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Property Rights, Endangered Species, Wetlands, and Other Critters - Is It against Nature to Pay for a Taking

James S. Burling

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PROPERTY RIGHTS, ENDANGERED SPECIES, WETLANDS, AND OTHER CRITTERS—IS IT AGAINST NATURE TO PAY FOR A TAKING?*

*James S. Burling***

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** Attorney, Pacific Legal Foundation; J. D. University of Arizona College of Law, 1983. Pacific Legal Foundation is a nonprofit, public interest legal group committed to the defense of private property rights, individual freedoms, the concept of limited government, and the free enterprise system.

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We are in danger of forgetting that a strong public desire to improve the public condition is not enough to warrant achieving the desire by a shorter cut than the constitutional way of paying for the change.¹

[N]or [shall any person] be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.²

The Fifth Amendment's guarantee . . . [is] designed to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole.³

I. INTRODUCTION

The 1990s have been hailed as the decade of the environment. As this appellation is replaced by new legislative mandates and regulatory fiats, clashes will develop over the extent to which private property rights ought to be respected. President Bush is propelling the nation toward a "no net loss" of wetlands policy,⁴ and the spotted owl has become part of every dinner table (conversation).⁵ A republican Senator has warned that we cannot protect the environment "if we are going to give into private property rights."⁶ The national media breathlessly exudes the new ethic of the environment in cartoons, commercials, and public-affairs shows of every stripe. At the same time, multimillion dollar judgments are being awarded for damages to property rights caused by environmental regulation,⁷ and the United

1. *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 416 (1922).

2. U.S. CONST. amend. V.

3. *Armstrong v. United States*, 364 U.S. 40, 49 (1960), cited in *Nollan v. California Coastal Comm'n*, 483 U.S. 825, 835 n.4 (1987) (noting that this is one of the "principal" rationales for the Fifth Amendment's Taking Clause); see also *San Diego Gas & Elec. Co. v. City of San Diego*, 450 U.S. 621, 656 (1981) (Brennan, J., dissenting); *Penn Central Trans. Co. v. City of New York*, 438 U.S. 104, 123 (1978).

4. See Memorandum of Agreement Between the United States Army Corps of Engineers and the Environmental Protection Agency, 55 Fed. Reg. 9210 (1991) [hereinafter Memorandum of Agreement].

5. See Michael Satchell, *The Endangered Logger: Big Business and a Little Bird Threaten a Northwest Way of Life*, U.S. NEWS & WORLD REPORT, June 25, 1990, at 27; see also Charles C. Mann and Mark L. Plummer, *The Butterfly Problem; Government Protection of Endangered Species*, ATLANTIC, January, 1992, at 47.

6. Warren Brookes, *Wetlands-Protection Policy Draws Fire*, S.F. CHRON., Aug. 13, 1991, at C3 (quoting Senator John Chafee).

7. See, e.g., *Whitney Benefits v. United States*, 926 F.2d 1169 (Fed. Cir. 1991), cert. denied, 112 S. Ct. 406 (1991) (\$60 million plus interest awarded for taking of coal deposit); *Loveladies Harbor, Inc. v. United States*, 15 Cl. Ct. 381 (1988) (*Loveladies I*); *Loveladies Harbor, Inc. v. United States*, 21 Cl. Ct. 153 (1990) (*Loveladies II*), appeal pending in *Federal Circuit Court of Appeals* (\$2.6 million awarded for taking of wetlands after fill permit denied); *Florida Rock Indus., Inc. v. United States*, 791 F.2d 893 (Fed. Cir. 1986), cert. denied, 479 U.S. 1053 (1987) (*Florida Rock I*); *Florida Rock Indus., Inc. v. United States*, 21 Cl. Ct. 161 (1990) (*Florida Rock II*) (\$1.02 million awarded for taking of wetland), appeal pending in *Federal Circuit Court of Appeals*; see also *Hendler v. United States*, 952 F.2d 1364 (Fed. Cir. 1991) (taking found when

States Supreme Court recently agreed to decide three major property rights cases, including one which may determine whether regulation of coastal zones constitutes a taking.⁸

America's firm and forthright decision to protect endangered species, regardless of the cost, is resulting in an unprecedented boon for a "Gaia goulash" of species from saltmarsh mice, minnows, sea turtles, fringe-toed lizards, red squirrels, desert tortoises, and, of course, the noble spotted owl.⁹ In the case of the owl, while it may be relatively easy for agencies such as the United States Fish and Wildlife Service to administrate a habitat protection plan that will cause the loss of between 62,273 and 131,000 jobs and increase housing costs,¹⁰ there could be some serious "takings" costs involved as well. Specifically, if owners of private old growth forests are unable to harvest trees because of the spotted owl, will that be considered a taking of their property?

In recent years, the United States Supreme Court has shown an increased solicitude towards the preservation of private property rights.¹¹ The state courts, however, have not universally followed this trend. In fact, when confronted with the choice between protecting

monitoring wells placed on property for purpose of assessing nearby toxic waste dump); *Award to Oil Firms Appealed*, DETROIT FREE PRESS, Oct. 9, 1991, at 1E (appeal of award); *Miller Bros. v. State of Michigan*, No. 88-11848-CM (Mich. Ct. Cl., Sept. 20, 1991) (\$71 million plus nearly \$29 million interest awarded to oil companies prohibited from drilling in Michigan's Nordhouse Dunes); MINN. STAR TRIB., Feb. 24, 1992, at 1 (\$761,818 awarded in settlement of *Beur -Co. v. United States*, 16 Cl. Ct. 42 (1988)). This is first actual payment of money in a wetland takings suit).

8. *Lucas v. South Carolina Coastal Council*, 404 S.E.2d 895 (S.C. 1991), cert. granted, 112 S. Ct. 436 (1991) (Court will decide whether building prohibition in coastal zone is a "taking"); *PFZ Properties v. Rodriguez*, 928 F.2d 28, cert. granted 112 S. Ct. 414 (1991), cert. dismissed, No. 91-122, 1992 WL 49782 (U.S. Mar. 9, 1992); *Yee v. City of Escondido* (Court decides mobile home park rent control is not a "physical invasion" takings and declines to rule whether or not it is a "regulatory taking.")

9. U. S. FISH AND WILDLIFE SERV., ENDANGERED SPECIES TECHNICAL BULLETIN (Feb. 1991) (605 species listed in United States); but see Joel Berger, *Funding Asymmetries for Endangered Species, Feral Animals, and Livestock (Roundtable)*, 41 BIOSCIENCE 105 (Feb. 1991) (not all species faring equally well). The press coverage of the subject is growing with the impact of the act. See, e.g., Charles McCoy, *Little Fish May Put California in Hot Water*, WALL ST. J., July 10, 1991, at B1 (water shipments to farms threatened by Delta Smelt); Dennis Pfaff, *Marshland Sale Meets a Challenge*, S.F. DAILY J., July 3, 1991, at 1 (concerning saltmarsh mice); Charles McCoy, *Salmon Battle Could Spawn Much Bitterness*, WALL ST. J., June 5, 1991, at B1; Susan Sward, *Endangered Species Act's Successes Have Been Few*, S.F. CHRON., May 14, 1990, at A1 (general overview).

10. U. S. FISH & WILDLIFE SERV., NEWS RELEASE 91-43, Aug. 5, 1991, at 6 (62,273 jobs lost); *New Court Clash Over Spotted Owl*, S.F. CHRON., May 1, 1991, at B12 (labor estimates further restrictions on owl will raise timber unemployment to 131,000); Rudy Abramson, *U.S. Designates Owl Habitat but Acreage Is Cut*, L.A. TIMES, Jan. 10, 1992 (33,000 to 100,000 jobs to be lost); Carl Nolte, *Whittled-Down Logging Ban In Owl Habitat*, S.F. CHRON., Jan. 10, 1992 (33,000 jobs to be lost); *Spotted Owl Surcharge*, WALL ST. J., June 21, 1991 (lumber prices 30% higher); *Spotted Owl Bumps Lumber Prices 30%*, BUFFALO NEWS, July 6, 1991, at HF 31.

11. See, e.g., Michael M. Berger, *Happy Birthday, Constitution: The Supreme Court Establishes New Ground Rules for Land-Use Planning*, 20 URB. L. 735 (1988).

wetlands for free, and paying property owners for their wetlands made undevelopable by regulation, many courts opt to take the wetlands for free. The Supreme Courts of Wisconsin, Washington, and New Hampshire have been leaders in this trend.¹²

In 1987, the United States Supreme Court issued the most significant series of cases on takings since Justice Holmes' 1922 opinion in *Pennsylvania Coal*.¹³ In the five years since the 1987 decisions of *Keystone Bituminous Coal Association v. DeBenedictis*,¹⁴ *First English Evangelical Lutheran Church of Glendale v. County of Los Angeles*,¹⁵ and *Nollan v. California Coastal Commission*,¹⁶ appellate opinions from the state and federal courts have only begun to fill the interstices in the law of regulatory takings left unfilled by the United States Supreme Court.¹⁷ Nevertheless, no matter how one views the reach of these decisions, it is certain that they have changed the landscape of regulatory takings.

It is also certain that the regulation of wetlands and endangered species will provide more permutations, questionable principles, raging argument, and incomprehensible court opinions than any other scheme of land use regulation. The fun has already begun, perhaps nowhere as profoundly as in Washington State's Supreme Court, the United States Claims Court, and the Federal Circuit Court of Appeals.

Two of the most significant recent cases on takings have arisen in the context of wetlands regulations. In *Loveladies Harbor v. United States (Loveladies II)*,¹⁸ the claims court awarded a developer \$2,658,000, plus interest, after a development permit was denied on 12.5 acres of land. On the same day that *Loveladies II* was decided, July 23, 1990, the same judge awarded a mining company \$1,029,000, plus interest, after a permit to mine limestone was refused for 98 acres in Florida in *Florida Rock Industries v. United States (Florida Rock II)*.¹⁹

In an analogous environmental takings dispute the same judge who decided *Loveladies II* and *Florida Rock II* awarded the owners of a coal deposit over \$60 million, plus interest, after finding that the enactment of the Surface Mining Coal Reclamation Act (SMCRA), when applied to specific coal deposits, was itself a taking, in *Whitney*

12. See *infra* Part VIII.

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

14. 480 U.S. 470 (1987).

15. 482 U.S. 304 (1987).

16. 483 U.S. 825 (1987).

17. See, e.g., Berger, *supra* note 11; see also David R. Mandelker & Michael M. Berger, *A Plea to Allow the Federal Courts to Clarify the Law of Regulatory Takings*, 42 LAND USE LAW & ZONING DIGEST 3 (1990); Jan G. Laitos, *Regulation of Natural Resources Use and Development in Light of the "New" Takings Clause*, 34 ROCKY MTN. MIN. L. INST. 1-1 (1988).

18. 21 Cl. Ct. 153 (1990).

19. 21 Cl. Ct. 161 (1990).

Benefits v. United States.²⁰ On appeal, the Federal Circuit unhesitatingly affirmed and emphasized the vitality of takings jurisprudence in the modern era of environmental protection.²¹

Finally, Connecticut's Supreme Court recently held that it would find a taking if a property owner, who had a reasonable expectation of developing in a wetland, could prove that the state prevented economically viable use of the wetland.²² And in Michigan, a trial court recently awarded \$90 million in damages and interest to oil companies prohibited from drilling in the Nordhouse Dunes.²³

This article will examine very briefly the basic principles of the law of takings, focusing on the most commonly articulated tests for finding (or not finding) a taking through the regulation of property, and will attempt to summarize the unifying principles of the law of takings in relation to the regulation of wetlands, endangered species, and other environmental concerns. In addition, trends from various states will be reviewed.

This article will conclude that there is no special wetland, habitat, or other environmental exception to the law of takings. Public burdens, including the cost of environmental regulation, should be borne by the public as a whole. Under federal law, a taking may be found in three circumstances. First, if a particular regulation limits property rights and does not substantially advance a legitimate governmental interest, there is a taking. Second, if a regulation totally destroys the value of property, there is a taking. Finally, if property is partially destroyed, there could be a taking depending on the nature of the regulation and the degree of economic impact.

Some state courts, however, have adopted doctrines that arguably do not harmonize well with federal law. For example, Washington State cases have held that invalidation, not compensation, is the appropriate remedy when a regulation fails to advance a legitimate governmental interest. Other states have found that there is no inherent right to alter the character of land (from wetland to upland) and thus no taking when property owners are prevented from undertaking such conversions. It is this conflict between some states and federal law that will engage the courts in the years ahead.

20. 18 Cl. Ct. 394 (1989), *aff'd*, 926 F.2d 1169 (1991), *cert. denied* 112 S. Ct. 406 (1991). This case is to be contrasted with the purely facial and/or federal jurisdictional challenges to the reclamation statute. See *Hodel v. Virginia Surface Mining & Reclamation Ass'n*, 452 U.S. 264 (1981) (SMCRA upheld against challenges based on Commerce Clause, 10th Amendment, and 5th Amendment grounds. Also no taking found because facial attack insufficient to show that any particular coal deposit taken); *Hodel v. Indiana*, 452 U.S. 314 (1981) (jurisdictional challenge to farmland provisions of SMCRA upheld against similar jurisdictional challenges).

21. *Whitney Benefits*, 926 F.2d at 1177 n.10.

22. *Gil v. Inland Wetlands & Watercourses Agency*, 593 A.2d 1368, 1373-74 (Conn. 1991). See *infra* note 321 and accompanying text.

23. *Michigan Plans Appeal of \$90 Million Award*, *supra* note 7.

II. A VERY BRIEF SURVEY OF FEDERAL WETLAND AND ENDANGERED SPECIES LAWS

Two areas of environmental concern have a particularly high potential to collide with the law of takings: the protection of wetlands and the preservation of endangered species.²⁴ The federal government and many states have comprehensive regulatory schemes to protect wetlands and endangered species. This section will briefly describe the relevant federal regulatory schemes.

A. Wetlands and Section 404 of the Clean Water Act

Section 404 of the Clean Water Act governs "dredge and fill" activities in "all waters of the United States."²⁵ In a clamshell, no person may "dredge and fill" waters of the United States, which include wetlands, without a "dredge and fill" permit from the United States Army Corps of Engineers (Corps).²⁶ The Environmental Protection Agency (EPA) has regulatory oversight and may veto a permit.²⁷ Either agency may enforce violations of the statute, and may assess civil fines of up to \$25,000 per day, per violation plus criminal penalties of mandatory incarceration plus fines ranging from \$25,000 for negligent first offenses to \$100,000 for knowing second offenses.²⁸

1. What Are "Waters of the United States?"

Wetlands are defined as "those areas that are inundated or saturated by surface or ground water at a frequency and duration sufficient to support, and that under normal circumstances do support, a prevalence of vegetation typically adapted for life in saturated soil conditions. Wetlands generally include swamps, marshes, bogs, and similar areas."²⁹

24. It is the profound impact on the ability of people to use real estate that creates conflict under these two statutes. See, e.g., Keith Schneider, *Environmental Laws Face A Stiff Test From Landowners*, N.Y. TIMES, January 20, 1992, at A1.

25. Clean Water Act, 33 U.S.C. § 1344 (1988). For a comprehensive treatise on the law of wetlands, see WILLIAM WANT, *LAW OF WETLANDS REGULATION* (hereinafter *WETLANDS REGULATION*) (1989). The relevant regulatory authority for wetlands is found at Corps' regulations 33 C.F.R. § 320 (1991), and EPA regulations 40 C.F.R. § 230 (1991) (also known as the "Section 404(b)(1) guidelines for specification of disposal sites for dredged or fill material"). In addition, the Corps has issued numerous regulatory guidance letters, collected at 54 Fed. Reg. 2414 (1989). Finally, the Corps, EPA, and other agencies have entered into numerous memoranda of agreement regarding wetlands regulations, see, e.g., *WETLANDS REGULATION* § 6.11 and Memorandum of Agreement, *supra* note 4.

26. 33 U.S.C. § 1344 (1988); 33 C.F.R. §§ 320, 384 (1991).

27. 33 U.S.C. § 1344(c) (1988).

28. 33 U.S.C.S § 1319(d), (c)(3) (Supp. 1991). See also UNITED STATES ARMY CORPS OF ENGINEERS, *REGULATORY GUIDANCE LETTER 90-09, WETLANDS ENFORCEMENT INITIATIVE*, reprinted in 54 Fed. Reg. 2414 (1989).

29. 33 C.F.R. § 328.3(b) (1991).

Until Congress prohibited its use,³⁰ a much more detailed and comprehensive definition was found in the *Federal Manual for Identifying and Delineating Jurisdictional Wetlands* (Manual) prepared by the Corps, EPA, United States Fish and Wildlife Service, and the Soil Conservation Service.³¹ Under the 1989 Manual, a wetland did not have to look wet, or even damp, for it to be defined as a wetland.³² Property owners became furious over the breadth of the wetlands definition and convinced the administration to propose changes.³³ Because the next version of the manual will determine whether or not millions of acres of "borderline" wetlands are to be regulated, it is a safe assumption that it will profoundly affect the degree to which private property owners sue the federal government for takings damages.

Agencies interpret their Clean Water Act jurisdiction over "waters of the United States" to include navigable waters, tributaries thereto, all wetlands adjacent to navigable waterways and their tributaries,³⁴ and possibly artificially created wetlands.³⁵ As for "isolated wetlands," which include prairie potholes, vernal pools, and other wetlands not associated with or flowing into other waters, the Corps asserts jurisdiction through the Commerce Clause; *i.e.*, if a migratory duck *might* land in it, it affects interstate commerce.³⁶

30. See Energy and Water Development Appropriations Act, 1992, 105 Stat. 510, 518 (1991).

31. U.S. FISH & WILDLIFE SERV. ET AL., FEDERAL MANUAL FOR IDENTIFYING AND DELINEATING JURISDICTIONAL WETLANDS (hereinafter MANUAL). The MANUAL was published in 1989 and is available from the Corps and EPA.

32. *Id.* at § 2.9(1)(B) at 7.

33. Proposals to amend the MANUAL were published at 56 Fed. Reg. 40,446 (1991), which would make wetlands more "wet" (soil would have to be saturated for at least 21 days at the surface instead of only 7 days 18 inches below the surface). See, *e.g.*, Warren Brookes, *The Strange Case of the Glancing Geese*, FORBES, Sept. 2, 1991, at 104; *Bush Draws Environmentalists' Anger with Wetlands Proposal*, L.A. TIMES, Aug. 11, 1991, at A1; Michael Weisskopf, *EPA Defense of Wetlands Fuels New Threats*, WASH. POST, July 18, 1991, at A15; Timothy Noah, *U.S. Panel on Housing Costs Targets Wetlands Rules, Rent Control in Report*, WALL ST. J., July 8, 1991, at A5E; Marianne Lavelle, *Even the Deserts Are Wet; Wetlands: The New Battle Cry in Washington*, NAT'L L. J., 1, 24 (1990). See also ADVISORY COMMISSION ON REGULATORY BARRIERS TO AFFORDABLE HOUSING, "NOT IN MY BACK YARD" REMOVING BARRIERS TO AFFORDABLE HOUSING, at 4-3 to 4-7 (1991) (hereinafter BACK YARD).

34. *United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121, 123-24 (1985).

35. Compare *Leslie Salt Co. v. United States*, 896 F.2d 354 (9th Cir. 1990), *cert. denied*, 111 S. Ct. 1089 (1991) (found jurisdiction over artificially created wetlands) with *United States v. City of Fort Pierre*, 747 F.2d 464 (8th Cir. 1984) (no jurisdiction over artificial wetlands created by the Corps).

36. What has become known as the "glancing duck" test of federal wetlands jurisdiction was first articulated in a September 15, 1985, internal EPA memorandum from Francis Blake, General Counsel, to R. Sanderson, Office of External Affairs (available from Pacific Legal Foundation). This assertion of jurisdiction was repudiated in an unpublished opinion, 885 F.2d 866 (4th Cir. 1989) (table) (text of the opinion can be found in 20 *Env'tl. L. Rep.* (Env'tl. L. Inst.) 20,008), but the Corps and EPA continue to assert jurisdiction in other circuits. See UNITED STATES ENVIRONMENTAL PROTECTION AGENCY AND UNITED STATES DEPARTMENT OF THE ARMY, CLEAN WATER ACT SECTION 404 JURISDICTION OVER ISOLATED WATERS IN LIGHT OF *TABB LAKES v. UNITED STATES*, memorandum dated Jan. 19, Jan. 24, 1990 (available from Pacific Legal Foundation). The Supreme Court expressly declined to address this jurisdictional issue in *Riverside*

2. What Is "Dredge and Fill?"

Regulated "dredge and fill" activities include virtually any activity on a wetland where material is moved. Placing clean fill into a wetland, such as for a road or home pad, is "dredge and fill."³⁷ Digging a ditch is "dredge and fill" when the ditch spoil is tossed next to the ditch.³⁸ Intensive farming can be "dredge and fill" when the "reach" of the wetlands is diminished.³⁹ In fact, virtually any activity which moves dirt around in a wetland is considered to be "dredge and fill" activity.⁴⁰ An activity need not "pollute" for it to be regulated.⁴¹

3. What Is a "404 Permit?"

Before a person can "dredge and fill," a permit must be obtained from the Corps of Engineers.⁴² If a wetland is filled without a Section 404 permit, an "after-the-fact" permit must be obtained.⁴³ Removal of the unlawful fill is usually a precondition for obtaining an after-the-fact permit.⁴⁴ Failure to obtain a permit for dredge and fill activities may result in substantial penalties.⁴⁵

If a permit is denied, the denial may be appealed.⁴⁶ A final denial of a permit may result in a taking.⁴⁷ The mere determination that a

Bayview Homes, 474 U.S. at 131 n.8, a case where it found federal jurisdiction over "adjacent" wetlands. See also *United States v. Larkins*, 852 F.2d 189, 193-94 (6th Cir. 1988) (Merritt, C. J., concurring) (noting that *Riverside* expressly declined to consider jurisdiction over nonadjacent wetlands and noting possible takings implications). See also *Brookes*, *supra* note 33.

37. 33 C.F.R. § 323.2(d),(e),(f) (1991).

38. *Id.* at § 323.2(f).

39. A limited exemption applies for some agriculture and silviculture. See 33 U.S.C. § 1344(f) (1988); 33 C.F.R. 323.4(a)(1) (1991); ARMY CORPS OF ENGINEERS, REGULATORY GUIDANCE LETTER 90-5, reprinted in 56 Fed. Reg. 2408 (1991); but see *United States v. Akers*, 785 F.2d 814 (9th Cir.), cert. denied, 479 U.S. 828 (1986) (limiting agricultural exemption), and *United States v. Huebner*, 752 F.2d 1235 (7th Cir. 1985), cert. denied, 474 U.S. 817 (1985) (limiting exemption).

40. *Id.*

41. See *Florida Rock I*, 8 Cl. Ct. at 172 (Judge Kozinski holding that regulated mining activity would not have caused pollution); *Loveladies I*, 15 Cl. Ct. at 389 (Judge Smith holding that the residential development would cause even less potential of "pollution" than *Florida Rock*).

42. 33 U.S.C. § 1344(a) (1988). For minor activities, blanket "nationwide" permits are available. 33 C.F.R. § 330.5(a) (1991). Revisions to the nationwide permits are being contemplated. 56 Fed. Reg. 2408 (1991). The EPA may veto the issuance of a Section 404 permit. 33 U.S.C. § 1344(c).

43. 33 C.F.R. § 326.3(e) (1991).

44. *Id.*

45. See *supra* note 28 and accompanying text.

46. Suit can be brought under the Administrative Procedure Act, 5 U.S.C. § 701 (1988), and 28 U.S.C. § 1331 (1988) (federal question jurisdiction); see *WETLANDS REGULATION*, *supra* note 25 at § 9.01[1]. See also *Loveladies Harbor, Inc. v. Baldwin*, Civ. No. 82-1948 (D.N.J. Mar. 12, 1984), *aff'd without opinion*, 751 F.2d 376 (3d Cir. 1984).

47. See *Loveladies II*, 21 Cl. Ct. 153; *Florida Rock II*, 21 Cl. Ct. 161. But see *Deltona Corporation v. United States*, 657 F.2d 1184 (Ct. Cl. 1981) (no taking found); *Jentgen v. United States*, 657 F.2d 1210 (Ct. Cl. 1981) (no taking found); *Ciampitti v. United States*, 22 Cl. Ct. 310, 318 (1991) (*Ciampitti II*) (no taking found). *Deltona* and

property is wetland, however, is not a taking.⁴⁸

B. *The Endangered Species Act*

Of all the federal environmental protection statutes the Endangered Species Act (ESA)⁴⁹ is the most comprehensive.⁵⁰ Economics may not be considered in the process through which a species is listed as threatened or endangered.⁵¹ Only after a species is listed may economics be considered in critical habitat designation,⁵² the consideration of habitat conservation plans,⁵³ or in the cabinet level review committee deliberations.⁵⁴ The ESA has created intense controversy when applied to scenarios ranging from stopping the Tellico Dam because of snail darters,⁵⁵ to restricting shrimping in the gulf (to protect sea turtles),⁵⁶ to threatening water supplies in California (Delta Smelt),⁵⁷ and most controversially to the threats of severe job losses in the Pacific Northwest logging industry because of the spotted owl.⁵⁸ As a result there have been calls to reform the Act during its 1992 reauthorization.⁵⁹

The ESA provides a mechanism whereby the Fish and Wildlife Service, on its own initiative or pursuant to a petition from a member of the public, will list a species as "threatened" or "endangered."⁶⁰

Jentgen were decided prior to the 1987 Supreme Court trilogy of takings cases. *Deltona* may be best explained by noting that its main holding is that the imposition of a permit requirement is not by itself a taking—the permit first must be applied for and denied, leaving the property owner without a viable use of property. *Jentgen* found that a denial of a permit is not a taking of the property when significant value remains in the property (the land in question was still partially developable). In *Ciampitti II*, no taking was found because the property owner did not have a reasonable expectation of being able to develop his property. These cases are discussed in more detail in Part VI, *infra*.

48. *Riverside Bayview Homes*, 474 U.S. at 127.

49. Endangered Species Act, 16 U.S.C. §§ 1531-1544 (1988). Relevant regulations are found at 50 C.F.R. §§ 17.1-17.108, 217.1-217.4, and Parts 402-453 (1991). For a concise review of the Act, see Constance A. Brooks and W. Hugh O'Riordan, *The ESA: A Practitioner's Point of View*, 4 NAT'L RESOURCES & ENV'T, No. 4 at 29 (1989).

50. *Tennessee Valley Authority v. Hill*, 437 U.S. 153, 180 (1978).

51. 16 U.S.C. § 1533(a), (b) (1) (a) (1988). "The Secretary shall make determinations . . . solely on the basis of the best scientific or commercial data." *Id.*

52. 16 U.S.C. § 1533(b)(2).

53. *Id.* at § 1539(a).

54. *Id.* at § 1536(e)-(h).

55. *Tennessee Valley Authority*, 437 U.S. 153.

56. See *infra* note 59.

57. Dennis Pfaff, *Threatened Fish Meet Prized Substance*, S.F. DAILY J., Jan. 16, 1992, at 5.

58. See *supra* note 10. See also BACK YARD, *supra* note 33, at 4-7 to 4-11.

59. See *Review & Outlook, Species Act, Endangered*, WALL ST. J., Jan. 15, 1992 at A 14; Mann and Plumer, *supra* note 5; Rudy Abramson, *Wildlife Act: Shield or Sword?*, L.A. TIMES, Dec. 14, 1990, at A1; But see Kurt Zimmerman, *Politics and Preservation: The Endangered Species Act and the Northern Spotted Owl*, 18 ECOLOGY. L. Q. 105 (1991).

60. 16 U.S.C. § 1533 (1988); 50 C.F.R. Part 424 (1991). Emergency listings also are available, 16 U.S.C. § 1533(7), which are extremely difficult to challenge. See Tony A. Sullins, Note, *Endangered Species Act—Judicial Review of an Emergency Listing—A*

The Fish and Wildlife Service, as a matter of law, may not consider social and economic factors in the listing process.⁶¹ The act defines an endangered species as: “[A]ny species which is in danger of extinction throughout all or a significant portion of its range other than a species of the Class Insecta determined by the Secretary to constitute a pest.”⁶² A “threatened” species is one that has a significant potential of becoming endangered.⁶³ Both plants and animals may be listed although endangered animals receive a greater level of protection than endangered plants.⁶⁴ As a practical matter, there is little difference in the regulatory impact of listing a species as either “threatened” or “endangered.”⁶⁵

Important consequences result from the listing of a species. Federal agencies are under an affirmative duty to avoid actions that would jeopardize the species.⁶⁶ In addition, activities on private property may be curtailed in order to avoid harming the species.⁶⁷ Thus, both private property owners and public land managers must be fully aware of the requirements of the ESA when any listed species may be affected by their activities.

1. A Short Word About a Different Species of Takings

Once a species has been listed as endangered or threatened, it is unlawful to “take” that species. “The term ‘take’ means to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct.”⁶⁸ Penalties for violation of the ESA include fines of up to \$50,000 per violation and mandatory incarceration.⁶⁹ The regulations amplify the definition of “take” by in-

Wasteful Allocation of Resources?, 26 LAND & WATER L. REV. 619 (1991).

61. 16 U.S.C. § 1533(b)(1)(a) (1991). “The Secretary shall make determinations . . . solely on the basis of the best scientific or commercial data.” *Id.*

62. *Id.* at § 1532(6).

63. *Id.* at § 1532(20).

64. Compare *id.* at § 1538(1) with § 1538(2) (prohibition on endangered plants limited to removal).

65. Compare 16 U.S.C. § 1538(a)(1)(B) (making it unlawful to take *endangered* species) with 50 C.F.R. § 17.31(a) (1991) (extending the prohibition to all *threatened* species). This extends the amount of property directly impacted by the Act. No court has addressed whether the regulatory extension to threatened species exceeds the statutory plan.

66. 16 U.S.C. § 1536 (1988). 50 C.F.R. § 402 (1991). All federal agencies must consult with the Secretary of Interior on any agency action likely to jeopardize a listed species. 16 U.S.C. § 1536(a)(4). Biological statements must be prepared by the Fish and Wildlife Service. 50 C.F.R. § 402.02(d). The biological opinion will determine whether or not the proposed agency action jeopardizes the listed species. 50 C.F.R. § 402.14(h)(3). If a “jeopardy” biological opinion is issued, the opinion shall include reasonable and prudent alternatives, if any. *Id.* If the proposed action does not jeopardize the species, or if a suggested alternative is available, the project may proceed if an “incidental take” statement is prepared. 16 U.S.C. § 1536(b)(4); 50 C.F.R. § 402.14(i).

67. 16 U.S.C. § 1539.

68. *Id.* at § 1532(19).

69. *Id.* at § 1540(a), (b).

cluding any action that harms the habitat of an endangered species.⁷⁰ Rhetorical confusion should be avoided by remembering that a "taking" in the context of the ESA refers to potential harm to animals, plants, or their habitat, but a "taking" of property refers to the deprivation of individual property rights.

2. The Impacts of the Endangered Species Act

Congress has modified the ESA in the past to ameliorate its inflexibility. When it was used, for example, to stop the construction of the Tellico Dam, no balancing of economic losses against the value of the snail darter was permitted.⁷¹ As a result of that case, Congress amended the ESA.⁷² The amendments provided limited methods through which activities may proceed in conjunction with endangered species. For example, agency action may proceed under Section 7 of the Act,⁷³ by obtaining an "incidental takings" statement.⁷⁴ Likewise, individuals stymied by the Act may submit a "habitat conservation plan" for approval.⁷⁵ If approved, an "incidental takings permit" may be issued.⁷⁶ Finally, the President and Congress may invoke a special cabinet-level committee that has the power to override the act in special circumstances.⁷⁷ This committee, known both as the "God Squad" and "God Committee," has almost never been invoked and is of little

70. 50 C.F.R. § 17.3(c); *Palila v. Hawaii Dep't of Land and Natural Resources*, 639 F.2d 495 (9th Cir. 1981) (affirming order to remove (kill) feral sheep in order to protect the habitat of the Palila bird).

71. *Tennessee Valley Authority*, 437 U.S. at 184 (purpose of statute is to "halt and reverse the trend towards species extinction, whatever the cost").

72. George Cameron Coggins and K. Russell, *Beyond Shooting Snail Darters in Pork Barrels: Endangered Species and Land Use in America*, 70 GEO. L. J. 1433, 1476-77 (1982); Jared des Rosiers, *The Exemption Process Under the Endangered Species Act: How the "God Squad" Works and Why (ESA Process)*, 66 NOTRE DAME L. REV. 825, 826 (1991). When the amendments proved inadequate to allow dam construction, Congress passed a special appropriation to allow the dam construction to proceed. VICTOR J. YANNAcone ET AL., ENVIRONMENTAL RIGHTS AND REMEDIES (hereinafter ENVIRONMENTAL RIGHTS) § 13.21 n.90 at 1883 (Supp. 1988).

73. Codified at 16 U.S.C. § 1536 (1988).

74. See *supra* note 66.

75. 16 U.S.C. § 1539(a) (1988). See Timothy Beatley Bentley, *Regional Approaches to Wildlife Habitat Conservation*, URB. LAND, Aug. 1991 at 36-39.

76. *Id.* In the Mojave Desert, for example, property owners are subject to a plan that permits home building in exchange for a fee of \$1,950 per acre which will be used to purchase habitat for the Stephens' Kangaroo Rat. UNITED STATES DEPARTMENT OF THE INTERIOR. FISH AND WILDLIFE SERVICE ET. AL., FINAL ENVIRONMENTAL IMPACT STATEMENT AND ENVIRONMENTAL IMPACT REPORT; SECTION (10)(A) PERMIT TO ALLOW INCIDENTAL TAKE OF THE ENDANGERED STEPHENS' KANGAROO RAT IN RIVERSIDE COUNTY, CALIFORNIA (1990); see also BACK YARD, *supra* note 33 at 4-10. Obtaining such a permit is a complicated task. See Robert D. Thornton, *Takings under Endangered Species Act Section 9*, 4 NAT'L RESOURCES & ENV'T, No. 4 at 7-9, 50 (Spring, 1990).

77. 16 U.S.C. § 1536(e)-(h) (1988) (subsection (h) explains that to be approved despite a potential harm to a listed species the committee must find that the project has no reasonable alternatives, has benefits that outweigh alternatives, is in the public interest, is of regional or national significance, and does not already involve an irreversible commitment of resources).

practical consequence.⁷⁸

Today the Endangered Species Act is being used to halt logging in old growth forests in the Pacific Northwest.⁷⁹ In January, 1992, the "God Squad" held a month-long hearing in Portland, Oregon, notable mostly for the intense amount of controversy generated with criticism from both the timber industry and environmental factions.⁸⁰ A decision may be rendered by spring, 1992.⁸¹ In the meantime, the federal government and state governments in the region are all adopting emergency regulations for owl protection that will curtail the logging of old growth timber.⁸² Although no lawsuits have been filed yet, the Pacific Northwest may become fertile ground for bringing Fifth Amendment takings claims against the federal government for prohibitions of endangered species "takings" on private forest lands. Test cases can be expected if landowners are prohibited from logging on private property because of the owl—especially in cases where logging is the only economic value of the property.⁸³

III. SOME GENERAL PRINCIPLES OF THE LAW OF TAKINGS

A. *The Nature and Importance of Private Property Rights*

The arguments in favor of environmental regulation have been repeatedly articulated in the mass media. But, central to any debate over the clash between environmental regulation and property rights is an understanding of the intrinsic value of a system of government that protects property rights.

78. The committee was invoked for the Tellico Dam controversy, but it decided *not* to authorize dam construction. ENVIRONMENTAL RIGHTS, *supra* note 72, § 13.21 n. 90 at 1883; des Rosiers, *supra* note 72, at 846 (at the same time it met and decided to allow the completion of the Gray Rocks Dam on the Laramie River). *Id.* at 846 *citing* ENDANGERED SPECIES COMMITTEE DECISION ON GRAY ROCKS DAM AND RESERVOIR APPLICATION FOR EXEMPTION (Feb. 7, 1979).

79. *See supra* note 10.

80. *See, e.g.* Kathie Durbin, *Expert Sees "Precipitous" Owl Decline*, OREGONIAN, Jan. 28, 1992 at B1 (owl may become extinct even if logging halted); Kathie Durbin, *Timber Attorneys Allowed More Time*, OREGONIAN, Jan. 24, 1992, at E1 (major conservation groups allege improprieties in hearings); Kathie Durbin, *Pro-Timber Group Fears Shut Out by "God Squad"*, OREGONIAN, Jan. 18, 1992, at D5; *Editorial—God Squad Confusion*, OREGONIAN, Jan. 12, 1992, at C8 (administration undercuts credibility); and Kathie Durbin, *"God Squad" Won't Resolve Problems*, OREGONIAN, Dec. 5, 1991, at C7 (foregone conclusion that the decision will be appealed).

81. Unless other arrangements are made, the Secretary has 140 days from the time a decision is made to hold a hearing to submit a report with recommendations to the Committee. 50 C.F.R. § 452.08 (1991). The Committee then has 30 days to render its decision. 50 C.F.R. § 453.03(a). Submittal of the report has been delayed. *See* Roberta Virich, *Lujan Delays Decision on Timber Sales in Oregon*, OREGONIAN, Mar. 21, 1992, at B01.

82. *See supra* note 10.

83. *See infra* Part IV.

1. Property Rights Are an Essential Liberty—an Academic View

Those who advocate the protection of property rights follow the Lockean view that property rights are as essential to liberty as are the freedoms of speech, religion, due process, and so on. To oversimplify, this theory holds that citizens enter into society and government for the purpose of protecting their property and selves.⁸⁴ But when government abuses the property of its citizens, the government is tyrannical and is owed no allegiance by its citizens. Without a government deserving allegiance, all liberties are at risk.⁸⁵ Additionally, private property is seen as an incentive for citizens to form and maintain a just government—a government that respects all liberties.⁸⁶ Finally, the protection of private property rights is inherent in any constitutional system that seeks to protect the rights of the few from the passions of the many.⁸⁷

An opposing view holds that the protection of private property rights is most certainly not an essential liberty (compared to the other liberties protected in the Constitution) and is at best an anachronistic impediment to an efficient and humane government.⁸⁸ Or, in the words of a 1973 task force led by now EPA Administrator William

84. JOHN LOCKE, *TWO TREATISES ON GOVERNMENT* § 124 (P. Laslett rev. ed. 1988).

85. *Id.* at §§ 201, 222 (“[w]henever legislators endeavor to take away, and destroy the property of the People . . . they put themselves into a state of War with the People, who are there upon absolved from any further obedience” (emphasis in original)).

86. FREDERICH A. HAYEK, *THE ROAD TO SERFDOM* 104 (1944, 1972).

87. For a view of one of the more radical advocates of private property rights, see RICHARD A. EPSTEIN, *TAKINGS: PRIVATE PROPERTY AND THE POWER OF EMINENT DOMAIN* [hereinafter *TAKINGS*] (1985); see also Richard A. Epstein, *Takings: Descent and Resurrection* (hereinafter *Takings Descent*), 1987 SUP. CT. REV. 1; Norman Karlin, *Back to the Future: From Nollan to Lochner*, 17 SW. U. L. REV. 627 (1988); Gideon Kanner, *Condemnation Blight: Just How Just Is Just Compensation?*, 48 NOTRE DAME L. REV. 765 (1973). For a market theory of private property and takings, see Lawrence Blume and Daniel L. Rubinfeld, *Compensation for Takings: An Economic Analysis*, 72 CAL. L. REV. 569 (1984). See also *Wilkinson v. Leland*, 27 U.S. 627, 657 (1829) (“government can scarcely be deemed to be free, where the rights of property are left solely dependent upon the will of a legislative body, without any restraint The rights of personal liberty and private property should be held sacred”).

88. See, e.g., Note, *The Constitutionality of Rent Control Restrictions on Property Owners' Dominion Interests*, 100 HARV. L. REV. 1067 (1987). For an academic economic theory that argues that the protection of private property rights promotes economic inefficiency, see William A. Fischel & Perry Shapiro, *Takings, Insurance, and Michelman: Comments on Economic Interpretations of “Just Compensation” Law*, 17 J. LEGAL STUD. 269 (1988). In Holmes Rolston, III, *Property Rights and Endangered Species*, 61 U. COLO. L. REV. 283, 288, 304 (1981), professor of philosophy Rolston argues that there is no moral or legal right to “superkill” (to make extinct) a species through wasteful killing, and that property rights are “lesser liberties” which must be tempered by larger societal rights. See also Joseph L. Sax, *Takings and the Police Power*, 74 YALE L. J. 36 (1964) (notably rejecting the theory that diminution in value leads to a taking); Joseph L. Sax, *Takings, Private Property and Public Rights*, 81 YALE L. J. 149 (1971) (“public rights,” a.k.a. the police power, limits the finding of takings); Frank I. Michelman, *Property, Utility, and Fairness: Comments on the Ethical Foundations of “Just Compensation” Law*, 80 HARV. L. REV. 1165, 1178 (1967) (it would be inefficient to compensate every burden).

Reilly:

Many [judicial] precedents are anachronistic now that land is coming to be regarded as a basic natural resource to be protected and conserved It is time that the U.S. Supreme Court re-examine its precedents that seem to require a balancing of public benefit against land value loss . . . and declare that, when the protection of natural, cultural or aesthetic resources or the assurance of orderly development are involved, a *mere loss in land value is no justification for invalidating the regulation of land use* (emphasis added) (brackets in original).⁸⁹

2. Property Rights Are Protected and Favored by the Constitution

Academic debate aside, the Supreme Court recognizes the continued vitality of private property rights and acknowledges that the protection of property is a fundamental liberty. For example:

[T]he dichotomy between personal liberties and property rights is a false one. Property does not have rights. People have rights. The right to enjoy property without unlawful deprivation, no less than the right to speak or the right to travel, is in truth a "personal" right In fact, a fundamental interdependence exists between the personal right to liberty and the personal right in property. Neither could have meaning without the other.⁹⁰

3. Courts May Show a New Willingness to Protect Private Property in the Face of Regulation

The Supreme Court may be more respectful of property rights today than at any time since the new deal. In *United States v. Carolene Products Co.*,⁹¹ the Supreme Court established an apparent dichotomy between applying strict scrutiny (read substantive due process and little deference) for liberties such as speech and religion, but less scrutiny (read relaxed due process and extreme deference) to the regulation of economic rights. In plain English, the Court was indicating that it would quickly overturn laws and regulations that affect speech, religion, and (in later years) discrimination and privacy.⁹² It would, however, usually uphold regulations affecting property.⁹³

89. See Brookes, *supra* note 33, at 112 (quoting William Reilly); *but see* Hender v. United States, 952 F.2d 1364, 1375 (Fed. Cir. 1991) ("the importance of exclusive ownership . . . is now understood as essential to economic development, and to the avoidance of the wasting of resources found under common property systems").

90. *Lynch v. Household Finance Corp.*, 405 U.S. 538, 552 (1972).

91. 304 U.S. 144, 152 n.4 (1938).

92. See Karlin, *supra* note 87, at 629. See also *Roe v. Wade*, 410 U.S. 113 (1973) (substantive due process applied to abortion regulation).

93. See Karlin, *supra* note 87, at 629.

In *Nollan v. California Coastal Commission*,⁹⁴ however, the Court indicated that it may once again be prepared to entertain a heightened level of scrutiny for property rights: "the regulation [must] 'substantially advance' the 'legitimate state interest' sought to be achieved. [It is not enough] . . . that 'the State "could rationally have decided" that the measure adopted might achieve the State's objective.'" (Emphasis in original.)⁹⁵ By adopting a heightened scrutiny test, courts should be willing to look at the actual nexus between a regulation and an activity's supposed harm—an element that may have dramatic effects on the regulation of wetlands and endangered species. The Supreme Court's decision to decide three property rights cases in the 1991 term may accelerate this trend.⁹⁶

4. Property Rights Have a Vitality and Origin Independent of the Constitution

While property rights are constitutionally protected, they are not constitutionally created: "[W]e are mindful of the basic axiom that '[p]roperty interests . . . are not created by the Constitution. Rather, they are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law.'" ⁹⁷ Thus, for example, if a governmental entity creates a property right subject to certain restrictions, such as an easement for access to navigable waterways, the regulatory enforcement of that restriction should not rise to the level of a taking. But, if an unencumbered property right is created by state law, then the subsequent imposition of new regulatory constraints would more likely be a taking.⁹⁸

Theories abound today that virtually all property is subject to a "public trust."⁹⁹ Originally designed as a mechanism to protect public

94. 483 U.S. 825 (1987); see *infra* Part III(B)(3).

95. *Nollan*, 483 U.S. at 834 n.3; *Azul Pacifico v. City of Los Angeles*, 948 F.2d 575 (9th Cir. 1991) (ends and means must have close fit). See also Karlin, *supra* note 87, at 629-31 & 670-71. But see *Commercial Builders of Northern California v. City of Sacramento*, 941 F.2d 872, 874 (9th Cir. 1991) (the Ninth Circuit finds *Nollan* does not mean what it says: "we are not persuaded that *Nollan* materially changes the level of scrutiny"), *petition for cert. in process of being filed*; Richard L. Settle, *Regulatory Taking Doctrine in Washington: Now You See It, Now You Don't*, 12 U. PUGET SOUND L. REV. 339, 380 n.243 (*Nollan* applies only to exactions; Washington state court in error holding otherwise).

96. See *supra* note 8.

97. *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 1001 (1984).

98. See *infra* note 119.

99. See, e.g., Rolston, *supra* note 88 at 291; Joseph L. Sax, *The Constitution, Property Rights, and the Future of Water Law*, 61 U. COLO. L. REV. 257, 269 (1990). But see James L. Huffman, *Avoiding the Takings Clause Through the Myth of Public Rights: The Public Trust and Reserved Rights Doctrines at Work*, 3 J. LAND USE & ENVTL. L. 171 (1987); James L. Huffman, *Trusting the Public Interest to Judges: A Comment on the Public Trust Writings of Professors Sax, Wilkinson, Dunning and Johnson*, 63 DENV. U. L. REV. 565 (1986).

access to navigable waterways,¹⁰⁰ academics in recent years have developed an argument that the doctrine must “evolve” into an all-encompassing ecological easement on all private property—which would supposedly limit the reach of the takings doctrine.¹⁰¹ Yet, if “existing rules and understandings” are relied upon, such a transmogrification of the public trust doctrine should logically have no ability to negate the existence of a regulatory taking.¹⁰² If the property right was created without being subject to the modern expanded public trust, then any later imposition of the newly defined public trust carries with it significant takings implications. Thus it is necessary to know what is and what is not included in the “bundle of sticks” of a particular property right before it can be argued that the right has or has not been taken by a governmental regulation.

5. Protected “Property” Includes an Array of Personal Rights

A fundamental property right is the right “to possess, use and dispose of it.”¹⁰³ The right to use property is a literal one, to which government cannot itself claim ownership. As stated in *Nollan*, “the right to build on one’s own property—even though its exercise can be subjected to legitimate permitting requirements—cannot remotely be described as a ‘governmental benefit.’”¹⁰⁴ Likewise, the right to exclude is fundamental.¹⁰⁵ This doctrine has led to such obvious results as giving landowners the ability to prevail against government demands for public access to private property.¹⁰⁶ As once rural lands become suburbanized, property owners are often required to maintain land as “open space,” “wetland,” or “habitat conservation zones.” In such cases a de facto public park has been created from the private property—although the governmental entity involved does not demand an actual deed transfer as in *Nollan*.¹⁰⁷ If a property owner can-

100. The public trust doctrine was simply a shorthand way of saying that private individuals could not impose a stranglehold on the public’s use of and access to navigable waterways. Thus, Illinois and Chicago could not sell the waterfront without first accommodating the interest of the public in access to the commons (navigable waterways). See *Illinois Cent. R.R. v. Illinois*, 146 U.S. 387 (1892); see also *Phillips Petroleum v. Mississippi*, 484 U.S. 469 (1988) (noting the doctrine not necessarily confined to navigable waters).

101. See *supra* note 99.

102. See *Hughes v. State of Washington*, 389 U.S. 290, 296-97 (1967) (Stewart, J., concurring) (“a State cannot be permitted to defeat the constitutional prohibition against taking property without due process of law by the simple device of asserting retroactively that the property it has taken never existed at all”).

103. *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 435 (1982) (quoting *United States v. General Motors Corp.*, 323 U.S. 373, 378 (1945)).

104. *Nollan*, 483 U.S. at 833 n.2 (emphasis added).

105. “[W]e hold that the ‘right to exclude,’ so universally held to be a fundamental element of the property right, falls within this category of interests that the Government cannot take without compensation.” *Kaiser Aetna v. United States*, 444 U.S. 164, 179-80 (1979). Accord *Nollan*, 483 U.S. at 831; *Loretto*, 458 U.S. at 433.

106. *Nollan*, 483 U.S. 825; *Kaiser Aetna*, 444 U.S. at 179-80.

107. *Nollan*, 483 U.S. 825.

not build on the new park-like property, and it becomes therefore impractical for the landowner to adequately control trespassers (a problem exacerbated by the surrounding suburbanization), it is arguable that the right to exclude has been compromised, giving rise to a taking. To the author's knowledge, this argument has not yet been squarely presented to the courts.

B. The 1987 Trilogy—the Supreme Court's Latest Words on Takings

In 1987, the United States Supreme Court issued three major opinions on the law of takings. Some familiarity of these cases is essential to an understanding of the modern law of takings.

1. *Keystone Bituminous Coal Association v. DeBenedictis*¹⁰⁸

For property owners, *Keystone* is the Mr. Hyde to the Dr. Jekyll of *Pennsylvania Coal Co. v. Mahon*.¹⁰⁹ In *Pennsylvania Coal*, an opinion by Justice Holmes, the Supreme Court overturned Pennsylvania's Kohler Act which prevented coal companies from mining if the mining would cause surface structures to collapse.¹¹⁰ *Pennsylvania Coal* was a landmark, because it was the first major case demonstrating that a regulation which goes "too far" may be a taking.¹¹¹ *Keystone*, on the other hand, held that a very similar mining regulation was *not* a taking.

An essential element to both *Keystone* and *Pennsylvania Coal* is the fact that under Pennsylvania law the "support estate" was considered to be a separate property right, one which could be bought and paid for by the coal companies along with the mineral rights in coal.¹¹² However, after a few years of allowing the transfer of support estates, Pennsylvania surface owners began to have second thoughts about their previous sales of the support estate and, outnumbering the coal companies, persuaded the Pennsylvania legislature to outlaw coal mining that would destroy the surface estate under buildings.¹¹³

108. 480 U.S. 470 (1987).

109. 260 U.S. 393 (1922).

110. *Id.* at 414.

111. *Id.* at 415. Prior to *Pennsylvania Coal*, courts generally did not recognize that a taking could occur through an exercise of the police power. See, e.g., *Florida Rock I*, 791 F.2d at 900; *Whitney Benefits*, 926 F.2d at 1177 n.10. But with the rise of the regulatory state, the outcome of *Pennsylvania Coal* became perhaps inevitable. See John M. Groen, *Regulatory Takings and the Public Safety/Nuisance Exception: Sorting out the Keystone Debacle*, in press [hereinafter Groen] (available on request from Pacific Legal Foundation).

112. 260 U.S. at 412. A "support estate" is the right to a stable land surface. *Id.* If a coal company purchases both the mineral and support estates, it has the theoretical right to mine all the available coal under the surface, even if that means the surface will collapse. In such a case, the surface estate owner retains the surface rights, albeit a less stable surface at a lower elevation.

113. For a discussion of the nature of property rights and majority rule in the

In 1922, the Supreme Court found the regulation to have gone "too far," and to be an unconstitutional taking of private property rights without compensation.¹¹⁴ The law was dead and buried. But in response to renewed public pressure, the Pennsylvania legislature passed a virtually identical statute, this time called the 1966 Bituminous Mine Subsidence and Land Conservation Act (Bituminous Act), the Act that was ultimately challenged in *Keystone*.

Between 1922 and 1987, however, a veritable cottage industry had sprung up among legal academicians debating the merits and significance of *Pennsylvania Coal*. To those who perceived it as a threat to the government's ability to regulate with impunity, valiant attempts were made to explain the case away. In a nutshell, they argued that *Pennsylvania Coal* was (1) dicta, (2) not an impediment to government regulation or prohibition for "nuisances," and (3) limited to its facts.¹¹⁵

That the Pennsylvania legislature passed the Bituminous Act, which so closely resembles the discredited Kohler Act, demonstrates that legislative bodies consciously or unconsciously will continue to test the limits of their regulatory authority, even in the light of contrary precedent. That the Third Circuit upheld the Bituminous Act¹¹⁶ shows that the courts are not in agreement as to where these limits may be. In light of the decision in *Pennsylvania Coal*, it was not surprising that the Supreme Court granted certiorari in *Keystone*, presumably because at least a few of the justices wanted to iron out the differences between where *Pennsylvania Coal* and the Third Circuit put these limits.¹¹⁷

Alas, for the advocates of private property rights, it was not to be. Writing for a five justice majority, Justice Stevens distinguished *Pennsylvania Coal* almost into oblivion by finding a different legislative purpose for the new Act. He found that the Kohler Act had been designed to protect only *private* rights (the support of privately owned buildings) and as such took those rights from one set of property owners (the coal companies) and gave them to another set of property owners (the surface estate owners).¹¹⁸ Thus, the statute was invalid because it took private property without just compensation.

In contrast, Stevens wrote that the 1966 Bituminous statute was

context of *Keystone* and *Mahon*, see Epstein, *supra* note 87, at 7-9.

114. *Pennsylvania Coal*, 260 U.S. at 414-15 (1922).

115. See, e.g., William B. Stoebuck, *Police Power, Takings, and Due Process*, 37 WASH. & LEE L. REV. 1057 (1980) (no compensation for regulations that do not enhance the value of government owned property). Alternatively, takings theories were developed that were pretty much independent of the rationale of *Pennsylvania Coal*. See, e.g., Sax, *Takings and the Police Power*, *supra* note 88; Sax, *Takings, Private Property and Public Rights*, *supra* note 88.

116. *Keystone Bituminous Coal Ass'n v. Duncan*, 771 F.2d 707 (3d Cir. 1985).

117. See, e.g., Amicus Brief of Pacific Legal Foundation, *Keystone*, 480 U.S. 470 (available on request from Pacific Legal Foundation).

118. 480 U.S. at 484-85.

designed to protect *public* rights by guarding the public against collapsing buildings, schools, and the like.¹¹⁹ Having distinguished *Pennsylvania Coal* factually on the basis of its purpose, the Court was free to analyze the 1966 law and determine that no taking resulted. The Court found that the act was a valid exercise of the police power and did not diminish the value of the coal or interfere with commercial mining operations to such an extent as to cause a facial taking.¹²⁰

Despite the apparent setback to private property rights in *Keystone*, the case must be kept in perspective.¹²¹ The decision had only the result of finding the Bituminous Act to be valid against a facial attack. The court expressly left the possibility open that a coal owner might be able to prove in an as-applied case that compensation is due for a taking of a specifically identified deposit of coal.¹²² Thus, the key principle of Justice Holmes' decision will remain intact for many years: "The general rule, at least, is that while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking."¹²³

2. First English Evangelical Lutheran Church of Glendale v. County of Los Angeles¹²⁴

Three months after *Keystone*, the Court in *First Church* strongly reaffirmed the regulatory takings principle, pointing out that since at least *Pennsylvania Coal* the Court has unhesitatingly applied the regulatory takings doctrine. *Pennsylvania Coal* invalidated the Kohler Act—but it did *not* find that any compensation should be paid to the coal owners for lost profits that they might have incurred during the period of time the act was in effect. In fact, the Court never addressed the issue of compensation. From that humble omission, the theory grew that whenever a governmental entity passes a statute that unconstitutionally violates the Fifth Amendment's Takings Clause, the only remedy is to invalidate the statute¹²⁵—and *never* pay money

119. *Id.* at 485-86. The validity of this distinction is troublesome in light of Justice Holmes' specific reference to "mining of coal under streets or cities." *Pennsylvania Coal*, 260 U.S. at 414. While Holmes finds the Kohler Act to have been in error because it gave property rights from one set of owners to another, the public-private distinction is not readily apparent in that decision.

120. 480 U.S. at 495.

121. For two pointed criticisms of *Keystone's* attempt to distinguish *Pennsylvania Coal*, see Rehnquist's dissent in *Keystone*, 480 U.S. at 506, and Epstein, *Takings Descent*, *supra* note 87, at 5-23.

122. 480 U.S. at 501 ("[t]he record is devoid of any evidence on what percentage of the purchased support estates . . . has been affected by the Act.").

123. *Pennsylvania Coal*, 260 U.S. at 415; see *supra* text accompanying note 1.

124. 482 U.S. 304 (1987).

125. This is to be contrasted to the situation where a statute takes property, but state or federal law still provides a mechanism for compensation. Such a statute is almost always constitutional. See, e.g., *Preseault v. Interstate Commerce Commission*, 494 U.S. 1 (1990) (holding the "Rails to Trails" Act constitutional because the Tucker Act is available to pay compensation for whatever property rights in railroad right-of-way easements might be taken).

damages for compensation—otherwise there would be a “chilling effect” on regulators.¹²⁶

For example, in *Agins v. City of Tiburon*,¹²⁷ the California Supreme Court adopted invalidation as the *exclusive* remedy for unconstitutional regulations.¹²⁸ When California again followed the no-compensation rule in *San Diego Gas & Electric v. San Diego*,¹²⁹ the United States Supreme Court granted certiorari.¹³⁰ But when the Court found the case unripe, and avoided the merits, Justice Brennan expressed his disgust with the abuse of the invalidation-only rule in a stinging dissent.¹³¹ He stated *if* the Court had reached the merits of the regulation in question, and *if* the challenged regulation had been found unconstitutional, then *not only* could the Court invalidate the regulation, but it would find that the property owners would be entitled to compensation for a “temporary takings”—for the time during which the unconstitutional law was in effect.¹³² Significantly, between dissenting and concurring opinions, Brennan’s “temporary takings” language commanded a majority of the Court.¹³³

The *San Diego* dissent sent the pro-government regulation fraternity into a dither,¹³⁴ and the pro-property rights advocates into a state of heightened optimism.¹³⁵ It was against this background that a forest fire raged upstream from a campground for disabled children run

126. See, e.g., *Agins v. City of Tiburon*, 598 P.2d 25, 30 (Cal. 1979) (“inverse condemnation is an inappropriate and undesirable remedy in cases in which unconstitutional regulation is alleged”), *aff’d*, 447 U.S. 255 (1980). See also Settle, *Regulatory Taking Doctrine*, *supra* note 95, at 391 (invalid regulations do not effect a “public purpose” and therefore can never take property; invalidation is the only remedy available).

127. 598 P.2d 25 (Cal. 1979).

128. *Id.* On appeal, the United States Supreme Court refused to reach the merits of the *Agins* case (which involved the denial of building permits) saying that the property owners, the *Agins*, must go back to their zoning board and try to get a different housing development plan approved. Only when all possible plans allowing economic use of the property had been denied would the “takings” issue be ripe for review. 447 U.S. at 262.

129. 450 U.S. 621 (1981).

130. *Id.*

131. *Id.* at 636-61 (Brennan, J., dissenting).

132. Brennan cited to advice given at the 1974 annual conference of the National Institute of Municipal Law Officers: “IF ALL ELSE FAILS, MERELY AMEND THE REGULATION AND START OVER AGAIN.” *San Diego*, 450 U.S. at 655 n.22. The advice continued that because of California’s invalidation-only remedy, that “even after trial and judgment” a city only had to change the regulation and “make it more reasonable, more restrictive, or whatever, and everybody starts over again See how easy it is to be a City Attorney.” *Id.*

133. Brennan was joined by Justices Stewart, Marshall, and Powell in the dissent. Justice Rehnquist concurred with the majority opinion because he believed the case was not ripe, but indicated that he agreed with Justice Brennan’s discussion of temporary takings. *Id.* at 633-34 (Rehnquist, J., concurring).

134. See, e.g., Norman Williams, Jr., et al., *The White River Junction Manifesto*, 9 VT. L. REV. 193 (1984).

135. See, e.g., Gus Bauman, *The Supreme Court, Inverse Condemnation and the Fifth Amendment: Justice Brennan Confronts the Inevitable in Land Use Controls*, 15 RUTGERS L.J. 15 (1983) [hereinafter Bauman].

by the First English Evangelical Lutheran Church of Glendale. As often happens in California when vegetation is burned off steep slopes, floods follow fire, and the campground was wiped out in a torrential deluge.¹³⁶ But by the time the church applied for permission to rebuild the campground, Los Angeles had passed an ordinance that prohibited building in flood zones.¹³⁷ Thus, the necessary permit was denied. It was on these underwhelming facts that the church appealed the denial all the way to the Supreme Court. As in *Agins* and *San Diego*, it appeared that the case was not ripe because the church arguably had not yet exhausted its administrative remedies. Nevertheless, the Court ruled on the case, using it as a vehicle to solidify the *San Diego* dissent's "temporary takings" doctrine.¹³⁸

What the Court did *not* do was rule that the Los Angeles ordinance was unconstitutional. That issue was remanded. But the Court did say that *if* on remand the statute was found unconstitutional, then the church would be entitled to temporary takings compensation.¹³⁹ With *First English* the "chilling effect" rationale was scuttled into oblivion—or at least into the State of Washington.¹⁴⁰

3. *Nollan v. California Coastal Commission*¹⁴¹

Nollan deals with the constraints that "takings" law places on the sort of conditions that government can place on development permits. Understanding the *Nollan* doctrine is critical for developers faced

136. *First English Evangelical Lutheran Church of Glendale v. County of Los Angeles*, 482 U.S. 304, 307 (1987).

137. *Id.*

138. Of some small significance in this case was the reappearance of Bonnie Agins—who now more than ten years after applying for a permit still had not received permission to build. Agins' attorneys urged the Court to make good its promise in *San Diego* to make temporary takings compensable. See Amicus Brief of Ms. Bonnie Agins in *First Church*, 482 U.S. 304 (available upon request from Pacific Legal Foundation). At oral argument, Justice Marshall expressed particular interest in Ms. Agins' fate. Telephone conference with Agins' attorney, Robert K. Best, Pacific Legal Foundation (January 19, 1987).

139. *First Church*, 482 U.S. at 322. As it turned out, on remand the statute was found to be a legitimate exercise of the police power designed to protect public health and safety. There was, therefore, no taking, permanent or temporary, and the statute remains in effect. *First English Evangelical Lutheran Church of Glendale v. County of Los Angeles*, 210 Cal. App. 3d 1353, 1366 (1989), *cert denied* 493 U.S. 1056 (1990). *But see* *McDougal v. County of Imperial*, 942 F.2d 668, 676-77, 679 (9th Cir. 1991) (distinguishing the appeals court's notion that a deprivation of all use would not necessarily give rise to a taking).

For an application of the temporary takings doctrine, see *Yuba Natural Resources, Inc. v. United States*, 821 F.2d 638 (Fed. Cir. 1987). See also *Hendler v. United States*, 952 F.2d 1364 (Fed. Cir. 1991) (discusses the distinction between temporary takings in a regulatory takings context versus the nonutility of temporary takings doctrine in physical occupation cases where all significant invasions are takings).

140. See *infra* note 295 and accompanying text. The Washington Supreme Court has resurrected this dead doctrine to once again avoid the payment of compensation for unconstitutional statutes. See *Presbytery of Seattle v. King County*, 787 P.2d 907 (Wash. 1990) *cert. denied*, 111 S. Ct. 284 (1990).

141. 483 U.S. 825 (1987).

with difficult mitigation requirements imposed during the wetlands or endangered species permitting processes.

In California, there are few things more sacred than the beach. In 1972 the voters of California established a mechanism for sweeping protection of the California coast.¹⁴² The scheme ultimately resulted in the creation of the California Coastal Commission (Commission), which was given permit authority over all development activities on the coast. In a short while, the Commission embarked on an ambitious program of creating new public beaches, public access corridors to the beach, and easements across private property.¹⁴³ The Commission, under the guise of its police power, chose not to pay for any of these improvements. Instead, it waited until a property owner sought a development permit—and then simply told the owner that the permit was for sale—at the price of giving up some land for a public beach, an access way, or whatever happened to be on the Commission's wish list.¹⁴⁴

When Marilyn and Patrick Nollan proposed replacing a ramshackle old beach bungalow with a two story family home more in line with the neighborhood, they were not thrilled when the Coastal Commission demanded that they dedicate one-third of their property to the state to be the first segment in a new park.¹⁴⁵ After exhausting their administrative remedies, the Nollans sued.¹⁴⁶ Eventually, the Supreme Court rejected the Commission's imposition of the "exaction" requirement that the Nollans give up one-third of their property in exchange for the building permit. Such an exaction, which would allow the public onto private property, would be a physical invasion and invoke the Takings Clause.¹⁴⁷

Writing for the Court, Justice Scalia explained the law of regulatory conditions. He indicated that it might be perfectly acceptable for a government agency to deny a development permit *if* the development were to have an adverse impact on the public "unless the denial

142. CAL. PUB. RES. CODE § 30000 (West 1986) Historical Note.

143. JOSEPH GUCHEMETTI & EUGENE D. WHEELER, *THE TAKING*, 36-39 (1981) (details regulatory abuses of California Coastal Commission).

144. *Id.*

145. The Nollans owned the land down to the mean high tide water mark. *Nollan*, 483 U.S. 825 (1987) (so did all their neighbors). What the Commission asked for was a lateral (*i.e.*, parallel to the shoreline) easement over the most seaward third of the Nollans' property. Because their adjacent neighbors still owned *their* most seaward property, the general public would not have been able to reach the new Nollan park strip during high tide without trespassing on the neighbors' property. What the Commission was hoping for, obviously, was that the rest of Nollans' neighbors would ultimately request permits, and then would be required to give up their seaward property, thus creating, in time, one long thin beach park. See 483 U.S. at 829; telephone conference with Nollans' attorney Robert K. Best, Pacific Legal Foundation (April 6, 1987).

146. By the time the case reached the United States Supreme Court the Nollans managed to build the house during a "window of opportunity" between two different state court appellate proceedings. 483 U.S. at 829. Because the challenge was to a specific application of a regulation it was an "as applied" rather than a "facial" attack.

147. *Nollan*, 483 U.S. at 831.

would interfere so drastically with the Nollans' use of their property as to constitute a taking."¹⁴⁸ In the situation where a permit can be denied, *and only in such a case*, the agency also has the option to approve the permit while imposing conditions on the permit when those conditions would directly ameliorate the same harms for which the permit could have been denied in the first place.¹⁴⁹

Under *Nollan*, it might be acceptable for an agency to require a builder to put in sewers in exchange for a permit to build a subdivision because without sewers, the development would be a health hazard. However, it would not be acceptable to require a builder to contribute to a fund to renovate city hall if the subdivision were not likely to adversely affect city hall. In the case of the Nollans, the replacement of a bungalow with a new home was *not* the sort of activity that was likely to create any need for a new lateral beach park. Therefore, the Commission could not condition *this* permit on the granting of a beach strip.

The Commission tried to justify the action by saying that the new home would obstruct the public's view of the beach. In the Commission's exact words, the home would prevent the public "psychologically . . . from realizing a stretch of coastline exists nearby they have every right to visit."¹⁵⁰ The Court noted, however, that even if the public's view of the beach were a legitimate governmental interest, a lateral beach park did nothing at all to ameliorate the loss of the view.¹⁵¹ There was no nexus between the view and the exaction of beachfront property.¹⁵²

Of special note is the *Nollan* Court's reliance on a heightened scrutiny test for examining whether the conditions have the required nexus to the permitted development activity.¹⁵³ This has been interpreted by some to be a sign that the relegation of property rights to a second class status of judicial protection and review, as hinted by the infamous *Carolene Product's* Footnote 4,¹⁵⁴ is over.¹⁵⁵

148. *Id.* at 836.

149. *Id.*

150. CALIFORNIA COASTAL COMM'N STAFF REP., Joint Appendix [to the briefs] Vol. II at 58, *Nollan*, 483 U.S. 825 (1986). Some things can happen only in California.

151. *Nollan*, 483 U.S. at 836.

152. *Id.* at 838. Somewhat tongue in cheek, the Court noted that if the condition were instead that the Nollans build a "viewing spot" for the public, then that might be a different matter. *Id.* at 836.

153. "We have required that the regulation 'substantially advance' the 'legitimate state interest' sought to be achieved . . . not that 'the State "could rationally have decided" that the measure adopted might achieve the State's objective.'" *Nollan*, 483 U.S. at 834 n.3.

154. *United States v. Carolene Products Co.*, 304 U.S. 144, 152 n.4 (1938).

155. *See, e.g.*, Karlin, *supra* note 87, at 629-31, 670-71. *But see* Frank Michelman, *Takings: 1987*, 88 COLUM. L. REV. 1600, 1608 (1988) ("[T]here may, however, be less to *Nollan's* heightened scrutiny lesson than first appears."). *See also* Department of Natural Resources v. Indiana Coal Council, Inc., 542 N.E.2d 1000 (Ind. 1989) (In the context of mining, the Indiana Supreme Court found no taking when the state banned strip mining in a historically significant area. This analysis is interesting in that it

If heightened scrutiny is indeed a proper interpretation of *Nollan*, then the case might indicate a future where there will be less judicial deference to acts of the police power that would otherwise be considered a "taking" of private property rights. However, it should be remembered that *Nollan* was decided by only a five vote majority. Furthermore, this was the same Court that upheld the Bituminous Act in *Keystone*.

To summarize, the key to *Nollan* is its "nexus" test: There must be a "nexus" or "close 'fit'" between the supposed harms from the development and the condition to be imposed.¹⁵⁶ Any practitioner confronted by a request from the Corps of Engineers for wetlands mitigation should carefully examine *Nollan*, and then determine (1) whether the proposed development will actually cause the sort of harm that would justify a denial of the permit in the first place (noting that the denial cannot "interfere so drastically"¹⁵⁷ with the use of the property to constitute a taking), and (2) whether the proposed condition will directly ameliorate *that* harm. Thus, being required to replace one acre of wetlands in a floodplain near Seattle with ten acres in the Amazon rain forest would probably fail, whereas a requirement to restore one adjacent acre may have a greater chance of survival.¹⁵⁸ Similarly, a requirement to pay \$1,950 per acre into a mitigation fund for the Stephens' Kangaroo Rat¹⁵⁹ could only pass the nexus test if the money is used to ameliorate a harm to the rat caused by developing the acre in question.¹⁶⁰

IV. THE STANDARD TESTS FOR REGULATORY TAKINGS—PREDICTING THE UNPREDICTABLE

Ultimately, all the theories and philosophical debate over takings would be meaningless if there were not some tests which the practitioner can apply to a particular governmental action. Over time, the courts have devised a set of tests to help determine whether a regulation violates the Constitution thus requiring invalidation and/or just compensation. Unfortunately, while the tests are well-known, their application is anything but certain. To maintain a sense of perspective, it is useful to remember that all the various takings tests and subtests serve one purpose: the determination of when a governmental action fails the fundamental underlying principle of the Takings Clause—whether a regulation is "forcing some people alone to bear

attempts to limit *Nollan's* heightened scrutiny test.); *Commercial Builders of Northern California v. City of Sacramento*, 941 F.2d 872, 874 (9th Cir. 1991) (rejects *Nollan's* heightened scrutiny analysis).

156. *Nollan*, 483 U.S. at 837-38.

157. *Id.* at 835-36.

158. See MEMORANDUM OF AGREEMENT, *supra* note 4.

159. See *supra* note 76.

160. For a discussion of the law of conditions, see Michael H. Crew, *Development Agreements After Nollan v. California Coastal Commission*, 22 THE URB. LAW. 23 (1990).

public burdens which, in all fairness and justice, should be borne by the public as a whole."¹⁶¹

A. *The Agins Threshold Test*

The most commonly articulated and accepted test for determining whether or not a governmental action has reached the threshold for regulatory taking is Justice Powell's two prong test in *Agins v. City of Tiburon*: "The application of a general zoning law to particular property effects a taking if the ordinance does not substantially advance legitimate state interests . . . or denies an owner economically viable use of his land."¹⁶²

1. The "Substantially Advance a Legitimate State Interest" Prong

Whether or not a governmental action affecting property rights "substantially advances a legitimate state interest" is not a particularly hard test to pass. First, there are few spheres of human activity that are not today considered "legitimate" governmental interests.¹⁶³ So long as the activity fits within the realm of the police power and protects or promotes public health, safety, or welfare it is considered by most courts to be a "legitimate" governmental interest.¹⁶⁴

It has been rare for a court to find that a regulation does not "substantially advance" a legitimate governmental interest. In *Loveladies I* the claims court stated that no governmental action ever failed this test.¹⁶⁵ However, the court had been briefed on, and was therefore certainly aware of the *Nollan* case, one of the most dramatic examples of a court striking down a government action because it did *not* substantially advance a legitimate governmental interest.¹⁶⁶

161. *Armstrong v. United States*, 364 U.S. 40, 49 (1960). See also *supra* text accompanying note 3.

162. 447 U.S. at 260 (emphasis added; citation omitted). *Accord Nollan*, 483 U.S. at 834. See also *Penn Central Transportation Co. v. City of New York*, 438 U.S. 104, 127 (1978).

163. See *Loveladies I*, 15 Cl. Ct. 390 (1988).

164. *Keystone Bituminous Coal Association v. DeBenedictis*, 480 U.S. 470, 485-86 (1987). While there is some spirited debate in support of a more libertarian approach to government, see, e.g., Epstein, *Takings Descent*, *supra* note 87, such theories have not swayed the courts (yet) to overturn well-established precedent that defines very broad parameters of the police power. As such, the theories calling for a return to a more limited government are more of an academic than practical interest.

165. *Loveladies I*, 15 Cl. Ct. at 390 (1988). Actually, the court may have been referring only to the fact that no money damages have been awarded when a taking has resulted from government's failure to meet the legitimate state interest prong. *Id.*

166. 483 U.S. at 834. Note that the "substantially advance" test is not passed just because a public benefit such as a beach park is created. Instead, the requirement that a property owner create such a public benefit must be related to the harm created by the property owner's project. The Alaska Supreme Court missed this point when it upheld a regulation which forced oil companies to give up well log data. The court found that the "substantially advance" test was met because the data was useful to

Another classic example of the Court striking down a regulation because it failed to meet the "substantially advance" standard was in *Delaware, Lackawana, & Western Ry. Co. v. Morristown*,¹⁶⁷ where the taking of railroad property for a taxi stand failed to advance a legitimate governmental interest. Thus, while cases finding that a regulation does not meet the "substantially advance" test have been rare, they do exist. It may be more common, however, for courts to consider the "substantially advance" prong not as an absolute all or nothing proposition, but as a question of degree.

For example, in *Florida Rock I*,¹⁶⁸ the Federal Circuit Court reasoned that a "balancing" of public and private interests is relevant to the "substantially advance" prong.¹⁶⁹ *Florida Rock I* involved a denial by the Army Corps of Engineers of Section 404 permits required to mine limestone. The court found that the Corps was not preventing a public harm, but instead was maintaining a public benefit in aesthetics.¹⁷⁰ The Federal Circuit Court of Appeals went on to say that such a taking must be compensated, but remanded the case for a determination of the value of the property that was actually taken.¹⁷¹

In *Loveladies I*, on the other hand, the claims court did not use the "substantially advance" threshold test either in whole or as part of a balancing test. In deciding whether the Corps' prohibition on placing fill for a housing development on Long Beach Island, New Jersey, was a taking the court quoted *Florida Rock I*, but then said the "substantially advance" test was "generally not a useful guideline."¹⁷² Thus, the utility of the "substantially advance" test is not yet

"maximize the income from state land." *Alaska v. Arctic Slope Regional Corp.*, Nos. S-3400, S-3416, S-3437, S-3776, 1991 WL 244366, at *10 (Alaska Nov. 22, 1991).

Justice Brennan's *Nollan* dissent, however, disregards the failure of the Coastal Commission action to advance a legitimate governmental interest by noting that all that would happen because of *Nollan* is that governmental agencies would become more clever at conjuring up nexuses between governmental interests, regulations, and conditions. *Nollan*, 483 U.S. at 863 (Brennan, J., dissenting).

167. 276 U.S. 182, 195 (1928) ("the declaration of the ordinance that the specified part of the driveway 'is hereby designated . . . as [a] . . . hack stand' clearly transcends the power of regulation" and would be a taking). Another case where a statute did not substantially advance a legitimate state interest is *Seawall Assoc. v. City of New York*, 542 N.E.2d 1059 (N.Y. 1989) (vacancy decontrol). The court's articulation of the standard is particularly lucid.

168. *Florida Rock Indus., Inc. v. United States (Florida Rock I)*, 791 F.2d 893 (Fed. Cir. 1986).

169. *Id.* at 904 (discussing a "substantial relationship to the public welfare,") quoting *Agins*, 447 U.S. at 261. *Florida Rock I* did not involve a case where the substantially advance prong was totally failed, because the court presumed that if the application of the wetlands regulation was invalid, it should have been challenged as a violation of the Administrative Procedure Act, 5 U.S.C. § 702 (1988), in a different court. 791 F.2d at 898.

170. "This appears to be a situation where the balancing of public and private interests reveals a private interest much more deserving of compensation for any loss actually incurred." *Florida Rock I*, 791 F.2d at 904.

171. See *infra* Part IV(A)(2)(a) for discussion of valuation.

172. *Loveladies I*, 15 Cl. Ct. at 389. *Loveladies I* went on to deny summary judgment motions leading to a trial to determine whether the "economically viable use"

clear in the Claims Court. In any event, the total destruction of the property value in both cases may have been the root cause of the finding of a takings in both cases. Perhaps on remand the Federal Circuit Court of Appeals will clarify this inconsistency.

In an unusual twist, the Eleventh Circuit Court of Appeals in *Wheeler v. City of Pleasant Grove*,¹⁷³ held that a zoning regulation was invalid because it did not advance a legitimate governmental interest.¹⁷⁴ The court continued to find, however, that there was no taking because there was no "public use" involved in the zoning of the property.¹⁷⁵ The court found no taking presumably because the Fifth Amendment refers only to the taking of property "for public use."¹⁷⁶ The property owners in *Wheeler* nevertheless prevailed, because the court continued to hold that the invalid regulation denied the property owner's due process rights, thus giving rise to a civil rights claim for damages under Section 1983 of the Civil Rights Act.¹⁷⁷

In sum, the first threshold prong of *Agins* states that if a regulation fails to advance a legitimate governmental interest, there will be a taking. This may not be an all or nothing proposition, however, because some courts have shown a willingness to "balance" consideration of state interests with economic impact.¹⁷⁸ It is, therefore, crucial to understand what sort of economic impacts the courts have considered.

2. The "Economically Viable Use of Property" Prong

The second part of the *Agins* test is the most difficult to apply. Numerous cases have held that there is no "set formula" for determining when 'justice and fairness' require that economic injuries caused by public action be compensated by government, rather than remain disproportionately concentrated on a few persons."¹⁷⁹ Instead, the resolution of the issue depends largely upon the particular circumstances; courts have "examined the 'taking' question by engaging in essentially ad hoc, factual inquiries."¹⁸⁰ These formulations do not

prong had been violated. This led to the eventual finding of a taking in *Loveladies Harbor, Inc. v. United States (Loveladies II)*, 21 Cl. Ct. 153 (1990).

173. 664 F.2d 99 (5th Cir. 1981) (*Wheeler I*); 746 F.2d 1437 (11th Cir. 1984) (*Wheeler II*); 833 F.2d 267 (11th Cir. 1987) (*Wheeler III*).

174. *Wheeler I*, 664 F.2d at 100; *Wheeler III*, 833 F.2d at 270 n.3.

175. *Wheeler III*, 833 F.2d at 270 n.3.

176. This reasoning does not follow any Supreme Court precedent. In *Pennsylvania Coal*, for example, the coal was not being taken for "public use," but only private uses. This distinction was explained in *Keystone*, 480 U.S. at 484-85. The *Wheeler* reasoning, does, however, follow Professor Settle's argument in *Regulatory Taking Doctrine*. Settle, *supra* note 95, at 391. See also *infra* note 282.

177. *Wheeler III*, 833 F.2d at 270 n.3; The Civil Rights Act is found at 42 U.S.C. § 1983 (1988). See *infra* Part X.

178. See, e.g., *Florida Rock I*, 791 F.2d at 904.

179. *Penn Central Transp. Co. v. City of New York*, 438 U.S. 104, 124 (1978).

180. *Kaiser Aetna v. United States*, 444 U.S. 164, 175 (1979).

provide the sort of useful bright line tests practitioners find helpful. But they do plainly show that a good factual record is a predicate for proving or disproving that a regulation's economic impact on private property is a taking under the *Agins* "economically viable use" threshold.

The most useful definition of "economically viable use" was formulated in *Kaiser Aetna v. United States*.¹⁸¹ There, the Court noted that "the economic impact of the regulation, its interference with reasonable investment backed expectations, and the character of the governmental action . . . have particular significance."¹⁸² The interplay of these three factors will determine whether a regulation has violated the "economically viable use" test of *Agins*.

a. *The Economic Impact of the Regulation.* Some economic impact of a regulation, alone, is not enough for there to be a regulatory taking. As the United States Supreme Court has said, "[g]overnment hardly could go on if to some extent, values incident to property could not be diminished without paying for every such change in the general law."¹⁸³

Indeed, there have been cases, such as *Andrus v. Allard*, where a substantial diminution of value led to *no* taking.¹⁸⁴ In *Florida Rock I*, after addressing the balance between the purpose of the regulation and the harm to the property, the Federal Circuit Court of Appeals discussed how much property had actually been taken by comparing the fair market value before and after the regulation was imposed.¹⁸⁵ The court concluded that it was theoretically possible that some economically viable use remained for the wetlands despite the fact that permits for limestone mining, the only known economically viable use, had been denied. The court reasoned that speculators might buy the property in the hope that the mining ban might someday be lifted.¹⁸⁶ The case was remanded to determine whether such investors did in fact exist.¹⁸⁷ If they did, then the property would still have value, and the economic impact of the mining ban might not be so significant as to result in a taking.¹⁸⁸

181. *Kaiser Aetna*, 444 U.S. at 175; quoted in *Connolly v. Pension Benefits Guaranty Corp.*, 475 U.S. 211, 224-25 (1986). See also *Penn Central*, 438 U.S. at 124.

182. *Kaiser Aetna*, 444 U.S. at 175.

183. *Pennsylvania Coal*, 260 U.S. at 413; see also *Williamson County Regional Planning Comm'n v. Hamilton Bank of Johnson City*, 473 U.S. 172, 198-99 (1985); *Penn Central*, 438 U.S. at 124; *Andrus v. Allard*, 444 U.S. 51, 67 (1979).

184. 444 U.S. at 66-68. *Andrus* involved the prohibition of the sale of eagle parts—since owners of eagle parts could still display the parts in a museum, no taking was found. But see *Hodel v. Irving*, 481 U.S. 704 (1987) (discussed *infra* note 253).

185. *Florida Rock I*, 791 F.2d at 904-05.

186. *Id.* at 902 (noting that south Florida is a land "where the gullible are fleeced . . . [and] where far-seeing investors realize fortunes").

187. *Florida Rock I*, 791 F.2d at 905.

188. *Id.*; see, e.g., *Beure'-Co. v. United States*, 16 Cl. Ct. 42 (1988), and *Formanek v. United States*, 18 Cl. Ct. 785 (1989) (where the property owners overcame dismissal motions when the court could not conclude that viable uses of property were left after

On remand the Claims Court dismissed the notion that the property had any significant value based on "dreams of avarice"¹⁸⁹ and held that the property lacked a "real market with knowledgeable investors."¹⁹⁰ In short, the court rejected the notion that the value of the property to the proverbial sucker looking for "swampland in Florida" was relevant.¹⁹¹ Similarly, in *Pennsylvania Coal*, the Supreme Court found a taking because the Kohler Act made coal mining "commercially impractical."¹⁹²

To summarize, one of the most accurate methods of determining the economic impact of a regulation is to compare its fair market value before and after the regulation. Where there has been a total diminution in value, courts have found a taking.

b. Distinct Reasonable Investment-Backed Expectations. The "economic impact" factor of *Kaiser Aetna* may be useful, but it cannot be characterized as self-evident in meaning. A more focused way of looking to see whether the "economically viable use" prong of *Agins* has been violated is to consider the second factor of the *Kaiser Aetna* test, reasonable investment-backed expectations. As with most tests, this one raises about as many questions as it solves. When is an investment expectation "reasonable" (which courts approve of) versus unrealistic or a windfall and/or profiteering (which courts disapprove of)?¹⁹³

An express government guarantee that property could be used for a particular purpose has been held to be reasonable,¹⁹⁴ as have reason-

permits to fill wetlands had been denied). The *Formanek* court also found that an offer of purchase from the Nature Conservancy was insufficient as a matter of law in refuting a taking presumably because the economic return from using the lands as a nature preserve was unlikely to equal its value for development. *Formanek*, 18 Cl. Ct. at 797.

189. *Florida Rock II*, 21 Cl. Ct. at 172.

190. *Id.*

191. *Id.* at 172-73, 175. (The Federal Circuit expressly referred to the relation between "suckers" and swampland in Florida, *Florida Rock I*, 791 F.2d. at 897). See also *Olson v. United States*, 292 U.S. 246, 257 (1934) (no market for "mere speculation"); *United States v. 117,763 Acres of Land in Imperial County*, 410 F. Supp. 628 (S.D. Cal. 1976), *aff'd sub nom.*; *United States v. Shewfelt Inv. Co.*, 570 F.2d 290 (9th Cir. 1977) (no market consideration for the "sucker born every minute"). It should be noted that the government's principal argument on appeal in *Florida Rock II*, is that "fair market value" should ignore whether or not potential land investors are knowledgeable. Federal Government's Opening Brief, *Florida Rock Indus., Inc. v. United States*, Case No. 91-5156 (available from Pacific Legal Foundation on request).

192. 260 U.S. at 414. However, there was no economic analysis given to support this statement. *Id.*

193. *Compare Loveladies Harbor, Inc. v. United States (Loveladies II)*, 21 Cl. Ct. 153 (1990) (wetland developer had reasonable expectation of developing last 12.5 acres of wetlands) *with Ciampitti v. United States (Campitti II)*, 22 Cl. Ct. 310, 318 (1991) (no taking found when wetland owner had unreasonable expectation of finding a jurisdictional loophole to avoid regulation. The court appears to have been motivated, at least in part, by an antipathy toward the owner's aggressive business tactics, allegedly causing him to profit at the expense of his partners). *Id.* at 314-15.

194. See *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 1011 (1984) (an "explicit government guarantee" to secure trade secret is a reasonable expectation); *but see*

able expectations under existing regulatory programs.¹⁹⁵ However, courts have not found the hope of a continuing right to engage in activities that are deemed potentially dangerous to the national security,¹⁹⁶ nor the hope of utilizing a loophole in an existing regulatory scheme to be reasonable.¹⁹⁷

If a property is already providing a fair return on investment, it may be difficult to prove a reasonable investment-backed expectation of greater profit. In *Penn Central*, the railroad argued that when the city prohibited the company from adding additional stories above Grand Central Station, its property had been taken.¹⁹⁸ The Court, however, disagreed, finding that the railroad company might have already recouped its investment-backed expectations with a "reasonable return" from the original station.¹⁹⁹ In any event, the city's offer of "transferable development rights" was seen to be adequate and just compensation and, implicitly, a return on investment for any taking that might have occurred.²⁰⁰

In the case of a wetland, the determination of what is a reasonable investment-backed expectation varies markedly by jurisdiction. In some states the question could even be asked whether or not it is ever reasonable for a property owner to expect to recoup an investment by being allowed to develop a wetland. The answer was no in *Just v. Marinette County*,²⁰¹ a case decided before the modern era of Section 404 enforcement. The Wisconsin Supreme Court thought it would *not* be reasonable to develop valuable wetlands.²⁰²

Marinette County was cited with approval by the Washington Supreme Court in *Orion Corporation v. State*: "Orion never had the right to dredge and fill its tidelands . . ." ²⁰³ In that case, the Washington Supreme Court seemingly ignored the language of *Nollan* which states that there is a *right* (rather than a privilege) to develop

Alaska v. Arctic Slope Regional Corp., No. S-3400, Alaska Nov. 22, 1991 WL 244366 (1991) (no "investment backed" expectation to keep well log data secret).

195. *United Nuclear Corp. v. United States*, 912 F.2d 1432 (Fed. Cir. 1990) (compensation awarded when Department of Interior failed to approve uranium mine on Navajo reservation after finding a reasonable expectation of approval).

196. *Allied-General Nuclear Serv. v. United States*, 839 F.2d 1572 (Fed. Cir. 1988) (no reasonable expectation in ability to operate a plutonium processing facility).

197. *See Ciampitti II*, 22 Cl. Ct. at 318.

198. *Penn Central*, 438 U.S. at 107.

199. *Id.* at 129.

200. *Id.* at 136 n.33. In hindsight, Penn Central railroad should have offered proof at trial that Grand Central Station did not provide a "reasonable return" and that the transferable development rights were inadequate compensation. Instead, the railroad agreed these rights were "valuable" but not just compensation. *Id.*

201. 201 N.W.2d 761 (Wis. 1972). *Accord* *M & I Marshall & Ilsley Bank v. Town of Somers*, 414 N.W.2d 824 (Wis. 1987). *See infra* Part VIII (A).

202. 201 N.W.2d at 768. "An owner of land has no absolute and unlimited right to change the essential natural character of his land . . . which injures the rights of others." *Id.*

203. 747 P.2d 1062, 1073 (Wash. 1987), *cert. denied*, 486 U.S. 1022 (1988). *See also infra* Part VIII(B).

one's property.²⁰⁴ Also, there was a decidedly different conclusion reached in both the *Loveladies* and *Florida Rock* series of cases. In *Florida Rock*, the Federal Circuit Court of Appeals found housing to be a more valuable use than swampland²⁰⁵ while *Loveladies* expressly rejected the *Marinette County* formulation as illogical.²⁰⁶

An interesting question arises in the context of the landowner who bought wetlands a long time in the past—before any of the current focus on wetlands preservation came to the fore. Because some courts consider inverse-condemnation rights to be personal, and not to “run with the land,” only the owner *at the time the wetlands regulations are imposed* can recover for takings damages.²⁰⁷ Under this theory, if the original owner sells the property, the original owner retains the inverse-condemnation right *unless the real estate contract expressly states otherwise*.²⁰⁸ However, this notion may have been implicitly rejected in *Nollan*.²⁰⁹

In short, the distinct investment-backed expectations test is difficult to apply. An attorney arguing this point would do well to proffer ample evidence on what actually constitutes a reasonable investment-backed expectation.

c. Character of the Governmental Action. The third factor mentioned in *Kaiser Aetna* is the “character of the government action.”²¹⁰ The courts that have considered this factor usually have done so in the context of determining how the government action actually impacts the land. In *Kaiser Aetna*, for example, the government action would have allowed public access onto what was formerly private property.²¹¹ Indeed, this sort of “physical invasion” of private property is the “character” of government action most likely to give rise to a taking.

In *Penn Central* the court noted that a “‘taking’ may more readily be found when [there is] . . . a physical invasion” rather than when a regulation indirectly impacts on land such as “some public program adjusting the benefits and burdens of economic life to promote the public good.”²¹² Indeed, physical invasion has often been seen as a separate test unto itself, meaning that if the government's action

204. *Nollan*, 483 U.S. at 833 n.2.

205. *Florida Rock I*, 791 F.2d at 904.

206. *Loveladies I*, 15 Cl. Ct. at 388, 395.

207. 2 PHILLIP NICHOLS, NICHOLS ON EMINENT DOMAIN, § 5.01[4] (1991).

208. *See id.*

209. *See infra* note 313.

210. *Kaiser Aetna*, 444 U.S. at 175.

211. *Id.* at 168.

212. *Penn Central*, 438 U.S. at 124 (citation omitted). Such public programs would include police powers such as zoning. It should be noted that while a physical invasion may take the property, it also may be a legitimate exercise of the police power and may substantially advance a legitimate governmental interest. It is a taking, however, because of its impact on property. This, of course, recalls the *Armstrong* rationale of disproportionate impact. *Armstrong v. United States*, 364 U.S. 40 (1960).

physically invades private property, there is a taking regardless of whether any of the other tests have been met.²¹³

Some commentators have gone so far as to say that *every* case where a taking has been found really just involved a physical invasion.²¹⁴ Examples cited include *Kaiser Aetna*,²¹⁵ and the flooding cases such as *Pumpelly v. Green Bay & Mississippi Canal Co.*²¹⁶ One commentator also characterizes *Nollan* as a physical invasion case,²¹⁷ although the Court's regulatory analysis of the law of permit conditions does not seem to be dependent upon the character of the government action. Despite the emphasis on physical invasions, however, it should not be forgotten that "a taking can occur by valid regulation with no physical invasion."²¹⁸

B. The So-Called "Nuisance" Exception to Takings

Throughout the discussions of takings law, there are references to a "nuisance exception."²¹⁹ This exception is fervently advanced by environmentally oriented advocates of regulation of property²²⁰ and just as thoroughly dismissed by pro-property rights advocates and some courts.²²¹

213. See Robert Meltz, *Federal Regulation of the Environment and the Taking Issue*, 37 FED. B. NEWS & J. 95-96; *Loretto v. Teleprompter Manhattan CATV*, 458 U.S. 419 (1982) (taking found for minimal intrusion by cable television wire; "the character of government action [in a physical occupation case] not only is an important factor . . . [it] also is determinative." *Id.* at 426.)

214. See Michelman, *supra* note 155; Settle, *supra* note 95 at 387-88.

215. 444 U.S. at 179-80 (denial of right to exclude others equivalent to physical invasion because trespass on property has a great potential impact on owners' use and enjoyment of property).

216. 80 U.S. (13 Wall.) 166 (1872) (the first recorded instance of the Supreme Court finding inverse condemnation in favor of a landowner). This case established the principle that when water backs up from a government owned dam onto private property, the government must pay for the value of the land lost. *Id.*

217. Michelman, *supra* note 155, at 1611-12. This distinction was followed in *Alaska v. Arctic Slope Regional Corp.*, No. S-3400, 1991 WL 244366, at *9 (Alaska Nov. 22, 1991). *But see* *Yee v. City of Escondido*, 1992 WL 60434, *6 (expressly refers to *Nollan* as a regulatory taking case).

218. *Florida Rock I*, 791 F.2d at 900 (citing *Skaw v. United States*, 740 F.2d 932 (Fed. Cir. 1984)); see *Hendler v. United States*, 952 F.2d 1364 (Fed. Cir. 1991) (discusses interplay between regulatory and physical invasion takings; taking found from physical invasion of pollution monitoring wells used to assess nearby toxic waste dump. But court noted that existence of regulatory taking "remains an issue in the case." 952 F.2d at 1375.). See also NORMAN WILLIAMS, JR. & JOHN M. TAYLOR, *AMERICAN PLANNING LAW* § 5A.20, at 174 n.74, n.75 (1988) (contrasts justices who see close similarity between regulatory takings and physical invasions and those who do not).

219. See, e.g., *Just v. Marinette County*, 201 N.W.2d 761 (Wis. 1972). *But see*, e.g., *Florida Rock Indus., Inc. v. United States*, 8 Cl. Ct. 160 (1985); *Florida Rock Indus., Inc. v. United States*, 21 Cl. Ct. 161 (1990); *Loveladies Harbor, Inc. v. United States*, 21 Cl. Ct. 153 (1990).

220. See, e.g., *Amicus Briefs of Environmental Defense Fund, Loveladies Harbor, Inc. v. United States (Loveladies II)*, 21 Cl. Ct. 153 (Fed. Cir. 1990) (No. 91-5050); *Florida Rock Indus., Inc. v. United States (Florida Rock II)*, 21 Cl. Ct. 161 (Fed. Cir. 1990) (No. 91-5156) (available upon request from Pacific Legal Foundation).

221. See, e.g., *Amicus Briefs of Pacific Legal Foundation, Whitney Benefits v.*

Conceptually, the nuisance exception could be viewed as an element of the "character" of government action. It also could be viewed as an element in determining whether or not a regulation substantially advances the legitimate governmental interest prong of *Agins*.

The "nuisance exception" involves two basic questions. First, does the regulation actually prevent some great public harm or nuisance? If it does, then it is a legitimate exercise of the police power. Second, the question must be asked whether or not the regulation has a significant economic impact. If the impact is too great there will be a taking. The significance of there being a nuisance involved is that the courts appear willing to tolerate a greater economic impact when nuisances are being regulated.

Proponents of the nuisance exception theory invariably hark back to *Mugler v. Kansas*,²²² where the Court found that it was permissible for Kansas, a "dry" state, to shut down a brewery without giving rise to a compensable taking. *Mugler* was decided before modern regulatory takings analysis. After *Pennsylvania Coal v. Mahon*,²²³ *Mugler's* vitality was problematic because *Pennsylvania Coal* had refuted the notion that there could never be a taking from an exercise of the police power.²²⁴ Furthermore, if coal mining under buildings did not have public nuisance implications, what would? Thus, the implication from *Mugler* that police power regulations could not "take" property was called into question by *Pennsylvania Coal* where a police power regulation was found to be a taking.

Keystone Bituminous added more fuel to the debate after the Court ruled that a statute very similar to the one in *Pennsylvania Coal* was a valid exercise of the police power and was *not* a taking. One court even said the so-called nuisance exception was "dusted off . . . and put . . . back on its pedestal, while reducing *Pennsylvania Coal Co. v. Mahon* as a precedent pretty much [limited] to its own peculiar facts."²²⁵ This is debatable. *Keystone* did not expressly overrule *Pennsylvania Coal*, and in light of *First Church* and *Nollan*, it is apparent that there will still be regulations designed to limit nuisances or other public harms that "go too far" and constitute a taking. In *Nollan*, for example, it was held that a permit denial that "would interfere so drastically with the Nollans' use of their property . . . [would] constitute a taking."²²⁶ Indeed, this term the Supreme Court in *Lucas* may confront head on the question of whether a public

United States, 926 F.2d 1169 (Fed. Cir. 1991); *Lucas v. South Carolina Coastal Council*, 404 S.E.2d 895 (S.C. 1991), cert. granted, 112 S. Ct. 436 (1991); *Whitney Benefits*, 926 F.2d at 1177 n.10.

222. 123 U.S. 623 (1887).

223. 260 U.S. 393 (1922).

224. See, e.g., *Florida Rock I*, 8 Cl. Ct. at 170-71; see also Groen, *supra* note 111.

225. *Allied General Nuclear Serv. v. United States*, 839 F.2d 1572, 1576 (Fed. Cir. 1988).

226. *Nollan*, 483 U.S. at 836.

safety regulation which totally destroys the value of private property is a taking.²²⁷

The real import of both *Mugler* and *Keystone* is that they are both cases where the Court decided that the regulation at issue substantially advanced a legitimate governmental interest in public safety (by abating a nuisance or preventing a public harm)—which is now the first prong of the *Agins* test. Most significantly, *Mugler* arose in an era when regulatory takings were not recognized to exist; it was not until *Pennsylvania Coal* that the Court conceded that a taking could occur through mere regulation. *Keystone's* citation of *Mugler* therefore simply helps buttress its analysis of the first prong of *Agins*.²²⁸

The Federal Circuit Court of Appeals recently tried to put *Mugler* and its progeny in perspective. In *Whitney Benefits* it explored the relationship between the early *Mugler* era cases and modern “nuisance” type cases. The court found that no “deference” should be given to the government in takings cases merely because the government asserts an exercise of the police power.²²⁹ “The government’s talismanic cry for reversal because ‘public purpose’ requires ‘deference’ is simply a too-facile misapplication of the constitutional parameters of takings law to the facts in this case.”²³⁰

Despite the reluctance of the federal courts to find a nuisance exception to takings, the exception lives in the swamps of some states. In Washington, the state supreme court took the nuisance exception to its outer limits in *Orion*,²³¹ holding “[n]o compensable taking can occur as long as regulations substantially serve the legitimate public purpose of prohibiting uses of property injurious to the public interest in health, the environment, or the fiscal integrity of the [state]” (emphasis in original).²³²

227. *Lucas v. South Carolina Coastal Council*, 404 S.E.2d 895 (S.C. 1991), cert. granted, 112 S. Ct. 436 (1991).

228. *Keystone*, 480 U.S. at 490. *Keystone* then continued to find that the second part of the *Agins* formulation had not been met because in the facial challenge at issue there was no proof of loss of economic value. *Id.* at 493-501. *Mugler* never reached this stage of analysis because it was decided in an era before it was recognized that the loss of value of property through regulation could give rise to a taking. See *Whitney Benefits*, 926 F.2d at 1177 n.10; Groen, *supra* note 111.

229. *Whitney Benefits*, 926 F.2d at 1177, 1177 n.10. See also *Keystone*, 480 U.S. at 512 (nuisance exception not coterminous with police power (Rehnquist, J., dissenting)); *Florida Rock I*, 8 Cl. Ct. at 170-71; *Florida Rock II*, 21 Cl. Ct. at 168. This issue may be resolved after the Supreme Court decides *Lucas*.

230. *Whitney Benefits*, 926 F.2d at 1177.

231. *Orion Corp. v. State of Washington*, 747 P.2d 1062, 1081 (Wash. 1987), cert. denied, 486 U.S. 1022 (1988). See *infra* text accompanying notes 205-98.

232. 747 P.2d at 1081. Perfecting the art of understatement, the court continued, “[c]ertain aspects of our state regulatory takings doctrine appear to conflict with federal analysis.” *Id.* See also *Presbytery of Seattle v. King County*, 787 P.2d 907 (Wash. 1990), cert. denied, 111 S. Ct. 284 (1990), which “clarifies” *Orion*. For two other cases which adopt the nuisance exception to the detriment of property owners, see *Lucas v. South Carolina Coastal Council*, 404 S.E.2d 895 (1991), petition for cert. granted, 112 S. Ct. 436, ___ U.S. ___ (Nov. 18, 1991); *Beard v. South Carolina Coastal Council*,

This case is disturbing, because it appears to be saying that the nuisance exception is as broad as the police power. In other words, a legitimate exercise of the police power cannot give rise to a taking. This notion, incidentally, was expressly rejected in *Florida Rock II*: "All valid statutes and regulations exist for the public welfare. But the assertion that a proposed activity would be a nuisance merely because Congress chose to restrict, regulate, or prohibit it for the public benefit indicates circular reasoning that would yield the destruction of the Fifth Amendment."²³³

Finally, even if the purpose of regulation is to abate a nuisance, there will still be a taking if the regulation takes all the value of the property.²³⁴ As noted by the Ninth Circuit Court of Appeals in *McDougal v. County of Imperial*,²³⁵ the United States Supreme Court has never held otherwise: "[e]ven in those cases where the activity restrained was akin to a public nuisance and the state's interest was admittedly substantial, the Court has gone on to weigh the claimant's showing of diminution of value to his property."²³⁶ This point was illustrated well in *Yancey v. United States*,²³⁷ where takings damages were awarded to a turkey farmer who had his turkeys quarantined during an outbreak of Asian flu. The public benefit from the quarantine did not negate a finding of a taking.

Nonetheless, because the existence of a nuisance does and probably will continue to influence the courts, an attorney arguing a wetland or other environmental case should be prepared to deal with the nuisance exception. It is critical, for example, to offer proof that a particular wetland or species habitat in question is (or is not) ecologi-

403 S.E.2d 620 (1991), *petition for cert. denied*, 112 S. Ct. 185 (1991).

233. *Florida Rock II*, 21 Cl. Ct. at 168. See also *Florida Rock I*, 8 Cl. Ct. at 170 (making a nuisance exception coterminous with the police power would read the Compensation Clause "out of existence").

234. *Nollan*, 483 U.S. at 835-36 (permit can be denied "outright . . . unless the denial would interfere so drastically with the Nollans' use of their property as to constitute a taking"). *Keystone*, 480 U.S. at 513 (Rehnquist, C.J., dissenting) ("our cases have never applied the nuisance exception to allow complete extinction of the value of a parcel of property").

235. 942 F.2d 668, 678 (1991).

236. *Id.* Thus, in *Mugler v. Kansas*, 123 U.S. 623 (1887), plaintiffs did not contend, nor the Court conclude, that no structures at all could be built, or that there was in any way a complete deprivation of all economically viable use of land. *Id.* In *Hadacheck v. Sebastian*, 239 U.S. 394 (1915), the prohibition of a brickyard operation did not prevent plaintiff from building residences or other manufacturing enterprises. *Id.* In *Miller v. Schoene*, 276 U.S. 272 (1928), Virginia's order to plaintiff to destroy diseased cedar trees did not prevent owner from using those trees or from making any other viable use of the property. (Furthermore, plaintiffs alleged only a due process violation and not a taking.) *Id.* In *Goldblatt v. Town of Hempstead*, 369 U.S. 590, 594 (1962) the plaintiff failed to produce evidence that a prohibition against a quarry "even remotely suggests that prohibition of further mining will reduce the value of the lot in question." *Id.* Finally, in *Keystone*, 480 U.S. at 492-93, the Court pointed out that plaintiffs "failed to make a showing of diminution of value sufficient to satisfy the test set forth in *Pennsylvania Coal* and our other regulatory takings cases." *Id.*

237. 915 F.2d 1534 (Fed. Cir. 1990).

cally valuable, and has (or does not have) a relationship to downstream flooding, pollution abatement, and the like.

V. REMEDIES MUST BE EXHAUSTED FOR A CLAIM TO BE RIPE

More takings cases have been lost or remanded for failure to exhaust than for any other cause.²³⁸ Courts are reluctant to decide cases if other remedies are available. The most common way of avoiding a takings claim is to argue that it is impossible to find a taking because the court does not know what a governmental body ultimately would or would not allow a property owner to do with a regulated property until all avenues of relief have been exhausted.

The United States Supreme Court has been more than clear on this requirement.²³⁹ This presents a troublesome difficulty for property owners because the pursuit of alternative permits, variances, zoning change requests, and so on can eat up an exorbitant amount of capital. A landowner may easily run out of cash before being ready to file a case for a taking.

A potential way to overcome a failure to exhaust argument is to claim that it would be futile to exhaust administrative procedures. Courts will not require litigants to jump through hoops when it can be shown that no administrative relief is available.²⁴⁰ However, a corollary of the rule requiring exhaustion is that it is almost futile to argue that it would be futile to try to exhaust remedies.²⁴¹ Even when remedies are not available, litigants have been told to exhaust them. For example, the Court's refusal to reach the merits in *Agins* or *San Diego* has been seen by some to reflect a lack of understanding of the remedies available under California law.²⁴² However, some lower federal courts have been more hospitable to futility exception arguments.²⁴³

238. See cases cited *infra* note 239. For a discussion of the doctrine of exhaustion and its exceptions, see BERNARD SCHWARTZ, ADMINISTRATIVE LAW, §§ 8.30-8.31, at 502-06 (2d ed. 1984).

239. See *Agins v. City of Tiburon*, 447 U.S. 255 (1980) (appellants should have submitted alternative development plans); *San Diego Gas and Elect. Co. v. San Diego*, 450 U.S. 621 (1981) (no final decision below on taking issue); *Williamson County Regional Planning Comm'n v. Hamilton Bank of Johnson City*, 473 U.S. 172 (1985) (developer should have applied for variance and sought compensation through established state procedures); *Hodel v. Virginia Surface Mining and Reclamation Assoc.*, 452 U.S. 264 (1981) (coal miners did not prove effects, if any, from regulation); *MacDonald, Sommer & Frates v. County of Yolo*, 477 U.S. 340 (1986) (developer must explore alternate building plans).

240. See *United States v. Anthony Grace & Sons*, 384 U.S. 424, 429-30 (1966).

241. See *Presbytery of Seattle*, 787 P.2d at 916.

242. See, e.g., *Bauman*, *supra* note 135.

243. For example, in *Florida Rock II*, the court found that once a Section 404 permit is denied, there is no reason to apply for state permits. *Florida Rock II*, 21 Cl. Ct. at 170. "With respect to the state permit applications, there is no legal requirement for a party to expend time and money on what would clearly be an unnecessary and futile exercise . . . [because] '[i]t would serve no purpose to require claimant to exhaust administrative procedures before seeking judicial review when it is clear that resort to administrative action would be futile.'" *Id.* (quoting *Conant v. United States*,

There is currently no precedent explaining how much exhaustion is required in an Endangered Species Act takings claim. If, for example, a property owner cannot obtain a federal permit to utilize land because of the presence of a spotted owl or desert tortoise, must the property owner first ask the permitting agency to ask the Secretary of Interior to prepare a biological opinion and issue an incidental takings statement?²⁴⁴ If activity on private property threatens to take or harass an endangered species must the property owner propose a habitat conservation plan²⁴⁵ with attendant mitigation measures? Finally, if the preceding options fail, must the property owner request the invocation of the cabinet level "God Squad"²⁴⁶ for relief?

Quite obviously, if any of these procedures are theoretically available, and not utterly futile, they should be pursued. If they are not pursued, considerable time and energy will be spent arguing that the available remedies were not meaningful.²⁴⁷

VI. THE SIZE OF THE PARCEL—WHAT OF PARTIAL TAKINGS?

If a property owner owns a parcel with 1,000 upland acres and one acre of wetland on which activity is absolutely prohibited, is there a taking? What if the one acre of wetland is *all* that a property owner owns? Generally speaking, a court will not break up property holdings for the sake of a takings analysis. Thus while the owner of only one acre of wetland might very well have had the property taken, the owner of the 1,001 acres might not because a court might reason, for example, that investment-backed expectations have not been significantly reduced.²⁴⁸

Logically, however, there is a flaw in this reasoning. If the taking were for a highway, rather than wetland, compensation would be due whether the owner owned one, ten, or a million acres.²⁴⁹ An owner unable to use an acre of wetland, however, can be just as much at an

12 Cl. Ct. 689, 692 (1987)). *Accord Loveladies I*, 15 Cl. Ct. at 386 (plaintiffs should not be forced to resort to "some endless series of requirements"). *See also* *Sierra Lake Reserve v. City of Rocklin*, 938 F.2d 951, 954-55 (9th Cir. 1991) (no need to pursue futile California court remedies in mobile home rent control takings case); *Azul Pacifico v. City of Los Angeles*, 948 F.2d 575 (9th Cir. 1991); *Kinzli v. City of Santa Cruz*, 830 F.2d 968 (9th Cir. 1987) (futility discussed); *Hoehne v. County of San Benito*, 870 F.2d 529 (9th Cir. 1989) (discusses exhaustion); Theodore E. Worcester, *Land Use Planning and Regulation After Granite Rock: State and Local Control of Operations on Federal Lands*, 36 ROCKY MTN. MIN. L. INST., § 19.05, at 19-27 to 19-38 (1990).

244. 16 U.S.C. § 1536(b)(4) (1988). *See supra* note 66 and accompanying text.

245. 16 U.S.C. § 1539(1) (1988). *See supra* notes 75-76 and accompanying text.

246. 16 U.S.C. § 1536(e)-(h) (1988). *See supra* notes 77-78 and accompanying text.

247. Finally, it is a rare case indeed when a court is reversed after dismissing a case on exhaustion grounds. For such a case, *see Tahoe-Sierra Preservation Council v. Tahoe Regional Planning Auth.*, 938 F.2d 153 (9th Cir. 1991) (attempt to amend general plan not necessary for claim to be ripe).

248. *See supra* text accompanying note 198.

249. *See generally*, *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982) (taking when television cable attached to building).

economic disadvantage with respect to that acre as an owner of land taken for a highway. From the landowner's perspective, it does not make any difference that a highway is a physical invasion and the wetland regulation is not a per se physical invasion—the land cannot be used and creates no wealth.²⁵⁰ As Justice Brennan said in dissent:

Police power regulations such as zoning ordinances and other land-use restrictions can destroy the use and enjoyment of property in order to promote the public good just as effectively as formal condemnation or physical invasion of property. From the property owner's point of view, it may matter little whether his land is condemned or flooded, or whether it is restricted by regulation to use in its natural state, if the effect in both cases is to deprive him of all beneficial use of it.²⁵¹

The United States Supreme Court has been split on whether or not there is a taking when just one of the "bundle of sticks" of property ownership has been destroyed. For example, in *Andrus v. Allard*,²⁵² the Court held that the denial of just one of the sticks in the bundle of property rights, the "transferability stick," or the right to sell eagle parts, was not enough for there to be a taking. But in *Hodel v. Irving*²⁵³ the Court overturned a law that prohibited intestate and testamentary succession for small Indian allotments.²⁵⁴ The Court found that the statute "took" the "testamentary stick," or the right to have one's property go to one's heirs through the law of intestate succession.²⁵⁵

In *Penn Central*,²⁵⁶ the loss of another stick in the bundle, the full use of air rights alone, did not constitute a taking because other rights in the property remained.²⁵⁷ On the other hand, where property rights are easily divisible, and commonly held by different owners, such as with mineral and surface rights, a regulation of only part of the total property might constitute a taking because a single property

250. An exception might exist for the theoretical case where a non-development use (e.g. hunting, bird watching) is more valuable than a development use. Such was not the case in *Loveladies II*, 21 Cl. Ct. at 158-59.

251. *San Diego*, 450 U.S. at 652 (footnote omitted), quoted with approval by Judge Kozinski in *Florida Rock I*, 8 Cl. Ct. at 170, 171 n.11.

252. 444 U.S. 51 (1967).

253. 481 U.S. 704 (1987).

254. *Id.* During the "assimilation" era of Indian policy, tribal property was subdivided and allotted to tribal members. Now, after several generations, some allotments are held by many dozens of owners, making it a practical impossibility to put the land to economic use—perpetuating the cycle of poverty. See *Irving*, 481 U.S. at 706-09; FREDERICK COHEN, HANDBOOK OF FEDERAL INDIAN LAW 137-38 (1982). The law at issue in *Irving* was an attempt to consolidate the land ownership by transferring devised and intestate shares to the tribes—at the direct expense of the heirs. 481 U.S. at 709.

255. 481 U.S. at 717.

256. *Penn Central Trans. Co. v. City of New York*, 438 U.S. 104 (1978).

257. *Id.* at 129. The court also noted that *Penn Central* had not refuted the argument that "transferable development rights" were not just compensation. *Id.*

owner may lose everything, even though the interests of other owners of the property may be unaffected by the regulation. *Pennsylvania Coal* recognized this possibility, and a taking of the mineral and support estates was found, even though the surface estate remained unaffected.²⁵⁸ In *Whitney Benefits*²⁵⁹ this concept was applied when the circuit court upheld a \$60 million damage award for the taking of the mineral estate, although the surface estate remained largely intact (and largely under separate ownership).²⁶⁰

A unique "partial takings" issue was decided in *Florida Rock I*, where the landowner originally argued that all 1,560 acres of its wetland mining property had been taken after a permit to mine on only 98 acres was denied.²⁶¹ The government argued, on the other hand, that there was *no* taking because the use of only 98 acres had been denied, leaving the "parcel as a whole" largely unaffected by the denial.²⁶² The Federal Circuit Court of Appeals rejected both arguments, holding that (1) it would be unfair to award compensation for property for which the applicant had no immediate plans,²⁶³ and (2) the idea that there was some value to the remaining 1,458 acres (which would give meaning to the "parcel as a whole" value argument) was totally unrealistic under the circumstances.²⁶⁴ Thus, to prevail in a takings claim when a permit to develop only part of a parcel has been denied, it would be helpful to offer evidence that the rest of the property has been rendered worthless as well.

Finally, in *Loveladies I* and *II*, the claims court awarded compensation when 12.5 acres of property was rendered useless after a wetland permit was denied, although the parcel was originally 250 acres in size.²⁶⁵ On appeal in *Loveladies II*, the federal government is arguing that the court must consider the entire *original* parcel before de-

258. *Pennsylvania Coal*, 260 U.S. at 415 (treats transfer of the support estate as the transfer of a compensable property right).

259. *Whitney Benefits, Inc. v. United States*, 926 F.2d 1169 (Fed. Cir. 1990).

260. *Id.* In Washington, the supreme court briefly adopted the idea that property could be subdivided for a takings analysis in *Allingham v. Seattle*, 749 P.2d 160 (1988). See *Settle*, *supra* note 95, at 396-400, for criticism of *Allingham*. This holding was overruled in *Presbytery of Seattle*, 787 P.2d at 915.

261. *Florida Rock I*, 791 F.2d at 895-06, 904-05. Had the permit been granted, ninety-eight acres was all that could have been mined in three years, the term of the permit. *Id.*

262. *Id.* at 904.

263. *Id.* at 904-05.

264. *Id.* at 904.

265. *Loveladies I*, 15 Cl. Ct. at 391-93; *Loveladies II*, 21 Cl. Ct. at 160, 161 n.9. This holding can be reconciled with *Ciampitti II*, 22 Cl. Ct. at 320 (1991), where neighboring upland parcels were considered to be a part of the parcel as a whole. In the *Loveladies* cases, the parcels had been sold off a long time ago, while Mr. Ciampitti still owned some of the upland parcels in question. 22 Cl. Ct. at 320 (noting the parcels were "still owned" as of the date of the lawsuit). See also *Deltona Corporation v. United States*, 657 F.2d 1184, 1192-93 (1981) (Deltona Corp. had been given a permit to fill some property; decision does not state whether Deltona owned this property at the time of subsequent denials; the court did note that portions of land not permitted also retained substantial value).

cing whether a taking has occurred.²⁶⁶ Based on the profit earned over the past 30 years, according to the government, there has been no significant destruction of investment-backed expectations.²⁶⁷ The United States Supreme Court has not yet directly addressed the issue of partial takings.²⁶⁸

VII. MEASURE OF DAMAGES

Once it has been determined that a taking has occurred, the courts will next determine the value of the property taken. This will generally be based upon the fair market value of the property at the time of the taking.²⁶⁹ Fair market value cannot be augmented by unreasonable speculation,²⁷⁰ nor diminished by considering the deleterious effects on land value caused by the regulation that caused the taking.²⁷¹ In *Florida Rock I*, for example, the government had argued that if the regulation reduced the value of the property to zero, then there would be no Fifth Amendment liability. The court surmised that appellant "added this contention to provide a little humor for an otherwise serious and scholarly brief."²⁷²

In the case where a regulation takes property only for a limited period of time, such as when a regulation is amended, there may still be a temporary taking.²⁷³ Most federal cases to consider the measure of damages for "temporary takings" have involved denials of mining permits.²⁷⁴

VIII. A SURVEY OF SELECTED STATE REACTIONS TO THE COLLISION BETWEEN THE PROTECTION OF WETLANDS AND THE TAKINGS DOCTRINE

Not all environmental regulations are federal. When property is taken by *state* regulation, then a property owner may attempt to file a takings claim in state court, alleging violations of both state and fed-

266. See Brief of Government, *Loveladies Harbor, Inc. v. United States*, 21 Cl. Ct. 153 (1990) (No. 91-5050).

267. *Id.*

268. For a California state court case where a court found it *could* look at a 1.7-acre plot of an 8.5-acre parcel separately for partial takings analysis, see *Twain Harte Assocs., Ltd. v. County of Toulumne*, 265 Cal. Rptr. 737 (Cal. Ct. App. 1990).

269. *Olson v. United States*, 292 U.S. 246 (1934). For extensive discussions of valuation, see *Florida Rock Indus. v. United States*, 21 Cl. Ct. 161 (1990); *Loveladies Harbor, Inc. v. United States*, 21 Cl. Ct. 153 (1991); *Whitney Benefits, Inc. v. United States*, 18 Cl. Ct. 394 (1989), *aff'd*, 926 F.2d 1169 (Fed. Cir. 1991), *cert. denied*, 112 S. Ct. 406 (1991).

270. *Olson*, 292 U.S. at 257.

271. *Florida Rock II*, 791 F.2d at 905.

272. *Id.*

273. See *supra* Part III(B)(2).

274. See *Yuba Natural Resources, Inc. v. United States (Yuba I)*, 821 F.2d 638 (Fed. Cir. 1987); *Yuba Natural Resources, Inc. v. United States*, 904 F.2d 1577 (Fed. Cir. 1990) (updating *Yuba I*). For a useful discussion of temporary regulatory takings, see *Hendler v. United States*, 952 F.2d 1364 (Fed. Cir. 1991) (analogizing length of time vehicle parked on property to significance of temporary taking).

eral constitutional rights, plus perhaps a violation of Section 1983 of the Civil Rights Act.²⁷⁵ Theoretically, state courts can provide greater protection under state constitutions than provided by federal constitutional law. Some state constitutions, for example, protect against both a "taking" of, and "damage" to, property.²⁷⁶

However, a number of state courts are seemingly trying to steadfastly ignore the law of the 1987 takings cases by carving out a special wetlands exception to property rights. Under this theory, persons who buy wetlands are entitled to less protection than those who own uplands. This section summarizes some of the more recent and significant state cases.

A. *The "When You Buy a Swamp You Just Get a Swamp" Theory of Takings—Wisconsin Cases*

The "if you buy a swamp, you just get a swamp" trend started in Wisconsin in *Just v. Marinette County*.²⁷⁷ As stated by the court: "An owner of land has no absolute and unlimited right to change the essential natural character of his land so as to use it for a purpose for which it was unsuited in its natural state and which injures the rights of others."²⁷⁸ It is highly debatable, however, whether the development of a wetland usually "injures the rights of others," but this appears to be assumed by the court.²⁷⁹ It is also debatable whether the general pronouncement against altering the natural character of land survives footnote 2 of *Nollan* which states that the ability to develop property is a *right* and not a government *benefit*.²⁸⁰ Be that as it may, the *Marinette County* result was followed in *M & I Marshall & Ilsley Bank v. Town of Somers*,²⁸¹ and *Reel Enterprises v. City of La Crosse*.²⁸²

275. Civil Rights Act of 1968, 42 U.S.C. § 1983 (1988). See discussion *infra* Part X. It is beyond the scope of this article to examine the choice of law questions involved. Note, however, that *Williamson County Regional Planning Comm'n v. Hamilton Bank of Johnson City*, 473 U.S. 172 (1985), requires compensation to be sought first through state procedures. *Sierra Lake Reserve v. City of Rocklin*, 938 F.2d 951 (9th Cir. 1991), explains that the federal courts may still be available if state remedies are futile.

276. See, e.g., ALASKA CONST. art. I, § 18; WASH. CONST. art. I, § 16; WYO. CONST. art. I, § 33. But see, *Presbytery of Seattle*, 787 P.2d at 911 n.10 (finding no significance to the word "damage"); but see *DeLisio v. Alaska Superior Court*, 740 P.2d 437, 439 n.3 (Alaska 1987) (term "'damages' affords the property owner broader protection").

277. 201 N.W.2d 761 (Wis. 1972).

278. *Id.* at 768.

279. This was not found to be the case, for example, in *Loveladies I*, 15 Cl. Ct. at 395 (rejecting *Marinette County*). See *supra* note 231 and accompanying text.

Property owners trying to challenge the *Marinette County* argument that filling wetlands is an inherently harmful activity may be wise to spend the time and money to prove otherwise with respect to their particular parcels.

280. *Nollan*, 483 U.S. at 833 n.2.

281. 414 N.W.2d 824 (Wis. 1987).

282. 431 N.W.2d 743 (Wis. App. 1988). The *Reel* court found no taking for a denial of a fill permit, but continued to find that a denial of a sewer extension was unlaw-

The *Somers* court also found a distinction between regulations designed to create a public benefit (compensable) versus regulations that take property to prevent public harms (noncompensable).²⁶³ Note, however, that *Somers* continues by softening this position, somewhat, by finding that a regulation designed to avoid a public harm may be compensable nonetheless if it "results in a value diminution . . . so great as to amount to a confiscation."²⁶⁴

In short, under Wisconsin state law, no taking will be found if a property owner is denied the right to change a wetland to an upland, especially if the regulation is designed to prevent a harm, rather than create a benefit. Property owners, therefore, would be wise to find a way to the federal courthouse and argue for federal precedent.

B. The State of Washington Goes Its Own Way and Ignores First Church for Property Owners Who "Bought the Swamp"

With *Orion*,²⁶⁵ the Washington Supreme Court cited and followed the *Marinette County* rationale: "Orion never had the right to dredge and fill its tidelands."²⁶⁶ *Presbytery*²⁶⁷ clarified the *Orion* decision,

ful. However, in a questionable rendering of *First Church*, the *Reel* court found that there could be no temporary taking during the period the sewer permit was unlawfully denied because the government had no authority to deny the permit. *Id.* at 830-31. Recent cases reject the theory proscribing inverse condemnation claims against government entities which lack condemnation authority. In *Kaiser Aetna*, 444 U.S. at 174 n.8, the Court looked toward the substance rather than the form of the government action: "[c]onfiscation may result from a taking of the use of property without compensation quite as well as from the taking of the title" (quoting *Chicago, R.I. & P. Ry. v. United States*, 284 U.S. 80, 96 (1931)). *Accord First Church*, 482 U.S. at 315-16 (noting that Takings Clause is self-executing and depends on impact of government action of property rather than formal exercise of condemnation authority). See also *Baker v. Burbank-Glendale-Pasadena Airport Auth.*, 705 P.2d 866 (1985) (finding inverse condemnation possible against entity that lacks condemnation power); *Fountain v. Metro. Atlanta Rapid Transit Auth.*, 678 F.2d 1038, 1043-44 (11th Cir. 1982) (same holding as *Baker*); *accord Orion*, 747 P.2d at 1075, (cites *Fountain* with approval), *cert. denied*, 486 U.S. 1022 (1986). See also *State v. The Mill*, 809 P.2d 434 (Colo. 1991) (finding a distinction between regulatory takings and inverse condemnation in order to provide a remedy when the government lacks condemnation power).

But see *Presbytery of Seattle v. King County*, 787 P.2d, 907 (Wash. 1990), *cert. denied*, 111 S. Ct. 2284 (1990), where the court's finding of no compensation for substantive due process violations—those regulations that do not advance a legitimate governmental interest—may be consistent with not awarding compensation against entities without compensation authority because there is no "public use" or "public purpose" in an invalid regulation. Also, *Florida Rock I* noted that a Tucker Act (takings claim) lawsuit assumes the propriety of the state action, 791 F.2d at 899. See also *supra* text accompanying notes 174-176.

283. 414 N.W.2d at 830. The "public harm" rationale may be logically related to the "nuisance doctrine," see *supra* note 231 and accompanying text, although the court did not specifically refer to nuisances. See also *supra* note 115 and accompanying text regarding the articulation of this theory by Professor Stoebuck. See also Frank I. Michelman, *Property, Utility, and Fairness*, *supra* note 88, at 1196-1201.

284. 414 N.W.2d at 831.

285. *Orion Corp. v. State of Washington*, 747 P.2d 1062 (Wash. 1987), *cert. denied*, 486 U.S. 1022 (1988). See also *Settle*, *supra* note 95.

286. *Orion*, 747 P.2d at 1073.

making it clear that the law in Washington is unique. The *Presbytery* case involved 4.5 acres of land owned by the Presbytery of Seattle, a church. Wetlands regulations made over half the property undevelopable. Although the plaintiff never applied for a permit,²⁸⁸ plaintiff sued and alleged that the county's ordinance, on its face, took the Presbytery's property. While the case likely could have been simply dismissed for failure to exhaust, the court noted some confusion in the pleadings about what constituted a taking and took upon itself the task, in "a consideration of recent . . . case law,"²⁸⁹ to outline the law of takings according to the Washington Supreme Court.

The most unusual and controversial part of the court's analysis in *Presbytery* was the establishment of a threshold test for even reaching a takings analysis. In short, the court ruled that if a regulation does not either: (1) go beyond preventing harm to the point that it actually enhances a publicly owned right in property, or (2) infringe upon any of what are called "fundamental attributes of ownership," then a challenge can be brought only on substantive due process grounds.²⁹⁰ Significantly, the court's definition of "fundamental attributes" is exceedingly narrow, naming only the rights to possess, exclude, and sell,²⁹¹ and ignores the right to build and use property discussed in *Nollan*.²⁹²

Furthermore, if a challenge is confined to due process grounds, the only remedy the Washington court allows "is invalidation of the regulation. No compensation . . . is warranted."²⁹³ Prohibiting compensation, "avoids intimidating the legislative body,"²⁹⁴ which is a rationale expressly rejected by the United States Supreme Court in *First Church* and in Justice Brennan's *San Diego* dissent.²⁹⁵

From the perspective of property owners, the *Presbytery* decision is disturbing; it could lead to the pre-*First Church* regime of abuse where after spending thousands of dollars in carrying costs (e.g., mortgages) and attorneys fees, a landowner might get an ordinance overturned, only to face a nearly identical and equally obnoxious ordi-

287. *Presbytery of Seattle v. King County*, 787 P.2d 907 (Wash. 1990), cert. denied, 111 S. Ct. 284 (1990).

288. 787 P.2d at 917.

289. *Id.* at 911. The "consideration of recent . . . case law" is also known as dicta.

290. *Id.* at 912-14. The court also ruled that the exhaustion doctrine applies in substantive due process challenges, a claim rejected by federal case law. See, e.g., *Yee v. City of Escondido*, 1992 WL 60434, *8; *Sinaloa Lake Owners Ass'n. v. City of Simi Valley*, 882 F.2d 1398 (9th Cir. 1989). See also *Herrington v. County of Sonoma*, 857 F.2d 567 (9th Cir. 1988).

291. 787 P.2d. at 912.

292. *Nollan*, 483 U.S. at 833 n.2.

293. 787 P.2d at 913.

294. *Id.*

295. *First Church*, 482 U.S. at 317-19; *San Diego*, 450 U.S. at 660-61, 655 n.22 (example where intimidation was in order). See *supra* notes 131-132 and accompanying text.

nance all over again.²⁹⁶ Under the *Presbytery* holding, property owners lose the ability to use land and government officials are not held accountable for constitutional takings violations.

In the event that a takings analysis is warranted, the tests advanced by the *Presbytery* court are consistent with federal law, except that federal law has never held that a regulatory action must always deny *all* use of property for a taking to occur.²⁹⁷ Instead of *Presbytery's* "all use" rule, each case should be looked at on an ad hoc basis.²⁹⁸

C. In New Hampshire, Persons Who Were on Notice That They Bought a Regulated Swamp Have No Reasonable Expectation of Compensation

In several decisions²⁹⁹ the supreme court of New Hampshire has opted to follow the *Marinette County* rule that there is no right to change the essential character of a wetland.³⁰⁰ In *Claridge v. New Hampshire Wetlands Board*,³⁰¹ the state Supreme Court upheld the trial court's finding that filling a wetland to build a house and septic system would do "irreparable damage to an already dangerously diminished and irreplaceable natural resource."³⁰² Thus, this finding represents an apparent trend for state courts to presume that all wetlands filling activities are inherently harmful. Such a trend has not been adopted by the Federal Circuit Court of Appeals.³⁰³

The New Hampshire court's reference to an "already . . . diminished . . . resource" is troubling. Does this mean it is acceptable for property owners to develop a resource until it is depleted, or until air pollution, noise, or traffic reaches a critical level? If so, those owners who are first with the bulldozers would win. Once a resource is depleted would all owners of undeveloped property be prevented from any development, and if so would these owners not bear a disproportionate share of the burden of protecting the depleted resource? And would it not give savvy property owners an incentive to immediately fill, develop, and build before their neighbors deplete the resource? Perhaps a more equitable burden sharing system would require those

296. See *supra* notes 131 and 132 and accompanying text.

297. See *supra* note 236.

298. *Penn Central*, 438 U.S. at 124. In *Keystone* the Court noted that a facial challenge was an "uphill battle" but did not indicate that *all* value of property must be denied. *Keystone*, 480 U.S. at 495. See, e.g., *Bell v. Town of Wells*, 557 A.2d 168 (Me. 1989).

299. These decisions were joined, but not written by Justice Souter.

300. See *supra* Part VIII(A). The *Marinette County* rule was also followed in a decision before Souter was on the state court. *Sibson v. State*, 336 A.2d 239, 243 (N.H. 1975).

301. 485 A.2d 287 (N.H. 1984).

302. *Id.* at 289.

303. *Florida Rock II*, 21 Cl. Ct. at 167; *Loveladies I*, 15 Cl. Ct. at 390, 395; see *supra* note 279 and accompanying text.

owners who have already depleted their share of the resource to compensate, through the mechanism of inverse condemnation, those owners who chose to not immediately develop.

In turning to the issue of how much economic value remained in the property, the *Claridge* court found that "the land continues to have some economic value."³⁰⁴ However, it appears that the court's real justification for finding a remaining economic value was that the owner had "notice of statutory impediments to the right to develop."³⁰⁵ There was no taking because the plaintiff had "constructive notice that the property was subject to state wetlands statutes,"³⁰⁶ and that there was a "strong public policy against the filling of saltmarshes."³⁰⁷ The court thought the *Claridges* chose the risk in light "of growing public concerns."³⁰⁸

In accordance with *Claridge*, the rule in New Hampshire is that a purchaser who is "on notice" of the regulations has no right to inverse-condemnation damages.³⁰⁹ Only the owner at the time the regulations are enacted has such rights. Of course, the original owner theoretically has the right to sell those rights to the purchaser, but this should be clearly spelled out in the real estate contract.³¹⁰

Following the doctrine that there are no investment-backed ex-

304. 485 A.2d at 289. Although the values mentioned (sale to abutters or using a neighbor's property for a leach field) appear to be fanciful, or as the concurrence (not joined by Souter) noted "conjectural" and "of little solace." *Id.* at 292 (King, C.J., concurring).

305. *Id.* at 291.

306. *Id.* at 292.

307. *Id.*

308. *Id.* The *Claridge* "notice" rule was upheld in *State Wetlands Bd. v. Marshall*, 500 A.2d 685, 689-90 (N.H. 1985) (Souter was on majority panel). In 1989, the notice rule was upheld in *Rowe v. Town of North Hampton*, 553 A.2d 1331, 1335-36 (N.H. 1989). In addition, the property owner in *Rowe* "failed to provide any evidence that her plans for the lot would not harm the wetland," and her property "would still have market value even if construction were not allowed." *Id.* at 1336.

It would be interesting to present an analogous case to the court, but one where the property owner's family had owned the land for many years, perhaps generations, before the promulgation of wetlands regulations. Would that owner be considered to have substantial investment-backed expectations? Or would the mere privilege of owning the property, paying taxes on it, and watching its value appreciate with inflation be enough?

309. The knowledge of the landowner at time of purchase was found to be relevant in *Florida* and *Maine*. See *Graham v. Estuary Properties, Inc.*, 399 So. 2d 1374, 1382 (Fla. 1981); *Maine Land Use Regulation Comm'n v. White*, 521 A.2d 710 (Me. 1987).

Other states have considered this factor indirectly in the context of the doctrine of "vested rights" whereby a developer who is far enough along in a permit process is seen to have right to develop, regardless of subsequent changes in the law. There is no doctrinal uniformity in the vested rights doctrine. See I NORMAN WILLIAMS, JR., & JOHN M. TAYLOR, *AMERICAN PLANNING LAW* § 5A.15, at 166 (1988). However, in *Ciampetti [sic] v. United States*, 18 Cl. Ct. 548 (1989), the claims court quoted that knowledge of wetlands regulations is but one factor in the "constitutional balance." *Id.* at 558.

310. See *supra* note 207 and accompanying text.

pectations (at least for subsequent purchasers) after regulations are passed, the New Hampshire court in *Rowe v. North Hampton* found that the permit denial “did not prevent the plaintiff from maintaining current uses of the property, but rather prevented a major change in the wetland for *speculative benefit*.”³¹¹ Whether this will evolve into an “antispeculative-profit” rule is anybody’s guess.³¹² In short, the evolution of the notice rule in New Hampshire may have some implications for federal law, now that Justice Souter is on the United States Supreme Court.³¹³

D. In Florida, There Is No Taking When a Property Owner Buys a Wetland on Notice and Is Denied a Permit to Build

Where a property owner purchased land “with full knowledge that part of it was totally unsuitable for development,” there was no taking.³¹⁴ Relying on *Marinette County*, the court found no right to “change the essential natural character” of land.³¹⁵ Furthermore, the court equated the filling with pollution, thus adopting a nuisance like exception for wetlands filling.³¹⁶ In summary, the Florida Court has taken a strong stand; it will not find a taking when a wetlands permit is denied. Considering the outcome in the Claims Court in *Florida Rock* and *Loveladies*, it may behoove property owners in Florida to apply for a federal permit first and sue the federal government in federal court.³¹⁷

311. 553 A.2d at 1336 (emphasis added).

312. *But compare* Ciampetti [sic] v. United States, 18 Cl. Ct. 548, 558 (1989) (*Ciampitti I*) (rejecting notice rule) *with* *Ciampitti II*, 22 Cl. Ct. 310 (holding no taking when property owner had unreasonable expectation to evade current regulations).

313. This “notice rule” appears to be implicit in *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 1011 (1984). In his dissent in *Nollan*, Justice Brennan concluded that the Nollans were “clearly on notice,” that the Commission would condition a new development permit with a beach access permit and therefore had “no reasonable expectation” of maintaining their private beach. 483 U.S. at 858-60 (Brennan, J., dissenting). See also discussion in Daniel R. Mandelker, *Waiving the Taking Clause: Conflicting Signals from the Supreme Court*, LAND USE L. & ZONING DIG., Nov. 1988, at 3, 5.

As noted by Mandelker, however, Justice Scalia’s majority opinion did not agree. *Id.* (citing *Nollan*, 483 U.S. at 833 n.2). Considering the New Hampshire court’s embrace of the notice rule, the replacement of Justice Brennan by Justice Souter may have little effect on the United States Supreme Court’s scorecard on the issue.

314. *Graham v. Estuary Properties, Inc.*, 399 So. 2d 1374, 1382 (Fla. 1981). By “totally unsuitable,” the court meant the land would be unsuitable for homes unless filled.

315. *Id.*

316. *Id.* The Florida Courts of Appeal have followed the *Graham* “status quo” test. See, e.g., *Glisson v. Alachua County*, 558 So. 2d 1030, 1034-35 (Fla. Dist. Ct. App. 1990); *Namon v. State*, 558 So. 2d 504, 505 (Fla. Dist. Ct. App. 1990) (a “subjective expectation that the land could be developed” is not a vested property right).

317. In *Loveladies II*, the court found the lack of state permits was not an impediment to a takings claim. 21 Cl. Ct. at 156-57.

E. Appeals Courts in New York Have Awarded Just Compensation for Wetlands Fill Denials—Subject to a Unique Offset

Two cases from New York suggest a novel approach to wetlands regulations—an approach that properly follows *Nollan*, appears to recognize that compensation is due when property is only partially taken, and which also requires the state government to compensate a property owner only for the loss of value attributable to state regulations (as opposed to county or federal regulations). In *Berwick v. State (Berwick I)*,³¹⁸ the court held: “[W]here a claimant has demonstrated that development of the property is economically feasible, and . . . that application of the wetlands regulations has destroyed the economic value of the parcel, or all but a bare residue of that value, he is entitled to an increment above the restricted value.”³¹⁹ Therefore, if a landowner can prove that wetlands regulations harmed the value of property, the landowner has a chance to recover damages.

However, the court later modified the holding by noting that the state should not be responsible for diminution in value caused by local and federal regulations.³²⁰ Presumably, the property owner must file suit against those other governmental entities for the remainder of the value. How the federal and county governments would react to such lawsuits is a very open question.

In New York, therefore, a takings suit will be complicated by the existence of overlapping local, state, and federal regulations. If possible, all governmental entities would ideally be joined in one suit after all administrative remedies are exhausted at all levels of government. However, once a suit is brought, New York appears willing to grant compensation.

F. Connecticut Will Find a Taking When a Wetland Owner Has a Reasonable Expectation of Development

In *Gil v. Inland Wetlands and Watercourses Agency*,³²¹ the Connecticut Supreme Court impliedly rejected the *Just v. Marinette County* doctrine, at least in part.

The regulating agency had argued that any claim of a loss of value to property should be measured only by valuing “the property . . . in its natural state; not . . . as the applicant might wish to

318. 486 N.Y.S.2d 260 (App. Div. 1985).

319. *Id.* at 268.

320. *Berwick v. State (Berwick)*, 552 N.Y.S.2d 409, 411 (App. Div. 1990). Of course, the mere designation of property as a wetland is not a taking in New York. *Wedinger v. Goldberger*, 522 N.E.2d 25 (N.Y. 1988).

321. 593 A.2d 1368 (Conn. 1991). This case was an appeal of an appellate court decision upholding a \$280,000 award for a taking of wetland property. *See Gil v. Inland Wetlands and Watercourses Agency*, 580 A.2d 538 (Conn. App. Ct. 1990).

change it."³²² The Connecticut Supreme Court speculated that this might be a fair argument if an owner purchased property without "any reasonable investment-backed expectation of development,"³²³ but that this was not the case in *Gil*. Instead, the court ruled that a "landowner, who purchased property with a reasonable expectation of residential or commercial development . . . [suffers] a taking if regulatory constraints allow him to use his land only in its natural state without any economically viable alternative use."³²⁴

Unfortunately for the wetland owner, the court was not convinced that the regulation had left the land without economically viable alternative uses. Although four development permits had been denied, these were all for a home nearly twice the size of the neighboring homes.³²⁵ In Connecticut, therefore, to prevail on a takings claim for a wetland, a property owner will have to prove first that there was a reasonable expectation of development of the wetland, and second that the proposed use of the wetland is not "exceedingly grandiose."³²⁶

G. South Carolina Equates the Police Power with a Nuisance Exception to Takings

In *Lucas v. South Carolina Coastal Council*,³²⁷ and *Beard v. South Carolina Coastal Council*,³²⁸ the South Carolina Supreme Court found no taking under a statute prohibiting construction or reconstruction of homes near the beach. The court reasoned that because the law had an important public safety rationale, there could be no taking. This was so despite the fact that the trial court in *Lucas* had awarded over one million dollars in takings damages.³²⁹ The court reasoned that allowing building close to the shoreline presented an unacceptable threat to public health and safety. These cases reflect, from the property owners' perspective, an extreme adoption of the so-

322. *Id.* at 1373 (citing *Manor Dev. Corp. v. Conservation Comm.*, 433 A.2d 999 (Conn. 1980), citing *Just v. Marinette County*, 201 N.W.2d 761 (Wis. 1972)).

323. *Gil*, 593 A.2d at 1373. This formulation implicitly indicates that the "notice" rule discussed with respect to New Hampshire cases in Part VIII(c), *supra*, can apply in certain circumstances.

324. *Id.* at 1373-74.

325. *Id.* at 1375.

326. *Id.* (citation omitted). Also, tracking the balancing language of *Florida Rock*, the Connecticut court earlier held that "under the closely related statutes regulating tidal wetlands . . . the public interests are to be balanced against those of private landowners in determining whether a taking has occurred." *Cioffoletti v. Planning and Zoning Comm'n*, 552 A.2d 796, 805 (Conn. 1989) (citing *Brecciaroli v. Commissioners of Envtl. Protection*, 362 A.2d 948 (Conn. 1975)).

327. 404 S.E.2d 895 (S.C. 1991), *cert. granted*, 112 S. Ct. 436 (1991) (statute which forbids rebuilding close to shoreline is not a taking).

328. 403 S.E.2d 620 (S.C. 1991), *cert. denied*, 112 S. Ct. 185 (1991) (no taking from denial of permit to build bulkhead). See also *Esposito v. South Carolina Coastal Council*, 939 F.2d 165, 170-71 (4th Cir. 1991) (no taking or due process violation from same statute).

329. *Lucas*, 404 S.E.2d at 896.

called nuisance exception.³³⁰

H. Maine Has Recognized Regulatory Takings Only in the Context of a Legislative Extension of the Public Trust Doctrine

Only once have the courts of Maine recognized that a regulation can, in the words of Justice Holmes' 1922 holding, go "too far."³³¹ In *Maine Land Use Regulation Comm'n v. White*,³³² no taking was found when private property was designated as a deer yard despite the fact that designation as a deer yard made it impossible to further develop the property. The court presented two rationales for this holding. First, in an apparent adoption of the notice rule, the court stated that "the 'taking,' if any, occurred . . . before the Whites acquired the property. Second, the record demonstrates on the basis of the Whites' own testimony that the property has not been substantially reduced in value."³³³

Similarly in *Sibley v. Inhabitants of Town of Wells*,³³⁴ a zoning ordinance that reduced the value of a lot from \$4,200 to \$1,000 was not a taking because the land retained "substantial value."³³⁵ These cases make it plain that the courts in Maine do not give tremendous weight to the "economically viable use" prong of *Agins v. City of Tiburon*.³³⁶

Finally, however, in *Bell v. Town of Wells*,³³⁷ the court ruled in favor of property owners in a facial takings challenge to a statute that purported to give the public a right to use privately owned intertidal lands. The supreme court held that Maine's attempt to extend a so-called "public trust doctrine" to private intertidal property was void as an unconstitutional taking. This is the only instance where a Maine regulation has been found to be an inverse condemnation taking. It should be noted, however, that this case involved a physical invasion, rather than a regulation that deprived property of value.

330. See *Keystone*, 480 U.S. at 513 (Rehnquist, J., dissenting) (there is always a taking when *all* value of property taken, even in light of alleged nuisance); accord *McDougal v. County of Imperial*, 942 F.2d 668 (9th Cir. 1991). See *supra* note 236 and accompanying text.

331. *Bell v. Town of Wells*, 557 A.2d 168 (Me. 1989).

332. 521 A.2d 710 (Me. 1987).

333. *Id.* at 713. The court provided absolutely no legal analysis beyond the quoted passage, except for a citation to *Seven Islands Land Co. v. Maine Land Use Regulation Comm'n*, 450 A.2d 475 (Me. 1982), a case where after permission was granted to cut trees on only 432 acres in a 25,000 acre township, the court did not find the land "substantially useless" and therefore there was not a taking.

334. 462 A.2d 27 (Me. 1983).

335. See also *Hall v. Board of Env'tl. Protection*, 528 A.2d 453, 456 (Me. 1987) (no taking where comparable adjacent properties had sold for "substantial" sums); *Opinion of the Justices*, 69 A. 627 (Me. 1908) (regulation of timber practices not a taking when owners still have control and opportunity to realize values).

336. 447 U.S. at 260. See *supra* text accompanying note 162.

337. 557 A.2d 168 (Me. 1989).

In short, Maine property owners bear a difficult burden of demonstrating factually that the value of their property has been taken.

IX. A FEW NOVEL TAKINGS DIVERSIONS FROM THE ENDANGERED SPECIES AND WILD HORSE AND BURRO ACTS

As discussed in Part II(B)(2) of this article, the restrictions against using property designated as the habitat of an endangered species may rise to a takings. There is also a unique subset of takings law arising out of the problem of what happens when critters eat private property, and the property owners are forbidden by law to do anything about it. Is there a taking?

In *Mountain States Legal Foundation v. Hodel*,³³⁸ the Tenth Circuit Court of Appeals overturned a district court decision that the government took property when wild horses ate privately owned forage. Under the Wild Horses and Burros Protection, Management and Control Act,³³⁹ it is unlawful to "harass" wild horses when done "maliciously." Assuming, but not holding, that this meant the plaintiff ranchers could not drive wild horses off private range, the court concluded there could be no taking. Citing a long line of precedent that damage to private property by protected wildlife is not a taking,³⁴⁰ the court found no loss of investment-backed expectations.³⁴¹ There was a strong dissent by Judge Speth who concluded that the government's "pervasive" control over the horses, combined with the unique status of the horses as "components" of the federal lands, worked together to create liability.³⁴²

In the context of the Endangered Species Act, the Ninth Circuit Court of Appeals held that a sheep rancher was not entitled to compensation when protected grizzly bears ate his sheep.³⁴³ Under normal circumstances the rancher would have shot the bear and accepted any incidental losses incurred up to the time the bear was terminated. But, because he was not allowed to kill the bears, the rancher argued a taking. The Ninth Circuit Court of Appeals, in a discussion of the lack of government liability arising out of actions of wild animals, found no taking.³⁴⁴ In his dissent from the denial of certiorari, Justice

338. 799 F.2d 1423 (10th Cir. 1986).

339. 16 U.S.C. § 1331 (1988).

340. 799 F.2d at 1428-29.

341. *Id.* at 1431.

342. *Id.* at 1431-38.

343. *Christy v. Hodel*, 857 F.2d 1324 (9th Cir. 1989), *cert. denied*, *Christy v. Lujan*, 490 U.S. 1114 (1989). For two thoughtful discussions on the implications of this case on takings and the doctrine of the right to protect property, see Lauri Alsop, Comment, *The Right to Protect Property*, 21 ENVTL. L. 209 (1991); Geoffrey L. Harrison, Comment, *The Endangered Species Act and Ursine Usurpations: A Grizzly Tale of Two Takings*, 58 UNIV. CHI. L. REV. 1101 (1991) (concludes that the Endangered Species Act "took" property under both physical invasion and regulatory takings analyses).

344. *Christy v. Hodel*, 857 F.2d 1324 (9th Cir. 1989).

White put the issue in terms that even his Eastern brethren could understand:

There can be little doubt that if a federal statute authorized park rangers to come around at night and take petitioner's livestock to feed the bears, such a governmental action would constituted [sic] a 'taking' . . . [t]hus, if the Government decided (in lieu of the food stamp program) to enact a law barring grocery store owners from 'harassing, harming, or pursuing' people who wish to take food off grocery shelves without paying for it, such a law might well be suspect under the Fifth Amendment. For similar reasons, the Endangered Species Act may be suspect as applied in petitioner's case.³⁴⁵

X. CIVIL RIGHTS CLAIMS

Any practitioner considering bringing an inverse condemnation claim should also be cognizant of remedies (including the recovery of attorneys' fees) under the Civil Rights Act.³⁴⁶ The *Presbytery* court ruled that there would be no "takings" damages for situations where there was only a due process violation. However, attorneys should not forget that if there is any indication that due process (or any other constitutional rights) have been violated, a civil rights Section 1983 claim should be explored. Title 42, United States Code, Section 1983, provides for monetary compensation when officials of state and local government violate a person's civil rights. An unlawful or unconstitutional regulation that affects private property rights is actionable under this section.³⁴⁷

If the unlawful regulatory action is a federal one, rather than a state one, then a Section 1983 remedy will not be available, although a *Bivens* civil rights action might be in order.³⁴⁸

XI. CONCLUSION

Whereas the law dealing with the use of the environment is driven by statute and regulation, the law of takings is driven by case law. The cases are often contradictory, confused, and confusing. Nevertheless, when applying the law of takings to the regulation of the

345. *Christy*, 490 U.S. at 1115-16.

346. 42 U.S.C. §§ 1983, 1988 (1988).

347. *San Diego*, 450 U.S. at 636 (Brennan, J., dissenting); *Lake Country Estates, Inc. v. Tahoe Regional Planning Agency*, 440 U.S. 391 (1979); see also *Herrington v. County of Sonoma*, 834 F.2d 1488 (9th Cir. 1987), modified, 857 F.2d 567 (9th Cir. 1988); *Wheeler v. City of Pleasant Grove*, 833 F.2d 267 (11th Cir. 1987) (discussed in Part IV(A)(1), *supra*). See also *Suess Builders v. City of Beaverton*, 656 P.2d 306 (Ore. 1982), for a discussion by the Oregon Supreme Court of civil rights claims in a takings context.

348. *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388 (1971).

environment, certain principles should be followed:

First, be sure to exhaust any available administrative remedies. Facial attacks on a regulation and/or reliance on a futility argument are not favored.

Second, be prepared to marshal the facts necessary to prove the value (or lack of value) of the property in question, the investment-backed expectations, and whatever compelling reasons there may be in favor of (or against) the development in question.

Third, it is difficult, but not impossible, to prove a taking under the rule that regulation takes if it does not substantially advance a legitimate governmental interest. Even if one cannot prove the regulation fails this threshold totally, any showing that the regulation is too harsh, overkill, or whatever, may influence some courts when they balance the economic impacts of the regulation.

Fourth, in analyzing the purpose of a regulation, it is clear that the more a regulation does to prevent public harm or abate a nuisance, the less likely it is to be a taking. Further, the more important it will be to prove loss of economically viable use.

Fifth, in addressing the economic impacts of a regulation, courts are split on how to deal with parcels that have been partially developed in the past, or are partially developable today. If at all possible, a property owner with a takings claim would do well to focus a lawsuit on the property that is actually impacted by the regulation.

As the government decides that more and more land deserves absolute protection against human use, the law of takings is sure to evolve. Supporters of property rights hope that it will evolve in the direction of providing compensation for overregulated property owners. This will thereby discourage excessive regulation of property by the state and federal governments. Supporters of government regulation, especially over land use, on the other hand, hope for a broadening of the "nuisance exception" to takings, wishing that the exception will one day be considered as broad as the police power itself.

For those of us who believe that there is a connection between good government, all our individual liberties, and the protection of private property rights, the only fair and equitable solution to the wetlands, endangered species, and other environmental issues will be to enforce the spirit and letter of the Fifth Amendment's Takings Clause. When society makes a determination that some wetlands, habitats, or species are so valuable that they must be protected, then society as a whole should bear the burden of the protection by paying for the necessary property. Without this protection, we may have wetlands and we may have habitat, but we will not have liberty. We can, and ought, to have wetlands, habitat, and liberty.