42 (2002).

25. The Court's practice is to speak of permanent physical intrusions as "occupations" and temporary physical intrusions as "invasions." *See, e.g., Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 428 (1982).

26. *See infra* Part I.B.

B. Ad Hoc Balancing

The ad hoc approach owes its moniker to *Penn Central Transportation Co. v. New York City*,²⁷ but its methodology dates back to Justice Holmes's opinion for the Court in *Mahon*. Holmes observed that while government could hardly go on if obliged to pay compensation every time its actions diminished the value of property, there had to be limits.²⁸ When diminution goes "too far," the action in question will be treated as a taking,²⁹ unless it is accompanied by reciprocal benefits to property owners, or justified as a means to protect public safety.³⁰ How far is too far is "a question of degree"³¹ that "depends upon the particular facts";³² it "cannot be disposed of by general propositions."³³ In the words of *Penn Central*, the decision in any case left unresolved by a categorical rule turns on "essentially ad hoc, factual inquiries," with several factors being of "particular significance."³⁴

Some, but not all, of the factors discussed by the Court figured in *Mahon* and other early precedents; several, however, found their first mention in *Penn Central*.³⁵ Professors Dana and Merrill list the factors as follows: the degree of diminution in value; whether the property owners had reasonable investment-backed expectations; whether the government action involved a physical invasion, as opposed to a permanent occupation; whether the action aimed at noxious uses of property, which, presumably, did not amount to common law nuisances; whether an average reciprocity of advantage existed; and whether the regulation destroyed a recognized property right.³⁶ Dana and Merrill go on to consider each of these factors

27. 438 U.S. 104, 124 (1978).

28. Pa. Coal Co. v. Mahon, 260 U.S. 393, 413 (1922).

29. *Id.* at 415.

30. *See id.* at 414-15.

31. *Id.* at 416.

32. *Id.* at 413.

33. *Id.* at 416.

34. Penn Cent. Transp. Co. v. New York City, 438 U.S. 104, 124 (1978).

35. For example, in *Penn Central* the Court noted that takings doctrine considers "the parcel as a whole," not as "discrete segments." *Id.* at 130-31. For a discussion of difficulties generated by this denominator problem, and various approaches courts have taken to determine what constitutes the "parcel as a whole," see generally John E. Fee, Comment, *Unearthing the Denominator in Regulatory Taking Claims*, 61 U. CHI. L. REV. 1535 (1994).

36. DANA & MERRILL, *supra* note 23, at 132.

at length,³⁷ but the exercise leaves them skeptical about the virtues of *Penn Central's* methodology, primarily because the weight and import of its list of factors, and the relationships between them, are nowhere explained.³⁸ “It would dignify the approach too much to describe it as a multi-factoral test or even a balancing test. All one can say for certain is that the method is *ad hoc*.”³⁹

C. *Wrinkles in the Doctrine*

The process of ad hoc review, and to some degree categorical decision-making, gives rise to several issues not clearly addressed by the rules themselves. A handful of these are recurring, and the Court has developed doctrines to deal with them.

1. *The Denominator Problem and Conceptual Severance*

Begin with the denominator problem, which arises in any case involving diminution in the value of an owner's property. Whether the allegation is that essentially all of the value has been wiped out, or instead that it has at least been unduly diminished, there is the matter of figuring out just what the “property” is.⁴⁰ If government action restricts development of some portion of a parcel of land, is the restriction's impact to be considered in light of the remaining value of the parcel “as a whole,” or in terms of the remaining value of the (conceptually severed) portion?⁴¹ The Court's opinions to date have rejected conceptual severance; restrictions are to be considered in light of the remaining value of the parcel as a whole, broadly construed.⁴²

37. *Id.* at 134-64. Presumably, physical invasions and controls on noxious activities that do not trigger the *Loretto* and *Lucas* per se rules might nevertheless matter in making an ad hoc decision about whether a particular government action did, or did not, amount to a taking. *See id.* at 142-43, 148.

38. *See id.* at 134.

39. *Id.* at 131.

40. *See Fee, supra* note 35, at 1536.

41. *See id.*

42. *See id.* at 1550. For further discussion of difficulties generated by the denominator problem, and various approaches courts have taken to determine what constitutes the parcel as a whole, see *id.* at 1538-45.

2. *Counting Benefits that Ameliorate Regulatory Impact*

A second twist in the Court's doctrine has a similar effect. Suppose that a regulation impacting the value of regulated property has, as part of the regulatory package itself, a provision that lessens the economic impact by providing benefits to the landowner that would otherwise not be available. If these benefits are considered in calculating the diminution in value, then a loss so substantial as to be a compensable taking without the benefit provision might be regarded as not so substantial given the benefit. The Court made exactly this move in *Penn Central*, in which the challenged legislation denied the owner of Grand Central Station the right to develop airspace over the station, but at the same time provided transferable development rights (TDRs) that permitted more extensive development on neighboring parcels than would otherwise be allowed.⁴³ The TDRs, the Court held, "mitigate whatever financial burdens the law has imposed ... and, for that reason, are to be taken into account in considering the impact of regulation."⁴⁴

3. *The Effect of Purchase with Knowledge of Government Imposition*

A final twist takes us back to *Lucas* and its exception to takings liability in the case of common law nuisance controls.⁴⁵ The rationale behind the exception is that restrictions on ownership imposed by "background principles of the State's law of property and nuisance" inhere in an owner's title, leaving no room to complain that rights were compromised because in fact they did not exist at the outset.⁴⁶ Suppose then that *A* owns a parcel of land at time *t*₁, that the government regulates it to the point of a permanent wipeout at

43. *Penn Cent. Transp. Co. v. New York City*, 438 U.S. 104, 115-16 (1978).

44. *Id.* at 137. The same reasoning would seem to apply to *Lucas* wipeout cases as well; the consequence that government programs wipe out all economic value (or all economically beneficial use) would not work for categorical takings, so long as they provide some special and reasonably substantial benefits to the owners of regulated property. All such programs, it seems, would be governed by a *Penn Central*-type analysis, in which, of course, the benefits provision would weigh in once again in determining whether the (net) diminution in value went too far.

45. *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1031-32 (1992).

46. *Id.* at 1029.

t2, and that *B* takes title from *A* at t3 and thereafter brings suit challenging the regulation as a categorical taking. It might seem that *B* has no grounds to claim a taking given that *B* had at least constructive notice of the regulation at the time of purchase. Put in the terms of *Lucas*, the argument would be that *B* purchased subject to a pre-existing limitation on title; put in the terms of *Penn Central*, *B* had no investment-backed expectation. Both arguments were advanced, unsuccessfully, in *Palazzolo v. Rhode Island*.⁴⁷ Regulations that amount to takings, the Court held, “do not become less so through passage of time or title.”⁴⁸ If the rule were otherwise, “postenactment transfer of title would absolve the State of its obligation to defend any action restricting land use, no matter how extreme or unreasonable.”⁴⁹ Perhaps legislation can at times be deemed a background principle of state property law, but it can never become so “by mere virtue of the passage of title.... A regulation or common-law rule cannot be a background principle for some owners but not for others.”⁵⁰

D. Exactions

Exactions are local government measures requiring land developers to provide goods and services, or pay money (impact fees) as a condition of project approval.⁵¹ Historically, governments paid for most public improvements with funds provided by property taxes and government grants.⁵² When private land development imposed specific burdens on local infrastructure, exactions were commonly used to expand the necessary public facilities.⁵³ But eventually local governments came to see that exactions could be a handy source of

47. See 533 U.S. 606, 616 (2001).

48. *Id.* at 627.

49. *Id.*

50. *Id.* at 630. The Court went on to uphold the Rhode Island Supreme Court’s finding that the challenged regulations did not deprive petitioner’s property of all economically valuable uses, and thus did not work a categorical taking. *Id.* at 630-32. A taking might still be found under the ad hoc approach, and the Court remanded accordingly. *Id.* at 632.

51. Mark Fenster, *Takings Formalism and Regulatory Formulas: Exactions and the Consequences of Clarity*, 92 CALIF. L. REV. 609, 613 (2004).

52. Laurie Reynolds & Carlos A. Ball, *Exactions and the Privatization of the Public Sphere*, 21 J.L. & POL. 451, 453-54 (2005).

53. Fenster, *supra* note 51, at 623-24.

revenue.⁵⁴ They enacted development restrictions for the very purpose of relaxing them, granting building permits to developers only if they agreed in exchange to build public facilities or provide the funds for them.⁵⁵ The method was abused; exactions came to bear little relationship to the particular burdens created by development.⁵⁶ The Supreme Court intervened, using the Takings Clause to police government zeal.

The three key Supreme Court cases are *Nollan v. California Coastal Commission*, *Dolan v. City of Tigard*, and *Koontz v. St. Johns River Management District*.⁵⁷ The standards they establish are *sui generis*, applicable only to exactions. *Nollan* requires that there be an “essential nexus” between the burden created by development and the exaction on which a development permit is conditioned.⁵⁸ If, for example, a commercial development would create the need for more public parking, the government may not insist in exchange that the developer dedicate land to a public park. *Dolan* adds a “rough proportionality” limitation.⁵⁹ If the government wants to exact increased parking facilities, it may do so only to the extent necessary to accommodate the increased demand that would result from the development. In *Nollan* and *Dolan* alike, the relationships between regulatory ends and means are to be reviewed with heightened scrutiny, more demanding than the deferential rational basis standard usually applied to judicial review of economic regulations.⁶⁰

Both *Nollan* and *Dolan* involved nonmonetary exactions (land dedications and construction of public facilities), and many commentators assumed that the Court would leave monetary exactions (impact fees) up to the states. *Koontz* proved them wrong, holding against strong dissent that *Nollan* and *Dolan* apply to permits conditioned on money payments.⁶¹ The case was decided after the

54. Reynolds & Ball, *supra* note 52, at 455-56.

55. Fenster, *supra* note 51, at 623.

56. Reynolds & Ball, *supra* note 52, at 453.

57. *Nollan v. Cal. Coastal Comm'n*, 483 U.S. 825 (1987); *Dolan v. City of Tigard*, 512 U.S. 374 (1994); *Koontz v. St. Johns River Water Mgmt. Dist.*, 133 S. Ct. 2586 (2013).

58. *Nollan*, 483 U.S. at 837.

59. *Dolan*, 512 U.S. at 391.

60. See *Nollan*, 483 U.S. at 840-41; *Dolan*, 512 U.S. at 388-91. See generally Fenster, *supra* note 51.

61. *Koontz*, 133 S. Ct. at 2591.

closing date of our data search, but we shall have occasion to mention it.

E. Remedies

For many years, a finding of an implicit taking did not necessarily result in payment of compensation to aggrieved landowners. Instead, some courts awarded declaratory or injunctive relief.⁶² If the government wished to proceed thereafter, it either had to bring an eminent domain proceeding or modify its action in hopes of avoiding the takings problem.⁶³ If the government chose the latter alternative, losses suffered by property owners in the meanwhile went uncompensated.⁶⁴ Given that the government could try and try again, and again, the “meanwhile” could go on interminably.

First English Evangelical Lutheran Church of Glendale v. County of Los Angeles called a halt to this practice.⁶⁵ The Court held that if government action results in an implicit taking, then the government must pay just compensation from the time the action first worked the taking until the time the action is abandoned or altered in such a way that no taking occurs.⁶⁶

F. Ripeness and Preclusion

We turn finally to the Court’s ripeness and preclusion rules. The first prong of the Court’s ripeness doctrine—applicable in both state and federal courts—deems a developer’s takings claim unripe until the developer obtains a definitive rejection of a development plan.⁶⁷

62. See, e.g., *Q.C. Constr. Co. v. Gallo*, 649 F. Supp. 1331, 1338-39 (D.R.I. 1986), *aff’d*, 836 F.2d 1340 (1st Cir. 1987).

63. See, e.g., *id.* at 1339 (ordering government to reconsider permit application without regard to unconstitutional factors).

64. See, e.g., *id.*

65. 482 U.S. 304, 310-11 (1987).

66. *Id.* at 321-22. *First English* adopted a view first expressed by Justice Brennan. *Id.* at 315 (quoting *San Diego Gas & Elec. Co. v. City of San Diego*, 450 U.S. 621, 658 (1981) (Brennan, J., dissenting)). Some state courts found the dissent so convincing that they accepted it without waiting for the Court to do so. See, e.g., Gene R. Rankin, *The First Bite at the Apple: State Supreme Court Takings Jurisprudence Antedating First English*, 22 *URB. LAW.* 417, 417 (1990).

67. See *Williamson Cty. Reg’l Planning Comm’n v. Hamilton Bank of Johnson City*, 473 U.S. 172, 193-94 (1985).

If a building inspector or planning commission denies an application because the developer needs variances, the developer may not bring a takings claim without first applying for those variances.⁶⁸

The second prong limits access to federal courts with respect to claims that state or local government action has worked a taking.⁶⁹ States are free to take property for legitimate government purposes, provided that they pay.⁷⁰ Because no constitutional violation occurs until just compensation has been denied, constitutional challenges in the federal courts are generally not ripe until a state court makes a final decision denying compensation.⁷¹ Moreover, if a state court rejects a landowner's claim that the government's action constituted a taking requiring compensation, the state determination will generally preclude the landowner from seeking compensation in federal court, even if the landowner attempted to raise only state constitutional claims in the state court proceeding.⁷²

II. STATE IMPLEMENTATION OF SUPREME COURT DOCTRINE

We turn now from what the Supreme Court says about takings to our survey of what state lawmakers do about takings. As we have seen in Part I, the Court's doctrine binds state lawmakers in some ways but gives them extraordinary latitude in other ways. We wanted to see how faithful state lawmakers have been to their constitutional obligations, and how inclined they have been to move beyond them—to protect property rights more than the Court says they must.

We began our empirical study with the work of state courts (we knew that state legislative activity would require far less data processing). Initially, we organized the state court decisions in terms of the classification system suggested by the Court's opinions—a category for per se takings claims based on permanent physical invasions; another for per se takings claims based on wipeouts not arising from common law nuisance regulation; a third for cases

68. *Id.*

69. *Id.* at 194, 199-200.

70. U.S. CONST. amend. XIV, § 1.

71. *Williamson Cty.*, 473 U.S. at 195.

72. See Stewart E. Sterk, *The Demise of Federal Takings Litigation*, 48 WM. & MARY L. REV. 251, 253-54 (2006).

involving ad hoc review; and a fourth for exaction cases. We soon saw, however, that these general categories did not discriminate sufficiently among the wide variety of implicit takings claims we found in our collection of cases. This led us to develop a longer list of categories that identified claims arising from condemnation blight and from government enterprise. Even though that exercise let us identify patterns of judicial action that would not have been predicted simply from a reading of Supreme Court opinions, there was a deficiency in our approach. We, like the Court, focused only on the nature of the government action in question, and the consequences of the action for affected landowners, yet our data suggested that the nature of the government decision maker, and the nature of the aggrieved claimant, also appear to play roles in state court decisions. Implicit takings claims might arise from actions by politically accountable public agencies, faceless bureaucrats, or ground-level employees; the aggrieved parties might be a homeowner, small-business owner, or instead a developer. We shall see below that the success rate of property owners in litigated takings cases varies considerably depending on these considerations.

A. Methodology

We assembled our database from cases abstracted in *Just Compensation*, self-described as “a monthly reporting service on eminent domain, inverse condemnation, and relocation assistance law.”⁷³ The periodical was published regularly from 1957 until June 2012; its editor from October 1974 on was Gideon Kanner, the well-known land use lawyer and law professor.⁷⁴ We relied on the *Just Compensation* reports in order to avoid two problems that would arise were we to use LexisNexis or Westlaw. First, any effort to be entirely comprehensive would generate thousands of false positives—cases in which words like “taking” or “compensation” were used out of context—and measures to eliminate those occasions would have made the project impossible to complete in a reasonable period of

73. JUST COMPENSATION, <http://www.justcompensation.com/> [<https://perma.cc/6A2F-K8X8>].

74. *Id.*

time. Second, our own conscious or unconscious preconceptions and biases would inevitably color any efforts we made to eliminate false positives electronically, by developing a narrower, more targeted search. Of course, the cases included in *Just Compensation* could reflect selection biases on Kanner's part, but we thought that risk insignificant. Since Kanner's cases were culled from reading advance sheets, they were not plagued by the biases inherent in an electronic search based on word usage. Moreover, because the *Just Compensation* reports were prepared as the cases were decided, there was little likelihood that important entries would be omitted because the issues involved did not fit today's ideas about what constitutes a takings case. Finally, whatever biases might mar the *Just Compensation* sample were not our biases, thus reducing the possibility that our results would simply reflect our initial selection of data.

We began our study with the January 1979 issue of *Just Compensation* (and reviewed every monthly issue from that date forward, until publication ceased at the end of June 2012). We chose 1979 because we consider *Penn Central*, decided the year before, as the first of the *modern* takings cases, and the first case to make clear that regulatory measures could result in implicit takings.⁷⁵ Because our focus is on implicit takings cases, we did not include those cases in which the *Just Compensation* abstract made it clear that government had explicitly exercised its eminent domain power (a majority of the cases abstracted in *Just Compensation* fell into that latter category). We also excluded other categories of cases, among them personal property cases, cases involving land located outside the fifty states and the District of Columbia, suits between government entities, and cases in which the court failed to reach a landowner's takings claim because the landowner had other remedies available, making it unnecessary to resolve the landowner's takings claims. Often we could not make the decision to exclude these cases until after we read them. As a result, we read many more cases than the total in our database.

75. Prior to *Penn Central*, some state courts considered allegations of unduly burdensome regulatory activity in terms of substantive due process, as opposed to the Takings Clause, notwithstanding Justice Holmes's early statement that if "regulation goes too far it will be recognized as a taking." *Pa. Coal Co. v. Mahon*, 260 U.S. 393, 415 (1922).

We selected several years for which each of us read all of the cases and conferred to make sure we were applying similar standards, both in terms of case selection and categorization. We then divided the remaining years. At least one of us read each case; we did not delegate any of the reading or categorizing to research assistants. We were learning by doing, and, by the end of our first pass through the data, we realized a second pass was in order, both to collect fresh information on matters we had not at first realized were significant, and to check the accuracy and consistency of our findings. Our final database includes 2020 cases.⁷⁶

B. Categorization

We placed each considered case in one of seven categories based on the character and consequences of the government action involved (taken together, the categories encompass more than 99 percent of all the takings cases we collected):

1. Regulations that allegedly caused wipeouts
2. Other regulations (but not involving physical intrusions)
3. Exaction cases
4. Flooding cases
5. Physical intrusion cases (other than flooding)
6. Cases in which government operation of an enterprise harms a landowner (other than by physical invasion)
7. Condemnation blight cases

The first two categories include actual “regulatory takings” cases, which is to say those arising from regulatory activity, such as land use restrictions. The exaction cases, of course, involve the issues the Court addressed in *Nollan*, *Dolan*, and, most recently, *Koontz*. The next three categories (4-6) do not typically involve regulation at all, but some other governmental action with invasive or noninvasive consequences to landowners (such as backups from malfunctioning sewer systems, flooding caused by government regrading of roads, physical invasions to excavate land or remove a dangerous structure, digging of public wells that reduce the water supply in some

76. Our sample is far larger and thoroughgoing than is the case in the few other empirical studies undertaken to date. See, e.g., Hubbard et al., *supra* note 4; Rosenberg, *supra* note 4.

areas, or airport construction that interferes with the enjoyment of land). The final category embraces cases of condemnation blight, instances in which the government never institutes formal condemnation proceedings but announces impending condemnation or similar government actions that essentially preclude owners from making otherwise permissible uses or improvements of their land.

The outcome of each case was designated as one of the following: Taking, No Taking, Remand, Denial of Summary Judgment, or Ripeness.⁷⁷ Whenever a court found even a partial taking, we designated the case as a “Taking.” We subsequently merged the Remand and Denial of Summary Judgment designations for statistical purposes because both involved cases in which the court found no taking but left open the theoretical possibility that the landowner could prevail at some point in the future. Ripeness cases, in contrast, are almost invariably cases in which the landowner’s claim is dismissed, albeit not “on the merits.” We further categorized the cases to see whether there might be a correlation between the identity of the government decision maker or the identity of the claimant seeking compensation, and the outcome of the takings case. We explore that issue in greater detail below.

C. Findings

We have said that a study of the implicit takings cases decided since 1979 reveals that the conventional “regulatory takings” label suggests an image that is both incomplete and inaccurate.⁷⁸ Takings claims arising from government regulation (what we mean when we speak of “regulatory takings”) constitute only a fraction of all implicit takings. As Table 1 illustrates, although regulatory takings claims account for 64.2 percent of total implicit takings claims, they make up a much smaller proportion (41.8 percent) of successful implicit takings claims. Second, even among regulatory takings claims, the supposedly sharp division between per se takings and ad hoc *Penn Central* balancing does not play out the way one might predict from reading Supreme Court opinions.

77. A small number of other cases were decided on other grounds, such as preclusion or lack of jurisdiction.

78. See *supra* Part I.

Table 1. Regulatory Takings as a Fraction of All Implicit Takings

	Total Cases	Cases Finding Taking
Regulation Cases	1286	134
Other Implicit Taking Cases	716	187
Regulation Cases as Proportion of Total	64.2%	41.8%

1. *Per Se Rules*

As we saw in Part I, the Supreme Court has developed two *per se* rules that are supposed to mandate compensation for implicit takings. The *Loretto* rule holds that when government action results in permanent physical occupations, landowners are entitled to compensation regardless of the actual economic loss suffered. Similarly, the *Lucas* rule holds, subject to what has come to be called the “nuisance exception,” that landowners are entitled to compensation when government action wipes out all economically productive use of their land. These much-criticized *per se* rules appear to rest on two similar justifications. First, permanent physical occupations and complete wipeouts look very much like explicit takings in which compensation follows as a matter of course.⁷⁹ Second, *per se* rules eliminate the need for case-specific determinations under the *Penn Central* balancing test and therefore reduce the complexity and volume of litigation.⁸⁰

79. This justification appears in the Court’s opinions in *Loretto* and *Lucas*. In *Loretto*, Justice Marshall labeled a permanent physical occupation “the most serious form of invasion of an owner’s property interests,” *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 435 (1982), and emphasized that permanent physical occupation effectively destroys all rights in physical property—the right to possess, use, and dispose of the property—the same rights the government takes in eminent domain, *see id.* (citing *United States v. General Motors Corp.*, 323 U.S. 373, 378 (1945)). In *Lucas*, Justice Scalia was even more explicit: “total deprivation of beneficial use is, from the landowner’s point of view, the equivalent of a physical appropriation.” *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1017 (1992). Justice Scalia went on to discuss “the practical equivalence in this setting of negative regulation and appropriation.” *Id.* at 1019.

80. Again, the opinions in *Loretto* and *Lucas* suggest this justification. In *Loretto*, Justice Marshall noted that the categorical rule requiring compensation of permanent physical occupations “avoids otherwise difficult line-drawing problems” and “presents relatively few problems of proof.” *Loretto*, 458 U.S. at 436-37. In *Lucas*, Justice Scalia emphasized that cate-

Our findings cast doubt on the proposition that these per se rules simplify litigation or reduce its volume. A per se rule entitling a landowner to compensation encourages landowners to tailor their claims to fall within the rule. As a result, one would expect a success rate far lower than 100 percent because of disputed questions of fact about whether the claim falls within the per se rules.⁸¹ Our data is consistent with that expectation.⁸² In many cases, however, landowners lose not because of questions about the scope of the per se rule, but because courts do not know or understand Supreme Court doctrine, or willfully ignore it or interpret it as having significant play in the joints.⁸³

a. Permanent Versus Temporary Physical Intrusion

We saw in Part I that Supreme Court doctrine differentiates between permanent occupations and temporary invasions: the former are takings per se, whereas the latter are resolved case-by-case in the process of *Penn Central* ad hoc review. To some degree, this distinction, if courts were to observe it, would undermine the per se rule's reduction-of-litigation objective, because one would expect parties to litigate the issue of a permanent occupation versus a temporary invasion. Commonly, however, the distinction does not figure in the decided cases. Indeed, *Loretto*, its per se rule, and the distinction it draws between permanent and temporary physical intrusions go unmentioned in the majority of cases involving government occupation of land. Perhaps because of inadequacy of briefing by lawyers, 65 percent (73 out of 113) of the state court cases involving physical intrusions, whether they find a taking or not, cite no Supreme Court takings decisions.⁸⁴ In those cases

gorical rules eliminate "case-specific inquiry into the public interest advanced in support of" a governmental restraint. *Lucas*, 505 U.S. at 1015.

81. In an influential article, George Priest and Benjamin Klein theorized that litigation success rates should converge toward 50 percent, especially as parties become better at gauging the outcome of potential litigation. George L. Priest & Benjamin Klein, *The Selection of Disputes for Litigation*, 13 J. LEGAL STUD. 1, 19-20 (1984). For further discussion of the Priest-Klein model in the takings context, see *infra* text accompanying notes 116-24.

82. See *infra* Table 2.

83. See *infra* notes 84-104 and accompanying text.

84. Table 6, *infra*, contains a more thorough summary of state court citations of Supreme Court cases in various categories. We did investigate the possibility that opinions in some cases that did not cite Supreme Court precedents did cite state court precedents that

upholding government actions that involve physical entry, the opinions tend to focus not on the supposedly temporary nature of the government entry, but rather on the justification for the government's action. A recurring fact pattern involves entry to demolish a building government officials regard as a hazard to health or safety.⁸⁵ Courts could dismiss takings claims in these cases by concluding that the government's entry is only temporary.⁸⁶ Instead, they choose to emphasize the need to protect public health and safety.⁸⁷ Similarly, when a government entity enters to remediate environmental conditions, courts do not say that they are denying compensation because the installation is temporary; rather, they emphasize the public interest in combating contamination.⁸⁸ In other cases, courts reject physical entry claims by concluding that state law never protected landowners against the physical intrusion involved. For instance, in two Arizona cases, the court held that a landowner was not entitled to compensation when government entities stored or transported water in a riverbed on the landowner's land, because owners of water had a pre-existing right to store or transport water in existing riverbeds.⁸⁹ Similarly, courts have sustained statutes giving the public a right to cross beachfront land without compensating the shorefront owner, on the ground that, even before enactment of the statute, state law created a public right to use the beachfront land.⁹⁰

Nevertheless, landowners prevailed in physical entry cases with far greater frequency than in most other categories of cases, as

themselves cited Supreme Court precedents.

85. *See, e.g.*, *Idlewild 94-100 Clark, LLC v. City of New York*, 898 N.Y.S.2d 808, 820 (Sup. Ct. 2010); *Mfrs. Guild, Inc. v. City of Enid*, 239 P.3d 986, 988 (Okla. Civ. App. 2010); *German v. City of Philadelphia*, 683 A.2d 323, 327 & n.8 (Pa. Commw. Ct. 1996).

86. *See supra* notes 24-26 and accompanying text.

87. *See, e.g.*, *Idlewild 94-100 Clark, LLC*, 898 N.Y.S.2d at 820 (holding municipal demolition of a dangerous structure is an exercise of the police power and cannot constitute a taking); *Mfrs. Guild, Inc.*, 239 P.3d at 990 (emphasizing that statute permitting demolition of dilapidated structure without compensation is designed to protect health, safety, and welfare, and therefore does not constitute a taking).

88. *See, e.g.*, *Brown v. California*, 26 Cal. Rptr. 2d 687, 689 (Ct. App. 1993).

89. *S.W. Sand & Gravel, Inc. v. Cent. Ariz. Water Conservation Dist.*, 212 P.3d 1, 8 (Ariz. Ct. App. 2009); *Western Maricopa Combine, Inc. v. Ariz. Dep't of Water Res.*, 26 P.3d 1171, 1180 (Ariz. Ct. App. 2001).

90. *See, e.g.*, *McDonald v. Halvorson*, 760 P.2d 263, 269-70 (Or. Ct. App. 1988), *rev'd*, 780 P.2d 714 (Or. 1989).

indicated in Table 2. But landowner success is far from guaranteed, and the difference between cases in which landowners prevail and those in which government prevails seldom appears to have anything to do with the permanent versus temporary distinction drawn by Supreme Court doctrine. The same is true of flooding cases, which we investigated as a separate category in our study notwithstanding that they involve physical intrusions. *Loretto* made clear (and suggested that earlier decisions by the Court had also made clear) that permanent flooding triggered its per se rule, whereas cases of temporary flooding were to be resolved by ad hoc review.⁹¹ Yet once again state courts have with great regularity decided flooding cases without citing *Loretto* and, more significantly, without reference to the permanent versus temporary distinction or the claimant's right to ad hoc review at the least.⁹² The coincidence could suggest judicial ignorance, and we did find at least one case that was probably decided incorrectly.⁹³ For whatever reason, takings were found in only about a third of the flooding cases.⁹⁴

91. *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 427-28 (1982).

92. See *infra* Table 6.

93. See *Farish v. S. Fla. Water Mgmt. Dist.*, 515 So. 2d 369, 370 (Fla. Dist. Ct. App. 1987) (per curiam) (affirming, with no rationale stated, a trial court decision dismissing the claimant's complaint for failure to state a cause of action, notwithstanding an allegation that 67 percent of his land had been, and would continue to be, flooded, destroying his cattle ranch operation and working a permanent appropriation). We found a few other decisions that seemed questionable but could perhaps be justified on some independent ground. Some cases find no taking, as a matter of state law, when the government action in question was not negligent, and some cases rely on state law that permits landowners (and, by extension, the government) to flood neighbors' land in a reasonable manner. See, e.g., *Hauselt v. County of Butte*, 91 Cal. Rptr. 3d 343, 348-49 (Ct. App. 2009).

It appears that it is not just state courts, but occasionally also federal courts, that have trouble understanding Supreme Court doctrine regarding flooding and the law of takings. See, e.g., *Ark. Game & Fish Comm'n v. United States*, 133 S. Ct. 511, 522-23 (2012) (reversing a decision by the Court of Federal Claims that flooding works a taking only if permanent or inevitably recurring, and remanding for ad hoc review).

94. See *infra* Table 2.

Table 2. Success Rates in Taking Cases by Category

	Total Cases	No Taking	Taking	Remand/ SJ/Denial	Ripeness	Misc.	Success Rate: (Takings)/(No Takings + Takings + Ripeness)
Regulation	1223	757	108	117	226	15	9.9%
Regulation/ Wipeout	70	31	26	11	2	0	44.1%
Exaction	117	57	29	16	15	0	28.7%
Flooding	132	62	35	27	8	0	33.3%
Physical Invasion	150	57	52	29	10	2	43.7%
Enterprise	234	115	56	47	14	2	30.3%
Condemnation Blight	83	52	15	11	5	0	20.8%

b. Wipeouts

Because *Lucas* was decided in 1992, thirteen years after the beginning of the period we studied, many of the earlier cases in our sample were decided without the benefit of its per se rule (unless one takes seriously Justice Scalia's assertion that the rule had been in place at least since a sentence of dictum in *Agins v. City of Tiburon*).⁹⁵ When we separated the cases decided in 1979-1992 from the cases decided in 1993-2012, the results were striking, but not in the direction one might expect. After *Lucas*, the success rate for wipeout claims dropped precipitously, as illustrated in Table 3. Perhaps the case emboldened claimants who would not previously have thought it worthwhile to challenge apparently confiscatory regulations.⁹⁶

95. See *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1015-18, 1016 nn.6-7 (1992) (discussing the importance of the phrase "or denies an owner economically viable use of his land" (quoting *Agins v. City of Tiburon*, 447 U.S. 255, 260 (1980))).

96. In contrast to the low rate of citations to *Loretto* and other relevant Supreme Court cases in physical intrusion cases, wipeout claims exhibit a high citation rate of 68 percent, as illustrated in Table 6.

Table 3. Success Rates in Wipeout Cases Before and After Lucas

	Total Cases	No Taking	Taking	Remand	Ripeness	Misc.	Success Rate: (Takings)/(No Takings + Takings + Ripeness)
1979-1992	34	10	18	6	0	0	64.3%
1993-2012	36	21	8	5	2	0	25.8%

The nuisance exception spelled out in *Lucas* does not figure prominently in the post-1992 cases. Instead, we find the courts focusing on what constitutes denial of an “economically beneficial or productive use.”⁹⁷ Suppose, for example, that a landowner’s property is located in a district that permits economically productive uses, but lot-size or setback restrictions make it impossible to make any use of the owner’s particular parcel. Does the fact that the landowner could make an economically productive use by combining her lot with that of a neighbor take the case outside the categorical rule? Some courts have held that restrictions like these fall within the per se rule and require compensation,⁹⁸ but others have disagreed, concluding that a landowner’s ability to sell to a neighbor takes the case out of the categorical rule.⁹⁹

97. See *supra* notes 20-24 and accompanying text (discussing the categorical rule in *Lucas* that denying all economically beneficial or productive use is a taking); *infra* notes 98-102 and accompanying text (discussing the state court tendency to focus on delineating what is an economically beneficial or productive use).

98. See, e.g., *Moroney v. Mayor & Council of Old Tappan*, 633 A.2d 1045, 1048-49 (N.J. Sup. Ct. App. Div. 1993).

99. See, e.g., *Wyer v. Bd. of Env'tl. Prot.*, 747 A.2d 192, 193 (Me. 2000) (holding that denial of a variance was not a taking when landowner could use the land for recreational use, emphasizing “the value of the property to abutters as an additional factor in determining the value of the property”). Sometimes, courts simply deny compensation without any discussion of *Lucas* or the categorical rule. See, e.g., *Milburn Homes, Inc. v. Trotta*, 776 N.Y.S.2d 312, 313-14 (App. Div. 2004) (rejecting a taking claim when the zoning board of appeals denied landowner’s applications for area variances, leaving landowner unable to develop a substandard lot). *Milburn* cited *Kransteuber v. Scheyer*, 574 N.Y.S.2d 968 (App. Div. 1991), *aff’d*, 599 N.E.2d 676 (N.Y. 1992), an earlier, pre-*Lucas* case in which there was testimony that a neighbor offered to buy landowner’s substandard lot. *Milburn*, 776 N.Y.S.2d at 314.

Disagreement becomes even more pronounced when landowners challenge a combination of regulatory and market forces that leave their land with no economically productive use. For instance, a regulation might permit development on a landowner's parcel, but the cost of all permitted development might exceed the market value of the completed development, whereas other development—not permitted by the regulatory scheme—would be economically feasible. Has the regulation prohibited all “economically beneficial or productive use”?¹⁰⁰ Suppose a zoning ordinance permits single-family homes, but traffic in the area or other market conditions would not make it possible to sell single-family homes at prices that exceed the cost of construction. Some courts have held, in that circumstance, that the zoning restriction falls within the categorical rule.¹⁰¹ Other courts have been more reluctant to apply the *Lucas* rule in this situation, emphasizing that market conditions might change, and that land might still have residual value based on the chance that the permitted development will be feasible in the future.¹⁰²

A similar division occurs when government regulations impose costs on landowners that exceed the value of the regulated property. Some courts have treated such regulations as takings, without attempting to balance the loss to the landowner against the benefits of the regulation. New York courts, for instance, have held that regulations requiring landlords to restore buildings after fires are takings when the restoration costs would exceed the value of the restored improvement.¹⁰³ By contrast, an Arizona court held the *Lucas* wipeout rule inapplicable when the City of Phoenix enacted a regulation requiring a building owner to retrofit an existing high-rise building with sprinkler systems, even though the cost of

100. *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1015 (1992).

101. *See, e.g., City of Sherman v. Wayne*, 266 S.W.3d 34, 46-47 (Tex. App. 2008) (holding that residential zoning restriction falls within the *Lucas* rule when jury verdict, based in part on expert testimony, determined that land had no value for residential purposes because developed lots would be worth less than cost of development).

102. *See, e.g., Rowlett/2000, Ltd. v. City of Rowlett*, 231 S.W.3d 587, 592 (Tex. App. 2007) (acknowledging that, under current market conditions and current zoning, cost to develop would exceed potential for revenue, emphasizing testimony by city's appraiser that “the highest and best use of the property is to hold the property for the future”).

103. *Bernard v. Scharf*, 675 N.Y.S.2d 64, 67-68 (App. Div. 1998), *rev'd as moot*, 711 N.E.2d 187 (N.Y. 1999). The court cited earlier New York cases for the same proposition, but did not cite or discuss *Lucas* itself. *Id.*

retrofitting the building would exceed the value of the building after the work was completed.¹⁰⁴

Our point here is not to resolve the merits of these competing approaches, but rather to demonstrate that the *Lucas* wipeout rule has not, in practice, proved to be a per se rule. Instead, courts invoke a number of different grounds to deny compensation when regulatory action leaves no economically beneficial right to develop land.

2. Regulatory Takings Claims that Fall Outside the Categorical Rules

We saw that when government actions generate neither permanent physical occupations nor permanent wipeouts, takings claims are to be resolved by ad hoc *Penn Central* review (so too for most other types of implicit takings, but bear in mind that our only concern in this section is with regulatory takings). The opinion in *Penn Central* eschewed any formula for deciding cases on ad hoc review; rather, it called for a balanced consideration of a number of factors, each of them relevant, but none of them decisive.¹⁰⁵ Each case is to be examined in light of all its facts and circumstances. Essentially, ad hoc review doctrine empowers state courts to reach whatever result they like.

a. The Overall Picture

Our findings suggest that any sort of ad hoc balancing test is rarely used, at least in cases challenging regulatory actions. Instead, courts almost always defer to the regulatory decisions made by government officials, resulting in an almost categorical rule that *Penn Central*-type regulatory actions do not amount to takings.¹⁰⁶ With respect to such cases, some courts are explicitly

104. *Third & Catalina Assocs. v. City of Phoenix*, 895 P.2d 115, 120 (Ariz. Ct. App. 1994) (concluding that *Lucas* was inapplicable because “[t]he City’s sprinkler retrofit ordinance is not a land use regulation. The ordinance does not impose any restrictions on the use of land... Compliance with the ordinance merely requires the expenditure of money, not the giving up of land. There is no taking.”).

105. *See supra* Part I.B.

106. *See supra* Table 2. For a similar observation made some years ago, see Frank Michelman, *Takings*, 1987, 88 COLUM. L. REV. 1600, 1621-22 (1988).

deferential, even in instances involving severe economic impact on landowners.¹⁰⁷ Many of them focus not on *Penn Central*, but on one sentence expressed in *Agins v. City of Tiburon*¹⁰⁸ and subsequently expanded in a sentence of dictum from *Dolan v. City of Tigard*.¹⁰⁹ In *Agins*, Justice Powell wrote that “[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.”¹¹⁰ Chief Justice Rehnquist quoted the *Agins* formulation in *Dolan*, but subtly expanded the reach of the statement from “a general zoning law” to “[a] land use regulation.”¹¹¹ In many cases, state courts find a public interest in the regulation at hand, find that it leaves owners with some use of their land, and thus conclude that there has been no taking.¹¹² Others rely on *Lucas* for the proposition that no diminution in value caused by regulatory activity is too large, so long as some economically beneficial use remains.¹¹³ In other words, they treat *Lucas*’s floor on diminution in value as a ceiling as well, an irony for anyone who thinks of the wipeout rule as one favoring property owners. Still, other courts appear to ignore Supreme Court doctrine altogether when evaluating regulatory takings claims, as shown below in Table 6.

107. See, e.g., *Griffin Dev. Co. v. City of Oxnard*, 703 P.2d 339, 344 (Cal. 1985) (“A land use measure may be unconstitutional and subject to invalidation ‘only when its effect is to deprive the landowner of substantially all reasonable use of his property.’” (quoting *Agins v. City of Tiburon*, 598 P.2d 25, 31 (Cal. 1979))).

108. 447 U.S. 255, 260 (1980).

109. 512 U.S. 374, 385 (1994).

110. *Agins*, 447 U.S. at 260 (citations omitted).

111. See *Dolan*, 512 U.S. at 385 (“A land use regulation does not effect a taking if it ‘substantially advance[s] legitimate state interests’ and does not ‘den[y] an owner economically viable use of his land.’” (quoting *Agins*, 447 U.S. at 260)).

112. See, e.g., *Craft v. City of Fort Smith*, 984 S.W.2d 22, 27 (Ark. 1998); *Bonnie Briar Syndicate, Inc. v. Town of Mamaroneck*, 721 N.E.2d 971, 974 (N.Y. 1999).

The Supreme Court subsequently retreated from its suggestion in *Agins* that a landowner could prevail on a takings claim by showing that the regulation in question did not substantially advance state interests. See *Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528, 532 (2005). In *Lingle*, the Court held that the “substantially advances” formulation “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.” *Id.* at 540. The Court did not discuss, or question, the remainder of the *Agins* dictum, namely, the statement that a regulation effects a taking if it denies an owner economically viable use of his land.

113. See, e.g., *Md. Aggregates Ass’n v. State*, 655 A.2d 886, 899-900 (Md. 1995).

Table 2 supports the conclusion that state courts have come close to developing a categorical rule that regulatory actions do not constitute takings unless they are governed by one of the Court's two per se takings rules. In takings claims based on regulatory activity, aggrieved landowners prevail in fewer than 10 percent of the cases in our survey, and even that may overstate the success rate because the table aggregates the results in all of the cases studied and does not account for subsequent reversals.¹¹⁴ In fact, 22 of the reported 108 "taking" findings (20.4 percent) in Table 2 resulted in reversal on appeal. By contrast, only 9 of the 757 "no taking" findings (1.2 percent) in Table 2 were reversed on appeal.¹¹⁵

The abysmal rate of success on these *Penn Central* claims raises a substantial question: Why do lawyers persist in litigating these cases to judicial decision when the prospect of success is so low? In their now-classic article, George Priest and Benjamin Klein theorized that when parties can estimate their likelihood of success with some accuracy, litigation success rates should generally approach 50 percent because lawyers will settle those cases in which the outcome appears certain, leaving only difficult cases for trial.¹¹⁶ Our data appears to be at odds with the Priest-Klein predictions.¹¹⁷

Several factors may explain the disparity. First, the Priest-Klein model assumes that parties have the same, and accurate, information about the likely outcome of litigation, assumptions that have caused Posner and Shavell to question its general predictive force.¹¹⁸ In takings cases, we suspect that government lawyers, as repeat

114. *See supra* Table 2.

115. Moreover, not all of the reversals led to a finding of a taking. In some cases, for instance, an appellate court reversed the court's decision on other grounds, and never reached the takings issue. *See, e.g., E.T.O., Inc. v. Town of Marion*, 375 N.W.2d 815, 820 (Minn. 1985), *rev'g* 361 N.W.2d 91 (Minn. Ct. App. 1985). In other cases, the appellate court reversed and remanded for reconsideration, concluding that the court below applied the incorrect legal standard for evaluating the takings claim. *See, e.g., Silva v. Township of Ada*, 330 N.W.2d 663, 666-67 (Mich. 1982), *rev'g* 298 N.W.2d 838 (Mich. Ct. App. 1980).

116. Priest & Klein, *supra* note 81, at 17-20.

117. Other studies have also found that trial win rates vary with various factors, including legal standards that affect case strength. For a summary of these studies, and an argument that asymmetric information and strategic bargaining may cause departures from a 50 percent success rate, see Daniel Klerman & Yoon-Ho Alex Lee, *Inferences from Litigated Cases*, 43 J. LEGAL STUD. 209, 210-14 (2014).

118. RICHARD A. POSNER, *ECONOMIC ANALYSIS OF LAW* 849 (8th ed. 2011); Steven Shavell, *Any Frequency of Plaintiff Victory at Trial Is Possible*, 25 J. LEGAL STUD. 493, 498-501 (1996).

players, may have a better understanding of the results in most takings cases.

Second, the Priest-Klein model assumes that settlement costs are low relative to litigation costs.¹¹⁹ In land use cases, however, settlement costs are often high because municipal lawyers do not have authority to bind the parties whose consent would be necessary to accommodate a settlement acceptable to the developer.¹²⁰ At the same time, because many takings cases are decided at the motion to dismiss or summary judgment stage, litigation costs are not as high as they would be in cases requiring a full-blown trial.

Third, the Priest-Klein model assumes that the stakes of the dispute are symmetric to the parties.¹²¹ In many takings cases, that assumption is false. A developer who succeeds on a takings claim acquires a right that may be worth more, in dollar terms, than the government defendant will ever have to pay.¹²² It may be in the developer's interest to bring such high-value, low-probability claims, and the government defendant has little incentive to settle these claims beyond avoidance of litigation costs. Moreover, the developer has an additional incentive to bring these low-probability claims: reputation as a litigious developer may increase the likelihood that a litigation-averse municipal entity will make concessions on future development applications.¹²³

Fourth, agency costs may lead hourly fee lawyers to litigate takings claims that are not in the interest of their clients.¹²⁴ Our

119. Priest & Klein, *supra* note 81, at 13 (“We assume that litigation costs to the parties are greater than settlement costs.”); *see also id.* at 13 n.34 (noting that if it would be cheaper to litigate than to settle, the parties would litigate even if they had identical estimates of the result in litigation); Daniel Kessler et al., *Explaining Deviations from the Fifty-Percent Rule: A Multimodal Approach to the Selection of Cases for Litigation*, 25 J. LEGAL STUD. 233, 245 (1996) (concluding that when there are no savings from settlement, “the probability of a plaintiff victory in a litigated dispute tends toward the probability of plaintiff victory in the population as a whole”).

120. *See* Stewart E. Sterk, *Structural Obstacles to Settlement of Land Use Disputes*, 91 B.U. L. REV. 227, 228-36 (2011).

121. Priest & Klein, *supra* note 81, at 24.

122. *See* First English Evangelical Church of Glendale v. County of Los Angeles, 482 U.S. 304, 316, 321 (1987) (holding that when a state action works a taking, the state must make available a money damage remedy).

123. *See* Christopher Serkin, *Big Differences for Small Governments: Local Governments and the Takings Clause*, 81 N.Y.U. L. REV. 1624, 1680 (2006) (noting that the risk aversion of local governments with respect to taking claims may reduce the incidence of regulation).

124. *See* Kessler et al., *supra* note 119, at 246 (noting that hourly fee lawyers have

research does not explain what combination of these factors accounts for the persistence of so many losing takings claims.

b. Disparities Among Regulatory Takings Claims

Although the aggregate success rate in regulatory takings claims is far lower than the success rate for every other category,¹²⁵ a more finely grained analysis does reveal differences among regulatory takings cases. When we identified the primary claim in each regulatory takings claim and categorized the cases by type of claim, we discovered potentially significant differences, as illustrated in Table 4. The table lists the nine most common subcategories of regulatory takings claims. We have excluded claims dismissed for ripeness from Table 4, because opinions dismissing claims on ripeness grounds often do not provide enough information to reveal the gist of the underlying claim. As a result, the success rates in Table 4 should not be compared directly to success rates in Table 2. If ripeness cases were included, the success rates listed in Table 4 would be even lower.

incentives to defer settlement).

125. See *supra* Table 2.

Table 4. Breakdown of Regulatory Takings by Category

	Total Cases (Ripeness Ex- cluded)	No Taking	Taking	Remand	Success Rate: (Takings)/ (Takings + No Takings)
Diminution in Value	392	341	18	33	5.0%
Tenant Protection	93	62	20	11	24.4%
Prohibition of Pre-Existing Use	64	51	10	3	16.4%
Delay in Deciding	53	45	0	8	0%
Denominator Issue	46	34	3	9	8.1%
Requirement of Out-of-Pocket Expense	35	27	6	2	18.2%
Moratorium	34	25	5	4	16.7%
Vested Rights	25	20	3	2	13.0%
Does Not Advance State Interest	24	18	3	3	14.3%

Table 4 demonstrates that diminution of value, taken alone, virtually never suffices to support a regulatory takings claim.¹²⁶ Successful takings claims almost always involve some interference with an existing use. As Table 4 shows, of the four categories with

126. But, occasionally it does. Diminutions in value are sometimes sufficient to amount to takings. *See, e.g.*, *D'Addario v. Planning & Zoning Comm'n of Darien*, 593 A.2d 511, 516-17 (Conn. App. 1991) (91.4 and 89.5 percent diminution in value of two lots); *City of Rome v. Pilgrim*, 271 S.E.2d 189, 190-91 (Ga. 1980) (diminution in value from \$25,000-\$30,000 to \$1500-\$2000); *Friedenburg v. N.Y. State Dep't of Env'tl. Conservation*, 767 N.Y.S.2d 451, 460-61 (App. Div. 2003) (92.5-95 percent not enough to trigger the per se wipeout rule, but does amount to a taking on ad hoc analysis under U.S. Constitution); *City of Glenn Heights v. Sheffield Dev. Co.*, 61 S.W.3d 634, 648 (Tex. App. 2001) (38 percent amounts to a taking under state constitution), *aff'd in part, rev'd in part*, 140 S.W.3d 660 (Tex. 2004).

the highest percentage of successful takings claims, three involve interference with existing uses. Only moratoria do not, and the success rate of those claims is overstated because 3 of the 5 “taking” determinations in that category were reversed or vacated on appeal. Although tenant protection cases do generally involve interference with an existing use, the success rate in those cases is also overstated because 9 out of the 20 “taking” determinations (45 percent) were reversed on appeal. When those reversals are factored into the analysis, the two categories that generated the most successful claims were prohibitions on nonconforming uses and requirements that landowners spend money out-of-pocket to continue uses that had previously been permitted without those out-of-pocket expenditures.

3. Exactions

State courts cited *Nollan*¹²⁷ and *Dolan*¹²⁸ about two-thirds of the time, and in any event appeared to be aware of their mandates.¹²⁹ There was a difference of opinion in the state decisions regarding whether conditions requiring landowners to pay money fell within the scope of *Nollan* and *Dolan*,¹³⁰ an issue the Court recently resolved in *Koontz*, which held that monetary exactions are subject to the same rules governing exactions in kind.¹³¹ Our survey shows that landowners prevail with somewhat greater frequency in exaction cases than in ordinary regulatory takings cases, although our sample size is considerably smaller—both because *Dolan* was not decided until almost midway into our study period, and because landowners are less likely to litigate exactions than they are other regulatory measures.¹³² This is because, by definition, in exaction

127. *Nollan v. Cal. Coastal Comm'n*, 483 U.S. 825 (1987).

128. *Dolan v. City of Tigard*, 512 U.S. 374 (1994).

129. An earlier empirical study of state decisions, focused in part on *Dolan* and *Nollan*, noted that surprisingly few state court decisions even mentioned those two cases in reaching decisions subject to them, apparently giving them little significance in reaching their decisions. See Rosenberg, *supra* note 4, at 537.

130. Compare *McCarthy v. City of Leawood*, 894 P.2d 836, 845 (Kan. 1995) (*Dolan* does not apply to impact fee), with *Ehrlich v. City of Culver City*, 911 P.2d 429, 433 (Cal. 1996) (recreational fee subject to *Dolan* rule).

131. *Koontz v. St. Johns River Water Mgmt. Dist.*, 133 S. Ct. 2586, 2603 (2013).

132. See *supra* Table 2.

cases the government is willing to approve development proposals without litigation, provided the landowners agree to abide by the conditions in question, and agreement is often less costly than litigation.¹³³

4. *Government as Enterpriser*

A significant percentage of takings claims involved actions taken by government not as a regulator, but as a service provider. Government entities at the local, state, and federal level build roads and airports to facilitate transportation. Government entities operate a variety of public utilities—power lines, sewer systems, and water lines—to service homes and businesses. Governments build dams to provide power and irrigation, and jetties to protect beaches. These activities can cause significant harm to neighboring landowners, even if the government does not directly or intentionally enter the land of any neighbors. The single most common harm was from flooding,¹³⁴ but we also saw takings claims arising from government enterprises causing fires,¹³⁵ erosion,¹³⁶ diversions of ground water,¹³⁷ and pollution.¹³⁸

Fifty years ago, Professor Sax developed an argument based on a sharp distinction between economic losses imposed by the government as service provider, acting in its “enterprise capacity,” and by the government as regulator, acting as a “mediator.”¹³⁹ When the government acts in its enterprise capacity, it functions much like service providers in the private sector.¹⁴⁰ Because private enter-

133. See Part I.D.

134. See, e.g., *Preister v. Madison County*, 606 N.W.2d 756, 758-59 (Neb. 2000) (involving road work that caused flooding on farm land); *Lea Co. v. N.C. Bd. of Transp.*, 304 S.E.2d 164, 169 (N.C. 1983) (involving highway construction that increased flooding); *Tarrant Reg'l Water Dist. v. Gragg*, 151 S.W.3d 546, 550 (Tex. 2004) (involving construction and operation of dam that caused flooding).

135. See, e.g., *Aetna Life & Cas. Co. v. City of Los Angeles*, 216 Cal. Rptr. 831 (App. 1985) (involving fire damage caused by negligence in installing utility wires).

136. See, e.g., *Ballam v. United States*, 806 F.2d 1017, 1018 (Fed. Cir. 1988) (involving erosion caused by government creation of an artificial waterway).

137. See, e.g., *Bingham v. Roosevelt City Corp.*, 235 P.3d 730, 733 (Utah 2010).

138. See, e.g., *Schick v. Fla. Dep't of Agric.*, 504 So. 2d 1318, 1319 (Fla. App. 1987) (alleging negligent operation of program caused pollution of private wells).

139. Joseph L. Sax, *Takings and the Police Power*, 74 YALE L.J. 36, 62 (1964).

140. *Id.* at 62.

prisers have to pay for resources they acquire in the course of their activities, so too should government enterprisers.¹⁴¹ Sax found sporadic support for his distinction in Supreme Court decisions.¹⁴²

More recently, Maureen Brady examined another class of cases in which the government acted as an enterpriser: nineteenth-century cases in which municipalities regraded streets to reduce the cost of transportation through hilly areas.¹⁴³ She detailed the growth in state court recognition of a right to compensation in these cases.¹⁴⁴

We have examined a broader range of cases than Sax or Brady, and our findings, summarized earlier in Table 2, suggest that courts treat government-as-enterpriser cases quite differently from government-as-mediator cases. Table 2 separates flooding cases from other enterprise cases—in part because when we began our study we did not know what we would find—but the landowner success rates in flooding and enterprise cases is, in any event, nearly identical. Landowners succeed at a rate of 30.3 to 33.3 percent—more than three times the landowner success rate in mediator (regulatory) cases.¹⁴⁵

Table 5 shows another significant difference between regulatory cases as compared to enterprise and flooding cases: the identity of the primary government decision maker responsible for the actions giving rise to takings claims. Although all government agents (except perhaps those protected by civil service rules) are ultimately accountable to the public, our surmise is that local, elected officials, such as village boards and city councils, are most directly accountable to voters for their actions, with a close second being members of local agencies, such as zoning boards of appeal and planning boards, that typically hold public hearings in the communities they help govern. By contrast, career government officials and lower-level government employees are typically less politically accountable.¹⁴⁶

141. *Id.* at 63, 67.

142. *Id.* at 70 (observing that his test would “leave the majority of current holdings intact,” but would require reversal of a number of old Supreme Court “grade crossing cases”).

143. *See generally* Brady, *supra* note 4.

144. *See generally id.*

145. *See supra* Table 2.

146. *See* David S. Rubenstein, *Administrative Federalism as Separation of Powers*, 72 WASH. & LEE L. REV. 171, 197-98 (2015) (“Whereas members of Congress are more likely to represent and be held accountable to their state constituents, agencies have no political con-

Table 5 excludes decisions made by state and federal officials, and decisions in which the opinion makes it impossible to determine the identity of the primary decision maker. The data suggests that one of the reasons courts offer for rejecting regulatory takings claims—deference to decisions of elected or other politically accountable officials¹⁴⁷—is largely absent in enterprise and flooding cases.

Table 5. Takings Claims by Government Decision Makers

	Elected Officials	Local Boards or Agencies	Local Officials	Local Employees or Maintenance	Total in All Four Categories	Percent Involving Elected Officials	Percent Involving Elected Officials or Local Boards
Regulation	657	184	41	6	888	74.0%	94.7%
Enterprise	14	17	37	77	145	9.7%	21.4%
Flooding	4	10	43	39	96	4.2%	14.6%

Our data sheds light on the role of deterrence as a policy objective in takings cases. In his dissent in *San Diego Gas & Electric Co. v. City of San Diego*, Justice Brennan asked rhetorically, “After all, if a policeman must know the Constitution, then why not a planner?”¹⁴⁸ The data suggests, however, that deterrence plays little role in most regulatory takings cases (exactions aside); courts apparently consider the political process an adequate check on the behavior of regulators. By contrast, deterrence may assume more significance in enterprise and flooding cases, in which courts typically review decisions made by lower government officials and employees.

stituents.”).

147. See *supra* notes 106-07 and accompanying text.

148. 450 U.S. 621, 661 n.26 (Brennan, J., dissenting). In his dissent, Justice Brennan argued for imposing a damages remedy for takings, a position the Court ultimately adopted in *First English Evangelical Lutheran Church of Glendale v. County of Los Angeles*, 482 U.S. 304, 321-22 (1987).

Courts often evaluate takings claims in the enterprise and flooding contexts in the same way they evaluate tort claims when the tortfeasor is someone other than the government.¹⁴⁹ They focus on causation of or government culpability for the harm, issues that do not arise the same way in regulatory takings cases.¹⁵⁰ Sometimes the causation inquiry is straightforward; if a claimant cannot prove that a government-operated landfill was the source of the contamination of his land, the landowner cannot recover for a taking.¹⁵¹ At other times, the causation issue is more complicated. For example, when government construction of a dike, combined with an upstream logjam, leads to flooding of a landowner's land, the question arises whether the intervening cause, the logjam, relieves the government from liability.¹⁵²

With respect to culpability, the decided cases generally agree that the government has no duty to alleviate natural conditions, so failure to undertake preventive measures does not constitute a taking.¹⁵³ The government also has no duty to insulate landowners from the effect of neighboring private development, so no taking results from government approval of a private development that causes harm to neighboring landowners.¹⁵⁴

When the government takes affirmative actions that result in harm to landowners, generalization about government culpability becomes more difficult. Although some courts hold that the with-

149. Takings doctrine provides a way around sovereign immunity for torts. See Jack M. Beermann, *Government Official Torts and the Takings Clause: Federalism and State Sovereign Immunity*, 68 B.U. L. REV. 277, 283 (1988).

150. Sometimes, as with regulatory takings, courts dismiss claims because the government action causes insignificant harm. See, e.g., *Perkins v. Bd. of Supervisors*, 636 N.W.2d 58, 62 (Iowa 2001) (finding landowners unsuccessfully claimed that authorization of a five-day county fair, which would feature figure-eight auto racing, constituted a taking of their adjacent land).

151. See *Clark v. Greenville County*, 437 S.E.2d 117, 118-19 (S.C. 1993).

152. See, e.g., *Fitzpatrick v. Okanogan County*, 177 P.3d 716, 717-18 (Wash. App. 2008), *aff'd*, 238 P.3d 1129 (Wash. 2010).

153. See Christopher Serkin, *Passive Takings: The State's Affirmative Duty to Protect Property*, 113 MICH. L. REV. 345, 385 (2014) (noting that "courts have largely resisted compelling governmental action" in takings cases in which the government did not have an affirmative duty to act).

154. See, e.g., *Phillips v. King County*, 968 P.2d 871, 878 (Wash. 1998) (finding county not liable for mere approval of a private development project that later caused injury to plaintiff's property).

drawal of services cannot constitute a taking,¹⁵⁵ others have indicated that landowners are entitled to compensation for losses resulting from the closing of an adjacent road.¹⁵⁶ When operation of a government enterprise causes harm, some courts hold that the government action constitutes a taking if the government conducted the enterprise negligently or unreasonably,¹⁵⁷ while others insist that only an intentional act can constitute a taking.¹⁵⁸ Still, other courts have held that even an intentional act causing significant harm to a landowner cannot constitute a taking when the act was designed to protect public safety.¹⁵⁹

These doctrinal disparities should not be surprising. Although Supreme Court takings doctrine plays only a limited role in determining results in regulatory takings cases, Supreme Court doctrine plays virtually no harmonizing role in the enterprise and flooding cases. As Table 6 demonstrates, only about 20 percent of state court enterprise cases, and fewer still of flooding cases, cite any Supreme Court takings decisions in evaluating takings claims. By contrast, although many state court opinions ignore Supreme Court takings decisions even in regulatory takings cases, a majority do cite at least one, and the percentage of exaction cases citing Supreme Court takings decisions is even higher. The infrequency of citation to Supreme Court decisions in enterprise and flooding cases undoubtedly reflects, in part, the paucity of recent Supreme Court decisions that deal with these issues. Therefore, lower courts are

155. *See, e.g.*, *Adams v. Bradshaw*, 599 A.2d 481, 486 (N.H. 1991) (holding shutting down sewer system not a taking even though landowner had no means to dispose of his sewage).

156. *See, e.g.*, *Chemung Canal Tr. Co. v. State*, 456 N.Y.S.2d 518, 519-20 (App. Div. 1982) (affirming denial of state's motion to dismiss when landowner alleged that closing of one street adjacent to landowner's bank facility constituted a taking).

157. *See, e.g.*, *Barham v. S. Cal. Edison Co.*, 88 Cal. Rptr. 2d 424, 432 (Ct. App. 1999) (holding landowners entitled to recover for taking when wildfire resulted from negligent operation of overhead electrical power line equipment).

158. *See, e.g.*, *Rolandi v. City of Spartanburg*, 363 S.E.2d 385, 387 (S.C. Ct. App. 1987) (holding that construction of inadequate sewers could not constitute a taking); *City of Dallas v. Jennings*, 142 S.W.3d 310, 314 (Tex. 2004) (applying definition of intent from RESTATEMENT (SECOND) OF TORTS (AM. LAW INST. 1965)).

159. *See, e.g.*, *Lewis v. DeKalb County*, 303 S.E.2d 112, 114-15 (Ga. 1983) (breaching dam in a way that caused flooding of landowner's parcel not a taking because county acted to prevent hazard posed by too much upstream water).

freer to craft local doctrines, and they more frequently rely on the takings clauses found in their respective state constitutions.¹⁶⁰

Table 6. Frequency of Citation to Supreme Court Takings Decisions

	Cases Finding Taking and Citing Supreme Court	Percentage Citing Supreme Court	Cases Finding No Taking and Citing Supreme Court	Percentage Citing Supreme Court	Total Cases Citing Supreme Court	Percentage Citing Supreme Court
Physical Invasion	13/41	31.7%	17/49	34.7%	30/90	33.3%
Flooding	11/33	33.3%	3/53	5.7%	14/86	16.3%
Wipeout	15/23	65.2%	19/27	70.4%	34/50	68.0%
Regulation	52/77	67.5%	243/473	51.4%	295/550	53.6%
Enterprise	9/54	16.7%	23/96	24.0%	32/150	21.3%
Exaction	18/28	64.3%	35/46	76.1%	53/74	71.6%
Condemnation Blight	6/17	35.3%	17/56	30.4%	23/73	31.5%

5. Condemnation Blight

A complete picture of implicit takings doctrine must include cases in which the threat of formal condemnation, or the condemnation of neighboring land, substantially diminishes the value of a landowner's parcel. Even when the government never formally condemns private land, condemnation can adversely affect land value. Landowners sometimes claim harm from condemnation of neighboring parcels or, more frequently, from government announcements that it is considering plans that could lead to condemnation actions,¹⁶¹ and these, even if eventually abandoned,

160. A number of state takings clauses require compensation for "damaging," as well as "taking," property. See Brady, *supra* note 4, at 4-5. The "damaging" language generally emerged as a means to ensure compensation for street regrading. *Id.* at 18, 21.

161. See, e.g., Joseph M. Jackovich Revocable Tr. v. State Dep't of Transp., 54 P.3d 294, 295-96 (Alaska 2002); Santini v. Conn. Hazardous Waste Mgmt. Ser., 739 A.2d 680, 681, 684-85 (Conn. 1999).

might in the interim have depressed land value by scaring off potential buyers or tenants (it is as though the government acquired an option to condemn without paying for it).¹⁶² Building moratoria have a similar effect, but landowners generally lose in both sorts of cases; however, Table 2 indicates that their success rate is somewhat higher than in run-of-the-mill regulatory takings cases. With respect to condemnation blight cases in particular, courts might be concerned that if announcements of possible government actions were to trigger liability for compensation, officials might shy from engaging in useful public discourse about construction of roads or public facilities. Even when the condemnation process moves to the next level and the government announces plans to condemn particular parcels, blight claims often fail unless aggrieved landowners can show some legal restraint—rather than a market restraint—on their ability to sell or develop their land.¹⁶³ Occasionally, however, takings have been found only when market forces, arising from long delays, effectively precluded development. In *Johnson v. City of Minneapolis*, for example, the Minnesota Supreme Court awarded compensation when the city imposed a “cloud of condemnation” over a landowner’s parcel, noting that “the cumulative effect of the City’s actions ... constituted an abuse of the City’s condemnation authority.”¹⁶⁴

6. Identity of the Claimant

Developers add value to land by obtaining regulatory approvals. Their business model is based on the risks and delays inherent in the approval process. Because they are repeat players in the development business, they are in a position to diversify their investment risk over many different development projects. By contrast, the

162. See *Davis v. Brown*, 851 N.E.2d 1198, 1202 (Ill. 2006) (using option terminology).

163. See, e.g., *Howell Plaza, Inc. v. State Highway Comm’n*, 284 N.W.2d 887, 893 (Wis. 1979). If the government does impose legal constraints, compensation may still be unavailable if a process is in place, enabling landowners to force the government to make a final decision about condemnation. See *Davis*, 851 N.E.2d at 1206 (sustaining Illinois statute giving Department of Transportation 120 days to initiate eminent domain proceedings, and allowing landowner to develop if Department did not bring proceedings within that time).

164. 667 N.W.2d 109, 111, 116 (Minn. 2003). The court decided the case under the Minnesota Constitution’s takings clause, and therefore did not decide whether the city’s actions were a violation of the U.S. Constitution. *Id.* at 115.

investment of homeowners, business owners, and landlords is more likely to be concentrated in a single parcel of land, making diversification more difficult. In addition, homeowners, business owners, and landlords, but not developers, are likely to have made significant investments in improvements threatened by government action, while the primary risk to developers involves reduction in land value. Table 7 suggests that the identity of the claimant plays some role in the outcome of takings cases because in every category other than flooding, homeowners, commercial (business) owners, and landlords are much more likely to prevail on takings claims than are developers.

Table 7. Takings Claims by Type of Landowner

	Percent of Successful Enterprise Cases	Percent of Successful Flooding Cases	Percent of Successful Regulation Cases	Percent of Overall Success Rate
Commercial	35.0%	20.0%	11.3%	19.4%
Developer	16.7%	28.9%	6.0%	13.4%
Homeowner	30.3%	25.0%	9.9%	23.6%
Landlord	Insignificant Number	Insignificant Number	19.5%	21.4%

This disparity may reflect a combination of two factors. First, courts may be less sympathetic to developers with diversified portfolios. Second, a developer, as a repeat player, may secure advantages from acquiring a reputation for litigiousness, leading the developer to bring weak cases that one-shot plaintiffs would forgo.

7. *The Federal Courts (the Supreme Court Aside)*

Most of the foregoing survey of Supreme Court implicit takings doctrine in practice has focused on decisions by state courts. Before going on, we want to say a few words about the work of the inferior federal courts. As indicated in Part I, the Supreme Court held in *Williamson County* that when a claimant challenges a state action as a taking, the claim is not ripe unless and until the state denies

compensation.¹⁶⁵ As a matter of logic, *Williamson County's* ripeness doctrine should have eliminated from federal court almost all claims alleging regulatory takings by a state or municipality.¹⁶⁶ Our findings suggest that federal courts got the Supreme Court's message, even if many litigants did not. A significant number of claimants continued to proceed in federal court, but with almost no success. More than 40 percent of the federal court claims alleging state or local regulatory takings were decided on ripeness grounds.¹⁶⁷ In total, of 290 federal decisions involving alleged takings by states or municipalities, only 13 resulted in a finding that a taking had occurred.¹⁶⁸ Moreover, of those thirteen decisions, more than half were vacated or reversed on appeal—a far higher percentage of reversals than in our survey as a whole.

By contrast, claims alleging a regulatory taking¹⁶⁹ by federal government action met with significantly more success than other regulatory takings cases, either in federal or state court, as indicated in Table 8. The table overstates the success rate of federal claims involving federal actions, and also federal claims involving state actions, because 8 of the 14 “taking” findings were ultimately reversed or vacated on appeal. The reversal rate is nearly identical in the two classes of federal claims, so the disparity remains: federal courts are more receptive to takings claims based on federal actions than to claims based on state actions, even after accounting for the effect of ripeness doctrine. Because the number of successful claims is so small, we hesitate to offer an overarching reason for the difference, although we think that institutional concerns may provide a partial explanation. Landowners adversely affected by local regulation can seek relief from state courts and legislatures; those avenues are not available to victims of federal regulation.

165. See *supra* notes 67-72 and accompanying text.

166. See Madeline J. Meacham, *The Williamson Trap*, 32 URB. LAW. 239, 239 (2000). See generally J. David Breemer, *You Can Check Out but You Can Never Leave: The Story of San Remo Hotel—The Supreme Court Relegates Federal Takings Claims to State Courts Under a Rule Intended to Ripen the Claims for Federal Review*, 33 B.C. ENVTL. AFF. L. REV. 247 (2006); Sterk, *supra* note 72.

167. See *infra* Table 8.

168. See *infra* Table 8.

169. Relatively few federal court cases involve implicit takings claims other than regulatory takings claims. Because of the small sample size for other categories, we only consider regulatory takings claims.

Table 8. Federal-State Comparison

	Total	No Taking	Taking	Remand	Ripeness	Misc.	Success Rate
State Court	845	584	80	83	93	5	10.6%
Federal Court/ State Action	290	129	13	20	120	8	5.0%
Federal Court/ Federal Action	80	40	14	14	11	1	21.5%

D. State Legislation

The constitutional bottom developed by the Supreme Court leaves not just state courts, but also state legislatures (or citizens, by way of plebiscites), free to grant greater protection to property rights than the Constitution mandates,¹⁷⁰ and a handful have availed themselves of this opportunity.¹⁷¹ Here we provide a quick summary.

Six states (Arizona, Florida, Louisiana, Mississippi, Oregon, and Texas) have enacted statutes providing for compensation in certain instances in which it might not be required by Supreme Court doctrine. These statutes, like takings doctrine itself, provide symbolic support for the property rights, but, outside of Oregon, their practical impact has been uncertain at best. The Mississippi and Louisiana statutes protect only the owners of agricultural land, and have generated no published opinions.¹⁷² Florida's statute

170. See Kirk Emerson & Charles R. Wise, *Statutory Approaches to Regulatory Takings: State Property Rights Legislation Issues and Implications for Public Administration*, 57 PUB. ADMIN. REV. 411, 412-14 (1997) ("Property rights legislation is being introduced and adopted by the states at a dramatic rate.")

171. Property rights legislation designed to limit power to condemn land for economic development purposes—the most common statutory supplement to constitutional protections—is outside the scope of our study. A recent and excellent study is ILYA SOMIN, *THE GRASPING HAND: KELO V. CITY OF NEW LONDON AND THE LIMITS OF EMINENT DOMAIN* (2015).

172. The Mississippi statute applies to any action by the state that "prohibits or severely limits the right of an owner to conduct forestry or agricultural activities on forest or agricultural land." MISS. CODE ANN. § 49-33-7(e) (2016). The Louisiana statute gives a right of action to "[a]n owner of private agricultural property." LA. STAT. ANN. § 3:3610(A) (2015).

applies to government action that “has inordinately burdened an existing use of real property or a vested right to a specific use of real property.”¹⁷³ An inordinate burden arises only when the government action disables a landowner from attaining “the reasonable investment-backed expectation for the existing use of the real property or a vested right to a specific use of the real property,” or when the owner “is left with existing or vested uses that are unreasonable such that the property owner bears permanently a disproportionate share of a burden imposed for the good of the public.”¹⁷⁴ By its terms, the statute does not appear more expansive than existing constitutional doctrine, and the few Florida cases interpreting the statute have construed it narrowly.¹⁷⁵ The Texas statute is more broadly applicable, encompassing government actions that cause “a reduction of at least 25 percent in the market value of the affected private real property,”¹⁷⁶ but Texas courts have not been sympathetic to landowner claims in the few cases that have been litigated.¹⁷⁷ Most state legislatures have been unwilling to expand constitutional constraints on implied takings.¹⁷⁸

Statutes in the other two states—Oregon and Arizona—were not enacted by state legislatures, but were instead the products of voter initiatives.¹⁷⁹ The Arizona statute starts with the broad statement that if enactment or enforcement of a land use law “reduces the fair market value of the property the owner is entitled to just compensation,”¹⁸⁰ but it goes on to except all laws that limit land use “for the protection of the public’s health and safety.”¹⁸¹ Authority

173. FLA. STAT. § 70.001(2) (2016).

174. *Id.* § 70.001(3)(e)(1).

175. *See, e.g.*, *Turkali v. City of Safety Harbor*, 93 So. 3d 493, 495 (Fla. Dist. Ct. App. 2012) (dismissing landowner’s claim because landowner’s appraisal was defective); *Holmes v. Marion County*, 960 So. 2d 828, 830 (Fla. Dist. Ct. App. 2007) (holding that denial of extension of special use permit for landfill did not “inordinately burden” landowner’s property, despite landowner’s argument that denial of the permit interfered with an existing use).

176. TEX. GOV’T CODE ANN. § 2007.002(5)(B)(ii) (West 2015).

177. *See, e.g.*, *City of Houston v. Guthrie*, 332 S.W.3d 578, 591, 598-99 (Tex. App. 2009) (holding that lessees lack standing under the statute, and that claims of landowner fall within an immunity exception).

178. *See Sterk, supra* note 3, at 257-58.

179. *See Private Property Rights Protection Act*, Prop. 207, 2007 Ariz. Sess. Laws 1563; Act of June 15, 2007, ch. 424, 2007 Or. Laws 1138.

180. ARIZ. REV. STAT. ANN. § 12-1134(A) (West 2016).

181. *Id.* § 12-1134(B)(1).

interpreting the statute has been sparse. A 2012 Arizona appellate opinion held that a municipality's statement of purpose does not conclusively establish that a regulation was enacted to protect health and safety,¹⁸² but to date, no reported decision has required compensation under the statute.¹⁸³

The situation in Oregon stands in marked contrast to that in the other states. Oregon voters have enacted two separate property rights initiatives. Measure 37, approved by voters in 2004,¹⁸⁴ included language and an exemption similar to that in the Arizona statute.¹⁸⁵ Measure 37 gave government entities a choice: either they could pay for the decline in market value caused by a challenged regulation, or they could waive enforcement of the regulation.¹⁸⁶ By the end of 2007, Oregon landowners had filed more than 6850 claims for government payment or waiver, covering more than 750,000 acres of land.¹⁸⁷ Although Measure 37 had been championed as a protector of the rights of homeowners, timber and mining interests filed many of the largest claims,¹⁸⁸ provoking a backlash that led to Measure 49, a modification approved by voters in 2007.¹⁸⁹

182. *Sedona Grand, LLC v. City of Sedona*, 270 P.3d 864, 870 (Ariz. Ct. App. 2012).

183. An opinion of the Arizona Attorney General, if reflective of the likely judicial response, suggests that it will not take much for an ordinance to escape the statute's reach. See *Statutes Requiring Paving or Stabilization of Parking Lots and Driveways as Air Pollution Control Measures*, Ariz. Op. Att'y Gen. I08-011 (2008). The attorney general concluded that a statute requiring paving of parking lots did not require compensation because the statute in question was designed to reduce air pollution by reducing dust in the environment. *Id.*

184. See *Legal Information*, OR. DEP'T OF LAND CONSERVATION & DEV., http://www.oregon.gov/lcd/pages/measure37/legal_information.aspx#Information_About_the_Election [<https://perma.cc/GX26-FFUX>] (last updated Jan. 1, 2008) (discussing the election results for Oregon Measure 37).

185. The codified statute provides that if a public entity "enacts one or more land use regulations that restrict the residential use of private real property ... and that reduce the fair market value of the property, then the owner of the property shall be entitled to just compensation." OR. REV. STAT. § 195.305(1) (2016) (originally codified at OR. REV. STAT. 197.352 (2005)). The statute exempts regulations "[t]hat restrict or prohibit activities for the protection of public health and safety." *Id.* § 195.305(3)(b).

186. See Edward J. Sullivan & Jennifer M. Bragar, *The Augean Stables: Measure 49 and the Herculean Task of Correcting an Improvident Initiative Measure in Oregon*, 46 WILLAMETTE L. REV. 577, 582-83 (2010).

187. *Id.* at 589. For a discussion of additional effects of Measure 37, see *id.* at 587-89. See generally Bethany R. Berger, *What Owners Want and Governments Do: Evidence from the Oregon Experiment*, 78 FORDHAM L. REV. 1281 (2009) (using the Measure 37 experiment to analyze modern debates about property regulation and takings laws).

188. See Sullivan & Bragar, *supra* note 186, at 586-87.

189. See OR. REV. STAT. § 195.301.

Measure 49 entitles landowners to compensation only when regulations limit residential uses or farming or forestry practices.¹⁹⁰ Much of the statute's language was designed to limit the remedies of landowners who filed claims under Measure 37.¹⁹¹ Nevertheless, both Oregon initiatives have had a significant effect on land use within the state,¹⁹² even though most of the litigation about the measures has focused on procedural issues surrounding the impact of Measure 49 on pre-existing Measure 37 claims.¹⁹³ Regarding states other than Oregon, the remaining unknown is whether statutory enactments have had, or will have, an effect on the regulatory process. To date, they have not resulted in litigation success for landowners.

III. A THEORETICAL PERSPECTIVE

We shall come back to the data gathered in our survey, but first it proves useful to turn from facts to theory. As mentioned earlier, modern takings theory seems to have begun with Professor Dunham.¹⁹⁴ His 1962 article surveyed “a long series of judgments that appear to make up a crazy-quilt pattern of Supreme Court doctrine on the law of expropriation”; his purpose was “to discover whether the Court’s judgments in this area reveal a rational plan or only a haphazard accumulation of rules.”¹⁹⁵ He discovered the latter.¹⁹⁶ Several notable articles citing Dunham and seemingly provoked by his work appeared just a few years after its publication.¹⁹⁷ Countless studies have been published since, and many

190. See § 195.310(1)(b).

191. See, e.g., § 195.312 (limiting number of homes claimant under Measure 37 would be entitled to build).

192. See OR. DEP'T OF LAND CONSERVATION & DEV., BALLOT MEASURES 37 (2004) AND 49 (2007) OUTCOMES AND EFFECTS, at 37 (2011) (reporting that 6100 new dwellings have been authorized under Measure 49's treatment of claims filed under Measure 37).

193. See, e.g., *Thomas v. Dep't of Land Conservation & Dev.*, 296 P.3d 561, 564-66 (Or. Ct. App. 2013).

194. See *supra* note 4. The cases Dunham surveyed concerned three areas of takings law—the public use requirement, the measure of just compensation, and implicit takings—but fully half of his attention was given to the last area. See Dunham, *supra* note 4, at 71-105.

195. Dunham, *supra* note 4, at 63-64.

196. See *id.* at 105-06.

197. See generally, e.g., Frank I. Michelman, *Property, Utility, and Fairness: Comments on the Ethical Foundations of “Just Compensation” Law*, 80 HARV. L. REV. 1165 (1967); Sax,

of them are fashioned on a template familiar to takings aficionados and plainly attributable to Dunham. The academic community has taken his work as a challenge, much in the way that mathematicians responded to Fermat's last theorem. The task was to find, as Dunham could not, the "rational plan" (if any) behind the (apparent) "crazy-quilt pattern" of implicit takings doctrine.¹⁹⁸ Frank Michelman has said that most of the post-Dunham legal writing on our subject has "two aims—rationalization of existing decisions and advocacy of a 'sound' principle."¹⁹⁹ The statement was prescient. It was made in 1967, when the corpus of pertinent scholarship consisted of only a handful of items, but it is as apt today as it was then. We can restate Michelman's observation in terms of the familiar distinction between positive and normative theory, the first of which undertakes to explain (Michelman's "rationalization"), the second to evaluate in terms of some "sound' principle" (as Michelman put it).²⁰⁰

A. The Historical Tension Between Private Property and State Power

Our theorizing is of the positive sort. At its base is the observation, mentioned in our introductory remarks, that two ongoing but often conflicting commitments have figured prominently throughout history of the Union—a commitment to strong rights of private property, on the one hand, and a commitment to an activist state, on the other.

The first proposition is familiar and incontestable; a good historical overview is provided by James Ely, who carefully documents his claim that "Americans have long seen individual property rights as the fountainhead of personal liberty and political democracy."²⁰¹ Nevertheless, as Ely shows with many examples, "the high standing

supra note 139.

198. Dunham, *supra* note 4, at 63-64.

199. Michelman, *supra* note 197, at 1171 n.14.

200. We agree with Michelman that the two approaches "tend to spill into one another." *See id.*

201. JAMES W. ELY, JR., *THE GUARDIAN OF EVERY OTHER RIGHT: A CONSTITUTIONAL HISTORY OF PROPERTY RIGHTS* 172 (3d ed. 2008). Ely notes the early influence of the Magna Carta, *id.* at 13-14, and of John Locke's view of property as a natural right that the government has the duty to protect, *id.* at 17.

of property rights ... did not preclude restrictions on ownership,” even early in the history of the republic.²⁰² This should hardly be regarded as surprising.

Our proposition regarding the commitment to an activist state was at one time debatable, though the matter seems to have been settled by the revisionist work of William Novak and others. Novak observes “that the American state is and always has been more powerful, capacious, tenacious, interventionist, and redistributive than was recognized in earlier accounts of U.S. history,” and that the historical record “reveals ample evidence of the construction of American state power from the earliest days of the republic to the very recent past.”²⁰³ In short, American history is marked throughout by an ongoing tension between the rights of private property owners and the rights of the public to govern property for the sake of a sound social order.²⁰⁴

B. The Impact of the Tension on Takings Jurisprudence

We suggest that the general story about property and the state can be observed in the particular story of takings. In our view, the ins and outs of takings doctrine can be understood as a means to maintain and reinforce, in a very particular fashion, the conflicting commitments to property and state. Begin with the two cases, *Pumpelly* and *Mahon*, that we introduced early on.²⁰⁵ *Pumpelly* and *Mahon* each struck a blow for property rights, and for the principle that legal doctrine should be structured to ensure that government officials respect those rights. Both opinions contain rhetoric about the sanctity of property, and about the need to preclude government officials from taking shortcuts in pursuit of legitimate government

202. *Id.* at 18.

203. William J. Novak, *The Myth of the “Weak” American State*, 113 AM. HIST. REV. 752, 758 (2008); see also WILLIAM J. NOVAK, *THE PEOPLE’S WELFARE: LAW AND REGULATION IN NINETEENTH-CENTURY AMERICA* 235-36 (1996) (an empirical study discussing “the overwhelming presence of the state and regulation in nineteenth-century American life”). Novak notes that “[p]ublic regulation—the power of the state to restrict individual liberty and property for the common welfare—colored all facets of early American development.” *Id.* at 2.

204. The tension is explored in detail in GREGORY S. ALEXANDER, *COMMODITY AND PROPERTY: COMPETING VISIONS OF PROPERTY IN AMERICAN LEGAL THOUGHT, 1776-1970* (1997).

205. See *supra* notes 10-12 and accompanying text.

ends.²⁰⁶ That rhetoric continues to pervade opinions both in the Supreme Court and elsewhere, and may be responsible in part for the plethora of unsuccessful takings claims our survey uncovered. That is, the rhetoric may have generated a form of acoustic separation²⁰⁷: the message to the public at large, and even to some developer lawyers, has been that property rights remain sacrosanct, while doctrine in operation imposes few restraints on the everyday operations of the state. With limited exceptions, doctrine, developed and implemented jointly by the Supreme Court and the state courts, has left protection of property in the hands of government officials.

1. The Limited Force of Per Se Rules

One might think that the Supreme Court's per se takings rules contradict the observation that takings doctrine lacks muscle, but as our study demonstrates, operation of the per se rules highlights their impotence.

a. Permanent Physical Occupations

Start with *Loretto* and the categorical rule that government actions resulting in *permanent* physical occupations are takings, period.²⁰⁸ *Loretto* itself represented a partial retreat from the broad language of *Pumpelly*, which suggested that *any* invasion worked a taking: "where real estate is actually invaded by superinduced additions of water, earth, sand, or other material, or by having any artificial structure placed on it, so as to effectually destroy or impair its usefulness, it is a taking, within the meaning of the Constitution."²⁰⁹ Invasion compromises the power to exclude, which, as the Court in *Loretto* said, "has traditionally been considered one of the most treasured strands in an owner's bundle of property rights."²¹⁰

206. See *Pa. Coal Co. v. Mahon*, 260 U.S. 393, 413, 415-16 (1922); *Pumpelly v. Green Bay Co.*, 80 U.S. 166, 177-78 (1872).

207. The term originated with Meir Dan-Cohen, *Decision Rules and Conduct Rules: On Acoustic Separation in Criminal Law*, 97 HARV. L. REV. 625, 630 (1984).

208. *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 441 (1952).

209. *Pumpelly*, 80 U.S. at 181. To be sure, the flooding in *Pumpelly* was permanent, but the Court's ruling in the case did not depend on that.

210. *Loretto*, 458 U.S. at 435. Variations on the phrase run through the Court's opinions like a melisma in a Gregorian chant. See, e.g., *Nollan v. Cal. Coastal Comm'n*, 483 U.S. 825,

But in holding that all permanent occupations, however trivial, were takings per se, but temporary invasions were not, the *Loretto* court embraced a rule that is curious in several respects.²¹¹ First, if actual invasion is the feature of concern, why should its duration matter, other than as a proxy for the degree of loss suffered by aggrieved property owners? Second, if degree of loss is the point, why not review *all* physical intrusion cases in the same ad hoc manner the Court uses to review all cases in which a taking has not been found on the basis of either of its two per se rules?²¹² This is exactly the view expressed in the dissenting opinion in *Loretto*. Constitutional rights should not turn on a “formalistic quibble” about permanent versus temporary,²¹³ nor, indeed, on whether there has been some physical contact, because neither distinction distinguishes, “even crudely, between significant and insignificant losses.”²¹⁴

Despite the dissent’s impeccable logic, it missed the point. The majority’s objective, in our view, was chiefly rhetorical. It wanted to stress emphatically that the right of property owners to exclude is of fundamental importance, but to do so in a way that had little impact on actual government operations. The Court admitted as much: describing its holding as “very narrow,” it affirmed the “historically rooted expectation of compensation” for physical occupations in which “the character of the invasion is qualitatively more intrusive than perhaps any other category of property regulation”; but, at the same time, it did not “question the equally substantial authority upholding a State’s broad power to impose appropriate restrictions upon an owner’s *use* of his property.”²¹⁵

831 (1987).

211. The Court acknowledged that earlier cases, decided after *Pumpelly*, had settled the proposition that, although temporary invasions might be adjudged takings, they were not takings per se. Instead, they were to be decided on a case-by-case basis of ad hoc review. *See Loretto*, 458 U.S. at 427-35 (discussing the line of cases).

212. *See Underkuffler*, *supra* note 4, at 2020 (asking why government can, in some instances, destroy property without compensation, but may not physically invade property without compensation).

213. *Loretto*, 458 U.S. at 442, 447 (Blackmun, J., dissenting) (quoting Sax, *supra* note 139, at 37).

214. *Id.* at 447 (quoting Michelman, *supra* note 197, at 1227).

215. *Id.* at 441 (majority opinion). The Court mentioned as a makeweight that its holding avoided “otherwise difficult line-drawing problems.” *Id.* at 436. But as the dissent observes, it does not, because of the obscure meaning of “permanent.” *See id.* at 448 (Blackmun, J., dissenting); *see also supra* notes 81-82 and accompanying text, suggesting, based on our

Horne reinforces the point. Chief Justice Roberts observed that “[t]he Government thinks it ‘strange’ and the dissent ‘baffling’ that the Hornes object to the reserve requirement, when they nonetheless concede that ‘the government may prohibit the sale of raisins without effecting a per se taking.’”²¹⁶ His response: “But that distinction flows naturally from the settled difference in our takings jurisprudence between appropriation and regulation. A physical taking of raisins and a regulatory limit on production may have the same economic impact on a grower. The Constitution, however, is concerned with means as well as ends.”²¹⁷ In other words, like *Loretto*, *Horne* amounts to little more than a wink and a nod to the government: next time, do it right.

Our survey of state court cases demonstrates that, despite the language in *Loretto* and *Horne*, the permanent physical occupation rule interferes little with state regulation of land. Regulatory permanent physical occupations are a very rare bird. Of the 150 physical invasion cases in our survey, 70 percent arose from government enterprise,²¹⁸ and many of the invasions appear to have been accidental, or the result of ignorance of the law on the part of employees conducting operations at work sites. These enterprise cases accounted for 86 percent of the successful physical invasion claims. Most of the remaining 30 percent of physical intrusion cases involved government efforts to prevent nuisances, to conduct environmental cleanups, or to demolish unsafe structures. Even though the physical occupation or invasion in many of these cases could easily have been characterized as permanent (what is more permanent than destruction of a building?), state courts have had no difficulty upholding the government action without payment of compensation—often without any citation to *Loretto*.²¹⁹

empirical study, that the Court’s per se rules neither reduce the rate of litigation nor simplify judicial inquiries.

216. *Horne v. Dep’t of Agric.*, 135 S. Ct. 2419, 2428 (2015).

217. *Id.*

218. Some data from the cases we surveyed in our study: We identified 150 physical invasion cases; 70 percent of the cases arose from governments acting in their enterprise capacity; 25.3 percent arose from government intrusions to prevent or regulate nuisances, to conduct environmental cleanups, or to demolish unsafe structures.

219. See, e.g., *Aztec Minerals Corp. v. Romer*, 940 P.2d 1025, 1032 (Colo. Ct. App. 1996) (“[W]e cannot conceive of any set of facts in which the mere remediation of a contaminated site, even if it resulted in physical damage to the property, could result in a taking for public or private use.”); *409 Land Trust v. City of South Bend*, 709 N.E.2d 348, 352 (Ind. Ct. App.

b. Wipeouts

Next consider *Lucas* and its categorical rule that takings always arise from government actions depriving property of all economically beneficial or productive uses (common law nuisance controls aside).²²⁰ Given our discussion of *Loretto*,²²¹ we can be very brief here. The two cases are different in terms of property rights rhetoric—*Lucas* being more moderate in this respect—but similar in terms of accommodating an active state. Just as the Court noted in *Loretto* that its narrow rule left broad powers in the government,²²² so it noted in *Lucas* that its per se rule, applicable only to “relatively rare situations,” posed no threat to the ability of government to continue.²²³

Our survey demonstrates the Court’s prescience on this issue. Only about 3.5 percent of regulatory taking cases involve plausible wipeout claims, and the landowner is ultimately successful in fewer than half of those.²²⁴ Some state courts have gone so far as to reject wipeout claims when legal rules preclude any permissible construction on the landowner’s parcel, emphasizing the recreational value of the land and its potential value to abutting owners.²²⁵

2. The Futility of Penn Central Claims

As a matter of Supreme Court doctrine, the inapplicability of per se rules need not prove fatal to a takings claim. Temporary physical invasions and regulations that do not work invasions might still

1999) (“[T]he demolition of the properties was an exercise of the City’s police power to protect the public from unsafe buildings.”).

More generally our data show that 86.5 percent of successful physical invasion claims involved government enterprise; only 9.6 percent of successful physical invasion claims involved government regulatory activities.

220. See *supra* notes 20-22 and accompanying text.

221. See *supra* Part III.B.1.a.

222. See *Loretto v. Teleprompter CATV Corp.*, 458 U.S. 419, 440-41 (1982).

223. *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1018 (1992). The narrowness of the majority’s rule prompted Justice Blackmun to remark that “the Court launches a missile to kill a mouse.” *Id.* at 1036 (Blackmun, J., dissenting).

224. See *supra* Table 2.

225. See, e.g., *Wyer v. Bd. of Envtl. Prot.*, 747 A.2d 192, 193 (Me. 2000) (noting that the court below, in rejecting taking claim, properly considered “uses of property for parking, picnics, barbecues, and other recreational uses,” as well as value to abutters).

amount to takings, depending on how they fare in the course of case-by-case ad hoc adjudication, commonly known as *Penn Central* review.²²⁶ In fact, *Penn Central* balancing involves little more than a rhetorical bow to private property rights in the course of upholding state or local regulation. The Court itself has never applied the supposed balancing test to invalidate a state or local regulation,²²⁷ and our survey demonstrates that in state court practice, relegation to ad hoc adjudication has marked the death knell for a takings claim.

Two of the Court's own doctrines stack the cards decidedly in favor of the state. First, the Court's rejection of conceptual severance means that, with the exception of physical intrusions, burdens imposed on property owners are figured in terms of an entire parcel, not just the particular part targeted by government action.²²⁸ Justice Brandeis, dissenting in *Mahon*, was the first to articulate objections to conceptual severance,²²⁹ and, ultimately, the Court embraced the Brandeis position, overruling almost all of *Mahon*—although only implicitly—save for the idea that if diminution goes too far, there is a taking.²³⁰

Second, the Court's doctrine also plays fast and loose with the constitutional requirement of just compensation in the event of a taking. The convention is that if property is taken, compensation is to be paid in money, and be a full and exact equivalent of the property's market value.²³¹ So, for example, if a regulation goes too

226. See *supra* Part I.B.

227. See Sterk, *supra* note 72, at 287.

228. See *supra* note 42 and accompanying text.

229. Pa. Coal Co. v. Mahon, 260 U.S. 393, 419 (1922) (Brandeis, J., dissenting). The majority held that “the extent of the diminution” in value should be considered when evaluating the limits on the police power. *Id.* at 413 (majority opinion). Brandeis responded:

If we are to consider the value of the coal kept in place by the restriction, we should compare it with the value of all other parts of the land. That is, with the value not of the coal alone, but with the value of the whole property. The rights of an owner as against the public are not increased by dividing the interests in his property into surface and subsoil.

Id. at 419 (Brandeis, J., dissenting).

230. See *Keystone Bituminous Coal Ass'n v. DeBenedictis*, 480 U.S. 470, 474 (1987). The facts in *Keystone* were virtually identical to those in *Mahon*. We should add, by the way, that in *Mahon*, Holmes took the position that the legislation in question could not be justified as a safety measure. *Mahon*, 260 U.S. at 414-15. Brandeis once again disagreed, *id.* at 417-18 (Brandeis, J., dissenting), as did, implicitly, the Court in *Keystone*, 480 U.S. at 485.

231. See, e.g., *Olson v. United States*, 292 U.S. 246, 254-55 (1934).

far in diminishing value, the government cannot simply choose to pay the limited amount that would reduce the diminution to the point where it did not go too far.²³² Suppose, however, that the limited compensation is initially built into the regulation. Does that work? *Penn Central* held that it does, and that the compensation need not even be paid in money, but could instead consist of transferable development rights.²³³ Although these rights, the Court conceded, “may well not have constituted ‘just compensation’ if a ‘taking’ had occurred, the rights nevertheless undoubtedly mitigate whatever financial burdens the law has imposed on appellants and, for that reason, are to be taken into account in considering the impact of regulation.”²³⁴ In the view of Justice Scalia, concurring in *Suitum v. Tahoe Regional Planning Agency*, a move like that in *Penn Central* was nothing but sleight of hand, “a clever, albeit transparent, device,” by which “the government can get away with paying much less” than the just compensation required by the Constitution.²³⁵ We are inclined to agree with that.

In effect, the Court has been content to delegate the responsibility for policing regulatory abuses to state courts. Our survey demonstrates that state courts, in turn, have been content to respect decisions made by the political branches. Fewer than 10 percent of regulatory takings claims are successful, and the percentage is even smaller for those claims that do not involve interference with an existing use of land.²³⁶

3. *The Limited Impact of Other Property-Friendly Rules*

We turn finally to three pieces of Supreme Court doctrine that appear, contrary to all the foregoing instances, to enhance the rights of property owners at the expense of state prerogatives; although, appearances here can be misleading.

232. Some years ago, a very interesting piece of student writing argued that such limited compensation should be constitutionally acceptable, saying that “it is hard to see why compensation need be greater than the amount necessary to leave the property holder above the ‘too far’ point.” *Developments in the Law—Zoning*, 91 HARV. L. REV. 1427, 1499 (1978).

233. *Penn Cent. Transp. Co. v. New York City*, 438 U.S. 104, 137 (1978).

234. *Id.*

235. 520 U.S. 725, 747-48 (1997) (Scalia, J., concurring).

236. *See supra* Table 4.

The first piece of doctrine relates directly to *Penn Central* review and has to do with the standing of claimants who purchased their land *after* enactment of the regulations they allege to be takings. For some time, most courts held that such post-enactment purchasers had no grounds to complain, because they were on notice, and also because they were probably already compensated, so to speak, by paying a lesser price for their land than would otherwise be the case.²³⁷ The oddity of this position was that it could let the government take without ever having to pay, to the detriment not just of the post-enactment buyer, but also the pre-enactment seller.²³⁸ This, the Court said in *Palazzolo*, “ought not to be the rule,” and thus held that it no longer is.²³⁹ The point is well-taken, but unlikely to matter a great deal, because even though claimants now have standing that they did not before, they are very likely to lose their cases in the course of ad hoc review.²⁴⁰

The second piece of doctrine might be more substantial in its impact, although we are hardly sure. We refer to *First English* and its holding that if government action works a taking, the property owner is entitled to the remedy of just compensation from the time the taking arose until the time the action is abandoned or altered to avoid the taking.²⁴¹ The Court intended to call a halt to the abusive practice in some states, most notably California, of limiting claimants to injunctive relief, which left the government free to try again (and again, etc.) without ever having to pay.²⁴² The Court’s plan has not been completely successful. A number of states have attempted to evade the doctrine by holding that the abusive regulation in question was not authorized by state law and was therefore a nullity. Since the government’s action did not count, it could not be a taking and did not require compensation.²⁴³ To a considerable

237. See, e.g., *Palazzolo v. Rhode Island*, 533 U.S. 606, 616, 626 (2001).

238. See *id.* at 627.

239. *Id.*; see also *supra* notes 47-50 and accompanying text.

240. Moreover, the rule is not likely to have much effect on the ex ante behavior of regulators, because at the time government imposes the regulation, regulators are not likely to know when or whether owners will transfer their interests. See Sterk, *supra* note 3, at 251.

241. See *supra* notes 65-66 and accompanying text.

242. See *First English Evangelical Lutheran Church of Glendale v. County of Los Angeles*, 482 U.S. 304, 319 (1987).

243. See, e.g., *Landgate, Inc. v. Cal. Coastal Comm’n*, 953 P.2d 1188, 1190 (Cal. 1998); *Pheasant Bridge Corp. v. Township of Warren*, 777 A.2d 334, 336 (N.J. 2001).

degree, however, most government actions will involve regulations subject to ad hoc review, meaning they will not be held to work takings in the first place.²⁴⁴

The third and last piece of doctrine—that concerning exactions—clearly does strike a strong blow for property rights.²⁴⁵ The Court has not simply constrained exactions practice but also required that compliance with the constraints is to be examined with heightened scrutiny—a departure from the far more deferential standard of review ordinarily applied in implicit takings cases.²⁴⁶ Most recently, in *Koontz*, the Court extended its rules to exactions of money as well as exactions in kind.²⁴⁷ *Koontz* was decided after we concluded our empirical survey, so we have nothing to say about its reception by the states. Even though its precise implications are opaque, the decision has already proved to be very controversial. Our impression is that most commentators regard it as a considerable—which is not to say commendable—victory for advocates of strong property rights.²⁴⁸

Thus, with the exception of exactions, the Court's support of strong property rights has been largely symbolic,²⁴⁹ whereas its support of an activist state has been substantial and operationally significant.

4. *The Role of the States*

Given our theoretical perspective, what role have the state courts played in resolving the tension between private property and the demands of an activist state? In light of the Supreme Court's limited

244. See Sterk, *supra* note 72, at 287.

245. See *supra* Part I.D.

246. See *supra* note 60 and accompanying text.

247. See *supra* note 61 and accompanying text.

248. See, e.g., John D. Echeverria, *Koontz: The Very Worst Takings Decision Ever?*, 22 N.Y.U. ENVTL. L.J. 1, 50 (2014); Lee Anne Fennell & Eduardo M. Peñalver, *Exactions Creep*, 2013 SUP. CT. REV. 287, 334-36; Mark Fenster, *Substantive Due Process by Another Name: Koontz, Exactions, and the Regulatory Takings Doctrine*, 30 TOURO L. REV. 403, 403-04 (2014).

249. Frank Michelman expressed a similar view regarding Supreme Court implicit takings doctrine as it stood in 1987. See Michelman, *supra* note 106, at 1628 (saying the Court's *per se* rules have “the feel of legality and the feel of resonance with common understanding of what property at the core is all about,” then adding that “doctrines like these, which at the most obvious level are instrumentally and even logically vulnerable, can still make sense ideologically as tokens of the limitation of government by law”).

docket, state courts have been critical both in the development and implementation of takings doctrine. One question is whether they have been faithful to the constitutional mandates imposed by the Supreme Court. Another is whether they have been ambitious in exercising their freedom to protect property rights more than the Court insists they must. The first question is somewhat difficult to answer, especially with respect to the Court's two per se rules. State courts regularly write opinions in physical intrusion cases, flooding cases, and wipeout cases that make no explicit reference to governing Supreme Court doctrine;²⁵⁰ moreover, whether they cite the Court or not, they often reason in ways suggesting that they pay the doctrine little mind, whether out of ignorance or spite. One could try to deal with such cases by considering whether the results they reach, as opposed to the reasons they provide, appear to be consistent with what doctrine demands, but that method is unreliable. Courts write opinions with conclusions in mind, and, in consequence, might distort or ignore relevant facts and circumstances; hence, no reliable evidence exists by which to judge the fidelity of decisions.

We surely cannot say that state courts roundly ignore the rules,²⁵¹ but we do have the impression that they wander off untethered to an unsettling degree.²⁵² But whether the decisions in such cases are nevertheless principled—though not in terms of Supreme Court doctrine—is another matter entirely. State courts viewed as a whole have developed a more finely granulated analysis than one finds in the Court's decisions. This might be in part a function of sample size. The population of relevant Supreme Court cases is small, whereas the population of state court cases for the years we studied is several thousand. The larger the population examined, the more likely that discrete and interesting clusters would appear, and so

250. See *supra* Table 6.

251. For example, we found many instances in which courts found no taking on the ground that the aggrieved property owners had purchased their land after the allegedly offending regulation had been enacted, yet this practice stopped entirely once *Palazzolo* held that post-enactment purchase did not bar takings claims.

252. This is true regarding ad hoc review cases as well. We found very few opinions showing courts marching with rigor through the multitude of factors mentioned in *Penn Central*. State courts have considerable practical, if extralegal, freedom because claimants alleging takings have limited effective access to the federal courts. See *supra* notes 69-71 and accompanying text.

they have. The state courts consider a number of factors, noted at several points in our discussion, that strike us as consistent with the spirit of the Takings Clause, if not the letter of takings doctrine.²⁵³

So much for state court fidelity to Supreme Court doctrine. Regarding the ambitions of state governments to protect private property more than the Court says they must, state courts and legislatures on the whole do not seem particularly interested in moving significantly beyond the constitutional bottom, with just a few exceptions.²⁵⁴ The states must cope with the same conflicting commitments to strong property rights and active government that confront the Supreme Court, and, by and large, they have taken the Court's path.

* * *

In short, our study suggests that Supreme Court doctrine has neither inspired nor constrained state lawmakers in any significant fashion. Although the Court continues, on sporadic occasions, to decide cases in ways that purport to fortify property rights, modern doctrine has largely reduced the property rights rhetoric of *Pumpelly* and *Mahon* to a whisper. Only two developments truly fortify private property rights: the broadened right to compensation provided by *First English* (which, while generating very few actual awards of compensation, has undoubtedly instilled fear in many would-be regulators), and the close governance of exactions provided by *Nollan*, *Dolan*, and *Koontz*. But generally speaking, the Court has seemed far more attentive to the needs of the state than to the claims of private property owners. We think this pattern is unlikely

253. See *supra* Part II.C.

254. There are a few instances of state court ambition, however. One example has to do with the compensation remedy afforded by *First English*. Several states adopted such a remedy even before it became a constitutional mandate; they were moved by Justice Brennan's dissent in *San Diego Gas & Electric Co.* See Rankin, *supra* note 66, at 424. Another example: we found a handful of state cases recognizing a cause of action for judicial takings and one case finding that such a taking had occurred. Judicial takings were not directly relevant to our survey because the Supreme Court has yet to recognize them, though it has come close. See *Stop the Beach Renourishment, Inc. v. Fla. Dep't of Env'tl. Prot.*, 560 U.S. 702, 714-15 (2010). On state judicial takings decisions generally, see Barton H. Thompson, Jr., *Judicial Takings*, 76 VA. L. REV. 1449, 1471-72 (1990).

to change, even if the ideological balance on the Court tips to the right. A majority on the Court, whether liberal or conservative, has to reckon more moderately than it otherwise would, because it is one thing to champion a view, and another to make that view the law of the land.

The Court's abdication has opened an opportunity for state courts to take the lead in policing state and local regulators. They could have done so by resting property-friendly decisions on state constitutions and statutes. Alternatively, they could have interpreted the Federal Constitution more expansively than the Supreme Court, knowing that the Court would be unlikely to overturn state court decisions according greater protection to property rights. But they have not taken that course; indeed, our findings suggest that in some instances state courts have provided less protection than the Court insists they must. When regulation is at issue, state courts, like the Supreme Court, appear content to leave local officials accountable to voters, not to judges, despite the oft-cited concern that land use regulation has the potential to single out victims who may have little clout in the local political process.

Nor have state legislatures intervened to any significant degree, with the notable exception of the legislative outburst of legislative activity in reaction to the Supreme Court's decision in *Kelo*,²⁵⁵ which expressed a very relaxed view of the public use requirement in the law of eminent domain.²⁵⁶ And even the post-*Kelo* reforms have struck some property rights advocates as less effective than what had been expected.²⁵⁷ Exactly what made *Kelo* so salient is anybody's guess, but it is likely that it will take such salience, very hard lobbying, or both to move state legislative bodies out of the status quo. Still, given the unlikelihood of significant shifts on the part of the Supreme Court and state courts, political action—especially at the state level—might be the best way for advocates to use their limited resources.²⁵⁸

255. See, e.g., SOMIN, *supra* note 171, at 141-64.

256. See *Kelo v. City of New London*, 545 U.S. 469, 478-80, 484 (2005).

257. See, e.g., SOMIN, *supra* note 171, at 136, 141-64, 173-78.

258. See Charles Fried, *Protecting Property—Law and Politics*, 13 HARV. J.L. & PUB. POL'Y 44, 45 (1990) (suggesting that property rights advocates should take their fight from the courts into the political arena).

Our study was designed to increase understanding of how takings doctrine operates “on the ground,” but our survey goes only so far. By focusing on decided cases, we have ignored an important piece of the puzzle: what effect does takings law have on government agents, municipal officials in particular, at the decision-making stage? Does the prospect of litigation serve to deter overregulation even when, in fact, the litigation is likely to be unsuccessful? Perhaps the Supreme Court’s jawboning has an effect that cannot be discerned from examining cases alone. But that is a subject for another day.