The Takings Clause:
The Fifth Amendment

- Regulation as Taking
  - *Pennsylvania Coal Co. v. Mahon*
- Balancing
  - *Penn Central Transp. Co. v. City of New York*
- Economic Use
  - *Lucas v. South Carolina Coastal Council*
- Balancing Again?
  - *Palazzolo v. Rhode Island*

Regulation as Taking

*Pennsylvania Coal Co. v. Mahon,*
260 U.S. 393 (1922), p. 281

- Limitations
- Limitations on limitations
- Average reciprocity of advantage
- Too far
- Safety & nuisance v. contract & economics
Pennsylvania Coal Co. v. Mahon
Cont’d

“Government hardly could go on if to some extent values incident to property could not be diminished without paying for every such change in the general law. As long recognized some values are enjoyed under an implied limitation and must yield to the police power. But obviously the implied limitation must have its limits, or the contract and due process clauses are gone.” p. 282.

Pennsylvania Coal Co. v. Mahon
Cont’d

Requiring pillars of coal be left to protect miners is OK because the requirement “secured an average reciprocity of advantage that has been recognized as a justification of various laws.” p. 282.
Pennsylvania Coal Co. v. Mahon
Cont’d

“[I]f regulation goes too far it will be recognized as a taking. . . . We are in danger of forgetting that a strong public desire to improve the public condition is not enough to warrant achieving the desire by a shorter cut than then constitutional way of paying for the change.” p. 283.

Penn Central Transp. Co. v. City of New York,

1. the character of the regulation,

2. the economic impact of the regulation upon the private property owner, and

3. the extent to which the regulation interferes with the distinct investment-backed expectations of the property owner.

• “harmful and noxious uses”
• “harm-preventing” v. “benefit-conferring”
• “land use regulation does not effect a taking if it ‘substantially advance[s] legitimate state interests’”
Lucas v. South Carolina Coastal Council Cont’d

- Compensation is required when government action deprives the property owner of “all economically beneficial use” of the property if it goes beyond what the relevant background principles of state nuisance and property law would dictate.

- Law must “do no more than duplicate the result” that could have been achieved in the courts.

Lucas’s Property
One New House by 2000
5000 sq. ft.

Categorical or Per Se Rules

- Physical invasion by government or authorized by government = taking.
  - *Loretto*
- Regulating a nuisance ≠ taking.
  - *Keystone & Hadacheck*
- When the value of the land is essentially wiped out = taking (unless).
  - *Lucas*

- **Background principles of state property law** – common, shared understanding of state’s authority (enactment not enough)
- **Notice** – when Palazzolo became title holder, regulation was already in place
- **Remember the public trust doctrine** – State holds wetlands in trust for its citizens. State cannot be held to have taken what the property owner never had (i.e., a right to develop wetlands).

Palazzolo v. Rhode Island cont’d

- **Token Interest** - $200,000 is not a token
- **Proper Denominator in Takings Fraction (Conceptual Severance)** – Should you consider the property as a whole or can the property owner divide up the property and argue that with respect to a particular portion, he was deprived of all economically beneficial use of the land?
Palazzolo v. Rhode Island cont’d

Justice O’Connor’s Concurrence

• What role should timing (enactment of law v. acquisition of property) play in the Penn Central analysis?

• The regulatory regime in place at the time of acquisition helps to shape the reasonableness of the investment-backed expectations.

• Still only one factor among several - not dispositive.