EMINENT DOMAIN

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Inverse Condemnation

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In inverse condemnation the property owner, not the government, institutes the proceeding, seeking to recover under the Fifth Amendment just compensation for the taking or reduced value of its property that the government has not formally condemned.[1] An inverse condemnation sometimes is termed a *de facto* taking or a regulatory taking. The standard defense is that the government action was a proper exercise of the police power for which no compensation is due. Over 80 years ago Justice Holmes provided the theoretical framework for that defense: "Government hardly could go on if to some extent values incident to property could not be diminished without paying for every such change in the general law," but "[t]he general rule, at least, is that while property may be regulated to a certain extent, if regulation goes too far, it will be recognized as a taking."[2]

To this day inverse condemnation is decided on an *ad hoc* basis other than when there is a *per se* taking through an actual physical occupation or where the government action results in a total deprivation of the use of the property. In reviewing the government's action, the courts consider whether the action would "forc[e] some people

alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole."[3]

Police Power

To place the issue in context, we briefly review the concept of police power. Over 100 years ago, the United States Supreme Court explained:

> It belongs to [the legislative] department to exert what are known as the police powers of the state, and to determine, primarily, what measures are appropriate or needful for the protection of the public morals, the public health, or the public safety.[4]

A court may look to the economic impact on property as to whether a taking has occurred. It should consider whether the public interest outweighs the individual property interest in deciding whether there has been a proper exercise of the police power.[5] Examples of valid use of the police power include regulations requiring the cut-down of red cedar trees to prevent the spread of rush or plant disease,[6] regulations controlling dredging and pit excavating,[7] and occupancy of buildings to protect from destruction by rioters.[8] A regulation to prevent a noxious use cannot by itself determine whether a regulatory action amounts to a taking because "regulation that 'prevents harmful use' and that which 'confers benefits' is difficult, if not impossible, to discern on an objective, value-free basis."[9]

Definition of an Inverse Condemnation

Assuming standing and justiciability, the first and most difficult step in an action for an inverse condemnation, or *de facto* taking, is to show a "taking." The Supreme Court in *Lingle v. Chevron U.S.A. Inc.* found four types of regulatory takings: (1) government's "physical" occupation or invasion of an owner's property; (2) government action that deprives the owner of all economically beneficial use of the property; (3) government action that, under the fact-based inquiry of *Penn Central Transportation Company v. City of New York*,[10] otherwise economically burdens the property owner, including investment-backed expectations, and the nature of the government action effects a tak-

ing; and (4) "land use exactions," whereby the government conditions a permit or other approval on the owner's agreement to dedicate all or part of its property to a public use.[11] *Lingle* deems the first two categories *per se* or categorical takings.[12] The *Lingle* Court declared that whether a taking has occurred does not depend on whether the government action substantially advances a legitimate state interest and does not analyze what the burden of the taking on the landowner would be.[13] The "substantially advances test" still has relevance in due process claims.[14]

Physical Occupation or Invasion

A permanent physical occupation of an owner's property is a taking, without regard to public benefit or economic impact on the owner.[15] A government permanently occupies an owner's property where it deprives the owner of the rights to possess the property, to exclude anyone from the property, to use the property, and to transfer the property.[16] The size of the occupation, no matter how small, is not determinative.[17] For example, in *Loretto v. Teleprompter Manhattan CATV Corporation*,[18] the Supreme Court found a physical taking where the appellee cable television company installed a "'cable slightly less than one-half inch in diameter and of approximately 30 feet in length along the length of the building'" as well as "two large silver boxes along the roof cables."[19] It is interesting to note, however, that the Second Circuit Court of Appeals recently decided not to extend the *Loretto* rule to cover an order by the Federal Communications Commission directing cable operators to carry signals of certain broadcast stations. The Second Circuit held such an order was not a physical taking under *Loretto* because "transmission of [the station's] signal does not involve a physical occupation of Cablevision's equipment or property."[20]

A physical invasion of property can constitute a taking of property even if not a permanent physical occupation. In *United States v. Causby*,[21] the frequent and regular flights of the government's low-flying aircraft over the property owner's land destroyed the property's use as a chicken farm and was a taking within the meaning of the Fifth Amendment.[22]

In *Air Pegasus of D.C., Inc. v. United States*,[23] the Federal Aviation Administration banned all commercial air traffic nationally in the days following the terrorist attacks of September 11, 2001.[24] The

FAA extended that ban permanently to much of the airspace above Washington, D.C., including the area above Air Pegasus' heliport, forcing Air Pegasus to shut down temporarily and then permanently. Air Pegasus lost its claim alleging a regulatory taking of its property.[25] The United States Court of Appeals for the Federal Circuit held that because navigable airspace is part of the public domain and that Air Pegasus had no property interest in that airspace, there was no taking of private property requiring just compensation.[26] The difference between *Air Pegasus* and *Causby* is that the landowner in *Causby* was not claiming an interest in the navigable airspace, as the court found in *Air Pegasus*, but rather its interest in the land. In *Causby*, airplanes were flying at such a "low altitude" that "continuous invasions of [the land] affect the use of the surface of the land itself."[27] The *Causby* Court stated that the landowner "must have exclusive control of the immediate reaches of the enveloping atmosphere."[28]

A property's physical invasion by water can be a taking.[29] The invasion of noise upon a property may also be compensable as a taking.[30]

Deprivation of All Economically Viable Use

While earlier decisions spoke of a "'direct appropriation'" of property or the "functional equivalent of a 'practical ouster of [the owner's] possession,'" the law now includes less physically obtrusive regulations of property as compensable takings.[31] The seminal case of *Lucas v. South Carolina Coastal Council*[32] holds that the deprivation of all economically viable uses of an owner's property is a *de facto* taking. Lucas purchased two lots in 1986 on the Isle of Palms in Charleston County, South Carolina, to build single-family residences.[33] South Carolina thereafter passed a Beachfront Management Act prohibiting "any permanent habitable structures" on the property.[34] Lucas brought suit alleging an unconstitutional taking without just compensation.[35] The Court ruled that the deprivation of all economically viable uses of the property would be a taking and remanded for findings whether the regulation would "do no more than duplicate the result that could have been achieved in the courts—by adjacent landowners (or other uniquely affected persons) under the State's law of private nuisance, or by the State under its complementary power to abate nuisances that affect the public generally, or otherwise."[36]

On remand, the Supreme Court of South Carolina held that the Coastal Council had shown no common law basis to restrict Lucas

from constructing a habitable structure on his land, and thus Lucas was entitled to damages.[37] As the Act was amended during the pendency of Lucas's appeal to allow "special permits" for the construction of habitable structures, the Supreme Court of South Carolina found only a temporary taking, commencing from enactment of the 1988 Act to the entry of that court's order.[38] The Court remanded the case to the trial court to make findings of fact necessary to calculate the damages owed to Lucas for a temporary taking.

Lucas leaves open the question of what percentage of the property's value must be lost to constitute a taking. Justice Stevens criticized the majority opinion because it would not allow recovery for a landowner whose property was 95 percent decreased in value.[39] The majority opinion responded, however, that only "some" of those 95-percent cases will not succeed in proving a taking, and that the owner's investment-backed expectations "are keenly relevant to takings analysis generally."[40]

Penn Central Takings

Governmental regulations or actions that do not amount to a physical occupation or invasion of an owner's property or a deprivation of all economically viable use of property (categorical takings) fall into a third category described in *Penn Central Transportation Company v. City of New York*.[41] The city enacted a legislative scheme to designate certain buildings as landmarks, restricting owners' use of such property.[42] City zoning law allowed the owners to transfer developmental rights to contiguous parcels on the same city block.[43] Penn Central owned Grand Central Terminal, designated a landmark in 1967.[44] Penn Central then applied under the legislative scheme to build either a 55-story building or a 53-story building on top of the terminal; the city denied both applications.[45] Penn Central then sought to enjoin the city from using the landmarks regulation to impede it from constructing an otherwise lawful structure.[46] The United States Supreme Court affirmed the New York Court of Appeals decision that the landmark regulation was not a constitutional taking of property.[47]

The *Penn Central* Court set up a balancing test to determine whether a regulation constitutes a taking. The test accounts for (1) the character of the governmental action, (2) the economic impact of the regulation on the claimant, and (3) the extent to which the regulation has interfered with the claimant's distinct investment-backed

expectations.[48] The Court found that Penn Central would obtain a "'reasonable return'" on its investment and that Penn Central was not deprived of all of its air rights above Grand Central, as it had not applied to the City of New York to construct a building with fewer floors than what was proposed.[49] In determining the nature of the government's actions, the Court distinguished the facts in *Penn Central* from *Causby*, where there was a physical invasion of property,[50] and held that there was no taking.

The dissent in *Penn Central* found that the city's "landmark designation imposes upon [a landowner] a substantial cost, with little or no offsetting benefit except for the honor of the designation."[51] The dissent found the landmark designation a compensable taking as it was based in the very words of the Constitution; i.e., air rights were property rights, and the property was "taken" because the government was not using its police power to prohibit a noxious use.[52] The dissent would have required review by the New York courts as to whether Penn Central's transferable development rights (TDRs) were just compensation under the Fifth Amendment, arguing that the City's position that those rights constituted just compensation was "irrelevant."[53]

As to the question of whether TDRs can be considered just compensation, some cases hold that the owner of property must be paid in cash. In *United States v. Miller*, the United States Supreme Court held that just compensation "means the full and perfect equivalent in *money* of the property taken" and that the "owner is to be put in as good position *pecuniarily* as he would have occupied if his property had not been taken."[54] Justice Scalia, in his opinion in *Suitum v. Tahoe Regional Planning Agency*, stated that TDRs "may also form a proper part, or indeed the entirety, of the full compensation accorded a landowner when his property *is* taken."[55]

Land Use Exactions

A fourth category of inverse condemnation is a land use exaction, where government requires an easement or other public use of property in exchange for a development permit or similar benefit. In *Nollan v. California Coastal Commission*,[56] appellants applied to the California Coastal Commission for a permit to demolish an existing house on beachfront property and replace it.[57] The Court quoted the commission's finding that the new house would create "a 'wall' of

residential structures" preventing the public "psychologically . . . from realizing a stretch of coastline exists nearby that they have every right to visit" and would burden the public's ability to access the beach. To minimize that effect, the appellants should provide "additional lateral access to the public beaches in the form of an easement across their property."[58] The property owners sought mandamus, arguing that the access condition was a taking requiring just compensation.[59] The commission appealed the writ and the California Court of Appeals found no taking, in part because the condition "did not deprive them [the owners] of all reasonable use of their property."[60]

The United States Supreme Court reversed. It held that if the access condition would substantially advance the same governmental purpose as a direct ban on the appellants' development of their property under the police power, the condition would not be a taking.[61] In this case, however, the access condition could not be "treated as an exercise of its land-use power." It was unclear that the access condition would alleviate any burdens on viewing the beach or remedy any congestion along the beach.[62] The Supreme Court held that the commission would have to use eminent domain to take an easement across the appellants' property and pay just compensation.[63]

The Supreme Court's decision in *Dolan v. City of Tigard*[64] expanded upon *Nollan*'s "substantially advances" test. Petitioner Florence Dolan sought to expand her plumbing and electric supply store.[65] Under the city's comprehensive land-use plan, the Planning Commission conditioned redevelopment on a dedication of property for storm drainage and an additional 15-foot strip of land as a pedestrian/bicycle pathway.[66] The commission denied variances from those conditions, finding that they related to the redevelopment.

The Supreme Court found an essential nexus between the conditions on petitioner's property and the municipality's intended goals.[67] Thus the Court stated that it must address "the required degree of connection between the exactions imposed by the city and the projected impact of the proposed development."[68] A majority of states relied on the "reasonable relationship" test to determine such a connection.[69] As this was also similar to the "rational basis" test used in equal protection cases, the Court instead adopted the test of "rough proportionality" for land use exactions.[70] There was no rough proportionality between the floodplain easement and the development or between the pedestrian/bicycle pathway and the traffic congestion,[71] and the Court reversed and remanded.

Note that in *Lingle* the Supreme Court did not overrule *Nollan* and *Dolan* but explained that *Nollan* and *Dolan* addressed a different issue and used a different standard from that in *Lingle*, namely whether the land use exactions substantially advanced the "*same*" legitimate state interests, and not merely "*some*" legitimate state interests.[72] The *Lingle* Court distinguished those cases on the basis that they dealt with a regulation that conferred a discretionary benefit that "'ha[d] little or no relationship to the property.'"[73] As the Court said, "[t]hat is worlds apart from a rule that says a regulation affecting property constitutes a taking on its face solely because it does not substantially advance a legitimate government interest."[74] Therefore, under *Lingle*, where a regulation has little or no relationship to the property in a land use exaction context, a substantially advances test is appropriate. In *Lingle*, the Court found such a test to be invalid in other contexts and thus did not overrule *Nollan* and *Dolan*.[75]

Moratoria

Some specific types of regulation touch upon inverse condemnation law, such as a government-implemented ban or moratorium on development. Such cases involve a fact-intensive inquiry. In *First English Evangelical Lutheran Church of Glendale v. County of Los Angeles California*,[76] an ordinance prohibited all construction in certain areas for approximately six years to ameliorate the results of predictable flooding.[77] The issue before the Court was whether a landowner could receive damages for a temporary taking.[78] The Court found just compensation was required in this case,[79] as "[i]nvalidation of the ordinance or its successor ordinance after this period of time, though converting the taking into a 'temporary' one, is not a sufficient remedy to meet the demands of the Just Compensation Clause."[80]

The next declaration on moratoria was in *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency*,[81] with a different issue not controlled by *First English*—that of whether temporary moratoria could effect a taking. *Tahoe-Sierra* involved two temporary moratoria by the Tahoe Regional Planning Agency (TRPA) to limit damage to Lake Tahoe due to increasing development.[82] Moratoria for eight months and for 32 months were imposed to freeze development in the area while TRPA developed a plan to protect the lake and surrounding areas.[83] TRPA terminated the moratoria in due course, but the District Court for Nevada ruled that the plan was insufficient and

enjoined plan implementation.[84] The injunction thus limited development for another three years.[85] Plaintiff landowners had purchased their properties prior to the creation of TRPA at a time when construction on the properties was not prohibited.[86] They argued that the moratoria constituted a *per se* taking requiring just compensation.[87] The Supreme Court limited its decision to this issue, as the effects of the district court injunction were not before the Supreme Court.[88]

The Court held that temporary moratoria such as those in this case did not constitute a *per se* taking and that a fact-specific analysis was required.[89] Regulatory takings jurisprudence is "essentially ad hoc"[90] and the Court faulted the landowners for erroneously relying on *Lucas*[91] to support their argument for a categorical rule.[92] In other inverse condemnation cases, including *Lucas*, the Court stated it had avoided declaring *per se* rules and instead decided inverse condemnation on fact-intensive analyses.[93]

"The starting point for the court's analysis should have been to ask whether there was a total taking of the entire parcel; if not, then *Penn Central* was the proper framework."[94] In cases where all value is not eliminated, even *Lucas* acknowledged that a *Penn Central* analysis is required.[95] The landowners had forfeited the argument about a partial taking under a *Penn Central* analysis since they expressly rejected that theory and did not appeal from the district court's determination that a *Penn Central* analysis was not supported.[96] The Court held that because the temporary moratoria were not a *per se* taking and the landowners had not claimed a taking under *Penn Central*, there was no taking, and it affirmed the court of appeals.

In *dicta* the Court rejected the argument that a regulatory taking analysis should look to the value of land only during the moratoria. Property involves a geographical as well as a temporal element and a total taking analysis must look at both.[97] A "permanent deprivation of the owner's use of the entire area is a taking of the 'parcel as a whole' whereas a temporary restriction that merely causes a diminution in value is not."[98] Duration of the moratoria was one of the factors to be considered in determining whether the action was a taking.[99] The Court was not stating a rule that such temporary restrictions can never be considered a taking; instead the determination must be a fact-driven inquiry.[100]

In separate dissents Chief Justice Rehnquist and Justice Thomas questioned the holding that *Lucas* does not apply to temporary moratoria. The Chief Justice argued that the applicable period with respect to the takings in this case was six years because the injunction was

essentially indistinguishable from the moratoria in its effect.[101] He questioned the distinction between temporary and permanent takings—the regulation in *Lucas* has been characterized as permanent, but remained in effect for less than two years before the law changed.[102] Justice Thomas argued that even temporary moratoria should be subject to *Lucas* if they prohibit all productive uses of land. The temporary nature of the restriction becomes relevant when determining the compensation due.[103]

Zoning

Zoning is regulating the use of property without need to pay just compensation. *Village of Euclid, Ohio v. Ambler Realty Company* is probably one of the earliest statements of the law in this area.[104] The claimant in that case owned a vacant 68-acre parcel in the Village of Euclid.[105] On November 13, 1922, the village established a zoning plan restricting the uses of property in different parts of the village as well as the size and height of buildings.[106] Under the zoning plan, a 620-foot-wide strip of claimant's property immediately north of Euclid Avenue could be used for one- and two-family dwellings, while claimant's next strip of property, which was 130 feet wide, could be used for one- and two-family dwellings, apartment houses, and motels. Neither zone permitted industrial uses at the time of the enactment of the zoning.[107] The claimant held the property to sell and develop for industrial uses for which it was "especially adapted."[108] The zoning ordinance thus lowered the value of the property because industrial use was considered to be more valuable than residential use.[109] The claimant challenged the ordinance as a denial of liberty and property and equal protection under the law.[110] In order to be found constitutional, the Court stated that the ordinance "must find [its] justification in some aspect of the police power, asserted for the public welfare."[111]

Reversing the lower court's holding that the zoning ordinance was unconstitutional, the Supreme Court found that the zoning scheme's separation of residential and industrial had a valid purpose, including increasing "the safety and security of home life" and "preserv[ing] a more favorable environment in which to rear children,"[112] all "sufficiently cogent to preclude [the Court] from saying, as it must be said before the ordinance can be declared unconstitutional, that such provisions are clearly arbitrary and unreasonable, having

no substantial relation to the public health, safety, morals, or general welfare."[113] Moreover, the Court would not find the scheme invalid merely because it restricted offensive industries as well as innocuous industries from areas of property.[114]

A recent example of the interplay between zoning restrictions and inverse condemnation law is *George Washington University v. District of Columbia*.[115] The District Board of Zoning Adjustment approved a campus plan submitted by the university on condition that the university house 5,600 of its 8,000 undergraduates (70 percent), and house any undergraduates over 8,000 either on campus or outside Foggy Bottom.[116] The university claimed an unconstitutional taking of property.[117] The D.C. Circuit affirmed the district court's conclusion that the regulations were rationally related to a legitimate government purpose and held that there was no taking.[118] Relying on *Loretto* and *Lucas*, the D.C. Circuit found no *per se* taking because there was no physical occupation of university property, nor did the board's condition deprive the university of all economically beneficial use of the property.[119] The condition also did not satisfy the *Penn Central* test.[120] The university did not show that the condition reduced the property's value, only that it restricted the use of the property; thus, it could not meet *Penn Central*'s first requirement of economic impact upon the claimant.[121] The district court also found no interference with the university's investment-backed expectations under *Penn Central*, as it was "on notice that its property was subject to governmental regulation."[122] Finally, the nature of the government's action was rationally related to a legitimate government purpose, and thus could not satisfy the third prong of the *Penn Central* test.[123]

Though quite the opposite of an inverse condemnation, at times the government's change in zoning enhances the value of the property subsequently acquired in a direct condemnation proceeding as well as other properties in the immediate area. Although the rezoning may have occurred as part of the development for which the property was acquired by condemnation, the property owner is entitled to compensation based on the highest and best use allowed by the new zoning.

Designation as Navigable Water

The designation of property as a wetland or as navigable water is a type of zoning regulation with its own vast body of law. The question

whether a designation of property as a wetland or as navigable water is a taking under the Fifth Amendment cannot be answered without a short description of the Clean Water Act of 1977 (CWA). The CWA makes it unlawful to discharge any pollutant into "navigable waters," which are defined as any "waters of the United States."[124] Under the CWA, an owner of a "water of the United States" cannot dredge or fill material that would bring "an area of the navigable waters into a use to which it was not previously subject, where the flow or circulation of navigable waters may be impaired or the reach of such water be reduced" without a permit under the CWA.[125]

In *Rapanos v. United States*,[126] the Supreme Court interpreted the meaning of wetlands within the CWA. Petitioner John A. Rapanos backfilled wetlands on a parcel of property that he owned. As to whether petitioner's activity was covered under the CWA, the Court held that "*only* those wetlands with a continuous surface connection to bodies that are 'waters of the United States' in their own right, so that there is no clear demarcation between 'waters' and wetlands, are 'adjacent to' such waters and covered by the Act." Wetlands with "only an intermittent, physically remote hydrologic connection to the 'waters of the United States'" are not covered by the Act.[127]

Is designation as a wetland subject to the jurisdiction of the CWA a taking for which just compensation must be paid? First, a designation of a property as a wetland does not *prevent* its designation as a taking of property for which just compensation must be paid. In *United States v. Riverside Bayview Homes, Inc.*, the landowners attempted to backfill their wetlands adjacent to navigable bodies of water and their tributaries.[128] The Sixth Circuit determined that these wetlands were not subject to the jurisdiction of the CWA, as a broader reading of the CWA would create "a serious taking problem."[129] The Supreme Court reversed, holding that an interpretation of the CWA that would result in a taking did not justify limiting the scope of the statute because compensation is available.[130] The Court held that a landowner who intends to backfill wetlands adjacent to waters of the United States is required to apply for a permit to do so.[131] The Court did not need to determine whether such a requirement was a taking because the respondent, Riverside Bayview Homes, Inc., had not brought an inverse takings claim.

Six years earlier, *Kaiser Aetna v. United States* shed some light in this area, although it did not deal with the CWA.[132] The issue was whether the petitioners' creation of the Hawaii Kai Marina by

dredging and filling the Kuapa Pond made it subject to a "'navigational servitude'" of the federal government, giving the public a right of access to the marina.[133] In 1961 the petitioners first notified the Army Corps of Engineers of their plan to fill the pond, and the Corps determined that no permits were required.[134] In 1972 a dispute arose between the Corps and petitioners as to whether permits were indeed required under the Rivers and Harbors Appropriation Act of 1899.[135] The United States eventually brought suit, and the District Court for Hawaii held that the pond was a navigable water and subject to regulation under the Act, but that the government could not open the marina to the public without payment of just compensation to the owner.[136] The Ninth Circuit affirmed but held that the pond's transformation into a marina did not require petitioners to grant access to the public.[137]

The Supreme Court reversed the Ninth Circuit. Although the government could have prevented petitioners from dredging the pond, or could have conditioned such dredging on certain measures, the government's action took petitioners' right to exclude the public from its property—a right that is "universally held to be a fundamental element of the property right"—and would have to pay just compensation.[138] The Court found that "the Government's attempt to create a public right of access to the improved pond goes so far beyond ordinary regulation or improvement for navigation as to amount to a taking under logic of *Pennsylvania Coal Co. v. Mahon*."[139]

Some cases hold that the inability to backfill wetlands is not a compensable taking. In *Palazzolo v. Rhode Island*, Anthony Palazzolo owned property designated as wetlands under Rhode Island law. [140] He submitted two proposals to develop the property to the Rhode Island Coastal Resources Management Council, and both were rejected.[141] The council rejected a proposal to construct a wooden bulkhead because it would have a significant impact on the waters in the surrounding area.[142] The second proposal to build a private beach club was rejected because it required a statutory exception to serve a "compelling public purpose which provide[d] benefits to the public as a whole as opposed to individual or private interests."[143] After the Rhode Island courts affirmed the council, the petitioner filed an inverse condemnation action.[144]

The Supreme Court then reversed the Rhode Island Supreme Court, holding that the claim was ripe for review. On the merits,[145] the Court stated the rule that where the property owner was aware

of the wetland regulation scheme at the time of purchase, it could not bring a takings claim: "A purchaser or a successive title holder like petitioner is deemed to have notice of an earlier-enacted restriction and is barred from claiming that it effects a taking."[146] In this instance, the land pre-enactment was owned by a corporation for which petitioner was the sole shareholder. Title passed to the petitioner by operation of state law after the corporation's failure to pay taxes.[147] The Court found that it "would be illogical, and unfair, to bar a regulatory takings claim because of the post-enactment transfer of ownership where the steps necessary to make the claim ripe were not taken, or could not have been taken by a previous owner."[148]

Finally, the Court found that the petitioner, assuming he had a takings claim, was not entitled to compensation because his property had not been depleted of all economically viable use. He could still build a substantial residence on an 18-acre parcel.[149] For the first time on appeal to the Supreme Court, the petitioner had argued that his takings claim should be limited to a deprivation of the wetlands portion and not the "uplands" portion of the property. While the Court noted case law disagreeing with the rule that damages are measured by the deprivation caused to the whole property, the petitioner's original claim was based on a taking of the entire parcel; thus, the Court declined to adjudicate the newly raised argument.[150]

The *Palazzolo* case dealt with the state regulatory scheme in Rhode Island. The determination of whether a property is considered a wetland and whether a taking has occurred is controlled by state law. The New York statutory scheme, for example, is in article 24 (Freshwater Wetlands) and article 25 (Tidal Wetlands) of New York's Environmental Conservation Law. Freshwater wetlands include such areas as marshes and swamps,[151] and tidal wetlands may include the same type of areas where they "border on or lie beneath tidal waters."[152] The regulations provide a procedure to obtain a permit if the property owner wishes to conduct any of the regulated activities on the property, such as dredging or filling of the land.[153] The statutes also provide for judicial review of any order with respect to the use of the property or denial of a permit to conduct any of the regulated activities.[154]

In New York, to prove that a taking has occurred by wetland regulation, the owner must prove that "there is no reasonable probability that the [jurisdiction would] approve any change" from the regulation.[155] New York case law holds that where the landowner took title

to the property knowing of the wetlands regulation applicable to the property, the landowner was not entitled to bring a takings claim.[156] Where the landowner purchases property and wetlands regulations are later imposed that take away development rights amounting to a total loss of the value of the property, a taking has occurred.[157]

Property Interest

Other issues frequently arise in inverse condemnation cases aside from whether the government's action is in fact a taking. Before a court reaches the question whether a taking has occurred, it determines whether the claimant has a valid and vested property interest. Property includes real and intangible property.[158] The scope of property now includes fishing permits,[159] contract rights,[160] and trade secrets.[161] Whether government action impedes a property right depends on whether the action impedes the owner's right to possess, use, or transfer the property or to exclude anyone from it, with the latter "traditionally . . . [having] been considered one of the most treasured strands in an owner's bundle of property rights."[162]

Ripeness

Whether a takings claim is ripe for adjudication is a preliminary issue that a court must address before it decides whether a taking occurred. A takings claim is not ripe until the government makes a final decision on the land use application.[163] The reason for this rule is that "[a] court cannot determine whether a regulation goes 'too far' unless it knows how far the regulation goes."[164]

In *Palazzolo*, the Supreme Court held that an inverse takings claim ripens after the landowner gives the government an "opportunity to exercise its discretion" and "it becomes clear that the agency lacks the discretion to permit any development, or the permissible uses of the property are known to a reasonable degree of certainty."[165] This is the "futility exception to the finality rule," meaning that it would be futile to seek any further review of the regulation in question.[166] The government may not burden the landowner with redundant administrative proceedings, and the landowner does not have to submit such applications for "their own sake."[167]

The landowners' actions in *Nollan v. California Coastal Commission* are an example of the steps taken to ripen a takings claim. In that case, the Nollans originally leased the property with an option to buy, which was conditioned on their promise to demolish the bungalow and replace it.[168] In order to replace the bungalow, the Nollans were statutorily required to obtain a coastal development permit from the California Coastal Commission.[169] Over objection by the Nollans, the commission granted the permit on the condition that the Nollans allow an easement across the property.[170] The Nollans then filed a petition for writ of administrative mandamus to invalidate the easement condition.[171] The state trial court agreed and remanded to the commission for a full evidentiary hearing.[172] The commission, after public hearing, reaffirmed the granting of the permit with the condition of the easement.[173] The Nollans then filed a supplemental petition for a writ of administrative mandamus with the trial court, arguing that the imposition of the easement was an unconstitutional taking of property.[174] At the United States Supreme Court, there was no dispute that the Nollans' claim was ripe. The Nollans had exhausted their administrative remedies and it was clear "how far" the regulation went.

Another interesting case of ripeness in the context of TDRs is *Suitum v. Tahoe Regional Planning Agency*.[175] Bernadine Suitum purchased an undeveloped parcel of land, and the statutory scheme adopted by the Tahoe Regional Planning Agency (TRPA) required both a Residential Development Right and a Residential Allocation to place a residential unit on a vacant parcel.[176] Having a Residential Allocation from the annual drawing, Suitum applied to TRPA for permission to construct a house on her property. TRPA denied her application, and the agency governing body denied relief when Suitum applied to it. After this denial, Suitum made no effort to sell any of the TDRs she held and did not apply for additional TDRs that she was eligible to receive.[177]

The issue before the Supreme Court was whether Suitum's claim was ripe given that she had not tried to transfer the TDRs she held or was eligible to receive.[178] The Court reversed the Ninth Circuit, which had held that Suitum did not obtain a final decision from TRPA.[179] As to the additional TDRs that Suitum may have obtained, the Supreme Court found that since Suitum would have to enter a lottery to obtain these rights, and that if the odds of success were low, Suitum's claim "could be kept at bay from year to year until she actu-

ally won the drawing; such a rule would allow any local authority to stultify the Fifth Amendment's guarantee."[180] As to Suitum's right to transfer her TDRs, the Court held that, although TRPA had the right to deny the transfer on the basis that the buyer's proposed use of the property was in violation of the statutory scheme, there was no question as to the "salability" of the TDRs and thus the case was ripe for adjudication.[181] Finally, under *Abbott Laboratories v. Gardner*,[182] the regulation clearly applied to Suitum's property and Suitum only had to test the enforceability of the scheme by bringing suit, so the claim was ripe.[183]

Date of Taking

As in direct condemnation, property taken inversely is valued as of the date seized, and interest accrues from that date. In *United States v. Dow*,[184] the Supreme Court considered the following claim. In March 1943 the federal government began proceedings and took possession of a 2.7-acre tract out of the 617-acre tract at issue, for use in laying a pipeline prior to formally taking the property by final order.[185] In November 1945 respondent purchased the 617-acre tract except for the pipeline tract subject to the condemnation proceedings.[186] In May 1946 the government filed a Declaration of Taking as to the pipeline strip and formally acquired the property.[187] Thus the government had actual possession prior to the respondent's purchase,[188] but respondent argued that the date of taking was the date the condemnor formally took title by a formal proceeding, not the date of actual possession. The Supreme Court disagreed and held, unanimously, that

> [T]itle to the property passes to the Government only when . . . the compensation is deposited into court pursuant to the Taking Act. . . . [T]he passage of title does not necessarily determine the date of "taking." The usual rule is that if the United States has entered into possession of the property prior to the acquisition of title, it is the former event which constitutes the act of taking. *It is that event which gives rise to the claim for compensation and fixes the date as of which the land is to be valued and the Government's obligation to pay interest accrues*.[189]

Policy considerations support fixing the date of taking at the earlier of the date of physical possession or the date that title transfers. The property value may decrease and the condemnor may take

advantage. As interest runs from the date of taking, a later date of taking absolves much of the interest that would otherwise be due.[190]

Statute of Limitations

Another consideration in inverse condemnation, as with garden-variety civil claims, is whether the taking claim is timely. Where the federal government is sued in inverse condemnation, the Tucker Act[191] imposes a six-year statute of limitations, including a claim for a violation of the Takings Clause.[192] The Act includes the process for filing in the Court of Federal Claims.[193] Inverse condemnation may also be brought against a state defendant (subject to sovereign immunity) in federal district court under 42 U.S.C. § 1988(a) (known as 42 U.S.C. § 1983 actions). The statute of limitations is determined by the state law in which the federal district court sits. In New York, for example, a claimant has three years to bring a claim for a violation of the taking clause and can assert other claims in that action if they are not time barred.[194]

In *Northwest Louisiana Fish & Game Preserve Commission v. United States*,[195] the claimant alleged that the Army Corps of Engineers had interfered with vegetation control in a lake. There were several possible dates to fix the taking, some of them outside of the six-year statute of limitations. The Court held that "when the damages from a taking only gradually emerge, e.g., as in recurrent flooding, a litigant may postpone a suit for a taking until 'the situation becomes stabilized' and 'the consequences of inundation have so manifested themselves that a final account may be struck.'"[196] Thus it was only when the "nature and extent of the harm" became clear that the claim accrued; that date, not before, was the date of taking.[197] The dissent disagreed on the facts and found that the date of taking occurred earlier because the claimant should have known that the government's action would have caused a vegetation problem.[198]

Burden of Proof

The landowner challenging a regulation carries a substantial burden to show that such action is unconstitutional.[199] Every regulation has a presumption of validity unless the challenger proves beyond a reason-

able doubt that the legislation is unconstitutional.[200] To show that in fairness and justice the burden should be spread among all of society is a fact-intensive analysis and should remain with the challenger of the regulation.[201]

The exception to this rule is in land use exaction cases where the burden may very well rest with the government agency. In *Dolan v. City of Tigard*, the Court held that while "[n]o precise mathematical calculation is required . . . the city must make some sort of individualized determination" that the required condition on the property "is related both in nature and extent to the impact of the [property owner's proposed use of the property]."[202] The Court held that the city had not made "any individualized determination to support" its imposition of requirements on a portion of Dolan's property, including the deprivation of Dolan's right to exclude others from her property. The city also did not show that this deprivation was reasonably related to the city's interest in reducing flooding problems along Fanno Creek.[203] With respect to the pedestrian/bicycle pathway the city required Dolan to build, the Court found that "the city [did] not [meet] its burden of demonstrating that the additional number of vehicle and bicycle trips generated by [Dolan's] development reasonably relate[d] to the city's requirement for a dedication of the pedestrian/bicycle pathway easement."[204] Although the city had estimated that Dolan's proposed development would create 435 additional traffic trips per day, it merely stated that the "creation of a pathway 'could offset some of the traffic demand . . . and lessen the increase in traffic congestion.'"[205]

Justice Stevens in his dissent, with Justice Blackmun and Justice Ginsburg, stated that the "Court should not isolate the burden associated with the loss of the power to exclude from an evaluation of the benefit to be derived from the permit to enlarge the store and the parking lot." An analysis of whether the pedestrian/bicycle pathway would decrease the traffic flow associated with Dolan's proposed development would amount to nothing more than estimates, whereas the "offsetting benefit [of the pathway] is entirely reasonable and should suffice whether it amounts to 100 percent, 35 percent or only 5 percent of the increase in automobile traffic that would otherwise occur."[206] In no uncertain terms, the dissent stated that this new burden imposed by the Court upon the government was a "micromanag[ing] [of] state decisions" which would be a "welcome mat to a significant new class of litigants."[207]

Judicial Taking

In 2010 the United States Supreme Court decided *Stop the Beach Renourishment, Inc. v. Florida Department of Environmental Protection*.[208] The question presented was whether the Florida Supreme Court's decision that there was no *de facto* taking of property was itself a "judicial taking." The U.S. Supreme Court decided the case with three nonmajority opinions, though there was agreement on one point: that the Florida Supreme Court's decision did not constitute a taking of property. [209]

This case dealt with the Beach and Shore Preservation Act passed by the Florida legislature in 1961, granting Florida's Department of Environmental Protection the right, in part, to provide funding for beach nourishment projects.[210] Under the Act, a Florida locality applies for funding for beach nourishment or restoration and a survey of the shoreline determines the "mean high water line." An "erosion control line" then determines the area of land to be protected.[211] Pursuant to the Act, the erosion control line becomes the dividing line between public property and property owned by the upland owners.[212]

The department placed the beaches of the cities of Destin and Walton on a list of critically eroded beaches,[213] and an erosion control line was established on the beaches at the surveyed mean high water line.[214] The erosion control line became the boundary separating publicly owned land and privately owned upland. The department issued a Notice of Intent to grant a permit with respect to work to be done on the newly created public beach land, specifically to bring dredged sand to the area and restore the critically eroded beaches.[215] Stop the Beach Renourishment, a nonprofit association of six owners of the targeted beachfront property, filed two petitions—one challenging the issuance of the permits and the other raising constitutional claims.[216] The association argued in part that the fixing of the new shoreline divested the property owners of common-law littoral rights.[217] The Supreme Court of Florida determined that the Act did not unconstitutionally deprive the owners of their littoral rights: under Florida law the "right to accretion and reliction is a contingent, future interest that only becomes possessory interest if and when land is added to the upland by accretion or reliction."[218]

The Supreme Court held that the Florida Supreme Court's decision in and of itself was a not a judicial taking. Justice Scalia stated in the plurality opinion that "[t]here is no taking unless petitioner can show that, before the Florida Supreme Court's decision, littoral-property owners had rights to future accretions and contact with the water superior to

the State's right to fill in its submerged land."[219] "Florida law as it stood before the decision below allowed the State to fill in its own seabed, and the resulting sudden exposure of previously submerged land was treated like an avulsion for purposes of ownership. The right to accretions was therefore subordinate to the State's right to fill."[220] Justices Kennedy, Sotomayor, Breyer, and Ginsburg agreed with these portions of Justice Scalia's opinion.[221]

Justice Scalia's opinion alone found that there could be a judicial taking: "If a legislature *or a court* declares that what was once an established right of private property no longer exists, it has taken that property, no less than if the State had physically appropriated it or destroyed its value by regulation."[222] Justice Kennedy, joined by Justice Sotomayor, and Justice Breyer argued in their separate opinions that this case did not require the Court to determine whether a judicial taking could exist.[223] Further, Justice Kennedy, joined by Justice Sotomayor, stated that the "power to select what property to condemn and the responsibility to ensure that the taking makes financial sense from the State's point of view . . . are matters for the political branches—the legislature and the executive—not the courts."[224] Instead, Justice Kennedy noted that if a judicial taking did not exist, it was the due process clause that "would likely prevent a State from doing 'by judicial decree what the Takings Clause forbids it to do by legislative fiat.'"[225] Justice Scalia responded that prior Supreme Court precedent prevents the use of substantive due process in this manner.[226] Justice Breyer warned that declaring the existence of judicial takings "would invite a host of federal takings claims without the mature consideration of potential procedural or substantive legal principles that might limit federal interference in matters that are primarily the subject of state law" and "threatens to open the federal court doors to constitutional review of many, perhaps large numbers of, state-law cases in an area of law familiar to state, but not federal, judges."[227]

While the question of whether a judicial taking could exist is still open, Justice Scalia's plurality opinion leaves room for much debate in the future.

Conclusion

This chapter for the most part focuses on federal inverse condemnation jurisprudence, but the law may vary considerably from state to state. The area of inverse condemnation is not clear-cut, and the case

law raises more issues than it resolves. The Court's debatable holding that *Lingle* does not overturn prior inverse condemnation decisions clearly leaves room for thought on future developments.

Notes

1. United States v. Clarke, 445 U.S. 253, 255 (1980).
2. Pennsylvania Coal Co. v. Mahon, 260 U.S. 393, 413, 415 (1922).
3. Armstrong v. United States, 364 U.S. 40, 49 (1960).
4. Mugler v. Kansas, 123 U.S. 623, 661 (1887).
5. Miller v. Schoene, 276 U.S. 272, 279–80 (1928) ("And where the public interest is involved preferment of that interest over the property interest of the individual, to the extent even of its destruction, is one of the distinguishing characteristics of every exercise of the police power which affects property.").
6. *See id.*
7. *See* Goldblatt v. Town of Hempstead, N.Y., 369 U.S. 590 (1962).
8. *See* Nat'l Board of Young Men's Christian Ass'ns v. United States, 395 U.S. 85, 93 (1969) (finding that there was no taking of private property in this circumstance under the test that "in any case where government action is causally related to private misconduct which leads to property damage—a determination must be made whether the government involvement in the deprivation of private property is sufficiently direct and substantial to require compensation under the Fifth Amendment.").
9. *See* Lucas v. South Carolina Coastal Council, 505 U.S. 1003, 1026 (1992).
10. 438 U.S. 104 (1978).
11. *See* Lingle v. Chevron U.S.A. Inc., 544 U.S. 528 (2005).
12. *Id.* at 538.
13. *Id.* at 540–42.
14. *Id.* at 542–43.
15. *See* Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419, 429–35 (1982).
16. *See id.* at 436.
17. *See id.* ("constitutional protection for the rights of private property cannot be made to depend on the size of the area permanently occupied").
18. 458 U.S. 419 (1982).
19. *Id.* at 422 (citations omitted).
20. Cablevision Sys. Corp. v. Federal Commc'ns Comm'n, 570 F.3d 83, 98 (2d Cir. 2009).
21. 328 U.S. 256 (1946).
22. *Id.*
23. 424 F.3d 1206 (Fed. Cir. 2005).
24. *Id.*

25. *Id.* at 1209–10.
26. *Id.* at 1217–18.
27. *Causby*, 328 U.S. at 265.
28. *Id.* at 264.
29. Pumpelly v. Green Bay & Miss. Canal Co., 80 U.S. (13 Wall.) 166 (1871) (holding that the construction of a dam that permanently flooded owner's property constituted a taking); United States v. Cress, 243 U.S. 316 (1917) (numerous floods of lands caused by governmental water project held to be a taking).
30. *See, e.g.,* 3775 Genesee Street, Inc. v. State, 99 Misc. 2d 59, 74–78, 415 N.Y.S.2d 575, 585–87 (Ct. Cl. 1979) (holding that if noise from aircrafts "reached a point where it caused substantial interference with the use of the surface, a landowner could seek compensation through an action in inverse condemnation"; however, finding that the claimant in this case did not proffer evidence necessary to show that the property's uses were affected by the noise); Fitzgarrald v. City of Iowa City, 492 N.W.2d 659, 663–65 (Iowa 1992) (finding that noise could amount to a taking although "every noise or interference with property as a result of overflying aircraft does not constitute a taking"; holding in this case that the claimant did not proffer evidence that the "overflying aircraft adversely affected the market value of plaintiffs' property" and thus there was no taking).
31. Lucas v. South Carolina Coastal Council, 505 U.S. 1003, 1014 (1992) (quoting Pennsylvania Coal Co. v. Mahon, 260 U.S. 393 (1922) and Northern Transp. Co. v. City of Chicago, 99 U.S. 635, 642 (1878)).
32. 505 U.S. 1003 (1992).
33. *Id.* at 1008.
34. *Id.* at 1007.
35. *Id.* at 1009.
36. *Id.* at 1029.
37. Lucas v. South Carolina Coastal Council, 309 S.C. 424, 427, 424 S.E.2d 484, 486 (1992).
38. *Id.* at 427–28, 424 S.E.2d at 486.
39. *Lucas*, 505 U.S. at 1064.
40. *Id.* at 1019 n.8 (citing *Penn Central*, 438 U.S. 104, 124 (1978), discussed *infra* in "*Penn Central* Takings").
41. 438 U.S. 104 (1978).
42. *Id.* at 109–11.
43. *Id.* at 113–14.
44. *Id.* at 115–16.
45. *Id.* at 117.
46. *Id.* at 119.
47. *Id.* at 121–22.
48. *Id.* at 124 (stating that a government action amounting to a physical invasion may more readily lay a claim for a taking than would "some public

program adjusting the benefits and burdens of economic life to promote the common good").

49. *Id.* at 136–37.
50. *Id.* at 135 ("The Landmarks Law's effect is simply to prohibit appellants or anyone else from occupying portions of the airspace above the Terminal, while permitting appellants to use the remainder of the parcel in a gainful fashion. This is no more an appropriation of property by government for its own uses than is a zoning law prohibiting, for 'aesthetic' reasons, two or more adult theaters within a specified area.") (citations omitted).
51. *Id.* at 139.
52. *Id.* at 142–49.
53. *Id.* at 150–51.
54. 317 U.S. 369, 373 (1943) (emphasis added).
55. 520 U.S. 725, 750 (1997) (emphasis in original).
56. 483 U.S. 825 (1987).
57. *Id.* at 828–29.
58. *Id.*
59. *Id.* at 829.
60. *Id.* at 830.
61. *Id.* at 836–37.
62. *Id.* at 838–39.
63. *Id.* at 841–42.
64. 512 U.S. 374 (1994).
65. *Id.* at 378.
66. *Id.* at 380.
67. *Id.* at 386.
68. *Id.* at 377.
69. *Id.* at 391. The Court found some states' standards, such as New York's standard, "too lax to adequately protect petitioner's right to just compensation." *Id.* at 389.
70. *Id.* at 391.
71. *Id.* at 392–97.
72. *See Lingle*, 544 U.S. at 547 (emphasis in original).
73. *Id.* (quoting *Dolan*, 512 U.S. at 385).
74. *Id.* at 547–48.
75. *Id.* at 545.
76. 482 U.S. 304 (1987).
77. *Id.* at 307, 319.
78. *Id.* at 310 (finding that due to the posture of the cases, the Court never addressed the remedial question in *MacDonald, Sommer & Frates v. Yolo County*, 477 U.S. 340 (1986), or *Agins v. Tiburon*, 447 U.S. 255 (1980) (the "substantially advances" test in *Agins* was later abrogated by *Lingle*, 544 U.S. at 540)).

79. *Id.* at 318–19.
80. *Id.* at 319.
81. 535 U.S. 302, 311.
82. *See* 8 Nichols on Eminent Domain § G14E.04[9][b], at 76–78 (3d ed. 2001).
83. *See Tahoe-Sierra*, 535 U.S. at 312.
84. *See id.*
85. *See id.*
86. *See id.* at 312–13.
87. *See id.* at 320.
88. *See id.* at 312. The landowners attempted to amend their complaint at the district court level, but their attempt was denied because those claims were time barred. *See id.* at 313–14 n.7.
89. *See id.* at 321.
90. *See id.* at 322 (citing *Penn Central*, 438 U.S. at 124).
91. 505 U.S. 1003.
92. *See Tahoe-Sierra*, 535 U.S. at 325.
93. *See id.* at 326 (citing *Lucas*, 505 U.S. at 1015 and *Penn Central*, 438 U.S. at 124; concurring opinion of Justice O'Connor in Palazzolo v. Rhode Island, 533 U.S. 606, 636 (2001), stating that regulatory takings cases require examination of a number of factors).
94. *Id.* at 331.
95. *See id.* at 330 (citing *Lucas*, 505 U.S. at 1019–20).
96. *See id.* at 334.
97. *See id.* at 332.
98. *Id.*
99. *Id.* at 342. The Court specifically noted that a moratorium that lasted for over a year should be viewed with "special skepticism" but that the Court would not establish a categorical rule that such action was unconstitutional. *See id.* at 341.
100. *See id.* at 337.
101. *See id.* at 344.
102. *See id.* at 347.
103. *See id.* at 356.
104. 272 U.S. 365 (1926).
105. *Id.* at 379.
106. *Id.* at 379–80.
107. *Id.* at 382.
108. *Id.* at 384.
109. *Id.* at 384–85 (the property had a market value of about $10,000 per acre for industrial use but $2,500 per acre for residential use).
110. *Id.* at 386 (the claim was not termed as one of inverse taking *per se*, although the language used by the claimant seems to imply just that: whether the ordinance violated "'the right of property in the appellee by attempted

regulations under the guise of the police power, which are unreasonable and confiscatory'").
111. *Id.* at 387.
112. *Id.* at 394.
113. *Id.* at 395.
114. *Id.* at 389 (the Court reasoned that the inclusion of all types of industries were necessary for "effective enforcement" because the "bad" and the "good" industries are not "capable of being readily distinguished and separated in terms of legislation").
115. 391 F. Supp. 2d 109 (D.D.C. 2005).
116. *Id.* at 110 (the condition was contained in the board's final order, an amended version of its initial order).
117. *Id.* (the university filed suit from the initial order and amended its complaint once the order was finalized).
118. *Id.* at 112–13.
119. *Id.* at 112–13.
120. *Id.* at 113. *See* "*Penn Central* Takings" section earlier in this chapter.
121. *Id.*
122. *Id.* (the board had "expressed concern" in 1985 about the university's growth).
123. *Id.* at 114.
124. 33 U.S.C. §§ 1311(a), 1362(7) and (11) (2006).
125. *Id.* § 1344(f)(2).
126. 547 U.S. 715 (2006).
127. *Id.* at 742.
128. 474 U.S. 121, 123 (1985).
129. *Id.* at 127.
130. *Id.* at 128–29 (finding that a claim for compensation could be brought through the Tucker Act, 28 U.S.C. § 1491).
131. *Id.*
132. 444 U.S. 164 (1979).
133. *Id.* at 165–66.
134. *Id.* at 167.
135. *Id.* at 168.
136. *Id.* at 168–69.
137. *Id.* at 169.
138. *Id.* at 179–80.
139. *Id.* at 178 (quoting Pennsylvannia Coal Co. v. Mahon, 260 U.S. 393 (1922)).
140. 533 U.S. 606, 611 (2001).
141. *Id.* at 614–15.
142. *Id.* at 614–15.
143. *Id.* at 615 (quoting section 130A(1) of the Rhode Island Coastal Resources Management Program).
144. *Id.*

145. *Id.* at 616. The aspects of this decision dealing with the ripeness of the landowner's takings claim are discussed in the "Ripeness" section below.
146. *Id.* at 626.
147. *Id.* at 614.
148. *Id.* at 628.
149. *Id.* at 631.
150. *Id.*
151. *See* N.Y. Envtl. Conserv. Law § 24-0107 (McKinney 2006) (hereinafter ECL).
152. *Id.* § 25-0103(1)(a).
153. *Id.* §§ 24-0701, 25-0403.
154. *Id.* §§ 24-1105, 25-0404 (if the court finds the determination of the commissioner to be a taking without compensation, the court may, at the commissioner's election, set aside the order or require the commissioner to take the property by the power of eminent domain). An action to review the denial of a permit may be brought under article 78 of New York's Civil Practice Law and Rules, except that the ECL shortens the statute of limitations from four months under the Civil Practice Law and Rules to 30 days. A party seeking review of any orders or decisions of the Commissioner of Environmental Conservation or the local government as to the use of a freshwater wetland under article 24 has the additional remedy (besides an article 78 proceeding) to seek review before the Freshwater Wetlands Appeals Board. *See* ECL §§ 24-1101, 24-1103.
155. De St. Aubin v. Flacke, 68 N.Y.2d 66, 78, 496 N.E.2d 879, 886 (1986).
156. *See* Basile v. Town of Southampton, 89 N.Y.2d 974, 976, 678 N.E.2d 489 (1997) (landowner purchased 12 acres of tidal wetlands as determined by article 25 of the ECL, and the Town of Southampton condemned the property by the power of eminent domain; the claimant argued that the wetlands restrictions effected a taking; court of appeals held that "[s]ince claimant took title to her property subject to wetlands regulations and the encumbrances of certain covenants, she cannot claim the value of the property without such restrictions."); Gazza v. New York State Dep't of Envtl. Conservation, 89 N.Y.2d 603, 607, 619, 679 N.E.2d 1035, 1036, 1043 (1997) (owner purchased property of which 65 percent was tidal wetlands under article 25 of the ECL at the time of purchase; the court of appeals held that the denial of setback variances did not effect a taking because the property "was, at most, diminished as restricted by the [wetlands] regulations" and the owner was aware of the "inherent limitations" when he purchased property).
157. *See* Friedenburg v. New York State Dep't of Envtl. Conservation, 3 A.D.3d 86, 99, 767 N.Y.S.2d 451, 461 (2003) ("Because the impact is so severe in this case, it is clear that a taking has taken place as the petitioners are bearing the brunt of the burden . . . [and have] established a taking pursuant to the pre-*Lucas* balancing test.").
158. *See Air Pegasus*, 424 F.3d at 1212–13.

159. *See* Foss v. Nat'l Marine Fisheries Serv., 161 F.3d 584, 588 (9th Cir. 1998) (finding a property interest where the government could not deny an application where owner met requirements); *but see* Am. Pelagic Fishing Co., L.P. v. United States, 379 F.3d 1363, 1377 (Fed. Cir. 2004) (finding that appellee could not have a property interest in the fishing permits, among other things, because it did not have authority to assign, sell, or transfer those permits, nor did it hold an interest in the vessel itself, but rather fishermen "simply were enjoying a use of their property that the government chose not to disturb.").
160. U.S. Trust Co. of New York v. New Jersey, 431 U.S. 1, 19 n.16 (1977) (citing Contributors to Pa. Hosp. v. City of Philadelphia, 245 U.S. 20 (1917)).
161. Ruckelshaus v. Monsanto Co., 467 U.S. 986, 1003–04 (1984) (held that "to the extent that [appellee] has an interest in its health, safety and environmental data cognizable as a trade-secret property right under Missouri law, that property right is protected by the Taking Clause of the Fifth Amendment").
162. *See Loretto*, 458 U.S. at 435.
163. *Palazzolo,* 533 U.S. at 618 (quoting Williamson County Reg'l Planning Comm'n v. Hamilton Bank of Johnson City, 473 U.S. 172 (1985)).
164. *Id.* at 622 (quoting MacDonald, Sommer & Frates v. Yolo County, 477 U.S. 340, 348 (1986)).
165. *Palazzolo*, 533 U.S. at 620.
166. *See* Anaheim Gardens v. United States, 444 F.3d 1309, 1316 (Fed. Cir. 2006).
167. *Palazzolo*, 533 U.S. at 622.
168. 483 U.S. 825, 827–28.
169. *Id.* at 828.
170. *Id.*
171. *Id.*
172. *Id.*
173. *Id.*
174. *Id.* at 829.
175. 520 U.S. 725.
176. *Id.* at 730.
177. *Id.* at 731.
178. *Id.* at 728–29.
179. *Id.* at 733.
180. *Id.* at 741 (instead "the value attributable to the allocation Suitum might or might not receive in the drawing would simply be discounted to reflect the mathematical likelihood of her obtaining one.").
181. *Id.*
182. 387 U.S. 136 (1967) (requiring ripeness to be subject to a two-prong test, namely that fitness of the issues for judicial decision be evaluated and that the hardship to the parties of withholding court consideration also be eval-

uated), *overruled on other grounds by* Califano v. Sanders, 430 U.S. 99, 105 (1977).
183. *Suitum*, 520 U.S. at 744.
184. 357 U.S. 17 (1958).
185. *Id.* at 18–19.
186. *Id.* at 19.
187. *Id.*
188. *Id.* at 22. In *Dow*, under the Declaration of Takings Act, the government took formal title to the property by filing a declaration of taking covering the pipeline strip. *Id.* at 19.
189. *Id.* at 21–22 (emphasis added).
190. *Id.* at 24–25.
191. *See* Dahn v. United States, 127 F.3d 1249 (10th Cir. 1997); 28 U.S.C. §§ 1491 *et seq.*
192. *See* 28 U.S.C. § 2501.
193. *Id.* §§ 1491 *et seq.*
194. *See* Court of Claims Act § 11; N.Y. Em. Dom. Proc. Law § 503(A) (McKinney 2011). In the case of an inverse condemnation, this means three years after the owner was stripped of the essential elements of ownership. Even if there is a later *de jure* condemnation, the three-year statute of limitations still applies to the *de facto* taking. *See* Carr v. Town of Fleming, 122 A.D.2d 540, 504 N.Y.S.2d 904 (1986).
195. 446 F.3d 1285 (Fed Cir. 2006).
196. *Id.* at 1290–91 (quoting United States v. Dickinson, 331 U.S. 745, 749 (1947)).
197. *Id.* at 1291.
198. *Id.* at 1293.
199. *See* Eastern Enters. v. Apfel, 524 U.S. 498, 523 (1998).
200. *See, e.g.*, Union Nat'l Bank v. Gallatin, 99 U.S. 700 (1878); *de St. Aubin*, 68 N.Y.2d at 76, 496 N.E.2d at 864.
201. Eastern Enters. v. Apfel, 524 U.S. 498, 523 (1998).
202. 512 U.S. at 391.
203. *Id.* at 39.
204. *Id.* at 395.
205. *Id.*
206. *Id.* at 402–03, 405.
207. *Id.* at 405.
208. 130 S. Ct. 2592 (2010).
209. *Id.*
210. Fla. Stat. § 161.34 (1965); *see also Stop the Beach Renourishment Inc.*, 130 S. Ct. at 2599.
211. Walton County v. Stop the Beach Renourishment, Inc., 998 So. 2d 1102, 1106 (Fla. 2008).
212. *Id.*

213. *Id.*
214. *Id.*
215. *Id.*
216. *Id.*
217. *Id.* at 1107.
218. *Id.* at 1112.
219. 130 S. Ct. at 2611.
220. *Id.*
221. *Id.* at 2613, 2618.
222. *Id.* at 2602.
223. *Id.* at 2613, 2618.
224. *Id.* at 2614.
225. *Id.* at 2615.
226. *Id.* at 2606.
227. *Id.* at 2618–19.