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The Realities of Takings Litigation

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The Realities of Takings Litigation

Dave Owen*

This Article presents an empirical study of takings litigation against the United States. It reviews the cohort of takings cases filed against the federal government between 2000 and 2014, tracing each case from filing through final disposition. The result is a picture of takings litigation that is at odds with much of the conventional wisdom of the field.

That conventional wisdom suggests that most takings cases will involve alleged regulatory takings; that the most intellectually challenging issues will arise within the field of regulatory takings; and, more broadly, that takings litigation will play an important role in the United States' efforts to balance government regulation against individual liberty. This Article instead reveals that most takings litigation against the federal government involves alleged physical takings; that key recurring questions involve the selection of a method of takings analysis and the nature of property rights rather than the nuances of regulatory takings standards; and that takings litigation is only peripherally relevant to relationships between federal regulators and most regulated entities. These findings apply only to takings litigation against the federal government; takings litigation against state and local governments was not part of this study.

Even with that significant caveat, these findings demonstrate the need to recalibrate the focus of takings theory and doctrine. At a general level, they call for heightened attention to alleged physical takings. More specifically, they call for more careful policing of the boundaries between methods of takings analysis, for more focus on the types of property rights that should receive

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takings protection, and for reexamination of the premise that almost all physical takings claims should be subject to categorical analyses.

CONTENTS

INTRODUCTION	578
I. TAKINGS LITIGATION: A TRADITIONAL VIEW.....	585
A. The Basics of Modern Takings Doctrine	585
B. The Court of Federal Claims and the Federal Circuit	588
C. Takings Questions and Debates	590
1. The primacy and problems of <i>Penn Central</i>	591
2. The political stories and stakes	595
II. METHODOLOGY	599
III. QUANTITATIVE RESULTS	603
A. Numbers and Types of Cases and Plaintiffs.....	603
B. Who Gets Paid.....	607
C. Who Litigates, and What Activities Generate Litigation	612
1. The noninvolvement of big business and (mostly) big law	613
2. The prevalence of aggregated physical takings claims	617
IV. THEMES AND EXAMPLES.....	619
A. Rails-to-Trails.....	620
B. Water Rights	626
C. Bailouts and Bankruptcies.....	631
D. The Grab Bag	635
V. BUSINESS MODELS AND IDEOLOGUES	639
CONCLUSION	643

INTRODUCTION

The Fifth Amendment of the United States Constitution states, “nor shall private property be taken without just compensation.” While jurists and academics have spent years debating what that phrase means, they generally agree that it is crucially important. Takings doctrine, according to the classic accounts, plays a central role in the United States’ struggles to balance individual liberty against collective regulation.¹ The recurring narratives of takings litigation reflect this framing. Supporters of takings claims tell of singled-out individual property owners gamely standing up to an

1. See *Murr v. Wisconsin*, 137 S. Ct. 1933, 1943 (2017).

overbearing regulatory state.² Regulations' defenders, in contrast, argue that takings litigants are often moneyed, powerful interests seeking to pad their good fortune with taxpayer money, and to undermine the democratically enacted regulatory systems upon which healthy, safe, and just communities depend.³ Yet both sides tend to agree that the stakes are high.

Beyond the importance of takings doctrine, several other points of agreement have emerged among jurists and academics. One such consensus point is that within the larger field of takings doctrine, regulatory takings cases are predominant and particularly important. Since 1978, when the United States Supreme Court decided *Penn Central Transportation Company v. New York City*,⁴ regulatory takings cases have dominated the Court's takings docket, and most academic articles focus on regulatory takings.⁵ Within that area of focus, *Penn Central* seemingly reigns supreme. The Court has stated, and academics agree, that most takings cases fall under the *Penn Central* standard,⁶ and much of the debate centers on improving that standard—or, often, castigating it.⁷ Those critiques highlight a second point of near-consensus: for decades, commentators and Supreme Court justices have described takings doctrine as a confusing mess,⁸ and they often trace that confusion to the amorphous standards and difficult policy

2. See, e.g., *What We Fight For: Property Rights*, PAC. LEGAL FOUND., <https://pacificlegal.org/property-rights/> (last visited Sept. 16, 2021).

3. See generally Douglas T. Kendall & Charles P. Lord, *The Takings Project: A Critical Analysis and Assessment of the Progress So Far*, 25 B.C. ENV'T AFFS. L. REV. 509 (1998) (explaining threats posed by takings plaintiffs); J. Peter Byrne, *Ten Arguments for the Abolition of the Regulatory Takings Doctrine*, 22 ECOLOGY L.Q. 89, 129–30 (1995).

4. *Penn Cent. Transp. Co. v. New York City*, 438 U.S. 104 (1978).

5. See *infra* notes 86–95 and accompanying text.

6. See *Ark. Game & Fish Comm'n v. United States*, 568 U.S. 23, 32 (2012); *Horne v. U.S. Dep't of Agric.*, 576 U.S. 350, 377 (2015) (Sotomayor, J., dissenting) (“Most takings cases therefore proceed under the fact-specific balancing test set out in [*Penn Central*].”).

7. See, e.g., Steven J. Eagle, *The Four-Factor Penn Central Regulatory Takings Test*, 118 PENN ST. L. REV. 601, 602 (2014) (“[T]he doctrine has become a compilation of moving parts that are neither individually coherent nor collectively compatible.”); Holly Doremus, *Takings and Transitions*, 19 J. LAND USE & ENV'T L. 1, 7 (asserting that the Court's regulatory takings decisions since *Penn Central* “have sown nothing but confusion”).

8. See Jed Rubenfeld, *Usings*, 102 YALE L.J. 1077, 1078 & n.2 (1993) (asserting that “we have a *Takings Clause* engulfed in confusion,” and compiling sources, spanning decades, saying much the same thing).

questions underlying regulatory takings disputes.⁹ Consequently, the holy grail of takings theory has long been a predictable, efficient, and fair way of resolving regulatory takings claims.¹⁰

But do these shared understandings align with the realities of takings litigation? To a surprising extent, the existing literature leaves that question unanswered. That literature is rich in theory; “[t]he vast majority of takings articles,” as Eduardo Penalver has accurately observed, “start with broad, normative theories and then attempt to delineate the precise content of takings doctrine on the basis of those theories.”¹¹ But empirical analyses of takings litigation are exceedingly rare.¹² Additionally, the takings literature tends to focus on United States Supreme Court cases, and the Court reviews a few cases that interest it, not a representative sample of lower-court actions. That means judges and commentators have little information about whether the questions addressed in high-profile Supreme Court cases and the associated academic commentary align with the issues typically raised in routine takings cases—or about whether the disparities, if they exist, matter.

To help fill these knowledge gaps, this Article studies the cohort of takings claims filed in the United States Court of Federal Claims (which hears nearly all takings cases filed against the federal government)¹³ between 2000 and 2014. I recorded the subject matter and tracked outcomes for all of the filed cases, which meant determining whether those cases had been dismissed, resolved on the merits, or settled. I also tracked which cases produced just compensation payments, either through court awards or

9. *E.g.*, Carol M. Rose, *Mahon Reconstructed: Why the Takings Issue Is Still a Muddle*, 57 S. CAL. L. REV. 561, 593–94 (1984); Joseph L. Sax, *Takings and the Police Power*, 74 YALE L.J. 36, 37 (1964).

10. Many commentators have noted the Supreme Court’s apparent dissatisfaction with its own takings jurisprudence and its unsuccessful quest for something better. *See, e.g.*, Joseph L. Sax, *Property Rights and the Economy of Nature: Understanding Lucas v. South Carolina Coastal Council*, 45 STAN. L. REV. 1433, 1437 (1993) (noting that the Court “wants to affirm the importance of property, but it cannot find a standard that will control regulatory excess without threatening to bring down the whole regulatory apparatus of the modern state”). For some scholars, that simple, efficient, and fair method would involve getting rid of regulatory takings altogether. *See* Byrne, *supra* note 3.

11. Eduardo M. Peñalver, *Regulatory Takings*, 104 COLUM. L. REV. 2182, 2186–87 (2004).

12. A notable exception is James E. Krier & Stewart E. Sterk, *An Empirical Study of Implicit Takings*, 58 WM. & MARY L. REV. 35 (2016).

13. For a more detailed explanation of the Court of Federal Claims’s role, see *infra* notes 64–76 and accompanying text.

settlements and how much money the plaintiffs received. Additionally, I recorded what types of entities were bringing takings claims, what types of law firms represented takings plaintiffs, and which federal government entities' activities triggered the litigation. I coupled this analysis with a qualitative review of decisions and filings from takings cases. The result is a different, and in some ways more comprehensive, account of takings litigation than anything in the existing literature.¹⁴

That methodology creates some limitations. Most importantly, because sufficiently comprehensive records of complaints only exist for federal-court litigation, I did not review state-court cases. That means my data set excludes cases arising out of state and local land use regulation, which is a primary concern for the United States Supreme Court and commentators.¹⁵ It is possible that a similar study of state-court litigation—if it were possible—would produce similar results, but this study does not eliminate the possibility that federal-takings litigation is just different.¹⁶ Additionally, I studied cases filed during a single fifteen-year period. Takings litigation evolved during that period, and it almost certainly evolved before and after. So while my conclusions may support hypotheses about what takings litigation was like in the 1990s or what it will be like in years to come, those hypotheses necessarily must be tentative.

Despite these caveats, several important conclusions emerge from the analysis. First, within my pool of cases, regulatory takings claims were much less prevalent than Supreme Court decisions and most academic writing would lead one to expect. From 2000 to 2014,¹⁷ the vast majority of takings claims—and all but four of the successful claims—against the federal government arose out of

14. To my knowledge, the only data set of comparable scope is Krier and Sterk's. But their data set is different in several important ways. Theirs includes only published decisions in takings cases, which means it excludes cases that produce no published decision and does not record case outcomes (which matters because parties sometimes win preliminary decisions but do not ultimately obtain any relief). In that sense, their database is narrower and less representative. Krier and Sterk's data set is broader than mine in one key way: it includes state-court cases. *See generally* Krier & Sterk, *supra* note 12.

15. *See infra* Table 1.

16. *See infra* notes 132–137 and accompanying text (elaborating on these limitations but also noting potential parallels between federal- and state-court takings litigation).

17. I chose 2014 as an end date because takings cases often take many years to resolve, particularly if the plaintiffs have credible claims, and more recent cases are less likely to have been litigated to completion.

alleged physical invasions or direct appropriations of property interests, with most arising out of military airplane flights, flooding, or conversions of railroad lines to recreational trails. The regulatory activities that have been of primary interest to the Supreme Court and academic commentators generated few claims. Rarer still were cases that turn on the classic doctrinal analyses that traditionally receive so much attention. Of the 472 cases in the pool, only twenty-three appear to have turned on a *Penn Central* or *Lucas* analysis, and not a single one turned on a *Nollan*¹⁸-*Dolan*¹⁹ analysis of exactions.²⁰ Physical takings claims overwhelmingly predominate.

Second, both traditional conservative and liberal narratives align unevenly with the pool of takings cases against the federal government. Liberal critics of takings litigation portray it as a coordinated effort by established, wealthy interests to undercut the regulatory state.²¹ Some conservatives have openly advocated such an effort, though they would not limit it to a moneyed class.²² But during the time period I studied, business and legal elites showed little interest in takings claims against the federal government, and most of the federal regulatory apparatus was essentially untouched by takings litigation. Most claims were filed by individuals or small businesses.²³ Many cases were litigated pro se. Indeed, the prototypical takings claim was filed by an individual, married couple, or small business owner, brought as part of an aggregated case in which dozens of plaintiffs participated, litigated by small- or mid-sized-firm lawyers based in Missouri, and targeted at fairly obscure non-regulatory activities involving the conversion of old, decrepit rail lines into recreational trails. At the federal level, at least, takings litigation has become an eclectic sideshow to the United States' grand struggles over regulatory policy.

Third, the doctrinal questions raised in federal-court takings litigation tend to differ from the questions upon which Supreme Court justices and academics typically focus. When explaining its focus on regulatory takings, the Court often states that per se

18. *Nollan v. Cal. Coastal Comm'n*, 483 U.S. 825 (1987).

19. *Dolan v. City of Tigard*, 512 U.S. 374 (1994).

20. See *infra* notes 50-55 and accompanying text (summarizing takings doctrines addressing exactions); *infra* note 143 and accompanying text (summarizing findings).

21. E.g., Kendall & Lord, *supra* note 3.

22. See *infra* notes 102-112 and accompanying text.

23. See *infra* Table 5 and surrounding text.

takings fall into small, discrete categories and are “easily identified.”²⁴ The Court also has spent much of its intellectual effort policing the boundaries between one of those discrete categories – specifically, *Lucas* claims – and the realm of *Penn Central*.²⁵ This focus fits with a conventional understanding that the most recurrent and important issues arise from alleged regulatory takings. But in fact, non-*Penn Central* cases aren’t just more abundant than one might expect; they also are more variegated and – sometimes – doctrinally complex. Many cases raise questions about the appropriate method of takings analysis, and the debate is between physical and regulatory frameworks, not between *Lucas* and *Penn Central*.²⁶ In other cases, the key questions are about what counts as constitutional property.²⁷ Other cases are more rote; courts dispose of many cases on statute-of-limitations grounds or because they obviously fail to state a claim,²⁸ and still other cases are so esoteric that one would be hard-pressed to connect them to any sort of larger theme.²⁹ But to the extent that patterns do emerge, one is that much of the work done by takings lawyers is oriented toward *avoiding* the questions that fascinate academics and Supreme Court justices. The goal, instead, appears to be to find ways to fit cases within categorical boxes, where questions of justice and fairness are off to the side and matters can be efficiently resolved. These efforts often succeed, and the result is a jurisprudence of category games, with haphazard alignments between results and any broader sense of fairness or justice.

24. *Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg’l Plan. Agency*, 535 U.S. 302, 324 (2002).

25. *See, e.g., id.* at 325–32; *Palazzolo v. Rhode Island*, 533 U.S. 606, 630–32 (2001).

26. *See, e.g., Casitas Mun. Water Dist. v. United States*, 543 F.3d 1276, 1288–96 (Fed. Cir. 2008) (considering whether a requirement to send water through a fish ladder should be analyzed as a physical or regulatory taking).

27. *See, e.g., Bair v. United States*, 515 F.3d 1323, 1327–30 (Fed. Cir. 2008) (evaluating whether a plaintiff could have a property interest in the priority of a lien); *Air Pegasus of D.C., Inc. v. United States*, 424 F.3d 1206, 1217–18 (Fed. Cir. 2005) (considering whether a heliport operator could have property rights in the use of navigable airspace overlying its land); *Members of the Peanut Quota Holders Ass’n. v. United States*, 421 F.3d 1323, 1324 (Fed. Cir. 2005) (considering whether peanut quotas are constitutionally-protected property); *Snyder & Assocs. Acquisitions LLC v. United States*, 133 Fed. Cl. 120, 125–26 (2017) (considering whether a business could have a property interest in an electronic filing identification number issued by the IRS).

28. *See infra* note 144 and accompanying text.

29. *See infra* Section IV.D.

While the primary goal of this Article is to offer a descriptive account of takings litigation, I also explore why the issues actually being litigated differ from the issues addressed in academic and Supreme Court discourse, and what the normative implications of the discrepancies might be. The most likely—and somewhat banal—reason for the difference is that while courts and commentators tend to focus on the policy debates, most businesses and law firms are more worried about making money. They have decided that classic regulatory takings litigation offers a poor business model and that sophisticated businesses have better ways to sort out their differences with the administrative state. That has left the field to law firms seeking to carve out subfields in which they can build successful business models on categorical takings standards and on aggregated, repeatable claims; to businesses and attorneys seeking big payoffs through creative one-offs; and to the fumbling rantings of an antigovernmental fringe. That may ultimately seem reassuring; one implication is that existing regulatory takings standards are deterring claims, which many people may view as a welcome outcome. But amid all the focus on regulatory takings,³⁰ thorny questions about the boundaries of physical takings analyses and even the nature of property are escaping attention.³¹ And the continuing requests for the courts to indulge “[t]he temptation to adopt what amount to *per se* rules in either direction”³² risk divorcing takings litigation from important equity questions that should be at its core.

This Article’s analysis proceeds as follows. Part I summarizes takings doctrine and explains traditional theories and areas of debate. Part II explains my research methodology. Part III summarizes quantitative results and explains ways in which my findings differ from conventional wisdom about takings, as well as some ways in which they corroborate that conventional wisdom.

30. Recent years seem to have produced an uptick in the Court’s interest in physical takings cases. See *infra* Appendix I.

31. For exceptions that do focus on physical takings, see generally John D. Echeverria, *What is a Physical Taking?*, 54 U.C. DAVIS L. REV. 731 (2020); Lynn E. Blais, *The Total Takings Myth*, 86 FORDHAM L. REV. 47 (2017); Sandra B. Zellmer, *Takings, Torts, and Background Principles*, 52 WAKE FOREST L. REV. 193 (2017); Lynda L. Butler, *The Governance Function of Constitutional Property*, 48 U.C. DAVIS L. REV. 1687 (2015); Andrea L. Peterson, *The False Dichotomy Between Physical and Regulatory Takings Analysis: A Critique of Tahoe-Sierra’s Distinction Between Physical and Regulatory Takings*, 34 ECOLOGY L.Q. 381 (2007).

32. *Palazzolo v. Rhode Island*, 533 U.S. 606, 636 (2001) (O’Connor, J., concurring).

Part IV uses qualitative discussion of several key areas of federal-court takings litigation to explore recurring themes and issues, including questions about appropriate takings tests and the boundaries of constitutional property. Finally, Part V switches from describing results to explaining and evaluating them. It sets forth several explanations for the differences between takings as viewed from the Supreme Court and academia and takings litigation on the ground. It also discusses normative implications of those discrepancies.

I. TAKINGS LITIGATION: A TRADITIONAL VIEW

To place this Article's findings in context, some background on traditional takings doctrine and debates will be helpful. This section therefore reviews currently settled doctrine and then discusses areas of ongoing judicial and academic debate.

A. *The Basics of Modern Takings Doctrine*

Most accounts of contemporary takings doctrine begin with the Supreme Court's 1922 decision in *Pennsylvania Coal Co. v. Mahon*.³³ Courts had been deciding takings cases since the dawn of the republic, but those cases generally involved government actions that confiscated or invaded land.³⁴ *Pennsylvania Coal* was different. The government's action regulated the use of property rather than physically invading it or asserting ownership claims over it.³⁵ While the Supreme Court had seen similar claims before, it had previously rejected them.³⁶ But in *Pennsylvania Coal*, Justice Holmes wrote that a regulation that goes "too far" is a taking.³⁷ From that

33. *Pa. Coal Co. v. Mahon*, 260 U.S. 393 (1922).

34. See *Horne v. U.S. Dep't of Agric.*, 576 U.S. 350, 360 (2015) ("*Pennsylvania Coal* expanded the protection of the Takings Clause, holding that compensation was also required for a 'regulatory taking . . .'"); e.g., *Pumpelly v. Green Bay Co.*, 80 U.S. 166, 178 (1872) (holding that permanent flooding caused a taking).

35. 260 U.S. at 417 (Brandeis, J., dissenting) ("The property so restricted remains in the possession of its owner. The State does not appropriate it or make any use of it.").

36. E.g., *Hudson Cnty. Water Co. v. McCarter*, 209 U.S. 349, 355 (1908). While commentators and court opinions tend to treat *Pennsylvania Coal* as a major departure from preexisting law, its reasoning echoes that of *McCarter*—except that in *McCarter*, the plaintiffs lost. See *id.* at 355–56 (stating that if police power regulations cut property down too far, a taking would occur).

37. 260 U.S. at 415.

cryptic phrase, the modern jurisprudence of regulatory takings has emerged.

In the years since, the Supreme Court and lower courts have refined takings doctrine in several ways. First, they agree that governmental confiscations of property generally are takings,³⁸ albeit with some exceptions, like seizures associated with criminal proceedings.³⁹ Likewise, direct and permanent governmental invasions of private property are generally takings, though again with some exceptions.⁴⁰

Regulations also can create takings in several different ways. Some regulations cause physical takings. If the effect of a regulation is to confiscate property and thus substitute government ownership for private ownership of that property, it is an appropriation, which the Court has generally described as a *per se* taking (and has often described as a physical taking).⁴¹ Similarly, if a regulation compels property owners to suffer permanent, non-governmental invasions of their property, that regulation again effects a physical taking.⁴²

Regulations also can create what we traditionally refer to as regulatory takings,⁴³ in which government neither compels the property owner to suffer a physical invasion nor appropriates ownership of property, but the regulatory restriction still effectively

38. *E.g.*, *Horne*, 576 U.S. at 362 (holding that a governmental seizure of raisins was a physical taking).

39. *See, e.g.*, *AmeriSource Corp. v. United States*, 525 F.3d 1149, 1153 (Fed. Cir. 2008).

40. *See* Echeverria, *supra* note 31, at 763–775 (describing exceptions).

41. *E.g.*, *Webb’s Fabulous Pharmacies, Inc. v. Beckwith*, 449 U.S. 155, 164 (1980) (“The state statute has the practical effect of appropriating for the county the value of the use of the fund for the period in which it is held in the registry.”); *see also* Echeverria, *supra* note 31, at 746–47 (noting the “cacophony” of ways in which the Court has described physical takings).

42. *E.g.*, *Kaiser Aetna v. United States*, 444 U.S. 164, 187 (1979) (holding that a regulatory decision compelling landowners to allow public access to a previously private lagoon would create a taking); *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 426 (1982) (finding a taking where a local regulation compelled landowners to allow the installation of cable boxes).

43. Because of the terminological oddity of using the phrase “physical takings” to describe some takings caused by regulations and “regulatory taking” to describe other takings caused by regulations, Krier and Sterk have suggested just using the phrase “implicit takings.” Krier & Sterk, *supra* note 12, at 40–41 (quoting Thomas W. Merrill, *Anticipatory Remedies for Takings*, 128 HARV. L. REV. 1630, 1637 (2015)). It is a sensible suggestion, but the traditional approach is ingrained, and I have stuck with it.

divests the owner of possession.⁴⁴ The Court has developed two main tests for deciding when such a regulatory taking has occurred. If a regulation deprives a property of all economic value, and that deprivation would not be authorized under background principles of property law, then a categorical, or *Lucas*, taking has occurred.⁴⁵ If, however, the governmental action leaves some economic value in the property, then the court applies the classic three-part inquiry set forth in *Penn Central*.⁴⁶ It considers the extent of the diminution in value, the nature of the government action, and the degree of interference with reasonable investment-backed expectations.⁴⁷ Importantly, both the *Penn Central* and *Lucas* tests require using the value of the whole parcel as a denominator, rather than just using the portion of the property—physical or temporal—that was specifically burdened by the regulation.⁴⁸ Physical takings, in contrast, can occur even when the allegedly taken portion of the property is just a small percentage of a larger parcel.⁴⁹

One last category of takings jurisprudence straddles physical and regulatory takings boundaries. In a series of three cases—*Nollan v. California Coastal Commission*,⁵⁰ *Dolan v. City of Tigard*,⁵¹ and *Koontz v. St. Johns River Water Management Authority*⁵²—the Supreme Court has held that exactions can be takings. An exaction occurs when a regulator grants a property owner permission to do something with her property, but only on the condition that the owner provides some benefit in return. That benefit might be to allow physical access to the property, as happened in the disputes that generated *Nollan* and *Dolan*, or it might be to provide some other form of compensation, monetary or otherwise, for the impacts

44. *Stop the Beach Renourishment, Inc. v. Florida Dep't of Env't Prot.*, 560 U.S. 702, 713 (2010) (“Similarly, our doctrine of regulatory takings ‘aims to identify regulatory actions that are functionally equivalent to the classic taking.’”) (quoting *Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528, 539 (2005)).

45. *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1019 (1992).

46. See *Murr v. Wisconsin*, 137 S. Ct. 1933, 1943 (2017) (summarizing the *Penn Central* framework).

47. *Id.*

48. *Tahoe Sierra Pres. Council, Inc. v. Tahoe Reg'l Plan. Auth.*, 535 U.S. 302, 326–27 (2002).

49. See, e.g., *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 434–35 (1982) (noting that the Court has found physical invasions to be takings even when the invasion “has only minimal economic impact on the owner”).

50. *Nollan*, 483 U.S. at 825.

51. *Dolan*, 512 U.S. at 374–75.

52. *Koontz v. St. Johns River Water Mgmt. Dist.*, 570 U.S. 595, 595–97 (2013).

of the permitted property use.⁵³ Exactions are routine components of government-permitting programs, and they usually occur without constitutional suspicion.⁵⁴ But if the exacted benefit lacks a “nexus” to the impact regulators are ostensibly trying to abate, or if the extent of the exaction isn’t roughly proportional to the extent of the impact, then, according to the Court, a taking has occurred.⁵⁵

The tests described so far all presume an initial conclusion that the allegedly taken interest qualifies as property. In most Supreme Court takings cases, the need to test that presumption does not come up.⁵⁶ The Court often deals with challenges brought by landowners, and there is no question that the plaintiffs owned the land in question.⁵⁷ But in the Federal Circuit and Court of Federal Claims, which deal with many non-land property interests, questions about what qualifies as property often arise.⁵⁸ The Federal Circuit therefore folds the Supreme Court’s takings tests into a larger analytical framework.⁵⁹ The first step, under this framework, is to determine whether the plaintiff actually holds a property interest in the allegedly taken thing.⁶⁰ If the answer is yes, then, at step two, the court must decide whether that interest was taken, using whichever Supreme Court takings test is appropriate to the case at hand.⁶¹

B. The Court of Federal Claims and the Federal Circuit

Because institutional arrangements and judicial ideologies sometimes matter as much as doctrine, this background summary

53. See, e.g., *id.* at 601–02 (describing compensatory mitigation requested by state wetlands regulators).

54. See Mark Fenster, *Takings Formalism and Regulatory Formulas: Exactions and the Consequences of Clarity*, 92 CALIF. L. REV. 609, 623–24 (describing the importance of exactions).

55. *Dolan*, 512 U.S. at 391 (establishing the “rough proportionality” standard); *Nollan*, 483 U.S. at 837 (stating the necessity of an “essential nexus”).

56. See Maureen E. Brady, *Property’s Ceiling: State Courts and the Expansion of Takings Clause Property*, 102 VA. L. REV. 1167, 1168 (2016) (“Paradoxically, the term ‘property’ has received less attention than the rest of the words in these takings clauses”); Thomas W. Merrill, *The Landscape of Constitutional Property*, 86 VA. L. REV. 885, 951 (2000) (arguing that the Supreme Court has been inattentive to questions about what counts as constitutionally-protected property).

57. See *infra* Table 1.

58. See *infra* note 299 and accompanying text.

59. See, e.g., *Baley v. United States*, 942 F.3d 1312, 1330 (Fed. Cir. 2019).

60. *Id.*

61. *Id.*

also briefly discusses the courts that hear takings cases against the federal government. If numbers of published decisions are a good indication (and they might not be⁶²), most takings cases are filed against state or local defendants and in state court.⁶³ Takings cases against the federal government, however, that have a value exceeding \$10,000, may be brought only in the United States Court of Federal Claims.⁶⁴ The United States Court of Appeals for the Federal Circuit has appellate jurisdiction over the Court of Federal Claims, and the United States Supreme Court in turn reviews Federal Circuit decisions.⁶⁵ Oddly, the Supreme Court has rarely exercised that review. In the forty-two years since *Penn Central* was decided, the Court has decided forty-four cases involving takings claims. Only one of those cases – *Arkansas Game & Fish Commission v. United States*⁶⁶ – was initially filed in the Court of Federal Claims.

The Court of Federal Claims's ability to hear takings cases is bounded in several key ways. First, the Tucker Act establishes a six-year statute of limitations.⁶⁷ Second, the Court of Federal Claims can hear only monetary takings claims against the United States; in a takings case, it cannot hear claims for declaratory or injunctive relief, even if they arise out of the same underlying set of facts.⁶⁸ Third, the Court of Federal Claims cannot hear a case if another

62. As described in Part III, some types of takings cases may be filed in abundance but produce few published decisions, largely because they tend to settle.

63. See Krier & Sterk, *supra* note 12, at 78 (table showing many more cases against state and local governments than against the federal government). Throughout most of my study period, cases against state entities would have been brought primarily in state court. See *id.* at 77–78 (providing numbers, but also noting that some litigants continued to file cases in federal court even after they should have known not to). This happened because a combination of United States Supreme Court decisions – *Williamson County Regional Planning Commission v. Hamilton Bank*, 473 U.S. 172 (1985) and *San Remo Hotel v. City and County of San Francisco*, 545 U.S. 323 (2005) – required plaintiffs to seek a final state-court disposition before they could allege that state or local governments had taken their property, and then precluded collateral federal-court attacks on the outcomes of those state court proceedings. In *Knick v. Township of Scott*, 139 S. Ct. 2162 (2019), the Supreme Court overruled *Williamson County*.

64. 28 U.S.C. § 1491(a)(1). Claims worth under \$10,000 may be brought either in the Court of Federal Claims or in federal district courts. 28 U.S.C. § 1346(a)(2).

65. 28 U.S.C. § 1295(a)(3).

66. *Ark. Game & Fish Comm'n v. United States*, 568 U.S. 23 (2012).

67. 28 U.S.C. § 2501; see *John R. Sand & Gravel v. United States*, 552 U.S. 130, 133–36 (2008) (holding that this statute of limitations is jurisdictional and can require dismissal even if the United States does not raise the issue).

68. 28 U.S.C. § 1491; *Eastport S.S. Corp. v. United States*, 372 F.2d 1002, 1007 (Ct. Cl. 1962) (“The claim must, of course, be for money.”).

federal court case arising out of the same facts was pending when the Court of Federal Claims action was filed, even if that other case seeks different relief.⁶⁹ In combination, these requirements create challenges for a takings plaintiff who also wishes to bring non-takings claims—for example, claims that a government action was arbitrary and capricious or that it violated the First Amendment.⁷⁰ The plaintiff cannot bring those actions concurrently, and if the plaintiff waits to bring the takings claim until after the other claim has been disposed, the statute of limitations may have run.⁷¹

One other detail about the Court of Federal Claims bears mentioning and has often been highlighted in accounts of takings litigation. It is a conservative court. The court came into existence in 1982, when Congress replaced the previously existing Court of Patent Appeals and Court of Claims with a single entity called the Court of Federal Claims. Judges previously serving on the Court of Claims were converted into Court of Federal Claims judges, but their terms were temporary.⁷² Consequently, within a few years, every judge on the Court of Federal Claims had been appointed by a Republican president.⁷³ This was not happenstance. Conservative activists at the time openly stated that they had grabbed an opportunity to create an important court and stack it with sympathetic judges.⁷⁴ The Court of Federal Claims has become only slightly more balanced in the years since. As of July 2021, nineteen of the twenty-four judges who hear cases (including regular and senior judges) are Republican appointees.⁷⁵

C. Takings Questions and Debates

Everything in the foregoing summary of takings law is currently settled doctrine. But there is, and for many years has been, ample debate about how the many interstitial questions within

69. 28 U.S.C. § 1500; *see* *United States v. Tohono O'odham Nation*, 563 U.S. 307, 317 (2011) (“Two suits are for or in respect to the same claim, precluding jurisdiction in the CFC, if they are based on substantially the same operative facts, regardless of the relief sought in each suit.”).

70. *See, e.g.,* *Ministerio Roca Solida v. United States*, 778 F.3d 1351, 1352–55 (Fed. Cir. 2015).

71. *See id.* at 1357–59 (Taranto, J., concurring) (describing these challenges for litigants).

72. *Kendall & Lord*, *supra* note 3, at 533.

73. *Id.*

74. *Id.* at 535.

75. *See* *Judges - Biographies*, U.S. CT. FED. CLAIMS, <https://www.uscfc.uscourts.gov/judicial-officers> (last reviewed Nov. 9, 2021).

these broad standards should be resolved. More generally, judges and academics for years have debated what takings doctrine should be, and nearly every principle I have summarized above is controversial even if it may currently be black-letter law. The debates are too voluminous for a complete explication, but the following overview summarizes some of the key questions judges and academics have discussed—each of which informs the empirical analysis that follows.

1. *The primacy and problems of Penn Central*

In its 2002 decision in *Tahoe-Sierra Preservation Council v. Tahoe Regional Planning Agency*,⁷⁶ the Supreme Court stated that “physical appropriations are relatively rare, easily identified, and usually represent a greater affront to individual property rights.”⁷⁷ In subsequent decisions, it has repeated similar statements, noting, for example, that physical and *Lucas* takings occupy “relatively narrow categories,”⁷⁸ and asserting that most takings cases involve ad-hoc, fact-specific applications of the *Penn Central* standard.⁷⁹ Academics have said similar things, describing *Penn Central* as “[t]he general default standard that applies [in most] takings [cases],”⁸⁰ and asserting that “[w]ithout any question, the most important case interpreting the Fifth Amendment’s Takings Clause is *Penn Central Transportation Co. v. New York City*.”⁸¹ While a few scholars have contested this view, most academics and judges seem to agree that in takings litigation, the *Penn Central* framework governs most of the action.

76. *Tahoe-Sierra Pres. Council v. Tahoe Reg’l Plan. Agency*, 535 U.S. 302 (2002).

77. *Id.* at 324.

78. *Lingle v. Chevron U.S.A.*, 544 U.S. 528, 538 (2005).

79. *E.g.*, *Ark. Game & Fish Comm’n v. United States*, 568 U.S. 23, 32 (2012) (“[A]side from the cases attended by rules of this order, most takings claims turn on situation-specific factual inquiries.”); *E. Enters. v. Apfel*, 524 U.S. 498, 541 (1998) (Kennedy, J., concurring) (“Cases attempting to decide when a regulation becomes a taking are among the most litigated and perplexing in current law.”); *see also Cedar Point Nursery v. Hassid*, 141 S. Ct. 2063, 2082 (2021) (Breyer, J., dissenting) (“[M]ost government action affecting property rights is analyzed case by case under *Penn Central*’s fact-intensive test.”).

80. Fenster, *supra* note 54, at 612; *see id.* at 618 (“Courts subject the majority of takings claims . . . to a *Penn Central* inquiry . . .”).

81. Christopher Serkin, *Penn Central Take Two*, 92 NOTRE DAME L. REV. 913, 913 (2016); *see* ANDREW COAN, RATIONING THE CONSTITUTION: HOW JUDICIAL CAPACITY SHAPES SUPREME COURT DECISION-MAKING 148 (2019) (asserting that “the highly deferential *Penn Central* regime . . . has long applied to the vast majority of challenged regulations”).

That framing is consistent with the Supreme Court's grants of review. Since 1978, when it decided *Penn Central*, the Court has issued forty-two takings decisions. Twenty-seven are clearly regulatory takings cases.⁸² Only nine have involved applying a physical taking standard.⁸³ The Court's past decade does hint at a shift in interest (as well as a possible decline in the Court's overall interest in takings); four of the seven cases decided since 2010 involve physical takings analytical frameworks (a fourth—the Court's first *Horne* decision—did not address what takings framework was appropriate). But on the whole, over the past several decades, the Court has been interested primarily in regulatory takings. It also has repeatedly reaffirmed the importance of the *Penn Central* framework,⁸⁴ while only in two cases—*Palazzolo* and *Tahoe-Sierra Preservation Council*—has the Court discussed the *Lucas* standard, both times rejecting its applicability.⁸⁵

In academic writing, the disparity of interest is even more pronounced. Since the 1960s, regulatory takings jurisprudence has been a central focus of scholarly interest, while writing about physical takings has been comparatively rare.⁸⁶ The resulting body of scholarship is rich, with authors tackling questions like when compensation for regulatory burdens will lead to economically efficient decisions by regulators and private actors,⁸⁷ how

82. See *infra* Appendix I. This category includes three land use regulation cases—*Agins v. City of Tiburon*, 477 U.S. 255 (1980); *MacDonald, Sommer & Frates v. County of Yolo*, 477 U.S. 340 (1986); and *City of Monterey v. Del Monte Dunes at Monterey*, 526 U.S. 687 (1999)—which the Court resolved without actually applying a regulatory takings standard, but which would have produced regulatory takings decisions had it proceeded to the merits.

83. This number would rise to eleven if one includes *Nollan* and *Dolan*, both of which I have placed in a separate category of exactions cases.

84. See *Murr v. Wisconsin*, 137 S. Ct. 1933, 1942–43 (2017); *Lingle v. Chevron U.S.A.*, 544 U.S. 528, 538–39 (2005); *Tahoe-Sierra Pres. Council v. Tahoe Reg'l Plan. Agency*, 535 U.S. 302, 321 (2002).

85. *Tahoe-Sierra Pres. Council*, 535 U.S. at 325–32; *Palazzolo v. Rhode Island*, 533 U.S. 606, 622 (2001).

86. For rare examples of recent physical takings scholarship, see *infra* Appendix I.

87. See generally, e.g., Daryl J. Levinson, *Making Government Pay: Markets, Politics, and the Allocation of Constitutional Costs*, 67 U. CHI. L. REV. 345 (2000) (questioning claims that takings doctrine forces government to think more carefully about the economic impacts of regulation); Lawrence Blume & Daniel L. Rubinfeld, *Compensation for Takings: An Economic Analysis*, 72 CALIF. L. REV. 569 (1984) (exploring efficiency arguments for and against compensation for regulatory takings); Lawrence Blume, Daniel L. Rubinfeld & Perry Shapiro, *The Taking of Land: When Should Compensation Be Paid?*, 99 Q.J. ECON. 71, 90–91 (1984) (analyzing the efficiency of paying compensation for land taken through eminent domain).

regulatory takings doctrine can (or cannot) be squared with the Constitution's text and original meaning,⁸⁸ how regulatory takings doctrine fits with public choice theories of political decision-making,⁸⁹ and how to reconcile regulatory takings jurisprudence with basic theories of property – among other topics.⁹⁰ This Article will not resolve any of these debates, though it should inform them, and for present purposes, the key point is that academic inquiry has gravitated to the intellectual challenges of regulatory takings.

Closely related to – and perhaps explaining – the emphasis on *Penn Central* is another theme: takings doctrine, many

88. See generally, e.g., RICHARD A. EPSTEIN, *TAKINGS: PRIVATE PROPERTY AND THE POWER OF EMINENT DOMAIN* (1985); Michael B. Rappaport, *Originalism and Regulatory Takings: Why the Fifth Amendment May Not Protect Against Regulatory Takings, but the Fourteenth Amendment May*, 45 *SAN DIEGO L. REV.* 729 (2008) (arguing that the Takings Clause may have a dual original meaning); Eric R. Claeys, *Takings, Regulations, and Natural Property Rights*, 88 *CORNELL L. REV.* 1549 (2003) (examining insights from nineteenth-century cases into the original meaning of the Takings Clause); John F. Hart, *Land Use Law in the Early Republic and the Original Meaning of the Takings Clause*, 94 *NW. U. L. REV.* 1099 (2000) (comparing the history of land use law in founding era with modern expansive readings of the Takings Clause); John F. Hart, *Colonial Land Use Law and Its Significance for Modern Takings Doctrine*, 109 *HARV. L. REV.* 1252 (1996) (arguing that colonial land use regulation would have been inconsistent with more expansive modern interpretations of the Takings Clause); William Michael Treanor, *The Original Understanding of the Takings Clause and the Political Process*, 95 *COLUM. L. REV.* 782 (1995) (arguing that political-process-based historical understandings of the Takings Clause argue against granting compensation for regulatory restrictions on the use of property); William Michael Treanor, *The Origins and Original Significance of the Just Compensation Clause of the Fifth Amendment*, 94 *YALE L.J.* 694 (1985) (arguing that the emergence of constitutional takings restrictions reflected a shift from republican to liberal political ideologies).

89. See generally, e.g., Daniel A. Farber, *Public Choice and Just Compensation*, 9 *CONST. COMMENT.* 279 (1992) (examining economic analyses of takings, including how public choice theory may factor into the analysis); Saul Levmore, *Takings, Torts, and Special Interests*, 77 *VA. L. REV.* 1333 (1991) (arguing that takings law protects the least secure parties in political processes).

90. See generally, e.g., ERIC FREYFOGLE, *ON PRIVATE PROPERTY: FINDING COMMON GROUND ON THE OWNERSHIP OF LAND* (2007) (arguing that property derives from community and should be subject to community regulation); Timothy M. Mulvaney, *Property-as-Society*, 2018 *WIS. L. REV.* 911 (2018) (describing three classic theories of property and their implications for takings doctrine); Dave Owen, *Taking Groundwater*, 91 *WASH. U. L. REV.* 253 (2013) (applying multiple property theories to groundwater regulation); Margaret Jane Radin, *Property and Personhood*, 34 *STAN. L. REV.* 957 (1982); Frank I. Michelman, *Property, Utility, and Fairness: Comments on the Ethical Foundations of "Just Compensation" Law*, 80 *HARV. L. REV.* 1165, 1192 (1967) (using utilitarian property theory to develop takings doctrine); see generally GREGORY S. ALEXANDER & EDUARDO M. PEÑALVER, *AN INTRODUCTION TO PROPERTY THEORY* (2012) (discussing different property theories and their implications, including implications for regulatory takings).

commentators agree, is a mess.⁹¹ For many scholars, the origins of that messiness lie in the indeterminacy of the *Penn Central* framework.⁹² *Penn Central* provides three broad factors for courts to consider without specifying rules for applying any of those factors, or for establishing their relative weights.⁹³ The consequence, many commentators allege, is an unpredictable totality-of-the-circumstances test.⁹⁴ Other scholars have argued that *Penn Central*'s indeterminacy is more symptom than cause, and that the real root of the confusion is conflicting notions about the ends takings doctrine—and property law more generally—should serve.⁹⁵ But even as commentators ascribe the confusion to different causes, it has long been commonplace to describe regulatory takings doctrine as a muddle.

One might expect the Supreme Court to have risen to the defense of its much-maligned takings jurisprudence, but it has not really done so. Although the Supreme Court has repeatedly reaffirmed the *Penn Central* framework, it has never offered particularly vigorous defenses of that standard.⁹⁶ Nor has it tried to articulate a foundational theory that lends broader coherence to its takings jurisprudence. Instead, on multiple occasions, the Court has remarked on its own struggles to arrive at predictable and just standards for resolving takings cases.⁹⁷ Its decisions convey the impression that *Penn Central*'s affirmers have adhered to the standard not because they particularly like it, but because they have not been able to come up with something better.

91. *E.g.*, Byrne, *supra* note 3, at 102 (“The regulatory takings doctrine has generated a plethora of inconsistent and open-ended formulations that have failed to make sense of the underlying constitutional impulse.”).

92. *See, e.g.*, Doremus, *supra* note 7, at 7 (asserting that the Court’s “decisions since *Penn Central* have sown nothing but confusion.”).

93. *Penn Cent. Transp. v. New York City*, 438 U.S. 104, 124 (1978).

94. *See, e.g.*, John D. Echeverria, *Making Sense of Penn Central*, 23 *UCLA J. ENV'T L & POL'Y* 171, 175 (2005) (stating that the test has served as “legal decoration for judicial rulings based on intuition”).

95. *See, e.g.*, Rose, *supra* note 9, at 593 (describing tensions between wealth-acquisition and civic-virtue-based conceptions of property law); Sax, *supra* note 9, at 37–38 (describing tensions that long predate *Penn Central*).

96. Perhaps the strongest judicial defense comes from *Murr*. Justice Kennedy’s opinion for the Court noted that takings standards—particularly *Penn Central*—give courts “flexibility” to balance important and competing policy concerns. *Murr v. Wisconsin*, 137 S. Ct. 1933, 1943 (2017).

97. *See* Byrne, *supra* note 3, at 102–03 (quoting some of the less-than-stirring ways in which the Court has described its own standards).

The handwringing, or worse, over the *Penn Central* standard stands in contrast to the Court's and scholars' discussions of non-*Penn Central* takings. In those realms, the Court has rarely critiqued its own doctrine, and its passing statements often suggest that the law of physical takings "involves the straightforward application of *per se* rules."⁹⁸ There are hints of a different view. In *Arkansas Game & Fish Commission v. United States*, for example, a unanimous Court rejected using categorical rules to govern cases arising from temporary flooding, and it instead adopted a multi-part standard resembling the *Penn Central* test.⁹⁹ Implicit in that choice of a multi-part standard is an acknowledgment that physical takings might not be as simple as the Court usually suggests. Similarly, some academic writing has argued that the realm of physical takings involves underappreciated complexities.¹⁰⁰ And some older work suggests that basic questions about what constitutes property—an issue that cuts across all types of takings claims—deserve more attention than they traditionally receive.¹⁰¹ But for the most part, both Supreme Court decisions and academic analyses convey the impression that takings is a muddle because *regulatory* takings doctrine is a muddle. For other takings, one would think, the courts have their house in order, litigants know what to expect, and the cases do not come up often enough to matter all that much.

2. The political stories and stakes

A second recurring theme of takings jurisprudence and scholarship is that takings doctrine is centrally important to the relationships between property owners and the state. Ordering these relationships is one of the most contentious political issues of our time, and scholars, judges, and policymakers disagree profoundly about the degree to which regulation should constrain individual uses of property. But whatever their views about the appropriate degree of regulation, commentators appear to agree that takings doctrine will play an important role in resolving the disputes.

98. *Brown v. Legal Found. of Wash.*, 538 U.S. 216, 233 (2003) (quoting *Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Plan. Agency*, 535 U.S. 302, 321–323 (2002).); see *Tahoe-Sierra Pres. Council*, 535 U.S. at 324 (describing physical takings as "easily identified").

99. *Ark. Game & Fish Comm'n v. United States*, 568 U.S. 23, 38–40 (2012).

100. See *supra* note 31 (citing articles that explore this complexity).

101. See *Merrill*, *supra* note 31.

On the conservative side, the view that takings doctrine should be centrally important received its most famous and influential exposition in Richard Epstein's book *Takings*.¹⁰² Drawing together arguments grounded in constitutional originalism, economics, and political theory, Epstein argued that essentially any government action that goes beyond traditional common-law tort and property doctrines and limits uses of private property or redistributes wealth—including taxation—is a taking.¹⁰³ He coupled those assertions with a call to action, arguing that judges should boldly employ the takings clause to limit all kinds of regulations.¹⁰⁴

For the most part, legal scholars dismissed Epstein's work (one reviewer described it as "a travesty of constitutional scholarship").¹⁰⁵ But in political and judicial realms, Epstein's ideas caught fire.¹⁰⁶ In an often-quoted passage, Charles Fried, who was Solicitor General in the Reagan Administration, explained,

Attorney General Meese and his young advisors—many drawn from the ranks of the then fledgling Federalist Societies and often devotees of the extreme libertarian views of Chicago law professor Richard Epstein—had a specific, aggressive, and, it seemed to be, quite radical project in mind: to use the Takings Clause of the Fifth Amendment as a severe brake upon federal and state regulation of business and property. The grand plan was to make government pay . . . for a taking . . . every time its regulations impinged too severely on a property right If the government labored under so severe an obligation, there would be, to say the least, much less regulation.¹⁰⁷

In subsequent years, this effort broadened to become something its opponents labeled "the takings project."¹⁰⁸ Supported by conservative foundation money, non-profit law firms like the Pacific Legal Foundation sought out promising cases to litigate and appeal, often bringing their claims all the way to the Supreme

102. EPSTEIN, *supra* note 88.

103. *Id.*

104. See Richard A. Epstein, *Judicial Review: Reckoning on Two Kinds of Error*, 4 CATO J. 711, 715–18 (1985).

105. Thomas C. Grey, *The Malthusian Constitution*, 41 U. MIAMI L. REV. 21, 24 (1986).

106. See Kendall & Lord, *supra* note 3, at 528–30.

107. CHARLES FRIED, *ORDER AND LAW: ARGUING THE REAGAN REVOLUTION—A FIRSTHAND ACCOUNT* 183 (1991) (footnotes omitted).

108. Kendall & Lord, *supra* note 3.

Court.¹⁰⁹ They often found sympathetic audiences in judges appointed partly because of their anti-regulatory bona fides.¹¹⁰ The results, during the 1980s and 1990s, were a series of Supreme Court and federal appellate victories for takings litigants¹¹¹ and a broader sense that a coordinated movement was underway, and that its ambitious goal was to use takings litigation to take down the regulatory state.¹¹²

As one might expect, that project has many critics.¹¹³ At a conceptual level, critics argue that takings activism rests on a theoretically flawed conception of property. To libertarian-leaning takings activists, property rights are, fundamentally, entitlements to exploit land or other resources without governmental restraint, and these broad entitlements exist because property is a natural and pre-political right.¹¹⁴ To many other property theorists, however, those claims are nonsense. Property, they argue, exists and holds value because it is created and protected by a political community,¹¹⁵ and therefore that community should have the ability to use democratic processes to adjust the terms under which property is held and used.¹¹⁶ Critics also point out that the libertarian ideals underpinning property rights activism overlook the interconnectedness of property.¹¹⁷ The regulations that spawn takings cases, they argue, often arise because uses of

109. *Id.* at 511, 541–45; see Oliver A. Houck, *More Unfinished Stories: Lucas, Atlanta Coalition, and Palila/Sweet Home*, 75 U. COLO. L. REV. 331, 344–47 (2004).

110. See Kendall & Lord, *supra* note 3, at 533–38.

111. *E.g.*, Lucas v. S.C. Coastal Council, 505 U.S. 1003 (1992); Nollan v. Cal. Coastal Comm'n, 483 U.S. 825 (1987); First Eng. Evangelical Lutheran Church of Glendale v. Cnty. of L.A., 482 U.S. 304 (1987) (opening temporary regulatory restrictions up to takings claims); Loveladies Harbor, Inc. v. United States, 28 F.3d 1171 (Fed. Cir. 1994) (upholding a finding that denial of a wetlands permit caused a taking).

112. See Kendall & Lord, *supra* note 3, at 542 (“As PLF founder and past-President Ronald Zumbun boasted, ‘[w]e see the ‘90s as our decade. . . . We have the weapons. . . .’”).

113. In addition to the critiques described below, critics argue that the takings project reflects poor historical and constitutional interpretation. See *supra* note 88 and accompanying text (compiling sources).

114. See Mulvaney, *supra* note 90, at 914–15; Joseph William Singer, *The Ownership Society and Takings of Property: Castles, Investments, and Just Obligations*, 30 HARV. ENV'T. L. REV. 309, 312 (2006) (describing these views).

115. *E.g.*, Rose, *supra* note 9, at 595 (“The concept of a prepolitical property right is problematic, primarily because it fails to address the question of what it means to ‘own’ anything in the absence of the community’s protection.”).

116. See, *e.g.*, Eric T. Freyfogle, *Property and Liberty*, 34 HARV. ENV'T. L. REV. 75, 114–16 (2010).

117. See *id.* at 79–84.

regulated property were harming private or public interests in other property, leaving the government no choice but to serve as referee.¹¹⁸

Adding to these theoretical critiques is a distributional concern: that takings litigation empowers relatively wealthy interests at the expense of everyone else. By definition, successful takings plaintiffs must have property, and they must have enough of it that bringing litigation for lost value is worthwhile. That means, according to critics, that takings litigation is primarily about empowering the wealthy.¹¹⁹ For basic equity reasons, that seems problematic. It also creates challenges for some of the theories underlying takings doctrine. One ostensible goal of takings is to protect individuals who have been unfairly singled out by political processes.¹²⁰ But affluent property owners, as multiple commentators have pointed out, seem unlikely to be the sort of repeat losers about which political process theories tend to be concerned.¹²¹ Instead, they seem to do quite well in politics, which arguably makes takings victories more likely to be gratuitous handouts than compensation for political victimization.¹²²

Of course, the proponents of takings litigation have responses to these critiques. In their view, takings litigation does indeed pit the disempowered against the establishment, but the roles are reversed. The Goliath, in their account, is government regulation – the “green machine,” in David Lucas’s memorable phrase – and the plaintiffs are individuals gamely standing against the colossus.¹²³ In these accounts, then, takings litigation serves several key

118. *E.g.*, Joseph L. Sax, *Takings, Private Property and Public Rights*, 81 *YALE L.J.* 149, 153 (1971) (noting how many takings cases involving competing property claims).

119. *See, e.g.*, Houck, *supra* note 109, at 334–36 (describing David Lucas as a successful and politically-connected developer); *id.* at 348 (describing the powerful interests that actively supported Lucas’s case).

120. *See Pennell v. City of San Jose*, 485 U.S. 1, 22–24 (1988) (Scalia, J., dissenting) (arguing that the takings clause prevents governments from achieving their regulatory goals “off budget” and at the expense of particular individuals).

121. *See Byrne, supra* note 3, at 129 (“Invoking [political process arguments] to defend the regulatory takings doctrine would, however, be ludicrous.”); Kendall & Lord, *supra* note 3, at 584 (raising similar concerns).

122. *See Byrne, supra* note 3, at 129 (“Real property ownership in the United States is very widely dispersed, and property owners have the means to be – and are – very politically active in defense of their interests.”).

123. DAVID LUCAS, *LUCAS VS. THE GREEN MACHINE* (Lorna Bolkey, Josh Warren & Pat Hutchison Roberts, eds., 1st ed., 1995).

functions. It provides some compensation to individual plaintiffs who have been unfairly “singled out” by warped political processes.¹²⁴ And it also provides important financial incentives for government, which otherwise would exercise its regulatory power with overweening indifference, to take the costs of regulatory oversight into account.¹²⁵

Obviously, the disagreements among these positions are significant. Yet all share a common conviction that takings litigation is the courtroom locus for important debates about the appropriate scope and reach of regulatory governance. That seems like a plausible position; if regulatory takings doctrine is the predominant form of takings litigation, and the core question in regulatory takings litigation is when government has gone “too far,”¹²⁶ then one would expect takings cases to be at the center of disputes over regulation. Consequently, whether participants in takings disputes argue in favor of or against that role, they tend to assume that a central role presently exists.

II. METHODOLOGY

To test this conventional wisdom, I created a data set of takings cases filed in the Court of Claims between January 1, 2000, and December 31, 2014. I chose the Court of Claims because Bloomberg’s database of dockets (which draws on the federal courts’ PACER system) is nearly comprehensive for that period, and because my research assistant and I were unable to identify any similarly comprehensive and searchable database of state court complaints. I chose the 2000–14 period because I expected the availability of pre-2000 electronic documents to be inconsistent and because cases filed more recently than 2014 are likely to be unresolved.

I compiled the data set by searching for (a) dockets for cases that Bloomberg classified as inverse condemnation, and (b) dockets that

124. See *Pennell*, 485 U.S. at 22–24 (Scalia, J., dissenting); *Loveladies Harbor, Inc. v. U.S.*, 28 F.3d 1171, 1175 (Fed. Cir. 1994) (stating that a regulatory takings case “requires us to decide which collective rights are to be obtained at collective cost, in order better to preserve collectively the rights of the individual”).

125. See *Pennell*, 485 U.S. at 22–24 (Scalia, J., dissenting).

126. *Pa. Coal Co. v. Mahon*, 260 U.S. 393, 415 (1922).

came up through keyword searches.¹²⁷ For each of those cases, I reviewed—to the extent they were available through Bloomberg or Westlaw—complaints and substantive court orders. I also reviewed briefs, status reports, and other documents, to the extent that reviewing them helped me determine the nature and disposition of the case. I also reviewed settlements, which I obtained through Bloomberg’s databases and through FOIA requests to the Department of Justice. The resulting data set probably does not include every takings case filed in the Court of Federal Claims during this period,¹²⁸ but it should come close, and I am not aware of any way in which the omissions would bias the resulting sample.

For each case, a research assistant and I recorded the plaintiffs and coded for plaintiff type, dividing the plaintiffs into (a) individuals and married couples, (b) government entities, (c) non-profit entities, (d) privately held businesses, and (e) publicly traded companies. I also counted the total number of plaintiffs involved in each case. Additionally, we coded whether companies were on Forbes’ Fortune 500 or Fortune 1000 lists at the time cases were filed. We also recorded the law firm (or solo practice) representing the plaintiffs and coded whether that firm had a Chambers Ranking¹²⁹ and, if so, whether it was ranked nationally or just regionally.¹³⁰ The goal of these classifications was to determine who tends to bring takings claims and, more precisely, whether the clients and lawyers are part of what one might consider a business and legal establishment.¹³¹

127. This search produced over 800 dockets. Some cases produced multiple dockets, which explains why the total number of cases in my sample is significantly less than the total number of dockets.

128. Cases likely to fall through the cracks would have two features: they would not be classified by Bloomberg as takings cases (which sometimes occurs when takings and breach-of-contract claims appear in the same case), and their dockets would not be text-searchable (which is more common with cases filed early in my study period).

129. See *Find the Top Lawyers and Law Firms in the Chambers USA Guide*, CHAMBERS AND PARTNERS, <https://chambers.com/guide/usa?publicationTypeId=5> (last visited Oct. 14, 2021) (describing the rankings, which the Chambers bills as a guide to America’s leading lawyers for business). Because firm status could change over the period during which cases filed between 2000 and 2014 were litigated, I used rankings from 2003–04, 2009, and 2015.

130. For this purpose, I defined a national ranking as either receiving a nationwide ranking or being ranked in at least three different geographic markets.

131. These are not terms of art, of course. Here, I am just using “establishment” to refer to particularly powerful and wealthy institutions.

I also recorded several data points about the nature of the takings claim, including the general category of claim being brought, the government agency (if there was one) whose actions precipitated the takings claim, and whether the claim generated a *Penn Central* or *Lucas* analysis. I initially began recording whether the claim was for a physical or regulatory taking, but plaintiffs often did not specify, and for some claims, the classification a court might use was unclear, contested, or both. Most claims, however, fell into categories that clearly qualify as physical takings, even if the plaintiffs never specified that classification in their filings.

I also recorded the dispositions of cases. Specifically, I recorded which party or parties prevailed, the basis on which they prevailed, and, if at least some of the plaintiffs prevailed, the amount of just compensation and attorneys' fees (both normalized to 2020 dollars) they and their lawyers received.

Finally, I combined this analysis with more traditional and qualitative legal research, which meant reviewing decisions and other documents¹³² to identify recurring issues and to understand and critique the courts' reasoning.

This methodology creates several important limitations. First, readers should be aware that I could not obtain about ten percent of the settlements, generally because they had not been filed in court and the Department of Justice was unable to find the files. I also was not able to obtain any documentation for a few cases, which typically were pro se cases filed early in the study period. Even within the pool of cases for which I was able to obtain documentation, the numbers are likely to have some minor errors, which derive from challenges like the difficulty of extrapolating total numbers of plaintiffs from a series of different complaints, none of which provides on its own a complete record of the number of participants in a case. Finally, some cases filed before 2014 have not reached a final resolution. Consequently, readers should view the numbers in the section that follows as strong approximations, not as exact and error-free totals.

A second limitation, which I have already mentioned, is that a study of takings claims against the federal government sheds limited light on the nature of takings litigation against state and

132. The other documents category includes complaints, briefs, status reports, and other filings that helped me determine what issues cases raised and how they were resolved.

local governments. The two areas of litigation aren't entirely disconnected; the Court of Federal Claims ostensibly applies the same body of constitutional law that state and local governments apply,¹³³ and federal government activity overlaps with many areas of state and local activity.¹³⁴ That is even true of land use regulation, which the Supreme Court has described as a "quintessential" state and local government function.¹³⁵ The federal government also engages in a huge amount of land use management and regulation, partly through its ownership and management of vast swaths of land,¹³⁶ partly as a builder or sponsor of infrastructure,¹³⁷ and partly through environmental regulatory programs.¹³⁸ So while one might expect federal, state, and local takings cases to emphasize different areas of government activity, there also should be substantial overlap. Nevertheless, I do not argue that my conclusions about federal-court litigation should be assumed to generalize to state courts.

Third, a study of takings cases cannot identify impacts that occur outside the courtroom. For example, my data do not reveal how many cases were never filed because potential plaintiffs thought governing legal standards were too unfavorable. Neither do they reveal government actions that never were taken or were modified because of the deterrent effect of potential takings claims. Nor do they reveal ways in which takings cases may have influenced political discourse, perhaps by affecting understandings

133. *But see* Krier & Sterk, *supra* note 12, at 56 ("[C]ourts do not know or understand Supreme Court doctrine, or willfully ignore it or interpret it as having significant play in the joints.").

134. *See* Heather K. Gerken, *Federalism 3.0*, 105 CALIF. L. REV. 1695, 1698 (2017) (arguing the federalism theories premised on separate state and federal roles are largely obsolete).

135. *Federal Energy Regulatory Commission v. Mississippi*, 456 U.S. 742, 768 n.30 (1982).

136. *See generally* John D. Leshy, *Public Land Policy After the Trump Administration: Is This a Turning Point?*, 31 COLO. NAT'L RES., ENERGY & ENV'T L. REV. 471 (2020) (describing the amount of publicly owned land and the agencies that manage it).

137. *See generally* HUNTER BLAIR, ECON. POL'Y INST., WHAT IS THE IDEAL MIX OF FEDERAL, STATE, AND LOCAL GOVERNMENT INVESTMENT IN INFRASTRUCTURE? (2017) (describing federal involvement in infrastructure development).

138. *See, e.g.,* Dave Owen, *Regional Federal Administration*, 63 UCLA L. REV. 58, 81-82 (2016) (describing Clean Water Act section 404 permitting); Patricia E. Salkin, *The Quiet Revolution and Federalism: Into the Future*, 45 J. MARSHALL L. REV. 253, 277-96 (2012) (providing an overview of federal regulatory programs that affect land use); J.B. Ruhl, *How to Kill Endangered Species, Legally: The Nuts and Bolts of Endangered Species Act "HCP" Permits for Real Estate Development*, 5 ENV'T. LAW. 345 (1999) (describing Endangered Species Act permitting).

of what property is and what it means to exercise ownership. A database from cases can be revealing, in other words, but it falls short of illuminating everything that might be interesting or important about takings doctrine.

III. QUANTITATIVE RESULTS

This Part summarizes the quantitative results of my inquiry. As it explains in detail, there are some ways in which takings litigation before the Court of Federal Claims and the Federal Circuit corresponds with conventional wisdom, but there are other ways in which it is different—sometimes dramatically so.

A. Numbers and Types of Cases and Plaintiffs

Both academic and Supreme Court writing suggest that takings jurisprudence should be dominated by regulatory takings claims.¹³⁹ That expectation seems consistent with some of the classic narratives of takings litigation, which emphasize the role of takings in checking the regulatory state, and with judicial rhetoric describing the federal government’s regulatory apparatus as a growing and far-reaching behemoth.¹⁴⁰ But numbers of takings cases and plaintiffs tell a different story.¹⁴¹

Before the Court of Federal Claims, physical takings cases are much more abundant than regulatory takings cases. The most abundant category of takings cases, by far, involves rails-to-trails conversions, which Part IV discusses in more detail. Without exception, these are physical takings cases. Similarly, the third-

139. See *supra* notes 77–81 and accompanying text.

140. See, e.g., *Free Enter. Fund v. Pub. Co. Acct. Oversight Bd.*, 561 U.S. 477, 499 (2010) (describing “[t]he growth of the Executive Branch, which now yields vast power and touches almost every aspect of daily life”); *Gutierrez-Brizuela v. Lynch*, 834 F.3d 1142, 1149 (10th Cir. 2016) (Gorsuch, J., concurring) (warning of deference doctrines that allegedly allow “executive bureaucracies to swallow huge amounts of core judicial and legislative power and concentrate federal power”).

141. Before delving into the numbers, one clarification about my counting methodologies may be helpful. While I searched for cases by docket numbers and initially did a docket-by-docket review of cases, the numbers that appear below are not based on numbers of case dockets. Instead, the number of cases treats a set of consolidated cases against a government action as a single case, and the number of plaintiffs counts each distinct plaintiff separately (treating family units as single plaintiffs). I did this because the numbers most likely to be of interest are (a) how many cases were litigated, and (b) how many plaintiffs were involved, and docket numbers correspond poorly to both of those metrics.

sixth-, and seventh-most numerous categories of cases also involve physical takings claims, and the fourth-most abundant category – water rights cases – often involves plaintiffs trying to characterize regulatory restrictions as physical takings.

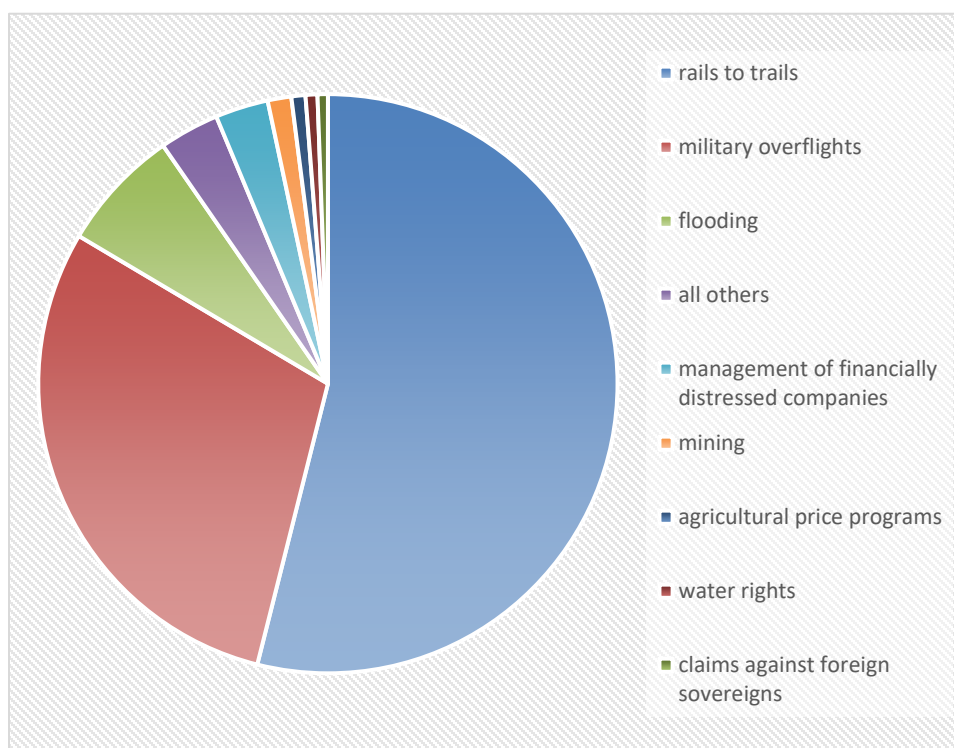
TABLE 1: CASE NUMBERS BY CATEGORY

Category of Case	Number of Cases
Rails-to-trails conversions	108
Mining regulation	44
Flooding allegedly caused by government infrastructure	35
Water rights	19
General public lands	19
Military overflights	14
Regulatory permitting	14
Erosion or avulsion allegedly caused by government action	13
Intellectual property	12
Government management of financially distressed companies	11
Military operations (non-overflight)	11
Contaminated site cleanup	10
Seizure or civil forfeiture associated with prosecutorial action	10
Agricultural price program regulation	7
Extinguishment of claims against foreign sovereigns	7
Air traffic regulation	7
Contract breach	7
Tribal resources	6
Forest fire damage	6
Unauthorized maintenance of air traffic control towers	5
Food safety regulation	4
Other	69
Unclear	27

The disparity becomes even more striking when one considers the number of plaintiffs bringing cases rather than the number of

cases litigated. As Figure 1 shows, for my pool of cases, almost ninety percent of the plaintiffs fall into three categories: rails-to-trails conversions, military overflights, and flooding. The rails-to-trails cases alone account for more than half of the plaintiffs. All of these plaintiffs are filing physical takings claims. Some of the remaining categories, like mining regulation, generally involve regulatory takings claims, and in others, like the water rights cases and the cases arising from post-2008 governmental management of Fannie Mae and Freddie Mac, the method of takings analysis is contested.¹⁴² But in the aggregate, the number of regulatory takings plaintiffs is relatively small.

FIGURE 1: PLAINTIFFS BY CASE CATEGORY



Total n = 11,693

Another measure captures the rarity of classic regulatory takings analyses. Of over 400 cases in the overall pool, I found just

142. See *infra* Part IV.

twenty-three in which a court actually applied a *Lucas* or *Penn Central* standard, or in which those standards obviously would have factored into a settlement. Those cases collectively involve 366 plaintiffs, but 299 of those plaintiffs are involved in just two cases, both brought by car dealerships arguing (unsuccessfully) that the federal government took their property when, during the Great Recession, it induced auto companies to terminate some of their franchise arrangements.¹⁴³ In addition to these cases, there are many others that might have turned on a *Penn Central* analysis if they had reached the merits, but instead were voluntarily dismissed (often for unclear reasons) or dismissed as time-barred, because of 28 U.S.C. section 1500, or on some other pre-merits basis.¹⁴⁴ There are also some cases in which incomplete records or incoherent complaints make it difficult to assess whether the plaintiffs anticipated application of regulatory takings standards.¹⁴⁵ But even accounting for those cases, classic regulatory takings cases are rare, and regulatory takings analyses are rarer still.

The data set also allows approximate quantification of the merits questions that are being litigated instead of *Penn Central* and *Lucas* questions. Most notably, an issue that comes up more often than either *Penn Central* or *Lucas* is whether the plaintiff actually holds a property interest in the thing allegedly taken by the government.¹⁴⁶ Within my overall pool of cases, forty-nine were dismissed for this reason, and an uncertain but non-trivial number

143. See *A & D Auto Sales, Inc. v. United States*, 748 F.3d 1142, 1159 (Fed. Cir. 2014) (rejecting a motion to dismiss the car dealership cases but holding that the plaintiffs would need to demonstrate a loss of economic value); *Colonial Chevrolet Co. v. United States*, 145 Fed. Cl. 243, 249 (2019) (holding that the United States did not compel Chrysler to reject the franchise agreements and that those agreements would have had no value but for the United States' intervention).

144. Specifically: forty-nine cases were voluntarily dismissed; thirty-nine were dismissed because the statute of limitations had run; twelve were dismissed because of 28 U.S.C. section 1500; and nine were dismissed on ripeness grounds. For a few of these cases, the Court of Federal Claims offered multiple reasons for the dismissal.

145. See *infra* note 311 and accompanying text.

146. See, e.g., *Bair v. United States*, 515 F.3d 1323, 1327–30 (Fed. Cir. 2008) (evaluating whether a plaintiff could have a property interest in the priority of a lien); *Air Pegasus of D.C., Inc. v. United States*, 424 F.3d 1206, 1217–18 (Fed. Cir. 2005) (considering whether helicopter operator could have property rights in the use of navigable airspace); *Members of Peanut Quota Holders Ass'n v. United States*, 421 F.3d 1323 (Fed. Cir. 2005) (considering whether peanut quotas are constitutionally protected property); *Snyder & Assocs. Acquisitions LLC v. United States*, 133 Fed. Cl. 120, 125–26 (2017) (considering whether a business could have a property interest in an electronic filing identification number issued by the IRS).

of successful plaintiffs needed to navigate this issue before obtaining a favorable court judgment or settlement.¹⁴⁷

B. Who Gets Paid

In addition to tracking which categories of cases and plaintiffs are most abundant, the data also reveal which kinds of cases and plaintiffs tend to succeed and what sort of payouts different types of claims produce.

Table 3, below, summarizes the success rates for cases and for individual plaintiffs. Several main findings emerge from these data. First (and consistent with prior findings and conventional wisdom), physical takings claims produce particularly high success rates. For some categories, those rates may just be artifacts of small sample sizes. But for some categories—particularly rails-to-trails and military overflights—the sample sizes are large, and the success rates clearly are not flukes. Likewise, in some large categories of predominantly regulatory classifications—mining cases are the most notable example—plaintiffs’ success rates are very low. In fact, the entire pool includes just four successful regulatory takings claims.¹⁴⁸ Not all categories of physical takings cases produce that sort of success; the flooding cases, for example, have produced a few plaintiff successes along with many losses, with many claims not yet resolved.¹⁴⁹ Likewise, while plaintiffs in water rights cases have succeeded, sometimes improbably, in convincing courts to use physical takings analyses, they still have often lost their cases.¹⁵⁰ But in general, physical takings plaintiffs aren’t just more abundant; they also win much more.

147. See, e.g., *A & D Auto Sales*, 748 F.3d at 1152–53 (holding that “franchise agreements are valid and compensable property interests”).

148. Those cases are *Plantation Development, Ltd. v. United States*, Docket No. 1:12-cv-00839 (Fed. Cl. Dec. 6, 2012); *Lost Tree Village Corp. v. United States*, 787 F.3d 1111, 1113 (Fed. Cir. 2015); *Made in Detroit, Inc. v. United States*, No. 1:06-cv-00457 (Fed. Cl. Jun 09, 2006); and *Wyatt v. United States*, 271 F.3d 1090, 1092 (Fed. Cir. 2001); see also *Wyatt v. United States*, Docket No. 1:02-cv-00945 (Fed. Cl. Aug. 7, 2002).

149. See, e.g., *Ark. Game & Fish Comm’n v. United States*, 736 F.3d 1364, 1367 (Fed. Cir. 2013) (affirming an award in favor of the plaintiff); *Alford v. United States*, 961 F.3d 1380 (Fed. Cir. 2020) (rejecting the flooding-based claims of lakefront property owners).

150. See *infra* Section IV.B.

TABLE 2: SUCCESS RATES

Category	# cases	successful cases	pending or unknown	case success rate	# plaintiffs	successful plaintiffs	pending or unknown	Ps' success rate
border security	2	2	0	1.00	11	11	0	1.00
flood control infrastructure	2	2	0	1.00	2	2	0	1.00
military overflights	14	6	1	0.46	3393	3290	1	0.97
erosion/avulsion	13	3	7	0.50	47	4	42	0.80
air traffic control towers	5	4	0	0.80	9	6	0	0.67
rails to trails	108	80	14	0.84	6182	3610	595	0.65
federal property leasing	3	1	1	0.50	4	1	2	0.50
contaminated site cleanup	10	3	1	0.33	14	5	1	0.38
fire	6	1	0	0.17	24	5	0	0.21
regulatory permitting	14	3	1	0.23	17	3	1	0.19
military operations (non-overflight)	11	4	0	0.36	33	4	0	0.12
food safety regulation	4	1	0	0.25	32	2	0	0.06
flooding	35	9	6	0.31	784	16	514	0.06
other	60	4	0	0.07	229	9	0	0.04
mining	44	1	1	0.02	151	1	1	0.01
2008 recession - govt. mgmt. of companies	4	0	0	0.00	299	0	0	0.00
agricultural price programs	7	0	0	0.00	90	0	0	0.00
water rights	19	0	1	0.00	76	0	4	0.00
claims against foreign	7	0	0	0.00	66	0	0	0.00

sovereigns								
general public lands	19	0	1	0.00	46	0	1	0.00
tribal resources	6	0	1	0.00	38	0	1	0.00
unclear	27	0	5	0.00	47	0	15	0.00
intellectual property	12	0	0	0.00	24	0	0	0.00
air traffic regulation	7	0	0	0.00	13	0	0	0.00
seizure or civil forfeiture	10	0	0	0.00	11	0	0	0.00
landownership disputes	2	0	0	0.00	9	0	0	0.00
contract breach (not FmHA or nuclear waste)	7	0	0	0.00	8	0	0	0.00
Fannie Mae - Freddie Mac	7	0	7		40	0	40	

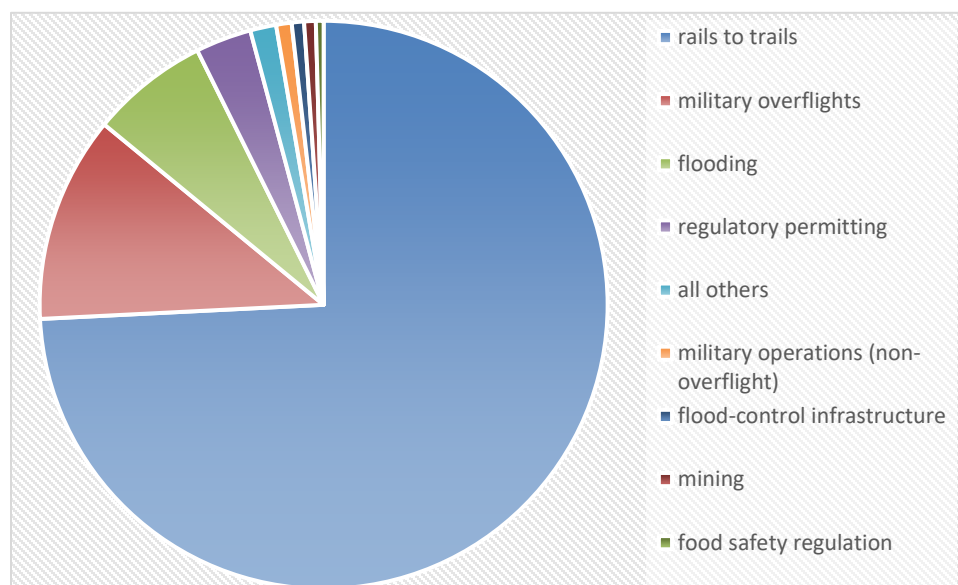
Financial outcomes tell a similar story. Close to ninety percent of the payments have been in physical takings cases, and nearly three-quarters of those payments have been in rails-to-trails cases.¹⁵¹ The fourth-largest category of payments is regulatory permitting cases, which fit the classic model of regulatory takings litigation, and those cases have produced returns disproportionate to their overall numbers. But even with those disproportionate

151. A judgment or settlement in a takings case typically includes three main elements: just compensation, prejudgment interest, and attorneys' fees and costs. To the extent possible, I have limited the numbers in payment charts to just compensation (normalized to 2020 dollars). However, some settlements describe a lump sum rather than separating out these three categories. For that reason, the actual amount of just compensation payments is likely to be modestly lower than the amounts in this chart.

Additionally, not all of the just compensation payments actually go to the plaintiffs. Attorneys often handle takings cases on a contingency-fee basis, so part of the takings award goes to the plaintiffs' attorneys (in addition to the statutory attorneys' fees). Occasionally the contingency fee becomes a litigation issue, and filed documents provide a window into the attorneys' payments. *See, e.g., Haggart v. Woodley*, 809 F.3d 1336 (Fed. Cir. 2016) (rejecting the use of common fund doctrine in a case governed by a statutory attorneys' fees provision). But for almost all cases, I have no data showing how plaintiffs and lawyers split just compensation awards.

payoffs, regulatory takings cases account for only about four percent of the overall payments.

FIGURE 2: JUST COMPENSATION PAYMENTS BY CASE CATEGORY



Total n = \$453,058,985

Boring into the financial return data reveals another contrast between case types. In general, regulatory takings plaintiffs – and flooding plaintiffs – succeed at much lower rates, but when they do prevail, they typically walk away with more money – though the winning cases form a very small sample. The non-flooding physical taking plaintiffs, in contrast, succeed at much higher rates, and their consolidated cases produce some huge verdicts, but individual plaintiffs take less. This is particularly striking with the military overflight cases, which involve thousands of plaintiffs whose average take – before the attorneys took whatever contingency fee they had negotiated – was just over \$16,000. Table 3, below, which includes the top ten most frequent case categories, captures this disparity.

TABLE 3: AVERAGE COMPENSATION FOR SUCCESSFUL PLAINTIFFS

Category	Plaintiffs' success rate	Average just compensation for successful plaintiffs (in 2020 dollars)
rails to trails	0.65	88,203
other	0.04	240,582
mining	0.01	2,990,684
flooding	0.06	1,901,047
water rights	0.00	NA
general public lands	0.00	NA
military overflights	0.97	16,172
erosion/avulsion	0.80	46,041
regulatory permitting	0.19	4,798,595
intellectual property	0.00	NA
military operations (non-overflight)	0.12	996,115

One clarifying point about these numbers is important. I have treated as successes cases in which plaintiffs prevailed on their takings claims or in which those claims appear to have been important drivers of a settlement. The category does not include cases in which the takings claims failed but the plaintiff still won the case, which sometimes occurs when plaintiffs are also bringing breach-of-contract claims.¹⁵² For example, many plaintiffs have argued that the federal government breached contracts and took property when it failed to take possession of nuclear power plants' spent nuclear fuel.¹⁵³ Within my pool of cases, none of those takings

152. See generally John Echeverria, *Public Takings of Public Contracts*, 36 VT. L. REV. 517 (2012). A few plaintiffs also achieved success through governmental actions not directly related to the litigation. See, e.g., Plaintiffs' Motion for Voluntary Dismissal with Prejudice Pursuant to RCFC 41(a)(2), *Acree v. United States*, No. 1:06-cv-00798 (Fed. Cl. Aug. 4, 2011) (explaining that the plaintiffs were dismissing their claims, which were based on actions that stopped them from litigating war crimes cases, because they had obtained relief through State Department action).

153. See Echeverria, *supra* note 152, at 520 (describing the spent nuclear fuel litigation).

arguments succeeded,¹⁵⁴ but some plaintiffs secured large sums through their breach-of-contract claims,¹⁵⁵ and that money is not included in these statistics.

Somewhat similarly, the pool also excludes cases arising out of housing projects funded by loans from the Farmers' Home Administration. Since the 1980s, hundreds of apartment building owners have brought takings and breach-of-contract claims after federal legislation took away their ability to prepay their Farmers' Home Administration loans.¹⁵⁶ Because prepaying those loans would have freed the apartment building owners to offer apartments at market rate, rather than as low-income housing, the denial of the prepayment option limited their revenues and compelled them to house different renters than they would have preferred.¹⁵⁷ Those cases have produced millions of dollars in settlements, and the takings claims in some of those cases theoretically remained live when the settlements occurred.¹⁵⁸ But the cases appear to have been driven primarily by the breach-of-contract theories; every type of damage claimed can be traced to the contractual breaches.¹⁵⁹ For that reason, I have left out the money produced by those settlements.

C. Who Litigates, and What Activities Generate Litigation

In addition to tracking case types and outcomes, I also collected data on the types of plaintiffs who filed cases, the types of law firms who represented them, and the federal agencies whose actions

154. See, e.g., *Niagara Mohawk Power Corp. v. United States*, 98 Fed. Cl. 313, 315-18 (2011) (rejecting the plaintiff's takings theories); but see *id.* at 316 n.4 (noting that a few courts had denied motions to dismiss spent-nuclear-fuel-related takings claims).

155. See, e.g., *Consolidated Edison Co. of N.Y. v. United States*, 676 F.3d 1331 (Fed. Cir. 2012) (partially reversing and partially upholding a breach-of-contract damages award).

156. See, e.g., *Franconia Assocs. v. United States*, 536 U.S. 129, 134-37 (2002) (summarizing the history that led to these claims).

157. See *id.*

158. See, e.g., *Henry Housing Ltd. P'ship v. United States*, 95 Fed. Cl. 250, 255 (2010) (allowing a takings claim and a breach-of-contract claim to proceed in parallel).

159. See *Sonoma Apartment Assocs. v. United States*, 124 Fed. Cl. 595, 600 (2015) (concluding that a takings claim had no viability independent of a breach of contract claim); see also Robert Meltz, *Takings Law Today: A Primer for the Perplexed*, 34 *ECOLOGY L.Q.* 307, 316 (2007) (describing the Federal Circuit's approaches to concurrently pled takings and contract claims).

triggered¹⁶⁰ takings litigation. In collecting these data, I had three primary goals. One was to assess the extent to which big business and big law are litigating takings claims, as a classic liberal critique of takings litigation might suggest. A second was to assess the extent to which takings implicates the central regulatory efforts of the administrative state. The third was to assess whether takings litigation instead is brought by the sort of singled-out individuals highlighted in the David-versus-Goliath narratives often cited by property rights advocates. There is some evidence consistent with each story and some that fits poorly with both.

1. The noninvolvement of big business and (mostly) big law

The most striking finding from this part of the analysis is the absence of big businesses. In the entire pool of cases, I found just seventeen in which a plaintiff was a publicly traded company and just three involving Fortune 1000 businesses. Even those numbers are somewhat deceptively high, for they include spent nuclear fuel cases, which ultimately were resolved on breach-of-contract theories rather than as takings, and rails-to-trails cases in which the business was just another property owner who opted into the lawsuit rather than an instigator of the case. At least for cases filed between 2000 and 2014, takings litigation before the Court of Federal Claims instead was the province of individuals, married couples, smaller businesses, churches, local governments, and even the occasional state. Big business, it appears, mostly left the field alone.

Similarly striking is the number of regulatory fields that appear largely untouched by takings litigation. The United States federal government, as the Supreme Court is fond of ominously noting, has great power and reach;¹⁶¹ hundreds of agencies regulate across a huge variety of fields.¹⁶² Yet the vast majority of those agencies

160. I use “trigger,” rather than “defend,” because in a takings case filed in the Court of Federal Claims and brought against the federal government, the named defendant always is the United States, which is represented by Department of Justice attorneys. Agencies also receive their authority through legislation, which sometimes leaves agencies with little or no discretion. Consequently, many takings-triggering events derive more from congressional than administrative choices.

161. See, e.g., *Free Enter. Fund v. Pub. Co. Acct. Oversight Bd.*, 561 U.S. 477, 499 (2010) (describing the “vast power” of the federal executive branch).

162. See *A–Z Index of U.S. Government Departments and Agencies*, <https://www.usa.gov/federal-agencies> (last visited Oct. 12, 2021).

were either untouched by takings litigation filed during the period of my study or were involved in only a tiny number of cases. And the cases those agencies trigger almost always involve physical infrastructure or military activity rather than regulatory oversight. EPA, for example, has emerged as the preferred *bête noir* of antiregulatory politicians and activists, yet it triggered only a handful of takings cases, almost all arising out of alleged physical takings of contaminated material at hazardous waste sites.¹⁶³ The intersection of the Endangered Species Act and takings litigation also has generated abundant academic concern,¹⁶⁴ yet for cases filed during the period covered by my study, the two agencies with primary responsibility for implementing the statute—the Fish and Wildlife Service and the National Marine Fisheries Service—defended only a few cases and did not pay a dime in takings compensation.¹⁶⁵ The aggregate amount of money paid in all regulatory takings cases also is modest; it amounts to a little bit more than one million dollars per year. This story could change, but the results to date suggests that the “takings project” has come nowhere close to taking down the federal regulatory state—or, less probably, that it completed its takedown prior to 2000.

163. See, e.g., *Gadsden Indus. Park, LLC v. United States*, 956 F.3d 1362, 1366–67 (Fed. Cir. 2020) (describing claims that EPA physically took contaminated materials).

164. See, e.g., Melinda Harm Benson, *The Tulare Case: Water Rights, the Endangered Species Act, and the Fifth Amendment*, 32 ENV'T. L. 551 (2002); Barton H. Thompson, Jr., *The Endangered Species Act: A Case Study in Takings & Incentives*, 49 STAN. L. REV. 305, 324 (1997) (discussing this attention).

165. One of those cases involved limitations on water deliveries from the Klamath River, and by any reasonable measure it was a major case. See *Baley v. United States*, 942 F.3d 1312 (Fed. Cir. 2019). At the other end of the spectrum is a case brought by a doctor after a NMFS biologist, not acting in her official capacity, posted negative internet comments about a “highly purified bovine testicular enzyme” treatment the doctor had given her. *Filler v. United States*, 116 Fed. Cl. 123, 126 (2014). In both cases, the plaintiffs lost.

TABLE 4: FEDERAL AGENCIES AND NUMBERS OF CASES

Agency	Number of cases
Surface Transportation Board	108
US Army Corps of Engineers	62
Department of the Interior	61
Bureau of Land Management	19
Office of Surface Mining	10
Bureau of Reclamation	8
Fish and Wildlife Service	7
Bureau of Indian Affairs	5
National Park Service	4
BOEMRE	1
Department of Agriculture	56
Forest Service	28
Farmers' Home Administration	18
Natural Resource Conservation Service	2
Farm Services Administration	1
Department of Defense (excluding cases involving only the Army Corps)	38
Federal Aviation Administration	11
DOJ	9
EPA	9
Department of Energy	8
Fannie Mae/Freddie Mac	7
HUD	6
Department of Homeland Security	5
ICE	2
Coast Guard	1
PTO	4
FDA	3
National Marine Fisheries Service	3
<i>Five agencies had two cases filed against them.</i>	
<i>Twenty agencies had one case filed against them.</i>	

The involvement of law firms presents a more nuanced picture, but it still suggests a modest role for the business or legal

establishment—however one might define that phrase. Of the total cases filed, approximately fifteen percent were litigated at some point by firms that the Chambers ranked as national leaders or as leaders in at least three states—a generous but useful proxy measure for prominent business-oriented law firms.¹⁶⁶ Regionally ranked firms—which I’ve defined as law firms that the Chambers ranked, but in fewer than three regions—participated in litigating approximately twenty percent of the total cases filed. Those numbers may seem to suggest that big law is widely involved in takings litigation, and indeed it is more involved than big business. But peering beneath the numbers complicates the story. Two firms—Arent Fox and Baker Sterchi—account for much of the nationally ranked and regionally ranked participation, entirely because of the involvement of a few Missouri-based attorneys in rails-to-trails cases. The four attorneys who handled most of those cases have since left the larger firms and now work in very small firms, neither of which has a Chambers ranking.¹⁶⁷ In other major subject areas, like military overflights, flooding, water rights, and, more recently, mining, Chambers-rated law firms are entirely absent.¹⁶⁸

TABLE 5: NUMBERS OF CASES HANDLED AND PLAINTIFFS REPRESENTED BY LAW FIRM TYPE¹⁶⁹

Law Firm Type	Nationally Ranked	Regionally Ranked	Not Ranked	Pro Se
Cases Handled	75	96	309	77
Plaintiffs Represented	1124	4949	9172	84

166. I make no claim that a Chambers ranking serves as a proxy for the quality of the lawyers involved.

167. See STEWART WALD + MCCULLEY LLC, <http://www.swm.legal/> (last visited Oct. 11, 2021); TRUE N.L., <https://truenorthlawgroup.com/> (last visited Oct. 11, 2021).

168. In the earlier years of the study period, several mining cases were brought by ranked firms representing coal mining companies. See, e.g., *Cane Tennessee, Inc. v. United States*, 57 Fed. Cl. 115 (2003) (decision in a case litigated by Charles Lettow, a Cleary Gottlieb partner who went on to become a Court of Federal Claims judge). Large firms have not handled the more recent mining cases.

169. The total numbers in this table are much higher than the total numbers of cases and plaintiffs because many cases involve multiple law firms.

All of this suggests that the aggregate reality of takings litigation differs from the plans of conservative activists and the warnings of their liberal critics. Some takings cases do involve moneyed interests,¹⁷⁰ and some involve highly ideological plaintiffs¹⁷¹ or attorneys closely affiliated with movement conservatism¹⁷²—including causes like anti-federal public lands activism,¹⁷³ opposition to gay marriage,¹⁷⁴ and the Trump Administration’s clumsy efforts to overturn the 2020 election.¹⁷⁵ But there does not appear to be any sort of broad affiliation between corporate business interests or law firms and takings litigation.

2. The prevalence of aggregated physical takings claims

The near absence of large corporate interests from federal-court takings litigation might seem to lend credence to another

170. See, e.g., *McCann Holdings, Ltd. v. United States*, 111 Fed. Cl. 608 (2013) (ruling in favor of a business wholly owned by Hugh Culverhouse, Jr.). Culverhouse is a wealthy real estate investor after whom the University of Alabama’s law school was briefly named. See *Alabama to Refund Hugh Culverhouse Jr.’s \$26M Donation After Anti-Abortion Backlash*, TAMPA BAY TIMES (June 8, 2019), <https://www.tampabay.com/business/alabama-to-refund-hugh-culverhouse-jrs-26m-donation-after-anti-abortion-backlash-20190607/>.

171. See, e.g., *Daniel Martinez – USFS*, WESTERNER (Nov. 1, 2005), <https://thewesterner.blogspot.com/2005/11/daniel-martinez-usfs-for-background-on.html> (posting letters from Daniel Martinez, the plaintiff in *Martinez v. United States*, No. 1:11-cv-00751 (Fed. Cl. Nov. 08, 2011), alleging that the federal government lacks jurisdiction in the state of Arizona); *Complaint, Brokaw v. United States*, No. 1:14-cv-00586-MCW (Fed. Cl. July 10, 2014) (116-page complaint by self-described “[c]onstitutionalists” and “[t]ax [p]rotestors”).

172. Perhaps the best-known conservative law firm representing plaintiffs is the Pacific Legal Foundation. See *What We Fight For: Property Rights*, PAC. LEGAL FOUND., <https://pacificlegal.org/property-rights/> (describing PLF’s property rights practice, including takings litigation).

173. See Kirk Siegler, *Critic of Federal Public Lands Management to Join Department of the Interior*, NPR (Oct. 15, 2018, 4:47 PM), <https://www.npr.org/2018/10/15/657542759/critic-of-federal-public-lands-management-to-join-department-of-the-interior> (describing Karen Budd-Falen, who often litigates takings cases).

174. Geoffrey A. Fowler, *The Other Lawyer in Gay-Wed Case*, WALL ST. J. (Mar. 26, 2013, 8:23 AM), <https://www.wsj.com/articles/SB10001424127887323466204578382792759517454> (describing Charles Cooper, whose firm Cooper & Kirk has litigated several takings cases and who has a “record of championing conservative causes, including preserving gun rights and limiting affirmative action and gay rights”).

175. See Robert Patrick, *Clayton Lawyer Pushing Trump’s Election Fraud Claims in Michigan*, ST. LOUIS POST-DISPATCH (Nov. 13, 2020), https://www.stltoday.com/news/local/crime-and-courts/clayton-lawyer-pushing-trumps-election-fraud-claims-in-michigan/article_a311f789-c998-5485-b7cd-bb0abf271233.html (discussing the election-law misadventures of Mark “Thor” Hearne, who also litigates many rails-to-trails cases).

traditional conservative narrative, in which takings are primarily about sympathetic, singled-out Davids standing up to the Goliath regulatory state.¹⁷⁶ But at the federal level, the reality is somewhat different. Litigants generally participate in aggregated groups, not as individuals, and take on nonregulatory actions.

Takings rhetoric puts heavy emphasis on individuals.¹⁷⁷ In the classic stories, the prototypical plaintiff stands alone or with his family against the giant and malevolent regulatory state.¹⁷⁸ Yet most federal-court takings litigants participate in aggregate litigation. Within my pool of cases, the average case involves twenty-four plaintiffs. The average *successful* case involves seventy-seven plaintiffs, some of which may be collective entities like municipalities or homeowners' associations.¹⁷⁹ In a country with over 300 million people, a small group might still seem singled out; the difference between seventy-seven and one might hold only modest significance. But many of these groups fit within even larger categories given similar treatment.¹⁸⁰ Additionally, in some ways the bare statistics understate the prevalence of aggregate litigation. Some of the cases that include only individuals or small groups of plaintiffs were brought as purported class actions, and the attorneys would have attempted to include many additional plaintiffs if the cases had survived motions to dismiss.¹⁸¹

Of course, far from all of the plaintiffs participate in aggregated cases. While most of the plaintiffs participate in aggregate litigation, the *median* number of plaintiffs in my pool of takings cases is one, which means that many individual cases are filed. These cases are an esoteric group, but some clearly do fit within a classic narrative of a single individual or small group up against a gigantic and indifferent state. To provide a few examples, there are border security cases in which federal agents seem to have gone

176. See *supra* notes 123–125 and accompanying text.

177. See Michael Pappas, *Singled Out*, 76 MD. L. REV. 122, 124 (2016); Pennell v. City of San Jose, 485 U.S. 1, 22–24 (1988) (Scalia, J., dissenting).

178. See, e.g., Lucas, *supra* note 123.

179. See, e.g., Rogers v. United States, 814 F.3d 1299, 1299–1300 (Fed. Cir. 2015) (listing plaintiffs—including multiple golf clubs and homeowners' associations in addition to individuals and businesses—in a major rails-to-trails case).

180. See *infra* notes 190–205 (describing the origins of rails-to-trails litigation).

181. See, e.g., Hair v. United States, 52 Fed. Cl. 279, 279 (2002) (describing claims brought “on behalf of a large putative class of United States citizens who were either killed or injured by the Japanese armed forces during World War II”).

where they pleased on the plaintiffs' property whenever they saw fit to do so;¹⁸² a case in which the military took shipping containers it knew belonged to the plaintiffs, shipped them from Afghanistan to Okinawa, and then claimed they were lost;¹⁸³ and several cases in which the Federal Aviation Administration left air traffic control towers on the plaintiffs' land even after its leases expired.¹⁸⁴ These cases do validate the basic idea that sometimes the federal government acts like a behemoth with little concern for individual property rights. But even these cases involve physical, not regulatory, takings claims.

IV. THEMES AND EXAMPLES

If the central story of federal takings litigation is not the conventional tale—in which takings cases lie at the locus of a high-stakes clash between individuals and the regulatory state, with regulatory takings doctrine at the center of the fight—then what is it? This Part uses a qualitative exploration of key areas of takings litigation to develop an alternative thematic explanation of takings litigation against the federal government. It argues that a defining theme of the field is an effort by litigants on all sides to create and then place cases within categorical boxes. That may seem like nothing new—a previous generation of takings litigation and scholarship focused on the boundaries of the *Lucas* categorical box¹⁸⁵—but *Lucas* isn't the issue anymore. Obtaining a physical takings framework often is, but that isn't the whole story either. Because obtaining a physical takings framework often isn't a given and sometimes isn't always enough to produce a win, plaintiffs—and, more importantly, their lawyers—are also trying to establish subcategories of successful litigation into which subsequent cases can be fit. They are trying, in other words, to create specialized cookie cutters, not, as the Supreme Court's takings rhetoric might suggest, to engage with the evidentiary and equitable uniqueness of each case.

182. See *D & D Landholdings v. United States*, 82 Fed. Cl. 329, 336 (2008).

183. *Textainer Equipment Mgmt. Ltd. v. United States*, 115 Fed. Cl. 708, 711 n.3 (2014).

184. *E.g.*, Complaint, *Takaho Estates, LLC v. United States*, No. 1:08-cv-00212 (Fed. Cl. Mar. 27, 2008) (No. 08-212 L).

185. See Daniel Farber, *Requiem for a Heavyweight: The Decline and Fall of Lucas v. S.C. Coastal Council*, 71 FLA. L. REV. F. 212, 216-17 (2020) (describing *Lucas*'s fall from importance).

This is a broad generalization about a diverse pool of cases, and some cases don't fit it. Some are really just creative one-offs, in which lawyers appear to be going for one big score rather than trying to create a lasting business model.¹⁸⁶ Many others, including but not limited to the many pro se cases, seem best explained by some combination of legal misunderstanding and anti-governmental animus.¹⁸⁷ For that reason, this Part closes by discussing cases that do not fit into categorical boxes. But first, it discusses three types of takings litigation in which categories are crucially important.

A. Rails-to-Trails

Even as law professors have churned out reams of writing about takings cases, few articles have mentioned rails-to-trails litigation.¹⁸⁸ The Supreme Court, which in 1990 helped create the rails-to-trails litigation mini-industry,¹⁸⁹ appears to have taken no notice of the phenomenon in the years since. Yet, as the statistics above make clear, rails-to-trails cases are where the action lies – and where the money is – with the 2000–2014 cohort of cases producing over \$300 million in just compensation payments and over \$44 million in attorneys' fees, with more cases still to be resolved. As those sums suggest, rails-to-trails cases also provide a model for plaintiff-side success litigating regulatory takings claims.

Rails-to-trails decisions have their origins in the right-of-way acquisition practices of railroad companies. Building a railroad requires acquiring lots of land, often from private owners, and rail companies did not always acquire that land in fee simple.¹⁹⁰ Instead, they often acquired easements, some of which by their terms would revert to the fee simple landowner if the railroad

186. See, e.g., *Love Terminal Partners, L.P. v. United States*, 889 F.3d 1331, 1336, 1339 (Fed. Cir. 2018), *cert. denied*, 139 S. Ct. 2744 (2019) (reversing a \$133.5 million just compensation award for a struggling airport).

187. See *infra* notes 306–311 and accompanying text.

188. One law professor – Danaya Wright of the University of Florida – has written nine articles about rails-to-trails litigation. See, e.g., Danaya C. Wright, *Eminent Domain, Exactions, and Railbanking: Can Recreational Trails Survive the Court's Fifth Amendment Takings Jurisprudence?*, 26 COLUM. J. ENV'T L. 399 (2001). Her work aside, attention to rails-to-trails cases in the general takings literature is minimal.

189. See *Preseault v. ICC*, 494 U.S. 1 (1990).

190. UNITED STATES GENERAL ACCOUNTING OFFICE, SURFACE TRANSPORTATION: ISSUES RELATED TO PRESERVING INACTIVE RAIL LINES AS TRAILS 3–4 (1999).

company abandoned rail use.¹⁹¹ By the late twentieth century, a few changes lent unforeseen significance to those reversionary interests. Rail usage declined, and rail lines all over the country were unused; many were falling into disrepair.¹⁹² In that decline, some entrepreneurial activists saw an opportunity: what if those abandoned rail lines could be converted into recreational trails? The change seems like a win-win, for railroad companies could shed themselves of unwanted land and communities could gain valuable amenities.

In the National Trails System Act Amendments of 1983,¹⁹³ Congress laid the legal groundwork for that change. It allowed railroad companies to “railbank” their lands, which meant enrolling them in a program to allow conversion to recreational use while still retaining the right to reclaim the land and reconstruct a rail line.¹⁹⁴ The Surface Transportation Board (STB) holds authority to approve or reject railbanking applications. But the initiative for rails-to-trails conversions instead typically comes from private actors and local government sponsors, as does the funding to build and maintain the trail, though local sponsors obtain much of that funding by applying for federal grants.¹⁹⁵ The STB approves railbanking applications as a matter of course so long as the railbanked segment meets basic eligibility criteria and the sponsor commits to fund the conversion.¹⁹⁶ Because of the program, tens of thousands of miles of rail line have been converted to recreational use.¹⁹⁷

191. *Id.*

192. See *Preseault*, 494 U.S. at 5 (“In 1920, the Nation’s railway system reached its peak of 272,000 miles; today only about 141,000 miles are in use, and experts predict that 3,000 miles will be abandoned every year through the end of this century.”).

193. National Trails System Act Amendments of 1983, Pub. L. No. 98–11, 97 Stat. 48 (1983).

194. See Danaya C. Wright, *A Requiem for Regulatory Takings: Reclaiming Eminent Domain for Constitutional Property Claims*, 49 ENV’T L. 307, 367 (2019) (describing railbanking).

195. John L. Crompton & Sarah Nicholls, *The Impact of Greenways and Trails on Proximate Property Values: An Updated Review*, 37 J. PARK & RECREATION ADMIN. 89, 92 (2019) (describing funding mechanisms).

196. U.S. GENERAL ACCOUNTING OFFICE, *supra* note 190, at 5 (describing the STB’s limited role); STB, 1996/1997 ANNUAL REPORT 16 (1998), <https://prod.stb.gov/wp-content/uploads/files/docs/annualReports/ActivityReport1996-1997.pdf> (describing the STB’s role as “ministerial”).

197. See RAILS-TO-TRAILS CONSERVANCY, *United States Rail-Trail Stats*, <https://www.railstotrails.org/our-work/united-states/> (last visited Oct. 11, 2021) (stating that 24,833 miles of conversions have occurred).

But in the late 1980s, landowners began litigating their objections to these conversions. The flagship case was brought by the Preseaults, a couple from Burlington, Vermont.¹⁹⁸ The Preseaults argued that railbanking was a federal-law contrivance that deprived them of their reversionary rights under state law.¹⁹⁹ This, they argued, was a taking. The Preseaults initially asserted that the whole rails-to-trails program was facially unconstitutional, and in 1990, the United States Supreme Court rejected that position.²⁰⁰ But the Court did not reject the possibility of takings claims; instead, it merely held that such claims should be raised in the Court of Federal Claims under the Tucker Act.²⁰¹ The Preseaults then did just that. The Court of Federal Claims ruled for the government,²⁰² as did the Federal Circuit panel that initially heard the appeal.²⁰³ But the full Federal Circuit granted en banc review.²⁰⁴ In what might well be the most consequential takings decision the Federal Circuit has ever issued, a divided court held for the Preseaults, finding that the STB had physically taken their land.²⁰⁵ That holding provided a blueprint for copycat litigation. Over the course of my study period, these cases account for the majority of takings claims filed and an even larger majority of the successful claims.

Beyond the numbers of cases and plaintiffs, several other features of rails-to-trails litigation also stand out. One is how closely akin rails-to-trails cases are to mass tort cases.²⁰⁶ Many of the individual claims are small: the average rails-to-trails plaintiff receives an award of approximately \$50,000, and a few relatively

198. *Preseault v. United States*, 100 F.3d 1525, 1531–32 (Fed. Cir. 1996) (describing the Preseaults' land).

199. *Preseault v. ICC*, 494 U.S. 1, 8–10 (1990).

200. *Id.* at 5.

201. *Id.* at 17 (“[P]etitioners’ failure to make use of the available Tucker Act remedy renders their takings challenge to the ICC’s order premature. We need not decide whether a taking occurred in this case.”).

202. *Preseault v. United States*, 27 Fed. Cl. 69, 96 (1992).

203. *Preseault v. United States*, 66 F.3d 1190, 1190 (Fed. Cir. 1995).

204. *Id.*

205. *Preseault v. United States*, 100 F.3d 1525, 1550–51 (Fed. Cir. 1996).

206. This is also true of the military overflight cases, which I do not discuss in depth here. They involve well-established takings theories, which trace their lineage to *United States v. Causby*, 328 U.S. 256 (1946), but the basic claim—that low-flying planes interfered with the use and enjoyment of property—sounds like a classic nuisance.

lucrative cases skew that number upwards.²⁰⁷ In most cases, the average successful plaintiff receives closer to \$10,000 in just compensation, and not all plaintiffs succeed. Few of these claims would make economic sense to litigate on their own, and lawyers don't do that. Instead, as with mass torts, the lawyers bring cases on behalf of dozens, and sometimes hundreds, of plaintiffs along a converted rail line, sometimes aggregating claims into a single named case and sometimes using class actions.²⁰⁸ The cases also appear to be initiated by lawyers rather than plaintiffs. The law firms that handle these cases talk openly about how they monitor rails-to-trails conversions and recruit plaintiffs for their cases – and about how many of their clients don't actually mind the presence of the trail.²⁰⁹ For the attorneys, these efforts appear to be lucrative. The Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970 allows attorney fee awards for successful plaintiffs in inverse condemnation cases,²¹⁰ and over the study period, rails-to-trails cases produced at least \$44 million in attorney fee awards. In addition, the lawyers use contingency fee agreements in at least some of their cases.²¹¹ The result is that a big-money win for plaintiffs can produce a small fortune for the small group of attorneys who litigated the case.²¹² And even if the

207. In *Joint Compromise Settlement Agreement Between Plaintiffs and the United States, Haggart v. United States*, No. 1:09-cv-00103 (2009) (No. 09-103L), 253 successful plaintiffs shared a \$133,494,970 award (normalized to 2020 dollars), for an average award of just below \$530,000 for each successful plaintiff.

208. The use of class actions isn't unique to rails-to-trails cases. The data set also includes class actions from flooding cases, military overflight cases, and Chrysler-bankruptcy cases, to provide a few examples. Some have over a thousand individual plaintiffs.

209. See, e.g., *Practice Areas: Rails-to-Trails*, STEWART WALD + MCCULLEY LLC, <http://www.swm.legal/what-we-do> (last visited Oct. 12, 2021) (“SWM . . . advises landowners if their land is in danger of being taken under the Trails Act . . .”); *Property Rights/Rails to Trails*, BAKER, STERCHI, COWDEN & RICE LLC, <https://www.bscr-law.com/?t=5&LPA=3001&format=xml&p=5253> (last visited Oct. 12, 2021) (“We monitor Rails-to-Trails conversions in every state . . .”).

210. 42 U.S.C. § 4654(c).

211. See Catherine Martin, *Three Top Rainmakers Break Off from Baker Sterchi*, MO. LAWS. MEDIA (Apr. 15, 2015), <https://molawyersmedia.com/2015/04/15/three-top-rainmakers-break-off-from-baker-sterchi/> (describing a case “that settled for \$33 million in 2013 and included a nearly \$11 million contingency fee”).

212. See *Haggart v. Woodley*, 809 F.3d 1336, 1340 (Fed. Cir. 2016) (describing a dispute over a \$35 million fee award, which came out of a case with a \$110 million settlement). The Federal Circuit overturned that award, see *id.* at 1359, and an alternative award is still being litigated.

just compensation for the plaintiffs is quite modest, the attorneys may still obtain a seven-figure fee award.²¹³

In addition, the issues raised in the litigation are quite different from what conventional wisdom might lead one to expect. In the kind of *Penn Central* case lawyers tend to view as typifying takings litigation, courts must conduct a broad-ranging inquiry into the degree of economic impact caused by the governmental action and into the relationship between that action and policy concerns grounded in fairness and justice. None of that happens in rails-to-trails cases. Instead, the key, and often only, question is whether the plaintiff holds a reversionary property interest.²¹⁴ Answering that question may require a detailed inquiry, but the inquiry turns entirely on state property law and the terms of the relevant deeds. There is none of the weighing of interests and equities that might accompany a more traditional regulatory takings claim. Indeed, many rails-to-trails cases now settle without the court doing any legal analysis at all.²¹⁵

If courts were to explore the equity issues underlying rails-to-trails conversions, they might find a complex picture somewhat at odds with prevailing ideas of takings litigation. The Supreme Court has repeatedly said that takings litigation exists to compensate people who are unfairly singled out and harmed by government actions that provide collective benefits.²¹⁶ Rails-to-trails conversions partially fit that model, for they do provide collective benefits.²¹⁷ But it's hard to claim that tens of

213. *E.g.*, Judgment, *Fauvergue v. United States*, No. 1:08-cv-00431 (Fed. Cl. Aug. 23, 2013) (No. 08-431 L) (\$119,292 in just compensation and \$1,321,000 in attorney fees); Stipulation of Settlement and Dismissal, *Buford v. United States*, No. 1:09-cv-00121-EJD (Fed. Cl. May 1, 2014) (No. 09-121 L) (\$32,843.55 in just compensation and \$251,732.31 in attorneys' fees); *see also* *Campbell v. United States*, 138 Fed. Cl. 65, 70 (2018) ("The amount of compensation ultimately agreed to, without interest, was only \$122,466, compared to \$1,187,470 claimed for attorney fees.").

214. *See* *Ellamae Phillips Co. v. United States*, 564 F.3d 1367, 1373 (Fed. Cir. 2009); Cecilia Fex, *The Elements of Liability in a Trails Act Taking: A Guide to the Analysis*, 38 *ECOLOGY L.Q.* 673 (2011).

215. *See, e.g.*, *Campbell*, 138 Fed. Cl. at 70 (describing a case with "no trial and no dispositive motion practice. . . no contested motions, briefing, or argument on any issues related to liability or compensation").

216. *See* *Pennell v. City of San Jose*, 485 U.S. 1, 22-24 (1988) (Scalia, J., dissenting).

217. *See, e.g.*, J.M. Bowker, John C. Bergstrom & Joshua Gill, *Estimating the Economic Value and Impacts of Recreational Trails: A Case Study of the Virginia Creeper Rail Trail*, 13 *TOURISM ECON.* 241 (2007) (finding a large and positive community impact).

thousands of landowners are being “singled out.” And whether those owners are being harmed is debatable. Before the conversions occur, the landowners have abandoned often-deteriorating rail lines crossing their property, and the land underlying the rail line still is in the railroad’s hands—conditions that may well have factored into the purchase price of the property.²¹⁸ After the conversion is complete, the resumption of rail traffic is exceedingly unlikely, and property owners instead have direct access to a recreational amenity. That access comes with a potential downside; other people will use the recreational trail, and there are likely to be more people walking or biking on a trail than walked on the unused tracks.²¹⁹ But economic studies suggest that the conversions generally increase the value of the burdened property, albeit not with complete uniformity.²²⁰

None of that means that the rails-to-trails program is fundamentally flawed. I do not have data on the number of potentially reversionary landowners who have *not* brought takings claims. That number may dwarf the number of owners that have sued, which would suggest that takings payment may be a modestly expensive (and very unevenly allocated) way of smoothing the path toward a nearly 25,000-mile (and counting) network of recreational trails.²²¹ For the public, that might not be such a bad deal. Also, not every plaintiff who brings a rails-to-trails claim succeeds. Indeed, the potential mother of all rails-to-trails claims—challenging the conversion that led to New York City’s now-famous High Line Park—was unsuccessful.²²²

218. And before the line fell into disuse, the land hosted an active rail line.

219. See, e.g., *Preseault v. United States*, 100 F.3d 1525, 1550 (Fed. Cir. 1996) (“On warm weekends up to two hundred people an hour go through the Preseaults’ property. . . . On one occasion Mr. Preseault was nearly run over by a cyclist as he walked across the path.”); see also *Toews v. United States*, 376 F.3d 1371, 1376–77 (Fed. Cir. 2004) (“Some might think it better to have people strolling on one’s property than to have a freight train rumbling through. But that is not the point. The landowner’s grant authorized one set of uses, not the other.”).

220. See *Crompton & Nicholls*, *supra* note 195 (reviewing multiple studies and finding that landowners generally perceived proximity to trails to either increase or not affect property values, though such perceptions were less prevalent in rural areas, and finding that hedonic analyses suggest an increase in value from proximity to trails).

221. See *Rails-to-Trails Conservancy*, *supra* note 197.

222. *Romanoff Equities, Inc. v. United States*, 815 F.3d 809, 810 (Fed. Cir. 2016), *cert. denied*, 137 S. Ct. 597 (2016).

Nevertheless, the rails-to-trails program has clearly allowed a small group of lawyers to monetize and streamline takings litigation in fairly predictable and very lucrative ways. They have done so through aggregation and by finding a legal standard that circumvents the need for the sort of equitable, fact-intensive analysis that makes regulatory takings claims expensive and unpredictable. In that sense, the rails-to-trails cases provide a sort of gold standard for the takings bar.

B. Water Rights

A second area in which takings lawyers have sought to create cookie-cutter patterns for successful litigation is in the realm of water rights regulation. Here, too, a central goal has been to craft a template under which regulatory takings inquiries can be avoided and plaintiffs – and their attorneys – can predictably win.

In the United States, water, like land, is allocated through systems of property rights.²²³ With some possible and limited exceptions, every consumptive water use has, at its roots, a property claim to the use of surface water or groundwater.²²⁴ Also like land rights, and sometimes to an even greater extent, those water rights are highly regulated.²²⁵ Much of that regulation comes from state agencies.²²⁶ But some comes from the federal government. Most importantly, the United States government manages the land where most water in the western United States first precipitates, and its land management policies therefore have

223. See Joseph L. Sax, *The Constitution, Property Rights, and the Future of Water Law*, 61 U. COLO. L. REV. 257, 260 (1990) (“Water rights are property.”).

224. See JOSEPH L. SAX, BARTON H. THOMPSON, JR., JOHN D. LESHY & ROBERT H. ABRAMS, *LEGAL CONTROL OF WATER RESOURCES* 27–590 (6th ed. 2018) (describing property rights in water).

225. See generally *id.* (discussing water rights and regulation); see, e.g., *United States v. Willow River Power Co.*, 324 U.S. 499, 510 (1945) (“Rights, property or otherwise, which are absolute against the world are certainly rare, and water rights are not among them.”); *United States v. State Water Res. Control Bd.*, 227 Cal. Rptr. 161, 171 (Cal. Ct. App. 1986) (“[A]ll water rights are subject to government regulation.”).

226. See *California v. United States*, 438 U.S. 645, 653 (1978) (describing “the consistent thread of purposeful and continued deference to state water law by Congress”). But see David H. Getches, *The Metamorphosis of Western Water Policy: Have Federal Laws and Local Decisions Eclipsed the States’ Role?*, 20 STAN. ENV’T L.J. 3, 8 (2001) (asserting that federal deference to state water authority is largely mythical).

implications for water rights.²²⁷ The United States Bureau of Reclamation manages massive water projects and delivers a significant portion of the agricultural irrigation water used in the western United States.²²⁸ And the United States Fish and Wildlife Service and the National Marine Fisheries Service regulate water uses that impact threatened and endangered species.²²⁹ That combination of property rights and regulatory oversight generates takings claims.

Takings claims involving water rights have arisen from two main types of fact patterns. In one type, environmental regulators limit water users' ability to divert water from rivers or streams containing threatened or endangered species, and the water users sue, alleging a taking. The classic example of this type of case is *Tulare Lake Basin Water Storage District v. United States*, a case arising out of federal restrictions on deliveries from California's State Water Project (and a case filed before my study period).²³⁰ The other fact pattern involves decisions by land management agencies that restrict ranchers' ability to graze their cattle on public lands, often because the ranchers have illegally overgrazed the land or refused to pay grazing fees.²³¹ The ranchers then often sue the United States, alleging that by restricting private grazing on public lands, the government has taken those ranchers' rights to the water on those lands.²³²

In these cases, the plaintiffs have pursued a consistent legal strategy: they have tried to convince the Court of Claims and the Federal Circuit to analyze their claims as potential physical takings.²³³ Those arguments have achieved some success. In *Tulare Lake*, the Court of Claims concluded that, because a regulatory restriction on water use "completely eviscerates the right itself," the

227. U.S. DEP'T AGRIC., PNW-GTR-812, WATER, CLIMATE CHANGE, AND FORESTS 6 (2010) ("National forests alone provide . . . over half the water in the West.").

228. See *About Us – Fact Sheet*, U.S. BUREAU OF RECLAMATION <https://www.usbr.gov/main/about/fact.html> (May 6, 2021).

229. See generally Dave Owen, *Critical Habitat and the Challenge of Regulating Small Harms*, 64 FLA. L. REV. 141 (2012) (describing the agencies' implementation of the Endangered Species Act, with a focus on fish species).

230. *Tulare Lake Basin Water Storage Dist. v. United States*, 49 Fed. Cl. 313, 313 (2001).

231. See, e.g., *Estate of Hage v. United States*, 687 F.3d 1281, 1284–85 (Fed. Cir. 2012); *Colvin Cattle Co. v. United States*, 468 F.3d 803, 805–06 (Fed. Cir. 2006).

232. E.g., *Estate of Hage*, 687 F.3d at 1285; *Colvin Cattle Co.*, 468 F.3d at 806.

233. See, e.g., *Casitas Mun. Water Dist. v. United States*, 543 F.3d 1276, 1283 (Fed. Cir. 2008).

claims should be analyzed as physical takings.²³⁴ The plaintiffs prevailed, the Department of Justice declined to appeal, and the United States paid out \$17 million in just compensation and attorneys' fees.²³⁵ *Tulare Lake* then became the model strategy, and in subsequent cases involving regulatory restrictions on water use, plaintiffs repeatedly asked for a similar physical takings standard.²³⁶ Indeed, sometimes they openly conceded that their entire case depended on the use of a physical takings standard and that a *Penn Central* analysis would be fatal to their claims.²³⁷

As a legal matter, this position is shaky. Regulatory action cannot physically invade a water right.²³⁸ Nor do the regulatory actions at issue in these cases appropriate the water rights at issue. To appropriate something means to take ownership of it, and in all of the recent water rights-takings cases, regulators have simply imposed regulations partially restricting use rather than actually claiming the water rights, much like land use regulators who restrict development on a property rather than taking title to an easement.²³⁹ Supreme Court precedent also does not support the plaintiffs' position.²⁴⁰ In several Court of Federal Claims and Federal Circuit decisions, the courts' selection of a physical takings standard purports to derive from three mid-twentieth-century Supreme Court cases, which the Federal Circuit has described as "provid[ing] guidance on the demarcation between regulatory and physical takings analysis with respect to [water] rights."²⁴¹ In fact,

234. *Tulare Lake Basin*, 49 Fed. Cl. at 319–20.

235. See Raymond Dake, *Trout of Bounds: The Effects of the Federal Circuit Court of Appeals' Misguided Fifth Amendment Takings Analysis in Casitas Municipal Water District v. United States*, 36 COLUM. J. ENV'T L. 59, 93 (2011).

236. E.g., *Baley v. United States*, 942 F.3d 1312, 1318 (Fed. Cir. 2019) (noting that the plaintiffs in Klamath River litigation requested a physical-taking standard); *CRV Enterprises, Inc. v. United States*, 626 F.3d 1241, 1246 (Fed. Cir. 2010) (arguing that restricting the plaintiffs' access to a waterway was a physical taking).

237. See *Casitas*, 543 F.3d at 1283.

238. See *Allegretti & Co. v. Cnty. of Imperial*, 42 Cal. Rptr. 3d 122, 132 (Cal. Ct. App. 2006) (noting this reality).

239. See *Benson*, *supra* note 164, at 583–84 (contrasting *Tulare Lake* to cases in which the government did physically invade land or did legally appropriate property).

240. See, e.g., *Holyoke Co. v. Lyman*, 82 U.S. 500, 502, 506–13 (1873) (finding that a requirement to spill water through an already-constructed dam did not create a taking or unlawfully infringe the dam owners' property rights).

241. *Casitas*, 543 F.3d at 1289. The cases are *Dugan v. Rank*, 372 U.S. 609 (1963); *United States v. Gerlach Live Stock Co.*, 339 U.S. 725 (1950); and *Int'l Paper Co. v. United States*, 282 U.S. 399 (1931).

none of the three cases discuss the distinction between physical and regulatory takings, and the Supreme Court has instead applied a regulatory takings framework to claims that restrictions on water withdrawals were takings.²⁴² The Court of Claims also has suggested that a physical taking standard is appropriate because water use regulation has physical effects akin to those of a direct physical taking.²⁴³ But most of the regulatory restrictions at issue in classic regulatory takings cases have such physical effects.²⁴⁴ *Pennsylvania Coal Company*, for example, had to leave physical coal in the ground, where it was used to prevent subsidence, rather than exercising its property right to remove it,²⁴⁵ and *Penn Central Railroad Company* had to leave physical space that it owned unoccupied.²⁴⁶ Yet these are iconic regulatory takings cases, and the Court has specifically cautioned against shoehorning regulatory takings claims into a physical taking framework.²⁴⁷

Nevertheless, these arguments have sometimes succeeded. In *Casitas Municipal Water District v. United States*, for example, a divided Federal Circuit adopted a physical taking standard.²⁴⁸ In a somewhat confusing opinion, which seems to rely heavily on the fact that the water in question was diverted from the water district's diversion canal and into a fish ladder, the court held that a physical taking standard was appropriate.²⁴⁹ That case alone does not suggest that all regulatory restrictions on water rights should be

242. *Hudson Cnty. Water Co. v. McCarter*, 209 U.S. 349, 355–56 (1908). In *Casitas*, the Federal Circuit distinguished *McCarter*, arguing that the case turned on the scope of the property right and did not involve a regulatory takings analysis. 543 F.3d at 1294–95. But *McCarter* describes the scope of the underlying rights and the possibility of regulation of those rights as two alternative grounds for its holding:

Whether it be said that such an interest justifies the cutting down by statute, without compensation, in the exercise of the police power, of what otherwise would be private rights of property, or that apart from statute those rights do not go to the height of what the defendant seeks to do, the result is the same.

209 U.S. at 356.

243. *Tulare Lake Basin Water Storage Dist. v. United States*, 49 Fed. Cl. 313, 320 (2001).

244. See *Benson*, *supra* note 165, at 584–85.

245. *Penn. Coal Co. v. Mahon*, 260 U.S. 393, 412–13 (1922).

246. *Penn Cent. Transp. Co. v. New York City*, 438 U.S. 104, 107–18 (1978).

247. *Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Plan. Auth.*, 535 U.S. 302, 324 (2002); see also *Horne v. U.S. Dep't of Agric.*, 576 U.S. 350, 362 (2015) (“A physical taking of raisins and a regulatory limit on production may have the same economic impact on a grower. The Constitution, however, is concerned with means as well as ends.”).

248. *Casitas Mun. Water Dist. v. United States*, 543 F.3d 1276, 1276 (Fed. Cir. 2008).

249. *Id.* at 1291.

analyzed as physical takings; the *Casitas* court distinguished its diversion-from-a-diversion facts from cases with traditional regulatory restrictions, pointedly noting that “the government did not merely require some water to remain in stream.”²⁵⁰ But some subsequent Court of Federal Claims decisions have dispensed with that nuance. In litigation involving the Klamath River,²⁵¹ and also in *Sacramento Grazing Association v. United States*,²⁵² Court of Federal Claims judges have stated that regulatory restrictions on water diversions should be analyzed as physical takings.²⁵³ The courts have not been consistent, with other decisions explicitly rejecting this position,²⁵⁴ and the more sweeping statements have come from individual Court of Claims judges, not from the Federal Circuit itself.²⁵⁵ To date, no published state court decision has ever endorsed this theory.²⁵⁶ So the issue is hardly resolved. But attorneys are still trying to establish a categorical rule, specific to water rights cases, that would avoid *Penn Central’s* questions about equity and economic impact and make claims very easy for plaintiffs to win.

To date, and despite these preliminary victories, plaintiffs have ultimately lost every water rights case that is within my 2000–2014

250. *Id.*

251. *Klamath Irrigation v. United States*, 129 Fed. Cl. 722, 737 (2016).

252. 135 Fed. Cl. 168, 169 (2017). This opinion is notable in another respect: its opening sentence is a gratuitous, and factually inaccurate, shout-out to the armed occupation of the Malheur National Wildlife Refuge by right-wing activists. *See id.* at 170–71 (stating that the activists had “unsuccessfully attempted to find common ground with environmental groups and officials from Oregon’s Malheur National Wildlife Refuge for over a decade”). In fact, the occupants, many of whom were from other states, were not affiliated with local groups that had been seeking compromises. *See* John D. Leshy & John D. Echeverria, *The Trump Judiciary Threatens Federal Public Lands*, HILL (Nov. 28, 2017, 5:20 PM), <https://thehill.com/opinion/energy-environment/362191-the-trump-judiciary-threatens-federal-public-lands> (“Almost every assertion of fact in that sentence is stunningly wrong . . .”).

253. *Sacramento Grazing Ass’n*, 135 Fed. Cl. at 202–07; *Klamath Irrigation*, 129 Fed. Cl. at 733–37; *see also* *Estate of Hage v. United States*, 82 Fed. Cl. 202 (2008), *rev’d*, 685 Fed. App’x. 927 (Fed. Cir. 2017), *rev’d*, 687 F.3d 1281 (Fed. Cir. 2012).

254. *E.g.*, *Clear Creek Cmty Servs. Dist. v. United States*, 132 Fed. Cl. 223, 262 (2017).

255. *See Casitas*, 543 F.3d at 1291 (emphasizing, before selecting a physical taking framework, that “the government did not merely require some water to remain in stream”).

256. *See, e.g.*, *Allegretti & Co. v. Cnty. of Imperial*, 42 Cal. Rptr. 3d 122, 132 (Cal. Ct. App. 2006) (“The reasoning is flawed because in that case the government’s passive restriction, which required the water users to leave water in the stream, did not constitute a physical invasion or appropriation . . . *Tulare Lake’s* reasoning disregards the hallmarks of a categorical physical taking.”).

pool and that has reached a final resolution.²⁵⁷ That includes the cases in which courts have prescribed a physical takings framework. In both *Casitas* and the *Klamath* litigation, the Court of Federal Claims ultimately concluded that the plaintiffs had no right to use the allegedly taken water,²⁵⁸ and the Federal Circuit affirmed.²⁵⁹ That pattern of losses may reduce interest in water rights litigation; the physical-regulatory taking distinction ultimately may not matter. But the effort to craft a special categorical rule for water rights cases also could – if not checked by reviewing courts – place water rights litigation in the rails-to-trails cases’ lucrative (for plaintiffs’ attorneys) footsteps.

C. Bailouts and Bankruptcies

When attorneys think about takings, they tend to think about real property, and most of the takings claims that come before the Court of Federal Claims are consistent with that expectation.²⁶⁰ But in recent years, perhaps the highest-stakes claims have involved shares of corporate ownership. During and after the 2008 financial crisis, the federal government took on a series of roles that straddled boundaries between public and private and between proprietary owner and regulator.²⁶¹ The decisions it made in that capacity have produced a series of takings claims, many of which are still being litigated.²⁶² The potential value of those claims runs

257. *E.g.*, *Colvin Cattle Co. v. United States*, 468 F.3d 803, 806–08 (Fed. Cir. 2006); *Goodrich v. United States*, 434 F.3d 1329, 1336 (Fed. Cir. 2006) (upholding dismissal of a water rights-grazing claim); *see also Estate of Hage*, 687 F.3d at 1284–85, 1292 (rejecting a takings claim filed before my study period).

258. *Baley v. United States*, 134 Fed. Cl. 619, 668–80 (2017) (holding that downstream tribes had superior rights to the water flows at issue); *Casitas Mun. Water Dist. v. United States*, 102 Fed. Cl. 443, 470 (2011) (finding the case unripe because “there has been no encroachment on plaintiff’s beneficial use to date”).

259. *Baley*, 942 F.3d at 1312, *cert denied*, 141 S. Ct. 133 (2020); *Casitas Mun. Water Dist. v. United States*, 708 F.3d 1340 (Fed. Cir. 2013).

260. For example, all of the rails-to-trails, flooding, and military overflights cases involve ownership of land.

261. *See* Nestor M. Davidson, *Resetting the Baseline of Ownership: Takings and Investor Expectations After the Bailouts*, 75 MD. L. REV. 722, 727–29 (2016); Steven Davidoff Solomon & David Zaring, *After the Deal: Fannie, Freddie, and the Financial Crisis Aftermath*, 95 B.U. L. REV. 371, 378–87 (2015).

262. *See, e.g.*, *Piszal v. United States*, 833 F.3d 1366, 1366 (Fed. Cir. 2016); *Cacciapalle v. United States*, 148 Fed. Cl. 745, 745 (2020) (dismissing claims based on actions taken during the conservatorships of Fannie Mae and Freddie Mac; the case is currently on appeal);

easily into the tens of billions.²⁶³ And while they involve very distinct subject matter from the rails-to-trails and water cases, a common thread—the quest for a physical and categorical takings test—runs through each.

The most prominent of these cases arise from the complicated saga of Fannie Mae and Freddie Mac. Both entities are government-created corporations designed to handle home mortgages.²⁶⁴ For years prior to the 2008 financial crisis, they occupied a cozy gray area between public and private status.²⁶⁵ They functioned much like private companies, with private ownership and generously compensated management, but their federally created status also brought perks, which helped them produce steady and substantial profits.²⁶⁶ The financial crisis drove both entities to the brink of insolvency, and they would have failed if the government had not infused cash and created a new entity—the Federal Home Finance Authority (FHFA)—to operate as a conservator for the distressed giants.²⁶⁷ Through the FHFA, the federal government took ownership of nearly eighty percent of both Fannie Mae and Freddie Mac.²⁶⁸ But the federal government did not entirely nationalize the companies, and instead allowed just over twenty percent of the stock in each to be held by private entities.²⁶⁹ Investors bought those shares, and within a few years, they may have seemed—to a degree that remains in dispute—like

Fairholme Funds, Inc. v. United States, 147 Fed. Cl. 1, 1 (2019) (dismissing some claims and allowing others to proceed; the decision is currently on appeal); Colonial Chevrolet Co. v. United States, 145 Fed. Cl. 243, 243 (2019) (dismissing claims arising out of the federal government's bailout of Chrysler; the case is currently on appeal).

263. Nick Timiraos, *Lawsuit Challenges Takeover of Fannie Mae, Freddie Mac*, WALL ST. J. (June 10, 2013), <https://online.wsj.com/article/SB10001424127887323949904578537994000684874.html> (describing claims seeking \$41 billion).

264. See U.S. GOV'T ACCOUNTABILITY OFF., GAO-20-637, FANNIE MAE AND FREDDIE MAC: EFFORTS TO PROMOTE DIVERSITY AND INCLUSION 6-7 (2020) (summarizing Fannie Mae and Freddie Mac's activities).

265. See Julie Andersen Hill, *Bailouts and Credit Cycles: Fannie, Freddie, and the Farm Credit System*, 2010 WIS. L. REV. 1, 31 (describing the rather favorable position in which the companies sat).

266. Solomon & Zaring, *supra* note 261, at 379.

267. See *History of Fannie Mae and Freddie Mac Conservatorships*, FED. HOUS. FIN. AGENCY, <https://www.fhfa.gov/Conservatorship/Pages/History-of-Fannie-Mae-Freddie-Conservatorships.aspx> (last visited Oct. 12, 2021).

268. Solomon & Zaring, *supra* note 261, at 382.

269. *Id.*

promising investments; in 2012 both Fannie Mae and Freddie Mac returned to profitability.²⁷⁰

For the private investors, that promise never paid out. In 2012, the FHFA changed the terms of the conservatorship, directing Fannie Mae and Freddie Mac to pay all of their profits to the United States Treasury rather than paying dividends to private stockholders.²⁷¹ There is some evidence—again, this is disputed—that the instigators of this “net worth sweep” thought Fannie Mae and Freddie Mac would never be able to fully pay back the public’s investment and would soon be wound down, and that the goal was simply to minimize public losses.²⁷² If those expectations did exist, they were mistaken.²⁷³ Fannie Mae and Freddie Mac have continued on; the subsequent payments have been worth billions of dollars; and the private investors have received—and, unless the net worth sweep goes away—will receive no dividend payments.²⁷⁴ Many of the investors sued, bringing a variety of claims in multiple courts.²⁷⁵ Among their claims were arguments that the federal government’s net worth sweep has effected a taking.²⁷⁶

The outcome of these takings claims remains uncertain.²⁷⁷ The Court of Federal Claims has dismissed many of them but has

270. *Id.* at 385.

271. *Fairholme Funds, Inc. v. United States*, 147 Fed. Cl. 1, 19 (2019); see Adam B. Badawi & Anthony J. Casey, *The Fannie and Freddie Bailouts Through the Corporate Lens*, 10 N.Y.U. J.L. & BUS. 443, 444–45 (2014) (noting widespread criticism, including from bedfellows as strange as Richard Epstein and Ralph Nader).

272. See Solomon & Zaring, *supra* note 261, at 384 (quoting a Treasury official who described the sweep as a step toward “winding down” Fannie Mae and Freddie Mac); Gretchen Morgenson, *The Secrets of a Bailout with No Exit*, N.Y. TIMES, May 22, 2016, at BU1 (arguing that internal documents show regulators anticipated the firms “were about to enter ‘the golden years’ of profitability”).

273. See Morgenson, *supra* note 272.

274. *Id.*; see *Fairholme Funds, Inc. v. Fed. Hous. Fin. Agency*, No. 13-1053, 2018 WL 4680197, *4 (D.D.C. Sept. 28, 2018).

275. See *Collins v. Mnuchin*, 938 F.3d 553, 553 (5th Cir. 2019) (en banc), *cert granted*, 141 S. Ct. 193, 193 (addressing a wide variety of non-takings claims); *Perry Cap. LLC v. Mnuchin*, 864 F.3d 591, 598 (D.C. Cir. 2017) (describing statutory, tort, and contract claims); *Robinson v. Fed. Hous. Fin. Agency*, 876 F.3d 220, 220 (6th Cir. 2017); *Roberts v. Fed. Hous. Fin. Agency*, 889 F.3d 397, 397 (7th Cir. 2018).

276. See, e.g., *Wash. Fed. v. United States*, 149 Fed. Cl. 281, 285 (2020).

277. The sweep also generated cases that do not involve any takings claims. One of those cases is now before the United States Supreme Court. See *Mnuchin v. Collins*, 141 S. Ct. 193 (2020) (granting cert).

allowed a few claims to proceed.²⁷⁸ The court also certified its decisions for interlocutory appeals²⁷⁹ but the Federal Circuit has yet to issue a decision. In all likelihood, the litigation will continue for a long time, and even if some plaintiffs do eventually prevail, the takings claims may not be their path to victory.²⁸⁰ My goal here also is not to say what the outcome of the cases *should* be. That issue already has received substantial and thoughtful academic disagreement. Some commentators argue that even though the plaintiff hedge funds are “not particularly attractive” actors who deserve to receive much less than they are requesting, the government’s actions violated fairness principles embedded in both administrative and corporate law, and some recovery is appropriate.²⁸¹ Others have argued that the plaintiffs were opportunistic purchasers who should have understood—and in fact probably did understand—that there could be no reasonable investment-backed expectation of profit from cheap stocks offered by distressed, heavily-regulated, and mostly government-owned entities.²⁸²

For present purposes, what is striking, instead, is the mode of argument used by the plaintiffs’ attorneys. Like good lawyers, they have hedged their bets, pressing both *Penn Central* and *Lucas* arguments in their brief opposing the government’s motion to dismiss.²⁸³ But those are backup claims, and their lead takings argument is different. It is that the government, through its dividend sweep, simply appropriated otherwise private

278. *Fairholme Funds, Inc. v. United States*, 147 Fed. Cl. 1, 53 (2019) (describing the dismissed and non-dismissed claims);

279. *Id.* at 53–54; *Fairholme Funds, Inc. v. United States*, 147 Fed. Cl. 126, 131 (2020) (reaffirming the decision to certify the case for an interlocutory appeal).

280. *See Collins v. Mnuchin*, 938 F.3d 553, 585 (5th Cir. 2019) (en banc), *cert. granted*, 141 S. Ct. 193 (2020) (allowing a non-takings claim to proceed).

281. *See Solomon & Zaring*, *supra* note 261, at 374, 377 (“We think that these lawsuits are compelling—even if the plaintiffs are not particularly attractive . . .”); Robert K. Rasmussen & David A. Skeel, Jr., *Governmental Intervention in an Economic Crisis*, 19 U. PA. J. BUS. L. 7, 18 (2016) (stating that the net sweep “appeared to affect a taking of the private investors’ investment property”).

282. *See Davidson*, *supra* note 261; *see also Badawi & Casey*, *supra* note 271, at 445 (“While wiping out equity has generated this political controversy, it is consistent with what often happens to stockholders of distressed companies.”).

283. Plaintiffs’ Omnibus Response to Defendants’ Motion to Dismiss at 50–55, *Fairholme Funds, Inc. v. United States*, 147 Fed. Cl. 126 (2020) (No. 13-465C).

interests.²⁸⁴ The plaintiffs' attorneys' lead Supreme Court cases therefore are physical takings cases: *Loretto*,²⁸⁵ *Washington Legal Foundation*,²⁸⁶ and *Webb's Fabulous Pharmacies*.²⁸⁷ And they also try to bolster their arguments with an interesting analogy: according to the plaintiffs, redirecting dividends from a stockholder is much like redirecting water from an irrigation ditch.²⁸⁸ Consequently, before the plaintiffs even get to *Lucas* or *Penn Central*, they cite *Casitas Municipal Water District*, the Federal Circuit decision discussed in the previous section.²⁸⁹

This is just one brief in one set of coordinated cases – albeit a carefully strategized brief in litigation with eleven- or twelve-figure sums potentially at stake. But it reflects a theme, which is consistent with the empirical data stretching across hundreds of cases. The strategies of takings litigation have shifted, and the focus of plaintiffs is not securing a favorable regulatory takings decision, though they will take that if it is offered. Instead, plaintiffs' attorneys' goal is to find a categorical treatment that avoids a regulatory takings analysis entirely. And if that is true, then the most important and interesting takings battles will likely be fought within, and at the boundaries of, the realm of physical takings.

D. The Grab Bag

So far, this Part has focused on a few case categories that exemplify broader themes (I have not discussed all the major categories; military overflights and flooding also generate huge numbers of claims). But that categorical focus leaves a large grab bag of other claims, some of which are unique or have only one or two close cousins. This last subsection discusses whether any thematic observations can be drawn from this collection. Any such observation has to be caveated, for the sheer variety means that generalizations have abundant exceptions. Nevertheless, two notable, though far from discrete, groups do emerge, along with some associated themes.

284. *Id.* at 48–49.

285. *Id.* at 48 (citing *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1892)).

286. *Id.* (citing *Brown v. Legal Found. of Wash.*, 538 U.S. 216, 235 (2003)).

287. *Id.* (citing *Webb's Fabulous Pharmacies, Inc. v. Beckwith*, 449 U.S. 155, 162 (1980)).

288. *Id.* at 49.

289. *Id.*

One group includes novel, creative, and relatively unique claims arising out of unconventional types of claimed property interests.²⁹⁰ To provide just a few examples, plaintiffs have argued that the federal government took property interests in heliport operations,²⁹¹ business interests in providing airport security services,²⁹² compensatory mitigation credits,²⁹³ tort claims against the Japanese government for World War II atrocities in the Philippines,²⁹⁴ and state claims to unredeemed federal savings bonds.²⁹⁵ In many of these cases, the financial stakes are high. In a Japanese war crimes case, for example, the plaintiffs sought a trillion-dollar damage award,²⁹⁶ and one airport's case produced a Court of Federal Claims decision ordering \$133.5 million in just compensation.²⁹⁷ From the plaintiffs' perspective—and perhaps from their attorneys' perspective, if they are handling the case on contingency-fee arrangements—the cases dangle the possibility of enormous payoffs. But the few initially successful cases generally have been reversed on appeals.²⁹⁸ Very few plaintiffs in this group have actually won.

Besides the rarity of success, several other themes emerge from these cases. Most strikingly, a recurring question in this group—in addition to questions about the appropriate method of takings analysis—is whether the assertedly taken interest even counts as property.²⁹⁹ Many of the cases compel courts to consider whether

290. The Fannie Mae and Freddie Mac cases also exemplify this group's main attributes, but I discuss them separately because they are both cutting-edge and particularly high stakes.

291. *Air Pegasus of D.C., Inc. v. United States*, 424 F.3d 1206, 1208 (Fed. Cir. 2005).

292. *Huntleigh USA Corp. v. United States*, 525 F.3d 1370, 1379 (Fed. Cir. 2008), *cert. denied*, 555 U.S. 1045.

293. *Hearts Bluff Game Ranch, Inc. v. United States*, 669 F.3d 1326, 1327 (Fed. Cir. 2012).

294. *See Achenbach v. United States*, 56 Fed. Cl. 776, 776 (2003); *Hair v. United States*, 52 Fed. Cl. 279, 279–80 (2002).

295. *Laturner v. United States*, 933 F.3d 1354, 1357 (Fed. Cir. 2019).

296. *Hair*, 52 Fed. Cl. at 281.

297. *See Love Terminal Partners, L.P. v. United States*, 889 F.3d 1331, 1339 (Fed. Cir. 2018).

298. *E.g., id.* (reversing the Court of Federal Claims's just compensation award).

299. *E.g., Hearts Bluff Game Ranch, Inc. v. United States*, 669 F.3d 1326, 1330–32 (Fed. Cir. 2012); *Acceptance Ins. Cos., Inc. v. United States*, 583 F.3d 849, 857–59 (Fed. Cir. 2009) (holding that the plaintiffs lacked a property interest in selling crop insurance); *Air Pegasus of D.C., Inc. v. United States*, 424 F.3d 1206, 1216–19 (Fed. Cir. 2005) (holding that the plaintiffs had no property interest in navigable airspace); *Meyers v. United States*, 96 Fed. Cl. 34, 62–64 (2010) (concluding that cattle ranchers lacked a property interest in payments from the Conservation Security Program).

interests in some heavily regulated field – and, sometimes, interests created by a regulatory program – are property interests protected by the Fifth Amendment.³⁰⁰ More deeply, those cases raise questions about the origins of property; can it only have roots in old, common-law traditions, or is it something that can be created and extinguished by modern positive law?³⁰¹ Some property theorists have suggested the latter answer; if property is a creation of political communities, they argue, then a democratic political community ought to have the ability, through positive law, to redefine the scope of property interests.³⁰² Adopting that view does not mean the plaintiffs would win their cases; a court still could easily hold that there could be few reasonable investment-backed expectations in arenas subject to heavy regulation.³⁰³ But the Federal Circuit’s general answer, instead, is that there can be no property interests *at all* in fields where heavy regulation preceded the interest in question – like, for example, the sale of compensatory mitigation credits generated by wetlands restoration. In contrast, according to the Federal Circuit, such interests can exist in fields, like the development of wetlands, which now are heavily regulated but once were not.³⁰⁴ That distinction implies that property must be something grounded in old common law. And for many of the

300. See, e.g., *Hearts Bluff Game Ranch, Inc.*, 669 F.3d at 1330–32 (compensatory mitigation credits); *Acceptance Ins. Cos., Inc.*, 583 F.3d at 857.

301. See Michael Pappas, *Disclaiming Property*, 42 HARV. ENV’T. L. REV. 391, 415–16 (2018).

302. See Joseph William Singer, *Property as the Law of Democracy*, 63 DUKE L.J. 1287, 1304 (2014) (describing property doctrines, many now seen as odious, that later laws have limited or eliminated).

303. See *Members of Peanut Quota Holders Ass’n, Inc. v. United States*, 421 F.3d 1323, 1335 (Fed. Cir. 2005) (noting but not adopting this rationale).

304. See, e.g., *Hearts Bluff Game Ranch, Inc.*, 669 F.3d at 1332 (holding that mitigation banking credits are not takings clause property because they are created through regulatory programs); *Members of Peanut Quota Holders Ass’n, Inc.*, 421 F.3d at 1334 (“Peanut quotas are property, but they are a form of property that is subject to alteration or elimination by changes in the government program that gave them value.”); *Mike’s Contracting, LLC v. United States*, 92 Fed. Cl. 302, 307 (2010) (holding that a plaintiff could not assert a property right where its interest was “tied to government approval in a context of pervasive government control”). In some subtly different cases, the Court of Federal Claims or the Federal Circuit has declined to find a property interest because the laws governing the program that created the interest also expressly limited the plaintiffs’ ability to do what the plaintiff wanted to do. See, e.g., *Acceptance Ins. Cos., Inc.*, 583 F.3d at 857–58 (“Under the ‘background principles’ and rules existing when Acceptance entered into the crop insurance business, Acceptance could not freely transfer the policies at issue. . . . Therefore, Acceptance did not possess a cognizable Fifth Amendment property interest in freely selling American Growers’ portfolio of insurance policies . . .”).

interests created by regulation, that view means that the plaintiffs lose without ever even getting to a *Penn Central* analysis.³⁰⁵

The second group – which has fuzzy boundaries with the first – involves cases grounded in combinations of legal misunderstanding and anti-governmental animus. These cases also are abundant and come in many varieties. Some fall within traditional takings categories; they include land use permitting cases, for example, in which the plaintiffs appear to believe that merely being asked to participate in a permitting process was a taking.³⁰⁶ Others are more extreme, or even bizarre. To provide a few examples, plaintiffs have sued because the federal government stopped them from building an unpermitted dam on federal land,³⁰⁷ because the federal government charges patent fees,³⁰⁸ because of inchoate claims grounded in categorical opposition to taxation,³⁰⁹ because the federal government allegedly stole people’s true identities at birth,³¹⁰ or under theories that the judges struggle mightily to even understand.³¹¹ These cases invariably lose, but they are abundant enough that one cannot just write them off as irrelevant sideshows.

305. See, e.g., *Air Pegasus of D.C., Inc. v. United States*, 424 F.3d 1206, 1219 (Fed. Cir. 2005) (dismissing a claim without applying the *Penn Central* test).

306. See, e.g., *Freeman v. United States*, 875 F.3d 623, 625 (Fed. Cir. 2017) (describing a claim brought by a miner who sued when the Forest Service asked for details about his planned operations); *Mehaffy v. United States*, 102 Fed. Cl. 755 (2012), *aff’d*, 499 F. Appx. 18, *cert. denied*, 571 U.S. 1124 (2014) (“While plaintiff may have expected the permitting process to be nothing more than ‘some red tape,’ it was his responsibility to take the permitting process seriously. He did not.”); *Pax Christi Memorial Gardens, Inc. v. United States*, 52 Fed. Cl. 318, 325–26 (2002) (dismissing as unripe a case in which the plaintiffs had not responded to requests for information about their application or responded to the concerns of other federal and state agencies).

307. *Underwood Livestock, Inc. v. United States*, 417 F. App’x 934, 935 (Fed. Cir. 2011).

308. E.g., *Figueroa v. United States*, 57 Fed. Cl. 488, 490 (2003).

309. E.g., Complaint at *4, *Brokaw v. United States*, No. 1:14-cv-00586-MCW (Fed. Cl. July 10, 2014) (alleging that the plaintiffs were “[p]rofiled and targeted as; [sic] anti-government, Constitutionlists, and Tax Protestors”).

310. *Troxelle v. United States*, 2010 WL 3982349 at *2 (Fed. Cl. 2010).

311. See, e.g., *Kortlander v. United States*, 107 Fed. Cl. 357, 359 (2012) (“Plaintiffs’ complaint is rambling, disjointed and, in many respects, it is difficult to sort relevant information from colorful background details.”); *Strubel v. United States*, 2009 WL 1636355 at *1 (Fed. Cl. 2009) (“While it was clear that Mr. Strubel labored with great effort to assemble his complaint . . . this is the only thing that was clear about the filing.”).

In summary, several key findings emerge from the numbers and from a qualitative review of takings cases against the federal government. Most importantly, the cases do not fit a conventional narrative, which suggests that regulatory restrictions will generate most of the takings cases and most of the intellectually interesting questions. Instead, the more challenging questions that arise tend to be about the appropriate method of analysis or the nature of property rights, not about applications of the *Penn Central* or *Lucas* standards. And the overall picture does not validate narratives in which takings litigation is a central locus for clashes between federal regulatory governance and individual liberty. Some plaintiffs are clearly trying to bring such cases, but they almost invariably lose, and in most cases even a brief review of their legal arguments clarifies why they are losing. Sophisticated businesses, meanwhile, will take occasional shots, as will large law firms; the Fannie Mae–Freddie Mac litigation involves well-heeled clients represented by some very prominent firms.³¹² But those are outliers. For the most part, takings litigation, at least in the federal courts, is not something in which large businesses are choosing to participate.

V. BUSINESS MODELS AND IDEOLOGUES

The discussion so far has described federal court takings litigation. This final Part considers, briefly, why federal takings litigation has become what it is and whether the current status of that litigation should be cause for concern.

One explanation for the nature of takings claims is grounded in the calculations of businesses. To put it simply, the kind of ad-hoc, fact-bound, and equity- and fairness-driven analyses envisioned by governing Supreme Court standards would make most takings litigation a rather poor business proposition, both for regulated entities and, perhaps more importantly, for their lawyers. Two of the *Penn Central* prongs demand time-consuming legal work – one cannot demonstrate diminution in value or interference with reasonable investment-backed expectations without introducing

312. See Joe Light, *Fannie Mae, Freddie Mac Shareholders Argue Against Government's Profit Sweep*, WALL ST. J., Apr. 17, 2016 (mentioning the involvement of Boies, Schiller & Flexner, LLP).

ample evidence and, in all likelihood, retaining expert witnesses.³¹³ While physical takings cases also require economic calculations, they typically occur at the valuation stage, which happens after liability has been established and the parties know the government will be paying for the plaintiffs' attorneys' time.³¹⁴ The other *Penn Central* prong—the nature of the government action—functions as an invitation to weigh some of the deeper equity questions underlying takings disputes, which again means an invitation to tell a fact-intensive story.³¹⁵ Combine the evidentiary demands of the standard with the traditionally low odds of success,³¹⁶ and it is no wonder that plaintiffs appear to avoid filing some takings cases entirely and, when they do file, try to use categories to simplify the analysis. Similarly, it should not be entirely surprising that many of the cases that do not fit into any sort of category, yet are filed anyway, either offer the temptation of a large payout or are filed by plaintiffs apparently motivated by mixes of anti-governmental animus and legal bewilderment.

The harder question is whether any of this is problematic. At first glance, the answer might be no. The absence of *Penn Central* claims might not seem worrisome (and does *not* show that *Penn Central* and its progeny lack importance); if a legal standard is deterring litigation, it may be serving a significant and appropriate function.³¹⁷ The absence of cases may also signal the extent to which federal regulation, though far reaching, is also accommodating. If regulated entities are getting compromises out of regulatory processes—and many clearly are³¹⁸—they may see little benefit in

313. See Meltz, *supra* note 159, at 336–38 (describing calculations that inform a diminution-in-value analysis).

314. See *id.* at 360–62 (describing the simplified evidentiary issues in a physical invasion liability analysis).

315. See Echeverria, *supra* note 94, at 186–98 (describing the wide range of inquiries that can fall within this factor).

316. See Krier & Sterk, *supra* note 12, at 88 (“[I]n state court practice, relegation to ad hoc adjudication has marked the death knell for a takings claim.”).

317. See COAN, *supra* note 81, at 151–54 (describing the burdens that more litigation-inviting takings standards would create).

318. See Dave Owen, *Little Streams and Legal Transformations*, 2017 UTAH L. REV. 1, 41, 51 (2017) (describing the flexibility of Clean Water Act section 404 permitting); Eric Biber & J.B. Ruhl, *The Permit Power Revisited: The Theory and Practice of Regulatory Permits in the Administrative State*, 64 DUKE L.J. 133, 169–73 (2014) (describing the Army Corps of Engineers' regulatory permitting programs); Owen, *supra* note 229, at 182–85 (describing flexible approaches to implementing the Endangered Species Act).

filing takings claims. Likewise, efforts to create and place cases within categorical boxes might also seem entirely appropriate. To a large extent, that is the point of legal systems: they lump similar situations into categories and govern those categories with consistent rules, all so that disputes can be predictably and efficiently resolved.³¹⁹ And if some attorneys use those categories to become rich, that is hardly unprecedented. For decades, tort litigation has relied on a similar business model, with many more attorneys and parties involved.³²⁰

The problem arises, however, if the categories are poor proxies for the underlying justice interests that law is supposed to serve. With the new categorical pushes in takings litigation, that threat is real. Takings, according to the Supreme Court, ultimately is about weighing owners' interests in using their property as they see fit against the needs of other property owners and of society as a whole.³²¹ In many cases, both sets of needs are compelling, and it is difficult to find a simple formula for balancing them. For example, the equitable dilemmas raised by the Fannie Mae and Freddie Mac net worth sweep are not simple. The taxpayers had bailed the companies out, at great risk and seem entitled to the benefit of the chance they took, and the other investors knew they were buying into a government-controlled entity;³²² yet, at the same time, a majority-shareholder action that leaves minority shareholders with nothing strikes many people as unfair.³²³ These dilemmas deserve careful thought, yet if the plaintiffs succeed in analogizing the case to *Brown v. Washington Legal Foundation* and treating it as a categorical physical takings case, these equitable questions might not even be part of the analysis.³²⁴ The same problem arises with

319. See Kathleen M. Sullivan, *Foreword: The Justices of Rules and Standards*, 106 HARV. L. REV. 22, 61–66 (1992) (describing the benefits of categorical legal rules).

320. See *Personal Injury Lawyers & Attorneys in the US - Market Size 2002–2027*, IBISWORLD, <https://www.ibisworld.com/industry-statistics/market-size/personal-injury-lawyers-attorneys-united-states/> (Aug. 16, 2021) (describing a \$41.5 billion market).

321. See *Armstrong v. United States*, 364 U.S. 40, 49 (1960) (describing the Takings Clause as “designed 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”).

322. See *Badawi & Casey*, *supra* note 271, at 445–46 (“The chorus of objectors . . . [to the net worth sweep] has ignored both the enormous risk facing all creditors of the Entities and the freedom that corporate law grants to limit this risk.”).

323. See *id.* at 444–45 (summarizing the diverse range of critics).

324. See *supra* notes 284–289 and accompanying text.

the water rights cases. To provide one prominent example, long-lasting litigation over the waters of the Klamath River involved difficult questions about how to achieve equity among tribes, irrigators, and environmentalists, all of whom had longstanding claims to the same river,³²⁵ yet a physical takings analysis could have sidelined these questions. In that particular case, the attempt failed—the Court of Federal Claims and Federal Circuit held that the tribes’ treaty rights precluded the irrigators from asserting a property interest in the flows at issue.³²⁶ But in a future case that lacks the Klamath’s distinctive treaty history, the result could be an abundance of efficiency but very ill-considered justice.

There are also multiple ways to avoid these problems. One is skepticism of plaintiffs’ attempts to treat regulatory restrictions as physical takings. The Supreme Court has already counseled courts to employ such skepticism,³²⁷ and in some cases they do.³²⁸ Another option is to limit plaintiffs’ attempts to treat novel interests as property. A reluctance to acquiesce to those attempts is also recurrent in Court of Federal Claims and Federal Circuit cases, though, as discussed above, the rationales for that reluctance beg some difficult questions about the origins of property.³²⁹

A third option is to step away from the decades-old assumption that the world of takings litigation is neatly split between regulatory claims, which require ad-hoc, fact-specific analyses, and physical takings, which require categorical analyses. And while this change might seem at odds with the Court’s repeated statements, the shift would be less dramatic than it initially appears. As multiple commentators have pointed out, the Court’s supposedly categorical tests have always been riddled with exceptions.³³⁰ And more recently, the Court has set a non-categorical test for an entire category—and, by the numbers, an important category—of physical takings claims. In *Arkansas*

325. See generally HOLLY DOREMUS & A. DAN TARLOCK, *WATER WAR IN THE KLAMATH BASIN: MACHO LAW, COMBAT BIOLOGY, AND DIRTY POLITICS* (2008) (describing the Klamath basin’s history of water conflict).

326. *Baley v. United States*, 942 F.3d 1312, 1341 (Fed. Cir. 2019).

327. See *Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg’l Plan. Auth.*, 535 U.S. 302, 323–24 (2002).

328. See, e.g., *Seiber v. United States*, 364 F.3d 1356, 1366 (Fed. Cir. 2004) (rejecting a claim that regulatory protections of spotted owls affected a physical taking).

329. See *supra* notes 299–305 and accompanying text.

330. See, e.g., Echeverria, *supra* note 31, at 763–75; Blais, *supra* note 31, at 59–65.

Game & Fish Commission v. United States,³³¹ a landmark flooding case, the Court rejected the position, which the United States had successfully asserted before the Federal Circuit, that a temporary flood can *never* be a taking.³³² It then offered a standard for deciding when such a taking had occurred.³³³ In contrast to the Court's frequent statements that physical takings require *per se* standards, the flooding standard demands a multipart and contextual inquiry; the time of the flooding, its foreseeability, the extent to which it interferes with reasonable investment-backed expectations, and the severity of its impacts all are relevant.³³⁴ If courts wish to engage the justice questions underlying takings claims, rather than indulging plaintiffs' requests for new categorical boxes, that standard provides a model.

CONCLUSION

Disputes over the appropriate scope and intensity of regulatory governance are central to American politics and law. And lawyers tend to assume that most takings cases arise from those disputes and, relatedly, that takings cases play important roles within those disputes. The empirical data summarized in this study show that those assumptions are wrong, at least for federal regulation. Most federal regulatory programs are largely untouched by takings litigation; most major businesses and law firms are not using takings litigation to address their differences with federal regulators; and the vast majority of the inverse condemnation claims against the federal government arise out of alleged physical, not regulatory, takings. Likewise, in federal court takings litigation, thorny questions do recur, but they relate to the boundaries between modes of takings analysis and the nature of non-traditional property rights more often than the nuances of regulatory takings standards. These conclusions do not suggest that regulatory takings doctrine is inconsequential; it likely plays an influential role by deterring claims. The core point, instead, is that takings litigation looks quite different—and different in

331. 568 U.S. 23 (2012).

332. *Id.* at 38.

333. *Id.* at 38–39.

334. *Id.* (citing *Penn Central*, among other cases).

interesting and important ways – outside the spotlights of Supreme Court and academic discourse.

*APPENDIX 1: UNITED STATES SUPREME COURT TAKINGS CASES
SINCE 1978*

Case Name	Date	Plaintiff type	Defendant type	Takings Test Type	General Subject Matter
Penn Cent. Transp. Co. v. N.Y.C., 438 U.S. 104	1978	Single company	Local	Regulatory	Land development
Andrus v. Allard, 444 U.S. 51	1979	Individual	Federal	Regulatory	Eagle feathers
Kaiser Aetna, 444 U.S. 164	1979	Single company	Federal	Physical	Navigational servitude (related to land and water use)
Agins v. City of Tiburon, 447 U.S. 255	1980	Individual	Local	Regulatory	Land development
PruneYard Shopping Ctr. v. Robins, 447 U.S. 74	1980	Single company	State	Physical	Requirement to allow speech in a shopping mall
Webb's Fabulous Pharmacies, Inc. v. Beckwith, 449 U.S. 155	1980	Single company	State	Physical	Interpleader accounts
San Diego Gas & Elec. v. City of San Diego, 450 U.S. 621	1981	Single company	Local	Regulatory	Land development
Hodel v. Va. Surface Mining & Reclamation Ass'n, 452 U.S.	1981	Industry association	Federal	Regulatory	Coal mining

264					
Dames & Moore v. Regan, 453 U.S. 654	1981	Company	Federal	Unclear	Claims against Iran
Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419	1982	Individual	Local	Physical	Cable television boxes
United States v. Sec. Indus. Bank, 459 U.S. 70	1982	Individual company	Federal	Regulatory	Bankruptcy obligations
Ruckelshaus v. Monsanto Co., 467 U.S. 986	1984	Company	Federal	Regulatory	Trade secrets (pesticides)
Williamson Cnty. Reg'l Plan. Comm'n v. Hamilton Bank of Johnson City, 473 U.S. 172	1985	Single company	Local	Regulatory	Land development
Connolly v. Pension Ben. Guar. Corp., 475 U.S. 211	1986	Multiple entities	Federally-created corporation	Regulatory	Regulation of pension plans
MacDonald, Sommer & Frates v. Yolo Cnty., 477 U.S. 340	1986	Company	Local	Regulatory	Land development
Bowen v. Public Agencies Opposed to Soc. Sec. Entrapment, 477 U.S. 41	1986	State, Public employees organization	Federal	Lack of property interest	Social Security

FCC v. Fla. Power Corp., 480 U.S. 245	1987	Company	Federal	Physical taking claimed; regulatory taking analysis used	Cable companies' access to utility poles
Keystone Bituminous Coal Ass'n v. DeBenedictis, 480 U.S. 470	1987	Coal companies	State	Regulatory	Coal mining
First Eng. Evangelical Church of Glendale v. Cnty. of Los Angeles, 482 U.S. 304	1987	Church	Local	Regulatory	Land development
Nollan v. Cal. Coastal Com'n, 483 U.S. 825	1987	Individuals	State	Exaction	Land development
Hodel v. Irving, 481 U.S. 704	1987	Individual tribe members	Federal	Regulatory	Inheritance of individually owned Indian lands
Pennell v. City of San Jose, 485 U.S. 1	1988	Individual, landlords' association	Local	Regulatory	Rent control
United States v. Sperry Corp., 493 U.S. 52	1989	Corporations	Federal	Court upholds fee as a valid user fee	User fees for processing claims against Iran
Preseault v. ICC, 494 U.S. 1	1990	Individuals	Federal	Claim dismissed as premature	Rails to trails
Yee v. City of Escondido, 503 U.S. 519	1992	Multiple mobile home park owners	Local	Physical taking claims; regulatory takings analysis used	Rent control (mobile homes)
Lucas v. S.C. Coastal	1992	Individual	State	Regulatory	Land development

Council, 505 U.S. 1003					
Concrete Pipe & Products of Ca., Inc. v. Constr. Laborers Pension Tr., 508 U.S. 602	1993	Individual company	Federal	Regulatory	Retirement benefit obligations
Dolan v. City of Tigard, 512 U.S. 374	1994	Individual	Local	Exaction	Land development
Suitum v. Tahoe Reg'l Plan. Agency, 520 U.S. 725	1997	Individual	Local	Regulatory	Land development
E. Enters. v. Apfel, 524 U.S. 498	1998	Individual company	Federal	Regulatory	Coal miners' retirement health benefits
Phillips v. Wash. Legal Found., 524 U.S. 156	1998	Individuals and organization	State	Physical	IOLTA accounts
City of Monterey v. Del Monte Dunes at Monterey, Ltd., 526 U.S. 687	1999	Single company	Local	Regulatory	Land development
Palazzolo v. Rhode Island, 533 U.S. 606	2001	Individual	State	Regulatory	Land development
Tahoe-Sierra Pres. Council v. Tahoe Reg'l Plan. Agency, 535 U.S. 302	2002	Landowner organization	Local/interstate	Regulatory	Land development
Brown v. Legal	2003	Individuals	State	Physical	IOLTA

Found. of Wash., 538 U.S. 216					Regulatory	funding
Lingle v. Chevron USA, Inc., 544 U.S. 528	2005	Corporation	State	Regulatory	Regulatory	Gasoline pricing
San Remo Hotel, L.P. v. City and Cnty. of San Francisco, 545 U.S. 323	2005	Single business	Local	Regulatory	Regulatory	Hotel room conversion fees
Stop the Beach Renourishment v. Fla. Dept. of Env't Prot., 560 U.S. 702	2010	Property owners' association	State	Physical/judicial	Physical/judicial	Beach augmentation program
Ark. Game & Fish Commission v. United States, 568 U.S. 23	2012	State	Federal	Physical	Physical	Flooding
Koontz v. St. Johns River Water Mgmt. Dist., 570 U.S. 595	2013	Individual	Local (regional)	Exaction	Exaction	Land development
Horne v. U.S. Dept. of Agric., 569 U.S. 513	2013	Farming businesses	Federal	No takings test applied	No takings test applied	Raisin pricing systems
Horne v. U.S. Dept. of Agric., 576 U.S. 350	2015	Farming businesses	Federal	Physical	Physical	Raisin pricing systems
Murr v. Wisconsin, 137 S. Ct. 1933	2017	Family	State and local	Regulatory	Regulatory	Land development
Knick v. Twp. of Scott, Pa., 139 S. Ct. 2162	2019	Individual	Local	Regulatory	Regulatory	Land use

Cedar Point Nursery v. Hassid, 141 S. Ct. 2063	2021	Single company	State	Physical	Union organizing
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