

Splitting the Atom of Property

Case	DP Claim/Jurisdict.	Takings Claim/Won	Law Challenged	Property Interests in Question	Reasoning and Head Count
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Case‡	DP Claim/ S.Ct. Jurisdiction†	5th Amend. Takings Claim Brought/Won	Law in Question	Past & Future Uses of Property in Question	Reasoning and Head Count
<u>Pumpelly v. Green Bay & Miss. Canal Co.</u> (1871) (predating <u>Murdoch v. Memphis</u> (1875))‡	No/1 Stat. 73, 85	WI Const. takings provision provides the specific grounds of the holding.	An 1840 WI statute preempts common law actions against canal co. that builds dam under specs of the Act, but provides for a statutory action if timely, w/ specified damages, etc.	Under the 1840 WI Mill Act, the canal co. erects a dam that floods 640 acres of petitioner’s property, but the flooding was incident to observance of the Act’s requirements	9-0. Miller for the Court that flooding is ‘taking’ in all but the narrowest sense of the term and, under the WI Const., can constitute an act that requires JC under “the Constitution” generally (in reference to other states’ takings provisions and <i>perhaps</i> the 5th amend.). Counsel for WI makes what seems like a denominator argument: the flooding was authorized by WI to improve its navigation, a power of the state as public trustee. The “universal right” to compensation when property is taken is discussed—but the only federal question arises under the power of WI as a state entering the Union by its enabling statute versus the

‡ Fields in red denote cases involving government-created or -authorized injuries to adjacent owners; blue denotes cases involving a “public use” issue; all others are in black.

† Until 2005, when the Court scrutinized the public purpose behind or justification for the law in question—and/or the precision of the means chosen to pursue its stated end(s)—it could have either been for the sake of due process or the Takings Clause. Of course, without collecting all the complaints and motions in the litigation, there is no way to verify what the claims were styled as in the papers. Where the Court itself delineates the separate claims (and the Court has been quite inconsistent over the years in that nicety of opinion writing), I have noted it.

‡ [Murdoch v. City of Memphis](#) 187 U.S. 590 (1875), held that the Court has no jurisdiction to review state court decisions on questions of state law. The holding is predicated on the statutory denial of such jurisdiction dating all the way back to the Judiciary Act of 1789 and it construes the Judiciary Act of 1867 (which, curiously, omitted the language from § 25 of the 1789 statute expressly denying such jurisdiction) by resort to principles of federalism and separation of powers. In [Fox Film Corp. v. Muller](#), 296 U.S. 207, 210 (1935), the Court stated that “[t]he settled rule [is] that where the judgment of a state court rests upon two grounds, one of which is federal and the other non-federal in character, our jurisdiction fails if the non-federal ground is independent of the federal ground and adequate to support the judgment.”

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					Northwest Ordinance's provisions on corporations and vested rights.
<u>Loan Association v. Topeka (1874)</u> (predating <u>Murdoch v. Memphis (1875)</u>)	Yes/1 Stat. 73, 85	No	Kansas towns authorized to raise revenues w/ bonds the interest from which to then be paid to business firms as subsidies.	Topeka issues \$100,000 in its bonds against the tax revenues secured from its property taxes.	8-1. Miller for the Court that the power to tax being "the power to destroy" (quoting Marshall), there must be an implied limitation requiring that taxes be for public purposes and not be from A to B for B's sole benefit. Clifford dissents to note how unprecedented this invasion of state sovereignty is—and without any explicit constitutional grounds.
<u>Davidson v. New Orleans (1877)</u>	Yes/1 Stat. 73, 85	No	Special assessment against "certain real estate" for "reclamation" (draining) of the swamplands in Carroll and Orleans Parishes.	Davidson's estate owned several assessed parcels, total assessment: \$50,000.	8-1. Miller for the Court that "it is not possible to hold that a party has, without due process of law, been deprived of his property, when, as regards the issues affecting it, he has, by the laws of the State, a fair trial in a court of justice, according to the modes of proceeding applicable to such a case."† Bradley writes separately from the Court to say it "narrows the scope of inquiry as to what is due process of law more than it

† Miller, the author of the opinion in Loan Association, distinguishes it on the grounds that the Loan Association case was an appeal from a federal court—not from a state's court of last resort. "If private property be taken for public uses without just compensation, it must be remembered that, when the fourteenth amendment was adopted, the provision on that subject, in immediate juxtaposition in the fifth amendment with the one we are construing, was left out and this was taken. It may possibly violate some of those principles of general constitutional law, of which we could take jurisdiction if we were sitting in review of a Circuit Court of the United States, as we were in [Loan Association]." 96 U.S. at 105.

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					should do.”
<u>Transportation Co. v. United States</u> (1878)	No/1 Stat. 73, 85	Yes/No	Chicago builds tunnel under the river along La Salle Street, plaintiffs lease bldg. on the street and are denied access to their bldg. during the work.	No allegation that either the work or the interval for its completion was unreasonable or that the coffer dam that blocked access was unnecessary; plaintiffs concede that the tunnel’s construction was directly authorized by statute.	9-0. Strong for the Court that “[t]hat cannot be a nuisance, such as to give a common-law right of action, which the law authorizes.” “[P]ersons appointed or authorized by law to make or improve a highway are not answerable for consequential damages, if they act within their jurisdiction and with care and skill. . . .” Court distinguishes <u>Pumpelly</u> on the grounds that it involved a “physical invasion of the real estate . . . and a practical ouster of [owner’s] possession.”†
<u>Bowditch v. Boston</u> (1879)	No/1 Stat. 73, 85	No	MA statute and Boston ordinance provided for the demolition of “a house or building” if it is a necessary means for stopping fire, w/ an entitlement to “reasonable compensation from the city or town,” unless the fire first broke out in that building.	In the event, the Boston ordinance required that a teardown be authorized by “any three or more of the engineers” from the fire department present.	9-0. Swayne for the Court that, though nothing in the record below reflected the “slightest proof” that the engineers present did actually concur as required by the ordinance prior to the teardown, this is not in any sense a federal question. If the MA courts wish to adopt a summary approach to the disposition of the case without the taking of evidence, they are

† The Court also acknowledged that it “examined the decisions of the courts of Illinois, and other to which we have been referred by the plaintiffs in error, but in none of them was it decided that a riparian owner on a navigable stream, or that adjoiner on a public highway, can maintain a suit at common law against public agents to recover consequential damages resulting from obstructing a stream or highway in pursuance of legislative authority, unless that authority has been transcended, or unless there was a wanton injury inflicted, or carelessness, negligence, or want of skill in causing the obstruction.” 99 U.S. at 643-44.

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					free to do so because courts sometimes direct verdicts. The police power included this in the title to land within a city, too.
<u>Baltimore & Potomac RR Co. v. Fifth Baptists Church</u> (1883)	No/1 Stat. 73, 85	Yes/Remanded to S.Ct. of DC	RR is authorized by federal statute to operate their road and this requires locating an engine house and machine shop somewhere—here, adjacent to the church.	Disturbance from trains upon the church is significant: it “rendered it impossible for the plaintiff to occupy its building with any comfort as a place of public workshop.”	Field for the Court that “[i]t is no answer to the action of the plaintiff that the [RR] was authorized by act of Congress to bring its track within the limits of the city of Washington, and to construct such works as were necessary and expedient for the completion and maintenance of its road, and that the engine house and repair shop . . . were thus necessary and expedient.” [‡] “The fact that the smokestacks of the engine house were as high as the city regulations for chimneys required, is no answer to the action, if the stacks were too low to keep the smoke out of the plaintiff’s church.”
<u>Mugler v. Kansas</u> (1887)	Yes/1 Stat. 73, 85	No	Kansas statute declaring all places where liquor was produced or sold to be “public” or “common” nuisances and therefore subject to injunction.	Brewery; distiller sued in nuisance to prohibit future brewing operations as a nuisance.	8-1. Harlan for the Court that “it is a fundamental principle in our institutions, indispensable to the preservation of public liberty, that one of the separate departments of government shall not usurp powers

[‡] The Court also quotes [Sinnickson v. Johnson](#) (NJ) for the proposition that “an act of the legislature authorizing an individual to erect a dam across a navigable water constituted no defence to an action for damages for an overflow caused by the dam. 108 U.S. at 332.

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					committed by the constitution to another department.” [‡] Field dissents because he believed the police power wouldn’t extend to cover a brewery mfg. beer to be <i>exported</i> from that state because that would be an attempt by the state to regulate the health and safety of other states’ citizens.
<u>Powell v. Pennsylvania</u> (1888)	Yes (and EP claim)/1 Stat. 73, 85	No	PA statute prohibiting the sale of oleomargarine	The Mfr. Powell (defendant in the action) argues that the restriction deprives him of “the privilege of pursuing an ordinary calling or trade, and of acquiring, holding, and selling property.”	8-1. Harlan for the Court that the question was “whether the prohibition of the manufacture out of oleaginous substances . . . other than that produced from unadulterated milk or cream . . . of an article designed to take the place of butter or cheese . . . is a lawful exercise by the State of the power to protect, by police regulations, the public health.” Yes. The Court imagines a proper justification for banning butter substitutes: their mfr. may resist adequate health inspection. Field dissents that the LH of the Act makes clear it was not about public health/inspections.
<u>Chicago, Milwaukee & St. Paul Ry. Co. v. Minnesota</u> (1890)	Yes (and Contracts Cl. claim)/1 Stat. 73, 85	No	MN statute delegates authority to its RR commission to set rates that are “equal and reasonable,” which the commission employs by	The MN Supreme Court held that it could not review the tariff’s reasonableness in the subsequent judicial review for the writ of	5-1-3. Blatchford for a majority on what is commonly regarded as the first step toward SDP: to deprive the RR of its right to judicial review of the commission’s tariff is to deprive

[‡] Harlan says in dicta that “[i]f . . . a statute purporting to have been enacted to protect the public health, the public morals, or the public safety, has no real or substantial relation to those objects, or is a palpable invasion of rights secured by the fundamental law, it is the duty of the courts to so adjudge, and thereby give effect to the constitution.” 123 U.S. at 661.

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			<p>administrative proceedings to set a tariff for milk hauls within MN by the Chicago, Milwaukee (a WI corporation).</p>	<p>mandamus</p>	<p>it of “property” without due process. But the majority goes further: the legislature, when delegating to a commission, may not allow that proceeding to go forth without notice to the interested parties.† Miller concurs separately to reject the delegation and notice/hearing conclusions, but does agree that subsequent JR is due. Bradley, Gray & Lamar dissent to argue that this practically overrules <u>Munn v. Illinois</u>, the delegation finding is unprecedented, and this is akin to reading the Takings Clause into the Fourteenth Amendment.</p>
<p>Shoemaker v. United States (1893)</p>	<p>Unclear, but probably no (most claims were statutory)/1 Stat. 73, 85</p>	<p>Yes (taking for Rock Creek Park w/ special assessments to those bordering the park is alleged not to be a “public use” within the meaning of the Takings Clause)/No</p>	<p>The Act authorizing the building of Rock Creek Park, 26 Stat. 492 (1890), provided in §§ 3-5 for the mapping and eventual condemnation of land. The designated Comm’n designs the park, maps it, and files its petition w/ the Supreme Court of DC, seeks to purchase the lands voluntarily and fails in all but 5 of 84 lots. That court then empanels</p>	<p>Some issues as to actual ownership of the fee to the lands at issue, and especially as to whether Congress has “police power” like states that condemn land for public parks.</p>	<p>9-0. Shiras for the Court, citing Mills on Eminent Domain, the Court defers to the court and commission below on issues of (1) ownership, and (2) “damages” (the JC due). As to the “public use” challenge, Shiras says that the extent to which property will be taken for the “public use” in eminent domain is a matter of “legislative discretion, subject only to the restraint that just compensation must be made.”</p>

† The Court even concludes MN violated the Equal Protection Clause! “If the company is deprived of the power of charging reasonable rates for the use of its property, and such deprivation takes place *in the absence of an investigation by judicial machinery*, it is deprived of the lawful use of its property, and thus, in substance and effect, of the property itself, without due process of law and in violation of the Constitution of the United States, and in so far as it is thus deprived, while other persons are permitted to receive reasonable profits upon their invested capital, the company is deprived of the equal protection of the laws.” 134 U.S. at 458 (emphasis added).

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			assessors who apply the provisions on valuation to the parcels included (w/ irregularities that become a famous precedent in the <u>Appointments Cl.</u>), the outcome of which is appealed.		
<u>Lawton v. Steel</u> (1894)	Yes/1 Stat. 73, 85	No	NY statute appointing fish & game wardens w/ the power to seize and destroy fishing nets used contrary to regulations.	Nets of alleged value (\$525) were taken by state and destroyed; NY court ruled for property owners.	6-3. Brown for the Court that “[t]he preservation of game and fish, however, has always been treated as within the proper domain of the police power,” and where “minor articles of personal property” are put to illegal uses, the legislature has the power to destroy them. CJ Fuller, for Field & Brewer dissenting that the nets, being property, cannot be summarily destroyed without a right to be heard, etc.‡
<u>United States v. Gettysburg Electric Ry. Co.</u> (1895)	No/1 Stat. 73, 80-81	Yes	Statute creating Gettysburg NM by condemnation and purchase, 25 Stat. 357 (1888), resulted in several takings from Ry.	Condemnation w/ compensation to be paid according to subsequently-enacted statutes.	9-0. Peckham for the Court that the creation of the battlefield monuments was without doubt a “public use” within the meaning of the 5th Amendment: “[W]hen the legislature has declared the use or purpose to be a public one, its judgment will be respected by the courts, unless the use be palpably without reasonable

‡ After likening the NY law to the abatement of a public nuisance (which often entailed the destruction of buildings that were dangerous to passersby), the majority in Lawton conceded that “[i]t is not easy to draw the line between cases where property illegally used may be destroyed summarily and where judicial proceedings are necessary for its condemnation. If the property were of great value, as, for instance, if it were a vessel employed for smuggling . . . But where the property is of trifling value, and its destruction is necessary to effect the object of a certain statute, we think it is within the power of the legislature to order its summary abatement.” 152 U.S. at 141.

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					foundation.” (citing Dillon on Municipal Corporations)
<u>Covington & Lex. Tpk Rd. Co. v. Sandford</u> (1896)	Yes/1 Stat. 73, 85	No (but a Contracts Clause claim was brought)	1890 Kentucky statute capping the tolls company could charge users of one segment of its turnpike	Turnpike co. was chartered in 1834 KY statute, subsequently reconfirmed in legislation of 1839, 1851, 1865 & 1872.	9-0. Harlan for the Court that an “unjust and unreasonable” cap on rates (evidence showed the Tpk. co. wouldn’t be able to maintain the road w/ the rates it was allowed) <i>can</i> be a deprivation of property w/o DP.
<u>Missouri Pacific Ry. Co. v. Nebraska</u> (1896)	Yes/1 Stat. 73, 85	No	Nebraska statute declared all RRs “public ways” and made passage on any RR “free” except as a rate/fee was permitted by legislation.	Hollenbeck et al., assert a statutory right through Nebraska’s transp. bd. to have their grain elevator erected on the RR’s depot property and the bd., <i>after hearing</i> , orders the RR accordingly.	9-0. Gray for the Court that the statute amounts to a taking of the interest in RR’s depot and giving it to Hollenbeck et al. for their own “private” interest and that this is a denial of DP.
<u>Fallbrook Irrig. Dist. v. Bradley</u> (1896)	Yes/1 Stat. 73, 85	No	CA statute creating irrigation districts and “reclaiming” arid lands, funded by “assessments” to benefited lands, also allowed irrigation infrastructure to be imposed by condemnation on adjacent land owners without any standard for a showing of the public “necessity” for the individual irrigation project. The formation of the <i>district</i> was accompanied by a hearing, but not the projects themselves.	This Irrigation District near San Diego assessed town properties w/ buildings, etc., which would never be irrigated as cropland, and assessed Mrs. Bradley in particular \$51.31.	9-0. Peckham for the Court that the Takings Clause’s “public use” element is present in DP, as well, but that “the people of [CA] . . . must in the nature of things be more familiar with the facts and circumstances which surround the subject and with the necessities and the occasion for the irrigation of the lands than can any one be who is a stranger to her soil.” Thus, while not “conclusive,” the “public” use of the law as determined by the CA legislature is afforded ““very great respect.”
<u>Long Island Water Supply Co. v. Brooklyn</u> (1897)	Yes (and a Contracts Cl. Claim)/1 Stat.	No	Village that was eventually annexed into City of Brooklyn made a water	No jury trial afforded and it is argued that that was a denial of DP in itself.	8-0. Brewer for the Court that the Contracts Clause claim is not viable and that the

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	73, 85		contract in 1881 that provided for a 25 year rental agreement—broken by NYS when it authorizes Brooklyn in 1892 to condemn and take its water supply for the public good.		“constitutional guarantee of just compensation is not a limitation of the power to take, but only a condition of its exercise.” Here, the value of the contract to the Water Co. is simply to become an element of the compensation adjudicated to be due. Moreover, “[i]t is not essential that the assessment of damages [in the condemnation action] be made by a jury (Peckham DNP.)
<u>Turner v. New York (1897)</u>	Yes/1 Stat. 73, 85	No	NYS brings action in replevin for the return of state owned timber felled by Turner (who acquired bad title to the land in question) from lands that had escheated to the state on a tax foreclosure/sale. Legislature had passed a statute shortening the period for “redemption” of such lands and applied the shortened period Turner had from 2 yrs. to 6 months.	Turner can’t get title back from NYS (which was acquiring land for the ADK Preserve) unless the statute fixing the redemption period is held invalid.	9-0. Gray for the Court that the statute did not take away any property right per se, but rather only limited the time within which that right of redemption might be asserted. It was thus no denial of DP as legislatures have always had the power to change statutes of limitation.
<u>Chicago B & O RR v. Chicago (1897)</u>	Yes/1 Stat. 73, 85	No	Chicago ordinance plotting a road through the RR’s easement, destroying the RR’s investment in its track etc. within the locus; jury verdict in condemnation proceeding for \$1 in compensation.	RR’s easement was granted by Ill statute and Chicago City Charter was enacted later in time.	7-1. Harlan for the Court that, in general, the taking of property without compensation would be the “deprivation” of property without due process of law—but that, in this case, \$1 is about all the RR had a right to expect. Brewer dissents that the compensation given by Chicago was <i>not</i> adequate; CJ Fuller DNP.

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<p><u>Norwood v. Baker</u> (1898)</p>	<p>Yes/1 Stat. 73, 85</p>	<p>No</p>	<p>Norwood ordinance making special assessment “per front foot” on the properties benefited by the condemnation of Baker’s land for completion of local street grid, w/ provision for a jury to make findings on total cost.</p>	<p>Jury found the total cost of the special assessment (\$2218, w/ \$2000 in compensation to Baker for condemned locus) and Village issued bonds pending payment from the benefited owner—Baker, whose now-dissected parcel fronted the subject street on two sides and thus was assessed “per front foot.”</p>	<p>6-3. Harlan for a majority that, in adjudicating that Baker’s parcel was “benefited” by the condemnation and construction of the street, the Village’s use of its “taxing power” was so rigid and insensitive to the facts of Baker’s case as to be a “deprivation” of property and thus a denial of DP. To lay the special assessment on Baker without even allowing consideration of the fact that it was Baker’s land that had been condemned, triggered the rule that “the exaction from the owner of the cost of a public improvement in substantial excess of the special benefits accruing to him is, <i>to the extent of such excess</i>, a taking, under the guise of taxation, of private property for public use without compensation.”</p>
<p><u>Ohio Oil Co. v. Indiana (No. 1)</u> (1900)</p>	<p>Yes/1 Stat. 73, 85</p>	<p>No</p>	<p>Indiana statute required the capping of wells leaking natural gas after two days if no pumping/capture equipment has been harnessed, purpose being to prevent waste.</p>	<p>Alleged that the defendants wished to drill wells that would leak a whole gas field in order to shorten supply.</p>	<p>9-0. White for the Court that the miner, though gas “is a mineral” and owning the land is owning its minerals, “has the exclusive right on his own land to seek to acquire [minerals], but they do not become his property until the effort has resulted in dominion and control by actual possession” (analogizing to <i>ferae naturae</i>)—</p>

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					and therefore there is no taking in this law. [†]
<u>Wight v. Davidson</u> (1900)	Yes/1 Stat. 73, 85	Yes/No	Federal statute providing for street extensions in DC by special assessment, tried to a jury but one which was bound by the specific parameters given in the statute.	No abuse of the discretion inherent in the taxing power and thus no “deprivation of property without due process of law.” Money can be “taken” and the objections are mostly confined to the margins.	6-3. Shiras for the Court that Congress, in creating the adjudicative proceeding for the special assessments under review, provided an affirmative legislative finding missing from <u>Norwood v. Baker</u> (which was a DP case only); stating in dicta that 14th amend. precedents are not, strictly speaking, applicable against the federal gov’t. Harlan for White & McKenna dissenting that the claims in both cases are functionally identical to those in <u>Norwood</u> , and that therefore <u>Norwood</u> could no longer be good law—unless the Fifth Amend. DP clause was different from that in the 14th. [‡]
<u>French v. Barber Asphalt Paving Co.</u> (1901)	Yes/1 Stat. 73, 85	No	KC ordinance is adopted for special assessments on improvements of residential street by per-front-foot formula.	MO statute authorized the city’s method of assessment and MO Const. was interpreted by MO courts as allowing	6-3. Shiras for the majority that the <u>Norwood</u> rule wasn’t categorical as to the legislative imposition of a rough formula like per-front-foot but was

[†] White presses the analogy to *ferae naturae* and Geer v. Connecticut (1896) (states’ sovereign ownership of game) to its limits to establish the premise that mere leaking of gas isn’t perfection of title. “Viewed, then, as a statute to protect or to prevent the waste of the common property of the surface owners, the law of the State of Indiana which is here attached because it is asserted that it divested private property without due compensation, in substance, is a statute protecting private property and preventing it from being taken by one of the common owners without regard to the enjoyment of the others.”

[‡] “[I]t by no means necessarily follows that a long and consistent construction put upon the Fifth Amendment, and maintaining the validity of the acts of Congress relating to public improvements within the District of Columbia, is to be deemed overruled by a decision [Norwood v. Baker] concerning the operation of the Fourteenth Amendment.” 181 U.S. at 384.

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				it.	rather particular to circumstances of Baker. [±] The KC law deprives abutting owners of any opportunity to challenge their actual benefit from the improvements. Harlan, White & McKenna dissent that this is inconsistent w/ <u>Norwood</u> .
<u>United States v. Lynah</u> (1903)	No/Tucker Act [±]	Yes/Yes	Dams and levees of the US cause poor drainage/flooding of petitioner's riparian property.	Gov't defends that the harm was at most a tortious injury (for which the Court of Claims had no jurisdiction), not a taking in any constitutional sense.	4-1-3. Brewer for a plurality that where an invasion of this kind occurs (without an actual condemnation proceeding), an "implied contract" for just compensation is created. "It is clear . . . that where the government by the construction of a dam or other public works so floods lands belonging to an individual as to substantially destroy their value there is a taking within the scope of the Fifth Amendment." Brown concurs that no contract is implied; the claim arises directly under the Fifth Amendment or not at all. White, for CJ Fuller & Harlan that no "taking" occurred because the damages cannot be the full value of the fee, but only the enhancement of the subject levee to reclaim the land in question. (McKenna

[±] Shiras's opinion notes that the "some of our cases arose under the provisions of the Fifth Amendment [regarding the District of Columbia's municipal authorities] and others under those of the Fourteenth Amendment . . ." 181 U.S. at 328. It went on at great length to disentangle those precedents, *id.* at 329-44, and to imply that judicial federalism was at work in how the two types of cases differed.

[±] The Tucker Act, enacted in 1887, 24 Stat. 505, provides that takings claims against the United States seeking monetary relief (today, in excess of \$10,000) are under the exclusive jurisdiction of the Court of Federal Claims (renamed as such in 1982). See 28 U.S.C. §§ 1346(a)(2), 1491(a)(1).

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					DNP.)
<p><u>Louisville & Nashville RR Co. v. Barber Asphalt Paving Co.</u> (1904)</p>	<p>No (but an EP Claim was used to “set up” the same issue as in <u>Norwood & French</u>)/1 Stat. 73, 85</p>	<p>No</p>	<p>KY stat. allowing liens on lots “improved with grading, curbing & paving,” challenged by RR whose interest was a right of way for its “main roadbed”—equally apportioned according to front footage.</p>	<p>RR did not challenge the failure of Barber to put liens on those having reversionary interests in the lots in question, only the apportionment criteria applied to its interest.</p>	<p>6-2. Holmes for the Court that “[i]t is dangerous to tie down legislatures too closely by judicial constructions not necessarily arising from the words of the Constitution” and that this means that a system of assessments like the KY stat. that is generally valid may result in some inaccuracies of benefit/assessment parity in particular cases, but that this is likely to balance out “in a good-sized city” and that legislatures are free to suppose that an owner like the RR can simply turn the property around to someone that is/will be benefited. White & Peckham dissent but write no opinion</p>

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					while Harlan DNP.
<u>Chicago B & O RR v. Drainage Commissioners</u> (1905)	Yes/1 Stat. 73, 85	No [†]	Action by Comm'rs for mandamus in Ill. ct. to enforce Ill. statute allowing commission to order the RR's reconstruction of bridge, on penalty of commission doing so and reversing the charges.	Mandamus for bridge reconstruction upheld: bridge must be rebuilt according to Comm'rs specifications or RR's creek-crossing easement abandoned.	5-3-1. Harlan for a majority that drainage of creek for navigation etc. was a police power prerogative as long as reasonably exercised and reasonably related to the public welfare; Holmes for White & McKenna concurring that compensation would be owed if the police power to widen the channel was exercised "unlawfully;" Brewer dissenting that any "taking" of property requires "due compensation."
<u>West Chicago Street RR v. City of Chicago</u> (1905)	Yes/33 Stat. 314	Yes/No	Action for mandamus against RR brought by city (and subsequently approved by US in the 1899 R&H Act)	Mandamus for costly relocation of RR tunnel under Chicago River upheld.	4-1-4. Harlan for a majority that the mandamus to the RR to move its tunnel "took" nothing the RR had in its denominator to give because the public right to unobstructed navigation was being denied by the tunnel; Holmes concurs on narrow grounds of precedent; Fuller, Brewer, White, McKenna dissent.

[†] The claims brought were for the denial of due process and of equal protection under the Fourteenth Amendment. But in the Harlan opinion, the Court holds that "injury may often come to private property as the result of legitimate governmental action, reasonably taken for the public good and for no other purpose, and yet there will be no *taking* of such property within the meaning of the constitutional guarantee against the deprivation of property without due process of law, or against the taking of private property for public use without compensation." 200 U.S. at 584 (citing Transp. Co. v. Chicago, Mugler v. Kansas, N.Y. & N.E. RR v. Bristol, Chicago B & O RR v. Chicago, Gibson v. United States, and Scranton v. Wheeler). This provoked Brewer to assert in dissent that "[w]hen private property is taken for public uses compensation must be paid. That is the mandate of the Federal Constitution and of that of nearly every State in the Union. *Independently of such mandate*, compensation would be required." (emphasis added) (citing Kent on due process and Sinnickson v. Johnsons, 17 N.J.L. 129, b/c referenced in Pumpelly v. Green Bay Co.) and elsewhere).

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Case	DP Claim/Jurisdict.	Takings Claim/Won	Law Challenged	Property Interests in Question	Reasoning and Head Count
<u>Lochner v. New York</u> (1905)	Yes/1 Stat. 73, 85	No/No	New York statute setting maximum work hours for bakery employees.	N/A	5-4. Peckham for a majority that “the general right to make a contract . . . is part of the liberty of the individual protected by the Fourteenth Amendment. . . .” [‡] Harlan, for White & Day dissent to argue that the NY legislature may have had a reasonable health-based justification for the workday restriction. Holmes dissents to compare this law to others in financial markets that had been sustained; later writes the opinion in <u>Pennsylvania Coal</u> .
<u>Otis Co. v. Ludlow Mfg. Co.</u> (1905)	Yes/1 Stat. 73, 85	No	Mill Act in MA allowed dam construction even where flooding of others’ lands would occur.	Upstream riparian owner has inundated lands from defendant’s mill dam.	9-0. Holmes for the Court that mill acts have been around in MA since at least 1714—that they are “an incident into the nature of property in streams as there understood.” But while mill acts and the flooding that goes with them are customary and perhaps inherent in title, to omit a right of compensation to the flooded owner would deny DP.

[‡] “The right to purchase or to sell labor is part of the liberty protected by this amendment, unless there are circumstances which exclude the right. There are, however, certain powers, existing in the sovereignty of each state in the Union, somewhat vaguely termed police powers, the exact description and limitation of which have not been attempted by the courts. Those powers, broadly stated, and without, at present, any attempt at a more specific limitation, relate to the safety, health, morals, and general welfare of the public. Both property and liberty are held on such reasonable conditions as may be imposed by the governing power of the state in the exercise of those powers, and with such conditions the 14th Amendment was not designed to interfere.” 198 U.S. at 52 (citing Mugler).

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Case	DP Claim/Jurisdiction	Takings Claim/Won	Law Challenged	Property Interests in Question	Reasoning and Head Count
Clark v. Nash (1905)	Yes/1 Stat. 73, 85	No	Utah statute allowed irrigation ditches to be condemned over any lands, notwithstanding landowner objecting to the laying of such ditches; supposedly did so because of the extreme importance of irrigation water to all occupants of land.	No appearance from “defendant in error” (condemnor)!	7-2. Peckham for the Court that a statute in Utah allowing one resident to condemn land enough for a trench conveying water across another’s land to his own is a “public use” in the sense of the Fourteenth Amendment. “This court has stated that what is a public use may frequently and largely depend upon the facts surrounding the subject . . .” Harlan & Brewer dissent w/o opinion.
Strickley v. Highland Boy Gold Mining Co. (1906)	Yes/1 Stat. 73, 85	No	Strickley owned land between the mine and its depot and the mining co. wanted a right of way to erect an aerial bucket line over the property. Once the company sued in condemnation and placed a deposit with the court (under Utah statute), Strickley then challenges. In the answer, Strickley argues that the use is “private” and not public and therefore contrary to the Fourteenth Amend.	Property would be burdened w/ aerial line, the towers needed to support it, the passage of loaded and empty buckets, and the occasional presence of routine maintenance and repair personnel.	9-0. Holmes for the Court that the case is almost completely decided by Clark v. Nash , but for the facts being slightly different. “[T]here might be exceptional times and places in which the very foundations of public welfare could not be laid without requiring concessions from individual to each other upon due compensation which under other circumstances would be left wholly to voluntary consent. In such unusual cases there is nothing in the Fourteenth Amendment which prevents a State from requiring such concessions.”
Welch v. Swasey (1909)	Yes/1 Stat. 73, 85	No (but an EP claim was made)	One MA statute limited the height of all buildings in Boston to 125’ and that law is left unchallenged. What the challenge is brought against are more specific orders of a	Challengers argue law allows unreasonable burdens to be placed on property owners and that the purposes were “of an aesthetic nature” with burdens	9-0. Peckham for the Court that, in matters just like this, state courts are much better positioned to judge the means/ends efficiency of such laws. “We do not, of course, intend to say that under such

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Case	DP Claim/Jurisdict.	Takings Claim/Won	Law Challenged	Property Interests in Question	Reasoning and Head Count
			Commission charged with limiting buildup—and that that Commission was ordering ceilings as low as 80' (in “residential districts”).	“disproportioned to any public necessity.”	circumstances the judgment of the state court upon the question will be regarded as conclusive, but simply that it is entitled to the very greatest respect, and will only be interfered with, in cases of this kind, where the decision is, in our judgment, plainly wrong.”
<u>Curtin v. Benson</u> (1911)	No/18 Stat. 470 (1875) (28 U.S.C. § 1331)	No	One of the first administrative rules w/ the force of law is promulgated by Interior to govern the use of lands within the proclamation boundary of a NP. Benson, the Army officer in charge of guarding the park, enforces those rules through prohibitive orders to the landowner/plaintiffs.	Inholdings within Yosemite are used by graziers, along w/ some driving of cattle over government lands/roads.	9-0. McKenna for the Court that the sovereign and proprietary power over federal lands, though extensive, have limits when it comes to the implied rights of inholders—who may not be prevented from making reasonable use of their own land—and that, therefore, the Secretary lacked adequate authority (probably because it wasn't expressly granted in the statute) to control federal lands as Benson had.
<u>Eubank v. City of Richmond</u> (1912)	Yes/1 Stat. 73, 85	No (but an EP claim was brought).	City ordinance provided that street committee could set a “building line” (a set-back requirement).	Lot was small and a 14' set-back requirement would substantially diminish its buildable space.	9-0. McKenna for the Court that this neighborhood consent statute, taken to “its extreme possibilities,” would allow “[o]ne person having a two-thirds ownership of a block may have that power against a <i>number</i> having a less collective ownership. If it be said that in the instant case there is no such condition presented, we answer that there is control of the property of plaintiff in error by other owners of property exercised under the ordinance. This, as we have said, is the

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Case	DP Claim/Jurisdict.	Takings Claim/Won	Law Challenged	Property Interests in Question	Reasoning and Head Count
					vice of the ordinance, and makes it, we think, an unreasonable exercise of the police power.”†
<u>United States v. Chandler-Dunbar Water Power Co.</u> (1913)	No/18 Stat. 470 (1875) (28 U.S.C. § 1331)	Appeal from a condemnation proceeding under 35 Stat. 818, 820 (1909)	By condemning riparian land along the St. Marys River, the Secretary of War deprived 3 plaintiffs of their water power, held by their riparian title—but MI law also vests in them title to the bed of the river to the “middle thread.”	Plaintiffs conceded the navigation servitude—but argued that that did not encompass the whole flow of a navigable river. The condemnation awards reflected some damages but categorically excluded the loss associated with the deprivation of flow for water power.	9-0. Lurton for the Court that the “technical title” plaintiffs claimed did not include—could not include—the right to the flow of the St. Mary’s river because Congress may conclusively determine the disposition of a navigable river’s water if its purposes are to aid navigation. “[T]he flow of the stream was in no sense private property, and there is no room for judicial review of the judgment of Congress that the flow of the river is not in excess of any possible need of navigation”
<u>Richards v. Washington Terminal</u> (1914)	No/1 Stat. 73, 85	No (action in tort for operation of a nuisance)	Act of Congress enables construction and engineering of Union Station and the adjacent tunnels cause concentration of trains and train exhaust in train yard and entrances thereto. Wash. Terminal operates a fanning system in the tunnels that directs much of the exhaust of the system to the opening near Richards’ property.	Richards’ property is adjacent to entering tunnel and the house becomes much less habitable from smoke and other , with depreciation from ~\$5,500 to 4,000 (and rental value of \$1,200 per month down to \$600)	8-1(?). Pitney for the Court w/ dissent from Lurton (no opinion). Richards’s property could have been condemned by the Terminal Co. under the statute. The discretionary judgment was not to and “since he is not wholly excluded from the use and enjoyment of his property, there has been no “taking” of the land in the ordinary sense.” Court adopts a rule for the 5th Amend. (that it says is similar to that of state

† The “Street Committee” and/or the “Committee of Public Safety” were empowered by the ordinance to set the line from five to thirty feet back from the street. “It is hard to understand how public comfort or convenience, much less public health, can be promoted by a line which may be so variously disposed.” 226 U.S. at 144.

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Case	DP Claim/Jurisdic.	Takings Claim/Won	Law Challenged	Property Interests in Question	Reasoning and Head Count
					constitutions w/ similar prohibition) that, “while the legislature may legalize what otherwise would be a public nuisance, it may not confer immunity from action for a private nuisance of such a character as to amount in effect to a taking of private property for public use.”
<u>Plymouth Coal v. Pennsylvania</u> (1913)	Yes/1 Stat. 73, 85	No	Anthracite Mine Law in PA regulates the safety of mines and prescribes a minimum pillar precaution in principle—with inspectors who interpreted the standards on scene (with varying results).	Mining was previously carried out w/o regard for subsidence and, thus, as to maximize extractable coal from the property in question.	9-0. Pitney for the Court denying the DP challenge alleging inspector practice was arbitrary and, in its substantial cost to the owner, therefore a denial of DP. “Administrative bodies with authority not essentially different are a recognized governmental institution.”
<u>Hadacheck v. Sebastian</u> (1915)	Habeas action brought against confinement under LA ordinance predicated on DP and EP grounds†	No	Convicted of a misdemeanor offense for operating a brick factory within city limits contrary to prohibitive ordinance.	Defendant purchased property (before the district was w/i city limits) in 1902 for its clay deposits and location and operated a brick mill on it since;	9-0. McKenna for the Court that a use need not be a nuisance-in-fact to be proscribed and that this particular use restriction, even though the business had been perfectly legal when est’d, was not necessarily arbitrary. Counsel for City made the “nuisance exemption” argument (re: the police power’s trump over private property) the showpiece of their case—clearly in error. The opinion expressly reserves the

† In 1914, Congress provided review by certiorari for all federal question cases that had previously been excluded from the Judiciary Acts (specifically: in cases where the state court had decided *in favor of* federal rights by refusing to declare federal law unconstitutional, by invalidating a state statute on supremacy grounds, or by upholding a claimed federal right of any kind).

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Case	DP Claim/Jurisdic.	Takings Claim/Won	Law Challenged	Property Interests in Question	Reasoning and Head Count
					question of an ordinance prohibiting removal of the clay from the ground.
<u>Chicago, Milwaukee & St. Paul RR co. v. Wisconsin</u> (1915)	Yes/1 Stat. 73, 85	No (but an EP claim was brought)	ICC prescribed rates were: for the upper berth, 80% of the rate charged for the lower and, for both, the sum of the two rates. WI statute is enacted prohibiting the lowering of the upper berth unless it was occupied and it was alleged that this was done for the “convenience” of the lower berth’s occupant.	Evidence is put in on the air circulation of sleeping cars, safety, inconvenience of making up a berth in mid-trip, etc.	7-2. Lamar for the Court that the WI statute “gives . . . the free use of that space [in the “upper berth,” above the lower berth on a train sleeping car]” to a passenger in the lower berth and is, therefore, a taking of “property”—and one without real police power justification (not a “nuisance” to lower the bunk (since the berths can be sold—just inconvenient). McKenna & Holmes dissent w/o opinion.
<u>Thomas Cusack Co. v. City of Chicago</u> (1916)	Yes/1 Stat. 73, 85	No (but an EP claim was brought)	Ordinance prohibited the construction of a billboard “on any block . . . in which one-half of the buildings on both sides of the street are used exclusively for residence purposes without first obtaining [written consent] of the owners owning a majority of the frontage on both sides of the street.	Cusack Co. was a billboard firm and at trial challenged the public health necessity of this ban on billboards and its “reasonableness.”	8-1. Clarke for the majority that this consent requirement is for the alleviation of an otherwise-valid prohibition under the police power on what is, at least the evidence at trial suggested, a health and safety menace (distinguishing it from <u>Eubank</u>). McKenna dissented w/o opinion.

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Case	DP Claim/Jurisdiction	Takings Claim/Won	Law Challenged	Property Interests in Question	Reasoning and Head Count
United States v. Cress (1917)	No/36 Stat. 1087, 1093 (§ 24) (repromulgation of Tucker Act)†	Yes/No	US ACE, by erection of dams and levees on Cumberland River, floods 6.6 acres of one plaintiff's land (diminishing it in value by ½ or about \$1000) and deprives another of water power for a mill, diminishing it in value by \$1500.	Kentucky law entitled riparian owners to incidental rights to the flow of the stream in its natural condition—subject to a common law navigational servitude.	8-0. Pitney for the Court that this is not a “case of temporary flooding or of consequential injury—but rather a “taking” is the physical sense— notwithstanding the government’s argument that, in one case, the damage was only a reduction in value of ½ (citing Pumpelly). The interest taken, because the flooding is periodic not permanent, is an easement—which the Gov’nt took under an implied contract when it built the dam and levees. (McReynolds DNP.)
Gray's Harbor Logging Co. v. Coats-Fordney Logging Co. (1917)	Yes/1 Stat. 73, 85	No	Provisions of WA Const. and statutes allowed for the institution of an action in condemnation by logging co. for its own right of way to build a logging RR across plaintiffs’ land because it was a “private way[] of necessity.”	Plaintiffs opposed the condemnation in WA courts, loses, and statute confines grounds of appeal to amount of damages awarded.	9-0. Pitney for the Court that the order granting the condemnation (an order that said nothing about the amount of the compensation due) was “interlocutory” under WA law and that the federal question had yet to arise. Denial of compensation or the award of less than adequate compensation would be the DP violation on plaintiffs’ theory of their federal case—but that that had not yet occurred and that the appeal was therefore lacking a ripe claim.
Buchanan v. Warley (1917)	Yes/1 Stat. 73, 85	No	Louisville ordinance prohibits whites and blacks alike from moving onto any block where the	The residence in question was on a block with 10 houses, all but 2 of which were occupied	9-0. Day for the Court that this is a denial of DP. City justified ordinance as an exercise of police power in pursuit of racial

† In 1916, Congress again amended the Judiciary Act by making all review certiorari review (eliminating the writ of error in federal question from state court cases).

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Case	DP Claim/Jurisdict.	Takings Claim/Won	Law Challenged	Property Interests in Question	Reasoning and Head Count
			majority is of the other race. White plaintiff sues city for specific performance on this purchase/sale agreement on grounds ordinance “deprives” him of his property right (sale/disposition).	by whites. The purchase/sale agreement Buchanan’s buyer executed conditioned his performance on the ability to use the property as his residence.	harmony, but the Court rejects this justification. “Property consists of the free use, enjoyment, and disposal of a person’s acquisitions without control or diminution save by the law of the land.” (quoting Cooley’s Blackstone).
<u>Palmer v. Ohio</u> (1918)	Yes/1 Stat. 73, 85	Yes/No	Plaintiffs sued Ohio for damages for flooding caused by state’s elevation of a floodway on one of its dams.	Land flooded was probably immediately reclaimed—but no abstract of plaintiff’s arguments appear.	9-0. Clarke for the Court dismissing appeal because the Fifth Amendment doesn’t apply to the states, citing <u>Barron</u> , and because no proper consent to suit from Ohio was cited.
<u>Bragg v. Weaver</u> (1919)	Yes/1 Stat. 73, 85	No	VA landowner sought injunction against the taking of earth from his land for the grading/repairing of public road	The objection was that the statute “makes no provision for affording the owner an opportunity to be heard respecting the necessity or expediency of the taking or the compensation to be paid.”	9-0. Van Devanter for the Court that “[w]here the intended use is public, the necessity and expediency of the taking may be determined b such agency and in such mode as the state may designate. They are legislative questions, no matter who may be charged with their decision, and a hearing thereon is not essential to due process in the sense of the Fourteenth Amendment.”†
<u>Erie RR Co. v. Bd. of Public Util. Commrs.</u> (1920)	Yes (and a Contracts Cl. Claim)/1 Stat. 73, 85	No	Bd. orders RR to build 14 underpasses and 1 overpass at an alleged cost of \$2M—on streets that were laid out after the RR had been built.	RR puts in evidence that has funds on hand of no more than \$100,000 and that it cannot comply w/ the order and that the order is therefore unreasonable.	6-3. Holmes for the Court that “[g]rade crossings call for a necessary adjustment of two conflicting interests—that of the public using the streets and that of the railroads and the public using them. Generically

† What was “essential to due process” was “that the mode of determining the compensation be such as to afford the owner an opportunity to be heard.” 251 U.S. at 59. But “[a]mong several admissible modes is that of causing the amount to be assessed by viewers, subject to an appeal to a court carrying with it a right to have the matter determined upon a full trial.” *Id.*

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					<p>the streets represent the more important interest of the two. . . . [T]he State [in caring for whole public's interests] from which, ultimately, the railroads derive their right to occupy the land, has a constitutional right to insist that they shall not be made dangerous to the public, whatever may be the cost to the parties introducing the danger.”[‡] White, CJ, joined by Van Devanter & McReynolds, dissenting w/o opinion.</p>
<p><u>Pennsylvania Coal v. Mahon</u> (1922)</p>	<p>Yes/1 Stat. 73, 85</p>	<p>Yes/No</p>	<p>1921 Kohler Act prohibiting coal mining to be conducted in any way so as to “cause the subsidence of . . . any structure used as a human habitation. . . .”</p>	<p>The 1878 deed conveying the property Mahon owned and for which he brought his suit expressly reserved to the seller (Pa. Coal co.) the right to that portion of the property below the surface for the purpose of mining coal.</p>	<p>7-1. Holmes writes for a majority that the police power justification behind the Kohler Act was insufficient (law prohibiting removals of coal for the benefit of homeowner’s surface estate is said to lack a “public” purpose and/or rational basis). In <i>dicta</i> Holmes says that exercises of the police power (or “nontrespassory devaluations”) can go “too far” and thereby become tantamount to the exercise of eminent domain. Brandeis dissents on the grounds that the Kohler Act was limited to preventing a “noxious” use: mining that might produce</p>

[‡] “If it reasonably can be said that safety requires the change it is for the [States] to say whether they will insist upon it, and neither prospective bankruptcy nor engagement in interstate commerce can take away this fundamental right of the sovereign of the soil.” 254 U.S. at 410-11. “If we could see that the evidence plainly did not warrant a finding that the particular crossings were dangerous there might be room for the argument that the order was so unreasonable as to be void. . . . But . . . [t]he Board must be supposed to have known the locality and to have had an advantage similar to that of a Judge who sees and hears the witnesses.” *Id.* at 412.

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Case	DP Claim/Jurisdiction	Takings Claim/Won	Law Challenged	Property Interests in Question	Reasoning and Head Count
					subsidence of another's (surface estate) land.
<u>Morrisdale Coal Co. v. United States</u> (1922)	No/Tucker Act	Yes/No	The President, exercising war power delegated him by statute, 40 Stat. 276, 286 (1917), orders a coal price that plaintiff observes and subsequently takes a loss on.	Coal dealer who sells in obedience of fixed price was one of those left without a remedy in the statutory scheme.	9-0. Holmes rejecting the takings claim and the claim that the Fuel Administration's order created some kind of "implied contract" for the government to make coal dealers whole w/ compensation for their losses. If this dealer had a remedy, it was to simply not obey the order—"not to sue the lawmaker."
<u>Jackman v. Rosenbaum Co.</u> (1922)	Yes/1 Stat. 73, 85	No	PA Act of 1895 allowed one neighbor building a "party wall" to erect it such that half of the wall would occupy the other neighbor's land.	The wall was 13" thick, w/ 6½" of it on the plaintiff's land. The two buildings at issue in downtown Pittsburgh were surveyed by city authorities. City decided that the plaintiff's existing building wall right on the edge of its lot was unsafe, ordering it removed by the other's contractor (then in the process of building its own wall). This demolition apparently disrupted the first's business.	8-0. Holmes for the Court that, irrespective of any public safety need for the intrusion (the state court had pointed to fire safety), this was a long-standing custom in PA dating back to Penn and his settlers, no deprivation of property occurred. "In a case involving local history as this does, we should be slow to overrule the decision of Courts steeped in the local tradition, even if we saw reasons for doubting it, which in this case we do not."

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Case	DP Claim/Jurisdict.	Takings Claim/Won	Law Challenged	Property Interests in Question	Reasoning and Head Count
Keokuk & Hamilton Bridge Co v. United States (1922)	No/Tucker Act	Yes/No	Corps dynamites the channel to deepen it for navigation purposes, damaging appellant's pivot pier/draw bridge (which could have been repaired, the Court of Claims found, for \$1,000).	Appellants total their bridge/pier and replace it, thinking the US is liable.	Holmes for the Court that the findings below will not be reviewed, that, therefore, the most the US could even possibly be liable for is the \$1,000 in damages to the pier, but that this "incidental damage," even if it were a tort if caused by a private party, is without remedy when caused by the United States engaged in its navigation power responsibilities (citing Bedford v. US, 192 US 217, 224).
Omnia Commercial Co. v. United States (1923)	No/Tucker Act	Yes/No	US Gov't demand to Allegheny Steel Co. for all of its production of steel plate for the year— notwithstanding its contractual obligations to others.	Steel purchaser had contract with mill for below-market price steel to be executed in 1918—the year the US gov't requisitions the mill.	9-0. Sutherland for the Court that the contract was property "within the meaning of the Fifth Amendment" which, if taken, would require JC. But he goes on to state that the "lawful" requisition was not a taking— just an inducement of Allegheny to breach its contract w/ Omnia for which Omnia has no remedy against the gov't.
North Laramie Land Co. v. Hoffman (1925)	Yes/1 Stat. 73, 85	No [‡]	WY "Road Act" allows board of county commissioners to establish roads and situate them over private land without first affording notice or a hearing to the affected landowners based only on a petition from "ten or more electors of the county living within	The Land Co.'s lands are mapped with proposed roads the "viewers" proposed, based on evidence they gathered, and the "notice they are afforded is of a fair accompli—not that they had a right to file exceptions, etc. "Damages" are then	9-0. Stone for the Court that the time limits for filing objections to the appraised value of the land after notice by publication was sufficient for DP and that the proceedings themselves were otherwise consistent w/ DP—easily so. On the objection to the process leading to the location of the road, the Court holds that while

[‡] The claim was made that the Wyoming statute allowed the "taking of property without due process of law in contravention of the Fourteenth Amendment. . . ." 268 U.S. at 278.

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			fifteen miles of the proposed road.”	assessed by three commissioners appointed to hear the landowner’s appeal.	no hearing or notice is required on siting the road, “[w]ith respect to the compensation for the taking . . . due process requires that the owner be given opportunity to be heard, upon reasonable notice of the pending proceedings.”
Old Dominion Land Co. v. United States (1925)	No/25 Stat. 357 (1888) (suit in condemnation by US)	Yes (and a “public use” claim)/No	US Gov’t leases land and then later initiates proceedings to condemn land, excluding from compensation the many improvements “upon the land or in the vicinity thereof made by the United States.”	The bldgs erected during US occupancy form no part of the denominator of what “just compensation” is due.	9-0. Holmes for the Court that this condemnation was for a “public use” (and that the government is entitled to deference barring some affirmative showing on the point, anyway) and that the instruction to the jury to value what was condemned irrespective of the value of the land in its improved state was proper.
Euclid v. Ambler Realty (1926)	Yes/1 Stat. 73, 85	No	Zoning Ordinance classified about 2/3 of parcel as “U2,” a classification that prohibited all but single- and two-family dwelling uses.	Prior established uses of the parcel in question (“commercial uses”) were prohibited once two portions of the parcel were placed in U2 and U3 designations.	6-3. Sutherland finds the zoning ordinance likely to improve everyone’s property values over time and expresses deference to the “expert” planning the city had done to that end; facial challenge (not “as-applied”) to the use zone as a denial of DP rejected by concluding the zoning was a valid exercise of the police

† “Where the equitable remedy of injunction is sought, as it is here, not upon the ground of a present infringement or denial of a specific right, or of a particular injury in process of actual execution, but upon the broad ground that the mere existence and threatened enforcement of the ordinance, by materially and adversely affecting values and curtailing the opportunities of the market, constitute a present and irreparable injury, the court will not scrutinize its provisions, sentence by sentence, to ascertain by a process of piecemeal dissection whether there may be, here and there, provisions of a minor character, or relating to matters of administration, or not shown to contribute to the injury complained of, which, if attacked separately, might not

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					power.†
<u>Tyson v. Banton</u> (1927)	Yes/1 Stat. 73, 85	No	NY law restricts ticket resale (scalping) and cites protection of the public from fraud	The broker/scalpers were threatened with prosecution and loss of their business licenses.	5-4. Sutherland for the Court that <u>Munn</u> 's doctrine allowing price controls in "businesses affected with a public interest" is limited: the right to sell at a price a willing buyer will pay inheres in "property" (of course, it must be the ticket that is "property" (even though Sutherland calls them contracts) given that the law is about <i>resale</i>). Theatres are not these businesses. Holmes & Brandeis dissent, as do Stone and Sandford separately.
<u>Zahn v. Bd. of Public Works, City of Los Angeles</u> (1927)	Yes (and an EP claim)/1 Stat. 73, 85	No	LA zoning ordinance placed plaintiffs' property in a residential zone (where any residence, church, private club or educational institution could be located), and the building permit for a commercial use was denied.	The one commercial use allowed in the "B" zone was the private medical practice, not the plaintiffs desires.	9-0. Sutherland for the Court that "[t]he constitutional validity of the ordinance in its general scope is settled by . . . <u>Euclid</u> . . . and upon the record here we find no warrant for saying the ordinance is unconstitutional as applied to the facts of the present case."
<u>Gorieb v. Fox</u> (1927)	Yes (and an EP claim)/1Stat. 73, 85	No	Roanoke ordinance dividing city into business/residential districts and a 1924 ordinance requiring setbacks of the same as 60% of the houses on the same block—but w/ reserved power to the city	Petitioner was a homeowner w/ several lots in the residential district, applied for a permit which was granted (w/ a 34' setback requirement) and he sued in state court seeking	9-0. Sutherland for the Court that the DP/deprivation claim is decided by <u>Euclid</u> . "It is hard to see any controlling difference between regulations which . . . limit the extent of his use of the space about his lot and a regulation which requires him to set his building a reasonable

withstand the test of constitutionality. In respect of such provisions, of which specific complaint is not made, it cannot be said that the landowner has suffered or is threatened with an injury which entitles him to challenge their constitutionality." 272 U.S. at 395-96.

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Case	DP Claim/Jurisdiction	Takings Claim/Won	Law Challenged	Property Interests in Question	Reasoning and Head Count
			council to make exceptions.	mandamus arguing the “standard” for adjudicating the permits was incoherent or at least vague.	distance back from the street.” EP claim rejected as unripe (“It will be time enough to complain when, if ever, the power shall be thus abused.”)
<u>Nectow v. City of Cambridge</u> (1928)	Yes/1 Stat. 73, 85	No	Cambridge zoning ordinance dividing plaintiff’s land into two zoning designations, one residential, one industrial, with a strong suggestion that the “residential” designation was without a “public” purpose.	The “locus” in question had never, up to and including the time the case went to the Court, been used for anything other than “residential” purposes. The parcel as a whole, though, had frequently been used for some of the purposes specifically prohibited by the Cambridge ordinance in “R3” areas.‡	9-0. Sutherland rejoins his fellow ‘Horsemen’ (McReynolds, Van Devanter & Butler), writing for a unanimous Court. The opinion as written relies exclusively on the fact that the division of Nectow’s parcel into two distinct zoning classifications was (1) exceptional within the scheme of Cambridge’s general practice, and (2) not “indispensable” to the achievement of the objectives Cambridge specified for itself in its ordinance.
<u>Miller v. Schoene</u> (1928)	Yes/1 Stat. 73, 85	No	Order of state entomologist to destroy red cedar trees on property to prevent spread of rusting disease to apple crops of VA.	Red cedar was common to VA, not cultivated commercially and was, on this property, wild and “ornamental”—although it did have cash value as timber.	9-0. Stone for the Court that a public authority forced to choose between the properties of two citizens does not “take” property by choosing the property that has a higher public interest because it is a valid use of the police power.
<u>Wash. ex rel. Seattle Title Trust Co. v. Roberge</u> (1928)	Yes/1 Stat. 73, 85	No	Zoning ordinance, together with a subsequent amendment, flatly prohibited many uses from	Same kind of home, operated since 1914, is being replaced by a new facility, necessitating a	9-0. Butler for the Court that this failed the test in <u>Nectow</u> : it restricts the “character” of use but did not “bear a substantial

‡ Saul Nectow’s property, according to the Special Master employed by the Mass. court, had suffered a significant diminution in value. But the Supreme Court focused on the “locus” in question (not the overall property) and judged the injury to that *portion* of the overall parcel. In answering that question, Sutherland found that it was “of comparatively little value for the limited uses permitted by the ordinance.” Nectow v. City of Cambridge, 277 U.S. 183, 187 (1928). Ultimately, of course, the Court’s holding rests on a finding that the dissection of Nectow’s parcel did not “bear a substantial relation to the public health, safety, morals, or general welfare” as Cambridge had defined those purposes (the holding below to which the Court says it will defer). Id.

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Case	DP Claim/Jurisd. dict.	Takings Claim/Won	Law Challenged	Property Interests in Question	Reasoning and Head Count
			“residence zone,” but conditioned others (including the building of a home for indigent elderly persons) on the gathering of “written consent . . . from the owners of two-thirds of the property within [400’] of the proposed building.”	building permit.	relation to the public health, safety, morals, or general welfare.” “Legislatures may not, under the guise of the police power, impose restrictions that are unnecessary and unreasonable upon the use of private property or the pursuit of useful activities.”
<u>Lynch v. United States</u> (1934)	No/18 Stat. 470 (1875) (28 U.S.C. § 1331)	Yes/Yes	So-called “war risk insurance” policies issued by the US—at a heavy burden upon the public fisc—with liabilities exceeding premium by \$1.6 billion in one FY.	WWI insurance policies negated by the “Economy Act” of 1933 (an attempt to discharge liabilities of the US Gov’nt).	9-0. Brandeis for the Court that contracts for insurance entered into by the US constitute “property” within the meaning of the Takings Clause such that their unilateral cancellation by the US would amount to a taking— <i>unless</i> there was a valid “police power” need or justification for such cancellation.
<u>Louisville Joint Stock Land Bank v. Radford</u> (1935)	No	Yes/Yes	Frazier-Lemke Act of 1934 legislated new rights for mortgagors in default, essentially rescheduling debts and depriving the mortgagees of their rights to foreclose. Law operated on debts already in existence as of 1934.	This bank was a secured creditor to Radford and was, through this bankruptcy law, deprived of the proceeds of a forced sale to which it would have otherwise been entitled.	9-0. Brandeis for the Court that no bankruptcy statute has ever completely extinguished the rights of secured creditors over discrete property as in this case with Radford’s farm. Debt relief upon liquidation of the asset has been one thing; legislative extinguishment of liens is something else. The Court then holds the statute “void; for the Fifth Amend. commands that, however great the nation’s need, private property shall not be thus taken

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Case	DP Claim/Jurisdict.	Takings Claim/Won	Law Challenged	Property Interests in Question	Reasoning and Head Count
					even for a wholly public use without just compensation.””†
<u>United States v. Miller</u> (1942)	No/46 Stat. 1421 (1931)	Challenge to award in condemnation proceeding.	US condemns land needed for Central Pacific RR, which was being moved because of the Central Valley Project flooding. The eminent domain proceedings snag on the appropriate measuring period for the FMV of the lands—before or after the CVP is <i>announced</i> (market would measure the value of the land very differently as between the before and after periods around that announcement)?	Lands in “Boomtown” fluctuated in value—with a most apparent rise after Aug. 26, 1937—the date the US committed to the CVP in 50 Stat. 844 (1937).	9-0. Roberts for the Court that the increment in value added to property resulting from the announced intention to condemn is not a part of “just compensation.” “[T]he Constitution has never been construed as requiring payment of consequential damages; and unless the legislature so provides, as it may, benefits are not assessed against such neighboring tracts for increase in their value.” (Congress <i>had</i> provided that in takings of this kind, “severance damages” where tracts were divided in condemnation were to be offset by benefits to the remainder of the tract. 40 Stat. 911 (1918))
<u>U.S. ex rel. TVA v. Powelson</u> (1943)	No/18 Stat. 470 (1875) (28 U.S.C. § 1331); appeal from 48 Stat. 58, 70 (TVA Act of 1933)	Challenge to award in condemnation proceeding.	Land of local power co. condemned by TVA in proceedings (against its assignee and successor in interest, Powelson).	The cost of the lands at issue, \$277,821, was a fraction of what was spent in developing the land as a hydropower project (allegedly over \$1M), and the lands were but a fraction of that overall project. That valuation is before any consideration is given to how the investment	5-4. Douglas for the majority, construing TVA Act § 25 requiring compensation for “the value of the lands sought to be condemned,” that the “owner of lands sought to be condemned is entitled to their ‘market value fairly determined” (quoting <u>United States v. Miller</u> , a condemnation case unrelated to TVA Act) and that this

† Brandeis elaborates that “[i]f the public interest requires, and permits, the taking of property of individual mortgagees in order to relieve the necessities of individual mortgagors, resort must be had to proceedings in eminent domain; so that, through taxation, the burden of the relief afforded in the public interest may be borne by the public.” 295 U.S. at 602.

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Case	DP Claim/Jurisdict.	Takings Claim/Won	Law Challenged	Property Interests in Question	Reasoning and Head Count
				<p>improved in market value from the special act the NC legislature passed vesting Powelson's predecessor in interest with power of eminent domain.</p>	<p>measurement of the award may take into account the "special adaptability" of the land to very profitable uses like hydro development, but only if there is a "reasonable probability" of the lands in question being so adapted—and in no event must the compensation include an amount for the value enhancement stemming from the condemnation power vested in condemnee by state. Jackson dissents, joined by Stone, Roberts, & Frankfurter.†</p>
<p><u>United States v. General Motors</u> (1945)</p>	<p>No/56 Stat. 176, 177 (War Powers Act allowing condemnation proceedings) and an appeal.</p>	<p>Challenging award in condemnation proceeding (measurement of "just compensation")</p>	<p>GM's lease on a warehouse is condemned and used during the war but returned unharmed following.</p>	<p>Warehouse lease's FMV is contested, but the most controversial issue is whether consequential damages incident to the eviction were part of JC, too.</p>	<p>5-1. Roberts for the majority on what "property" is that can be "taken" through condemnation: more than that which is destroyed—the "value of the interest taken"—but less than full "consequential" damages. Depreciation in fixtures, for example, will be part of the FMV calculation. Douglas concurs separately to emphasize that "[c]onsequential losses or injuries resulting from the</p>

† Jackson's dissent rightly calls the majority on its twisted reasoning in the denominator discussion. According to the majority, "[e]quity and fair dealing do not require the payment by the [US] to the landowner of the amount of a valuation of his lands based on the existence of his privilege to use the power of eminent domain. It is 'private property' which the Fifth Amendment declares shall not be taken for public use without just compensation." 319 U.S. at 280. This, it said, excluded the "consequential damages" that are comprised of all the losses running with the investment—not least because the State's power could have been reclaimed in advance of the condemnation, rendering the relevant parcel much smaller in overall value. "I understand the Court to hold that property physically adaptable to power purposes, taken by the Federal Government for power purposes among others, is to be valued as worthless for power purposes as [a] matter of law because its projected development might be defeated if the State should revoke the power of eminent domain at the time of the taking." *Id.* at 286.

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Case	DP Claim/Jurisdict.	Takings Claim/Won	Law Challenged	Property Interests in Question	Reasoning and Head Count
					taking are not compensable under the Fifth Amendment.” Stone, Frankfurter & Murphy DNP.
United States v. Causby (1946)	No/Tucker Act	Yes/No	US leases NC airport and overflights lead to a “nuisance” at ground level.	Ct. of Cl. held that overflights were so frequent, low, and loud that property value was substantially diminished and chicken farm was no longer feasible.	7-1 Douglas for the Court citing only Fifth Amend. cases but acknowledging that “local law” establishing a fee interest in the surface estate is what necessitated the “easement” that was being taken by implication. Both nuisance and trespass seem to animate the conclusion. Black dissents; Jackson DNP.
United States v. Dickinson (1947)	No/Tucker Act	Yes/Yes	Taking by inundation/trespass from War Dept. dam (not condemnation action)	Most of parcel was eventually reclaimed by diking etc., although intermittent flooding (which Cl.Ct. said req’d an easement in perpetuity).	9-0. Frankfurter for the Court that a temporary taking was compensable and that the subsequent reclamation (“at considerable expense”) didn’t change the fact that a taking had occurred at law.
Berman v. Parker (1954)	Yes/ 28 U.S.C. § 1253 (appeal from 3 judge D.Ct.)	Yes/No	DC Redevelopment Act of 1945 § 2 makes congressional declaration of “blighted areas” in DC and that they are injurious to the public health, safety, welfare and morals—pursuant to its implied “police power” in the District.	Redevelopment Land Agency creates a plan of slum clearance throughout SW DC—including appellants properties. The two properties at issue were a department store and a hardware store, to be demolished for (uncertain) other private development.	9-0. Douglas for the Court that the “police power” is not constrained from using eminent domain as the means to take land and then it deed to private parties where this will serve the public ends most effectively. The D.Ct. had linked the extension of eminent domain and the “public use” language of the Fifth Amend. to the presence of a “slum” and its affirmatively harmful properties, but Douglas clearly rejects any interpretation of “due process” or “public use” that involves courts in

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Case	DP Claim/Jurisdct.	Takings Claim/Won	Law Challenged	Property Interests in Question	Reasoning and Head Count
					scrutinizing the public purposes behind the taking.
<u>United State v. Twin City Power Co.</u> (1955)	No/Tucker Act	Appeal from condemnation award.	The power company owned the fee simple intending to develop the land as a hydropower site and the taking of the site was otherwise of a low-value parcel.	US condemned 70,000 acres in seven proceedings split between two district courts. The controversy is over 4,700 acres of which that were on the part of the Savannah River constituting the most prime dam site—and where the US eventually located its Clark Hill Dam.	5-4 Douglas for the Court that the compensation due here cannot reflect the site's value as a dam site because of the navigational servitude defeating any "property right" to the flow of a navigable water. Burton, joined by Frankfurter, Minton, Harlan, dissenting arguing that the measure of compensation is FMV at the time of condemnation and that that should reflect the riparian character of the parcel.
<u>United States v. Central Eureka Mining Co.</u> (1958)	?/66 Stat. 605 (special jurisdiction for Ct.Cl.)	Yes/No	War Prod. Bd. order prohibiting operation of gold mines during wartime, challenged as "arbitrary and without rational connection with the war effort."	Gold mines shuttered during operation of Order L-208, but otherwise unharmed.	7-2. Burton for the Court that the order was legal and justified and the deprivation was not of "property," strictly speaking. Frankfurter dissents on the grounds Congress's special jurisdiction statute was adopted amid much sympathy for the mine operators and that this should mean <i>some</i> kind of claim w/ some kind of remedy. Harlan dissents that the order was a "temporary confiscation" deserving just compensation.
<u>United States v. Armstrong</u> (1960)	No/Tucker Act	Yes/Yes	Contract to build ships that fails w/ the US taking possession of hulls and other half-finished products, ignoring the	With sovereign immunity, the Gov't can't be sued for the hulls; the "destruction" of the liens and their marketable	5-1-3. Black for the Court that the destruction of the liens was the "effective" taking of property Stewart concurs w/o opinion.† Harlan, Frankfurter &

† Armstrong is most famous for its dictum announcing the "purpose" of the Takings Clause as serving to "bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole." 364 U.S. at 49.

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Case	DP Claim/Jurisdict.	Takings Claim/Won	Law Challenged	Property Interests in Question	Reasoning and Head Count
			mechanics' liens the shipyard's suppliers held under ME law.	value were the property "taken."	Clark dissent on the grounds that the destruction of the liens isn't the "taking" of property, isn't the use of eminent domain and isn't a misuse of its sovereign immunity.
United States v. Virginia Electric & Power Co. (1961)	No/Tucker Act	Challenge to condemnation award.	US Gov't condemns a "flowage easement" (the right to periodically flood) over 1840 acres of "fast land" along a tributary of the Roanoke River—where the hydro project will be. The owner of the underlying fee agreed to donate this easement to the Gov't for \$1, but when the proceedings began, another easement holder joins the action. This respondent had acquired its flowage easement by succession from a purchaser (whose title dated to 1907 in some places) with the intent to use it for its own private hydro-development.	With a long procedural history in the 4th Circuit (intertwined with Twin City Power), the flowage easement owner challenges the compensation award and focuses on its value as an instrument of (private) water power development along the river.	5-1-3. Stewart for the Court that, in valuing this flowage easement, the expression for the value of this easement is "the difference in the value of the land with and without the flowage easement"—but that the "actual <i>measure</i> " of that value will be the value of the easement to its owner—not including any <i>strategic</i> value as against some other hydropower developer and not from any "water power" gains to be made (which are cancelled by the navigation servitude). D. Ct. had held that no compensable value could attach to the easement from its potential role in developing hydropower because that would result from the flow of the stream—something no riparian has property in given the navigational servitude. Douglas concurs separately to boil it down to "property of very little value"; Whittaker, Warren, and Black dissent to argue that this easement was, in effect, extinguished by the Gov't acquisition.

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Case	DP Claim/Jurisdict.	Takings Claim/Won	Law Challenged	Property Interests in Question	Reasoning and Head Count
<u>Goldblatt v. Hempstead</u> (1962)	Yes/28 U.S.C. §§ 1257, 2104 [†]	No	Ordinance prohibiting mining below the water table; action brought by town to enjoin further mining as not in compliance w/ ordinance.	38 acre parcel used since 1927 as sand/gravel mine; mining had left a 20 acre lake with an avg. depth of 25 feet that was adjacent to homes and schools.	7-0. Clark for the Court that no evidence was in the record to say how much the value of the parcel had been diminished by the ordinance; ordinance was “reasonable” and in pursuit of a valid public purpose—quoting <u>Lawton v. Steele</u> for the test of a valid exercise of the police power. (Frankfurter & White DNP.)
<u>United States v. W.G. Reynolds</u> (1970)	No/Tucker Act	Appeal from condemnation award	W.D.Ky. hears condemnation complaint by US in reservoir project taking. Of the 250 acres condemned, Reynolds argues that 78 acres were not within the “original scope of the project” and, thus, that the appreciation in value of those lands is due in the “just compensation” award.	Jury awards \$20,000 on instruction from court that the 78 acres were “outside the scope of the original project,” and Court grants cert. on whether this is a question for the bench or the jury.	7-2. Stewart acknowledges that the Court early on held that the “market value” of condemned property can be affected by the imminence of the very public project that makes the condemnation necessary, but that “just compensation” ought not be so affected. [†] Jury need not decide the issue of which property was so affected and which was not. Black & Douglas dissent that the factual questions surrounding the scope of the project planning should’ve sent the question to the jury under the <u>Miller</u> test.

[†] With the 1948 revisions to the Judicial Code, the Judiciary Act of 1789, and in particular § 25, 1 Stat. 73, 85, was reorganized into several different sections of Title 28.

[†] Of course, the development of a public project may also enhance the market value of *neighboring* land that is not covered by the project itself. If that land is eventually condemned, the “general rule of just compensation requires that such enhancement in value” be “wholly” compensated. Nevertheless, since the Seventh Amend. provides no jury trial right in condemnation proceedings, FRCP 71A serves as the only source of law on whether such questions belonged to the jury—and the rule gives sweeping authority to the trial judge (who applied the “scope of the project” test himself in the property at issue in Reynolds).

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Case	DP Claim/Jurisdct.	Takings Claim/Won	Law Challenged	Property Interests in Question	Reasoning and Head Count
<u>Belle Terre v. Boraas</u> (1974)	Yes (and an EP claim)/28 U.S.C. §§ 1257, 2104	No	Local ordinance prohibiting all land uses except single-family dwellings, w/ a definition of “family” that included “one or more persons related by blood, adoption, or marriage, living and cooking together as a single housekeeping unit. . . .”	Boraas, the one time lessee of a boardinghouse in town, is ejected from municipality (as a student at nearby SUNY Stony Brook, he lived in boarding houses) in practical effect.	7-2. Douglas for the majority that the ordinance did not burden any “fundamental” right guaranteed by the Constitution and that it was permissible because it was “economic and social legislation where legislatures have historically drawn lines which we respect against the charge of the [EP] Clause if the law be reasonable, not arbitrary . . . and bears ‘a rational relationship to a [permissible] state objective.’” (citing <u>Reed v. Reed</u> , 404 U.S. 71). Brennan dissents that the case was moot and Marshall dissents separately to question the tailoring of the ordinance.
<u>City of Eastlake v. Forest City Ent.</u> (1976)	Yes/28 U.S.C. §§ 1257, 2104	No	City charter provision requiring all proposed changes in land use be ratified by 55% of local voters.	Developer challenges the charter provision (which was adopted while its application was pending before the City) in the context of a particular rezoning application to the City Planning Comm’n & City Council. Files a declaratory judgment action in Ohio state court, appeals to Ohio Supreme Court.	6-3. CJ Burger for the majority that, contrary to Ohio Supreme Court’s reading of <u>Roberge</u> , <u>Eubank</u> , & <u>Thomas Cusack</u> , there is no denial of DP inherent in an initiative or referendum that focuses on a narrow issue pertaining directly to one landowner. “[T]he standardless delegation of power to a limited group of property owners condemned by the Court in <u>Eubank</u> and <u>Roberge</u> is not to be equated with decision-making by the

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Case	DP Claim/Jurisdic.	Takings Claim/Won	Law Challenged	Property Interests in Question	Reasoning and Head Count
					<p>people through the referendum process.”‡ Powell dissents on grounds that this rezoning application was “adjudicative,” not legislative, in nature and thus should be beyond the power of the referendum. Stevens and Brennan dissent that “[t]he fact that an . . . owner . . . may not have a legal right to the relief he seeks [a rezoning] does not mean that he has no right to fair procedure in the consideration of the merits of his application.”</p>
<p><u>Moore v. City of East Cleveland</u> (1977)</p>	<p>Yes/42 U.S.C. § 1983</p>	<p>No</p>	<p>Zoning ordinance prohibiting non-traditional family from inhabiting dwelling without regulating overall occupancy.</p>	<p>Moore’s the lessee; no evidence put in on the East Cleveland landowner’s claims per se.</p>	<p>4-1-1-3. Powell, Brennan, Marshall & Blackmun find the ordinance deprives Moore of “liberty” protected under the DP Clause; in distinguishing Belle Terre, the plurality focuses on the familial relationship of Moore to her grandsons as a matter of “liberty.” Stevens concurs on grounds the ordinance impermissibly burdened Moore’s use of her property (in the form of the lease); Burger, Stewart, Rehnquist dissenting that neither is impermissibly burdened.</p>
<p><u>Penn Central Transp. Co. v. New York City</u> (1978)</p>	<p>Yes/28 U.S.C. §§ 1257, 2104</p>	<p>Yes/No</p>	<p>1965 NYS Landmark Preservation Law. Law made no pretense of</p>	<p>Train station; traditional (and profitable) use left intact and TDR’s vested</p>	<p>6-3. Brennan upholds the City’s diminution of Penn Central’s property value w/ the</p>

‡ “As a basic instrument of democratic government, the referendum process does not, in itself, violate the Due Process Clause of the Fourteenth Amendment when applied to a rezoning ordinance.” 426 U.S. at 679.

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Case	DP Claim/Jurisd. dict.	Takings Claim/Won	Law Challenged	Property Interests in Question	Reasoning and Head Count
			prohibiting any sort of “harmful” or “noxious” use; PCTC made no use of the administrative appeals/judicial review of the landmarking designation under the NY statute.	in PCTC as a way of mitigating the economic impact on PCTC.	factor-based analysis (although Brennan also states that “it is implicit in <u>Goldblatt</u> that a use restriction . . . may constitute a “taking” if not reasonably necessary to the effectuation of a substantial public purpose . . .”). In dissent, Rehnquist cites <u>Mugler</u> for the proposition that NYC’s extraordinary “adjustments” of property rights may only be done where the use being prohibited is “noxious” or “harmful” in some way.
<u>Andrus v. Allard</u> (1979)	Yes (but dropped at S.Ct.)/28 U.S.C. § 2282 (direct appeal from three judge D.Ct.)	Yes/No	Eagle Protection Act prohibited commerce in eagle parts and dealers were thus left w/ economically worthless artifacts.	Collection and sale of eagle feathers, etc.	8-1. Brennan for the Court (without detailed application of <u>Penn Central</u>) that elimination of the right of alienability of (personal?) property is not dispositive under <u>Penn Central</u> and that “loss of future profits—unaccompanied by any physical property restriction—provides a slender reed upon which to rest a takings claim.” “Regulations that bar trade in certain goods have been upheld against claims of unconstitutional taking.” Rehnquist concurred in the judgment w/o opinion.
<u>Kaiser Aetna v. United States</u> (1979)	No/28 U.S.C. §§ 1257, 2103	Yes/Yes	RHA § 10 & CWA § 404 permit requirement that led, by process of connecting an ancient Hawaiian “pond” to the sea, to the supposed extension of the navigation servitude and the owners’	Pond was made “navigable waters” by improvement and the USACE’s assertion of servitude jurisdiction therein was going to be the deprivation of the owners’ right to exclude	6-3. Rehnquist for the Court that this was tantamount to the forced imposition of an easement. Blackmun, Brennan & Marshall, dissenting for (among others) the proposition that, with another test of navigability, the “ebb and flow”

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Case	DP Claim/Jurisdict.	Takings Claim/Won	Law Challenged	Property Interests in Question	Reasoning and Head Count
			duty to allow non-member access to marina therein.	third parties.	test, this would be land that, at common law, was subject to the navigational servitude and, thus, the Corps's permit conditions would remove nothing from the numerator.
<u>Pruneyard Shopping Ctr. v. Robbins</u> (1980)	Yes/28 U.S.C. § 1257	Yes/No	CA Const. requires owner of shopping ctr. to leave premises open to speakers because the shopping ctr. was a quasi-public forum—even though privately owned.	Shopping center was private property with the right of exclusion; following CA S.Ct. interpretation of CA Const., it is now a free speech activity zone.	6(3)-3. Rehnquist for a majority that the forced 3d party “physical invasion” is not determinative. “It is, of course, well established that a State in the exercise of its police power may adopt reasonable restrictions on private property so long as the restrictions do not amount to a taking without just compensation or contravene any other federal constitutional provision.” Powell and White concur separately to emphasize the facts about Pruneyard as a quasi-public forum; Marshall concurs separately to emphasize that “[a]ppellants’ claim in this case amounts to no less than a suggestion that the common law of trespass is not subject to revision by the State. . . .” Blackmun concurs in all of Rehnquist’s opinion except one sentence on US law defining “property.”
<u>United States v. Clarke</u> (1980)	No/25 U.S.C. § 357; 28 U.S.C. § 1252 (statute allowing state to take Indian lands by	Yes/No	A 1901 statute allowed state or territorial gov’nt to “condemn” Indian lands and thereafter pay JC.	No AK municipality ever instituted condemnation proceedings; the 9th Cir., responding to the claim that an inverse condemnation action	7-2. Rehnquist for the majority that because the subject municipality lacked the power of eminent domain the subject Indian lands never had a perfected takings injury and

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Case	DP Claim/Jurisdiction	Takings Claim/Won	Law Challenged	Property Interests in Question	Reasoning and Head Count
	condemnation)			should lie against a gov't with eminent domain power, held that the state law restrictions on subject Indian lands were tantamount to the "taking" of the land and thus actionable (by inverse condemnation) under 25 U.S.C. § 357.	thus were not entitled to a remedy under 25 U.S.C. § 357. Blackmun & White dissent on grounds that the "inverse condemnation" in AK law was a functional response to what had been, in effect, a taking w/o condemnation proceedings. This sparring over "condemnation" v. "inverse condemnation" proceedings and the underlying powers reappears in <u>Agins</u> , 447 U.S. at 257 n.2, for the proposition that "inverse condemnation" causes of action are a functional response to regulatory takings.
<u>Agins v. City of Tiburon</u> (1980)	Unclear/28 U.S.C. §§ 1257, 2104	Yes/No	A density restriction ordinance reducing down to some number of house lots (1-5) on Agins' 5 acres of "unimproved land," changing the zoning from what had previously been unrestricted use. City had <i>originally</i> begun condemnation action, but abandoned it before any outcome was adjudicated.	Unclear. Probably no past development, but the <i>inverse</i> condemnation (and declaratory judgment) action is brought before any permit proceeding was even initiated.	9-0. Powell for the Court that no taking had yet even possibly occurred because (1) ordinance "substantially advances a legitimate state interest" and (2) "appellants are free to pursue their reasonable investment backed expectations by submitting a development plan to local officials."
<u>Webb's Fabulous Pharms. v. Beckwith</u> (1980)	No/28 U.S.C. §§ 1257, 2104	Yes/Yes	Fla. Statute required interpleader fund fee by set rate (\$9,228) charged for administration of bankruptcy—along with the interest on the principal kept back upon return of the principal based on questionable interpretation	Webb's, in bankruptcy, surrenders its assets to the clerk of courts and is told that the interest that accrued to that principal during the proceeding was "public money" (from the date of deposit until it leaves the	9-0. Blackmun for the Court calling this exaction a "forced contribution to general governmental revenues . . . not reasonably related to the costs of using the courts," holds that under the common law rule, interest follows the principal.

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Case	DP Claim/Jurisdiction	Takings Claim/Won	Law Challenged	Property Interests in Question	Reasoning and Head Count
			of state statute.	account).	
<u>Hodel v. Virginia Surface Mining & Reclam. Ass.</u> (1981)	Procedural DP Claim/ 28 U.S.C. § 2282 (direct appeal from three judge D.Ct.)	Yes/No	Facial challenge to SMCRA as a set of standards on the mining of coal and the rehabilitative work necessary following the mining of coal.	Coal mines purchased with the express expectation that extraction and waste deposition methods allowed in the past would be permissible in the future, too.	9-0. Marshall for the Court that the claim was “not ripe” because the “mere enactment” of SMCRA did not cause a taking requiring just compensation and that “[t]he test to be applied in considering [a] facial challenge is fairly straightforward. A statute regulating the uses that can be made of property effects a taking if it “denies an owner economically viable use of his land.” (citing <u>Agin</u> and <u>Penn Central</u> .)
<u>San Diego Gas & Elec. v. San Diego</u> (1981)	No/28 U.S.C. §§ 1257, 2104	Yes/No	1973 rezoning from industrial to agricultural, together with an “open space” plan, which had the sum effect of increasing minimum lot size from 1 to 10 acres and, on the rest of the parcel, prohibiting development inconsistent w/ the open space controls.	Property was held by SG&E under plans to develop a nuclear generating station and the bond issue which the city proposed in order to acquire some of the parcel consistent w/ its “open space plan” failed, leaving the open space designation in place but w/o the condemnation	4-1-4. Blackmun for a plurality dismissing for lack of jurisdiction (on ripeness grounds); Rehnquist concurring but acknowledging that he agreed in substance w/ the dissent (Brennan, Stewart, Marshall, Powell) which argued that the CA court was wrong in holding that exercises of the police power cannot, as a matter of federal const. law, ever constitute a “taking” just by being arbitrary.
<u>Texaco v. Short</u> (1982)	Yes (and a Contracts Clause claim & an EP Clause claim against one of the Act's exceptions)/28	Yes/No	Indiana Mineral Lapse Act “extinguished” interests in subsurface estates lying dormant/unused for 20 years and reverted the interest to the “then owner of the interest out of which	No pre-extinguishment notice coupled with a fairly novel use of escheat powers ensure many mineral interests will lapse—precisely the state's purpose.	5-4. Stevens for the majority that states have long been allowed to make provision for escheats and other property it deems “abandoned” and, because a lapsed mineral estate is deemed “abandoned,”

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	U.S.C. §§ 1257, 2104		it was carved.”		IN is not taking “property” at the time of the reversion. Interestingly, while “self-executing” MLA itself cannot be at issue in any DP-required “hearing,” <u>Mullane v. Central Hanover Bank & Trust</u> requires that, even where a general law disposes of the issue, “notice and opportunity for hearing appropriate to the nature of the case” be provided. Brennan, White, Marshall & Powell dissenting that the retrospective counting of lapse time violates the “Due Process Clause of the Fourteenth Amendment” (citing <u>Usery v. Turner-Elkhorn</u>)
<u>Loretto v. CATV</u> (1982)	No/28 U.S.C. §§ 1257, 2104	Yes/Yes	NY statute mandating landlords allow cablebox installations on roof if tenants desire cable service	Apt. building with tenants; 4”x4”x4” permanent physical occupation required by state statute.	6-3. Marshall for the majority that this was tantamount to a condemnation of that space (just like with a mill act), however small, and that it is therefore a taking under <u>Penn Central</u> ’s “character of the governmental action” factor. Blackmun for Brennan & White dissenting on the “curiously anachronistic” focus on the “physical” aspects of this invasion.
<u>Hawaii Housing Auth. v. Midkiff</u> (1984)	No/28 U.S.C. §§ 1257, 2104	Yes/No	Hawaii Land Reform Act of 1967 takes land from concentrated group of owners by condemnation proceedings that may be initiated by renters, adjudicates the claim	The involuntary land sales the Act allows may or may not have comported with “substantive due process” standards (although the opinion	8-0. O’Connor for the Court that the Act is easily within the precedents on public use and that “[t]he “public use” requirement is thus coterminous with the scope of a sovereign’s police powers”

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			under the statute's standards.	cites <u>Berman</u> on the scope of "Public Use" requirement).	after quoting at length from <u>Berman v. Parker</u> . Opinion clearly references means/ends testing. (Marshall DNP.)
<u>Ruckelshaus v. Monsanto</u> (1984)	No/28 U.S.C. §§ 1252	Yes/Yes for one specific window in which data should've been secret under the law.	Beginning in 1972, FIFRA requires pesticide developer to submit proprietary data and is silent on the care and keeping of that data. While "trade secrets" as defined by MO law were present in Monsanto's submittals then, wide consideration and dissemination of the data was legal.	1978 amendments to FIFRA allowed data that had been required and was accumulating since 1972 to be publicly available upon request. "The economic value of [the trade secrets] property right lies in the competitive advantage over others that Monsanto enjoys by virtue of its exclusive access to that data"	7-1. Blackmun for the Court that trade secrets, though intangible, can be property under the Takings Clause, can be "taken" for a "public use" when disclosed to third parties, and that a "reasonable investment-backed expectation" under <u>Penn Central</u> may have formed around the data collected by EPA—but only from 1972-78 because of how FIFRA was structured. Given the pervasiveness of regulation of pesticides and the fact that disclosure was noticed to the public by FIFRA itself, expectations after 1978 should have been that disclosure was possible. O'Connor dissents that pre-1972 data should be protected, too and that "reasonable investment-backed expectations" should not be so easily dashed by regulation. (White DNP.)
<u>PBGC v. RA Gray Co.</u> (1984)	Yes/28 U.S.C. §§ 1257, 2104	No (although Ex Post Facto, Equal Protection, and procedural Due Process are pled)	ERISA and Multiemployer Pension Plan Amendments Act of (MPPAA) 1980 level retroactive liability for withdrawing employers (requiring them to pay whatever share of the plan's unfunded liabilities	A substantial debt, hard if not impossible to cancel, is put onto Gray's books by MPPAA.	9-0. Brennan for the Court denying the facial challenge to the imposition of retroactive liability for purposes of MPPAA solvency because Congress was "eminently rational" in finding the means/ends connection in this provision.

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			was attributable to that employer's participation) even where, as here, employer withdrew prior to law's enactment.		The arbitrary/irrational standard articulated elsewhere applies with equal force here—and the Contracts Clause does not apply to Congress.
<u>Kirby Forest Industries v. United States</u> (1984)	No/40 U.S.C. § 257 (complaint in condemnation by US)	Appeal of JC award.	Along w/ FRCP 71A, US may proceed in eminent domain, w/ proper underlying statutory authorization, through one of two procedures or by simply occupying the land and awaiting the "inverse condemnation" action.	Forest landowner has substantial lands in eastern TX and the Park Service condemns it (in anticipation of creating the "Big Thicket National Preserve")	9-0. Marshall for the Court on how to establish the date of a taking and, in Part II, on what constitutes "just compensation" under the Fifth Amendment—FMV on the date of the taking or on the date of the evaluation? Where the award would be diminished under the latter, it must be on the date of the taking—even if that means tricky evidentiary issues at trial.
<u>United States v. Locke</u> (1985)	Yes/28 U.S.C. § 1252	Yes/No	FLPMA creates a recording burden for unpatented mining claims (to address the >6million unpatented mining claims on public lands), the penalty for missing a filing deadline is forfeiture of the claim—conclusively established.	Claimants had filed late on negligent advice from BLM on how to interpret FLPMA's deadline and their claim was automatically forfeited	6-1-2. Marshall for the Court that regulation of property rights does not "take" property when "an individual's reasonable investment-backed expectations can continue to be realized as long as he complies with reasonable regulatory restrictions the legislature has imposed." O'Connor concurs separately to note that estoppel ought to lie in this case given the egregious facts of the case. Stevens & Brennan dissent on the interpretation of FLPMA's deadline language.
<u>Williamson County v. Hamilton Bank</u> (1985)	Yes (not in cert. petition)/ 42 U.S.C. § 1983	Yes/Not Ripe	Zoning ordinance changing the density restrictions to reduce the number of buildable lots, amended as	Subdivision of house lots and required dedication of open space easements under	5-2-1. In rejecting the argument that a temporary appropriation of property could be a denial of DP, Blackmun

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			such in 1978, reduced the subdividability of property as compared to the 1973 ordinance was original plan was developed.	ordinance; transfer of property to lender through default; parcel taken in bankruptcy was portion of original subdivision yet to be developed and an intervening condemnation had reduced the acreage in question.	refuses to decide whether a regulation that “goes too far” is <i>either</i> a denial of DP or a “taking” and instead holds that the present facts presented neither—decision is premature because owner did not exhaust remedies available from the state. Brennan & Marshall concur, but write separately to protect analysis in San Diego Gas & Elec. Stevens writes separately.
United States v. Riverside Bayview Homes (1985)	No/28 U.S.C. §§ 1253, 2104	Yes/No	CWA § 404 permit requirement regarding the filling of jurisdictional wetlands.	Developer begins filling its parcel, 80 acres of marshy land near the shores of Lake St. Clair, and the Corps goes to court to enjoin it as a permitted activity.	9-0. White for the Court that “our general approach was summed up in Agins . . . where we stated that the application of land-use regulations to a particular piece of property is a taking only “if the ordinance does no substantially advance legitimate state interests . . . or denies an owner economically viable use of his land.” As to timing, White says that “only when a permit is denied and the effect of the denial is to prevent “economically viable” use of the land in question can it be said that a taking has occurred.”
Connolly v. PBGC (1986)	No/28 U.S.C. §§ 1253, 2104	Yes/No	ERISA and MPPAA level retroactive liability for withdrawing employers (requiring them to pay whatever share of the plan’s unfunded liabilities was attributable to that employer’s participation.	Debt in place of a contract holding harmless.	9-0. White for the Court that this facial claim under Takings Clause is fails not necessarily because the contracts (and “contractual rights”) destroyed by the statute are not “property” in every case—as the facial challenge seemingly

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					requires.‡ It fails on the three factor <u>Penn Central</u> test. O'Connor & Powell concur separately to make clear the "Court does not decide today, and has left open in previous cases, whether the imposition of withdrawal liability . . . may in some circumstances be so arbitrary and irrational as to violate the Due Process Clause of the Fifth Amend."
<u>MacDonald, Sommer et al. v. Yolo County</u> (1986)	No/28 U.S.C. §§ 1257, 2104/ State inverse condemnation action for damages; because CA law doesn't provide monetary relief for a regulatory taking, case was dismissed in CA Superior Ct.	CA S.Ct. affirms, perfecting the claim that the denials of permission to subdivide were a regulatory taking of property.	Density restrictions on the subdivision and development of a parcel applied to proposal and cited as reason for denial	The possibility was left open that some development proposal would be approved within the residential zone in which petitioner's land was found—a "less intensive use" application, thus, might be approved	5-4. Applying the <u>Williamson County</u> standard, the case is dismissed for lack of 'arising under' jurisdiction because CA has not yet gone "too far" and thus, logically, could not have denied JC; White, for the Chief, Powell & Rehnquist that CA law prohibiting monetary relief and the complaint's allegations that further process below would be futile should state a valid claim that arises under the Fourteenth Amend.
<u>FCC v. Florida Power Corp.</u> (1987)	Yes/28 U.S.C. § 1254 (appeal from agency order)	Yes/No	The Pole Attachments Act, 92 Stat. 35, gave authority to FCC to regulate rates charged by utilities for space on their poles sought be cable providers. "Over the past 30 years, utilit[ies] throughout the country have entered into arrangements for the	FCC issues order to Florida Power in response to claims it was abusing its monopoly position and overcharging in a state where the rate is not regulated by the state (FL).	7-2. Marshall for the Court distinguishing <u>Loretto</u> as not being about imposed physical occupation while paying no attention to any "reasonableness" test, and holding that there was no Fifth Amendment issue. Powell & O'Connor concur separately to emphasize that, as the Court

‡ "Given the propriety of the government power to regulate, it cannot be said that the Taking Clause is violated whenever legislation requires one person to use his or her assets for the benefit of another." 475 U.S. at 223.

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			leasing of space on poles to operators of cable television systems.”		held in <u>Permian Basin Area Rate Cases</u> , 390 U.S. 747 (1968), the Fifth Amend. has traditionally been interpreted to control how far government rate regulation can go.
<u>Nollan v. Cal. CCC</u> (1987)	No/28 U.S.C. §§ 1257, 2104	Yes/Yes	Exaction in exchange for permit to rebuild house was for a permanent public right of way (easement) over property—what the majority calls a “permanent physical occupation”	Bungalow on beach parcel snug between two public beaches and adjacent to a public road; permit to rebuild large residence	5-4. Scalia for a majority that exactions must serve the same purpose as the underlying prohibition requiring a permit. The germaneness test links means/ends scrutiny back into the takings analysis: “We have long recognized that land use regulation does not effect a taking if it “substantially advance[s] legitimate state interests” and does not “den[y] an owner economically viable use of his land.” (citing <u>Agins & Penn Central</u>).
<u>First English v. County of LA</u> (1987)	No/28 U.S.C. §§ 1257, 2104	Yes/Remand	County ordinance temporarily banning construction in flood plain after catastrophic flood	Church filed inverse condemnation suit a month after the ordinance was enacted	6-3. Rehnquist for Brennan, White, Marshall, Powell, Scalia that temporary takings are possible even if the restriction is eventually invalidated (injunction for landowner against ordinance isn’t a sufficient remedy); Stevens for Blackmun & O’Connor argue that no taking occurred because the church never tested the ban, the ban was for valid public health reasons (preventing “noxious” uses), and, in any event, church didn’t properly plead the federal claim.

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<u>Keystone Bituminous v. DeBenedictis</u> (1987)	No (but a Contracts Cl. Claim was brought and denied)/ 42 U.S.C. § 1983.	Yes/No	PA Subsidence Act prohibiting mining in any way that causes certain kinds of subsidence anywhere in the state.	Petitioners were out 27 million tons of coal if the Act was enforced as written.	5-4. Stevens for Brennan, White, Marshall, & Blackmun denying coal companies' claim and distinguishing <u>Mahon</u> by articulating the valid public purpose of the Subsidence Act (which the Kohler Act supposedly lacked)—protection of health & safety—and showing that this act didn't much interfere w/ investment-backed expectations. Rehnquist for Powell, O'Connor & Scalia that the law a mere transfer of a real property interest under PA law and that it did take the PA law-recognized "support estate" of petitioners w/o compensation.
<u>Hodel v. Irving</u> (1987)	No/28 U.S.C. §§ 1257, 2104	Yes/Yes	Indian Land Consolidation Act of 1983 ("ILCA") § 207 prohibited descent of extremely fractionated interests in Indian lands by intestacy or devise and instead made all such interests escheat to the tribe.	N/A	6-1-2. Under the second <u>Penn Central</u> factor, the "character" of § 207 amounts to a total taking of the (admittedly, highly-fractionated) interests in Indian Lands which ILCA was meant to concentrate. O'Connor's opinion provokes three separate concurrences, each of which interprets the outcome differently.†
<u>United States v. Sperry Corp.</u> (1989)	Yes/Tucker Act	Yes/No	Algiers Accords, creating the Iran-U.S. Claims Tribunal, attaches all	Sperry faced a 2% charge on a \$2.8 million settlement it reached	9-0. White for the Court on the takings claim that the Court has "never held that the

† The concurrence from Brennan, Marshall & Blackmun required that nothing in the principal opinion implied Andrus v. Allard, 444 U.S. 51 (1979), was overruled or even that the case had been confined to its facts. The concurrence from Scalia, Rehnquist & White required that Andrus's denial of any denominator problem was confined to its facts by O'Connor's holding that § 207 "goes too far." Stevens & White viewed § 207's proviso avoiding escheat of the interests (the augmentation of the subject interest to more than the 2% cutoff) as only levying a statutory duty on owners who wanted to retain and devise ownership, but that it was "unreasonable" and therefore a denial of due process under the Fifth Amendment. 481 U.S. at 731 & n.14.

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			assets and claims and transfers jurisdiction to the Hague tribunal and charges substantial user fees in connection with any settlements reached.	with Iran, automatically deducted by US Govn't prior to payment.	amount of a user fee must be precisely calibrated to the use that a party makes of Government services. . . All that we have required is that the user fee be a "fair approximation of the cost of benefits supplied." The DP claim is rejected on rational basis grounds and the Court also finds that retroactive legislation was inevitable here.
<u>Preseault v. United States</u> (1990)	No/Tucker Act	Yes/Remanded	The Rails to Trails Act amended the terms under which abandonment of a rail right of way would revert to adjacent owners, giving ICC the power to cede the right of way to various parties for the maintenance of recreational trails	Property adjacent to an abandoned RR right of way (where all equipment had been removed, etc.) would've succeeded to the reversionary interest in the right of way under VT law, but an ICC order suspended the succession.	9-0. Brennan for the Court that the Tucker Act supplies jurisdiction over claims alleged to arise from statutes like this—making the challenge premature. O'Connor, with Scalia & Kennedy, JJ., concurring to say that state law defines these reversionary interests and when they mature, even though ICC jurisdiction over their disposition preempts state procedures.
<u>Lucas v. South Carolina CC</u> (1992)	No/28 U.S.C. §§ 1257, 2104	Yes/Yes	SC Beachfront Mngmt Act prohibiting construction of any "permanent habitable structure" seaward of est'd baselines.	Prior to 1988 zoned for residential (Lucas's plans at purchase in 1986), but intermittently under water/nonbuildable throughout 20th cent.	6-1-1-1. Scalia for the Court holding that denial of all "economically beneficial" uses effects a taking no matter what the other <u>Penn Central</u> factors say. Kennedy concurs but holds that a modern "noxious use exception" to this rule must be broader than the common law version.
<u>Yee v. City of Escondido</u> (1992)	Yes/28 U.S.C. §§ 1257, 2104	Yes/No	CA Mobilehome Residency Law severely restricting the land owner's power of	Law does not, according amount to a physical taking (see <u>FCC v.</u>	7-1-1. O'Connor for Court that no physical taking occurred and DP and regulatory taking claims

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			eviction	<u>Florida Power</u>); only controls rent and reasons for eviction.	were not properly before the Court; Part III.B specifically holds that “substantially advances” test is a facial takings challenge and is ripe even w/o a denial of compensation. Blackmun writes separately to state that the ripeness holding in Part III.B ought to be dicta, given the cert. petition as filed and Souter writes to concur in judgment but not what opinion says about regulatory takings.
<u>Concrete Pipe & Prods. v. Construction Laborers Pension Trust</u> (1993)	Yes/28 U.S.C. §§ 1253, 2104	Cert. granted on DP claims against presumptions in arbitration/appeal and Takings claim	ERISA and MPPAA challenged again, this time applied to a employer that “withdraws” from the plan consequent to a failure in collective bargaining, with withdrawal liability assessed at \$288,168, an amount that reduced in arbitration to \$190,465.	Major focus of Concrete Pipe’s challenge was on the bizarre procedural track created in arbitration structure wherein the decisionmaker was not neutral because (1) Gray & Connolly were decisive on takings and SDP, and (2) Concrete Pipe’s withdrawal came after the liability rule was in force.	7-2. Souter for the Court that the hardest problems are procedural; that <u>Connolly & Gray</u> dispose of the SDP and takings claims almost conclusively; and that rationality review is the essence of the SDP scrutiny of “economic legislation” (where was this kind of reasoning in <u>Dolan?</u>) (citing <u>Ferguson v. Skrupa & Williamson v. Lee Optical</u>). O’Connor & Thomas each concur separately on statutory interpretation of ERISA/MPPAA.
<u>Dolan v. City of Tigard</u> (1994)	No/28 U.S.C. §§ 1257, 2104	Yes/Remand on test announced but not applied.	Impervious surface ordinance and greenway exaction for development code applied to property when permit application sought to double store size	Commercial use in central business district under application to double size of establishment and parking.	5-4. Rehnquist for O’Connor, Scalia, Kennedy & Thomas that the “essential nexus” or means/ends analysis is a necessary an element of the exactions scrutiny under <u>Nollan</u> and that a “reasonable relationship” or “rough proportionality” between the

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					legitimate state end and the exaction must be in the record. Stevens dissents and argues that means/ends testing has no legitimate place in the takings analysis, that it has always been a state law doctrine, and that <u>Penn Central</u> was incorrect in holding that <u>Chicago B&O RR</u> had incorporated the Fifth Amend. against the states.
<u>Suitum v. Tahoe Regional Planning Agency</u> (1997)	Yes/42 U.S.C. § 1983 action facial challenge as a taking, denials of DP & EP	Yes/Held to be a ripe claim	Agency rule prohibiting the building of any permanent structure on sensitive lands	Undeveloped house lot in Tahoe prohibited from developing any “additional land coverage or other permanent land disturbance” but which was vested with the right to sell TDRs	6-3. Stevens for the Court that the transfer of TDRs is immaterial to the finality of the TRPA prohibition and, thus, whether a taking has ripened under <u>Williamson County</u> . Scalia, O’Connor & Thomas concurring that the “final” determination for purposes of deciding whether a regulation “goes too far” can only be about the application of the law determining “use” of the land—not the valuation of any mitigating currency like TDRs.
<u>Babbitt v. Youpee</u> (1997)	No/28 U.S.C. §§ 1253, 2104	Yes/Yes	Instead of a total ban on devise and descent of fractional interests, amended ILCA § 207 allows the devise of an otherwise escheatable interest to “any other owner of an undivided fractional interest in such parcel or tract.”	Youpee’s right to make a testamentary disposition of his property (first provided for in 1910, 36 Stat. 856) is severely constrained in its present quantum: he must find a member of the “ever-so-slight class of individuals equipped to receive fractional interests by devise.”	8-1. Ginsburg for the Court that amended § 207 is still of an “extraordinary” character under the Penn Central test because it means the “virtual abrogation of the right to pass on a certain type of property.” Stevens dissents on the ground that § 207 is no more a taking than any other law imposing conditions on the continuation of ownership—as was upheld in

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					<u>Texaco v. Short.</u>
<u>City of Chicago v. Int'l College of Surgeons</u> (1997)	Yes (28 U.S.C. §§ 1257, 1331, 1332 (removal))	Yes/Not Reached	Historic landmark law limiting demolition of landmarked structure.	Mansions owned by ICS that were under contract for sale/demolition/replace ment at the time of the city ordinance landmarking them.	7-2. O'Connor for Rehnquist, Scalia, Kennedy, Souter, Thomas & Breyer. Removal of an action with supplemental jurisdiction statute, 28 U.S.C. § 1367, serving as the basis for on-the-record review of city council action under Ill law. Ginsburg & Stevens dissent that this unprecedented creation of "cross-system appellate review" is contrary to many established principles of federal courts law, including <u>Rooker-Feldman</u> .
<u>Eastern Enterprises v. Apfel</u> (1998)	Yes (28 U.S.C. §§ 1257, 2104)/Not addressed by plurality	Yes/Yes	Coal Act merger of pension funds in 1992 required contributions from all operators with pensioners then in the system	Eastern had divested itself of its coal mining subsidiary by 1987 but under the Act was liable for ~\$5 million per year in premiums	4-1-4. O'Connor for the plurality that this form of "disproportionate" and "retroactive" liability effects a taking under the <u>Penn Central</u> test, citing <u>Connolly & Concrete Pipe</u> (two cases w/o holdings to that effect); Kennedy concurs in the judgment but on DP grounds (calling the takings rationale "unwise").
<u>Phillips v. Wash. Legal Found.</u> (1998)	No/28 U.S.C. §§ 1257	Yes/Not reached	IOLTA funds, under a 1980 Fed interpretation of 12 U.S.C. § 1832, may be deposited in interest-bearing NOW accounts but only where the interest is paid to a charitable organization. From that change in federal law, several states (TX, FL, etc.)	WLF had members: one a lawyer in TX w/ deposited IOLTA funds, another who is client making regular use of that lawyer (whose retainer had gone into an IOLTA account paying interest into the Texas Equal Access to Justice	5-4. Rehnquist for a majority that <u>Webb's</u> held "interest follows the principal" is a common law rule of impeccable strength—even if TX law is somewhat inconsistent to this effect—and that this interest/cash is a "physical item" being taken. Souter for Stevens & Ginsburg dissenting

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			mandate that interest be paid into legal services financing funds and direct attorneys to deposit client funds into special IOLTA program accounts.	Found.).	that the Court ignores the fact that this interest cannot legally follow its principle because the Fed has prohibited accounts of this kind from being invested in an interest bearing account <i>unless</i> the interest is going to a qualified charitable organization. Breyer (joined by Stevens, Souter & Ginsburg) dissenting with an emphasis on the better analogy to be drawn between TX law on IOLTA and the Court's land valuation cases where the denominator ought not include any premium that attaches from Gov'nt enrichment of the parcel's value.
<u>City of Monterrey v. Del Monte Dunes</u> (1999).	Yes (42 U.S.C. § 1983 action)/No	Yes/Yes	Site plan approval by planning comm.; staff finally OKs and comm. rejects for what amount to inscrutable reasons.	After 5 yrs., 5 formal rejections, 19 different site plans and several substantial dedications to the City, Del Monte Dunes decided the city wouldn't permit development of its property under any circumstances and brings § 1983 action. SDP claim was tried to the bench and rejected by the D.Ct.	4-1-4. Kennedy for the Court that <u>Dolan's</u> proportionality reasoning doesn't extend beyond exactions and that this particular § 1983 claim for takings and SDP is within the 7th Amend. (the cause of Scalia's separate concurrence); and that the jury instruction based on the <u>Agins</u> "substantially advances" test was appropriate to the claim. Souter for O'Connor, Ginsburg & Breyer: direct and inverse condemnation are too similar to deviate from the est'd rule of no jury trial for condemnation actions under the Fifth Amend.
<u>Palazzolo v. Rhode Island</u> (2001)	No/28 U.S.C. §§ 1257, 2104	Yes (RI inverse condemnation)	Inverse condemnation action challenged repeated	SGI entity goes defunct and the property	3-1-1-4. Part II-B of the Kennedy opinion is interpreted

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		action) /Remand w/ instructions on post-enactment property acquisition and the changed expectations that result	denials of permit to build under different RI laws restricting development in the area, w/ emphasis on wetlands restrictions.	succeeds to Palazzolo as the sole shareholder— <i>after</i> the 1971 RI coastal wetlands protection law (~1983).	differently by O'Connor and by Scalia—both of whom are presumably necessary for a majority. Breyer's dissent join's O'Connor for the proposition that denominators are shaped by legislated land use restrictions—perhaps more so following exchanges of title.
<u>Tahoe Sierra Preserv. Council v. Tahoe Regional Planning Agency</u> (2002)	No/42 U.S.C. § 1983	Yes/No	Temporary moratorium on development as new comprehensive plan is drawn up.	Facial challenge brought by membership organization—not any one property owner.	6-3. Stevens for the majority rejecting any per se rule on when a temporary moratorium on development becomes a taking, denying the facial challenge (to one moratorium of 32 mos.).
<u>Brown v. Legal Found. of Washington</u> (2003)	No/42 U.S.C. § 1983	Yes/No	WA's IOLTA rules require investment by the lawyer only where the client's investment cannot earn net interest benefits for him/her.	Court assumes without deciding that Brown's IOLTA investment earned some non-trivial amount of interest and that it went for a "public use" when it was turned over to the Foundation for support of counsel for indigent clients.	5-4 Stevens for O'Connor, Souter, Ginsburg & Breyer. Picking up where <u>Phillips</u> left off (that IOLTA interest was constitutional property), the majority holds that no "just compensation" is due under the WA program because there is no scenario where the owner of the principal is entitled to the interest under WA/federal law in which that interest is expropriated. The "type" of taking is again found to be a per se (not a <u>Penn Central</u>) taking, but then the focus is on what constitutes just compensation (nothing lost, nothing due). Scalia, for Rehnquist, Kennedy, and Thomas that this overrules <u>Phillips</u> .

Splitting the Atom of Property

Case	DP Claim/Jurisdict.	Takings Claim/Won	Law Challenged	Property Interests in Question	Reasoning and Head Count
<p><u>Cuyahoga Falls v. Buckeye Community Hope Found.</u> (2003)</p>	<p>Yes(and EP claim)/ 42 U.S.C. § 1983</p>	<p>No</p>	<p>City officials approve a proposed site plan for low-income housing as in accordance w/ all zoning requirements and do so by enacting ordinance, provoking a petition drive and eventual popular referendum on the ordinance in accordance w/ city charter.</p>	<p>City Engineer, awaiting the outcome of the referendum denies the building permit; referendum is ultimately successful in repealing ordinance, w/ questionable grounds urged in public debate on referendum. In July 1998, the Ohio Supreme Court holds, reversing itself, that the Ohio Constitution prohibits the forms of discrimination that were given voice in the referendum—calling it arbitrary governmental conduct in an “adjudicative” or administrative act by a local government. Building permits eventually issued (federal claim probably litigated for fess).</p>	<p>9-0. O’Connor for the Court that no decision need be made on the deprivation of “property” issue because the underlying course of conduct was “eminently rational”: it was dictated by the city charter. “We need not decide whether respondents possessed a property interest in the building permits [denied by the city pending outcome of referendum on development], because the city engineer’s refusal to issue the permits while the petition was pending in no sense constituted egregious or arbitrary government conduct.” Scalia & Thomas concur separately to emphasize that “[f]reedom from delay in receiving a building permit is not among the[] “fundamental liberty interests.”</p>
<p><u>Lingle v. Chevron</u> (2005)</p>	<p>Yes (but dismissed w/o prejudice from § 1983 action /Remanded</p>	<p>Yes/No</p>	<p>Hawaii statute capping the rent owners of service stations could charge a lessee-dealer</p>	<p>While Chevron was not inhibited in any way from changing the uses of its property, the lower courts had held the statute failed <u>Agins</u>’ test that the law “substantially advance” a legitimate state interest.</p>	<p>9-0. Writing for a unanimous Court, O’Connor establishes that means/ends rationality has no place in the takings analysis and is, rather, confined to SDP scrutiny. Kennedy concurs separately to emphasize that the SDP test is viable, especially as laid out in his concurrence in <u>Eastern Enterprises</u>.</p>

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Case	DP Claim/Jurisd. §	Takings Claim/Won	Law Challenged	Property Interests in Question	Reasoning and Head Count
San Remo Hotel v. City of San Francisco (2005)	No/42 U.S.C. § 1983	Yes/No	City ordinance requiring \$567,000 fee for hotel conversion out of serving the local public; litigated in state court, adjudicated by Cal. S.Ct. as a merged state/federal takings claim (in an opinion applying Nollan/Dolan essential nexus and rough proportionality tests) and appealed to S.Ct. under Rooker/Feldman .	Hotel was used for “tourist” purposes before ordinance, but was erroneously enrolled as a residence hotel; following conversion, hotel could expand operations as a tourism hotel only by paying the substantial penalty for doing so; CA courts denied relief.	9-0. Stevens for the Court to affirm Court of Appeals’ application of 28 U.S.C. § 1738. Rehnquist, O’Connor, Kennedy & Thomas concurring in the judgment to say that reconsideration of Williamson County rule that a federal litigant must first seek compensation in state court to ripen takings claims may soon be necessary.
Kelo v. City of New London (2005)	Yes/28 U.S.C. §§ 1257/2104	Yes/No	Economic redevelopment condemnation by City pursuant to comprehensive plan and w/o regard to the eventual (private) recipient of the fee simple.	Residence-turned-commercial redevelopment by municipal condemnation and land assembly.	5(1)-4. Stevens for Souter, Breyer, Ginsburg, and Kennedy. The “public use” language in the Fifth Amendment does not imply a duty to keep land in public ownership after it is condemned and land can be condemned simply to make more economically productive use of it than current owners are making. Kennedy concurs separately to emphasize that the NL redevelopment authority had solid grounds to find the plan would serve the public welfare and, in any event, sanctioned the takings before knowing the identity of the eventual developer. O’Connor for Rehnquist, Scalia & Thomas that this is a perversion of sovereignty for someone’s private benefit. After Lingle , might the dissenters in Kelo have another vehicle for their doubts about economic

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Case	DP Claim/Jurisdict.	Takings Claim/Won	Law Challenged	Property Interests in Question	Reasoning and Head Count
					redevelopment takings: SDP?