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Promoting Healthy Communities through Land Use Initiatives: Federal Limits on Regulatory Takings of Property

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I. Introduction and Research Overview

This paper analyzes the possible objections to, and limitations on, potential land use initiatives that might be employed to reverse the trends in childhood obesity in the United States. There are two primary mechanisms by which state and local governments can institute land use initiatives to combat childhood obesity. They can condemn private property to put it to public use in service of this goal, or they can impose limitations on privately owned property. The first option—relying on the power of eminent domain—may be used to increase the number of public parks or walking and biking trails, for example, or to provide other amenities and services that promote healthy, active lifestyles. The second option—adopting land use restrictions applicable to private property—may be used to limit the number of fast-food establishments in vulnerable neighborhoods or ensure that convenience stores stock healthy food in addition to high-fat, low-nutrient alternatives.

The Fifth Amendment to the U.S. Constitution limits the power of state and local governments in both contexts. The Fifth Amendment states: "[N]or shall private property be taken for public use without just compensation." This prohibition is interpreted in two parts. First, private property may not be taken unless it is for public use.[1] Second, if private property is taken for public use, the government must pay just compensation.[2] In addition, most state constitutions contain a takings clause that may be more protective of private property rights than the U.S. Constitution, either in terms of what goals count as a valid public use of private property or in terms of when a government restriction on private land use constitutes a taking.[3] Finally, many states have adopted statutory constraints on governmental power over private property. Again, these constraints can be focused on the power of eminent domain or the authority to impose land use restrictions without paying compensation, or both.[4]

Land use initiatives that rely on condemnation of private land will be invalidated if they do not satisfy the federal and state public use requirements. At the federal level, this hurdle is relatively easy to surmount, and state laws are also unlikely to derail state and local attempts to combat obesity through the power of eminent domain. However, each exercise of the power of eminent domain comes at a price to the state or local government—namely, just compensation to the private landowner. Accordingly, to successfully stem the rising incidence of childhood obesity,

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[1] *See, e.g.,* Kelo v. City of New London, 545 U.S. 469 (2005).

[2] *See, e.g.*, Pa. Coal Co. v. Mahon, 260 U.S. 393 (1922).

[3] Most state constitutions have eminent domain provisions that are similar to, but slightly different from, the Fifth Amendment to the U.S. Constitution. The differences are well illustrated by article 1, section 17, of the Texas Constitution, which prohibits not only the "taking" of private property for public use without just compensation, but also the "damaging" or "destruction" of property for public use without just compensation. These differences are likely to have an impact on the determination of whether a particular land use regulation constitutes a taking for which compensation must be paid. One can imagine, for example, that a land use regulation that does not rise to the level of a taking under the U.S. Constitution is considered substantial enough to constitute the "damaging" of property under the Texas Constitution.

[4] For example, the Texas Private Real Property Rights Preservation Act was enacted to supplement the protections granted to property owners under the state and federal constitutions, state statutes, and the common law. It set out a standard that triggers compensation: The government action must temporarily or permanently restrict the use of private real property that the owner would otherwise have and result in a diminution in the market value of the property by at least 25 percent. The reduction in value is determined by comparing market value with the regulation in effect with that of the property free of the regulation.

state and local governments may want to employ less costly initiatives that do not entail outright condemnation. These initiatives will rely on the regulation of land use by private owners for the promotion of healthy living and eating patterns. Such land use regulations—while unlikely to be declared invalid—may be so burdensome that they will be declared takings for which compensation must be paid. In those cases, the initiatives will be as costly as outright condemnation and therefore may be too costly to implement.

The purpose of this analysis is to provide a guide through the jurisprudence that marks the limit of valid public uses in the context of eminent domain so that policy initiatives relying on eminent domain are not invalidated, as well as to provide guidance concerning the likely application of the jurisprudence that distinguishes between land use restrictions that require compensation and those that do not. Thus, the analysis is guided by two principal divisions: (1) the division between limitations imposed at the federal level versus the state level; and (2) the division between the legal limitations imposed on the use of the power of eminent domain and those that apply to the valid exercise of the police power to regulate or condition a specific land use. These divisions are addressed in a set of related papers: this paper, which analyzes the federal limitations on land use restrictions; another paper analyzes the federal limitations on the use of eminent domain and the requirement for public use;[5] a general paper that that analyzes state constitutional and statutory limitations on land use restrictions and eminent domain;[6] and a series of state specific papers that provide a more detailed discussion of the constitutional and statutory limitations on land use restrictions and the exercise of eminent domain.[7]

In this paper we discuss the application of the federal regulatory takings doctrine to policy initiatives designed to combat childhood obesity. To provide context for the specific discussion, however, we first outline the general theoretical framework that governs the federal takings inquiry.

II. Overview of the Legal Landscape of Regulatory Takings

The U.S. Supreme Court has interpreted the Fifth Amendment to limit the extent to which state and local governments (as well as the federal government) can impose on private landowners regulatory burdens that "in all fairness and justice should be borne by the public as a whole."[8] Unfortunately, identifying those burdens that satisfy this relatively imprecise standard is no easy task. While the Court has fairly consistently articulated the applicable standards, and has even carved out some areas in which absolute rules apply, the application of these standards to actual land use restrictions is considered, even by the Court itself, to be essentially "ad hoc."

A Fifth Amendment challenge to land use restrictions raises the fundamental issue of how much control a state may exercise over the uses of private property before it must compensate the owner of that property for the lost value associated with the state control. One way to conceive of

[5] Promoting Healthy Communities through Land Use Initiatives: Federal Limits on Physical Taking of Property for Public Use, *available at* http://www.nplanonline.org.
[6] Land Use Initiatives to Prevent Childhood Obesity and Potential Obstacles from State Takings Laws, *available at* http://www.nplanonline.org.
[7] These papers are available at http://www.nplanonline.org.
[8] Armstrong v. United States, 364 U.S. 40, 49 (1960).

this challenge is that the government may not accomplish through regulation those ends for which it would normally have to pay. For example, imagine that a city wants more parkland to provide space for outside physical activity to encourage children (and adults) to be more active and engage in more exercise. In the normal course of events, state and local governments exercise their powers of eminent domain over private property to provide public parkland, paying the landowner just compensation. Theoretically, the city could accomplish the same goal by prohibiting all development on the private property and precluding the landowner from exercising her right to exclude. This looks like a regulatory "end-run" around the just compensation requirement, and the courts will treat it as a compensable taking.

On the other hand, a well-functioning government in a complex and highly regulated society must impose some restrictions on land uses to serve valid public policies. Such regulations—intended to protect the public health, safety, and welfare—are typically embraced in the general police powers of the state. The police powers are those inherent plenary powers of the government to make all necessary and proper laws to preserve the public security, health, order, and (traditionally) morality. Thus, cities regularly engage in municipal planning and adopt zoning ordinances in service of the public health, safety, or welfare that restrict the types of uses to which landowners can put their private property. Many of these restrictions impose substantial costs on landowners. These restrictions, however, do not seem quite like the regulatory "end-run" of the parkland example above. Accordingly, courts do not treat the average, run of the mill land use regulation as a compensable takings.

The regulatory takings jurisprudence developed under the Fifth Amendment undertakes to provide a framework in which the distinctions noted above are crystallized. That is, what factors govern a court's determinations that some land use restrictions—such as the regulatory creation of parkland—constitute a compensable taking while others—such as ordinary zoning ordinances—do not.[9]

There have been many attempts to construct a general theory of regulatory takings, but none has carried the day. Despite the failure of the courts (and legal scholars) to create a theory that resolves every nuance of these distinctions, there are some categorical rules and useful approximations that can give the planner guidance. The following section surveys the rules that have emerged from land use litigation and outlines the dominant theories of regulatory takings.

The constitutional boundary that marks the extent of both the power of eminent domain and the police power is the requirement of public use. The Fifth Amendment to the U.S. Constitution sets out the clear requirement that the power of eminent domain be exercised only for a public use, and the Supreme Court has suggested that the meaning of the public use requirement is coterminous with the extent of the police power. Thus a state or local government can exercise in the regulatory context only those powers that would justify an outright condemnation of the

[9] Challenges to land use regulations typically take two forms. The first is to have the regulation declared invalid as beyond the regulatory authority of the government—that is, not justified as an exercise of the ordinary police power of the state. In the event a claimant prevails on such a challenge, she would likely seek compensation for the loss of value suffered during the period the regulation was in place. The second is what was often called inverse condemnation, but now is more commonly known as regulatory takings—that is, a challenge based on the claim that the regulation has effectively deprived a property owner of so much of the use of her property that the only legal way to sustain the action is to pursue the ends through the eminent domain authority.

private property it seeks to regulate. The first inquiry, then, in any regulatory takings challenge is a consideration of whether the government regulation can be justified as a legitimate exercise of the state's police power. If not, the action will be invalid, and no amount of compensation will legitimate it. These kinds of challenges are often characterized as substantive due process attacks on the legitimacy of the power of the state to act in the way that it proposes. That just means that if the government is prohibited from acting in a particular way, it cannot buy its way out of that prohibition. While the power to protect the health, safety, welfare, and morals of a community might be a very wide grant of authority, it is not absolute.

Substantive due process challenges to the exercise of regulatory authority, however, rarely succeed. Regulations premised on the police power will be invalidated in only three circumstances: if the government entity does not have the authority under state or local law to promulgate the regulation; if the government entity has been delegated the general authority to promulgate such regulations, but is prohibited from doing so by a more particular provision of law; and if the regulation is not rationally related to a valid legislative concern. Whether each and every state and local governmental entity has been delegated the general authority to promulgate land use restriction to combat childhood obesity or has been given general regulatory authority but is constrained by more specific provisions is beyond the scope of this paper. However, the police powers of state and local governments are broad and far reaching, and protection of the health, safety, and welfare of children is at the core of these powers.[10] Thus, because the proposed initiatives to combat childhood obesity are rationally related to the valid legislative concern for the health and welfare of its constituents, and especially its children, they are unlikely to be vulnerable to rational basis review.

The police power inquiry is just the first step in a regulatory takings case. Even if a regulation restricting land use is found to be a legitimate exercise of the government's police powers—which most will be—it may still implicate the compensation requirement of the Fifth Amendment. This consideration is the subject of this paper: Under what circumstances will a valid land use regulation that does not purport to take title to private property nonetheless obligate the regulating government to compensate the landowner for the lost value imposed on her by the regulation? To answer this question, the Supreme Court has developed three tests: two categorical tests that apply to certain narrow categories of exceptional regulatory actions, and a general, fact-based ad hoc inquiry that applies to the vast majority of challenged land use regulations.

The two categorical rules provide bright lines obligating governments to provide compensation to landowners whenever they impose certain types of land use restrictions on private property. The first categorical rule is generally referred to as the permanent physical occupation rule. It compels compensation whenever the government requires a landowner to acquiesce in the permanent physical occupation of his private property, either by the government itself or by another private party.[11] Under this rule, whenever a landowner is forced to endure a permanent physical occupation of his land, the government must pay the landowner just compensation. The

[10] *See, e.g.*, Greater N.Y. Metro. Food Council v. Giuliani, 195 F.3d 100, 109 (2d Cir. 1999) ("[R]egulations directed at the safety and welfare of children lie at the heart of the state's police power.") (internal citation and quotation omitted).
[11] Loretto v. Manhattan Teleprompter CATV Corp., 458 U.S. 419 (1982).

compensation requirement inheres even if the public benefit of the permanent occupation is great and the physical occupation minimal. In *Loretto v. Manhattan Teleprompter CATV Corp.*, for example, the permanent physical occupation was comprised of a small cable relay box and its attached cable, both of which were quite minimal and, in fact, increased the value of the landowner's property.[12] Two challenges arise in the application of this apparently simple rule: The first is in determining whether the government has forced a landowner to acquiesce in the occupation of her property, and the second is in deciding whether that occupation is permanent or merely temporary. These two particular issues are discussed in more depth below in the section exploring the application of the rule.

The second categorical rule is also deceptively simple in its articulation and decidedly more complex in its application. This rule requires the government to provide compensation whenever a regulation deprives the landowner of all economically viable use of her property.[13] In *Lucas v. South Carolina Coastal Council*, for example, the challenged land use regulation prohibited the private landowner from building *any* habitable structure on his property, and the Court held that such an extreme restriction on the use of private property, which deprived the owner of all economically viable use of his property, was the functional equivalent of taking title. Compensation was therefore required.[14]

As with the first categorical exception, however, the application of this rule presents a significant challenge. In particular, the challenge inherent in applying this rule is in determining what the relevant "property interest" is for deciding whether a landowner has been deprived of all economically viable use of her land.[15] This challenge arises because property rights can be measured geographically (i.e., by metes and bounds), temporally (i.e., present and future interests), and conceptually (i.e., the surface rights and the mineral rights). Thus, landowners have ample opportunity to divide their property into such small components (along whichever of these metrics is implicated by the challenged land use regulation) that any land use regulation can be described as depriving the landowner of all economically viable use of the small component. For example, if a land use regulation prohibits development of one-quarter of a landowner's private property to protect a wetlands feature, it is at least possible to argue that the prohibition constitutes a total deprivation of that portion of the property. Similarly, if a landowner owns both the surface rights and the mineral rights on a parcel, and the government prohibits the mining of the mineral resource, has the prohibition worked a complete deprivation of the mineral right or a more limited deprivation of the landowner's total holdings? Again, this challenge is discussed in more detail below in the section applying this per se rule.

Notwithstanding their absolute nature, these categorical rules are implicated in only a very small percentage of takings cases. The vast majority of regulatory takings challenges are decided under a much less rigid framework, and in these cases courts exercise substantially more discretion. *Pennsylvania Coal v. Mahon*[16] ushered in the modern era of regulatory takings analysis. In that case, the State of Pennsylvania enacted an anti-subsidence statute (called the Kohler Act) that

[12] *Id.*
[13] Lucas v. S.C. Coastal Council, 505 U.S. 1003 (1992).
[14] *Id.*
[15] This is generally referred to as the denominator problem.
[16] 260 U.S. 393 (1922).

required mining companies to leave sufficient coal in the ground to support the surface. Pennsylvania Coal Company challenged the statute, claiming that if the state wanted to compel coal companies to leave substantial amounts of their coal in the ground to benefit landowners it should have to compensate the coal companies for the lost value of their coal. The Supreme Court agreed, holding for the first time that a land use regulation could go "too far" and thereby become the functional equivalent of the taking of title for which compensation is owed. The opinion in *Pennsylvania Coal* highlighted the apparent private benefits conferred by the Kohler Act and described the deprivation in relation only to the coal company's property interest in the subsidence estate, not its overall property interests in coal. The decision was accompanied by a powerful dissent by Justice Brandeis, in which he emphasized the public welfare aspects of the Kohler Act and pointed out that the regulation impacted only a very small portion of the company's overall property interests in coal. The *Pennsylvania Coal* majority made clear that the determination of whether a land use regulation would constitute a compensable taking would turn on the particular facts of each case. Unfortunately, the Court did not fully articulate the standards that courts should apply when analyzing those particular facts.

The Supreme Court finally systemized the inquiry in *Penn Central Transportation Co. v. City of New York*.[17] In that case, New York City's Landmark Preservation Commission designated Grand Central Terminal as a landmark under the city's Landmark Preservation Law. This designation imposed significant limitations on Penn Central's ability to develop the property, and after the designation the Commission denied Penn Central's application to construct a fifty-story office tower above the terminal. In rejecting the landowner's claims for compensation, the Court admitted that it had been "unable to develop a 'set formula' for determining when 'justice and fairness' require that economic injuries caused by public action be compensated by the government" but nonetheless identified several factors that have "particular significance" in the "essentially ad hoc, factual inquiries."[18] The factors, which remain central to regulatory takings jurisprudence, are (1) the economic impact of the regulation, (2) the degree of interference with reasonable investment-backed expectations, and (3) the character of the governmental action.

Since 1978 the Supreme Court and lower courts have faithfully applied these factors to regulatory takings challenges. While the cases are contextual and fact intensive, it is fair to say that very few land use restrictions are held to be compensable takings under this three-factor inquiry. To convince a court that compensation is due under the *Penn Central* test, it seems that a landowner must demonstrate that the challenged restriction is unusually severe on at least two of the three factors.[19] In fact, the Supreme Court has not found a land use restriction to be a compensable taking under this three-factor test since 1922, when it first articulated the concept of regulatory takings in *Pennsylvania Coal*. Indeed, in 1987, the Supreme Court rejected a takings challenge to the Subsidence Act, a statute very similar to the Kohler Act that was at issue in *Pennsylvania Coal*. In *Keystone Bituminous Coal Ass'n v. DeBendictis*, the Court characterized the regulation as serving the "common welfare" by removing the risk of

[17] 438 U.S. 104 (1978).
[18] *Id.* at 124.
[19] For instance, in *Kaiser Aetna v. United States*, 444 U.S. 164 (1979), the Court found a compensable taking where the navigational servitude imposed on the landowner constituted a physical invasion and substantially decreased the economic value of the property, which was dependent in large part on the landowner's right to exclude.

subsidence.[20] It also discounted the degree of interference with economic impact by comparing the coal that the company was required to keep in place against Keystone's entire coal holdings, as opposed to viewing the coal left in place as its own distinct property right for purposes of the denominator. *Keystone* clearly set the tone for the lower courts—Justice Brandeis's dissent in *Pennsylvania Coal* seemed vindicated, and rarely would a land use restriction be considered a compensable taking under the *Penn Central* factors.

III. Application of Regulatory Takings Jurisprudence to Learning Community Initiatives

It is within this federal constitutional landscape that next we evaluate proposed land use initiatives aimed at combating childhood obesity. For analytic clarity, we group the proposed initiatives into the following four categories that align with relevant jurisprudential distinctions: (1) general land use restrictions that do not make prior nonconforming uses unlawful, (2) general land use restrictions that seek to eliminate prior nonconforming uses, (3) land use restrictions that may require the owner to suffer a physical invasion, and (4) conditional use restrictions. We discuss each in turn below.

A. Land Use Restrictions That Do Not Make Prior Nonconforming Uses Unlawful

Several possible policy initiatives would require a state or local government merely to limit the use to which a landowner can put her property.[21] These policies include the following:

1. Limiting the number of fast-food restaurants in a community by prohibiting the establishment of new fast-food restaurants
2. Limiting the proximity of fast-food restaurants to certain venues, such as schools
3. Limiting the density of fast-food restaurants in a community (e.g., no more than 1 per 10,000 residents or none within 10,000 feet of another fast-food restaurant)
4. Limiting fast-food advertising signage on safe routes to school[22]

Land use restrictions that do not make prior nonconforming uses unlawful and do not require a landowner to suffer a physical invasion of his property raise straightforward regulatory takings claims that will be resolved under the *Penn Central* factors, and these types of regulatory takings claims rarely succeed. As the Supreme Court has said, and as its cases demonstrate, only in "extreme circumstances" will land use restrictions be held to require compensation under the

[20] 480 U.S. 470 (1987).

[21] As noted above, this memo does not explore the extent of state and local governmental police power authority to enact these land use restrictions. However, as general matter, state and municipal governments have extensive authority to regulate land use in service of public health and welfare. Decreasing obesity rates and concomitant morbidity among children is unquestionably a health and welfare concern of state and local governments, and any land use regulation that is reasonably related to obesity concerns is likely to be within the police powers of states and most local governments (again, subject to state specific limitations on local government authority).

[22] While commercial speech enjoys less First Amendment protection than pure political speech, to the extent any signage limitation is based on the content of the message on the sign it may raise First Amendment concerns. *See, e.g.,* Morales v. Trans World Airlines, 540 U.S. 374 (1992); Ohralik v. Ohio State Bar Ass'n, 436 U.S. 447 (1978); Va. State Bd. of Pharm. v. Va. Citizens Consumer Council, 452 U.S. 748 (1976) (a state may choose to regulate price advertising in one industry but not in others because of the risk of fraud). Because this research project is evaluating only the Fifth Amendment concerns raised by signage limitations on private property, First Amendment issues raised by advertising restrictions are beyond the scope of this paper.

Fifth Amendment to the U.S. Constitution.[23] None of the proposed land use restrictions listed above is likely to present such extreme circumstances. Accordingly, none are likely to implicate the compensation requirement under the U.S. Constitution.

As noted above, the Supreme Court has established two per se takings rules and an ad hoc balancing test for determining whether a land use restriction will constitute a taking for which compensation must be paid. Under the per se rules, the government must pay compensation to a landowner whenever a restriction on the use of private property denies the landowner all economically viable use of her property[24] or requires her to suffer a permanent physical occupation of all or a portion of her property.[25] For those land use restrictions that do not satisfy these two per se standards, compensation will be required if the regulation goes "too far" or, in other words, imposes burdens on the private landowner that in all justice and fairness should be borne by the public as a whole.[26]

None of the proposed land use restrictions aimed at combating childhood obesity is likely to even arguably deprive a landowner of all economically viable use of his land.[27] The Supreme Court has made clear that this rule is implicated only in the rarest, most extreme circumstances, in which a landowner has literally no remaining viable economic use of his property.[28] As the Court stated in *Tahoe-Sierra Preservation Council v. Tahoe Regional Planning Agency*, "our holding [in *Lucas*] was limited to 'the extraordinary circumstance when *no* productive or

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[23] *See* United States v. Riverside Bayview Homes, 474 U.S. 121, 126 (1985).
[24] *See* Lucas v. S.C. Coastal Council, 505 U.S. 1003 (1992).
[25] *See* Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419 (1982).
[26] *See* Pa. Coal Co. v. Mahon, 260 U.S. 393 (1922).
[27] Some of the initiatives being considered by the Learning Community may implicate the second per se rule—the rule that requires compensation when a land use restriction requires a landowner to suffer a permanent physical occupation of his property. These initiatives are discussed in the appropriate section below.
[28] Of course, to determine whether a land use restriction deprives a landowner of 100 percent of the economically viable use of his property, one must know what the appropriate denominator will be. This question has presented a challenge to courts since the *Lucas* test was first formulated. *See, e.g., Lucas*, 505 U.S. at 1016 n.7 (noting that the "rhetorical force" of the *Lucas* test is "greater than its precision, since the rule does not make clear the 'property interest' against which the loss of value is to be measured."). Since then, lower courts have struggled with the denominator problem. *See, e.g.,* District Intown Props. v. District of Columbia, 198 F.3d 874, 880-83 (D.C. Cir. 1999) (discussing the denominator problem and rejecting the claimant's attempts to divide one large parcel into several smaller ones to make out a *Lucas* claim). The denominator dilemma is unlikely to arise in the context of proposed anti-obesity policy initiatives, however, for two reasons. First, the Supreme Court has made clear that when a claimant owns a parcel in fee simple, that is the relevant parcel for denominator purposes. *See Lucas*, 505 U.S. at 1016 n.7; *see also* Penn Cent. Transp. Co. v. New York City, 438 U.S. 104, 130 (1978) ("'taking' jurisprudence does not divide a single parcel into discrete segments and attempt to determine whether rights in a particular segment have been entirely abrogated."). Second, denominator problems usually arise either when there has been a prohibition of all development on a portion of a landowner's property and the landowner attempts to subdivide to establish a *Lucas* claim or when there has been a limitation on a type of use that is typically conveyed separately from the fee simple (such as mineral rights) and the landowner owns only those separately conveyed rights. *See, e.g.,* Pa. Coal Co. v. Mahon, 260 U.S. 393 (1922) (finding a compensable taking when the state prohibited mining of the subsidence estate); Vulcan Matls. Co. v. City of Tehuacana, 369 F.3d 882 (5th Cir. 2004) (finding a compensable taking when the city prohibited quarrying or mining within city limits and claimant owned only the right to mine and quarry). Since the contemplated policy initiatives will not prohibit development on any portion of a landowner's property and are unlikely to prohibit a use that is typically conveyed separately from the underlying fee (e.g., the right to sell fast food), the denominator problem is unlikely to present itself.

economically beneficial use of land is permitted.'"[29] Indeed, the *Lucas* case itself is the only case in which the Supreme Court has found a categorical taking under this rule, and lower courts have repeatedly emphasized the extreme nature of the showing required to establish a compensable taking under this exception. In *Cooley v. United States*, for example, the Federal Circuit overturned a holding by the Court of Claims that land use restriction that destroyed 98.8 percent of the value of the landowner's property constituted a compensable taking under *Lucas*.[30] While some of the proposed land use initiatives may well diminish the value of a landowner's property, it is inconceivable that any of them will render the property completely without value. Thus, they will not require compensation pursuant to the "deprivation of all economically viable use" test.

Nor are any of these proposed policy initiatives likely to constitute a compensable taking under the fact-based, ad hoc inquiry applied to land use restrictions that lower the value of private property without depriving the landowner of all economically viable use of that property. As noted above, the Court has identified three factors that must be weighed in determining whether a land use regulation has gone "too far" and thus requires compensation: (1) the regulation's economic impact on the landowner, (2) the regulation's interference with reasonable investment-backed expectations, and (3) the character of the government action.[31] None of these factors is determinative; rather, the court must evaluate the impact of the land use restriction in light of these factors to determine whether the regulation goes too far and in all justice and fairness the burdens it imposes should be borne by the public as a whole. While this test is fact specific, and therefore no concrete claim can be made concerning its application to any of the proposed policies in the abstract, it is nonetheless fair to observe that takings claimants rarely succeed in regulatory takings cases, and the proposed policy initiatives are unlikely to give rise to creditable claims for compensation.

The economic effect of a regulation is most likely to be measured by the decrease in the market value of the landowner's property.[32] The economic impact must be very substantial for this factor to counsel in favor of finding a taking. In *Euclid v. Ambler Realty*, for example, the Court rejected a takings challenge to a zoning ordinance that decreased the value of a landowner's property by 75 percent.[33] Similarly, in *Hadacheck v. Sebastian*, the Court rejected a takings challenge to a zoning ordinance that decreased the landowner's property values by more than 90 percent.[34] Thus, a deprivation must come very close to 100 percent to give rise to a valid claim for compensation. For example, the Federal Circuit has held that a regulation that resulted in the loss of 96 percent of the owners' reasonable investment-backed expected rate of return constitutes a compensable taking.[35] While it is impossible to know for certain the extent to which any of the proposed initiatives will decrease the market value of the property to which they are applied, it seems unlikely that they will decrease the market value by close to 100 percent, or, in other words, enough to make a compelling case for a compensable taking.
In addition to evaluating the economic impact of a land use restriction, the courts will consider the degree to which the regulation interferes with reasonable investment- backed expectations. A

[29] 535 U.S. 302, 330 (2002) (emphasis in original).
[30] The court remanded for a consideration of the *Penn Central* factors. 324 F.3d 1297, 1306-07 (Fed. Cir. 2003).
[31] *Penn Cent. Transp. Co.*, 438 U.S. at 124.
[32] *See* Hodel v. Irving, 481 U.S. 704 (1987).
[33] 272 U.S. 365 (1926).
[34] 239 U.S. 394 (1915).
[35] *See* Cienega Gardens v. United States, 331 F.3d 1319 (Fed. Cir. 2003).

reasonable investment-backed expectation is more than just a unilateral expectation or an abstract need—it must be an expectation reasonably grounded in existing policies and practices.[36] If the applicable zoning provisions in existence before the anti-obesity initiative permitted use as a commercial food establishment, the property owners will have little difficulty establishing a reasonable expectation to use their property in such a manner. But in the context of a land use restriction applied to property that has not yet been put to the prohibited use, the degree of investment specifically backing the expectation that the landowner will be able to engage in that prohibited use will be limited. Since it requires a substantial interference with reasonable investment-backed expectations for this factor to weigh in favor of a compensation requirement, it is unlikely that the policy initiatives listed above, if applied to land that is not already devoted to the prohibited use, will result in a degree of interference significant enough to cause concern.

Finally, in evaluating regulatory takings claims, courts will consider the character of the government action. This inquiry focuses on two aspects of the challenged land use restriction. First, the court will determine whether the restriction requires the landowner to suffer a physical invasion of her property against her wishes. If so, the regulation is more likely to constitute a compensable taking than if it merely restricts the use to which the property can be put. Since none of the limitations listed above require the landowner to endure a physical invasion, this aspect of the character inquiry will not be problematic for these initiatives.[37] Second, in evaluating the character of the government action the courts will consider whether the land use restriction has a legitimate public purpose.[38] Protecting the health and welfare of a community's children is a quintessential component of public police powers. To the extent a land use restriction is rationally related to protecting public health and welfare by decreasing childhood obesity, this factor of the *Penn Central* inquiry will be resolved in favor of the regulation, not the takings claimant.

In sum, the policy initiatives listed above, when imposed on property that is not currently being used for the prohibited purpose, are very unlikely to constitute compensable takings under the U.S. Constitution.

B. Land Use Restrictions That Seek to Eliminate Prior Nonconforming Uses

While it would be simplest from a takings perspective if land use initiatives to combat childhood obesity could always be promulgated in areas where they did not affect existing uses, this may not always be possible or ideal. Indeed, in many neighborhoods or communities the very existence of the established uses (i.e., extensive fast-food establishments in the close proximity of schools) may have contributed in large part to the obesity concerns of the community. In these circumstances—that is, where there is a perceived need to adopt land use restrictions that seek to prohibit existing uses—the takings inquiry is somewhat more problematic. Nonetheless, even restrictions that prohibit existing commercial uses of property are generally unlikely to require compensation under the Fifth Amendment to the U.S. Constitution.

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[36] *See* Ruckelshaus v. Monsanto Co., 467 U.S. 986, 1005-06 (1984).

[37] We discuss below those potential anti-obesity initiatives that implicate forced physical invasions and the constitutional consequences of this factor.

[38] *See* Keystone Bituminous Coal Ass'n v. DeBenedictis, 480 U.S. 470, 485 (1987).

Before exploring the Fifth Amendment issue, however, it bears noting that in many states either the state constitution or state law requires that prior nonconforming uses be grandfathered when zoning ordinances are amended to prohibit that particular use, and this requirement may impede the adoption of some desirable policy initiatives. New York is typical in this regard. Under New York State law, a zoning ordinance cannot prohibit an existing use to which the property was devoted at the time of the ordinance's enactment.[39] A vested nonconforming use is one that lawfully existed prior to the enactment of a zoning ordinance that prohibits such use, and that is continuously maintained after the zoning changes, even though such a use does not comply with use restrictions of the new ordinance.[40] To establish a right to a vested nonconforming use, "the person claiming the right must demonstrate that the property was indeed used for the nonconforming purpose, as distinguished from a mere contemplated use, at the time the zoning ordinance became effective."[41] Under the vested rights doctrine, an owner will be permitted to complete a structure or a development that a zoning amendment has rendered nonconforming if the owner has undertaken substantial construction and made substantial expenditures prior to the effective date of the amendment.[42]

Prior nonconforming uses, however, need not completely derail policy initiatives, for several reasons. First, while zoning authorities in states requiring grandfathering may not prohibit a prior nonconforming use, they may adopt regulations that restrict the right of the property owner to extend such use, enlarge, rebuild, or to make other alterations to the structures on the property.[43] Second, most states that recognize vested rights in prior nonconforming uses permit zoning ordinances to adopt amortization provisions that require the prior nonconforming use to be discontinued after a specified period of time. These amortization provisions will generally be upheld under state law if they permit the landowner a reasonable period in which to recapture his investment in the existing use. In New York, reasonableness is determined by examining all the facts, including the length of the amortization period in relation to the investment and the nature of the use. Amortization provisions are presumptively valid, and to overcome such a provision a landowner must demonstrate that the loss suffered is so substantial that it outweighs the public benefit gained by the exercise of the police power.[44] Finally, in New York the right to use property for nonconforming purposes is extinguished when the prior nonconforming use is abandoned.[45]

Because this paper is concerned with compensation requirements under the Fifth Amendment to the U.S. Constitution, it will not further discuss the amortization requirements of the laws of the various states, except to note that their existence makes it even less likely that the owner of a prior nonconforming use will succeed on a Fifth Amendment challenge to a zoning ordinance

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[39] *See* Syracuse Aggregate Corp. v. Weise, 414 N.E.2d 651 (N.Y. 1980).
[40] City of New York v. Bilynn Realty Corp., 118 A.D.2d 511 (N.Y. App. Div. 1986) (lower court's grant of a vested nonconforming use reversed where defendant's only established prior uses that could be deemed vested were medical and dental offices and not a realty office and grocery store).
[41] *Syracuse Aggregate Corp.,* 414 N.E.2d at 654.
[42] *See* Ellington Constr. Corp. v. Zoning Bd. of App. of the Inc. Vill. of N.H., 566 N.E.2d 128 (N.Y. 1990).
[43] *See, e.g.,* Fairmeadows Mobile Vill. v. Shaw, 16 A.D.2d 137 (N.Y. App. Div. 1962).
[44] Town of Islip v. Caviglia, 540 N.E.2d 215 (N.Y. 1989).
[45] *See* Ellentuck v. Klein, 570 F.2d 414, 418 (2d Cir. 1978) ("Under New York law, abandonment of a nonconforming use may be found if there was a manifestation of intent to discontinue the prior nonconforming use, coupled with an actual discontinuance.").

prohibiting that use, since the amortization period required by state law will generally ensure sufficient return on the landowner's investment-backed expectation to defeat the takings claim.

As noted above, resolution of a takings challenge to a land use restriction will entail an evaluation of the economic impact of the regulation, the degree of interference with reasonable investment-backed expectations, and the character of the government action. When a land use restriction prohibits an existing commercial enterprise, the economic impact of the ordinance and the degree of interference with reasonable investment-backed expectations are likely to be relatively greater than they would be if the landowner had not already invested in the prohibited use. Again, however, these regulations are unlikely to interfere with these expectations substantially enough to constitute compensable takings. Courts have consistently made clear that the takings clause does not guarantee to landowners the right to use their property for its most highly valued use or for the landowner's preferred use. Given the very high threshold that a land use restriction must cross before it will be considered a compensable taking, even these ordinances are unlikely to be vulnerable to Fifth Amendment takings claims.

Indeed, in one of its earliest regulatory takings cases, the Supreme Court rejected a takings challenge to a Los Angeles zoning ordinance that prohibited the operation of the landowner's existing brick-making operation and facility, decreasing the value of his property from $800,000 with the operational brickyard to $60,000 without it.[46] That zoning ordinance contained no provision for the amortization of the landowner's investment in brick-making machinery.

Since then, lower courts have readily dismissed takings challenges to zoning ordinances prohibiting established commercial uses, either because the economic impact was not substantial enough to warrant a finding that the property was taken or because the reasonableness of the claimant's investment-backed expectations was limited by the highly regulated nature of the enterprise in which the claimant was engaged. For example, in *SDJ, Inc. v. City of Houston*, the Fifth Circuit summarily rejected the landowner's claim that a zoning ordinance that required it to stop operating its sexually oriented business within nine months constituted a compensable taking.[47] Similarly, in *Outdoor Graphic v. City of Burlington, Iowa*, the court held that an ordinance prohibiting billboards in residential neighborhoods did not constitute a compensable taking, even though the landowner had bought the real property for the billboard business and the real property was irregularly shaped and therefore marketable only to adjacent landowners for "a fraction" of its value as a location for billboards.[48] And in *Hawkeye Commodity Promotions v. Vilsack*, the court rejected a takings challenge to a law terminating the state video lottery game one year after the claimant had invested more than $6 million in video lottery machines and start-up costs.[49] The court recognized that the ordinance had a substantial economic impact on the claimant since the machines (which cost $4.7 million) had only salvage value remaining, but concluded that because the lottery system was so highly regulated the claimant could not demonstrate a reasonable expectation that it would continue in its present form long enough for him to recoup his investment.

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[46] *See* Hadacheck v. Sebastian, 239 U.S. 394 (1915).
[47] 837 F.2d 1268, 1278 (5th Cir. 2004) ("Almost by definition, the Ordinance here does not prevent all reasonable uses of plaintiff's property; it follows that the Ordinance is not a taking.").
[48] 103 F.3d 690 (8th Cir. 1996).
[49] 486 F.3d 430 (8th Cir. 2007).

Takings-based challenges to land use restrictions prohibiting existing profitable uses are likely generally to fail, even if they require a searching judicial inquiry into the magnitude of the loss and a complicated rationale for the choice of denominator in making that assessment. Moreover, while some claimants insist on litigating these challenges to the highest courts of their states, the overwhelming odds against prevailing serve as a substantial deterrence to most potential claimants.

C. Regulatory Measures That May Require Physical Invasions into Private Property

Some of possible initiatives to combat childhood obesity would require, or be vulnerable to the claim that they require, private landowners to endure a physical invasion of their property for the public good. For example, an initiative that sought to establish safe and healthy routes to school to promote students' walking and bike riding might require landowners to dedicate a portion of their property for a walking/biking trail or to permit the local government to erect signs identifying safe and healthy routes.[50] Or, in an effort to increase access to fresh, healthy food, some communities might wish to undertake initiatives that require certain businesses to stock and sell fresh fruits and vegetables and other healthy foods in addition to food that has little nutritional value. To the extent that these initiatives require landowners to suffer a physical invasion onto their private property, they will be more vulnerable to regulatory takings claims. And, if the physical invasion is held to be a permanent physical occupation, compensation will be required as a matter of law.

Initiatives raising physical invasion issues include the following:

1. Requiring landowners to permit school children to walk or bike on their property as part of a safe-routes-to-school initiative
2. Erecting signs on private property to identify safe routes to school
3. Requiring businesses in certain areas to provide fresh fruits and vegetables or other healthy food options for purchase
4. Requiring businesses in certain zones to devote a certain amount of floor or shelf space to specified "healthier" food alternatives

1. The Jurisprudence of Permanent Physical Occupations

As noted above, one of the per se rules in the regulatory takings jurisprudence is that whenever a government requires a private property owner to endure a permanent physical occupation of her property, compensation must be made.[51] In *Loretto*, the case in which the Court first announced the permanent physical occupation test, it held that an ordinance that required a landowner to allow the cable company to attach a cable box to her roof and run a cable down the front of the

[50] Communities could also implement these policies by condemning the desired property—either in the form of an easement or a fee simple title—and then devote the publicly owned property to the desired public use (i.e., walking/biking trail or signage). Under this alternative, the community would be liable for compensating the landowner for the fair market value of the property or property right actually condemned.

[51] *See* Loretto v. Manhattan Teleprompter CATV Corp., 458 U.S. 419 (1982). In contrast, if the physical invasion is not compelled or is temporary in nature, the per se rule will not apply, and the takings challenge will be evaluated under the *Penn Central* factors.

building constituted a permanent physical occupation. In so holding, the Court made clear that "the permanent physical occupation of property forever denies the owner any power to control the use of the property: he not only cannot exclude others, but can make no nonpossessory use of the property. . . . Finally, even though the owner may retain the bare legal right to dispose of the occupied space by transfer or sale, the permanent occupation of that space by a stranger will ordinarily empty the right of any value, since the purchaser will also be unable to make any use of the property."[52]

While the permanent physical occupation rule seems straightforward enough, its implementation involves two line-drawing problems that have challenged the Supreme Court itself and perplexed the lower courts. The first line-drawing challenge is to determine when the land use restriction requires a landowner to suffer a compelled physical invasion. The second challenge is the determination of when a required physical invasion is permanent, rather than temporary or sporadic. For a land use restriction to fall within the permanent physical occupation category requiring compensation as a matter of law, both elements—compelled physical invasion and permanence—must be present.

Mandatory easements present the easy case of compelled physical invasion. The Court has made clear that compelled acquiescence is present whenever a regulation creates an easement permitting members of the public to enter private property on a regular basis.[53] In each of these cases, because the landowner had not invited the intruding people or objects onto the property but was required to acquiesce in the invasion, the Court had no difficulty in concluding that the physical invasion was compelled. And because the intruders and/or objects were not owned by the landowner, there was no question that they were third parties gaining access under government authority.

In contrast, when a regulation merely governs the relationship between a landowner and an invitee, the Court has held that there is no compelled physical invasion, and the multifactor *Penn Central* test governs the takings inquiry. For example, in *Yee v. City of Escondido*, the Court rejected the argument that a rent control ordinance applicable to mobile home parks constituted a compelled physical invasion.[54] The ordinance stated, in part, that as long as a valid rental agreement was in place with respect to a particular mobile home, the park owner could not require the removal of the home from the park if it was sold. Nor could the park owner retain the right to approve or disapprove of the purchasers of the mobile home. In rejecting the park owner's claims that this ordinance constituted a compelled physical invasion (i.e., by the new owners of the mobile home, which was still located on the landowner's property), the Court said that "because they voluntarily opened their property to occupation by others, petitioners cannot

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[52] *Id.* at 436, 437.
[53] *See* Dolan v. City of Tigard, 512 U.S. 374 (1994) (permit condition requiring landowner to dedicate flood plain for hike and bike trail constitutes a compelled physical invasion); Nollan v. Cal. Coastal Comm'n, 483 U.S. 825 (1987) (permit condition requiring landowners to dedicate an easement across their private beach constitutes a compelled physical invasion); PruneYard Shopping Ctr. v. Robins, 447 U.S. 74 (1980) (state constitutional requirement that shopping center owners permit individuals to exercise free speech and petition rights on their property constitutes a physical invasion); Kaiser Aetna v. United States, 444 U.S. 164 (1979) (federal navigational servitude creating a public right of access to what was once a private pond constitutes a physical invasion).
[54] 503 U.S. 519 (1992).

assert a *per se* right to compensation based on their inability to exclude particular individuals."[55] Similarly, in *FCC v. Florida Power Corp*., the Court concluded that FCC regulation of the rates that utility companies can charge cable television operators who lease utility company poles to carry their television cables does not constitute a compelled physical occupation because the utility company had invited the cable company to lease the poles.[56] As the Court explained, "required acquiescence is at the heart of the concept of occupation."[57]

The second line-drawing challenge in the permanent physical occupation cases is the distinction between a permanent and a temporary physical invasion. As noted above, a compelled physical invasion will implicate the per se compensation requirement *only* if it is permanent. While the Supreme Court's cases are not models of clarity, the trend of the Court's reasoning has been to regard most compelled rights of access as constituting permanent, rather than temporary, physical occupations.

In two early takings cases, the Court identified rights of access as being temporary physical invasions. In *PruneYard Shopping Center v. Robins*, the Court concluded that the compelled physical invasion of public access to a shopping center for the purpose of disseminating political information was temporary, not permanent.[58] And in *Kaiser Aetna v. United States*, the Court similarly identified the federally protected navigational servitude as a temporary, not permanent, compelled physical invasion of the private landowner's marina.[59]

More recently, however, virtually identical rights of access have been held to be permanent, not temporary. In *Nollan*, for example, the Court held that a permit condition requiring the Nollans to allow strangers to walk across their privately owned beach constituted a permanent physical occupation. The Court said, "we think a 'permanent physical occupation' has occurred, for purposes of that rule, where individuals are given a permanent and continuous right to pass to and from, so that the real property may continuously be traversed, even though no particular individual is permitted to station himself permanently upon the premises."[60] It reached the same conclusion in *Dolan*. In *Dolan*, the land use restriction at issue was a 15 foot-wide pedestrian/bicycle pathway, which is essentially identical to a path for a safe route to school. In that case, the Court made clear that the required dedication of the pathway for public use constituted a permanent physical occupation.[61]

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[55] *See id.* at 531.
[56] 480 U.S. 245, 252-53 (1987).
[57] *Id.* at 252. Lower courts have elaborated on this distinction. In *Boise Cascade Corp. v. United States*, 296 F.3d 1339 (Fed. Cir. 2002), for example, the court rejected the landowner's claim that it suffered a compelled physical occupation by endangered spotted owls as a result of the denial of its application for a logging permit. The court pointed out that "[t]he government has no control over where the spotted owls nest, and it did not force the owls to occupy Boise's land." *Id.* at 1354-55.
[58] 447 U.S. 74 (1980).
[59] 44 U.S. 164 (1979).
[60] *Nollan*, 483 U.S. at 831.
[61] *Dolan*, 512 U.S. at 384 ("Without question, had the city simply required petitioner to dedicate a strip of land . . . for public use . . . a taking would have occurred.").

Lower courts have followed suit, recognizing that the "permanent" aspect of the permanent physical occupation test "does not mean forever, or anything like it."[62] Rather, lower courts treat a "government occupation as 'permanent' when the government's 'intrusion is a substantial physical occupancy of private property' . . . even if it is not 'exclusive, or continuous and uninterrupted.'"[63] Thus, in *Hendler* the Federal Circuit determined that groundwater monitoring wells were permanent in nature given their structure and the regular government intrusions to monitor them.[64] The wells had already been there several years prior to the court's opinion and were 100 feet deep, lined with plastic and stainless steel, surrounded by gravel and cement, capped with a cement casing lined with reinforcing steel bars, and enclosed by steel pipe set in concrete.[65] The *Hendler* court determined that these wells were at least as "permanent" as the cable equipment in *Loretto*.[66] Similarly, in *John R. Sand & Gravel Co.*, the Federal Circuit held that a security fence installed by the government during environmental remediation "with posts anchored by concrete in some instances" constituted a "permanent structure" sufficient to satisfy *Loretto*, even though the security fence would be removed after the environmental remediation was complete.[67] In contrast, the Federal Circuit rejected a claim of permanent physical occupation where the compelled physical invasion was much more transient in nature.[68] In *Boise Cascade*, the landowner was compelled to permit government agents to enter his property from time to time to conduct owl surveys pursuant to the Endangered Species Act. He sought compensation, claiming that the government surveys constituted a permanent physical occupation of his property. In rejecting that claim, the court stated that "transient, nonexclusive entries by the Service to conduct owl surveys do not permanently usurp Boise's exclusive right to possess, use, and dispose of its property."[69]

2. Applying the Law to Proposed Land Use Initiatives

Of the policy initiatives listed above that might be considered permanent physical occupations, both the requirement that private landowners permit students to walk or bike on their property and the requirement that they erect signs indicating safe routes to school clearly entail compelled acquiescence by the government or by third parties acting under government authority and rather clearly seem to be permanent in nature.[70] Accordingly, both would likely require compensation. These two proposed initiatives are very similar to cases already decided by the Supreme Court: the walking/biking trail is indistinguishable from the easements at issue in *Nollan* and *Dolan*, and the signage is similar to the cable box at issue in *Loretto*. If communities want to adopt

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[62] Hendler v. United States, 952 F.2d 1364, 1376 (Fed. Cir. 1991); *see also* John R. Sand & Gravel Co. v. United States, 457 F.3d 1345, 1357 (Fed. Cir. 2006) (noting that "permanent" means something "special . . . in the determination of whether a physical occupation has occurred").
[63] *John R. Sand & Gravel Co.*, 457 F.3d at 1357 (quoting *Hendler*, 952 F.2d at 1377).
[64] *Hendler*, 952 F.2d at 1376.
[65] *Id.*
[66] *Id.*
[67] *John R. Sand & Gravel Co.*, 457 F.3d at 1357.
[68] *See* Boise Cascade Corp. v. United States, 296 F.3d 1339 (Fed. Cir. 2002).
[69] *Id*. at 1354.
[70] A requirement that a private landowner erect a sign indicating a safe route to school is different from compelled signage in places of public accommodation or commercial enterprises. Landowners who profit by opening their private property to the public can be compelled to post signs to protect the public (such as emergency exit signs). In this example, we are referring only to requirements to post signs on privately owned land for the purpose of indicating public uses unrelated to the uses of the privately owned land.

policies and programs that rely on using private property for safe routes to school, it would be preferable for them to use their eminent domain power to acquire the property for such public use.

The takings implications of a regulation requiring landowners to dedicate a certain percentage of their retail shelf space to healthy food or to stock a certain amount of healthy foods if they choose to operate convenience stores are less clear-cut. On the one hand, courts could readily decide that these regulations do not implicate the per se rule applicable to permanent physical occupations because they arguably involve neither compelled physical access nor permanence. Rather, these regulations can be seen as analogous to those at issue in *Yee* and *Florida Power*, in which the physical invasion is voluntary, not compelled, because the landowner is in the business of selling food, and this just happens to be a regulation of the type of food she can sell. And, importantly, the invading object (the healthy food) is not owned by the government or third parties obtaining access pursuant to government control, just as the government did not own the mobile homes in *Yee* or the spotted owl in *Boise Cascade*. In fact, in the healthy foods initiatives, the invading objects would actually be owned by the landowner herself. In addition, because the food will come and go as it is stocked and purchased, it does not have the same air of permanence to it that a fence, a pipe, or a sign does. Finally, as with *Yee* and *Florida Power*, the landowner could avoid the physical invasion by exiting the business that gave rise to the regulatory burden.

On the other hand, it is at least possible that courts might conclude that the healthy foods initiatives constitute a permanent physical occupation. If you describe the sort of business that the landowner is in as "the junk food/convenience food business" rather than "the business of selling food," then the requirement that a store owner stock certain types of food embodies an element of compulsion not found in *Yee* and *FCC*. That is, it does not regulate an invasion that the landowner has invited, but compels an invasion he has, probably purposefully, not permitted without the regulation. In addition, the scope of the invasion is arguably more "permanent" than temporary. As *Nollan* and *Dolan* indicate, the invasion compelled by a regulation need not be fixed and interminable to be considered permanent. Rather, it must entail "substantial physical occupancy" of the landowner's private property. A requirement that a portion of a store's shelf space be dedicated to food items that the owner would prefer not to stock may, indeed, be found to entail just such a substantial physical occupancy.

Ultimately, the constitutional difference between the first two initiatives—the walking/biking trail and the signage—and the latter initiative—the compelled stocking of healthy foods—can be illuminated by considering the government's alternatives in each case. In the first two cases, the government can simply take title to the property using its powers of eminent domain and provide a walking trail or a useful sign, and this is the sort of public benefit that governments regularly provide using their powers of eminent domain. In the latter case, however, it is conceptually challenging to imagine how the government would "take title" to a few shelves and some food products within a convenience store for the purpose of selling healthy food. While this thought experiment obviously does not resolve the hard legal questions, it does help crystallize the differences in the initiatives in light of the general purpose of the takings clause (and in particular the categorical rules), which is to prevent the government from doing by regulation what it should, in all justice and fairness, accomplish using eminent domain. Given the basic differences

between a healthy foods initiatives and the sorts of regulations that have been held to be permanent physical occupations in the past, as well as the Supreme Court's admonition that the categorical rules should apply to very few takings claims, it seems most likely that courts will reject landowner challenges to these initiatives under the permanent physical occupation rule.

In challenges to these land use initiatives, if a court rejects a landowner's claim that the challenged land use constitutes a permanent physical occupation, the regulations would be analyzed under the multifactor *Penn Central* test. As noted above, regulations challenged under *Penn Central* are rarely held to be compensable takings, and it is very unlikely that these regulations would be categorized as such.

D. Conditional Use Restrictions

Many of the policies discussed above do not raise serious takings concerns. For those that do,[71] a community may wish to eliminate the possibility of a takings challenge by imposing the land use restriction as a condition on a permit. Every state has the power to establish land use standards, and this state power is generally delegated to municipalities and other political subdivisions. Under these police powers, states and political subdivisions can adopt regulations designed to advance the public safety, health, and welfare. The most common of these types of regulations are general zoning and building codes.

Local governments have long used the power to grant or withhold permits based on its general police powers as a sort of leverage to gain concessions of property rights from landowners. In *Dolan*, for example, the landowner sought a permit to expand her hardware store, and the City of Tigard offered to grant the permit in exchange for a grant of an easement for a hike and bike trail. In *Nollan*, the landowner sought a permit to demolish an old, small beach house and build a much larger one in its place. Both Nollan and Dolan (in different cases, years apart) challenged this governmental permit leveraging as a form of unconstitutional blackmail, and the Supreme Court agreed in part. In particular, the Supreme Court made clear that a state or local government can impose land use restrictions that would otherwise be considered compensable takings on private landowners without paying compensation if it imposes those restrictions as conditions on the issuance of a permit as long as (1) the government would be justified in denying the permit outright under its general police powers and applicable ordinances and regulations, (2) the conditions bear an essential nexus to the legitimate government interest that would have justified the denial of the permit in the first instance, and (3) the condition is roughly proportional to the projected impact of the project for which the permit is sought.[72]

The essential nexus test is a somewhat heightened version of rational basis review. While courts will generally defer to the legislative determinations of public welfare, when those determinations manifest themselves in the permitting process, the possibility of government arbitrariness or overreaching require a more concrete connection between the condition and the government interest purportedly underlying it. In *Nollan*, the Court rejected the condition of

[71] For example, requiring the landowner to dedicate part of her property to a walking/biking trail or to dedicate a portion of her retail shelf space to healthy foods.

[72] *See* Dolan v. City of Tigard, 512 U.S. 374, 389-91 (1994); Nollan v. Cal. Coastal Comm'n, 483 U.S. 825, 840-42 (1987).

lateral public access across the landowner's beach because it could not draw a logical connection between that condition and the purported justification of increasing visual access to the beach from the road.

The rough proportionality requirement demands that the government entity seeking to impose a condition on a permit demonstrate that the condition, in addition to bearing an essential nexus to the government interest that would justify denying the permit, also bear a rough proportionality to the harm that will be caused if the permit is granted. While this standard does not require "mathematical precision," it does impose on the regulating entity the burden to make some sort of individualized determination that the condition is related both in nature and extent to the impact of the proposed development.[73]

The initial challenge for municipalities seeking to use conditional permits to avoid compensating for otherwise compensable initiatives such as the walking/biking trail is in finding the permit application that can trigger the condition. If the municipality wants to create a safe route to school by using easements over private property, it can do so using conditional permitting only if the properties needed for the route request permits that the city could legitimately deny. Valid reasons for denying the permits will have to be drawn from local zoning ordinances or building codes, which will vary from city to city. It is fair to say, however, that most of these reasons will have to do with lot size, setback requirements, maximum impervious lot surface coverage, and so on.

The second challenge will be tying the condition—through the essential nexus and rough proportionality tests—to the purposes for which the permits might legitimately be denied. In the case of private homeowners and the desire for a safe route to school, this may be impossible. It is difficult to imagine what sort of building permit or zoning approval a private landowner could seek that would exacerbate or even be related to the rise in childhood obesity. For example, if the landowner is seeking a variance for lot size, the municipality will not be able to establish an essential nexus between the legitimate reasons that would justify denying the variance (e.g., property values, light, or safety) and the condition of an easement for a walking/biking trail.

The healthy foods initiatives might present an easier challenge for cities seeking to impose land use restrictions via conditional permits, but it will present a challenge nonetheless. If the cities enact ordinances limiting the density, placement, or size of fast-food or convenience food locations, and these ordinances withstand constitutional scrutiny, then they may form the basis for conditional permitting that eliminates the compensation requirement. For example, a convenience food store might seek a variance to open and conduct business 990 feet from a school, in a city in which the ordinance prohibits such establishments from opening within 1,000 feet of a school. If the zoning board has the authority to grant the variance under local law and if the convenience store is not grandfathered in the location, the board can grant the variance on the condition that the convenience store comply with the terms of the healthy foods initiative. The task for the communities seeking to impose such conditions is to establish the logical connection between the types of business on which these conditions will be imposed, the increase in the incidence of childhood obesity, and the ameliorative impact of increased options for exercise and/or the purchase of healthy snacks and food. In addition, communities must include in their

[73] *Dolan*, 512 U.S. at 389-91.

findings concerning the conditions individualized determinations about the particular impact of the proposed development and its proportional relationship to the condition sought to be imposed.

IV. Conclusion

In general, state and local governments have broad power to regulate land use in service of public health, safety, and welfare. In rare circumstances, the Fifth Amendment to the U.S. Constitution will serve as a barrier between a landowner and overzealous regulatory control over his land use options. Most of the proposed initiatives to combat childhood obesity constitute valid governmental actions that do not implicate the protections afforded landowners by the Fifth Amendment, while a few—such as the safe routes to school initiative and the healthy foods initiative—may raise serious constitutional questions.