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Does the Alaska Constitution Provide Broader Protection for Taking or Damage of Property? An Analysis

Lawrence V. Albert*

INTRODUCTION

The federal and state courts are charged under the Takings Clause to protect property from governmental action that unreasonably interferes with rights of ownership and use. Historically, the Takings Clause was interpreted to refer to eminent domain, i.e., formal actions to acquire property and physical occupation or seizure of property in the absence of formal condemnation. Through the beginning of the twentieth century, courts interpreted the government's exercise of regulatory authority over property to not interfere with the owners' rights where basic elements of due process were satisfied. The Supreme Court eventually recognized that the police power was not immune from takings protection.

In the last 30 years, takings law has been transformed with the expansion of regulatory programs concerning conservation, resources management, and environmental protection. Modern takings law has also been applied to a variety of financial and personal interests apart from real property. Unfortunately, takings law has become one of the most convoluted subjects in constitutional law due to these factors, coupled with the Supreme Court's acknowledged difficulty in establishing ground rules for takings protection.¹ Complicating

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1. See e.g. *San Diego Gas & Elec. Co. v. City of San Diego*, 450 U.S. 621, 649–651 n. 15 (1981) (Brennan, J., dissenting) (“the attempt to differentiate 'regulation' from 'taking' [is] the most haunting jurisprudential problem in the field of contemporary land use law”); Richard Lazarus, *Putting the Correct “Spin” on Lucas*, 45 Stan. L. Rev. 1411, 1432 (1993) (“The Court's inability to develop a

this difficulty has been the judiciary's reluctance to impose liability rules that financially burden governments from discharging their functions.²

Many state constitutions, including Alaska's, protect property from either taking or damage.³ Article I, § 18 of the Alaska Constitution states, "Private property shall not be taken *or damaged* for public use without just compensation" (emphasis added). According to the Alaska Supreme Court, the presence of the damage clause confers broader protection to private property than the Takings Clause in the U.S. Constitution. However, the Alaska Court's decisions have neither clearly applied the damage clause nor differentiated between state and federal takings protection so as to effectively delineate the broader rights available under the Alaska Constitution.

Nonetheless, the Alaska Supreme Court has developed a takings jurisprudence associated with contemporaneous developments in federal takings law. Since statehood in 1959, the Alaska Supreme Court has issued over 30 takings decisions interpreting the Alaska or U.S. Constitutions.⁴ While the Alaska

coherent, consistent framework for takings analysis is symptomatic of a deeper flaw in the Court's thinking"); Frank Michelman, *Property, Utility and Fairness: Comments on the Ethical Foundations of "Just Compensation" Law*, 80 Harv. L. Rev. 1165, 1170 (1967) ("The results [of takings decisions], if thus explainable, are nonetheless liberally salted with paradox").

2. See e.g. *Penn. Coal Co. v. Mahon*, 260 U.S. 393, 413 (1922) ("Government could hardly go on if to some extent values incident to property could not be diminished without paying for every such change in the general law"); *Tahoe Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency*, 535 U.S. 302, 324 (2002) ("Treating . . . all [land use regulations] as *per se* takings would transform government regulation into a luxury few governments could afford").

3. See 2A Julius Sackman, *Nichols on Eminent Domain* § 6.01[12][c] (3d ed., Matthew Bender 2008) (emphasis added).

4. E.g. *Hageland Aviation Serv., Inc. v. Harms*, 210 P.3d 444 (Alaska 2009); *Anderson v. C. Bering Sea Fishing Assn.*, 78 P.3d 710 (Alaska 2003); *R & Y, Inc. v. Mun. of Anchorage*, 34 P.3d 289 (Alaska 2001); *Beluga Mining v. St. Dept. of Nat. Resources*, 973 P.2d 570 (Alaska 1999); *Anchorage v. Sandberg*, 861 P.2d 554 (Alaska 1993); *St. Dept. of Nat. Resources v. Arctic Slope Regl. Corp.*, 834 P.2d 34 (Alaska 1992); *St. v. Doyle*, 735 P.2d 733 (Alaska 1987).

Court has found takings in several cases,⁵ its ascertainment of liability has varied due to several factors borrowed from federal takings precedent along with rules developed by the Alaska Court. The Alaska Supreme Court's uneven application of Alaska versus federal takings law has produced ambiguity regarding the extent of property protection under the Alaska versus the U.S. Constitution.

This article is developed as follows: a synopsis of federal takings law is provided along with a review of the Supreme Court's understanding of "private property" subject to the Takings Clause. First discussed is the threshold issue of property interests protected under the Alaska Constitution in comparison to the Takings Clause and the possible ramifications for substantive protection from "taking or damage." The analysis then traces the Alaska Court's application of federal takings principles along with the key factors articulated in federal takings law. Thereafter, the Alaska Court's claim of broader protection for damage under the Alaska Constitution is critically evaluated. Finally, the issue of broader protection in Alaska is analyzed through just compensation as opposed to a taking. The conclusion is that the Alaska Supreme Court has failed to articulate broader protection for regulatory interference with property rights under its constitutional damage clause.

5. See *Hageland* 210 P.3d at 459–461 (retrospective legislation nullified a property interest in accrued causes of action); *Tlingit-Haida Regional Electr. Auth. v. Alaska*, 15 P.3d 754, 764–766 (Alaska 2001) (public utility decertification order resulted in stranded facility); *City of Kenai v. Burnett*, 860 P.2d 1233, 1240–1242 (Alaska 1993) (revocation and destruction of express easement between the city and a developer); *Bakke v. Alaska*, 744 P.2d 655, 656–657 (Alaska 1987) (landslide damage resulted in physical invasion); *DeLisio v. Super. Ct. of Alaska*, 740 P.2d 437, 442–443 (Alaska 1987) (appropriation of a person's labor); *Alaska v. Doyle*, 735 P.2d 733, 735–737 (Alaska 1987) (airplane overflights manifested navigational easement); *Wernberg v. Alaska*, 516 P.2d 1191, 1200–1201 (Alaska 1974) (destruction of littoral access).

I. SYNOPSIS OF FEDERAL TAKINGS LAW⁶A. *The Foundation of Modern Takings Law:
Mahon and Penn Central*

At the beginning of the twentieth century, the U.S. Supreme Court interpreted the Takings Clause as referring to condemnation actions, and in the absence of formal condemnation, only those governmental actions that resulted in physical invasion to real property.⁷ Thus, exercise of the police power to protect public health, safety, and welfare did not result in a taking where due process concerns were satisfied.⁸ The U.S. Supreme Court first concluded that regulatory interference with private property could result in a taking in *Pennsylvania Coal Co. v. Mahon*.⁹ Writing for the Court, Justice Holmes declared that “while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking.”¹⁰ In *Mahon*, Pennsylvania legislation protected surface structures from subsidence due to underground coal mining.¹¹ Reasoning the legislation “purports to abolish what is recognized in Pennsylvania as an estate in land—a very valuable

6. There is a vast literature on federal takings law. See generally Robert Meltz, *Takings Law Today: A Primer for the Perplexed*, 34 *Ecol. L.Q.* 307 (2007); Jan Laitos, *Law of Property Rights Protection: Limitations on Governmental Powers* (Aspen 1998 & Supp. 2003); Steven J. Eagle, *Regulatory Takings* (3d ed. Mathew Bender 2005). The synopsis here is ventured solely for the purpose of evaluating Alaska Supreme Court decisions.

7. See *Pumpelly v. Green Bay Co.*, 80 U.S. 166 (1887) (permanent flooding of property constituted a taking); see also *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 427–28 (1982) (discussing early takings cases involving physical invasion of property); *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1014 (1992) (discussing early interpretation of the Takings Clause).

8. See e.g. *Mugler v. Kan.*, 123 U.S. 623, 665–70 (1887).

9. *Mahon*, 260 U.S. at 415.

10. *Id.* Justice O'Connor has since described Justice Holmes' statement in *Mahon* as a “storied but cryptic formulation.” *Lingle v. Chevron USA, Inc.*, 544 U.S. 528, 537 (2005).

11. *Mahon*, 260 U.S. at 412–413.

estate,” the *Mahon* Court held a taking had occurred.¹²

Modern takings law can be traced to the U.S. Supreme Court's 1978 seminal decision, *Penn Central Trans. Co. v. City of New York*.¹³ In *Penn Central*, the Court acknowledged the Takings Clause posed a “problem of considerable difficulty,” wherein it “has been unable to develop any set formula.”¹⁴ Consequently, whether there has been a taking “depends largely upon the particular circumstances” to which the Court must apply “essentially ad hoc, factual inquires.”¹⁵ *Penn Central* identified “several factors that have particular significance” in the Court’s takings analyses, including: “[t]he economic impact of the regulation on the claimant,” “the extent to which the regulation has interfered with distinct investment backed expectations,” and “the character of the governmental action.”¹⁶ Now known as the “*Penn Central* factors,” the ad-hoc analysis pronounced by the Court’s 1978 decision has substantially guided federal takings law ever since.¹⁷

B. *Lucas and Loretto: Per Se Takings*

Subsequent to *Penn Central*, the Supreme Court developed two categories of governmental action that qualify as a taking in the absence of “case specific inquiry,” i.e., analysis according to the *Penn Central* factors. The first category of *per se* taking was established in *Loretto v. Teleprompter Manhattan CATV Corp.* and pertains to governmental action that manifests a physical invasion

12. *Id.* at 414.

13. *Penn Central Trans. Co. v. City of New York*, 438 U.S. 104 (1978).

14. *Id.* at 124.

15. *Id.* (citations omitted).

16. *Id.*

17. *See e.g. Tahoe-Sierra*, 535 U.S. at 326–27, 335–336 (discussing *Penn Central* and the Court’s continued utilization of its three factors for case specific inquiry where a *per se* taking is not alleged).

and results in a permanent occupation of private property.¹⁸ The second category of *per se* taking involves governmental regulation that denies an owner all economically beneficial or productive use of its property and was established in *Lucas v. South Carolina Coastal Council*.¹⁹ In *Tahoe-Sierra*, the Court subsequently qualified the latter *per se* taking category by expressly limiting its application to “extraordinary circumstance[s].”²⁰

In *Loretto*, the U.S. Supreme Court held “a permanent physical occupation authorized by the government is a taking without regard to the public interests that it may serve.”²¹ *Loretto* concerned a New York statute that required landlords to allow cable service in their buildings for tenant use through a nominal \$1 charge.²² An apartment building owner challenged the statute as a taking due to the cable company’s installation of a cable box and associated equipment without her consent and without just compensation.²³ The Court agreed and struck down the New York law as a taking.²⁴ Drawing on its takings precedent and *Penn Central*’s formulation, *Loretto* ruled the character of the governmental action in cases of permanent physical occupation is determinative of a taking.²⁵ In support, the Court applied traditional property law and takings precedent for the proposition that permanent physical occupation abridges an owner’s right to quiet enjoyment, exclusive possession, and control of the premises.²⁶ *Loretto* differentiated the Court’s traditional rule regarding non-compensable police power regulation of property from situations where no permanent physical invasion

18. *Loretto v. Teleprompter Manhattan CATV Corp*, 458 U.S. 419 (1982).

19. *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992).

20. *Tahoe-Sierra*, 535 U.S. at 330.

21. *Loretto*, 458 U.S. at 426.

22. *Id.* at 421.

23. *Id.* at 424.

24. *Id.* at 426, 438.

25. *Id.* at 426.

26. *Id.* at 435–436 (citing *Restatement of Property* § 7 (1936); *Kaiser Aetna v. U.S.*, 444 U.S. 164, 179–180 (1979); *Andrus v. Allard*, 444 U.S. 51, 65–66 (1979); *U.S. v. Gen. Motors*, 323 U.S. 373, 378 (1945)).

occurred.²⁷

Lucas concerned a South Carolina coastal management statute that regulated property located in sand dunes which had been subject to beach erosion.²⁸ The owner had purchased two residential lots in an approved subdivision prior to the enactment.²⁹ At the time, the adjacent lots in the subdivision had been developed. The owner later applied for a development permit and was denied the permit under the coastal management law. The record was undisputed that the permit denial destroyed any economic use to the owner's residential lots.³⁰ The South Carolina Supreme Court upheld the regulation as a police power intended to prevent public harm associated with coastal development.³¹ The Supreme Court reversed, adopting Justice Brennan's dissent in an earlier decision, and ruled that total deprivation of beneficial use to property is the functional equivalent of a physical appropriation.³² In so concluding, the Court determined that neither *Mahon's* fairness principle nor *Penn Central's ad hoc* inquiry could be satisfied when the government deprives a landowner of all economically beneficial use of his property.³³

27. *Id.* at 430, 440.

28. *Lucas*, 505 U.S. at 1008–1009.

29. *Id.* at 1006.

30. *Id.* at 1009, 1020.

31. *Id.* at 1010 (quoting *Lucas v. South Carolina Coastal Council*, 404 S.E.2d 895, 896, 898–899 (S.C. 1991)); *Id.* at 1020–1021.

32. *Lucas*, 505 U.S. at 1017 (citing *San Diego Gas & Electr. Co. v. City of San Diego*, 450 U.S. 621, 652 (1981) (Brennan, J., dissenting)). The court also noted prior dicta to the same effect. *Id.* at 1015–1016 (citing, *inter alia*, *Nollan v. Calif. Coastal Commn.*, 483 U.S. 825, 834 (1987); *Keystone Bituminous Coal Assn. v. DeBenedictus*, 480 U.S. 470, 495 (1987)).

33. *Id.* at 1017–1018 (citing *Penn Central*, 438 U.S. at 124; *Mahon*, 260 U.S. at 415). *Lucas* separately justified its total taking rule under English common law: “[f]or what is the land but the profits thereof[?]” *Id.* (quoting E. Coke, *Institutes* vol. 1, ch. 1, § 1 (1st Am. ed.1812)).

*C. Protected Property Interests after Lucas:
Background Principles of State Law and the Nuisance Exception*

Aside from announcing a new rule on *per se* takings, *Lucas* reviewed the Supreme Court's precedent on "noxious use" logic.³⁴ According to *Lucas*, "many of [the Court's] prior opinions have suggested that 'harmful or noxious uses' of property may be proscribed by government regulation without the requirement of compensation."³⁵ However, the Court determined that its traditional harm prevention rationale would be no longer tenable as a police power regulation where property was sacrificed for conservation purposes and a common law nuisance was not demonstrated.³⁶ *Lucas* reasoned:

[T]he distinction between regulation that 'prevents harmful use' and that which 'confers benefits' is difficult, if not impossible, to discern on an objective, value-free basis; [therefore,] it becomes self-evident that noxious-use logic cannot serve as a touchstone to distinguish regulatory 'takings'—which require compensation—from regulatory deprivations that do not require compensation.³⁷

Having discarded "noxious use logic" as a police power rationale, *Lucas* then constructed a separate justification for limitations on property use.³⁸ According to the Court, a "logically antecedent inquiry into the nature of the owner's estate" is necessary to ascertain whether a total use prohibition burdened the title upon acquisition.³⁹ At this juncture, *Lucas* identified "background principles of the State's law of property and nuisance" as legitimate

34. *Lucas*, 505 U.S. at 1022, 1026.

35. *Id.* at 1022.

36. *Id.* at 1024–1026.

37. *Id.* at 1026.

38. *Id.* at 1027–1032.

39. *Id.* at 1027.

restrictions on property use.⁴⁰ Even when regulatory action eliminates all beneficial use, *Lucas* held the action will be sustained against a takings challenge where the land use was “proscribe[d] . . . under relevant property and nuisance principles.”⁴¹ As discussed later in this article, the Court’s new rule regarding background principles becomes significant in ascertaining the presence or absence of constitutionally protected property for takings purposes.⁴²

D. *Investment-Backed Expectations as a Penn Central Factor and Monsanto’s Notice Rule*

Penn Central did not clearly explain the application of investment-backed expectations in case specific taking inquiry.⁴³ Instead, the Court cited precedent wherein property value was either destroyed or rendered useless as examples of “public policies [that] may so frustrate distinct investment-backed expectations as to amount to a ‘taking.’”⁴⁴ In *Penn Central*, the New York City Landmarks Preservation Board had imposed a historic preservation ordinance on the Grand Central Terminal.⁴⁵ *Penn Central Transportation Co.* claimed the ordinance constituted a taking because it was not allowed to build an office tower above the

40. *Lucas*, 505 U.S. at 1029.

41. *Id.* at 1029–1030.

42. *See infra*, pt. II(B).

43. *See Penn Central*, 438 U.S. at 124–128; *see also* Daniel Mandelker, *Investment Backed Expectations in Takings Law*, 27 Urb. Law. 215, 216–217 (1995) (interpretation of *Penn Central*’s intent on investment expectations).

44. *Penn Central*, 438 U.S. at 127–128 (citing *Mahon*, 260 U.S. at 414–415; *Armstrong v. U.S.*, 364 U.S. 40 (1960); *Hudson Water Co. v. McCarter*, 209 U.S. 349 (1908)). *Penn Central*’s examples of interference with investment backed expectations describe economic impact only, and thus, do not shed light on constitutionally protected investment expectations apart from economic impact.

45. *Penn Central*, 438 U.S. at 115–118.

terminal building, which bore a beaux-art architectural design.⁴⁶ *Penn Central* suggests the owner's investment expectations were preserved because the terminal building and railroad operations earned a reasonable return and were allowed to continue pursuant to the city's ordinance.⁴⁷ Also, the Court ruled the owner's investment expectations would not be measured solely by its asserted property interest in the office tower, but instead, by the "extent of the interference with rights in the parcel as a whole—here, the city tax block designated as the 'landmark site.'"⁴⁸

The U.S. Supreme Court first reviewed its investment-backed expectations factor in *Ruckelshaus v. Monsanto Co.*⁴⁹ *Monsanto* concerned trade secret protection associated with pesticides registered for commercial use under federal environmental law.⁵⁰ As registrant, the Monsanto Company contended the government's utilization or disclosure of its proprietary submissions after a designated period constituted a taking.⁵¹ The Court rejected the company's claim, stating Monsanto lacked investment-backed expectations regarding confidential information it provided the government in exchange for a federal permit, especially because the enabling legislation expressed no promise or guarantee of preserving confidentiality.⁵² Moreover, it concluded "Monsanto was on notice of the manner in which the EPA was authorized to use and disclose any data turned over to it by an applicant for registration."⁵³

Monsanto was thereafter interpreted in literature and precedent as establishing a "notice rule" whereby a person acquiring

46. *Id.* at 118–119.

47. *Id.* at 129 n. 26, 136.

48. *Id.* at 130–131 n. 27. *Penn Central's* "investment backed expectations" factor derives from Professor Michelman's 1967 law review article. *Id.* at 128 (citing Michelman, *supra* n. 1, at 1229–1234); see also Robert Washburn, 'Reasonable Investment Backed Expectations' as a Factor in Defining Property Interest, 49 Wash. U. J. Urb. & Contemp. L. 63, 66–67 (1996) (explaining Michelman derivation); Eagle, *supra* n. 6, at § 7:13(b) (same).

49. *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986 (1984).

50. *Id.* at 994–996.

51. *Id.* at 998–999.

52. *Id.* at 1006–1007.

53. *Id.* at 1006.

property subject to a pre-existing regulation is deemed to lack investment-backed expectations, and a taking challenge in such situation would therefore be rejected.⁵⁴ A stronger version of *Monsanto*'s notice rule states that a person imparted foreseeability of future regulation in a presently regulated industry has no investment-backed expectations.⁵⁵ Some have argued the notice rule, taken to its logical extreme, results in all property being disqualified from any reasonable investment expectations due to our modern regulatory state.⁵⁶ Fortunately, *Mahon* bars such a conclusion because, "if regulation goes too far it will be recognized as a taking."⁵⁷

Many commentators have criticized *Penn Central*'s investment-backed expectations principle as problematic or

54. *E.g. Creppel v. U.S.*, 41 F.3d 627, 632 (Fed. Cir. 1994) ("One who buys [property] with knowledge of a restraint assumes the risk of economic loss"); *accord Good v. U.S.*, 189 F.3d 1355, 1360–1361 (Fed. Cir. 1999) (where sales contract of coastal wetlands recited difficulties in obtaining fill permits, the buyer lacked investment expectations in light of *Monsanto*); *see also* Steven J. Eagle, *The Regulatory Takings Notice Rule*, 24 U. Haw. L. Rev. 533, 533, 562–563 (2002); Washburn, *supra* n. 48, at 76–82 (discussing the notice rule); Mandelker, *supra* n. 43, at 218–219, 222.

55. *E.g. Connolly v. Pension Benefit Guaranty Corp.*, 475 U.S. 211, 227 (1986) ("[t]hose who do business in the regulated field cannot object if the legislative scheme is buttressed by subsequent amendments to achieve the legislative end").

56. *E.g. Dist. Intown Prop., Ltd. v. Dist. of Columbia*, 198 F.3d 874, 886 (D.C. Cir. 1999) (Williams, J., concurring) ("the majority's analysis begs the question of whether any landowner, in a world where zoning regulations are prevalent, could ever again argue that a particular regulation was 'unexpected'"); *see also* J. David Breemer and R.S. Radford, *The (Less?) Murky Doctrine of Investment Backed Expectations after Palazzolo, and the Lower Courts' Disturbing Insistence in Wallowing in the Pre-Palazzolo Muck*, 34 Sw. L. Rev. 351, 357–360 (2005); Richard Epstein, *Lucas v. South Carolina Coastal Council: A Tangled Web of Expectations*, 45 Stan. L. Rev. 1369, 1370–1371 (1993).

57. *Mahon*, 260 U.S. at 415.

incoherent, resulting in divided precedent and confusion in the law.⁵⁸ According to Professor Mandelker, the investment-backed expectations factor is capable of multiple interpretations, including: the landowner's expectations at the time of purchase; vested interest in a contemporaneous regulatory approval; assumption of regulatory risk upon acquisition of title; and expectations derived from statutes and regulations passed by legislatures and agencies.⁵⁹ Professor Laitos interprets the investment expectations factor to include the following factual variables: (1) the nature and degree of the legal change; (2) the amount of loss experienced by the property owner; (3) the extent to which the change is unexpected; and (4) whether the owner's expectations are reasonable.⁶⁰ Even Justice Kennedy acknowledged "an inherent tendency towards circularity" in the concept of investment-backed expectations, i.e., that expectations reflect the judiciary's *a priori* interpretations of property transactions rather than some objective measurement of market activity involving the same.⁶¹

E. Palazzolo and its Revision of the Notice Rule
as a Takings Defense

Due apparently to complications associated with the notice rule, the U.S. Supreme Court in 2000 granted certiorari in *Palazzolo v. Rhode Island*⁶² to revisit *Penn Central*'s investment expectations factor. *Palazzolo* decided the notice rule was overly broad and held

58. See e.g. Daniel Mandelker, *Investment Backed Expectations in Takings Law*, in *Takings: Land Development Conditions and Regulatory Takings after Dolan and Lucas*, 119, 119 n. 2 (David L. Callies ed., American Bar Association 1996); Laitos, *supra* n. 6, at §§ 11.05, 11.05 n. 4; Epstein, *supra* n. 56, at 1370–1371.

59. Mandelker, *supra* n. 58, at 130–131.

60. Laitos, *supra* n. 6, at § 11.05.

61. *Lucas*, 505 U.S. at 1034 (Kennedy, J., concurring).

62. *Palazzolo v. State ex rel. Tavares*, 746 A.2d 707 (R.I. 2000), *cert. granted sub nom. Palazzolo v. Rhode Island*, 531 U.S. 923 (Oct. 10, 2000) (reviewing, among other issues, whether a property owner is categorically barred from asserting a taking claim where the challenged regulation was in effect before acquisition of title).

a purchaser's taking claim "is not barred by the mere fact that title was acquired after the effective date of the state-imposed restriction."⁶³ The Court found the notice rule effectuates "an expiration date on the Takings Clause" because the pre-enactment owner is prevented from transferring its rights to the post-enactment purchaser.⁶⁴ Accordingly, *Palazzolo* concluded such prohibition conflicts with a fundamental attribute of property—a right to transfer title.⁶⁵ Further, assuming the pre-enactment owner perfected a development right into a taking claim, the notice rule still prohibits transfer of such claim to a purchaser.⁶⁶

Justice O'Connor concurred in rejecting "the sweeping rule that the preacquisition enactment of the use restriction *ipso facto* defeats any takings claim."⁶⁷ However, her opinion recommended that the issue of regulatory notice be retained as part of *Penn Central* case-specific inquiry.⁶⁸ According to Justice O'Connor, the timing of a purchaser's acquisition vis-a-vis property regulation is relevant to

63. *Palazzolo v. R.I.*, 533 U.S. 606, 630 (2001).

64. *Id.* at 627.

65. *Id.* at 628 (citing Robert Ellickson, *Property in Land*, 102 Yale L.J. 1315, 1368–1369 (1993)). *Palazzolo* buttressed its rejection of the notice rule by citing to *Nollan*, which reached a similar result for an owner who acquired property in the California coastal zone subsequent to land use regulations that restricted development. *Id.* at 629 (citing *Nollan*, 483 U.S. at 834 n. 2).

66. *Id.* at 628. Eminent domain law requires the owner of property on the date of taking to be joined in the action, whereas a successor or assignee in title lacks standing to seek compensation. *Id.* (citing *Danforth v. U.S.*, 308 U.S. 271, 284 (1939); J. Sackman, *Nichols on Eminent Domain*, vol. 2, § 5.01[5][d][i] (3d. rev. ed., Matthew Bender, 2000)); see also *U.S. v. Dow*, 357 U.S. 17, 20–21 (1959). Accordingly, *Palazzolo* concluded the notice rule would have required a pre-enactment owner to litigate her taking claim, because only such person would be the owner on the date of taking of a non-transferable cause of action, whereas the purchaser taking title subject to the regulation would not. 533 U.S. at 628.

67. *Palazzolo*, 533 U.S. at 632 (O'Connor, J., concurring).

68. *Id.* at 632–635.

evaluating investment-backed expectations.⁶⁹ Further, Justice O'Connor would look at a purchaser's reliance interest in evaluating investment expectations; however, she recognizes the state's increasing regulation of property should not necessarily limit an owner's rights in property disposition.⁷⁰ Subsequent decisions have been mixed on application of the notice rule, presumably as a result of the Court's divided opinions in *Palazzolo*.⁷¹

F. *Economic Impact as a Penn Central Factor: Diminution in Value and Partial Takings*

Penn Central noted that "diminution in property value, standing alone, can[not] establish a 'taking,'" and cited two early cases resulting in a 75% to 87% reduction in value, despite the lack of a taking.⁷² *Mahon* first stated the diminution in value test; there the Court found a taking because the regulation made coal mining commercially impractical.⁷³ Following *Penn Central*, the federal courts have consistently upheld non-compensable regulation with

69. *Id.* at 632–633.

70. *See id.* at 634–635.

71. *See e.g. Guggenheim v. City of Goleta*, 638 F.3d 1111 (9th Cir. 2010) (en banc), *rev'g*, *Guggenheim v. City of Goleta*, 582 F.3d 996, 1023–1027 (9th Cir. 2009) (split in Ninth Circuit panels regarding whether a post-enactment purchaser is entitled to investment expectations after *Palazzolo*); *see also* James Burling, *The Latest Take on Background Principles and the States' Law of Property After Lucas and Palazzolo*, 24 U. Haw. L. Rev. 497, 529–530 (2002) (discussing post-*Palazzolo* cases); Breemer & Radford, *supra* n. 56, at 403–417 (discussing post-*Palazzolo* cases regarding both total and partial takings).

72. *Penn Central*, 438 U.S. at 131 (citing *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926); *Hadacheck v. Sebastian*, 239 U.S. 394 (1915)). However, neither *Euclid* nor *Hadacheck* were takings cases. *Euclid*, 272 U.S. at 386, was a substantive due process challenge to a zoning ordinance, while *Hadacheck*, 239 U.S. at 409–410, was a habeas corpus petition challenging a misdemeanor prosecution for violation of a land use ordinance.

73. *Mahon*, 260 U.S. at 413 ("One fact for consideration in determining such limits [of the police power] is the extent of the diminution"); *Id.* at 414 (the Pennsylvania regulation "make[s] it commercially impracticable to mine certain coal [which] has very nearly the same effect for constitutional purposes as appropriating or destroying it").

substantial reductions of property value in the range of 60% or higher.⁷⁴ Conversely, the same courts find a taking where the loss in valuation exceeds 80%.⁷⁵ In dictum, *Lucas* acknowledged, “in at least *some* cases the landowner with 95% loss will get nothing, while the landowner with a total loss will recover in full.”⁷⁶ With these severe results, *Penn Central*’s diminution in value factor may be interpreted to mean that a regulation is non-compensable under the Takings Clause if economically viable use of property remains—however *de minimis* or meager that may be.

Lucas’ disconnect between compensable versus non-compensable regulation illustrates the confounding nature of the Court’s takings jurisprudence: “Takings law is full of these ‘all-or-nothing’ situations.”⁷⁷ In attempting to mollify this harsh regime, while following *Lucas*’ guidance, the Federal Circuit developed a “partial regulatory taking” rule in *Florida Rock Industries, Inc. v. United States*.⁷⁸ However, the economic impact in *Florida Rock* was eventually determined to be a 71% reduction in value.⁷⁹ Consequently, the Federal Circuit’s version of a partial taking rule appears slightly less onerous than non-compensable losses decided under other *Penn Central* precedent.⁸⁰ *Tahoe–Sierra* did recognize a partial regulatory taking rule but declined to alter *Penn Central*’s criteria for case specific inquiry, including the economic impact

74. *E.g. Brace v. U.S.*, 72 Fed. Cl. 337, 357, 357 n. 33 (2006) (collecting federal cases).

75. *E.g. id.* at n. 32 (collecting federal cases).

76. *Lucas*, 505 U.S. at 1019 n. 8 (emphasis in original).

77. *Id.*

78. *Fla. Rock Indus., Inc. v. U.S.*, 18 F.3d 1560, 1568–1571 (Fed. Cir.1994).

79. *Id., on remand*, 45 Fed. Cl. 21, 31, 36 (1999).

80. *Compare Brace*, 72 Fed. Cl. at 357 n. 33 with *Fla. Rock*, 45 Fed. Cl. at 36.

factor.⁸¹

G. *Agins*, *Lingle* and *Due Process Versus Takings Claims*

Two years after handing down its *Penn Central* decision, the Supreme Court decided *Agins v. City of Tiburon*.⁸² *Agins* involved a facial taking challenge to an “open-space” zoning ordinance that limited construction on a previously purchased 5-acre tract of land to less than five single-family dwellings.⁸³ Seeking to determine “whether the mere enactment of the zoning ordinance constitutes a taking,” the Court announced a disjunctive rule of decision:

The application of a general zoning law to a 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.⁸⁴

Agins’ first test was based on *Nectow v. Cambridge*,⁸⁵ while *Agins*’ second test was based upon *Penn Central*. *Nectow* was an early decision of the Court that struck down a land use restriction that violated due process.⁸⁶ In *Nectow*, an owner challenged a municipal zoning ordinance that classified his land to residential but not commercial uses.⁸⁷ A master found this classification would not

81. *Tahoe-Sierra*, 535 U.S. at 318–319, 322, 326. For an economist’s take on *Penn Central*’s economic impact factor, see William Wade, *Penn Central’s Ad Hocery Yields Inconsistent Takings Decisions*, 42 Urb. Law. 549 (2010); William Wade, “*Sophistical and Abstruse Formulas*” Made Simple: *Advances in Measurement of Penn Central’s Economic Damage Prongs and Estimation of Economic Damages in the Federal Claims and Federal Circuit Courts*, 38 Urb. Law. 337 (2006).

82. *Agins v. City of Tiburon*, 447 U.S. 255 (1980), overruled, *Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528, 545 (2005).

83. *Id.* at 257–258.

84. *Id.* at 260 (emphasis added) (citing *Nectow v. Cambridge*, 277 U.S. 183, 188 (1928); *Penn Central*, 483 U.S. at 138 n. 36).

85. *Nectow v. Cambridge*, 277 U.S. 183 (1928).

86. *Id.* at 189.

87. *Id.* at 185–186.

support public health, safety and welfare because “no practical use could be made of the land for residential purposes.”⁸⁸ Applying both tests, *Agins* determined the local zoning action supported a legitimate state interest in land use regulation and the ordinance neither prevented the owner’s best use of its land nor extinguished a fundamental attribute of ownership; thus, the Court concluded a taking had not occurred.⁸⁹

Although *Agins*’ “substantially advances” test has been recited in federal takings law for over thirty years, it has never really been applied.⁹⁰ In 2005, the Supreme Court determined *Agins* was improperly decided and overruled it.⁹¹ The *Lingle* Court reviewed the early decisions on which *Agins* relied, interpreted its “substantially advances” inquiry to be a means–ends test, and concluded this test sounded in due process rather than a taking.⁹² Notably, the Court reasoned:

[T]he ‘substantially advances’ inquiry reveals nothing about the *magnitude or character of the burden* a particular regulation imposes on private property rights. Nor does it provide any information about how any regulatory burden is *distributed* among property owners.⁹³

While *Lingle* discarded *Agins* as a taking case, it simultaneously

88. *Id.* at 187.

89. *Agins*, 447 U.S. at 262.

90. *Lingle*, 544 U.S. at 546 (citing *Tahoe-Sierra*, 535 U.S. at 334; *City of Monterey v. Del Monte Dunes at Monterey, Ltd.*, 526 U.S. 687, 704 (1999); *Lucas*, 505 U.S. at 1016; *Yee v. Escondido*, 503 U.S. 519, 534 (1992); *U.S. v. Riverside Bayview Homes, Inc.*, 474 U.S. 121, 126 (1985)).

91. *Id.* at 545.

92. *Id.* at 540–542.

93. *Id.* at 542 (emphasis in original).

reaffirmed the Court's taking jurisprudence, including *Penn Central's* case-specific inquiry.⁹⁴

An incidental consequence of *Lingle* may be the subordination or substantial alteration of *Penn Central's* "character of the governmental action" factor due to the Court's particular emphasis on the two other factors: "the *Penn Central* inquiry turns in large part, albeit not exclusively, upon the magnitude of a regulation's economic impact and the degree to which it interferes with legitimate property interests."⁹⁵ Thus, subsequent precedent has recognized that character of the governmental action must be reassessed to achieve consistency with *Lingle's* emphasis on the magnitude and distribution of regulatory burden.⁹⁶

H. Character of the Governmental Action as a *Penn Central* Factor

Where the bona fides of governmental regulation are not questioned, the character of governmental action is typically not decisive in federal takings law.⁹⁷ Still, the character of the action becomes relevant when: (1) the relative burden versus benefit of a

94. *Id.* at 545 ("We emphasize that our holding today—that the 'substantially advances' formula is not a valid takings test—does not require us to disturb any of our prior holdings").

95. *Id.* at 540; see also D. Benjamin Barros, *At Last, Some Clarity: The Potential Long Term Impacts of Lingle v. Chevron and the Separation of Takings and Substantive Due Process*, 69 Alb. L. Rev. 343, 353–355 (2005); Robert G. Dreher, *Lingle's Legacy: Untangling Substantive Due Process from Takings Doctrine*, 30 Harv. Envtl. L. Rev. 371, 404 (2006); Dale Whitman, *Deconstructing Lingle: Implications for Takings Doctrine*, 40 John Marshall L. Rev. 573, 581–582 (2006) (questioning the continued relevance of *Penn Central's* character of action factor after *Lingle*).

96. See e.g. *Rose Acre Farms, Inc. v. U.S.*, 559 F.3d 1260, 1277–1278 (Fed. Cir. 2009) ("[federal circuit] courts recognize that *Lingle* alters the calculus") (citing *Spoklie v. Mont.*, 411 F.3d 1051, 1058 (9th Cir. 2005)); *Adams v. Village of Wesley Chapel*, 259 Fed. Appx. 545, 549–550 (4th Cir. 2007) (unpublished); see also *Crown Point Dev., Inc. v. City of Sun Valley*, 506 F.3d 851, 855 (9th Cir. 2007); *A Helping Hand, LLC v. Balt. Co.*, 515 F.3d 356, 396 n. 6 (4th Cir. 2008)).

97. See e.g. *Fla. Rock*, 45 Fed. Cl. at 40 ("There is no dispute . . . as to whether preservation of the wetlands through the Corps' implementation of the Clean Water Act serves to advance legitimate state interests").

regulation is weighed;⁹⁸ (2) the police power is exercised for the purpose of protecting public health and safety interests as opposed to other regulatory objectives;⁹⁹ (3) there are questions regarding causation, i.e., whether the governmental action caused the regulatory interference with the property;¹⁰⁰ or (4) the good faith of the government's actions is placed at issue.¹⁰¹ Alternative suggested criteria for character of the action have been identified in takings commentary.¹⁰²

Following *Penn Central*, the Supreme Court has frequently cited two principles in evaluating character of the action. The first is *Mahon's* principle of an "average reciprocity of advantage,"¹⁰³ which

98. See e.g. *Penn Central*, 438 U.S. at 124; *Fla. Rock*, 18 F.3d at 1570–1571.

99. E.g. *Keystone Bituminous*, 480 U.S. at 485–486 ("the character of the action involved here weighs heavily against finding a taking" due to public safety considerations in mining subsidence legislation); *Rose Acre Farms*, 559 F.3d at 1279–1282 (USDA regulation directed at preventing salmonella virus in poultry farms served important public health objective).

100. See e.g. *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regl. Plan. Agency*, 34 F. Supp. 2d 1226, 1245–1248 (D.Nev. 1999) (three year permitting moratorium held not to be proximate cause of alleged taking due to court injunction), *rev'd in part and aff'd in part*, 216 F.3d 764, 782 (9th Cir. 2000) (affirming temporary moratorium issue); *City Natl. Bank of Miami v. U.S.*, 33 Fed. Cl. 224, 231–232 (1995) (problem of joint and several liability where both federal and state regulation affected property).

101. See e.g. *Tahoe-Sierra*, 535 U.S. at 333 (agency's "stalling" in order to avoid final decision on merits could support a taking); *City of Monterey*, 526 U.S. at 698–699, 706 (city's repeated rejections of development plans suggested dilatory tactics, which, together with justifications not reasonably related to legitimate regulation, could support jury verdict for property owner in § 1983 taking action); *Agins*, 447 U.S. at 263 n.9 (indicating in dictum that "extraordinary delay" in permitting process could support a taking).

102. See e.g. Melz, *supra* n. 6, at 341–346.

103. *Mahon*, 260 U.S. at 415. The Court compared the absence of reciprocity in *Mahon*, wherein the benefitting owners had bargained away their right of surface support, with another case, *Plymouth Coal Co. v. Penn.*, 232 U.S.

ascertains whether the regulatory burden on the property owner is balanced by benefits exchanged with other owners.¹⁰⁴ The second is the principle stated in *Armstrong v. United States*,¹⁰⁵ which inquires whether the burden imposed on a property owner should “in all fairness and justice . . . be borne by the public as a whole.”¹⁰⁶ These principles overlap to the extent the Court compares the regulation's effect on the takings claimant with the effects on similarly situated property owners. Unfortunately, the precedent does not yield clear standards because the courts have failed to consistently describe or measure the benefits and burdens of challenged regulations.¹⁰⁷ Still, federal courts frequently discuss these principles in applying *Penn Central* case-specific inquiry.¹⁰⁸

II. THE IDENTIFICATION OF CONSTITUTIONALLY PROTECTED PROPERTY FOR TAKING PURPOSES

Fundamental to takings law is ascertaining whether a claim qualifies as constitutional property.¹⁰⁹ This component of takings

531 (1914), wherein the mineral estate owners and their employees benefitted from mutual sub-adjacent support. *Id.*

104. See e.g. *Hodel v. Irving*, 481 U.S. 704, 715–716 (1987); *Keystone Bituminous*, 480 U.S. at 491–492; *Agins*, 447 U.S. at 262.

105. *Armstrong v. U.S.*, 364 U.S. 40 (1960).

106. *Id.* at 49. See also e.g. *Lingle*, 544 U.S. at 537, 542–543; *Tahoe-Sierra*, 535 U.S. at 332, 336; *Palazzolo*, 533 U.S. at 633 (O'Connor, J., concurring); *Nollan*, 483 U.S. at 835 n. 4 (discussing *Armstrong*'s fairness and justice principle).

107. For a critical analysis of the *Armstrong* and *Mahon* principles and their ambiguous significance in regulatory takings law, see Thomas Merrill, *Why Lingle is Half Right*, 11 Vt. J. Envtl. L. 421, 424–425 (2010); Joseph L. Sax, *The Property Rights Sweepstakes: Has Anyone Held the Winning Ticket*, 34 Vt. L. Rev. 157, 162 171–172 (2009); William W. Wade & Robert L. Bunting, *Average Reciprocity of Advantage: “Magic Words” or Economic Reality—Lessons from Palazzolo*, 39 Urb. Law. 319 (2007); Eagle, *supra* n. 6, at § 7.7(a)(1).

108. *Supra* nn. 104, 106 and accompanying text (discussing the two principles commonly used to evaluate the “character of the governmental action” factor); see also *Rose Acre Farms*, 559 F.3d at 1282–1283; *Maritrans v. U.S.*, 342 F.3d 1344, 1356 (Fed. Cir. 2003); *Fla. Rock*, 18 F.3d at 1570–1571.

109. See *Monsanto*, 467 U.S. at 1000–1001; *Penn Central*, 438 U.S. at 24–25.

law has magnified over the last forty years in conjunction with the Supreme Court's takings jurisprudence. Part II of this article traces the identification and refinement of protected property under the U.S. Constitution and then examines how the Alaska Supreme Court treats the subject. The issue of property status is significant for purposes of federalism in constitutional interpretation; that is, whether state versus federal courts shall decide if a property interest qualifies for taking protection. The issue of property status is also significant because, without such status, no taking protection applies.

A. *The Pre-Lucas Framework for Identifying Property in Taking Cases*

The Takings Clause protects "private property" from taking without compensation while the Due Process Clause protects "property" according to due process of law.¹¹⁰ However, the Fifth Amendment defines neither term.¹¹¹ While the Constitution does contain a Property Clause,¹¹² this refers to the public domain and the federal government's property interests rather than "private property."¹¹³

In *Board of Regents v. Roth*,¹¹⁴ the Supreme Court developed the modern rule regarding protection of property interests under the Fifth Amendment. *Roth* concerned a non-tenured university teacher whom the Court ruled was not eligible to claim continued employment after his one year contract was not renewed.¹¹⁵ The

110. U.S. Const., amend. V.

111. *See id.*

112. U.S. Const., art. IV, § 3, cl. 2.

113. *See generally* George C. Coggins & Robert L. Glicksman, *Public Natural Resources Law* vol. 1, §§ 3:10–3:13 (2d ed. West 2010) (discussing the Property Clause).

114. *Bd. of Regents v. Roth*, 408 U.S. 504 (1972).

115. *Id.* at 569.

threshold question was whether the teacher's claim qualified as constitutionally protected property under the Due Process Clause.¹¹⁶ Reviewing its precedent, the Court decided that "[t]o have a property interest in a benefit, a person clearly must have more than . . . a unilateral expectation of it. He must, instead, have a legitimate claim of entitlement to it."¹¹⁷ In evaluating the teacher's claim of property entitlement, the Court provided an explanation that has been followed ever since:

Property interests, of course, are not created by the Constitution. Rather they are created and their dimensions are defined by existing rules or understanding that stem from an independent source such as state law—rules or understandings that secure certain benefits and that support claims of entitlement to those benefits.¹¹⁸

Roth was illustrative of the Supreme Court's shift in the 1970's towards "new property" in due process jurisprudence.¹¹⁹ Through a series of decisions, the Court recognized a variety of statutory entitlements as worthy of due process protection where the claimants demonstrated expectation and reliance interests on established governmental benefits.¹²⁰ By comparison, a narrower spectrum of property interests are protected under the Takings Clause because "private property" has its source in the private markets, the

116. *Id.* at 571–572.

117. *Id.* at 577.

118. *Id.*

119. *E.g.* Laurence Tribe, *American Constitutional Law* § 10.9 at 514–516 (1st ed. Foundation Press 1978); Thomas W. Merrill, *The Landscape of Constitutional Property*, 86 Va. L. Rev. 885, 918 (2000); *Schneider v. Calif. Dept. of Corrections*, 151 F.3d 1194, 1200 (9th Cir. 1998). The term "new property" in due process law originates from a 1964 law review article, Charles Reich, *The New Property*, 73 Yale L.J. 733 (1964), which the Supreme Court subsequently recognized. *See also Goldberg v. Kelly*, 397 U.S. 254, 262 n. 8 (1970).

120. *Roth*, 408 U.S. at 576–77 (discussing cases; citations omitted).

common law, and statutes apart from governmental entitlements.¹²¹ As *Roth* noted, “[t]he Court has also made clear that the property interests protected by procedural due process extend well beyond actual ownership of real estate, chattels or money.”¹²² Though property interests in statutory entitlements may also be constitutionally protected under the Takings Clause,¹²³ their protection is qualified for various reasons associated with enabling authority by comparison to private property interests not created by government.¹²⁴

Despite its antecedents in due process, the Supreme Court has consistently followed *Roth* for purposes of identifying constitutionally protected property in takings cases.¹²⁵ Accordingly,

121. *E.g.*, *Adams v. U.S.*, 391 F.3d 1212, 1220, 1220 n. 4 (Fed. Cir. 2004) (“entitlements are often referred to as ‘property interests’ within the meaning of the Due Process Clause . . . , but such references have no relevance to whether they are ‘property’ under the Takings Clause”); Laitos, *supra* n. 6, at § 5.02; Merrill, *supra* n. 119, at 956–957.

122. *Roth*, 408 U.S. at 571–572.

123. *See generally* Jan G. Laitos & Richard Westfall, *Governmental Interference with Private Interests in Public Resources*, 11 Harv. Envtl. L. Rev. 1, 23–25 (1987); Laitos, *supra* n. 6, at § 6.04[A][3].

124. *E.g. U.S. v. Locke*, 471 U.S. 84, 104–105 (1985) (“This power to qualify existing property rights is particularly broad with respect to the ‘character’ of the property rights at issue here [*i.e.* public land mining claims]”). Takings protection for public natural resources is a litigious topic; however, the subject is beyond the scope of this article. *See e.g.* Marla Mansfield, *When “Private” Rights Meet “Public” Rights: the Problems of Labeling and Regulatory Takings*, 65 U. Colo. L. Rev. 193 (1994); Karolyn King Nelson, *Takings Law West of the Pecos: Inverse Condemnation of Federal Oil and Gas Lease Rights*, 37 Nat. Resources J. 253 (1997); Coggins & Glicksman, *supra* n. 113, at §§ 4:20, 4:23, 4:28; Laitos & Westfall, *supra* n. 124.

125. *E.g. Phillips v. Wash. Legal Found.*, 524 U.S. 156, 172 (1998); *Lucas*, 505 U.S. at 1030–1031; *Monsanto*, 477 U.S. at 55–56; *Texaco, Inc. v. Short*, 454 U.S. 516, 525 (1982); *Webb’s Fabulous Pharmacies v. Beckwith*, 449 U.S. 155, 164–165 (1980).

federal courts look to non-constitutional sources of law in ascertaining the presence of state property. This has led commentators to characterize the Court as adopting a “positivist” approach in defining property for takings purposes.¹²⁶ As Professor Merrill has stated, “‘positivism’ has been employed as a term of art to distinguish non-constitutional law, including federal and state statutory, administrative and common law, from law derived directly from the Constitution.”¹²⁷ A critical premise to the positivist method for identifying property is that federal courts do not independently evaluate or redefine state property status in adjudicating takings claims.¹²⁸

However, the Supreme Court’s takings jurisprudence does not strictly adhere to a positivist approach; its precedent has disregarded or subordinated state authority to the Court’s own conception of property.¹²⁹ In this regard, commentators suggest the Court’s departures from a positivist view of state property law support a “normative” approach to property interests under the Takings Clause.¹³⁰ Professor Merrill believes the Court’s identification of property interests depends upon federal constitutional criteria, which

126. Barton Thompson, *Judicial Takings*, 76 Va. L. Rev. 1449, 1522–1523, 1525–1526 (1990); Laitos, *supra* n. 6, at § 4.02; Merrill, *supra* n. 119, at 920, 920 n. 144 (citations omitted), 922.

127. Merrill, *supra* n. 119, at 920 n. 144.

128. *See id.* at 921; Laitos, *supra* n. 6, at § 4.04; Thompson, *supra* n. 126, at 1524–1525.

129. *See Phillips*, 524 U.S. at 161–162, 165–167 (finding interest in IOLTA account was property of the client according to common law in Texas and other jurisdictions, even though Texas Supreme Court rule declared such accounts to be non-interest bearing); *E. Enter. v. Apfel*, 524 U.S. 498, 529–537 (retroactive application of employer withdrawal liability under ERISA insured pension plans found a taking without identifying a property interest according to *Roth* or otherwise).

130. *See* Laurence Tribe, *American Constitutional Law* § 9-7, 609 (2d ed. Foundation Press 1988) (“[E]xpectations protected by the [takings] clause must have their protection outside positive law”); *see also* Laitos, *supra* n. 6, at § 4.02; Merrill, *supra* n. 119, at 934–935, 935 n.199, 942, 950–951 (property defined through social expectations or other normative commitments rather than state law sources); Thompson, *supra* n. 126, at 1526, 1530–1531, 1536–1537.

he describes as a “patterning definition” approach.¹³¹ Such approach involves comparing social expectations of property ownership or other normative considerations against the state law sources in question.¹³² Professor Thompson believes the Court’s derivation of property by positivist sources alone results in indeterminate outcomes as to the level of constitutional protection, and hence, the Court has occasionally supplemented state law with independent sources pertaining to owners’ expectations or normative values.¹³³

The Court itself has alluded to “core” or “fundamental” notions of property being protected under the Takings Clause without regard to state law sources.¹³⁴ However, the Court presumably has been reluctant to articulate a normative theory of property due to federalism concerns as well as its aversion to revisiting earlier “Lochnerian” doctrine that questioned the wisdom of legislation.¹³⁵ In conclusion, the federal judiciary’s deference to state non-constitutional sources for determining property, coupled with its willingness in specific instances to establish an independent

131. Merrill, *supra* n. 119, at 893–894, 952.

132. *Id.* at 926–927, 952, 969.

133. Thompson, *supra* n. 111, at 1522–1523, 1530–1531, 1532, 1534; *accord*, Laitos, *supra* n. 6, at 4-4 to 4-5.

134. *E.g.* *Hodel*, 481 U.S. at 716 (“the right to pass on property—to one’s family in particular—has been part of the Anglo American legal system since feudal times”); *Pruneyard Shopping Ctr. v. Robins*, 447 U.S. 74, 93–94 (1980) (Marshall, J., concurring: “the constitutional term . . . ‘property’ do[es] not derive [its] meaning solely from provisions of positive law . . . there are limits on governmental authority to abolish ‘core’ common law rights”); *Kaiser Aetna*, 444 U.S. at 176, 179–180 (“we hold the ‘right to exclude’ so universally held to be a fundamental element of the property right, falls within the category of interests the Government cannot take without compensation”); *see also* James Burling, *Private Property Rights and the Environment after Palazollo*, 30 B.C. Env’tl. Aff. L. Rev. 1, 34, 34 n. 203 (2002).

135. Laitos, *supra* n. 6, at 4-15, 4-15 n. 2; Thompson, *supra* n. 126, at 1525, 1525 n. 290.

conception of property according to constitutional norms, affects the scope of Takings Clause protection.

B. *The Post Lucas Framework for Property Identification—
“Background Principles” of State Law in Takings Cases*

Lucas announced, but did not explain, a threshold requirement to takings liability that “inhere[s] in the title itself” according to “background principles of the State’s law of property and nuisance.”¹³⁶ *Lucas*’ new rule replaced “noxious use logic” and determines whether constitutionally protected property exists in the first place, thereby circumventing any taking inquiry.¹³⁷ With the advent of *Lucas*, then, the identification of “background principles” of state property law has taken on great significance in takings law.

Lucas suggests that “background principles” are limited to the common law of nuisance while Justice Kennedy’s concurrence and Justice Stevens’ dissent urged that property status be evaluated more broadly pursuant to common law generally, along with statutory law.¹³⁸ The majority in *Lucas* indicated that legislation would not qualify as “background principles” where it is “newly legislated or decreed.”¹³⁹ However, it also recognized that “changed circumstances or new knowledge may make what was previously permissible no longer so” with regard to property status.¹⁴⁰ *Lucas*

136. *Lucas*, 505 U.S. at 1029; see *supra* pt. I(C) (discussing background principles of state law and the nuisance exception regarding protected property interests following *Lucas*).

137. See e.g. Michael Blumm & Lucas Ritchie, *Lucas’s Unlikely Legacy: the Rise of Background Principles as Categorical Takings Defenses*, 29 Harv. Envtl. L. Rev. 321, 322, 325, 327, 330–331 (2005); Burling, *supra* n. 134, at 33.

138. Compare *Lucas*, 505 U.S. at 1029–1031 with *id.* at 1035 (Kennedy, J., concurring) (“the common law of nuisance is too narrow a confine for the exercise of regulatory power . . . The State should not be prevented from enacting new regulatory initiatives in response to changing conditions”); *Id.* at 1068–1069 (Stevens, J., dissenting) (“The Court’s holding today effectively freezes the State’s common law, denying the legislature much of its traditional power to revise the law governing the rights and uses of property”).

139. *Lucas*, 505 U.S. at 1029.

140. *Id.* at 1031 (citing *Restatement (Second) of Torts* § 827 cmt. g

did tie its background principles to the *Roth* “tradition . . . of resort[ing] to existing rules or understandings . . . to define the range of interests that qualify for protection as property under the Fifth and Fourteenth Amendments,” thereby suggesting that state law controls in ascertaining background principles.¹⁴¹

Subsequent to *Lucas*, *Palazzolo* criticized legislative enactments morphing into background principles that limit or nullify property status: “a regulation . . . is not transformed into a background principle of the State’s law by mere virtue of the passage of title.”¹⁴² On application, the Court rejected a Rhode Island Supreme Court ruling allowing the state’s coastal management legislation, which had preceded the owner’s title, to operate as a background principle of state property law.¹⁴³ The Court further stated, “A regulation or common-law rule cannot be a background principle for some owners but not for others.”¹⁴⁴ This criticism is consistent with the Court’s admonition that changes in the law do not automatically extinguish protection under the Takings Clause. Otherwise, *Monsanto*’s notice rule¹⁴⁵ would frustrate transferability

(1979)); see also e.g. *Munn v. Ill.*, 94 U.S. 113, 134 (1876) (“the great office of statutes is to remedy defects in the common law as they are developed, and to adopt it to the changes of time and circumstances”); *Cmmw. v. Parks*, 30 N.E 174 (Mass. 1892) (“the legislature may change the common law as to nuisances . . . although by doing so it affects the use or value of property”).

141. *Lucas*, 505 U.S. at 1030 (quoting *Roth*, 408 U.S. at 577).

142. *Palazzolo*, 533 U.S. at 629–630.

143. *Id.* at 626 (citing *Palazzolo v. St., ex. rel. Tavares*, 746 A.2d 707, 716 (R.I. 2000)), 627–628. On remand, the Rhode Island Superior Court found that development of the tidal portion of the owner’s property would constitute a public nuisance and violated that state’s version of the public trust doctrine. *Palazzolo v. R.I.*, 2005 WL 1645974, *14 (R.I. Super. Ct. July 5, 2005). Accordingly, “background principles” of Rhode Island real property law applied to the owner’s takings claim even though the state’s coastal management legislation did not.

144. *Palazzolo*, 533 U.S. at 630.

145. The notice rule states that a person acquiring property subject to a pre-existing regulation is placed on notice, and assumes the risk, that the owner has

of property interests.¹⁴⁶ *Palazzolo*, however, qualified its criticism as dicta: “We have no occasion to consider the precise circumstances when a legislative enactment can be deemed a background principle of state law or whether those circumstances are present here.”¹⁴⁷

The dissent in *Tahoe-Sierra* recognized that some land use regulations might qualify as background principles.¹⁴⁸ However, the dissent urged that “a moratorium prohibiting all economic use for a period of six years is not one of the longstanding, implied limitations of state property law.”¹⁴⁹ Moreover, it acknowledged that “short-term delays attendant to zoning and permit regimes are a longstanding feature of state property law and form part of a landowner’s reasonable investment backed-expectations.”¹⁵⁰ As an example of regulations that “have the lineage” of several decades’ of enactment, the dissent cited New York City’s zoning ordinance, which was enacted in the early twentieth century.¹⁵¹

Following *Lucas*, state courts have decided that statutes qualify as “background principles,” and hence, the Supreme Court’s direction for an “antecedent inquiry” is not limited to the law of nuisance, or even the common law for that matter.¹⁵² However, the

no constitutional protection against such regulation. *See supra* pt. I(D) (discussing *Monsanto*’s notice rule).

146. *See Palazzolo*, 533 U.S. at 627–628; *see also supra* pt. I(E) (discussing *Palazzolo* and the effect of the notice rule on transferability of property interests).

147. *Palazzolo*, 533 U.S. at 639. *Palazzolo* left open the possibility that a statutory enactment would qualify as a background principle according to the criteria set forth in *Lucas*. *Id.* at 630 (quoting *Lucas*, 505 U.S. at 1030). The Court’s guidance, as in *Lucas*, was restricted to a “total taking” inquiry and did not address the possibility of a statute qualifying as a background principle in the absence of prohibiting all beneficial use. *Id.*

148. *Tahoe-Sierra*, 535 U.S. at 351–354.

149. *Id.* at 352.

150. *Id.*

151. *Id.* (citing *Anderson’s American Law of Zoning* vol. 1, § 3.07 (Kenneth H. Young ed., rev. 4th ed., Clark Boardman Co. 1995)); *see also Village of Euclid*, 272 U.S. at 397 (first Supreme Court decision upholding the constitutionality of a zoning ordinance following a due process challenge on the grounds that the ordinance was a valid exercise of police power).

152. *See e.g. City of Va. Beach v. Bell*, 498 S.E.2d 414, 417, 419 (Va. 1998) (coastal dune law limited the purchaser’s “bundle of rights” and qualified as

decisions do not uniformly analyze whether the statute or regulation is consistent with the common law, or “undertake a more exacting study of state property law,”¹⁵³ but instead find that enactment without more results in a limitation on property title.¹⁵⁴ Based on their decisions, the Court of Federal Claims and Federal Circuit appear divided on whether statutes and regulations qualify as background principles to limit constitutionally protected property interests.¹⁵⁵

a proscribed use interest in the owner’s title); *Kim v. City of N.Y.*, 681 N.E.2d 312, 315–316 (N.Y. 1997) (municipal charter requiring owner to provide lateral support for public road was deemed a background principle of state property law); *Grant v. S.C. Coastal Council*, 461 S.E.2d 388, 391 (S.C. 1995) (coastal tidelands law prohibited fill on property and purchaser acquired title subject to this limitation); *Hunziker v. St.*, 519 N.W.2d 367, 370–371 (Iowa 1994) (statute which prohibited disinterment of human remains constituted a background principle of property law that inhered in the title of purchaser); see also e.g. Robert L. Glicksman, *Making a Nuisance of Takings Law*, 3 Wash. U. J.L. & Policy 149, 169–182 (2000).

153. *Tahoe-Sierra*, 535 U.S. at 352 n. 4 (Rehnquist, C.J., dissenting).

154. See e.g. *City of Va. Beach*, 498 S.E.2d at 417, 419; *Grant*, 461 S.E.2d at 391; *Hunziker*, 519 N.W.2d at 370–371 (all three concluding statutory enactments, without more, qualified as *Lucas* background principles); see also *Tahoe-Sierra*, 34 F. Supp. 2d at 1251 (“What the *Lucas* opinion does not make completely clear, but which most [state] courts since appear to have accepted, is that ‘newly legislated or decreed’ restrictions on land use can also constitute ‘background principles’ of state law”), *rev’d on other grounds*, 216 F.3d 764, 782 (9th Cir. 2000), *aff’d*, *Tahoe-Sierra*, 535 U.S. 302, 343.

155. Compare e.g. *Maritrans*, 342 F.3d at 1352–1353 (federal maritime legislation did not constitute a background principle that eliminated single hulled vessels as constitutionally protected property subject of retrofitting requirement for double hulls); *Presault v. U.S.*, 100 F.3d 1525, 1530, 1533, 1539 (Fed. Cir. 1996) (en banc) (federal legislation regulating railroads, including “Rails to Trails Act,” did not qualify as background principle thereby depriving owners of fee interest in property subject to abandoned rights of way) with *M & J Coal Co. v. U.S.*, 47 F.3d 1148, 1154–1155 (Fed. Cir. 1995) (mineral owner and holder of state permit to mine still subject to federal surface mining legislation which qualified as a *Lucas* background principle; federal statute codified constitutional police power protection for public health and safety and implied nuisance exception); *Reeves v.*

The usage of statutes and associated regulation as a background principle of property law for the purpose of defeating takings claims sounds like a recycling of *Monsanto's* notice rule. Thus, instead of pre-existing land use regulations defeating a takings claim according to the notice rule—whereby purchasers are denied any investment-backed expectations—the same pre-existing regulations now defeat a takings claim when these are denominated background principles of state property law.¹⁵⁶ Commentators are divided as to whether *Lucas's* background principles should extend to statutes that do not readily correspond to the common law as a basis for limiting property interests in subsequently acquired titles.¹⁵⁷ Given the limited guidance in *Lucas*, *Palazzolo*, and *Tahoe-Sierra*, the debate on background principles focuses on particular topics, such as the law of nuisance, the public trust doctrine, and the law of custom applied to beach access.

U.S., 54 Fed. Cl. 652, 672 (2002) (federal surface management statute construed as a background principle limiting mining claimant's subsequent entry and acquisition of mineral rights on public land).

156. Compare *supra* nn. 54, 56 and accompanying text (discussing the notice rule applied to pre-existing regulations to defeat takings claims) with *supra* n. 152 and accompanying text (discussing background principles applied to pre-existing regulations to defeat takings claims).

157. Compare Lynn Blais, *Takings, Statutes and the Common Law: Considering Inherent Limitations on Title*, 70 S. Cal. L. Rev. 1, 6–7, 22, 39–42, 55 (1996); Blumm & Ritchie, *supra* n.137, at 354–359 (advocating expansive interpretation of background principles to encompass statutes and regulatory law) with David L. Callies & David J. Breemer, *Selected Legal and Policy Trends in Takings Law: Background Principles, Custom and Public Trust "Exceptions" and the (Mis) Use of Investment Backed Expectations*, 36 Val. U. L. Rev. 339, 361–378 (2002); Burling, *supra* n. 134, at 517–529; Steven J. Eagle, *The 1997 Regulatory Takings Quartet: Retreating from the "Rule of Law,"* 42 N.Y. L. Sch. L. Rev. 345, 383–386, 388–390, 398 (1988) (arguing for a narrower interpretation of background principles tied to the common law); see also Christie Olsson, *Takings Law in the Aftermath of Lucas v. South Carolina Coastal Council: Does the Background Principles Exception Clarify or Complicate Regulatory Takings Law*, 45 Santa Clara L. Rev. 707, 727, 731–732 (2005) (decisions applying background principles to regulations appear to restate the common law).

C. *A Constitutional Role for Judicial Review of Background Principles of State Property Law in Takings Cases*

Currently, one of the most important questions in federal takings law is who determines whether property qualifies for constitutional protection.¹⁵⁸ Based upon *Roth*, *Lucas*, and *Palazzolo*, the Supreme Court has indicated state legislatures and state courts should play a decisive role in the determination of constitutionally protected property. However, the Court has also signaled it may review state determinations of constitutionally-protected property according to *Lucas*' background principles. Still, the Court's willingness to review such determinations may raise federalism concerns due to *Roth*'s enshrining of state property law.¹⁵⁹

In *Stevens v. City of Cannon Beach*, the Supreme Court denied certiorari of a taking claim the Oregon Supreme Court had rejected due to background principles.¹⁶⁰ The Oregon Court ruled coastal owners did not own the beach portion of their property

158. See e.g. John Humbach, *Evolving Thresholds of Nuisance and the Takings Clause*, 18 Colum. J. Envtl. L. 1, 4 (1993); Laitos, *supra* n. 6, at § 5.04.

159. See Frank Michelman, *Property, Federalism and Jurisprudence: A Comment on Lucas and Judicial Conservatism*, 35 Wm. & Mary L. Rev. 301, 302–303, 305, 314, 318, 320 (1993). Following Justice Black, Professor Michelman defines “Our Federalism” as the federal judiciary maintaining respect for the competence and responsibility of state judiciaries, along with a posture of federal judicial restraint. *Id.* at 302–303. However, Michelman believes that *Lucas* and Justice Scalia’s philosophy forebode federal supremacy in the determination of constitutionally protected property under the Takings Clause. *Id.* at 313, 318, 320. Michelman’s suspicions may be allayed by the Court’s most recent taking decision, discussed *infra* at 28–30; see also Thompson, *supra* n. 126 at 1525 n. 290 (“any normative view of property is likely to constrain and thus federalize property rights to some degree”).

160. *Stevens v. City of Cannon Beach*, 510 U.S. 1207 (1994) (Scalia & O'Connor, JJ., dissenting from denial of certiorari).

according to that state's law of custom guaranteeing public access.¹⁶¹ Instead, that Court concluded the law of custom qualified as a background principle according to *Lucas*.¹⁶² Expressing concern for potential abuse of *Lucas*' background principles of state property law, Justices Scalia and O'Connor dissented from the denial of the writ of certiorari, explaining: "a State may not deny rights protected under the Federal Constitution . . . by invoking non-existent rules of state substantive law."¹⁶³

Further, the dissent stated, "[o]ur opinion in *Lucas* . . . would be a nullity if anything that a state court chooses to denominate 'background law'—regardless of whether it is really such—could eliminate property rights."¹⁶⁴ The dissent drew support from an earlier decision, *Hughes v. Washington*, wherein Justice Stewart agreed with the proposition that a state could not take property "by the simple device of asserting retroactively that the property it has taken has never existed at all."¹⁶⁵

In 2009, the Supreme Court accepted review on a takings challenge to a Florida Supreme Court decision regarding that Court's determination of Florida common law.¹⁶⁶ In *Walton County*,

161. *Stevens v. City of Cannon Beach*, 854 P.2d 449, 460 (Or. 1993), cert. denied (Mar. 21, 1994).

162. *Id.* at 456–457.

163. *Cannon Beach*, 510 U.S. at 1207. The dissent contended: (1) the Oregon Court was creating a new doctrine rather than applying the common law of custom; (2) Oregon's precedent on the subject was vacillating and therefore not persuasive; and (3) an evidentiary record had not been developed to support a claim of custom. *Id.* at nn. 4–5. For a critical review of *Cannon Beach*, see Callies & Breemer, *supra* n. 157, at 351, 375–377.

164. *Cannon Beach*, 510 U.S. at 1207.

165. *Id.* (quoting *Hughes v. Wash.*, 389 U.S. 290, 296–297 (1967) (Stewart, J., concurring)). *Hughes* held that public land law rather than the Washington Constitution controlled as to ownership of land accreted to a federal patent, which had been conveyed prior to the State of Washington's admission to the Union. *Hughes*, 389 U.S. at 291. Thus, *Hughes* was not decided as a taking, see *id.*, and Justice Stewart's concurrence on a taking theory was dictum. See *id.* at 296–297 (Stewart, J., concurring).

166. *Walton Co. v. Stop the Beach Renourishment, Inc.*, 998 So.2d 1102 (Fla. 2008), cert. granted sub. nom. *Stop the Beach Renourishment, Inc. v. Fla. Dept. of Envtl. Protec.*, 130 S.Ct. 2792, 2793 (June 15, 2009).

oceanfront property owners claimed their littoral rights were abrogated due to a government-sanctioned “erosion control line” that replaced the mean high-water mark where beach replenishment had occurred.¹⁶⁷ This surveyed boundary vested the state with property ownership seaward,¹⁶⁸ and the owners contended that as a result, their rights to future accretions and contact with the water were abolished.¹⁶⁹ Despite two dissenting justices, the Florida Supreme Court denied the owners’ taking challenge.¹⁷⁰

Among the issues the U.S. Supreme Court accepted for review was whether the Florida Court invoked “nonexistent rules of state substantive law” following *Cannon Beach*, such that its decision could be viewed as a “judicial taking.”¹⁷¹ The Supreme Court began its analysis by acknowledging the State of Florida, as owner of the beach seaward of the littoral property, had the right to fill its tidal and submerged land in order to manage its coastal resource.¹⁷² It further acknowledged that littoral owners had no right to dry land created and contact with the water where avulsion had occurred.¹⁷³ The Court then held the beach renourishment to be an avulsive event under Florida common law, and therefore, the Florida Supreme Court

167. *Id.* at 1108–1109. The legislation in question was the Beach and Shoreline Preservation Act, codified at Fla. Stat. §§ 161.011–161.045 (2005).

168. *Walton Co.*, 998 So.2d at 1108 (citing Fla. Stat. § 161.191(1)–(2))

169. *Id.* at 1115–1116.

170. *Id.* at 1109, 1116, 1121.

171. *Stop the Beach Renourishment, Inc. v. Fla Dept. of Env'tl Protec.*, 129 S.Ct. 2792 (2009) (grant of petition for certiorari).

172. *Stop the Beach Renourishment*, 130 S.Ct. 2592, 2611 (2010) (merits decision). The Court qualified this right by stating the state could not engage in fill that interfered with the littoral owners’ rights nor that of the public generally. *Id.*

173. *Id.* at 2598. Avulsion is the sudden or perceptible loss or addition to land by action of a waterbody. *Id.* In Florida, as at common law, title to dry land created by avulsion belongs to the owner of the previously submerged land rather than the upland owner. *Id.* at 2598–2599.

had not extinguished a common law property right.¹⁷⁴

While *Stop the Renourishment* affirmed the Florida Supreme Court's decision, the justices disagreed on whether a judicial taking would be recognized under the Takings versus the Due Process Clause and whether to articulate such a rule as dictum.¹⁷⁵ Hence, the decision is precedential only for the proposition that the Florida Supreme Court correctly interpreted that state's common law of property and that previously recognized property rights had not been abolished. Nonetheless, *Stop the Renourishment* may impart that the Court will continue to monitor state court precedent, consistent with the dissent in *Cannon Beach* and the concurrence in *Hughes*, for compliance with the Takings Clause, despite a lack of consensus on the judicial taking theory.¹⁷⁶

D. *The Alaska Supreme Court's Analysis of Protected Property and Lucas Background Principles*

The Alaska Supreme Court has addressed the question of constitutionally protected property in a number of takings decisions; however, it has not expressly considered *Lucas*' "background principles" in evaluating whether changes in positive law may abrogate or eliminate property interests.¹⁷⁷ Still, in four decisions

174. *Id.* at 2611–2613.

175. Compare *id.* at 2601–2602 (Scalia, J., plurality); *Id.* at 2613 (Kennedy & Sotomayor, JJ., concurring in part) with *id.* at 2618 (Breyer & Ginsburg, JJ., concurring in part). As presented in the case, the judicial taking issue was whether a court decision, as distinguished from legislative or regulatory action, eliminated a previously recognized property right. *Id.* at 2601–2602.

176. See *Vandevere v. Lloyd*, __ F.3d __, No. 09-35957, slip op. at 9228 n.4, (9th Cir. July 11, 2011) ("a federal court remains free to conclude that a state supreme court's definition of a property right really amounts to a subterfuge"). For commentary on judicial takings, see W. David Sarrat, *Judicial Takings and the Course Pursued*, 90 Va. L. Rev. 1487 (2004); Roderick Walston, *The Constitution and Property: Due Process, Regulatory Takings and Judicial Takings*, 2001 Utah L. Rev. 379 (2001); Thompson, *supra* n. 126.

177. See e.g. *Hageland*, 210 P.3d at 449; *Anderson*, 78 P.3d at 714–716 (Alaska 2002) (dispositional); *St. Dept. of Nat. Resources v. Arctic Slope Regl. Corp.*, 834 P.2d 134, 138 (Alaska 1991); cf. *Vanek v. St. Bd. of Fisheries*, 193 P.3d

concerning the constitutionality of 1997 tort-reform legislation, the Court has taken a similar approach in ascertaining whether punitive damage claims would be protected after the Legislature changed the law.¹⁷⁸ Through dispositional opinions in the first two cases and ratified by a majority in the third and fourth cases, the Court rejected taking challenges to a 1997 statute that allocates 50% of a punitive damage award to the State on the theory the claimants lacked a constitutionally-protected property interest.¹⁷⁹ The 1997 tort-reform legislation is commonly known in the literature as a “split-recovery” statute.¹⁸⁰

Evans was the first decision to address a taking challenge to the 1997 legislation. Plaintiffs in that case alleged tort claims that had not yet been adjudicated but whose underlying events had apparently occurred prior to enactment.¹⁸¹ The dispositional opinion,

283, 292 (Alaska 2008) (mentions “background principles of state law” in passing without identifying *Lucas* or engaging in a *Lucas* inquiry).

178. See *Alaska v. Carpenter*, 171 P.3d 41, 67–68 (Alaska 2007); *Reust v. Alaska Petroleum Contractors, Inc.*, 127 P.3d 807, 82 (Alaska 2005); *Id.* at 826 (Bryner, C.J., dissenting); *Anderson*, 78 P.3d at 714–716 (dispositional); *Id.* at 723 (Bryner, J., concurring in part and dissenting in part); *Evans ex. rel. Kutch v. Alaska*, 56 P.3d 1046, 1058 n.74 (Alaska 2002) (dispositional); *Id.* at 1075–1079 (Bryner, J., dissenting). The 1997 legislation raised a number of constitutional challenges aside from takings that are not considered here.

179. *Id.* The challenged legislation is codified at Alaska Stat. § 09.17.020(j), and was enacted as part of 1997 tort reform legislation. See Ch. 26, § 10, SLA 1997. The disputed provision states: “[i]f a person receives an award of punitive damages, the court shall require that 50 percent of the award be deposited into the general fund of the state.”

180. The term “split-recovery” statute refers to state legislation that allocates a portion of punitive damages awarded in a private action to a designated public fund. At least 12 states have adopted such legislation through the year 2000. See Scott Dodson, Note, *Assessing the Practicality and Constitutionality of Alaska’s Split-recovery Punitive Damages Statute*, 49 Duke L. J. 1335, 1336 n. 12 (2000) (collecting statutes).

181. See *Evans*, 56 P.3d at 1048 (plaintiffs described as “all injured parties contemplating tort actions” and “all allegedly injured persons who have filed or

delivered by a divided Court, ruled the 1997 legislation did not constitute a taking because it was “construed as a cap on punitive damages, limiting them *before* they are awarded to successful plaintiffs, [and therefore] no constitutional problem exists.”¹⁸² The *Evans* dissent reasoned the statutory limitation applied to punitive damage awards and hence, the provision referred to a fully adjudicated and liquidated chose in action for which protected property status applies.¹⁸³

In *Anderson* and subsequent cases, the injuries for which the plaintiffs sought punitive damages arose subsequent to the 1997 enactment.¹⁸⁴ The dispositional opinion by a divided court in *Anderson* invoked a rationale for rejecting the taking challenge beyond that stated in *Evans*: “unlitigated claims only become property when they accrue, and a claim cannot accrue before the events that give rise to it occur.”¹⁸⁵ Since the punitive damage claim in *Anderson* accrued after the effective date of the 1997 legislation, the Court concluded plaintiffs had no constitutionally-protected property interest.¹⁸⁶ The dissent to *Anderson* reiterated the earlier dissent to *Evans*.¹⁸⁷

Though not articulated, the four Alaska Supreme Court decisions are consistent with the views of other courts,¹⁸⁸ as well as commentators regarding the constitutionality of split-recovery

plan to file tort actions”).

182. *Id.* at 1058 (emphasis in original).

183. *Id.* at 1076–77. The dissent also argued the statutory forfeiture of 50% of a punitive damage award took someone’s property, otherwise the State acquired no property interest for deposit into the general fund. *Id.* at 1077–1078. *Evans*’ dispositional opinion failed to address this critique. *See id.* at 1058.

184. *Carpenter*, 171 P.3d at 68; *Reust*, 127 P.3d at 823; *Anderson*, 78 P.3d at 714.

185. *Anderson*, 78 P.3d at 714.

186. *Id.*

187. *Id.* at 723 (Bryner, J., dissenting).

188. *See e.g. Enquist v. Or. Dept. of Agric.*, 478 F.3d 985, 1001–1005 (9th Cir. 2007); *Cheatham v. Pohle*, 789 N.E.2d 467, 474–475 (Ind. 2003); *DeMendoza v. Huffmann*, 51 P.3d 1232, 1245–1247, 1246 n.14 (Or. 2002); *Mack Trucks, Inc. v. Conkle*, 436 S.E.2d 635, 639 (Ga. 1993); *Gordon v. Fla.*, 608 So.2d 800, 801–802 (Fla. 1992) (per curiam).

statutes against takings challenges.¹⁸⁹ According to these authorities, punitive damages are a recognized element of the common law,¹⁹⁰ and as a chose in action, persons may claim a property interest in such causes of action at least for due process purposes.¹⁹¹ However, the common law also recognizes that the purposes served by punitive damages are punishment and deterrence of prohibited conduct rather than compensation to injured plaintiffs.¹⁹²

Due to these societal objectives and the discretionary nature of punitive damages,¹⁹³ the courts have characterized the property status of punitive damages as a contingent rather than vested interest under the Takings Clause.¹⁹⁴ Furthermore, since punitive damages

189. See e.g. Michael J. Klaben, *Split-recovery Statutes: the Interplay of the Takings and Excessive Fines Clauses*, 80 Cornell L. Rev. 104 (1994); Charles F.G. Parkinson, *A Shift in the Windfall: An Analysis of Indiana's Punitive Damage Statute and the Recovery of Attorney's Fees under the Particular Services Clause*, 32 Val. U. L. Rev. 923 (1998); Dodson, *supra* n. 180, at 1336 n. 12.

190. E.g. *Pac. Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1, 25–26 (1991) (Scalia, J., concurring); *DeMendoza*, 51 P.3d at 1239–1241 (reviewing nineteenth century treatises on the subject prior to Oregon's admission into the Union).

191. E.g. *Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 428 (1982) (quoting *Mullane v. C. Hanover Bank & Trust Co.*, 339 U.S. 306, 313 (1950)); accord e.g. Jeremy A. Blumenthal, *Legal Claims as Private Property: Implications for Eminent Domain*, 36 Hast. Const. L.Q. 373, 373–377 (2009); see also *Bush v. Reid*, 516 P.2d 1215, 1219 (Alaska 1973) (“a chose in action . . . is a form of property”).

192. E.g. *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 568 (1996); *Restatement (Second) of Torts* § 908(1) (1979); see also *Chizmar v. Mackie*, 896 P.2d 196, 209 (Alaska 1995) (quoting *State Farm Mut. Auto. Ins. Co. v. Weiford*, 831 P.2d 1264, 1266 (Alaska 1992)).

193. *Smith v. Wade*, 461 U.S. 30, 52 (1983); *Nissen v. Hobbs*, 417 P.2d 250, 251 (Alaska 1966) (punitive damages are within the discretion of the trier of fact); see also Alaska Stat. § 09.17.020(b) (“The fact finder *may* make an award of punitive damages only if the plaintiff proves” certain conduct by the defendant) (emphasis added).

194. See e.g. *Enquist*, 478 F.3d at 1004 (“plaintiff’s interest in punitive damages is even more contingent and uncertain than her interest in a tort cause of

are part of the common law, both the legislative and judicial branches of state governments have inherent authority to alter the rules on punitive damages¹⁹⁵ or abolish them altogether, as the Washington Supreme Court has done.¹⁹⁶ For these reasons, courts have determined punitive damage claims do not qualify as constitutionally protected property and accordingly, have upheld split-recovery statutes against takings challenges where the legislation severs a portion of the punitive damage award prior to entry of judgment.¹⁹⁷

The rationale behind these decisions distinguishes *Penn Central* expectations protected under the Takings Clause and leads to the conclusion that punitive damage claimants lack such expectations for the reasons stated above, especially where the legislation is enacted before the cause of action existed.¹⁹⁸ By comparison, some jurisdictions have interpreted punitive damage claims as fully vested property interests deserving of constitutional protection so long as they were reduced to judgment and awarded prior to statutory abrogation.¹⁹⁹

action”). Reviewing litigation challenging split-recovery statutes, *Enquist* noted “[t]he state supreme courts concluded that a plaintiff has no vested right in punitive damages.” *Id.* at 1005. See also *Anderson*, 78 P.3d at 714 (concluding “Anderson has no vested right in a punitive damages award”); *Cheatham*, 789 N.E.2d at 471–472.

195. *E.g. Haslip*, 499 U.S. at 39 (Scalia, J., concurring) (“State legislatures and courts have the power to restrict or abolish the common-law practice of punitive damages,” citing, *e.g.* Alaska Stat. § 07.17.020); see also *Duke Power Co. v. Carolina Envtl. Study Group*, 438 U.S. 59, 88 n. 32 (1978) (“the Constitution does not forbid the creation of a new right, or the abolition of old ones recognized by the common law, to allow a permissible legislative object”). Both *Haslip* and *Duke Power* were due process rather than takings cases.

196. *Dailey v. N. Coast Life Ins. Co.*, 919 P.2d 589, 590 (Wash. 1991) (describing the Court’s “long standing rule prohibiting punitive damages without express legislative authorization”).

197. See *supra* n. 194 (citing cases).

198. *Enquist*, 478 F.3d. at 1003–1004 (invoking the *Penn Central* investment expectations factor to “conclude plaintiff’s interest in a prospective punitive damages award does not qualify as ‘property’ under the Takings Clause”); see also *Anderson*, 78 P.3d at 714–715 (plaintiff had no reasonable expectation of full punitive damage award since Alaska’s split-recovery statute was enacted before her claim accrued).

199. See *Smith v. Price Dev. Co.*, 125 P.3d 945, 949–50 (Utah 2005); *Kirk*

Interestingly, neither the courts nor commentators have applied *Lucas*' background principles in determining the constitutionality of split-recovery statutes against takings challenges.²⁰⁰ Yet the analysis here suggests such legislation would qualify as an inherent limitation on state property titles under *Lucas* because *Roth*'s "existing rules and understandings" incorporates the common law, the evolution of tort reform, and the precedent among jurisdictions sustaining the constitutionality of split-recovery statutes.

Subsequent to the split-recovery litigation, the Alaska Supreme Court in *Hageland Aviation Services, Inc. v. Harms* ruled that a cause of action qualified as property for takings purposes even though the claim had not been reduced to judgment.²⁰¹ *Hageland* held employee overtime compensation claims accrued as causes of action to qualify as a vested interest against retroactive legislation that would have extinguished the claims.²⁰² The Court reasoned that "unlitigated causes of action become property when they accrue" and relied on Alaska precedent that analogized accrual to the ripening of a vested right.²⁰³ In comparison to the constitutional challenges to

v. Denver Publg. Co., 818 P.2d 262, 266–267 (Colo. 1991).

200. See *supra* nn. 188–99; see also Bethany Rabe, *The Constitutionality of Split-recovery Punitive Damage Statutes: Good Policy but Bad Law*, 2008 Utah L. Rev. 333; Victor S. Schwartz, Mark A. Behrens & Cory Silverman, *I'll Take That: Legal and Public Policy Problems Raised by Statutes that Require Punitive Damage Awards to be Shared with the State*, 68 Mo. L. Rev. 525 (2003).

201. *Hageland Aviation Servs., Inc. v. Harms*, 210 P.3d 444, 449 (Alaska 2009).

202. *Id.* *Hageland* was an employee class action lawsuit brought under Alaska's Wage & Hour Act contending that pilots were not exempt employees. *Id.* at 446. The superior court ruled in plaintiffs' favor as to the employer's liability. *Id.* at 446–447. While the suit was pending, the Legislature enacted a bill that retroactively exempted the pilots from coverage under the Act, thereby extinguishing their compensation claims. *Id.* at 447. Plaintiffs then alleged a takings claim and prevailed. *Id.* at 447, 449–451.

203. *Hageland*, 210 P.3d at 449 (discussing *Bidwell v. Scheele*, 355 P.2d 584, 586 n. 5 (Alaska 1960), wherein a general savings statute was construed to

the 1997 tort reform legislation, the *Hageland* plaintiffs' causes of action had been, with the exception of damages, favorably adjudicated before the Alaska Legislature retroactively changed the substantive law.²⁰⁴

Hageland's reasoning regarding the property status of choses in action appears to be inconsistent with other court decisions for three primary reasons. First, the Alaska Supreme Court has recognized "the term 'vested rights' is conclusory," "unhelpful" and "especially problematic . . . as a determinant of retrospectivity."²⁰⁵ Consequently, *Hageland's* reliance on vested rights may be overbroad in evaluating takings protection.²⁰⁶ By comparison, principles of retroactivity may provide a more meaningful assessment of due process or taking protection for asserted property interests subject to retrospective legislation.²⁰⁷ In *Landgraf v. USI Film Products*, the Court noted that James Madison argued against retroactive legislation

preserve a statutory cause of action that arose before repeal of the legislation). *Bidwell* held the cause of action had accrued and became a vested right. 355 P.2d at 587.

204. *Hageland*, 210 P.3d at 446, 450 ("the pilots' recovery was certain when Chapter 19 was enacted [because] Hageland had already been found liable for the pilots' unpaid overtime").

205. *Norton v. Alcoholic Beverage Control Bd.*, 695 P.2d 1090, 1092–1093, 1093 n. 5 (Alaska 1985) (citing Charles B. Hochman, *The Supreme Court and the Constitutionality of Retroactive Legislation*, 73 Harv. L. Rev. 692, 696 (1960)).

206. The vested rights doctrine was developed in the nineteenth century to protect established property and contract rights against new police powers. In the early decades of the twentieth century, the distinction between vested rights and expectancies was sharply criticized. Merrill, *supra* n. 119, at 922, 922 n. 153, 961 n. 282. Later in the twentieth century, vested rights became subordinated to the Court's expansive interpretation of the Due Process, Contract, and Takings Clauses. Laitos, *supra* n. 6, at § 3.02. The vested rights doctrine still exists in constitutional law, but it now typically incorporates equitable estoppel against governmental action. *Id.* See also Eagle, *supra* n. 6, at §§ 7-1(b), 7-1(f)–(j) (discussing vested rights).

207. *E. Enters.*, 524 U.S. at 528–529; see also James L. Kainen, *Historical Framework for Reviving Constitutional Protection for Property and Contract Rights*, 79 Cornell L. Rev. 87, 103–105, 112–114 (1994); Symposium, *When Does Retroactivity Cross the Line?* Winstar, Eastern Enterprises and Beyond, 51 Ala. L. Rev. 933 (2000); Ann Woolhandler, *Public Rights, Private Rights and Statutory Retroactivity*, 94 Geo. L. J. 1015 (2006).

that allows “the powerful to obtain special and improper legislative benefits.”²⁰⁸ Applying this principle, *Hageland’s* retroactive legislation was targeted at eliminating the employees’ class action after liability had been established; such invidious treatment through retroactive legislation may explain the court’s disposition, notwithstanding that a general statement of legislative purpose had been presented.²⁰⁹

Second, *Hageland* is subject to criticism for failing to address the well settled federal rule that choses in action do not conclusively vest as constitutionally protected property for either due process or takings purposes until a final, unreviewable judgment is entered.²¹⁰ While a chose in action has provisional property status *pendente lite*, the law applicable to a pending claim may be altered, and the court must apply the law in effect at the time of final decision rather than prior law on which the claim was predicated.²¹¹ Accordingly, a

208. *Landgraf v. USI Film Prods.*, 511 U.S. 244, 267 n. 20 (1994) (discussing Madison’s reasoning in *The Federalist* No. 44 at 301 (J. Cooke ed. 1961)).

209. *Hageland*, 210 P.2d at 450 (“The avowed purpose of Chapter 19 was to eliminate the pilots’ claims along with the claims of two other class actions against Alaska air carriers”). The Chapter 19 legislation did include a legislative purpose of “retroactively removing flight crews from the scope of statutory overtime compensation required under the Alaska Wage and Hour Act.” *Id.*; Appellant’s Excerpts of Rec., vol. I at 131 (Alaska Sen. Bill 105, Sponsor State. (Feb. 14, 2005)).

210. See e.g. *In re Consol. Atmospheric Testing Litig.*, 820 F.2d 982, 989 (9th Cir. 1987) (tort actions brought against government contractors were superseded by retroactive legislation imposing FTCA as exclusive forum; this legislation neither constituted a taking nor resulted in a violation of due process), *cert. denied sub nom. Konizeski v. Livermore Labs*, 485 U.S. 905 (1988); *Ileto v. Glock, Inc.*, 565 F.3d 1126, 1139–1142 (9th Cir. 2009) (common law tort claims against gun manufacturers superseded by retroactive legislation barring pending claims; this legislation upheld against separation of powers, due process and taking challenges).

211. *Plaut v. Spendthrift Farm, Inc.*, 514 U.S. 211, 212 (1995) (“when a

chose in action may lose its protected property status if retroactive legislation abrogates or eliminates the property status before a final judgment is entered. The employer-appellants in *Hageland* advanced this argument.²¹² The pilot-appellees relied on *Anderson*'s analysis of choses in action and contended its rule on accrual before entry of judgment controlled over the adverse federal authority.²¹³ *Hageland* declined to address the federal authority on retroactive legislation applied to claims *pendente lite*.²¹⁴

Third, *Hageland* and *Anderson* may be inconsistent with *Evans* in determining when choses in action acquire property status for takings protection. *Hageland* and *Anderson* indicate that choses in action will acquire property status when they accrue. *Evans* suggests its claims had accrued prior to the tort reform legislation,²¹⁵ and therefore, the accrued claims should qualify as constitutionally protected property. However, the dispositional opinion in *Evans* indicates the retroactive legislation was constitutional because it became effective prior to a punitive damage award rather than accrual of the cause of action.²¹⁶ If *Hageland* and *Anderson* are to be reconciled with *Evans*, the Alaska Supreme Court is apparently of the view that other choses in action vest differently from punitive damage claims as property interests for taking purposes.

In *State Department of Natural Resources v. Arctic Slope Regional Corp.*, the Alaska Supreme Court followed the U.S. Supreme Court in defining intangible commercial interests, such as confidential business information and trade secrets, as

new law makes clear that it is retroactive, an appellate court must apply it in reviewing judgments still on appeal, and must alter the outcome accordingly"); *U.S. v. Schooner Peggy*, 5 U.S. 103 (1801); accord e.g. *Natl. Coalition to Save Our Mall v. Norton*, 269 F.3d 1092, 1096 (D.C. Cir. 2001); *Eramly v. INS*, 131 F.3d 1284, 1285 (9th Cir. 1997) (per curiam).

212. *Hageland*, Br. of Appellants, 21–24 nn. 13–14 (filed Mar. 3, 2008). Additionally, an opinion of the Alaska Attorney General found the Ch. 19 retroactive legislation to be constitutional according to the federal authority. *Id.*; Appellant's Excerpts of Rec., vol. I, 62–64 (reproducing 2005 Inf. Op. Atty. Gen., 6–8 (May 2; 883-05-0016))

213. *Id.*, Br. of Appellees at 16.

214. *Hageland*, 210 P.3d at 449–450.

215. See *Evans*, 56 P.3d at 1048.

216. *Id.* at 1058.

constitutionally protected property.²¹⁷ The Alaska Court quoted with approval *Monsanto*'s "notion of 'property' that extends beyond land and tangible goods and includes the products of an individual's 'labour and invention.'"²¹⁸ *Arctic Slope* went on to declare: "By protecting all persons' 'enjoyment of the rewards of their own industry,' the Alaska Constitution adopts this Blackstone/Locke theory of property."²¹⁹ On application, the Court ruled that a company's confidential drilling records generated on an oil and gas exploration qualified as property for purposes of a takings claim against compulsory disclosure to either the State Department of Natural Resources (DNR) or the public.²²⁰ It ruled separately that DNR had authority to use the confidential information internally without a taking; however, the Court did not reach the issue of whether compulsory records disclosure to the public would actually result in a taking.²²¹

DeLisio v. Alaska Superior Court is perhaps the first case wherein the Alaska Supreme Court evaluated the presence of a property interest under the Alaska versus the Federal Constitution for takings purposes.²²² In *DeLisio*, an attorney objected to his compulsory appointment for criminal representation, contending his labor qualified as property, and the appointment amounted to a taking under both the Alaska and U.S. Constitutions.²²³ The Alaska Supreme Court agreed that a taking had occurred under the Alaska

217. *St. Dept. of Nat. Resources v. Arctic Slope Regl. Corp.*, 834 P.2d 134, 138 (Alaska 1991).

218. *Id.* at 138 (quoting *Monsanto*, 467 U.S. at 1002–1003 (citing William Blackstone, *Blackstone Commentaries* vol. 2, 405; John Locke, *The Second Treatise of Civil Government* ch. 5 (J. Gough ed., Blackwell 1947)).

219. *Id.* at 138.

220. *Id.* at 136, 138.

221. *Id.* at 140–142, 144 n. 11.

222. *DeLisio v. Alaska Super. Ct.*, 740 P.2d 437, 438 (Alaska 1987).

223. *Id.* at 438.

Constitution.²²⁴ *DeLisio* acknowledged the great weight of authority denied such a taking and that the attorney's argument might not have merit under the Federal Constitution.²²⁵ In fact, *DeLisio* overruled two prior decisions of the Alaska Supreme Court that denied such a taking claim.²²⁶

Fundamental to *DeLisio* was whether the asserted property interest concerned the practice of law or a person's labor.²²⁷ Following state precedent, *DeLisio* stated "it has long been recognized that '[l]abor is property'" and ruled personal services should not be excluded from the Alaska Constitution's takings clause.²²⁸ However, the Alaska Court acknowledged the "longstanding tradition" of an attorney being an officer of the court.²²⁹ Still, *DeLisio* discounted this significance by finding "this practice is neither as traditional nor as venerable as had been previously supposed" and "tradition alone, regardless of its venerability, cannot validate an otherwise unconstitutional practice."²³⁰ *DeLisio's* rejection of a "longstanding tradition" suggests a critical treatment of *Lucas's* "background principles" and *Roth's* "existing rules and understandings" in evaluating the presence of constitutional property interests under Alaska's taking clause.²³¹

III. THE ALASKA COURT'S *PER SE* TAKINGS ANALYSIS

The Alaska Supreme Court has adopted *Lucas's* test for *per se* takings pertaining to either a prohibition on all economic use or

224. *Id.* at 438, 442–443.

225. *Id.* at 440.

226. *Id.* at 439, overruling, *Wood v. Super.Ct.*, 690 P.2d 1225, 1229 (Alaska 1984) and *Jackson v. Alaska*, 413 P.2d 488, 490 (Alaska 1966)).

227. *Id.* at 440–442.

228. *DeLisio*, 740 P.2d at 440 (quoting *Coffeyville Vitrified Brick & Tile v. Perry*, 76 P. 848 (Kan. 1904)).

229. *Id.* at 441.

230. *Id.*

231. *Id.* at 441–442 (reviewing American precedent and comparing English common law on attorneys as officers of the court).

physical invasion of property.²³² Since *Lucas* was decided, the Court has applied the “total taking” test in several cases.²³³ In all but one of these cases, the Court rejected the taking claims under the total taking test.²³⁴ Prior to *Lucas*, the Court held a taking occurred in several cases that appear to be consistent with *Loretto*’s rule on physical invasion.²³⁵ However, the Court’s post-*Lucas* precedent has not clarified whether these earlier decisions sound as *Lucas per se* takings.²³⁶ The combination of these results leaves some questions regarding the Court’s interpretation of the *Lucas per se* takings tests.

A. *Per Se Taking through Denial of All Economically
Beneficial Use of Property*

In cases alleging a *Lucas* total taking, the Alaska Supreme Court has expressed difficulty evaluating the claim due to a lack of evidence regarding deprivation of all beneficial use of property.²³⁷ In

232. *Anchorage v. Sandberg*, 861 P.2d 554, 557 (Alaska 1993); see also e.g., *Cannone v. Noey*, 867 P.2d 797, 800 (Alaska 1994) (citing *Sandberg* 861 P.2d at 557).

233. See *Spinell Homes v. Mun. of Anchorage*, 78 P.3d 692, 702 (Alaska 2003); *Balough v. Fairbanks N. Star Borough*, 995 P.2d 245, 266 (Alaska 2000); *Tlingit-Haida*, 15 P.3d at 765; *Beluga Mining Co. v. St. Dept. of Nat. Resources*, 973 P.2d 570, 575 (Alaska 1999); *Cannone*, 867 P.2d at 801; *Sandberg*, 861 P.2d at 557 n.7.

234. *Tlingit-Haida*, 15 P.3d at 765 (recognizing a *Lucas per se* taking for a public utility’s “stranded facility” due to regulatory action).

235. See *Bakke*, 744 P.2d at 657 (dictum); *DeLisio*, 740 P.2d at 442–443; *Doyle*, 735 P.2d at 735; *Grant*, 560 P.2d at 39; *Wernberg*, 516 P.2d at 1200–1201.

236. See *City of Kenai*, 860 P.2d at 1238 (taking can occur by physical invasion without explanation to pre-*Lucas* Alaska precedent); *Arctic Slope*, 834 P.2d at 142 (discussing federal precedent for a taking by physical invasion but not reviewing Alaska decisions); *Sandberg*, 861 P.2d at 557 n. 7 (dictum: a *per se* taking by physical invasion amounts to an appropriation of property).

237. See *Spinell*, 78 P.3d at 702 (“Spinell makes no effort to show that the value of its land was at all altered by the municipality’s actions”); *Balough*, 995

this regard, the Court has stated that the availability of an alternative property use not pursued by the owner or evidence of marketability despite the regulation will defeat a *Lucas per se* taking claim.²³⁸ In *Zerbetz*, the Alaska Supreme Court colorably misstated *Lucas* for the proposition that a federal taking would not occur “unless the owner has been deprived of all economically beneficial uses of his property.”²³⁹ *Lucas* recognized that a *per se* taking is established if the owner has been deprived of all economically beneficial or productive use; however, *Lucas* also recognized the principle of a *Penn Central* taking for a diminution in value warranting compensation.²⁴⁰

In *Tlingit-Haida*, the Alaska Supreme Court agreed with the superior court that a “de facto taking” had occurred when the former Alaska Public Utility Commission (PUC) modified a utility’s certificate of authority.²⁴¹ The Court furthermore “agree[d] with the superior court that the modification is a *per se* taking for which compensation is due.”²⁴² The PUC action pertained to the Tlingit-Haida Regional Electrical Authority (THREA), which provided service to Klawock and other villages. The PUC decided the public interest was better served by another utility providing electrical service to Klawock.²⁴³ However, the PUC’s order did not affect the entirety of THREA’s service area nor was its operating certificate revoked altogether.²⁴⁴ Instead, “the commission’s modification of THREA’s certificate had the effect of denying THREA the use of

P.2d at 266 (no evidence proffered to substantiate assertion that marketability of property was impaired); *Cannone*, 867 P.2d at 801 (reversing superior court finding of *per se* taking as “wholly unsupported by the record”).

238. *Balough*, 995 P.2d at 266 n. 83; *Cannone*, 869 P.2d at 801.

239. *Zerbetz v. Mun. of Anchorage*, 856 P.2d 777, 782 n. 5 (Alaska 1993) (citing *Lucas*).

240. *Lucas*, 505 U.S. at 1016–1017 (*per se* taking rule); *Id.* at 1016 n. 7 (*Penn Central* rule). See also *Palazzolo*, 533 U.S. at 617 (citing *Penn Central*, the Court stated that “where a regulation . . . fall[s] short of eliminating all economically beneficial use, a taking may nonetheless have occurred”).

241. *Tlingit-Haida*, 15 P.3d at 764.

242. *Id.* at 765.

243. *Id.* at 759–761 (PUC Ords. nos. 9 and 19).

244. *Id.* at 765 (“the commission’s action did strand some of THREA’s physical assets”).

property dedicated to providing Klawock with electrical service.”²⁴⁵

Tlingit-Haida made no finding that the utility’s loss of service amounted to a deprivation of all beneficial use of its property.²⁴⁶ To the contrary, the Court affirmed the PUC’s finding that “THREA’s loss of Klawock [electrical service] would not jeopardize the utility’s financial well-being or the Rural Electrification Act loans that Klawock’s physical plant secured.”²⁴⁷ With this record, *Tlingit-Haida* cannot be reconciled with the Court’s denial of *per se* takings in *Spinell*, *Balough*, and *Cannone* where economic property use remained.²⁴⁸ Despite this significant disparity, *Tlingit-Haida* can be explained as turning on public utility rather than takings law.²⁴⁹ Thus, both the PUC and the competing utility recognized that some measure of compensation would be due THREA pursuant to Alaska law concerning the PUC’s authority to transfer assets as part of a modification of a certificate of convenience.²⁵⁰

Sandberg rejected a developer’s claim of a *per se* taking “because the municipality neither sought to appropriate SD&R’s

245. *Id.*

246. *See Tlingit-Haida*, 15 P.3d at 764–765.

247. *Id.* at 760 (PUC finding), 764 (court deferred to PUC’s review of conflicting expert testimony as to economic impact of decertification).

248. *Spinell*, 78 P.3d at 702; *Balough*, 995 P.2d at 266; *Cannone*, 867 P.2d at 801.

249. *See Tlingit-Haida*, 15 P.3d 754; Reply Br. of Cross Appellant Alaska Power Co.’s, *Tlingit-Haida Regl. Electr. Auth. v. Alaska*, 13–14 (“The imposition of stranded investment would be a taking for which the affected utility must be allowed to obtain compensation equating with the used and useful remaining value of its affected facilities”); *see also* William J. Baumol & J. Gregory Sidak, *Stranded Costs*, 18 Harv. J.L. & Pub. Policy 835, 845–847 (1995); Eagle, *supra* n. 6, at § 1-6(d)(2) (discussing change in regulatory policy that results in confiscation to utility investors and whether taking occurs).

250. *Tlingit-Haida*, 15 P.3d at 764; *see also* Alaska Pub. Util. Commn.’s Reply Br. on Takings Issues 3, 5, 8; Alaska Power Co.’s Reply Br. on Condemnation and Takings Issues 11, 13.

property nor enacted a regulation constraining SD&R's use of its property in any way."²⁵¹ Justice Compton dissented from the Court's opinion.²⁵² The dissent drew upon the superior court's finding that the Municipality of Anchorage's "conduct made the development of plaintiffs' property economically infeasible."²⁵³ The dissent argued that the Municipality substantially interfered with the developer's property use because "the interference resulted from the municipality's program of acquiring park land and its efforts to minimize costs associated with the acquisitions."²⁵⁴ The dissent suggests, but does not explain, that the nature of the governmental interference is immaterial if the result denies an owner all economically beneficial use of property.²⁵⁵ The dissent can also be read to apply *Armstrong's* fairness principle that the developer was singled out to bear disproportionate costs of a program benefitting the public generally.²⁵⁶

B. Per Se Taking Through Physical Invasion or Appropriation

In a series of cases decided before *Loretto* and *Lucas*, the Alaska Supreme Court held a taking occurred under the following circumstances: destruction of an express easement, denial of littoral access, imposition of a navigational easement, appropriation of labor, or physical occupation of property.²⁵⁷ Though the Alaska Court has not subsequently classified this precedent as a *per se* taking following

251. *Sandberg*, 861 P.2d at 557 n. 7.

252. *Id.* at 561–565.

253. *Id.* at 561.

254. *Id.* at 563.

255. *Id.* at 562 n. 3.

256. *See id.* at 562–563; *see also supra* pt. I(H) (discussing *Armstrong's* fairness principle).

257. *See City of Kenai*, 860 P.2d at 1239 (revocation and destruction of express easement); *Bakke*, 744 P.2d at 657 (dictum—landslide from state logging operation); *DeLisio*, 740 P.2d at 442–443 (appropriation of attorney's labor); *Doyle*, 735 P.2d at 735 (navigational easement constructively imposed); *Grant*, 560 P.2d at 39 (destruction of littoral access); *Wernberg*, 516 P.2d at 1200–1201 (same).

Lucas,²⁵⁸ federal takings law supports such a conclusion: the right to exclude is deemed fundamental to property ownership and actions depriving owners of their exclusive right of possession are traditionally recognized as takings.²⁵⁹ Thus, the destruction of a right of access,²⁶⁰ the imposition of an easement through regulation,²⁶¹ and the permanent physical occupation of property regardless of governmental purpose²⁶² are all takings according to this rationale.

IV. THE ALASKA COURT'S CASE-SPECIFIC INQUIRY IN *PENN CENTRAL* PARTIAL TAKINGS

Although *Penn Central* was decided in 1978, the Alaska Supreme Court did not acknowledge *Penn Central*'s case-specific approach until *Arctic Slope* in 1991.²⁶³ In the intervening period, the Court decided takings cases according to Alaska precedent.²⁶⁴

258. See e.g. *Spinell*, 78 P.3d at 702; *R & Y, Inc. v. Mun. of Anchorage*, 34 P.3d 289, 293 (Alaska 2001); *Sandberg*, 861 P.2d at 557 (Alaska's post *Lucas* decisions only mention physical appropriation as a form of *per se* taking without elaboration or citation to precedent).

259. E.g. *Laitos*, *supra* n. 6, at § 11.03[A].

260. E.g. *Wernberg*, 516 P.2d at 1194–1197 (explaining rights of riparian and littoral property owners and rule that public obstruction of the owner's right of access when not in aid of navigation constitutes a taking; citing cases & authorities).

261. *Nollan*, 483 U.S. at 831–832 (imposition of an easement as a condition of regulatory entitlement was tantamount to physical occupation of property, and therefore, a taking).

262. E.g. *Loretto*, 458 U.S. at 428–430 (collecting cases holding fixture installation or structure placement on property is tantamount to an ouster of possession); see also *U.S. v. Causby*, 328 U.S. 256, 261, 264 (1946) (frequent aircraft overflights amounted to direct invasion of owner's property; held a taking).

263. *Arctic Slope*, 834 P.2d at 139 (quoting *Monsanto*, 467 U.S. at 1005 and citing *Pruneyard*, 447 U.S. at 83); accord *Hageland*, 210 P.3d at 449 n. 13. *Monsanto* and *Pruneyard* follow *Penn Central*.

264. See *Ehrlander v. St. Dept. of Transp. & Pub. Facilities*, 797 P.2d 629,

Following *Arctic Slope* and based upon *Agins*, *Sandberg* added a fourth factor regarding “the legitimacy of the interest advanced by the regulation.”²⁶⁵ While the Alaska Court has subsequently described its case-specific inquiry as following the “*Sandberg* factors,” this approach is identical to *Penn Central* coupled with *Agins*’ substantially advances test.²⁶⁶

A. Character of the Governmental Action

As with federal takings law, the character of the governmental action factor generally has not been decisive in most Alaska takings cases.²⁶⁷ While a few cases do emphasize this factor, drawing any significance from this factor beyond the context of each decision would be speculative.

Hageland applied the character of action factor in ruling that retroactive legislation constituted a taking of employees’ causes of action for overtime compensation.²⁶⁸ The Alaska Court rejected the employer’s contention that the legislation served a general economic purpose in furtherance of the police power.²⁶⁹ *Hageland* distinguished companion legislation that was applied prospectively. With regard to the challenged legislation that was expressly retroactive, the Court stated that “[i]n carrying out the legislature’s narrow purpose to prevent litigation of these class actions, Chapter 19 effectively transferred money from the pockets of one private

632–633 (Alaska 1990); *Homeward Bound, Inc. v. Anchorage Sch. Dist.*, 791 P.2d 610, 614 (Alaska 1990); *Bakke*, 744 P.2d at 657; *DeLisio*, 740 P.2d at 439–440, 442–443; *Doyle*, 735 P.2d at 736–737. These Alaska decisions occasionally drew on federal precedent but did not employ the *Penn Central* factors. *See id.*

265. *Sandberg*, 861 P.2d at 557 (citing *Ruckelshaus*, 467 U.S. at 1000–1005; *Agins*, 447 U.S. at 260–261).

266. *See Spinell*, 78 P.3d at 702; *R & Y*, 34 P.3d at 293 (describing “*Sandberg* factors”); *see also e.g. Beluga*, 973 P.2d at 575; *Cannone*, 867 P.2d at 800 (describing factors and citing *Sandberg*).

267. *See e.g. Balough*, 995 P.2d at 266 (“[t]he [Borough] Assembly’s rezoning action was a legitimate government action, consistent with the [Fairbanks North Star Borough]’s comprehensive zoning plan”).

268. *Hageland*, 210 P.3d at 450.

269. *Id.*

party to another.”²⁷⁰ Although not stated, *Hageland*’s finding suggests the retroactive legislation violated the public use requirement of the Takings Clause that has been the subject of much scrutiny following the Supreme Court’s decision in *Kelo v. City of New London, Conn.*²⁷¹

Sandberg concerned a developer’s challenge to the Municipality of Anchorage’s refusal to fund water, sewer, and road improvements through assessment districts in which the Municipality itself held title to several parcels.²⁷² The Alaska Supreme Court held the Municipality’s actions “involved neither a physical invasion nor even regulation concerning SD&R’s use of its property.”²⁷³ The Court described the situation as “a series of municipal decisions which, indirectly, have rendered SD&R’s development plans economically infeasible.”²⁷⁴ With regard to the character of the action, the Court stated that “the infringement on SD&R’s property rights is so unclear” and ruled that the other *Penn Central* factors “must weigh heavily in SD&R’s favor.”²⁷⁵ Justice Compton dissented in *Sandberg* and was persuaded that the Municipality’s actions substantially interfered with the owner’s property, regardless of the absence of regulatory action.²⁷⁶

The character of the action issue in *R & Y* was joint wetlands

270. *Id.*

271. *Kelo v. City of New London*, 545 U.S. 469 (2005). *Kelo* noted that usage of the eminent domain power for purely private purposes, *i.e.* transfer of property from one private owner to another, would not satisfy the “public use” prong of the Takings Clause. *Id.* at 477 (quoting *Hawaii Housing Authority v. Midkiff*, 467 U.S. 229, 245 (1984)); *see generally* Dwight H. Merriam & Mary Massaron Ross, *Eminent Domain Use and Abuse: Kelo in Context* (2006).

272. *Sandberg*, 861 P.2d at 555–556.

273. *Id.* at 558, 559 (the Municipality “has never placed any restrictions on SD&R’s right to use and develop any portion of its property”).

274. *Id.* at 558.

275. *Id.*

276. *Id.* at 562 n. 3 (Compton, J., dissenting).

regulation by the Municipality and the Army Corps of Engineers.²⁷⁷ At trial, the owners argued that joint governmental regulation should not be a legal defense to liability and requested that the issue of joint and several liability be decided.²⁷⁸ The superior court found “the lion’s share” of property regulation was attributable to the federal government rather than the Municipality.²⁷⁹ Although declining to rule on the matter, the trial court acknowledged the joint and several liability issue and found this to be a matter of first impression.²⁸⁰ The trial court instead followed *Sandberg* by finding “the MOA’s conduct regarding the land was ‘mostly indirect.’”²⁸¹ Due to this complication in proving a taking, the trial court applied *Sandberg* in requiring the investment expectations and economic impact to weigh heavily in the owners’ favor.²⁸² The Alaska Supreme Court affirmed the trial court’s application of *Sandberg*.²⁸³

The issue of joint governmental action in regulatory takings law is a vexing one,²⁸⁴ due, *inter alia*, to limitations in state and federal jurisdiction.²⁸⁵ A property owner subject to cumulative regulatory burdens by different governments, in effect, is required to

277. *R & Y*, 34 P.3d at 291–292, 294.

278. Appellant’s Br., *R & Y, Inc. v. Mun. of Anchorage*, 29–33, 37–42. The owners cited federal takings precedent on the issue of joint governmental regulation including a U.S. Supreme Court decision that held a local government liable for its involvement in a federally mandated program. *Id.* at 32, 32 n. 13, 41–42 (citing, *inter alia*, *Griggs v. Allegheny County*, 369 U.S. 84, 89–90 (1962)).

279. *R & Y*, 34 P.3d at 295 (quoting Memorandum Decision, *R & Y, Inc. v. Mun. of Anchorage*, 17).

280. Memorandum Decision, *R & Y, Inc. v. Mun. of Anchorage*, 11.

281. *R & Y*, 34 P.3d at 294.

282. *Id.* at 296 n. 19 (citing *Sandberg*, 861 P.3d at 558).

283. *Id.* at 294.

284. The U.S. Court of Federal Claims has stated in dictum, but not expressly ruled, on the issue of joint and several liability as between two governments allegedly causing a taking. See *Ciampetti v. U.S.*, 18 Cl.Ct. 548, 556 (1989); *City National Bank*, 33 Fed.Cl. at 231–232.; *Good v. U.S.*, 39 Fed.Cl. 81, 105 (1997). At the time of *R & Y*, there did not appear to be any precedent on the matter.

285. See e.g. *Orion Corp. v. Wash.*, 747 P.2d 1062, 1070 (Wash. 1987) (state taking action could not join federal government as party defendant, and similarly, federal taking action could not join state government as party defendant).

establish causation among the different regulators to work a taking.²⁸⁶ Meanwhile, each defendant can deflect from taking causation by contending the plaintiff failed to comply with another regulator or that the regulator caused the taking.²⁸⁷ *R & Y* does not provide a satisfactory solution to this problem where the regulatory impact is bifurcated due to jurisdictional limitations. Property owners subject to multiple government regulations would likely welcome a more definitive ruling in takings law.

In *Waiste v. State*,²⁸⁸ the seizure of a vessel through an *in rem* forfeiture action was held not to be “an exercise of the State’s constitutional taking power for which the Takings Clause triggers the requirement of just compensation. Rather, that law is an exercise of the State’s police powers.”²⁸⁹ *Waiste* followed well established law that asset forfeitures reflect a traditional exercise of police power.²⁹⁰ If *Waiste* were analyzed through *Penn Central*, its health and safety objective would weigh strongly with regard to the character of the governmental action.²⁹¹ The vessel owner asserted lost profits from temporary forfeiture, but the Alaska Court decided the police power pre-empted any claim under Alaska’s constitutional damage clause.²⁹²

286. See e.g. *Resource Invs., Inc. v. U. S.*, 85 Fed.Cl. 447, 521–23 (2009) (fact question as to causation of temporary taking as between federal versus state and local permitting review precluded summary judgment; surveys federal precedent on causation in takings cases).

287. See *id.*

288. *Waiste v. Alaska*, 10 P.3d 1141 (Alaska 2000).

289. *Id.* at 1155.

290. See *id.* at 1155 n. 75 (citations omitted); Eagle, *supra* n. 6, at § 6.2 (regarding civil forfeiture law versus taking protection.)

291. See *supra* pt. I(H).

292. *Waiste*, 10 P.3d at 1154–1155.

B. Reasonable Investment-Backed Expectations

The Alaska Supreme Court's leading case regarding investment-backed expectations is *Arctic Slope*. However, *Monsanto's* early formulation of the notice rule in federal takings law governed the context of that case and the rule of decision.²⁹³ Subsequent to *Monsanto*, the notice rule in federal takings law has evolved through both *Lucas* and *Palazzolo*, as explained above.²⁹⁴ The Alaska Supreme Court has yet to apply *Palazzolo* in a case wherein a person has acquired property post-enactment and the question is whether reasonable investment expectations are retained notwithstanding the owner's notice of regulation.

Arctic Slope drew upon *Monsanto's* framework for evaluating whether information submitted as part of a permitting and registration scheme would be protected due to an "express promise or guaranty" or, instead, whether the licensed companies were "on notice of the manner in which EPA was authorized to use and disclose any data turned over to it"²⁹⁵ In *Arctic Slope*, companies had completed oil and gas exploration wells and were required to submit confidential information to the State as a condition of permitting.²⁹⁶ Reviewing state regulations governing oil and gas resources, the Alaska Court determined the exploration companies had no "reasonable investment-backed expectations" that the State would not use the confidential information for internal purposes.²⁹⁷ *Arctic Slope* presented several reasons for its conclusion.²⁹⁸ In dictum, the decision suggests the State's disclosure of proprietary information obtained through regulatory action to competitors or the public results in a compensable taking.²⁹⁹

293. *Supra* pt. I(D).

294. *Supra* pts. I(C), I(E).

295. *Arctic Slope*, 834 P.2d at 139–140 (discussing *Monsanto*, 467 U.S. at 1005–1008, 1011, 1013).

296. *Id.* at 136 (citing Alaska Stat. §§ 31.05.026(e)–31.05.035(c) (2007)).

297. *Id.* at 140.

298. *Id.* at 140–144.

299. *Id.* at 144 (distinguishing *Noranda Exploration, Inc., v. Ostrum*, 335 N.W.2d 596, 604 n. 8 (Wis. 1983) and stating *Noranda* to hold "that public

Sandberg followed *Arctic Slope* in ruling that a developer lacked investment expectations with regard to the Municipality of Anchorage's repudiation of a prior agreement to participate in funding subdivision improvements.³⁰⁰ *Sandberg* cited *Arctic Slope* for the proposition the Municipality had not provided an "express promise or guaranty" regarding any commitment to fund road construction despite prior balloting to participate in funding water and sewer improvements.³⁰¹ Since the cost of the road alone rendered the project economically infeasible, *Sandberg* reasoned the developer could not fault the Municipality for subsequently acquiring adjacent lots for park purposes which did not need a road.³⁰² Further, the Court found project feasibility "was always contingent upon the agreement of other landowners in the area," and consequently, "SD&R's acquisition of these lots and subsequent petitions for improvement districts do not evidence reasonable investment backed expectation, but rather, a business gamble."³⁰³

In a dissent to *Sandberg*, Justice Compton contended the court confused an owner's reasonable expectations with vested rights regarding water and sewer improvements: "it makes no sense to require expectations to become vested in order to be protected."³⁰⁴ Having authored *Arctic Slope*, Justice Compton disagreed with the majority's reliance on that opinion: "*Arctic Slope* requires that a property owner's expectations be reasonable and investment backed, not that the law 'guarantee' those expectations."³⁰⁵ Justice Compton's dissent also disagreed with the majority's conclusion that the developer's investment expectations amounted to a "business

disclosure of data filed with the state geologist bore no reasonable relationship to the purpose of informing agency decisions" (emphasis in original).

300. *Sandberg*, 861 P.2d at 559–560.

301. *Id.* at 559 (citing *Arctic Slope*, 834 P.2d at 140).

302. *Id.* at 559–560.

303. *Id.*

304. *Id.* at 564 (Compton, J., dissenting).

305. *Sandburg*, 861 P.2d at 564 n. 6.

gamble.”³⁰⁶ The dissent took exception to the majority's insinuation that the developer's investment was not bona fide or was required to be risk free: “[u]ntil today there has been no requirement that investment-backed expectations also be 100% guaranteed to warrant protection.”³⁰⁷ The dispute in *Sandberg* illustrates the ambiguity and varying application of *Penn Central*'s investment expectations factor.

Other Alaska decisions briefly discuss investment expectations in applying *Sandberg*'s case-specific inquiry. In *R & Y*, the Court held that the “[o]wners were able to realize most of their investment backed expectations and have done so through the sale of Subdivision property.”³⁰⁸ In *Balough*, the Court rejected an owner's investment expectations in a junkyard because no showing was made that the land was purchased for investment purposes rather than as interim use for subsequent development.³⁰⁹ The only showing of relevant investment was \$17,000 to partially construct a fence required by local zoning to shield the junkyard from surrounding areas.³¹⁰ In *Hageland*, the Court determined that reasonable investment expectations are to be objectively rather than subjectively evaluated, and thus the taking claimant's own expectations are not dispositive.³¹¹

In *Beluga*, the Alaska Supreme Court acknowledged that a company had invested heavily, but held the company lacked reasonable expectations because its mining claims were the subject of litigation clouding the title, an injunction prohibited mineral development without court approval, and the Alaska Statutes stated that a locator's mineral title was subject to existing claims.³¹² In

306. *Id.* at 565.

307. *Id.* at 565 n. 10.

308. *R & Y*, 34 P.3d at 296 (quoting trial court decision).

309. *Balough*, 995 P.2d at 266.

310. *Id.* at 249, 266.

311. *Hageland*, 210 P.3d at 451 n. 27 (following *Chancellor Manor v. U.S.*, 331 F.3d 891, 904 (Fed. Cir. 2003)).

312. *Beluga*, 973 P.2d at 574–576. The mining claimants' title to state land was clouded by the mental health lands litigation in *Alaska v. Weiss*, 706 P.2d 781 (Alaska 1985). Due to breach of the trust grant, an injunction was issued in *Weiss* barring the Alaska Department of Natural Resources from approving permits

these circumstances, the Court stated that reasonable investors would have recognized regulatory delays and project difficulties and declined to confer takings protection for the expenditures made.³¹³ *Beluga* was a disastrous result for mining claimants who had invested \$1,800,000 and spent several years in an unsuccessful attempt to get regulatory approval pending the *Weiss* mental health lands litigation.³¹⁴

C. *The Economic Impact of Regulation upon Property Owners*

Alaska decisions applying case-specific inquiry for takings have not consistently discussed or analyzed the economic-impact factor. This lack of coverage may stem from a paucity of evidence proffered on the issue. Thus, in some decisions, the Alaska Supreme Court notes the takings claimant failed to show adverse affect on property value, inability to market property, or loss of beneficial use.³¹⁵ This finding, without more, disqualified the claimant from

on trust lands without the superior court's approval. *Beluga*, 973 P.2d at 575–576. The *Beluga* claimants purported to have sought state approval but failed to intervene in the injunction to pursue their permitting objective and instead complained of onerous advocacy by the *Weiss* litigants. *Id.* at 573–576.

313. *Beluga*, 973 P.2d at 575–576.

314. *Id.* at 572–573, 575 (discussing *Weiss*); see also Compl., *Beluga Min. Co. v. State Dept. of Nat. Resources*, ¶ 14. *Beluga* is critically examined in Susan Reeves et al., *Utilization, Development and Conservation of Natural Resources for the Maximum Benefit of Alaskans: Scrutinizing Alaska's Permitting Regime for Large Mines*, 26 Alaska L. Rev. 40, 41–43 (2009) (available at www.law.duke.edu/journals/alr).

315. See *Spinell*, 78 P.3d at 702 (“Spinell makes no effort to show that the value of the land was altered by the Municipality’s actions”); *Balough*, 955 P.2d at 266 (owner failed to show adverse economic impact from rezoning action; fencing requirement applied regardless of zoning classification for property); *Fairbanks N. Star Bor. v. Lakeview Enterprises, Inc.*, 897 P.2d 47, 55 (Alaska 1995) (“Lakeview offered no evidence of the value of these increased impacts [from adjacent municipal landfill] and did not otherwise quantify any incremental impacts on the value of its property”).

proving an economic impact necessary for the case specific inquiry under *Sandberg* and *Penn Central*.³¹⁶

According to *Penn Central*, the economic impact of a governmental action is measured by diminution in property value.³¹⁷ However, this test is quite severe and almost always results in no taking.³¹⁸ The Alaska Supreme Court has stated that a diminution in value is required for a taking to occur, but it has not specified what incremental loss constitutes a diminution in value under the Alaska Constitution.³¹⁹ *R & Y* noted that diminution in value is not established where economic property use remains; while citing federal precedent, the Court did not explain why imputed *Penn Central* diminution in value is required for “damage” under the Alaska Constitution.³²⁰ *Doyle* recognized that a diminution in value may be measured by a loss of appreciation rather than an absolute reduction in property value due to the taking.³²¹ Absent further guidance and noting *Doyle* as an exception, the Alaska Supreme Court’s diminution in value test thus far appears to be indistinguishable from the *Penn Central* test.

The Alaska Supreme Court has recited the “economic advantages of ownership” in evaluating taking claims.³²² However, the Court has not explained what such advantages are—with one exception: “the economic advantages incident to ownership of unimproved property are the potential for appreciation and the opportunity for development.”³²³ Yet, the Alaska takings decisions

316. See *Spinell*, 78 P.3d at 702; *Balough*, 955 P.2d at 266; *Fairbanks N. Star Bor. v. Lakeview Enterprises, Inc.*, 897 P.2d 47, 55 (Alaska 1995).

317. *Supra* pt. 1(F).

318. *Id.*

319. *Lakeview*, 897 P.2d at 52 (citing *Doyle*, 735 P.2d at 738).

320. *R & Y*, 34 P.3d at 299 n. 45 (citations omitted).

321. *Doyle*, 735 P.2d at 737.

322. E.g. *Lakeview*, 897 P.2d at 52 (“A property owner may recover damages for inverse condemnation where the state’s activities deprive the owner of the ‘economic advantages of ownership’”); *Sandberg*, 861 P.2d at 558 (“[p]rivate property is taken or damaged for constitutional purposes if the government deprives the owner of the economic advantages of ownership”); *Zerbetz*, 856 P.2d at 782; *Homeward Bound*, 791 P.2d at 614 n. 6.

323. E.g. *Homeward Bound*, 791 P.2d at 614 n. 6; accord *Zerbetz*, 856

that mention “the economic advantages of ownership” have consistently resulted in no taking.³²⁴ As with the Court’s recitation of a diminution in value test, its “economic advantages of ownership” test has thus far not resulted in any meaningful, enhanced protection for regulated property owners beyond a *Penn Central* analysis.

Furthermore, analysis of Alaska taking cases indicates that “economic advantages of ownership” are not unconditional and may be subject to non-compensable regulation as illustrated in the following contexts: loss of property income during a period of possible acquisition;³²⁵ rezoning that does not permit a previous nonconforming use;³²⁶ municipal siting of landfill that does not impact property value within a ten year statute of limitations;³²⁷ permitting delay or denial that prevents a specific development project;³²⁸ and a restrictive land use wherein the owner failed to exhaust administrative remedies in permitting.³²⁹

P.2d at 782.

324. *Lakeview*, 897 P.2d at 52; *Sandberg*, 861 P.2d at 558; *Zerbetz*, 856 P.2d at 782; *Homeward Bound*, 791 P.2d at 614 n. 6.

325. See *Joseph M. Jackovich Revocable Trust v. St. Dept. Trans. & Pub. Facilities*, 54 P.3d 294, 297–298, 300 (Alaska 2002) (borough’s intentions on property acquisition not established; owners’ commercial property still produced “some income” despite loss of rents; proffer made on inability to sell property).

326. *Balough*, 995 P.2d at 265–266 (borough rezoning that excluded junkyard nonconforming use did not impair marketability for other uses; rural residential use of land still allowed).

327. *Lakeview*, 897 P.2d at 55 (jury verdict sustained on appeal that owner failed to show loss in value due to borough landfill sited adjacent to property during ten year statute of limitations period).

328. See *Cannone*, 867 P.2d at 801–802 (DEC rejection of several wastewater disposal plans for rural subdivision found to be arbitrary and capricious. Although *Sandberg* case-specific inquiry was not applied, the Court found the owner’s development options were not precluded).

329. *Zerbetz*, 856 P.2d at 783 (land use designation as “Conservation Wetland,” without more, did not affect property value upon showing that 26 out of 28 similarly regulated properties had been platted for subdivision approval; owner had not tested the permitting process).

A few Alaska decisions focus on the economic impact of the challenged action in ascertaining a taking. In *Hageland*, the Court ruled that employee claims for overtime compensation had accrued in pending litigation. Retroactive legislation thereafter nullified the claims, and this constituted a taking.³³⁰ *Hageland* did not apply a *Penn Central* diminution in value test or otherwise compare the claimants' economic loss in overtime compensation against their regular compensation or other benefits.³³¹ Instead, the Court found a damage judgment of \$1,600,000 to be a "substantial economic loss," without further analysis.³³² However, this finding is misleading because it reflects a cumulative award for a class of 23 claimants.³³³ *Hageland* may be analogous to *DeLisio* where the appropriation of a person's labor was held to be a taking without any analysis of economic impact.³³⁴

In *R & Y*, the Court determined that a 20-foot setback surrounding a pond resulted in a loss between 1.5 to 2% of total property value for a subdivision.³³⁵ The Court described this as a "relatively minor" rather than an "unduly burdensome economic loss" and held no taking.³³⁶ The Court's holding excluded the owner's loss in value attributable to the Corps of Engineers' separate regulation of wetlands on the property, which was significant.³³⁷ *R &*

330. *Hageland*, 210 P.3d at 450.

331. *Id.* at 450–451.

332. *Id.*

333. *Id.* at 446 (identifying class of plaintiffs). The imputed average value of loss for the class of pilots would be \$69,565. However, the appellate record in *Hageland* does not disclose how the damages were calculated. Still, an individual sustaining a \$70,000 loss to a protected property interest due to governmental action has arguably been "damaged" according to a lay person's view; see Bruce A. Ackerman, *Private Property and the Constitution* 116–117, 123, 129 (Yale U. Press 1977) (suggesting a cultural and linguistic interpretation of the Takings Clause according to common usage and lay persons' understanding).

334. *DeLisio*, 740 P.2d at 442–443.

335. *R & Y*, 34 P.3d at 294. Measuring this impact turned on segregating the owners' loss in property value attributable to federal versus municipal authority over wetlands regulation. *Id.* at 291, 294.

336. *Id.* at 300.

337. *Id.* at 293–294. At trial, the owners in *R & Y* contended joint exercise

Y did not reconcile its finding of a “relatively minor” economic loss with the Alaska Supreme Court’s frequent representations of broader protection under the damage clause to the Alaska Constitution.³³⁸ The opinion seems to equivocate on the issue of economic impact by noting a “minor economic loss may be indeed be compensable under our takings doctrine,”³³⁹ while also stating “mere diminution in a property’s value, however serious, is insufficient to demonstrate a taking” under federal law.³⁴⁰

In *Doyle*, the measure of economic impact upon property owners was critical to establishing a taking. *Doyle* sounded in constructive imposition of a navigational easement due to aircraft overflights.³⁴¹ A group of homeowners contended the rate of appreciation in their property value was lower than other comparable properties not in the flight path of the Anchorage International Airport.³⁴² The State contended an absolute diminution in property value was required to prove damage under the Alaska

of police power between the Municipality of Anchorage and the Army Corps of Engineers resulted in a 17 to 20% reduction in value for the total area of wetland regulation. *Id.*; Pl.’s Trial Brief, *R & Y, Inc. v. Mun. of Anchorage*, 41. To avoid uncertainty in the untested context of joint and several taking liability, the owners on appeal requested the court focus only on the Municipality’s imposition of the last 20 feet of setback in assessing economic impact. *R & Y*, 34 P.3d at 293–294.

338. *Id.* at 300 (citing *Ehrlander*, 797 P.2d at 633).

339. *Id.*

340. *Id.* at 298 n. 39 (quoting *Concrete Pipe & Products of Cal., Inc. v. Construction Laborers Trust*, 508 U.S. 602, 604 (1993)). *R & Y* further justified its result by erroneously describing the owners’ taking claim based upon economic impact alone without regard to the other *Sandberg* factors. *R & Y*, 210 P.3d at 294, 296, 298. However, the owners clearly applied all four *Sandberg* factors in arguing for a taking or damage and did not rely on the economic impact factor alone. *R & Y*, 34 P.3d 289; Appellant’s Br., *R & Y, Inc. v. Mun. of Anchorage*, 20–28, 50–57; Appellant’s Reply Br., *R & Y, Inc. v. Mun. of Anchorage*, 10–15.

341. *Doyle*, 735 P.2d at 735 n. 3.

342. *Id.* at 734–735. The trial court found the annual rate of increase in valuation for the subject properties was 13.7% whereas for comparable unaffected properties the increase was about 16%. *Id.* at 738.

Constitution.³⁴³ *Doyle* rejected the State's argument and ruled "[a] claim for loss of appreciation of property is compensable if it represents value that would have been realized as of the date of taking, if the taking had not occurred."³⁴⁴ Based upon the evidence reported in the opinion, the annual loss of appreciation in value was approximately 2.3%.³⁴⁵ Interestingly, *Doyle* did not apply *Penn Central's* diminution in value test in determining economic impact; instead, the Court measured damage to property value directly without regard to any legal standard as to sufficiency of impact.³⁴⁶ Further, *Doyle* conflates damage for proof of liability with damage for proof of just compensation.³⁴⁷

The record regarding economic impact in *R & Y* and *Doyle* appears commensurate, and yet, the Alaska Supreme Court reached conflicting taking results. In both cases, the diminution attributable to the governmental action was measured at a few percent of total property value.³⁴⁸ Nonetheless in *R & Y*, the Court dismissed the economic impact as legally insignificant, whereas in *Doyle*, the commensurate economic impact warranted just compensation. The disparate results in these two cases illustrate the arbitrary nature of takings law due to the analytical categories of wetlands regulation versus a constructive easement. If the disparate results can be rationalized in federal takings law, it is that *Doyle* sounds in physical invasion whereas *R & Y* sounds in regulatory interference, however the Alaska Supreme Court has never reasoned that this distinction controls for damage claims under the Alaska Constitution.

D. *The Legitimacy of Interest Advanced by Governmental Action*

Alaska decisions prior to *Lingle* typically did not undertake

343. *Id.* at 735.

344. *Id.* at 737.

345. *Id.* at 738. The 2.3% annual loss of appreciation in value is imputed from *Doyle's* findings that the impacted properties had appreciated 13.7% annually whereas unimpacted properties appreciated 16% annually.

346. *See id.* at 736–739.

347. *See id.* at 735–737.

348. *R & Y*, 34 P.3d at 294; *Doyle*, 735 P.2d at 738–739.

independent examination of legitimacy of the state interest advanced. Where mentioned, this factor did not appear to affect the *Sandberg* analysis under case-specific inquiry.³⁴⁹ The dearth of meaningful results for application of *Agins*' test in Alaska decisions, with few exceptions, was shared in U.S. Supreme Court decisions.³⁵⁰ Following *Lingle*, the Alaska Supreme Court has decided that *Agins*' test for whether a governmental action legitimately advances a state interest shall no longer be included in *Sandberg* case-specific inquiry.³⁵¹ The Court has also adopted *Lingle*'s inference that legitimacy of the state interest be incorporated into the character of the governmental action factor in case specific inquiry.³⁵²

E. *Balancing of Sandberg Factors*

In *R & Y*, the Alaska Supreme Court noted that "Alaska case law does not elaborate on how the *Sandberg* factors are to be weighed against each other."³⁵³ *R & Y* then provided guidance on balancing the *Penn Central/Sandberg* factors to the facts of the case. In pertinent part, the Court decided against a taking by interpreting *Armstrong*'s fairness principle through *Agins*.³⁵⁴ The Court also decided against a taking by applying *Mahon*'s reciprocity of advantage principle as developed by the Federal Circuit in *Florida Rock*.³⁵⁵ However, *R & Y*'s interpretation of *Agins* and *Florida Rock*

349. See *Spinell*, 78 P.3d at 702; *R & Y*, 34 P.3d at 293.

350. *Supra* pt. I(G).

351. *Hageland*, 210 P.3d at 450 n. 21; see also *Vanek*, 193 P.3d at 293–294 n. 64.

352. *Hageland*, 210 P.3d at 450 n. 21.

353. *R & Y*, 34 P.3d at 296.

354. *Id.* at 298–300; see also *supra* pt. I(H) (regarding *Armstrong*'s fairness principle).

355. *R & Y*, 34 P.3d at 299–300; see also *supra* pt. I(H) (regarding *Mahon*'s reciprocity of advantage principle).

is flawed, and its imputed weighing of the *Sandberg* factors according to these decisions is consequently defective.

According to *R & Y*, the Municipality of Anchorage's wetland program was analogous to the residential zoning ordinance sustained in *Agins* because the litigant was not the only owner burdened by the regulation and because the burdened landowners would share the benefits and burdens of the zoning regulation with other property owners.³⁵⁶ However, *Agins* was a facial challenge to a zoning ordinance, and the owner had not submitted any application to test the regulatory process.³⁵⁷ Thus, there was no record in *Agins* regarding the actual benefits versus burdens of the land use regulation upon the community.³⁵⁸

In the absence of any evidentiary record, *Agins* recited to state and local legislative policies to evaluate the distribution of benefits and burdens.³⁵⁹ The Supreme Court then inferred that benefits and burdens were shared because there was no finding that the zoning regulation affected the subject property only.³⁶⁰ This inference in *Agins* is either speculation or a *non-sequitur* because the fact that a regulation affects more than one property tells us nothing about the distribution of benefits and burdens as to the other properties, especially on a facial taking challenge.³⁶¹ Also, the analysis in *Agins* was couched in terms of its "substantially advances" standard, which was subsequently overruled in *Lingle*.³⁶²

Regarding *Mahon*'s principle, *R & Y* purported to follow the Federal Circuit's guidance in *Florida Rock* in determining whether a reciprocity of advantage would apply to wetlands regulation of

356. *R & Y*, 34 P.3d at 298–299 (discussing *Agins* as "illustrative" of non-compensable land use regulation).

357. *Agins*, 447 U.S. at 258, 259.

358. *See id.* at 258–260.

359. *Id.* at 261–262.

360. *Id.* at 262.

361. For further analysis of the circumstances in *Agins* and commentary regarding *Armstrong*'s fairness principle, see Sax, *supra* n. 107, at 162–163, 169–170.

362. *Agins*, 447 U.S. at 260–263.

property.³⁶³ However, the Federal Circuit's guidance in *Florida Rock* was not conclusive because the Court of Federal Claims on remand subsequently found: "there can be no question Florida Rock has been singled out to bear a much heavier burden than its neighbors without reciprocal advantage. . . . The court finds that Florida Rock's disproportionately heavy burden was not offset by any reciprocity of advantage."³⁶⁴ Thus, the decision in *R & Y* failed to explain that the Federal Circuit's guidance actually resulted in finding *no* reciprocity in a wetlands takings case.³⁶⁵

R & Y concluded that the property owners before the court "incurred only relatively minor economic loss due to generally applicable wetlands regulations which govern all land use in Anchorage and benefit all landowners, including these landowners."³⁶⁶ Unfortunately, the Court made no finding on whether the burdens of Anchorage's wetlands management program were equitably distributed among all property owners.³⁶⁷ Though *R & Y* ruled "the owners were not singled out," no evidence was proffered to support this finding.³⁶⁸ To the contrary, the 1982 Anchorage Wetlands Management Plan indicates the *R & Y* owners were part of a small percentage of properties subject to the

363. *R & Y*, 34 P.3d at 299 nn. 40–42 (discussing *Florida Rock*, 18 F.3d at 1570–1571).

364. *Florida Rock*, 45 Fed.Cl. at 37.

365. *See R & Y*, 32 P.3d at 299–300.

366. *Id.* at 300.

367. *Id.* at 299–300. The owners in *R & Y* contended both before the trial court and the Alaska Supreme Court that they were disproportionately burdened with Anchorage's wetland regulation, and the Municipality failed to respond to this contention. Trial Br., *R & Y, Inc. v. Mun. of Anchorage*, 37; Appellant's Br., *R & Y, Inc. v. Mun. of Anchorage*, 38 n.15; Appellant's Reply Brief, *R & Y, Inc. v. Mun. of Anchorage*, 42.

368. *R & Y*, 34 P.3d at 300. The court did not consider the federally regulated portion of wetlands and waters of the United States on the owners' property in finding they were not singled out. *Id.* at 294.

Preservation category that prohibited development, whereas most owners were not regulated by the plan because their property contained no wetlands.³⁶⁹ Professor Barros has commented that *R & Y*'s determination regarding reciprocity of advantage to be "complete bunk:" "The regulations certainly create a public benefit to the environment, but the burden . . . is imposed only on property owners who have wetlands."³⁷⁰

V. IS THERE BROADER PROTECTION FROM DAMAGE UNDER THE ALASKA CONSTITUTION?

The Alaska Supreme Court has regularly stated that the damage clause in the Alaska Constitution provides broader protection than available under the U.S. Constitution's Takings Clause.³⁷¹ The Alaska Supreme Court has also regularly stated that Article I, Section 18 of the Alaska Constitution is to be liberally construed.³⁷² However, the Court has never clearly applied the damage clause to determine liability for regulatory interference with property rights.³⁷³ Nor has the Court articulated what "broader protection" means under the Alaska Constitution for regulatory interference with property rights in a manner noticeably different from federal takings jurisprudence.³⁷⁴ Thus far, the Court has not provided any exposition of liberal construction by comparison to the Takings Clause, especially with regard to regulatory interference with property.³⁷⁵

This article has shown that the Alaska Supreme Court typically follows federal takings precedent in construing Alaska's

369. *Id.*; Stip. Ex. 18, Anchorage Wetlands Mgt. Plan, Figure 6-4: Wetlands Designations, Anchorage Bowl.

370. Barros, *supra* n. 80, at 354 n. 56 (quoting *R & Y*, 34 P.3d at 298).

371. *E.g. Vanek*, 193 P.3d at 291 n. 36; *R & Y*, 34 P.3d at 293 n. 11; *Sandberg*, 861 P.2d at 557; *Arctic Slope*, 834 P.2d at 138; *Doyle*, 735 P.2d at 736.

372. *E.g. Anderson*, 78 P.3d at 714, 714 n. 16; *Tlingit-Haida*, 15 P.3d at 764; *Zerbetz*, 856 P.2d at 782; *Ehrlander*, 797 P.2d at 633.

373. *See supra* n. 5. *Hageland* and *Tlingit-Haida* qualify this conclusion although these cases can be distinguished. *Infra* pt. V(A).

374. *See supra* n. 5

375. *See id.*

constitutional article.³⁷⁶ Thus, the Court has adopted *Penn Central's* case specific inquiry,³⁷⁷ along with *Lucas' per se* liability rules.³⁷⁸ Further, the Court has adopted *Monsanto's* notice rule as to reasonable investment-backed expectations³⁷⁹ and impliedly adopted *Lucas' background* principles of state law in ascertaining whether persons hold constitutionally protected property interests.³⁸⁰ The Court has followed *Lingle* in deciding that *Agins'* legitimate state interest test is no longer relevant under the Takings Clause.³⁸¹ The Court has yet to apply *Palazzolo's* recognition of investment expectations notwithstanding that ownership is acquired subsequent to regulatory restrictions.³⁸²

A. *Broader Protection from Regulation Versus Other Interference with Property Rights under the Alaska Constitution*

The Alaska Supreme Court has colorably applied the State's taking or damage clause to find liability in situations of physical invasion or appropriation of property. In *Doyle*, *DeLisio*, and *Bakke*, the Court imposed liability according to Alaska rather than federal constitutional precedent.³⁸³ *Doyle* concerned constructive imposition of a navigational easement, which sounds in physical invasion rather than regulatory interference with property.³⁸⁴ *DeLisio* involved an

376. *Supra* pts. I, III, IV.

377. *E.g. R & Y*, 34 P.3d at 296–297 n.21 (identifying source of *Sandberg* factors as federal takings law); *Arctic Slope*, 834 P.2d at 139.

378. *Sandberg*, 861 P.2d at 557.

379. *Arctic Slope*, 834 P.2d at 139; *Sandberg*, 861 P.2d at 557.

380. *See Vanek*, 143 P.3d at 292; *Anderson*, 78 P.3d at 715.

381. *Supra* pt. I(G).

382. *Supra* pt. I(E), IV(B).

383. *Doyle*, 735 P.2d at 735, 736 n. 3; *DeLisio*, 740 P.2d at 440, 442–443; *Bakke*, 744 P.2d at 657.

384. *Doyle*, 735 P.2d at 735.

attorney's compulsory rendering of court appointed legal services and sounded in appropriation of the person's labor.³⁸⁵ *Bakke* recited California's constitutional article, which is identical to Alaska's, and followed California precedent establishing liability for physical invasion to property.³⁸⁶

Doyle, *DeLisio*, and *Bakke* do not clearly reflect broader protection under the damage provision in Alaska's taking or damage clause. Instead, these cases yield a result commensurate with a *Loretto* physical invasion or appropriation of property under federal takings law.³⁸⁷ *Tahoe-Sierra* made clear that federal takings law differentiates between regulatory takings and taking by physical invasion or appropriation.³⁸⁸ *Hageland* suggests broader protection of property rights due to retrospective legislation without any analysis of diminution in value.³⁸⁹ However, *Hageland* also sounded in appropriation of labor, and therefore, the case may not be governed by regulatory takings law.³⁹⁰ *Tlingit-Haida* involved regulatory interference with a public utility, but public utility law could control a "stranded facility" rather than takings law.³⁹¹ Therefore, the issue remains as to whether the Alaska Supreme Court is willing to extend broader protection and liberal construction of the Alaska Constitution to regulatory takings cases absent the above distinguishable contexts.

The Alaska Supreme Court has evaluated damage for purposes of rendering just compensation to property subject of formal condemnation.³⁹² However, damage for purposes of just compensation is different from, and logically follows, liability established for unconstitutional damage to property.³⁹³ Thus, the

385. *DeLisio*, 740 P.2d at 442-443.

386. *Bakke*, 744 P.2d at 657 (citing *Albers v. Co. of Los Angeles*, 398 P.2d 129, 136-137 (Cal. 1965)).

387. See text accompanying *supra* nn. 257-262.

388. *Tahoe-Sierra*, 535 U.S. at 321-324, 322 n. 17.

389. See *Hageland*, 210 P.3d at 450-451.

390. See *id.* at 444.

391. See *Tlingit-Haida*, 15 P.3d 754.

392. *Infra* pt. V(B).

393. See Alaska. Const. art I, § 18.

language of Alaska's constitutional article states the liability rule in the disjunctive first, and then provides for just compensation: "[p]rivate property shall not be taken *or* damaged for public use without just compensation."³⁹⁴ According to canons of statutory of construction, usage of the disjunctive in this text indicates that just compensation shall be provided for taking *or* damage to private property.³⁹⁵ Yet, the Alaska Supreme Court has not undertaken such textual analysis.

The commentary on Article I, Section 18, of the Alaska Constitution at the 1956 constitutional convention is terse: "These words ['or damaged'] were added in recognition of the fact that property may be damaged or made worthless as an incident of the taking of other property for public use."³⁹⁶ Accordingly, the commentary states, "[i]t is our belief that the property owner should be compensated for such injury."³⁹⁷ This construction of Alaska's damage clause is consistent with California's constitutional article,³⁹⁸ although there appears to be no official statement of such intent in the records of the 1956 constitutional convention.³⁹⁹

394. *Id.* (emphasis added).

395. See generally Norman Singer & J.D. Shambie Singer, *Statutes and Statutory Construction* vol. 1A § 21.14, 180–182 (7th ed., West 2009); *Alaska v. Andrews*, 707 P.2d 900, 908 (Alaska 1986).

396. Alaska Const. Conv. Comm., Proposal 7, Commentary on the Preamble and the Declaration of Rights, 6 *Proceedings of the Alaska Constitutional Convention* 73 (1956) (re: draft Article I, Section 17 "Eminent Domain").

397. *Id.*

398. B.E. Witkin, *Summary of California Law*, vol. 8, § 1132 (10th ed. 2005) ("the words 'or damaged' were added in 1879 [to the California Constitution] to make it clear that compensation is due when, because of a public improvement, adjacent property is damaged, even though it was not taken") (citing cases).

399. *Supra* n. 396; see also Alaska Const. Conv. Comm. on Article I, Folders 203.3, 204 (microfilm at Alaska Law Library, Anchorage); Alaska Const. Conv. Comm. on Preamble and Bill of Rights, Folder 205—Miscellaneous

According to constitutional damage clause decisions from other jurisdictions,⁴⁰⁰ state courts generally acknowledge broader protection in principle; nonetheless, the courts will rely on federal precedent when interpreting claims of regulatory interference brought under a state constitutional damage clause.⁴⁰¹ The sampled precedent does not clearly indicate that broader protection under state constitutions will extend to regulatory interference as distinguished from other constitutional infringements upon property rights.⁴⁰² The question may therefore remain open. No published literature appears to exist on whether a state constitutional damage clause confers broader protection for regulatory interference with property rights.⁴⁰³

Sandberg is the only decision of the Alaska Supreme Court

Materials, Folder 205.1—Minutes (microfilm at Alaska Law Library, Anchorage).

400. See *Interstate Cos. v. City of Bloomington*, 790 N.W.2d 409, 413 (Minn. Ct. App. 2010); *Kafka v. Mont. Dept. of Fish, Wildlife, & Parks*, 201 P.3d 8, 18 (Mont. 2007); *Krier v. Dell Rapids Township*, 709 N.W. 2d 841, 846–847 (S.D. 2006); *Wild Rice River Ests., Inc., v. City of Fargo*, 705 N.W.2d 850, 856 (N.D. 2005); *San Remo Hotel v. S.F. City & Co.*, 41 P.3d 87, 100–101 (Cal. 2002); *Manufactured Housing Communities v. Wash.*, 13 P.3d 183, 187–188 nn. 7–8 (Wash. 2000).

401. See *id.*

402. See *San Remo Hotel*, 41 P.3d at 100–101 (state damage clause construed “congruently” with Takings Clause; ordinance regulating rental housing not a taking); *Kafka*, 201 P.3d at 18 (*San Remo* followed; no taking or damage for legislated abrogation of licensed rights to game farms); *Krier*, 709 N.W. 2d at 847–848 (state damage clause compensates for incidental and consequential injuries peculiar to owners; no peculiar damage to owner due to road resurfacing); *Wild Rice River*, 705 N.W.2d at 856–858 (state damage clause provides broader protection but *Tahoe Sierra* and *Palazzolo* applied to find no damage for 21 month building moratorium). Cf. *Interstate Cos.*, 790 N.W.2d at 413–415 (state damage clause will compensate for regulatory interference that benefits public enterprises whereas owner “suffer[s] a substantial and measurable decline in market value”); *Manufactured Housing*, 13 P.3d at 187–188 nn. 7–8 (dictum—state damage clause may provide greater protection from regulatory interference upon proof of six part test; clause not applied due to separate constitutional violation against private use). Generalizing on the cited precedent is difficult absent a survey of state constitutional damage clauses, and that endeavor is beyond the scope of this article.

403. Cf. Richard L. Settle, *Regulatory Taking Doctrine in Washington: Now You See It, Now You Don't*, 12 U. Puget Sound L. Rev. 339 (1989) (discussing substantive due process versus taking doctrines of the Washington and U.S. Supreme Court).

wherein the issue of broader protection under the State's damage clause was the subject of differing opinions.⁴⁰⁴ The Court in *Sandberg* ruled that no liability existed because the governmental action did not involve direct interference with or denial of beneficial use of property.⁴⁰⁵ Justice Compton dissented and recommended a *Lucas* per se taking due to the Municipality of Anchorage's actions that rendered subdivision lots economically infeasible for development.⁴⁰⁶ The dissent then stated that "[b]ecause of this conclusion, I would find it unnecessary to reach the issue of 'broader protection' afforded by Article I, Section 18 of the Alaska Constitution."⁴⁰⁷ Since the Court decided *Sandberg* under the Alaska Constitution and held no liability, the dissent commented "until today [the court] has afforded property owners *broader* protection than that conferred by the Fifth Amendment."⁴⁰⁸ Regrettably, *Sandberg* is typical of the Alaska Supreme Court decisions stating that the Alaska Constitution provides broader protection, but the Court's opinions do not explain how this is realized.⁴⁰⁹

B. *Just Compensation for a Taking and Broader Protection
Measured as Damage under the Alaska Constitution*

In *State v. Hammer*,⁴¹⁰ the Alaska Supreme Court ruled that a

404. *Sandberg*, 861 P.2d at 557–561 (majority), 563 (dissent).

405. *Id.* at 558 n.8, 559.

406. *Id.* at 563.

407. *Id.* (citing *Alaska v. Hammer*, 550 P.2d 820, 824 (Alaska 1976)).

408. *Id.* (emphasis in original).

409. *See id.* at 557–561; *see also Arctic Slope*, 834 P.2d at 138 (noting "the difference between Alaska's takings clause and the federal clause is irrelevant to this case" without explanation); Thomas Van Flein, *The Baker Doctrine and the New Federalism: Developing Independent Constitutional Principles under the Alaska Constitution*, 21 Alaska L. Rev. 227, 255 n. 145 (2004).

410. *Hammer*, 550 P.2d at 823–824.

commercial tenant would be allowed to recover lost profits due to business interruption caused by condemnation to the fee owner. The Alaska Court reviewed federal precedent, which excluded any award for incidental or consequential damages from just compensation under the Fifth Amendment.⁴¹¹ *Hammer* decided that such a restrictive rule under the Fifth Amendment would not control because “the Alaska Constitution . . . expressly require[s] compensation for *damage* to property.”⁴¹² Further, the Court found the tenant’s “business is ‘property,’ and it has been directly damaged by the state in the taking of his leasehold.”⁴¹³ *Hammer* has been followed in Alaska as authority for awarding special damages in just compensation.⁴¹⁴

The long-standing rule in federal jurisdictions has been that just compensation is measured by fair market value.⁴¹⁵ Fair market value in federal just compensation law is ascertained objectively with regard to market conditions rather than the subject property specifically.⁴¹⁶ Thus, any subjective elements of value associated with the property owner, including commercial activity, good will, or

411. *Id.* at 823–826 nn. 4–18 (discussing federal cases).

412. *Id.* at 824 (emphasis in original).

413. *Id.* at 826.

414. *E.g. Four Separate Parcels of Land v. City of Kodiak*, 938 P.2d 448, 452 n. 9 (Alaska 1997) (citing *Hammer*); *City of Kenai*, 860 P.2d at 1244 (citing *Hammer*). To the extent that Alaska’s damage clause is construed to be consistent with the California Constitution, *see supra* n. 386 and accompanying text, the latter has been interpreted to allow consequential damages in inverse condemnation. *E.g. Yamagiwa v. City of Half Moon Bay*, 523 F. Supp. 2d 1036, 1088, 1090 (N.D. Cal. 2007) (following *Albers*, 398 P.2d 129)). In *Yamagiwa*, a local government was liable for \$36 million in property damage due to its creation of artificial wetlands on property otherwise suitable for development. *Id.* at 1069–1070, 1090–1091, 1112.

415. *E.g. Kirby Forest Indus., Inc. v. U.S.*, 467 U.S. 1, 10 (1984).

416. *See e.g. U.S. v. Miller*, 317 U.S. 369, 375 (1942) (some elements of value must be eliminated that pertain to the parties’ needs; “[t]hese elements must be disregarded by the fact finding body in arriving at ‘fair’ market value”); *see also* The Am. Inst. of Real Est. Appraisers, *The Appraisal of Real Estate* 20, 22 (11th ed. 1996) (“market value . . . is an objective value created by the collective patterns of the market”).

other value to the owner, are disregarded.⁴¹⁷ Accordingly, federal just compensation law excludes consequential damage and elements thereof to the owner.⁴¹⁸

The inadequacy of the fair market value standard in federal just compensation law has been the subject of repeated criticism.⁴¹⁹ The Supreme Court signaled its awareness of this criticism in *Kelo* by acknowledging “questions about the fairness of the measure of just compensation.”⁴²⁰ *Kelo* provoked commotion in the media and the public generally regarding the propriety of condemnation authority for economic development purposes only.⁴²¹ Therefore, *Hammer* sets an important precedent by which the Alaska Supreme Court has staked out broader measures of just compensation as damage in the event of a taking or condemnation under the Alaska Constitution.

417. *E.g. U.S. v. 564.54 Acres of Land*, 441 U.S. 506, 511–512, 515–517 (1979) (court recognized “fair market value does not include the special value of property to the owner”; replacement cost for substitute recreational facility rejected as measure of compensation); *Mitchell v. U.S.*, 267 U.S. 341, 345 (1925) (compensation excluded cannery business: “[i]f the business was destroyed, the destruction was an unintended incident of the taking of land”).

418. *E.g. Miller*, 317 U.S. at 376 (“the Constitution has never been construed as requiring payment of consequential damages”); *Yuba Nat. Resources, Inc. v. U.S.*, 904 F.2d 1577, 1581 (9th Cir. 1990) ; see generally *Uniform Appraisal Standards for Federal Land Acquisitions* 57–58 (Interagency Land Acquisition Conf., 2000) (discussing non compensability of consequential damages in federal condemnation and citing cases).

419. *E.g. Christopher Serkin, The Meaning of Value: Assessing Just Compensation for Regulatory Takings*, 99 *Nw. U. L. Rev.* 677, 678–679 n. 5 (2005); Thomas W. Merrill, *Incomplete Compensation for Takings*, 11 *N.Y.U. Envtl. L.J.* 110, 111, 128–133 (2002); see also *Hammer*, 550 P.2d at 825 n. 16.

420. *Kelo*, 545 U.S. at 489 n. 21.

421. *E.g. Timothy J. Dowling, How to Think About Kelo After the Shouting Stops*, 39 *Urb. Law.* 191 (2006); Merriam & Ross, *supra* n. 271, at 321.

CONCLUSION

The takings jurisprudence of the Alaska Supreme Court substantially follows that of the federal courts interpreting the Takings Clause. Yet the Alaska Supreme Court has regularly stated that Article I, Section 18, of the Alaska Constitution affords broader protection to property rights than available under the Federal Constitution. While Alaska cases may colorably support this proposition in other contexts, the Alaska Supreme Court has yet to clearly extend broader protection to regulatory taking cases. Moreover, the disparity of results is not readily explainable in Alaska Court taking opinions.

Though the *ad hoc* nature of takings decisions seems to be unavoidable in state and federal courts' interpretation of *Penn Central*, some measure of broader protection to regulatory taking claimants would be a welcomed improvement to a case-specific inquiry in Alaska. For example, the Alaska Supreme Court has stated the economic advantages of ownership are relevant in evaluating takings protection under the Alaska Constitution. Assuming continued vitality to this pronouncement, then Alaska courts should endeavor to give meaning to the economic advantages of ownership in regulatory taking cases.

The Alaska courts could also clarify broader protection under the Alaska Constitution with regard to *Penn Central's* investment-backed expectations. This component to federal takings law has consistently been criticized as incoherent and problematic. Although takings liability is ultimately a constitutional and hence legal question, Alaska courts should interpret investment expectations to have a factual component that is objectively measurable by market participants, or experts opining on the same, rather than *a priori* formulation by jurists. Thus, the extent to which the market responds to risks of governmental regulation and how such risks are measured in investment decisions and property acquisitions could be far more meaningful in Alaska regulatory takings cases than under the current analysis.

Critics of federal takings law emphasize that fairness criteria should ultimately explain the protection due property owners under the Takings Clause. The articulation of fairness criteria would mitigate the present uncertainties and deficiencies in *Penn Central*

case specific inquiry applied in federal takings law. The Alaska Supreme Court could contribute to this effort by focusing fairness criteria on broader protection ostensibly available to property owners under the Alaska Constitution.

