Table of Contents

PART I. TEN CRITICAL STEPS IN TAKINGS LITIGATION

CHAPTER 1. INTRODUCTION TO TAKINGS CONCEPTS

I. IN GENERAL

§ 1:1 The basic structure of takings law
§ 1:2 The direct condemnation/eminent domain setting
§ 1:3 The *non*direct condemnation/eminent domain setting
§ 1:4 The many and varied takings contexts: Governmental powers versus constitutional clauses protecting property rights
§ 1:5 —Governmental powers giving rise to takings claims
§ 1:6 —Constitutional provisions giving rise to takings claims
§ 1:7 —The role of 42 U.S.C.A. § 1983 in takings litigation
§ 1:8 —The role of the Tucker Act in takings litigation
§ 1:9 The critical importance of standards of judicial review in takings litigation
§ 1:10 Givings

II. CHECKLISTS AND FORMS

§ 1:11 *Checklist of strategic considerations*
§ 1:12 *Forms to consider*

CHAPTER 2. TYPES OF TAKINGS CLAIMS

I. FEDERAL CLAIMS

A. IN GENERAL

§ 2:1 Overview

B. FEDERAL JUST COMPENSATION CLAUSE CLAIMS

§ 2:2 Generally
§ 2:3 "On face" and "as applied" claims
§ 2:4 —"On face" claims

§ 2:5 —"As applied" claims
§ 2:6 Two types of direct condemnation/eminent domain federal just compensation clause claims
§ 2:7 —Government appropriation through condemnation
§ 2:8 —Functional equivalent of government appropriation
§ 2:9 Four types of *non*direct condemnation/eminent domain federal just compensation clause claims
§ 2:10 —Permanent Physical Occupation (PPO)-Loretto
§ 2:11 — —Permanent conceptual deprivation (PCD) variant
§ 2:12 —Complete deprivation of economically valuable use (C-DEVU)-Lucas
§ 2:13 — —Importance of relevant property determination
§ 2:14 — —Governmental defenses in the complete deprivation setting
§ 2:15 —Partial deprivation of economically valuable use (P-DEVU)-Penn Central
§ 2:16 — —Reduced importance of relevant property determination
§ 2:17 — —3-factor standard
§ 2:18 —Land use exactions-Nollan/Dolan
§ 2:19 — —Under "rough proportionality" standard
§ 2:20 — —Under modern doctrine

C. OTHER FEDERAL CONSTITUTIONAL CLAUSES

§ 2:21 Generally
§ 2:22 Due process
§ 2:23 —Due process as independent ground
§ 2:24 —Protectible interest prerequisite
§ 2:25 —Ripeness requirement
§ 2:26 —Valid, but compensable, government conduct
§ 2:27 Equal protection
§ 2:28 —Premium on articulation of classification
§ 2:29 —Elements of "class of one" claims
§ 2:30 —"Ill will" as an element of "class of one" claims
§ 2:31 Contracts clause
§ 2:32 Fourth Amendment

D. FEDERAL STATUTORY TAKINGS CLAIMS

§ 2:33 Federal statutory takings claims
§ 2:34 —Presidential Executive Order 12630
§ 2:35 —Federal takings bills

II. STATE CLAIMS

§ 2:36 Generally

§ 2:37 State just compensation clause claims
§ 2:38 —State "Takings" claims
§ 2:39 —State "damage" claims
§ 2:40 —State "applied to public use" claims
§ 2:41 Other state constitutional clauses
§ 2:42 —"Open Courts" claims
§ 2:43 —State "Uniform Laws" claims
§ 2:44 State statutory takings claims
§ 2:45 —State takings statutes
§ 2:46 —State takings ordinances

III. CHECKLISTS AND FORMS

§ 2:47 *Checklist of strategic considerations*
§ 2:48 *Forms to consider*

CHAPTER 3. STRATEGIC CONSIDERATIONS IN STRUCTURING THE TAKINGS LAWSUIT

I. DISTINGUISHING GOVERNMENT CONDUCT FROM IMPACT ON OWNER

§ 3:1 Generally
§ 3:2 Government conduct—As omission or act
§ 3:3 —Physical governmental conduct
§ 3:4 —Regulatory governmental conduct (nonphysical)
§ 3:5 Impact on owner
§ 3:6 —Physical impact on owner
§ 3:7 —Regulatory impact on owner (impact on legal rights)

II. DEFINING THE PROPERTY INVOLVED

§ 3:8 Is "property" involved at all?—Two competing perspectives
§ 3:9 —Illustrative cases
§ 3:10 — —"No property" cases
§ 3:11 — —"Property" cases
§ 3:12 What is the "relevant" property?
§ 3:13 —Physical and conceptual definitions of the "property"
§ 3:14 —Broad and narrow definitions of the "relevant" property—Combination of physical/conceptual definitions of "property" with broad/narrow definitions of the "relevant" property
§ 3:15 — —Relevant property defined broadly
§ 3:16 — —Relevant property defined narrowly
§ 3:17 —Impact of Palazzolo on importance of relevant property definition

§ 3:18 —Government defenses in partial takings after Palazzolo

III. THE NATURE OF THE DEFENDANT

§ 3:19 Overview
§ 3:20 Local governments and officials
§ 3:21 State governments and officials
§ 3:22 Federal government and officials

IV. SELECTING THE FORUM

§ 3:23 Generally
§ 3:24 Litigation of takings claims in state courts
§ 3:25 United States Supreme Court review of state court judgments
§ 3:26 Federal court
§ 3:27 Forum-splitting

V. RELIEF SOUGHT

A. IN GENERAL

§ 3:28 Overview

B. MONETARY RELIEF

§ 3:29 Generally
§ 3:30 "Just compensation" for "forced condemnation" remedy
§ 3:31 —Highest and best use
§ 3:32 —Impact of possibility of rezoning
§ 3:33 —Methods of valuation
§ 3:34 — —Three general approaches
§ 3:35 — —Comparable sales approach
§ 3:36 — —Cost approach
§ 3:37 — —Capitalization of income approach
§ 3:38 —Leases as the property taken
§ 3:39 —Partial takings
§ 3:40 —Date of valuation
§ 3:41 —Changes in value due to proposed public use
§ 3:42 Interim damages
§ 3:43 Interest on award
§ 3:44 Costs and expenses
§ 3:45 Attorney's fee

C. NONMONETARY RELIEF

§ 3:46 Generally
§ 3:47 Declaratory judgment

§ 3:48 Prohibitory injunction
§ 3:49 Mandatory injunction

VI. TYPES OF CLAIMS ASSERTED

§ 3:50 Generally
§ 3:51 Federal constitutional takings claims
§ 3:52 State constitutional takings claims
§ 3:53 State claims other than state constitutional takings claims

VII. INTERACTION OF EXHAUSTION, RIPENESS AND PRECLUSION CONCERNS

§ 3:54 Generally

VIII. ALTERNATIVE DISPUTE RESOLUTION

§ 3:55 Generally

IX. CAUSATION

§ 3:56 Generally

X. TRIAL BY JURY

§ 3:57 Introduction
§ 3:58 Trial by jury under federal law—Takings claims against the federal government
§ 3:59 —Takings claims against state or local governments
§ 3:60 Trial by jury under state law

XI. CHECKLISTS AND FORMS

§ 3:61 *Checklist of strategic considerations*
§ 3:62 *Forms to consider*

CHAPTER 4. EXHAUSTION OF ADMINISTRATIVE REMEDIES—AND PRECLUSION RULES

I. IN GENERAL

§ 4:1 Overview
§ 4:2 Requirement generally

II. TAKINGS CLAIMS AGAINST THE FEDERAL GOVERNMENT

§ 4:3 Foundations for takings claims against the federal

government—Evolution of takings claims against the federal government
§ 4:4 —Takings claims distinguished from tort claims against the federal government—Significance for subject matter jurisdiction and statute of limitations purposes
§ 4:5 Exhaustion of administrative remedies for takings claims against the federal government
§ 4:6 Preclusive effect of administrative determinations on takings claims against the federal government
§ 4:7 Preclusive effect of other pending lawsuits on takings claims against the federal government

III. TAKINGS CLAIMS AGAINST STATE OR LOCAL GOVERNMENTS

§ 4:8 Foundations for takings claims against state or local governments
§ 4:9 —Federal law
§ 4:10 —State law
§ 4:11 Exhaustion of administrative remedies
§ 4:12 Exhaustion not required as to federal constitutional claims—Generally
§ 4:13 —Rationale and uneven application
§ 4:14 —"Final" determination must be obtained ("finality" requirement)
§ 4:15 Exhaustion as to prerequisite to adjudication of state constitutional claims
§ 4:16 "Futility" and other exceptions to "final" determination requirement as prerequisite to adjudication of federal or state constitutional claims
§ 4:17 Preclusive effect of administrative determinations on subsequent administrative proceedings against state or local governments
§ 4:18 Preclusive effect of administrative determinations on subsequent court proceedings against state or local governments

IV. ADDITIONAL ADMINISTRATIVE OR PROCEDURAL CONDITIONS FOR JUDICIAL ADJUDICATION OF TAKINGS CLAIMS AGAINST STATE AND LOCAL GOVERNMENTS

§ 4:19 Notice of claim under State Governmental Immunity/ Liability Act
§ 4:20 State negative statutes of limitation
§ 4:21 State attorney general must be given notice or made a party
§ 4:22 State bond requirements

V. CHECKLISTS AND FORMS

§ 4:23 *Checklist of strategic considerations*
§ 4:24 *Forms to consider*

CHAPTER 5. RIPENESS (EXHAUSTION OF JUDICIAL REMEDIES)—AND PRECLUSION RULES

I. EXHAUSTION OF JUDICIAL REMEDIES GENERALLY

§ 5:1 Definition

II. EXHAUSTION OF JUDICIAL REMEDIES IN REGARD TO TAKINGS CLAIMS AGAINST THE *FEDERAL* GOVERNMENT

§ 5:2 Generally

III. EXHAUSTION OF JUDICIAL REMEDIES IN REGARD TO TAKINGS CLAIMS AGAINST *STATE OR LOCAL* GOVERNMENTS

§ 5:3 Overview
§ 5:4 Exhaustion of judicial remedies requirements for *Federal* takings claims against state or local governments—"Completeness" requirement
§ 5:5 Exhaustion of judicial remedies requirements for *Federal* takings claims against state or local governments—Futility exception to completeness requirement
§ 5:6 Exhaustion of judicial remedies requirements for *State* takings claims against state or local governments
§ 5:7 California
§ 5:8 New York
§ 5:9 Other states

IV. PRECLUSIVE EFFECT OF JUDICIAL DETERMINATIONS ON SUBSEQUENT COURT PROCEEDINGS

§ 5:10 Generally
§ 5:11 Preclusive effect of judicial determinations on subsequent court adjudication of *federal* takings claims—"Completeness" requirement for ripeness
§ 5:12 Preclusive effect of judicial determinations on subsequent court adjudication of *federal* takings claims—Preclusion effect of satisfying "completeness" requirement

§ 5:13 —United States Supreme Court review of federal takings claims adjudicated by state courts—Roadmap from state courts to the United States Supreme Court
§ 5:14 — —The "presentation" requirement
§ 5:15 —Federal takings claims that may be adjudicated in federal district court directly
§ 5:16 Preclusive effect of judicial determinations on subsequent court adjudication of *state* takings claims

V. CHECKLISTS AND FORMS

§ 5:17 *Checklist of strategic considerations*
§ 5:18 *Forms to consider*

CHAPTER 6. FEDERAL ABSTENTION DOCTRINES

I. IN GENERAL

§ 6:1 Introduction
§ 6:2 Common law doctrines—"Pullman" abstention
§ 6:3 —"Colorado River" abstention
§ 6:4 —"Younger" abstention
§ 6:5 —"Burford" abstention
§ 6:6 Federal Anti-Injunction Act
§ 6:7 Political Question Doctrine

II. CHECKLISTS AND FORMS

§ 6:8 *Checklist of strategic considerations*
§ 6:9 *Forms to consider*

CHAPTER 7. UNITED STATES SUPREME COURT REVIEW

I. IN GENERAL

§ 7:1 Generally

II. CHECKLISTS AND FORMS

§ 7:2 *Checklist of strategic considerations*
§ 7:3 *Forms to consider*

CHAPTER 8. COMPLEMENTARY CLAIMS AND REMEDIES

I. IN GENERAL

§ 8:1 Declaratory judgment

§ 8:2 Injunctive relief—Generally
§ 8:3 —As invalidation remedy
§ 8:4 —As forced condemnation remedy
§ 8:5 Nuisance
§ 8:6 Writ proceedings—Common-law extraordinary writs
§ 8:7 —Statutory
§ 8:8 Statutory actions (petitions for review)
§ 8:9 Variance applications
§ 8:10 Estoppel, vested rights, nonconforming status
§ 8:11 —Estoppel
§ 8:12 —Vested rights
§ 8:13 —Nonconforming status
§ 8:14 Retaliation for assertion of constitutional rights
§ 8:15 Inalienable Rights clauses in state constitutions

II. CHECKLISTS AND FORMS

§ 8:16 *Checklist of strategic considerations*
§ 8:17 *Forms to consider*

CHAPTER 9. FORMS: ADMINISTRATIVE PROCEEDINGS

§ 9:1 Notice of claim
§ 9:2 —Illustrative statutory provisions—Notice of claim requirement
§ 9:3 — —Takings claims exempt from notice of claim requirement
§ 9:4 —Form
§ 9:5 Petition for *Administrative* review of administrative decision
§ 9:6 —Illustrative statutory provisions
§ 9:7 —Form

CHAPTER 10. FORMS: JUDICIAL PROCEEDINGS

§ 10:1 Petition for *Judicial* review of administrative decision
§ 10:2 —Illustrative statutory provisions
§ 10:3 —Form
§ 10:4 *State* court complaint asserting state and federal takings claims
§ 10:5 —Statutory provisions may not restrict substantive constitutional takings protection
§ 10:6 —Form
§ 10:7 *Federal* court complaint asserting state and federal takings claims
§ 10:8 —Statutory provisions may not restrict substantive constitutional takings protection

§ 10:9 —Form
§ 10:10 State supreme court appellant's opening brief asserting state and federal takings claims against state department of transportation
§ 10:11 Relation between statutory direct condemnation/eminent domain provisions and state and federal constitutional takings claims
§ 10:12 —Form
§ 10:13 *State* court of Appeals—Intervenor-appellees' brief seeking to *uphold* governmental conduct alleged to be a taking; discussing relation between state statutory petition proceedings and takings claims
§ 10:14 — —Factual and procedural context
§ 10:15 — —Form

PART II. TAKINGS ANALYTICAL FRAMEWORK AND MATERIALS ELABORATING ON TAKINGS DOCTRINE

CHAPTER 11. TAKINGS ANALYTICAL FRAMEWORK

I. IN GENERAL

§ 11:1 Introduction
§ 11:2 Structure and operation
§ 11:3 Takings analytical framework

II. CHECKLISTS AND FORMS

§ 11:4 *Checklist of strategic considerations*
§ 11:5 *Forms to consider*

CHAPTER 12. FURTHER ELABORATION OF TAKINGS DOCTRINE

§ 12:1 Introduction

I. DEFINING THE PROTECTED "INTEREST" OR "PROPERTY" AFFECTED

§ 12:2 Defining the protected "interest" or "property" affected—Determining whether a protected "interest" or "property" right is involved at all
§ 12:3 — —Case summaries and comments
§ 12:4 —Determining the "relevant" property for purposes of takings analysis: The "denominator problem"

§ 12:5 —Determining whether a protected "interest" or "property" right is involved at all—Case summaries and comments

II. TAKINGS—LAND USE SETTINGS

§ 12:6 Land use takings settings
§ 12:7 —Direct condemnation (scope of power of direct condemnation/eminent domain)—Case summaries and comments
§ 12:8 Nondirect condemnation: Land use regulation settings—Cases and comments regarding federal due process limitations on police power
§ 12:9 — —Just compensation clause in *Pennsylvania Coal* and *Keystone*: A problem in reconciliation
§ 12:10 — —"per se rule" cases
§ 12:11 — —The *Penn Central*, 3-factor test cases
§ 12:12 — —The "NSA-LGO" line of cases

III. TAKINGS—NONLAND USE SETTINGS

§ 12:13 Nonland use takings settings—Pro bono attorney services cases and comments
§ 12:14 —Statutory limitations on general and punitive damages case and comments
§ 12:15 —Milk prices and taxicabs cases and comments
§ 12:16 —Restricting or eliminating utility service areas
§ 12:17 Marketable record title
§ 12:18 —Regulation of insurance companies
§ 12:19 —Plant closings
§ 12:20 —Pension plans

IV. REMEDIES FOR TAKINGS

§ 12:21 Remedies for takings—Remedial alternatives when the claimant demands money
§ 12:22 —Cases and comments on computation of interim damages
§ 12:23 —Cases and comments regarding nonmonetary remedies for takings

V. RIPENESS

§ 12:24 Ripeness cases and comments

VI. STATE CONSTITUTIONAL ALTERNATIVES

§ 12:25 State constitutional alternatives (the troubled development of state takings law)
§ 12:26 —State due process clauses

APPENDIX TAKINGS LEGISLATION

PART III. THE JURISPRUDENCE OF TAKINGS: PRESENT AND FUTURE

CHAPTER 13. JUDICIAL TAKINGS

I. IN GENERAL

§ 13:1 The judicial takings problem
§ 13:2 Freedom from "startling" state court overrulings as giving rise to a federal judicial takings claim—Commentary
§ 13:3 Case summaries and comments

II. CHECKLISTS AND FORMS

§ 13:4 *Checklist of strategic considerations*
§ 13:5 *Forms to consider*

CHAPTER 14. SOVEREIGN IMMUNITY AND TAKINGS LAW

§ 14:1 Relation between sovereign immunity and takings law
§ 14:2 Sovereign immunity generally
§ 14:3 The concept of sovereign immunity in the United States
§ 14:4 —Federal sovereign immunity doctrine
§ 14:5 —State sovereign immunity doctrine
§ 14:6 — —Received common law sovereign immunity doctrine
§ 14:7 — —Judicial abrogation of common law sovereign immunity doctrine
§ 14:8 — —Legislative revival of sovereign immunity doctrine—Substantive and procedural dimensions
§ 14:9 — —Judicial limitation of legislative revival of sovereign immunity
§ 14:10 —Local government sovereign immunity doctrine
§ 14:11 The promise of takings doctrine as a bulwark against sovereign immunity
§ 14:12 International takings—Investor-state dispute settlement

CHAPTER 15. SCHOLARLY COMMENTARY ON TAKINGS LAW

§ 15:1 Introduction

§ 15:2 Jurisprudential approaches to law in general—Martinez, *A Cognitive Science Approach to Teaching Property Rights in Body Parts*, 42 J. Legal Educ. 290 (1992)
§ 15:3 —Terrell, *Flatlaw: An Essay on the Dimensions of Legal Reasoning and the Development of Fundamental Normative Principles*, 72 Cal. L. Rev. 288 (1984)
§ 15:4 —Fletcher, *Paradoxes in Legal Thought*, 85 Colum. L. Rev. 1263 (1985)
§ 15:5 Jurisprudential approaches to takings in particular—Ross, *Modeling and Formalism in Takings Jurisprudence*, 61 Notre Dame L. Rev. 372 (1986)
§ 15:6 —Rose, *Mahon Reconstructed: Why the Takings Issue is Still a Muddle*, 57 S. Cal. L. Rev. 561 (1984)
§ 15:7 Takings theories based on natural rights to property—Note, *Richard Epstein on the Foundations of Takings Jurisprudence*, 99 Harv. L. Rev. 791 (1986)
§ 15:8 —Burns, *Blackstone's Theory of the "Absolute" Rights of Property*, 54 Cinn. L. Rev. 67 (1985)
§ 15:9 "Civic virtue" takings theory (Large, *This Land is Whose Land? Changing Concepts of Land as Property*, 1973 Wis. L. Rev. 1039 (1973)
§ 15:10 Functional approaches to takings law—Radin, *Property and Personhood*, 34 Stan. L. Rev. 957 (1982)
§ 15:11 —Baker, *Property and Its Relation to Constitutionally Protected Liberty*, 134 U. Pa. L. Rev. 741 (1986)
§ 15:12 —Michelman, *Property, Utility, and Fairness: Comments on the Ethical Foundations of "Just Compensation" Law*, 80 Harv. L. Rev. 1165 (1967)

CHAPTER 16. COGNITIVE SCIENCE APPROACH TO TAKINGS—THINKING OUTSIDE THE BOX

§ 16:1 Introduction
§ 16:2 Cognitive science—Approach to law
§ 16:3 —Special role of standards of judicial review
§ 16:4 —Strengths and shortcomings of a cognitive approach to law
§ 16:5 A cognitive science approach to takings—Core areas of takings doctrine in conventional terms
§ 16:6 —Basic experiences, idealized cognitive models and related metaphors which takings doctrine may embody
§ 16:7 —Critical analysis of the basic experiences, idealized cognitive models and metaphors in contemporary takings doctrine

§ 16:8 —Possible evolution of takings doctrine in cognitive terms

Table of Laws and Rules

Table of Cases

Index