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Takings Decisions of the U.S. Supreme Court: A Chronology

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Summary

This report is a reverse chronological listing of U.S. Supreme Court decisions addressing claims that a government entity has "taken" private property, as that term is used in the Takings Clause of the Fifth Amendment. The Takings Clause states: "[N]or shall private property be taken for public use, without just compensation." A scattering of related, substantive due process decisions is also included.

Under the Takings Clause, courts allow two distinct types of suit. *Condemnation* (also "formal condemnation") occurs when a government or private entity formally invokes its power of eminent domain by filing suit to take a specified property, upon payment to the owner of just compensation. By contrast, a *taking action* (also "inverse condemnation")—our topic here—is the procedural reverse. It is a suit by a property holder against the government, claiming that government conduct has effectively taken the property notwithstanding that the government has not filed a formal condemnation suit. A typical taking action complains of severe regulation of land use, though the Takings Clause reaches all species of property, real and personal, tangible and intangible. The taking action generally demands that the government compensate the property owner, just as when government formally exercises eminent domain.

Finding the line between government interferences with property that are takings and those that are not has occupied the Supreme Court in most of the 100-plus decisions compiled here. The Supreme Court's decisions in these takings actions reach back to 1870, and are divided in this report into three periods.

The modern period, 1978 to the present, has seen the Court settle into a taxonomy of four fundamental types of takings—total regulatory takings, partial regulatory takings, physical takings, and exaction takings. The Court in this period also has sought to develop criteria for these four types, and to set out ripeness standards and clarify the required remedy. In the preceding period, 1922 to 1978, the Court first announced the regulatory taking concept—the notion that government regulation alone, without appropriation or physical invasion of property, may be a taking if sufficiently severe. During this time, however, it proffered little by way of regulatory takings criteria, continuing rather its earlier focus on appropriations and physical occupations. In the earliest period of takings law, 1870 to 1922, the Court saw the Takings Clause as protecting property owners only from appropriations and physical invasions, two forms of government interference with property seen by the Court as most functionally similar to an outright condemnation of property. During this infancy of takings law, regulatory restrictions were tested under other, non-takings theories, such as whether they were within a state's police power, and were generally upheld.

The three takings cases decided by the Supreme Court during its 2012-2013 term attest to the Court's continuing interest in the takings issue.

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Introduction

Once in the constitutional wings, the Takings Clause of the Fifth Amendment today stands center stage. More than 50 takings cases have been decided by the Supreme Court since it launched the modern era of takings jurisprudence in 1978. No debate on the proper balance between private property rights and conflicting societal needs is complete without noting the Takings Clause.

The Takings Clause states: "[N]or shall private property be taken for public use, without just compensation." Until the late 19th century, this clause was applied by the Supreme Court only to *condemnation*: the formal exercise by government of its eminent domain power to take property coercively, upon payment of just compensation to the property owner. In such condemnation suits, there is no issue as to whether the property is "taken" in the Fifth Amendment sense; the government concedes as much by filing the action. The only question, typically, is what constitutes "just compensation."

Beginning in the 1870s, the Supreme Court gave its imprimatur to a different use of the Takings Clause. When the sovereign appropriated or caused a physical invasion of property, as when a government dam flooded private land, the Court found that the property had been taken just as surely as if the sovereign had formally condemned. Therefore, it said, the property owner should be allowed to vindicate his constitutional right to compensation in a suit against the government. In contrast with condemnation actions, then, such *takings actions* have the property owner sue government rather than vice-versa; hence the synonym "*inverse condemnation actions*." The key issue in takings actions is usually whether, given all the circumstances, the impact of the government action on a particular property amounts to a taking in the constitutional sense. Only if a taking is found does the question of just compensation arise.

In 1922, in the most historically important taking decision,[1] the Supreme Court extended the availability of takings actions from government appropriations and physical invasions of property, as described above, to the *mere regulation* of property use. This critical expansion of takings jurisprudence to "regulatory takings" acknowledged that purely regulatory interferences with property rights can have economic and other consequences for property owners as significant as appropriations and physical invasions. The regulatory taking concept opened up vast new legal possibilities for property owners, and underlies many of the Supreme Court's takings decisions from the 1970s on.

The ascendancy of the regulatory taking concept since the 1970s is hardly surprising. Starting with the advent of comprehensive zoning in the early 20th century, federal, state, and local regulation of private land use has become pervasive. Beyond comprehensive zoning, the past 60 years have seen explosive growth in the use of historic preservation restrictions, open-space zoning, dedication and exaction conditions on building permits, nature preserves, wildlife habitat preservation, wetlands and coastal zone controls, mining restrictions, and so on. Regulation of non-real-estate property has also proliferated. In the Supreme Court, the appointment of several conservative justices since the 1970s has prompted a new scrutiny of government conduct vis-à-vis the private property owner.

[1] Pennsylvania Coal Co. v. Mahon, 260 U.S. 393 (1922).

As a result of these factors, the Court since the late 1970s has turned its attention toward the takings issue with vigor. Through the 1980s and 1990s, property owner plaintiffs scored several major victories; by and large, the substantive doctrine of takings shifted to the right. In 2000-2005, however, the Court's decisions moved the analytical framework in a more government-friendly direction. The pendulum may yet be swinging again: the three takings cases decided by the Court during its 2012-2013 term were all decided in favor of the property owner, though mostly as to narrow issues.

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This report compiles only Supreme Court decisions addressing issues with special relevance to takings (inverse condemnation) actions, not those on formal condemnation or property valuation. Thus the headline-grabbing Supreme Court opinion in *Kelo v. City of New London*[2] (2005), principally a formal condemnation case, is not included here. On the other hand, a scattering of substantive due process decisions is interspersed where they have been cited by the Court as authority in its takings decisions.

In the interest of brevity, we mention no dissenting opinions, and almost no concurrences. Thus, the report does not reveal the closely divided nature of some Supreme Court takings opinions.

The reader desiring a more analytical discussion of inverse condemnation law should consult CRS Report RS20741, *The Constitutional Law of Property Rights "Takings": An Introduction*, also prepared by Robert Meltz.

[2] 545 U.S. 469 (2005).

I. Takings Law Today: *Penn Central* (1978) to the Present

In 1978, the Supreme Court ushered in the modern era of regulatory takings law by attempting to inject some coherence into the ad hoc analyses that had characterized its decisions before then. In *Penn Central Transportation Co. v. New York City*, *infra* page 10, the Court declared that whether a regulatory taking has occurred in a given case is influenced by three principal factors: the economic impact of the regulation, the extent to which it interferes with distinct (in most later decisions, "reasonable") investment-backed expectations, and the "character" of the government action. After *Penn Central*, ad hocery in judicial taking determinations emphatically still remains, but arguably is confined within tighter bounds.

The Supreme Court's many takings decisions since *Penn Central* have developed the jurisprudence in each of its main areas: ripeness, takings criteria, and remedy. As for takings criteria, the Court announced several "per se taking" rules in the two decades after *Penn Central*—see, for example, *Loretto*, *infra* page 9, and *Lucas*, *infra* page 6. Since 2000, however, it has again been extolling the multifactor, case-by-case approach of that decision—*see Palazzolo*, *infra* page 5; *Tahoe-Sierra*, *infra* page 4; and *Lingle*, *infra* page 4. In *Lingle*, one of its newest takings decisions, the Court summed up the four types of takings claims it now recognizes:

> a plaintiff seeking to challenge a government regulation as an uncompensated taking of private property may ... alleg[e] a "physical" taking, a *Lucas*-type "total regulatory taking," a *Penn Central* taking, or a land-use exaction violating the standards set forth in *Nollan* and *Dolan*.[3]

Case	Action attacked	Holding/rationale
Koontz v. St. Johns River Water Mgmt. Dist., 133 S. Ct. 2586 (2013)	Exaction condition demanded by district to approve landowner's proposed development of 3.7 acres, almost all wetland, of 14-acre tract. Condition was for landowner to pay for enhancing wetlands on district-owned land.	Exaction takings tests in *Nollan*, *infra* page 7, and *Dolan*, *infra* page 6, apply even when, as here, land-use permit applicant refuses exaction conditions and permit is denied. Immaterial that no exactions were imposed, since *Nollan* and *Dolan* are based on doctrine of unconstitutional conditions under which it is the impermissible burdening of right not to have property taken without compensation that offends. But in absence of a taking, remedy hinges on cause of action. Also, *Nollan* and *Dolan* tests apply to monetary as well as land-dedication exactions. Rule in *Eastern Enterprises*, *infra* page 5, that monetary liability payable with any funds cannot be taking, does not apply here where liability is tied to specific property.
Horne v. Dep't of Agriculture, 133 S. Ct. 2053 (2013)	Fines and civil penalties imposed on petitioners for failing to set aside raisin reserve contribution required under 1937 statute seeking to stabilize agricultural prices by controlling market surpluses.	Ninth Circuit erred in holding it lacked jurisdiction over takings claim. It incorrectly found that petitioners brought taking claim as raisin producers rather than raisin handlers, only handlers being covered by statute. Case is ripe because petitioners are subject to final agency order imposing fines and penalties, and because statute is comprehensive remedial scheme that withdraws Tucker Act jurisdiction over taking claim in Court of Federal Claims. Finally, takings defense may be raised by handler in USDA enforcement proceeding: statute does not forbid, and makes little sense to pay fine in one proceeding and then have to sue to recover same money in second, takings proceeding.

[3] 544 U.S. 528, 548 (2005).

Case	Action attacked	Holding/rationale
Arkansas Game & Fish Comm'n v. United States, 133 S. Ct. 511 (2012)	Corps of Engineers' 8 years of deviations from its long-standing water release plan for dam, extending flooding period in downstream wildlife preserve and killing bottomland hardwood trees there.	Even government-induced flooding that is temporary may, depending on circumstances, be a taking. Categorical rule extracted by court below from *Sanguinetti*, *infra* page 15—that unlike other physical invasions by government, flooding can be a taking only if permanent or "intermittent but inevitably recurring"—is inconsistent with later Supreme Court takings jurisprudence recognizing temporary takings. Circumstances pertinent to whether temporary flooding effects a taking include severity, duration, character of parcel, and owner's expectations regarding parcel's use.
Stop the Beach Renourishment, Inc. v. Florida Dep't of Environmental Protection, 560 U.S. 702 (2010)	Florida Supreme Court decision below holding that state does not, through beach restoration project, effect facial taking of beachfront property owners' littoral rights of accretion and direct contact with water.	No taking. Court holds unanimously that state supreme court decision did not contravene established property rights. Cannot be shown that littoral owners had rights to future accretions, nor that contact with water is superior to state's right to fill in its submerged land. Four justices nonetheless venture that "judicial taking" concept is sound. That is, Takings Clause applies to judicial branch just as to other branches; hence if a court declares "that what was once an established right of private property no longer exists, it has taken that property." In other opinions, four justices express reservations about judicial takings, or argue that issue need not be addressed here. Justice Stevens recused himself.
San Remo Hotel, L.P. v. City and County of San Francisco, 545 U.S. 323 (2005)	City requirement that hotelier pay $567,000 fee for converting residential rooms to tourist rooms, under ordinance seeking to preserve supply of affordable rental housing.	Federal full faith and credit statute (barring relitigation of issues that have been resolved by state courts of competent jurisdiction) admits of no exception allowing relitigation in federal court of takings claims initially litigated in state court pursuant to "state exhaustion" ripeness prerequisite of *Williamson County*, *infra* page 8. Court rejects argument that whenever claimant reserves his federal taking claim in state court, federal courts should review the reserved federal claim de novo, regardless of what issues the state court decided.
Lingle v. Chevron USA Inc., 544 U.S. 528 (2005)	State statute limiting rent that oil companies may charge service station operators who lease stations owned by oil companies, in order to hold down retail gasoline prices.	No taking. Rule announced in *Agins, infra* page 10, that government regulation of private property is a taking if it "does not substantially advance legitimate state interests," is not a valid takings test. Takings law looks at burdens a regulation imposes on property. Thus, physical taking, total regulatory taking, and *Penn Central* partial regulatory takings tests (*infra* page 10) each aims to spot government actions that are "functionally equivalent" to a direct appropriation. In contrast, "substantially advances" test focuses on regulation's effectiveness, a due-process-like inquiry. Moreover, assessing efficacy of regulations is a task to which courts are ill-suited.
Brown v. Legal Found. of Washington, 538 U.S. 216 (2003)	State's use of interest earned by small or short-lived deposits of title company's clients' funds to support legal services for the poor—under Interest on Lawyers' Trust Accounts (IOLTA) program.	IOLTA program satisfies "public use" requirement of Takings Clause, given compelling interest in providing legal services for the poor. As to whether there was a taking, a per se test like that in *Loretto*, *infra* page 9, seems appropriate, and we assume such a taking occurred. But there is still no constitutional violation, since Takings Clause proscribes only takings *without just compensation.* IOLTA mandates government use of interest only when it could generate no net funds for client, owing to administrative costs. Thus, just compensation owed under Takings Clause is zero.
Verizon Communications, Inc. v. FCC, 535 U.S. 467 (2002)	FCC regulations under Telecommunications Act of 1996 providing that rates charged by incumbent local exchange carriers to new competitors are to be based on forward-looking cost methodology, rather than historical costs.	Argument that historical costs should be used to avoid possibility of takings does not present a serious question. Incumbents do not argue that any particular rate is so unjust as to be confiscatory, but general rule is that any question about constitutionality of ratesetting is raised by rates, not ratesetting methods. Nor is FCC's action placed outside this rule by any clear signs that takings will occur if historical-costs interpretation is allowed.

Case	Action attacked	Holding/rationale
Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency, 535 U.S. 302 (2002)	Building moratoria imposed 1981-1984 until bistate agency could formulate new regional land-use plan—plus freeze on building permits from 1984 to 1987 under court injunction against 1984 plan, plus restrictions under 1987 plan.	1981-1984 moratoria are not per se takings. Argument that a moratorium prohibiting all economic use of a property, no matter how briefly, is a per se taking must be rejected. Rather, such moratoria are to be analyzed under ad hoc balancing test of *Penn Central, infra* page 10. Neither *First English, infra* page 7, nor *Lucas, infra* page 6, support the per se taking argument. And "parcel as a whole" rule bars segmentation of a parcel's temporal dimension, precluding consideration of only the moratorium period. Finally, "fairness and justice" and need for informed land-use planning support an ad hoc approach here. (Post-1984 restrictions not addressed.)
Palazzolo v. Rhode Island, 533 U.S. 606 (2001)	State denials rejecting developer's proposals to fill in all or most of principally wetland lot adjacent to coastal pond.	Taking claim is ripe. Given state's interpretation of its regulations, there was no ambiguity as to extent of development (none) allowed on wetlands portion of lot. Similarly, value of uplands portion, where a single home may be built, was also settled. Hence, lot owner need not make further applications to satisfy "final decision" prong of ripeness doctrine. On the merits, a taking claim is not barred by fact that property was acquired after effective date of state regulation. And, a regulation permitting a landowner to build a substantial house on a 20-acre parcel is not a total taking under *Lucas, infra* page 6, but must instead be evaluated under the *Penn Central* test, *infra* page 10.
City of Monterey v. Del Monte Dunes at Monterey, Ltd., 526 U.S. 687 (1999)	City's failure to approve property owner's development plans after five, progressively scaled-back proposals accommodating city's progressively lower development caps.	Issue of whether city was liable for taking, raised through civil rights claim under 42 U.S.C. §1983, was in this case an essentially fact-bound one, and thus properly submitted by district court to jury. Suit for legal relief under Section 1983 is action at law sounding in tort, and is thus within jury guarantee in Seventh Amendment. Also "rough proportionality" standard of *Dolan, infra* page 6, is not appropriate takings test. It was designed to address exactions on development permits, not, as here, denials of development.
Eastern Enterprises v. Apfel, 524 U.S. 498 (1998)	Federal statute requiring company to fund health benefits of miner who worked for it decades earlier, where company left mining business before promise of lifetime benefits in collective bargaining agreements became explicit in 1974.	Statute is unconstitutional as applied to Eastern. In opinion accompanying judgment, four justices find taking because statute imposes severe retroactive liability on a limited class of parties that could not have anticipated liability, and extent of liability is substantially disproportionate to company's experience in mining field. This points to taking under *Penn Central* test, *infra* page 10. Also, remedy for taking based on generalized monetary liability is invalidation rather than compensation, supporting jurisdiction in district court. Remaining justice supporting judgment sees instead a substantive due process violation.
Phillips v. Washington Legal Foundation, 524 U.S. 156 (1998)	State's use of interest earned on small or short-lived deposits of lawyers' clients' funds to support legal services for the poor—under Interest on Lawyers' Trust Accounts (IOLTA) program.	Interest is property of clients, not state. Despite fact that interest would not exist but for IOLTA program, state's rule that "interest follows principal" must be followed. Nor can interest be regarded as mere government-created value. Remanded for decision on whether taking occurred.
Suitum v. Tahoe Regional Planning Agency, 520 U.S. 725 (1997)	Agency's ban on new land coverage in "Stream Environment Zones," under which plaintiff was barred from building home on residential lot.	Taking claim is ripe despite plaintiff's not having applied for TRPA approval of her sale of transferrable development rights (TDRs). "Final decision" requirement of *Williamson County, infra* page 8, does not embrace such TRPA approval, since parties agree on TDRs to which plaintiff is entitled and no discretion remains for TRPA. TDRs' value here is simply an issue of fact, which courts routinely resolve without benefit of a market transaction.

Case	Action attacked	Holding/rationale
Babbitt v. Youpee, 519 U.S. 234 (1997)	Federal statute's ban on descent or devise of small interests in allotted Indian land—as ban was narrowed by amendment.	Taking occurred. The amendment, made in 1984, did not cure taking that *Hodel v. Irving, infra* page 7, found in pre-amendment version of statute. Amendment narrowed ban only as regards income-producing ability of the land, not its value. More important, amendment's allowance of devise to current owners in same parcel still offends Hodel by continuing to "severely restrict[]" Indian's right to direct descent of his property.
Bennis v. Michigan, 516 U.S. 442 (1996)	Forfeiture of car, owned jointly by plaintiff and her husband, because of husband's illegal sexual activity in car.	No taking (of wife's joint interest in car). To be sure, wife had no prior knowledge of husband's planned use of car. But government may not be required to compensate an owner for property which it has already lawfully acquired under authority other than eminent domain. Then, too, cases authorizing forfeiture are "too firmly fixed" to be now displaced.
Dolan v. City of Tigard, 512 U.S. 374 (1994)	Conditions imposed by city for granting building permit, requiring applicant to dedicate public greenway along stream and adjacent bike/pedestrian pathway.	Taking occurred. While greenway dedication condition rationally advanced a purpose of permit scheme (flood prevention), requiring landowner to allow public access to greenway did not. Hence, latter violated "nature of the permit condition" taking criterion in *Nollan, infra* page 7. Other condition, that pathway be dedicated, was not shown by city to impose burden on applicant that was "roughly proportional" to impact of applicant's proposed project on community. Hence, it violates "degree of burden" taking criterion that Court announces here. Also, burden of proof is on government to demonstrate "rough proportionality."
Concrete Pipe & Products, Inc. v. Construction Laborers Pension Trust, 508 U.S. 602 (1993)	Federal statute requiring that employer who withdraws from multi-employer pension plan pay a fixed debt to plan.	No taking. Taking claim is not aided by fact that collective bargaining agreement predating statute protected employer from liability to plan beyond specified contributions. Three-factor *Penn Central* test, *infra* page 10, does not point to taking: (1) government action merely adjusted benefits and burdens of economic life; (2) withdrawal liability was not disproportionate; and (3) given long-standing federal regulation in pension field, employer lacked reasonable expectation it would not be faced with liability for promised benefits.
Lucas v. South Carolina Coastal Council, 505 U.S. 1003 (1992)	Development ban imposed on vacant lots under state's beachfront management statute.	Government regulation of land that completely eliminates economic use is a per se taking, even when the legislature asserts a prevention-of-harm purpose. There is a prior inquiry, however, as to whether proposed use is inherent in landowner's title in light of "background principles of the state's law of property and nuisance" existing when land was acquired. If not, there is no taking, since regulation does not take any right owner ever had.
Yee v. City of Escondido, 503 U.S. 519 (1992)	Mobile home rent-control ordinance, combined with state law forcing mobile home park owner to accept purchasers of mobile homes in park as new tenants.	No physical taking occurred. Neither state nor local law on its face requires landowner to dedicate his land to mobile home rentals, nor overly limits his ability to terminate such use. Per se rule in *Loretto, infra* page 9, applies only when permanent physical occupation is coerced. Claim that procedure for changing use of park is overly burdensome is not ripe, since plaintiff has not gone through procedure. Regulatory taking claim is not properly before Court, since not subsumed by questions in petition for certiorari.
Preseault v. ICC, 494 U.S. 1 (1990)	Federal "rails-to-trails" statute, under which unused railroad rights of way are converted to recreational trails notwithstanding reversionary property interests under state law.	Premature for Court to evaluate taking challenge to statute, because even if it causes takings of reversionary interests, compensation is available under Tucker Act (authorizing suits against U.S. for compensation). Nothing in statute suggests the "unambiguous intention" to withdraw Tucker Act remedy which this Court requires. For example, Congress's expressed desire that program operate at "low cost" might merely reflect its rejection of a more ambitious federal program, rather than withdrawal of Tucker Act remedy.

Case	Action attacked	Holding/rationale
United States v. Sperry Corp., 493 U.S. 52 (1989)	Statutory 1½% deduction from awards of Iran-United States Claims Tribunal as reimbursement to United States for expenses incurred in the arbitration.	No taking. 1½% deduction is a reasonable "user fee" intended to reimburse United States for its costs in connection with tribunal. Amount of fee need not be precisely tailored to use that party makes of government services. Fee here is not so great as to belie its claimed status as a user fee.
Duquesne Light Co. v. Barasch, 488 U.S. 299 (1989)	State agency's refusal to allow inclusion of cost of canceled nuclear plants in utility's rate base.	No taking. Under the circumstances, overall impact of preventing amortization of such costs was small, and not shown to be unjust or confiscatory.
Pennell v. City of San Jose, 485 U.S. 1 (1988)	Rent control ordinance allowing rent increases of greater than set percentage only after considering economic hardship caused to tenants.	Not ripe. There was no evidence that hardship provision had in fact ever been relied upon to limit a rent increase. Also, ordinance did not require rent limit in event of tenant hardship, only that hardship be considered.
Nollan v. California Coastal Comm'n, 483 U.S. 825 (1987)	State's grant of building permit on condition property owners record easement allowing public to traverse beach on property.	Taking occurred. Permit condition (recording easement) did not substantially advance a government purpose that would justify denial of permit (ensuring visual access to beach). Where such linkage exists, however, no taking occurs even if outright appropriation of the property infringement (here, the easement) would be a taking.
Bowen v. Gilliard, 483 U.S. 587 (1987)	Amendments to federal welfare program resulting in lower benefits and assignment of child support payments to entire family.	No taking. Family has no property right to continued welfare benefits at same level. Child receiving support payments suffers no substantial economic impact, since payments were likely used for entire family before amendments.
First English Evangelical Lutheran Church v. County of Los Angeles, 482 U.S. 304 (1987)	Interim ordinance prohibiting construction of any structures in flood zone.	If a regulation is held to have taken property, Takings Clause requires compensation for the time during which regulation was in effect—i.e., until date of repeal or judicial invalidation. Mere invalidation of regulation is not a constitutionality sufficient remedy. (Existence of taking assumed by Court owing to posture of case.)
Hodel v. Irving, 481 U.S. 704 (1987)	Federal statute declaring that small interests in allotted Indian land may not descend by intestacy or devise, but must escheat to tribe.	Taking occurred. Statute amounts to complete abrogation, rather than regulation, of right to pass on property—a right which, like the right to exclude others, is basic to the concept of property.
Keystone Bituminous Coal Ass'n v. DeBenedictis, 480 U.S. 470 (1987)	State regulation requiring that at least 50% of underground coal be left in place, where mining coal might cause subsidence damage to surface structures.	No taking. Unlike similar anti-subsidence law held a taking in *Pennsylvania Coal Co., infra* page 15, the statute here has a broad public purpose and does not rule out profitable mine operation.
FCC v. Florida Power Corp., 480 U.S. 245 (1987)	Federal regulation requiring that utility greatly reduce rent charged cable TV company for attaching its cables to utility's poles.	No taking. Per se rule in *Loretto, infra* page 9, applies only when permanent physical occupation is coerced, unlike here where utility voluntarily entered into contract with cable company. And new rent ordered by FCC was not confiscatory, hence not a taking.

Case	Action attacked	Holding/rationale
MacDonald, Sommer & Frates v. Yolo County, 477 U.S. 340 (1986)	County's rejection of developer's first-submitted subdivision plat.	Not ripe. Developer must first obtain "final and authoritative determination" of the type and intensity of development that will be permitted. County's rejection of first-submitted plat does not preclude possibility that submissions of scaled-down version of project might be approved. Also, a court cannot determine whether compensation is "just" until it knows what compensation state or local government will provide.
Bowen v. Public Agencies Opposed to Social Security Entrapment, 477 U.S. 41 (1986)	Statutory repeal of provision in federal-state agreements allowing states to end social security coverage of state and local employees.	No taking. Repealed provision is not "property," since Congress reserved right to amend agreements in enacting governing statute, and clause was not a debt or obligation of United States.
Connolly v. Pension Benefit Guaranty Corp., 475 U.S. 211 (1986)	Federal act requiring that employers who withdraw from a multi-employer pension plan pay a fixed debt to the plan.	No taking. Taking does not occur every time law requires one person to use his assets for benefit of another. Nor can statute be defeated by pre-existing contract provision protecting employers from further liability.
United States v. Riverside Bayview Homes, Inc., 474 U.S. 121 (1985)	Corps of Engineers' assertion of dredge and fill jurisdiction over certain freshwater wetlands.	Not ripe. Mere assertion of regulatory jurisdiction by Corps is not taking; only when permit is denied so as to bar all beneficial use of property is there a taking. Also, fact that broad construction of statute might yield more takings is not reason to construe statute narrowly, since taking is unconstitutional only if no means to obtain compensation exists. Such means does exist here, since Tucker Act authorizes compensation for federal takings.
Williamson County Regional Planning Comm'n v. Hamilton Bank, 473 U.S. 172 (1985)	County's rejection of developer's subdivision plat.	Not ripe. Taking claim against state/local government in federal court is not ripe unless (1) there is final and authoritative decision by government as to type and intensity of development allowed, and (2) avenues for obtaining compensation from state forums have been exhausted. Here, developer failed to seek variances following initial denial, thus has not received a final decision. Nor did developer use an available state procedure for obtaining compensation. Absence of exhaustion requirement in 42 U.S.C. §1983 distinguished.
United States v. Locke, 471 U.S. 84 (1985)	Federal statute voiding unpatented mining claims when claim holder fails to make timely annual filings.	No taking. Loss of claim could have been avoided with minimal burden. No taking when property can continue to be held through owner's compliance with reasonable regulations. *Texaco, Inc., v. Short, infra* page 9, found controlling.
Ruckelshaus v. Monsanto Co., 467 U.S. 986 (1984)	Public disclosure and other use by EPA of industry-generated trade-secret data submitted with application for pesticide registration.	Taking occurred. Trade secrets are property, but only those submitted 1972-78, when federal pesticide statute contained a confidentiality guarantee, were taken. Before and after this period, there was no investment-backed expectation of confidentiality, hence no taking. Tucker Act remedy (right to seek money from U.S. in Court of Federal Claims) was not withdrawn by pesticide act. Pesticide act reveals no such intention, and withdrawal would amount to disfavored repeal by implication of Tucker Act. Also, federal pesticide act sets up exhaustion of agency remedies as precondition to any Tucker Act claim.
Kirby Forest Industries, Inc. v. United States, 467 U.S. 1 (1984)	Filing of condemnation action by U.S. to acquire land for national park.	No taking. Mere act of filing leaves landowner free, during pendency of condemnation action, to make any use of property or to sell it (but loss in market value from such action is not compensable).

Case	Action attacked	Holding/rationale
United States v. Security Industrial Bank, 459 U.S. 70 (1982)	Retroactive use of bankruptcy statute to avoid liens on debtor's property that attached before statute was enacted.	Statute will not be applied retroactively to property rights established before enactment date, in absence of clear congressional intent. There is substantial doubt whether retroactive destruction of liens comports with Takings Clause, and statutory reading raising constitutional issues should be avoided where possible.
Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419 (1982)	State statute requiring landlords to allow installing of cable TV equipment on premises, for one-time payment of $1.	Taking occurred. Whereas here government causes a "permanent physical occupation" of property, it is a per se taking—no matter how important the public interest served or how minimal the economic impact. In contrast, temporary physical invasions must submit to balancing of factors.
Texaco, Inc. v. Short, 454 U.S. 516 (1982)	State statute extinguishing severed mineral estates unused for long time unless owner filed statement within prescribed period.	No taking. It is the owner's failure to use the mineral estate or timely file a statement, not the state's imposition of reasonable conditions on estate retention, that causes the property right to lapse.
Dames & Moore v. Regan, 453 U.S. 654 (1981)	President's nullification of attachments on Iranian assets in U.S., during hostage crisis.	No taking. Attachments were revocable and subordinate to President's power under International Emergency Economic Powers Act. Hence, there was no property in the attachments such as would support claim for compensation. Also, possibility that suspension of claims against Iranian assets may effect taking makes ripe the question whether there is Tucker Act remedy here. We hold there is.
Hodel v. Indiana, 452 U.S. 314 (1981)	Restrictions in federal statute on surface mining of prime farmlands.	No taking. Plaintiffs failed to allege that any specific property was taken. Mere enactment of statute was no taking, since prime farmland provisions do not on their face deny landowners all economic use of such land—e.g., do not restrict non-mining uses thereof.
Hodel v. Virginia Surface Mining & Reclamation Ass'n, 452 U.S. 264 (1981)	Demand in federal act that surface miners restore steep slopes to original contour, and surface mining prohibitions therein.	No taking. Plaintiffs failed to allege that any specific property was taken. Mere enactment of statute was no taking, since challenged provisions do not on their face deny landowners all economic use of affected land. In any event, taking claim is not ripe, since plaintiffs never used avenues for administrative relief in act—e.g., variance from original-contour requirement.
San Diego Gas & Electric Co. v. San Diego, 450 U.S. 621 (1980)	City's adoption of open-space plan.	No final judgment by state court below as to whether a taking had occurred, hence no Supreme Court jurisdiction under 28 U.S.C. §1257.
Webb's Fabulous Pharmacies, Inc., v. Beckwith, 449 U.S. 155 (1980)	County court declaring as public money the interest on interpleader fund deposited by litigants with the court.	Taking occurred. On facts presented, interest could not be viewed simply as fee to cover court costs. State may not take interest simply by calling a deposited fund "public money."
United States v. Sioux Nation of Indians, 448 U.S. 371 (1980)	1877 statute abrogating Sioux Nation's rights to Black Hills, thus abrogating 1868 treaty with tribe.	Taking occurred. In giving tribe rations until they became self-sufficient, 1877 statute did not effect a mere change in the form of investment of Indian tribal property (land to rations) by the federal trustee. Rather, it effected a taking of tribal property set aside by the 1868 treaty. This taking implied an obligation by the U.S. to make just compensation to the Sioux.

Case	Action attacked	Holding/rationale
Agins v. City of Tiburon, 447 U.S. 255 (1980)	Municipal rezoning under which property owner could build between one and five houses on his land.	No facial taking; as-applied claim not ripe. Zoning law effects taking if it does not substantially advance legitimate state interests or denies owner economically viable use of his land. Thus, no facial taking here: enactment of ordinance is rationally related to legitimate public goal of open-space preservation, ordinance benefits property owner as well as public, and owner may still be able to build up to five houses on lot. As-applied challenge is premature, since owner never submitted development plan for approval under the new zoning.
Prune Yard Shopping Center v. Robins, 447 U.S. 74 (1980)	State constitutional mandate that persons be allowed to engage in political expression in private shopping center.	No taking. Will not unreasonably impair value or use of property as a shopping center, since facility is open to public at large. And owner may restrict time, place, and manner of expression.
United States v. Clarke, 445 U.S. 253 (1980)	Municipalities' entering into physical possession of land without bringing condemnation action.	Federal statute providing that allotted Indian lands may be "condemned" under state law does not allow cities to take land by physical possession in absence of formal condemnation proceeding. Term "condemned" refers only to filing of condemnation by government, not filing of "inverse condemnation" action by landowner.
Kaiser Aetna v. United States, 444 U.S. 164 (1979)	Federal order that owners of exclusive private marina, made navigable by private funds, grant access to boating public.	Taking occurred. Infringement of marina owner's right to exclude others, particularly where there's investment-backed expectation of privacy, goes beyond permissible regulation. Navigation servitude does not grant government absolute taking immunity.
Andrus v. Allard, 444 U.S. 51 (1979)	Federal ban on sale of eagle parts or artifacts made therefrom, as applied to stock lawfully obtained before ban.	No taking. Denial of one traditional property right (selling) does not necessarily amount to taking, even if it is most profitable use of property. Plaintiff retained right to possess, pass on, or exhibit for an admission price, the affected inventory.
Penn Central Transp. Co. v. New York City, 438 U.S. 104 (1978)	City's use of historic preservation ordinance to block construction of office tower atop designated historic landmark.	No taking. Generally, there are three factors of "particular significance" in a takings determination: (1) economic impact of regulation on property owner; (2) extent to which regulation interferes with distinct investment-backed expectations; and (3) "character" of government action (meaning principally that regulation of use is less likely to be taking than physical invasion). Here, landmark owner may earn adequate return from building as is, and more modest additions to building still might be approved. City's offering of transferrable development rights to building owner also weighs against a taking. Finally, building owner cannot segment air rights over building from remainder of property and claim that all use of air rights was taken.

II. The Dawn of Regulatory Takings Law: *Pennsylvania Coal Co.* (1922) to 1978

The principle that government may "take" property in the Fifth Amendment sense merely through regulatory restriction of property use—that is, without physical invasion or formal appropriation of the property—was announced in 1922. In *Pennsylvania Coal Co. v. Mahon*, the redoubtable Justice Oliver Wendell Holmes wrote for the Supreme Court that a state law prohibiting coal mining that might cause surface subsidence in certain areas was a taking of the mining company's mineral estate.

The first steps taken by this infant doctrine, however, were unsteady ones. Aside from making clear that takings occur only with the most severe of property impacts, the Court's opinions during this period display little in the way of principled decisionmaking. Moreover, the Court refused at times to part with its long-standing due-process approach to testing property-use restrictions, vacillating between the two theories.

Case	Action attacked	Holding/rationale
Duke Power Co. v. Carolina Environmental Study Group, 438 U.S. 59 (1978)	Federal statute limiting amount recoverable by injured parties in the event of a nuclear accident.	Where individuals seek declaratory judgment that statute (Price-Anderson Act) is unconstitutional because it does not assure adequate compensation in the event of a taking, rather than seeking compensation, they may do so in district court under 28 U.S.C. §1331(a), and may do so before potentially uncompensable damages are sustained. (Footnote 15.) Also, it is unnecessary to reach taking claim here, because statute does not withdraw Tucker Act remedy (right to seek compensation from U.S. in Court of Federal Claims). (Footnote 39.)
Regional Rail Reorganization Act Cases, 419 U.S. 102 (1974)	Federal statute directing transfer of bankrupt railroads' assets to federally created corporation and forcing continued operation of unprofitable lines.	Availability of Tucker Act remedy (right to seek compensation from U.S. in Court of Federal Claims) if rail act effects "erosion taking" is ripe issue in view of distinct possibility that compelled rail operations at a loss would erode railroad's value beyond constitutional limits. Similarly, issue of remedy's availability if rail act effects "conveyance taking" is ripe, since act will lead inexorably to conveyance of assets. On merits, Tucker Act remedy is available for both alleged takings because rail act indicates no contrary intent; availability need not be stated.
Calero-Toledo v. Pearson Yacht Leasing Co., 416 U.S. 663 (1974)	Puerto Rico's seizure of yacht used for unlawful activity by lessee, but having innocent lessor.	No taking. Forfeiture is not rendered unconstitutional because it applies to property of innocents. The property itself is treated as the offender, making owner's conduct irrelevant. Also, owner voluntarily entrusted yacht to lessee, and there was no allegation that owner did all it could to avoid having property put to unlawful use.
Hurtado v. United States, 410 U.S. 578 (1973)	Pre-trial detention of federal criminal witnesses who are likely to flee and cannot post bond; payment of only $1 per day.	No taking. There is public duty to provide evidence; fact that pre-trial detention is involved here, and that financial burden may be great, is immaterial. Takings Clause does not make U.S. pay for performance of duty it is already owed. Hence, issue of whether $1 is adequate compensation need not be reached.

Case	Action attacked	Holding/rationale
New Haven Inclusion Cases, 399 U.S. 392 (1970)	Accumulation of losses by New Haven Railroad from inception of bankruptcy reorganization plan in 1961 to inclusion in Penn Central Railroad in 1968.	No taking of bondholders' interests. They invested in a public utility that has obligations to public, thus assuming risk that interests of public would be considered in any reorganization along with their own. Bondholders' rights do not dictate that vital rail operations be jettisoned despite feasible alternatives. And no bondholder petitioned court to dismiss reorganization proceeding and permit foreclosure until 1967.
YMCA v. United States, 395 U.S. 85 (1969)	Occupation of plaintiff's buildings in Canal Zone by U.S. troops seeking to protect buildings from Panamanian rioters.	No taking. Where private party is intended beneficiary of government activity, resultant losses need not be compensated even though activity was also intended incidentally to benefit public. Also, damage by rioters was not caused directly and substantially by government occupation.
Permian Basin Area Rate Cases, 390 U.S. 747 (1968)	Federal determination of maximum producers' rates for interstate sale of natural gas on an area, rather than individual producer, basis.	The Constitution does not forbid area-wide rate determinations. Also, recall that the "just and reasonable" rate standard of the Natural Gas Act coincides with constitutional standards. Thus, there is no constitutional objection if the Federal Power Commission, in setting rates, takes fully into account the various interests that "just and reasonable" requires it to reconcile.
Heart of Atlanta Motel, Inc. v. United States, 379 U.S. 241 (1964)	Federal statute banning racial discrimination in public accommodations.	No taking. "The cases are to the contrary [of the taking claim]."
Dugan v. Rank, 372 U.S. 609 (1963)	Threatened storage and diversion of water at federally operated Central Valley Project dam.	If plaintiffs have valid water rights that are partially taken, their remedy is not an injunction stopping reclamation project but a taking suit against United States under Tucker Act. Damages are to be measured by difference in market value of plaintiffs' lands before and after the taking.
Goldblatt v. Hempstead, 369 U.S. 590 (1962)	Ordinance barring excavation below water table.	No taking. Fact that ordinance deprives property of its most beneficial use, even an existing one, does not render it a taking. No evidence that ordinance will reduce value of lot, and ordinance is valid police-power regulation.
Griggs v. Allegheny County, 369 U.S. 84 (1962)	Low and frequent flights over home near county-owned airport.	Taking occurred of an air easement, per rule of *United States v. Causby, infra* page 13. County, rather than U.S., must assume taking liability, since notwithstanding federal airport standards that must be met for receipt of federal funds, county promoted, built, owns, and operates airport.
Armstrong v. United States, 364 U.S. 40 (1960)	Required transfer to U.S. of title to unfinished boat, making a materialmen's lien unenforceable.	Taking occurred. Destruction by government of all value of lien (which is property) is not mere consequential injury, hence non-compensable, but is rather a direct result of United States' exercising option under contract to take title to vessel.
United States v. Central Eureka Mining Co., 357 U.S. 155 (1958)	Federal wartime order requiring non-essential gold mines to close.	No taking. Government did not occupy, use, or possess mines; rather it sought only to free up essential equipment and manpower for critical wartime uses. Such a temporary restriction during wartime is not a taking.
Tee-Hit-Ton Indians v. United States, 348 U.S. 272 (1955)	Removal by U.S. of timber from certain Indian-occupied lands in Alaska.	No taking. Permissive Indian occupancy—i.e., occupancy not specifically recognized by Congress as ownership—may be extinguished without compensation.
United States v. Caltex (Philippines), Inc., 344 U.S. 149 (1952)	Destruction by U.S. army of private oil terminal, to prevent its capture by advancing enemy.	No taking. Wartime destruction of private property by U.S. to prevent imminent capture by an advancing enemy is exception to taking clause.

Case	Action attacked	Holding/rationale
United States v. Pewee Coal Co., 341 U.S. 114 (1951)	Temporary seizure and operation of coal mine by U.S. during wartime to avert strike.	Taking occurred. Government asserted total dominion and control over the mines.
United States v. Kansas City Life Insurance Co., 339 U.S. 799 (1950)	Maintaining river level at high water mark by federal lock and dam, raising water table on farm and thus destroying its agricultural value.	Taking occurred. Government is not shielded from takings liability by its navigation servitude here; farm is above ordinary high water mark, which defines limit of servitude. Destruction of farm's agricultural value is taking under principle that destruction of private land by flooding is taking. As with flooding, land was permanently invaded, and it matters not whether invasion was from above or below.
United States v. Gerlach Live Stock Co., 339 U.S. 725 (1950)	Building of federal dam that ended seasonal inundation of plaintiffs' grasslands, turning them parched.	Need not reach taking question, since Congress has not attempted to take, or authorized the taking without compensation, of any rights valid under state law.
United States v. Dickinson, 331 U.S. 745 (1947)	Flooding of land by federal dam in gradual, successive stages.	When government takes by a continuing process of physical events, owner is not required to resort to piecemeal or premature takings actions. Date of taking occurs when situation becomes "stabilized."
United States v. Causby, 328 U.S. 256 (1946)	Frequent flights of military aircraft over chicken farm at low altitude.	Taking occurred of air easement. Flights over private land that are so low and frequent as to be direct and immediate interference with use and enjoyment of land effect a taking.
United States v. Willow River Power Co., 324 U.S. 499 (1945)	Raising of water level by U.S., impairing efficiency of upstream hydro-electric dam.	No taking. Dam operator's interest in river's water level is subordinate to paramount authority of United States to improve navigation.
Bowles v. Willingham, 321 U.S. 503 (1944)	Federal statute authorizing restriction of rents in "defense areas" to levels that are "generally" fair, rather than fair to each landlord.	No taking. Impossibility of fixing rents landlord by landlord and existence of war are germane to constitutional issue. Nothing in act requires offering accommodations for rent. Price control may reduce value of property, but that does not mean there is taking.
Federal Power Comm'n v. Natural Gas Pipeline Co. of America, 315 U.S. 575 (1942)	Federal regulation of rates for interstate sale of natural gas.	By long-standing usage in the field of rate regulation, the lowest reasonable rate is one which is not confiscatory in the constitutional sense. It follows that the "just and reasonable" standard for interstate gas rates in the Natural Gas Act "coincides with that of the Constitution."
United States v. Chicago, M., St. P. & P. Railroad Co., 312 U.S. 592 (1941)	Raising of water level by U.S., forcing railroad to incur costs to protect embankment.	No taking. Embankment was built on low-water mark in bed of navigable stream; government's navigation servitude covers entire bed of such streams to high-water mark.
Danforth v. United States, 308 U.S. 271 (1939)	Enactment of flood control statute authorizing con-demnation.	Mere enactment of statute authorizing future action cannot be taking, since "[s]uch legislation may be repealed or modified, or appropriations may fail."
United States v. Sponenbarger, 308 U.S. 256 (1939)	Enactment of flood control act and operations pursuant to act.	No taking of land within floodway. Improvements under act had not increased flood hazard. Also, government effort to lessen flood hazard did not constitute taking of those lands not afforded as much protection as others.
Chippewa Indians v. United States, 305 U.S. 479 (1939)	Federal statute creating national forest on land held by U.S. in trust for tribe.	Taking occurred. Mere enactment deprived tribe of all its beneficial interest in the land.

Case	Action attacked	Holding/rationale
Wright v. Vinton Branch of Mountain Trust Bank, 200 U.S. 40 (1937)	Elimination of certain rights of mortgagees in property held as security, by statute amended in response to *Louisville Joint Stock Land Bank, infra* page 14.	No due process violation. Amended statute shortened stay of foreclosure proceedings (during which debtor remained in possession paying rent) from five years to three years, and included new provision requiring that judicial sale be held if debtor failed to pay rent or comply with court orders.
Shoshone Tribe v. United States, 299 U.S. 476 (1937)	Federal sanction of Arapahoe occupancy of land promised by treaty to exclusive occupancy of Shoshone.	Federal guardianship of tribal land does not include requiring tribe to which exclusive occupancy has been pledged to share land with another tribe absent compensation.
Louisville Joint Stock Land Bank v. Radford, 295 U.S. 555 (1935)	Federal statute eliminating certain rights of mortgagees in property held as security.	Taking occurred. At the outset, bankruptcy power is subject to Takings Clause. The statute as applied deprives mortgagee bank of its property rights under state law to retain lien until indebtedness is paid, to realize on the security through judicial public sale, to control property during default period, etc. Aggregate loss of these rights effects substantial impairment of the security. Act has taken from bank and given to mortgagor rights of substantial value.
Railroad Retirement Bd. v. Alton Railroad Co., 295 U.S. 330 (1935)	Required federal retirement scheme for interstate carriers.	Due process violation occurred. Under scheme, a railroad must, in addition to making its own contributions to pension fund, act as insurer of contributions required of other railroads and railroad employees. Though property of railroads is dedicated to public use, it remains private property of its owners, and may not be taken without compensation.
United States v. Creek Nation, 295 U.S. 103 (1935)	Portion of treaty lands taken by survey error of United States, given to another tribe.	Federal guardianship of tribal land does not allow appropriation by U.S. without compensation.
Norman v. B. & O. Rd. Co., 294 U.S. 240 (1935)	Federal mandate that obligations be dischargeable by payment of legal tender, voiding gold clause in pre-existing private contract.	No taking. Relies entirely on *Legal Tender Cases, infra* page 19.
Mullen Benevolent Corp. v. United States, 290 U.S. 89 (1933)	Acquisition by U.S. of lands, frustrating the replenishment of town's fund for repayment of bonds.	No taking of bonds. No lien remained on land at time of purchase by U.S., and frustration of ability to replenish fund is merely consequential damage, hence noncompensable.
International Paper Co. v. United States, 282 U.S. 399 (1931)	Wartime requisition by U.S. of all power producible by power company from water in canal, cutting off paper company's lease right to use portion of such water.	Taking occurred. Fact that requisition occurred by contract is of no moment, since power company was bound under governing requisition statute to obey. Paper company had water right, a property right, to use of canal water, and federal action terminated that right in its entirety. *Omnia Commercial Co., infra* page 15, can be distinguished, since here government took the property that petitioner owned, rather than merely frustrating future deliveries under contract.
Nectow v. City of Cambridge, 277 U.S. 183 (1928)	Euclid-style comprehensive zoning ordinance, as applied to designate portion of plaintiff's tract residential.	Due process violation occurred. Because of industrial uses to which adjoining lands on two sides are devoted, subject land has little value for limited purposes permitted in a residential zone. Land-use restriction cannot be imposed where, as here, it does not bear substantial relation to public health, safety, morals, or general welfare.

Case	Action attacked	Holding/rationale
Miller v. Schoene, 276 U.S. 272 (1928)	State order that cedar trees infected with infectious rust disease be cut down, so as not to endanger nearby cash crop.	State did not exceed due process or proper bounds of police power. State may order destruction of one class of private property to save another of greater value to public.
Village of Euclid v. Ambler Realty Co., 272 U.S. 365 (1926)	Comprehensive zoning ordinance.	No due process violation. Zoning, as a general matter, is reasonable use of police-power to deal with increasingly crowded urban conditions. Fact that non-offensive as well as noxious uses are barred from a zone is not fatal.
Everard's Breweries v. Day, 265 U.S. 545 (1924)	Federal statute prohibiting doctors from prescribing intoxicating malt liquors for medicinal purposes.	No taking of brewery's property. (No further discussion.)
Brooks-Scanlon Corp. v. United States, 265 U.S. 106 (1924)	Wartime requisition by U.S. of all ships under construction by shipyard and related contracts, including plaintiff's purchase contract.	Taking occurred. U.S. put itself in plaintiff's shoes and appropriated to its own use all the rights and benefits that an assignee of the contract would have had—such as credit for payments already made by plaintiff. U.S. sought to enforce the contract. This case is easily distinguished from *Omnia Commercial Co., infra* page 15, where U.S. frustrated, but did not take over, the contract.
Sanguinetti v. United States, 264 U.S. 146 (1924)	Flooding of land between river and slough, following construction of canal connecting the two to divert flood waters from slough to river.	No taking. Overflow must be direct result of government structure, and constitute a permanent invasion of land. These conditions are not met here. The land was subject to same periodic overflows before canal; it was not shown that overflow was direct result of canal. And owner was not ousted, nor was customary use of land prevented.
Omnia Commercial Co. v. United States, 261 U.S. 502 (1923)	Wartime requisition by U.S. of steel plant's entire output, precluding plaintiff from buying steel at favorable price under preexisting contract with plant.	No taking. Though contract rights are property, U.S. did not "take" those rights, but merely frustrated their exercise. The Constitution does not demand compensation for such consequential harm.
Pennsylvania Coal Co. v. Mahon, 260 U.S. 393 (1922)	State law barring coal mining that might cause subsidence of overlying land, applicable only where surface estate owner is different from mineral estate owner.	Taking occurred. "While property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking." By eliminating right to mine coal, state law leaves the mineral estate owner with nothing. Moreover, because state law applies only where surface is in different ownership, it benefits a narrow private interest rather than a broad public one. And surface owners had expressly contracted away their right to subjacent support.

III. Appropriations and Physical Takings Only: 1870 to 1922

The 1870s marked the Supreme Court's first clear acknowledgment that the Takings Clause is not only a constraint on the government's formal exercise of eminent domain, but the basis as well for suits by property owners challenging government conduct not attended by such formal exercise. However, until 1922 the Court believed such "inverse condemnation" suits to be confined to government appropriations or physical invasions of property. Cases involving the impacts of government water projects (flooding, reduced access, etc.) were typical. When cases involving mere restrictions on the use of property reached the Court, they were tested under due process, scope of the police power, or ultra vires theories.

Case	Action attacked	Holding/rationale
Portsmouth Harbor Land & Hotel Co. v. United States, 260 U.S. 327 (1922)	Positioning of military guns for firing over private resort island, and actual firing on several occasions.	Occasional firings and other evidence showed that U.S. might have installed guns not simply as wartime defenses, but to subordinate resort to right of government to fire across it at will, in peacetime. If so, effects an appropriation of a servitude and requires compensation.
Corneli v. Moore, 257 U.S. 491 (1922)	Federal refusal under National Prohibition Act to allow plaintiffs to remove purchased liquor barrels from warehouse, despite pre-act purchase.	No taking. Application of National Prohibition Act to plaintiffs, despite their purchase of the liquor prior to its enactment, does not effect a taking. Takings argument is "answered ... by the National Prohibition Cases, 253 U.S. 350, 387."
John Horstmann Co. v. United States, 257 U.S. 138 (1921)	Construction of federal irrigation project, which raised groundwater and lake water, destroying value of plaintiffs' property.	No taking. To bind federal government, there must be implication of a contract to pay, but circumstances here rebut that implication. The project's consequences for the plaintiffs' properties could not have been foreseen, given the "obscurity" of the movement of percolating waters.
Block v. Hirsh, 256 U.S. 135 (1921)	Statute allowing tenants to remain in possession at same rent upon expiration of lease.	No taking. Validity of rate regulation in the public interest is well settled. Statute is justified only as temporary measure related to war effort. Landlord is assured of rents that are "reasonable."
Bothwell v. United States, 254 U.S. 321 (1920)	Government flooding of private land, forcing sale of cattle at low prices and destroying business.	No taking as to cattle or business. The U.S. need only pay for property it actually takes.
Walls v. Midland Carbon Co., 254 U.S. 300 (1920)	State ban on non-heating uses of natural gas, forcing closing of plant that used gas to make carbon black.	Within state's police power and does not take property without due process. State may curtail extravagant uses of a natural resource in which many have rights, limiting one person's rights in order that others may enjoy theirs.
Jacob Ruppert, Inc., v. Caffey, 251 U.S. 264 (1920)	Federal statute extending wartime ban on domestic liquor sales to beer, including supplies on hand at enactment.	No taking. As in *Hamilton, infra* page 17, there was no appropriation of private property, but merely a lessening of value due to a permissible restriction on its use. Nor is it significant that ban took effect immediately.

Case	Action attacked	Holding/rationale
Hamilton v. Kentucky Distilleries & Warehouse Co., 251 U.S. 146 (1919)	Federal statute imposing wartime ban on domestic liquor sales, including supplies on hand at enactment.	No taking. There was no appropriation for public purposes. Moreover, statute gave plaintiff nine months after enactment to sell liquor, and imposed no restriction at any time on export. Finally, restrictions here are less severe than ones upheld in state takings cases under Fourteenth Amendment.
Corn Products Refining Co. v. Eddy, 249 U.S. 427 (1919)	State food and drug law requiring that table syrup manufacturer affix labels on product disclosing ingredients.	No taking. Though plaintiff's syrup is a proprietary food, made under a secret formula, there is no constitutional right to sell goods without giving information to purchaser as to what it is that is being sold. Hence, cannot be said that there is "taking of ... property without due process of law."
United States v. Cress, 243 U.S. 316 (1917)	Federal lock and dam project that raised water above natural levels, periodically flooding private land.	Taking of flowage easement occurred. Government's right to make navigational improvements is subject to taking clause when natural bounds of stream are exceeded.
Hadacheck v. Sebastian, 239 U.S. 394 (1915)	Ordinance barring brick manufacture in residential section of city, allegedly reducing site's value by 92½%.	Police power not exceeded. Only limit on police power is that it not be exercised arbitrarily. Fact that when brick manufacturing commenced, residences on surrounding land had not yet been built, does not avail manufacturer.
Houck v. Little River Drainage District, 239 U.S. 254 (1915)	Tax of 25 cents per acre levied upon all land within drainage district to pay district's preliminary organizing expenses.	No taking. Argument that plaintiff's land will not be benefitted by newly formed district, and thus that tax is to that extent a taking without just compensation, must be rejected. "[T]he power of taxation should not be confused with the power of eminent domain. Each is governed by its own principles."
Greenleaf Johnson Lumber Co. v. Garrison, 237 U.S. 251 (1915)	Demand by Secretary of War that portion of pier outside redrawn pier line be removed, even though within pier line when built.	No taking. Though pier was built with state approval, state's authority is subordinate to federal navigation servitude. Where it applies to a body of water, as here, the servitude exonerates the United States from takings liability when acting to promote commerce and navigation.
Reinman v. Little Rock, 237 U.S. 171 (1915)	Ordinance barring livery stables in section of city.	Police power not exceeded; due process not violated. It is within police power to declare that in certain situations, a type of business shall be deemed a nuisance and prohibited, even if it is not a nuisance per se, as long as this power is not exercised arbitrarily or with unjust discrimination.
Richards v. Washington Terminal Co., 233 U.S. 546 (1914)	Harm to property from operation of nearby railroad located, constructed, and maintained under acts of Congress.	Property owner's nuisance action against railroad may proceed. While Congress may legalize what would otherwise be a public nuisance, it may not immunize congressionally chartered railroad from private nuisance actions so as to amount to taking of private property. Private nuisances amounting to takings in this context are those where railroad operation subjects property owner to more than typical injury, as is the case here.
Peabody v. United States, 231 U.S. 530 (1913)	Positioning of military guns with capability of firing over private resort island; last fired in 1902.	No taking. If U.S. had installed guns to establish right to fire over land at will in peacetime, would be a taking. But here, practice shots can be aimed elsewhere, and indeed, guns have not been fired for many years. Cf. *Portsmouth Harbor Land & Hotel Co., supra* page 16.

Case	Action attacked	Holding/rationale
Lewis Blue Point Oyster Cultivation Co. v. Briggs, 229 U.S. 82 (1913)	Federal contractor's dredging of navigation channel across submerged lands leased for oyster cultivation, destroying oysters	No taking. Under federal navigation servitude, property rights in submerged land may be destroyed by dredging of channel in interest of navigation without compensation. See also *United States v. Chandler-Dunbar Co.*, 229 U.S. 63 (1913), addressing effect of navigation servitude on property rights in a direct condemnation case decided the same day.
Noble State Bank v. Haskell, 219 U.S. 104 (1911)	State statute requiring banks to pay assessment to fund designed to secure full repayment of deposits.	No taking. A public advantage may justify a small taking of private property for what, in its immediate purpose, is a private use. In addition, benefit conferred on plaintiff bank through this scheme of mutual protection is sufficient compensation for correlative burden that it must assume.
United States v. Welch, 217 U.S. 333 (1910)	Flooding from government dam, cutting off right of way.	Taking occurred. Destruction of an easement is as much a taking of it as is an appropriation.
Welch v. Swasey, 214 U.S. 91 (1909)	State statute limiting height of buildings in area containing plaintiff's land to lower height than elsewhere.	No taking. Height limitation here, even though a discrimination, is not so unreasonable as to deprive owner of property of its profitable use without justification. The discrimination was justified by the police power.
Juragua Iron Co. v. United States, 212 U.S. 297 (1909)	Wartime destruction of U.S. company's property in enemy territory, on order of U.S. military officer, to prevent spread of yellow fever.	No taking. American company doing business in enemy territory is deemed enemy of the U.S. with respect to its property located in that territory. No compensation is owed when such property is destroyed through military action justified under laws of war.
Sauer v. City of New York, 206 U.S. 536 (1907)	Construction of elevated public viaduct in city street, impairing access, light, and air reaching plaintiff's property.	No taking. Under New York law, public-highway abutter has easements of access, light, and air against erection of elevated roadway by private corporation, but not against erection of same for public use.
Union Bridge Co. v. United States, 204 U.S. 364 (1907)	Order by Secretary of War that bridge be altered at owner's expense to eliminate obstruction to navigation	No taking. U.S. actions under its navigation servitude are not takings but rather exercise of dominant government power to which riparian property has always been subject. Fact that bridge was lawfully constructed and did not obstruct navigation when built is immaterial.
Manigault v. Springs, 199 U.S. 473 (1905)	Construction of state-authorized dam, compelling plaintiff to raise his dikes and impairing access to his lands.	No taking. Flooding effects taking only where there is material impairment of flooded land's value—not, as here, where plaintiff is merely put to some extra expense in raising dikes (and even though dam's sole purpose is to enhance value of downstream lowlands for agriculture). No compensation for impaired access either, since within state's police power.
California Reduction Co. v. Sanitary Reduction Works, 199 U.S. 306 (1905)	Ordinance requiring that waste generated within city be disposed of at designated site, at transporter's expense.	No taking. Imposing expense on waste generator (assuming transporter passes on disposal fees) was not taking, since it has always been generator's duty to have garbage removed from his premises. Nor did destruction of waste amount to taking, even if some of its constituents had value.
New Orleans Gaslight Co. v. Drainage Comm'n of New Orleans, 197 U.S. 453 (1905)	Requirement by drainage district that gas utility move some of its pipes at its own expense.	No taking. Plaintiff's franchise gave it only right to locate its pipes under streets of city, not right to any particular place such that plaintiff must be compensated should relocation be required.

Case	Action attacked	Holding/rationale
Bedford v. United States, 192 U.S. 217 (1904)	Government revetments along river to halt widening, causing river to flow faster and erode/flood downstream property.	No taking. Damage to land, if caused by revetment at all, was but an incidental consequence; distinguished from instance where government dam in river causes flooding of private land directly.
United States v. Lynah, 188 U.S. 445 (1903)	Flooding from government dam, completely destroying land's value.	Taking occurred. Where government dam floods land so as to substantially destroy its value, there is a taking.
Scranton v. Wheeler, 179 U.S. 141 (1900)	Pier constructed by United States in navigable waters in aid of navigation, eliminating riparian owner's access to navigable water	No taking. Congress's power to regulate commerce, and therefore navigation, may be exercised without compensation. Riparian owner's right of access to navigable waters is subject to being thwarted by government erection of structures on submerged land in front of property to improve navigation. Irrelevant whether title to submerged land on which pier was built was in state or private riparian owner.
Norwood v. Baker, 172 U.S. 269 (1898)	Ordinance assessing landowner the costs to condemn strip of his land for road, including village's expenses in connection with condemnation.	Taking occurred. Special assessments to meet cost of public improvements are justified on ground that property owner on which they are imposed is specially benefitted by the improvement. Still, when such assessments are in substantial excess of those special benefits, they are, to the extent of such excess, a taking.
Meyer v. Richmond, 172 U.S. 82 (1898)	City-authorized railroad obstruction to street, reducing traffic at plaintiff's properties nearby.	No taking. Obstruction was not on plaintiff's land. Hence, impact on plaintiff amounted only to consequential damages, which are noncompensable.
Gibson v. United States, 166 U.S. 269 (1897)	Construction of government dike near plaintiff's land, preventing ingress and egress of vessels to commercial wharf on plaintiff's land.	No taking. No appropriation or direct invasion occurred, only incidental injuries from lawful exercise of federal navigation servitude. No water was thrown onto plaintiff's land; dike did not physically touch land or cause deposits thereon.
Mugler v. Kansas, 123 U.S. 623 (1887)	Ban in state constitution on manufacture or sale of liquor, greatly reducing brewery's value.	No taking. A prohibition simply upon use of property for purposes declared by valid legislation to be noxious cannot be deemed a taking.
United States v. Pacific Rd., 120 U.S. 227 (1887)	Government's offset of its costs in rebuilding bridges destroyed in Civil War, against railroad's claim for services.	Related discussion asserts that government cannot be charged for injury to private property caused by wartime operations in the field, or by measures necessary for army's safety. But when property of loyal citizens is taken for army's use, it has been practice to compensate, though "it may not be within the terms of the constitutional clause."
United States v. Great Falls Mfg. Co., 112 U.S. 645 (1884)	Building of dam, which occupied plaintiff's land and took his water rights.	Taking occurred. Where United States by its agents proceeds under act of Congress to occupy property for public use, it must compensate.
Transportation Co. v. Chicago, 99 U.S. 635 (1878)	Construction of tunnel under river, temporarily limiting access to wharf.	No taking. Acts done in proper exercise of government powers, and not directly encroaching on private property, are not a taking.

Case	Action attacked	Holding/rationale
Pumpelly v. Green Bay Co., 80 U.S. (13 Wall.) 166 (1871)	Dam that flooded plaintiff's land continuously.	Taking occurred. It is not required that property be formally taken in order to implicate Takings Clause. Serious interference with the common and necessary use of property, as by continuous flooding, effects a constitutional taking.
Legal Tender Cases (Knox v. Lee), 79 U.S. (12 Wall.) 457 (1870)	Federal statutes making U.S. currency legal tender for payment of all debts, even those entered into before enactment.	No taking. Takings Clause "has always been understood as referring only to a direct appropriation"; it has no bearing on laws such as this one that only indirectly cause loss. Overrules *Hepburn v. Griswold*, 75 U.S. (8 Wall.) 603 (1870) (finding legal tender acts violative of due process, but briefly raising taking issue).

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