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REGULATORY TAKINGS: A CONTRACT APPROACH

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Professor Martinez, the author of the preceding Article, states:

> Traditional analyses of the takings problem seek an accommodation between private property rights and governmental power. This Article proposes instead that the takings problem be analyzed as the search for the proper demarcation between private and public "bundles of rights" with respect to property. The doctrinal framework for this separation is a concept that the relationship between private and public rights "in" property is an "implied contract" between government and individual. The Article proposes an analytical approach that asks what expectations a property owner has and when those expectations were formed. In my Article, I suggest that a sharp division between property and governmental regulation of it is unjustifiable and leads to a takings jurisprudence that is unworkable. I suggest a unitary analysis which focuses instead on the purposes that property serves.

I. Introduction

In every modern society, land and its use rank among the government's most important concerns.[1] If a society were measured

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1. *See generally* MODEL LAND DEV. CODE (Proposed Official Draft 1975); 1 R. ANDERSON, AMERICAN LAW OF ZONING §§ 1.02 - 1.11 (3d ed. 1986); D. HAGMAN, URBAN PLANNING AND LAND DEVELOPMENT CONTROL LAW §§ 28-32 (1971); 8 E. MCQUILLAN, THE LAW OF MUNICIPAL CORPORATIONS §§ 25.01 - 25.46 (3d ed. 1983); 5 R. POWELL & P. ROHAN, POWELL ON REAL PROPERTY ¶¶ 745-747 (1986); 1 P. ROHAN, ZONING AND LAND USE CONTROLS §§ 1.02 - 10.04 (1987).

exclusively by the skill with which this concern had been handled, the United States would be less than a success. In fact, until only last year, the Supreme Court had avoided making substantive decisions in the area of land use regulation since 1981.[2] The Court's 1987 decisions[3] thus ended an era in which the most influential opinion was, in large part, a dissenting opinion written by Justice Brennan in *San Diego Gas & Elec. Co. v. San Diego*.[4]

Although the actual impact of the Court's most recent decisions on the future of land use regulation remains unknown, it is certain to be extensive—and expensive. Specifically, the decisions fail to give either land owners or municipalities clear-cut guidance in answering the frequently litigated question: when does land use regulation go too far and become a taking under the fifth amendment?[5]

This Article begins, in Part II, by defining the parameters of the fifth amendment's taking clause. Part III then reviews the various tests used in determining whether governmental action constitutes a taking. Part IV places the recent Supreme Court decisions within the framework of case law as it has evolved since the Court's 1922 landmark decision, *Pennsylvania Coal Co. v. Mahon*.[6] Finally, the Article suggests a formula based on well-established contract principles for analyzing the impact of land use regulation on private property interests.

II. The Fifth Amendment's Taking Clause: Defining the Parameters

This Article focuses on the relationship between land use regulation and the taking clause of the fifth amendment, which provides that

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2. San Diego Gas & Elec. Co. v. San Diego, 450 U.S. 621 (1981). The Court dismissed the appeal for lack of a final state court judgment. *Id.*; *see also* MacDonald, Sommer & Frates v. Yolo County, 477 U.S. 340 (1986); Williamson County Regional Planning Comm'n v. Hamilton Bank, 473 U.S. 172 (1985); Agins v. Tiburon, 447 U.S. 255 (1980).

3. *See* Keystone Bituminous Coal Ass'n v. DeBenedictis, 107 S. Ct. 1232 (1987); First English Evangelical Lutheran Church v. Los Angeles County, 107 S. Ct. 2378 (1987); Nollan v. California Coastal Comm'n, 107 S. Ct. 3141 (1987).

4. *San Diego Gas & Elec.*, 450 U.S. at 636 (Brennan, J., dissenting). In his dissent, Justice Brennan disputed the majority's holding that no final state court judgment had been reached and addressed the merits of the case. He found that a property owner should receive compensation for the period of time during which a confiscatory regulation denies all beneficial use of the property, even if the regulation is later withdrawn or amended. A majority of the Court adopted this view in First English Evangelical Lutheran Church v. Los Angeles County, 107 S. Ct. at 2388. See *infra* notes 185-98 for a discussion of *First English*.

5. See *infra* note 7 and accompanying text for a discussion of the fifth amendment's taking clause.

6. 260 U.S. 393 (1922). *See infra* notes 97-114 and accompanying text.

private property shall not "be taken for public use, without just compensation."[7] As the Supreme Court observed in *United States v. General Motors Corp.*,[8] the critical terms are "property,"[9] "taken,"[10] and "just compensation."[11]

What is meant by the word "property"?[12] In a case involving the effect of New York's Landmark Preservation Law on the ability of the owner of Penn Central Terminal to construct a fifty-five-story office tower above the terminal, Justice Rehnquist conceded that it is conceivable that the word property was "not used in the 'vulgar and untechnical sense of the physical thing with respect to which the citizen exercises rights recognized by law.' " Rather, the word denoted " 'the *group of rights* inhering in the citizen's relation to

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7. U.S. CONST. amend. V.

8. 323 U.S. 373, 377 (1944).

9. *See infra* notes 12-15 and accompanying text.

10. *See infra* notes 23-59 and accompanying text.

11. For a discussion of the just compensation issue, which exceeds the scope of this Article, see Berger & Kanner, *Thoughts on the White River Junction Manifesto: A Reply to the "Gang of Five's" Views on Just Compensation for Regulatory Taking of Property*, 19 LOY. L.A.L. REV. 685 (1986); Costonis, *Presumptive and Per Se Takings: A Decisional Model for the Taking Issue*, 58 N.Y.U. L. REV. 465 (1983); Michelman, *Property, Utility, and Fairness: Comments on the Ethical Foundations of "Just Compensation" Law*, 80 HARV. L. REV. 1165 (1967); Sallet, *Regulatory "Takings" and Just Compensation: The Supreme Court's Search for a Solution Continues*, 18 URB. LAW. 635 (1986); Williams, Smith, Siemon, Mandelker & Babcock, *The White River Junction Manifesto*, 9 VT. L. REV. 193 (1984).

12. Black's Law Dictionary defines property in the following manner:

> Property. That which is peculiar or proper to any person; that which belongs exclusively to one. In the strict legal sense, an aggregate of rights which are guaranteed and protected by the government. The term is said to extend to every species of valuable right and interest. More specifically, ownership; the unrestricted and exclusive right to a thing; the right to dispose of a thing in every legal way, to possess it, to use it, and to exclude every one else from interfering with it. That dominion or indefinite right of use or disposition which one may lawfully exercise over particular things or subjects. The exclusive right of possessing, enjoying, and disposing of a thing. The highest right a man can have to anything; being used to refer to that right which one has to lands or tenements, goods or chattels, which no way depends on another man's courtesy.

BLACK'S LAW DICTIONARY 1095 (5th ed. 1979) (citation omitted). Compare this legal definition with the following:

> Property—2a: something that is or may be owned or possessed . . . b: the exclusive right to possess, enjoy, and dispose of a thing: a valuable right or interest primarily a source or element of wealth . . . c: something to which a person has a legal title: an estate in tangible assets (as lands, goods, money) or intangible rights (as copyrights, patents) in which or to which a person has a right protected by law.

WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 1818 (1971).

the physical thing, *as the right to possess, use and dispose of it.*' "[13]

Thus, the word property means more than a physical object or piece of land. Ownership of property is often described as a bi ndle of rights with each of the elements of ownership a strand or :alk within the bundle.[14] The lay person, however, may not thir in terms of a bundle of rights, but instead may perceive proper in the manner that one commentator has suggested:

> [T]hat is property to which the following label can be attached To the world: Keep off unless you have my permission, whicl I may grant or withhold. Signed: Private Citizen. Endorsed: Th State.[15]

These words imply a very complex relationship between the indiv lual and the state concerning the ownership of property. Withir the context of this complex relationship, the private citizen and the :ate establish their respective rights. In fact, there are actually two bu dles of rights—one inhering in the individual and one in the state. The individual's bundle holds three basic stalks: (1) the right to ph; ical possession, including the right to exclude others;[16] (2) the rig to alienate the property;[17] and (3) the right to use the property a the owner sees fit.[18]

Similarly, the state has a parallel three-stalk bundle: (1) the ght to take property for public use;[19] (2) the right to tax and re uire fees;[20] and (3) the right to regulate or limit the use of proper to prevent a harm to, or promote a benefit to, society.[21] The delic tely balanced relationship between these two interrelated bundles of r: hts,

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13. Penn Cent. Transp. Co. v. New York City, 438 U.S. 104, 142-43 978) (Rehnquist, J., dissenting) (quoting United States v. General Motors Corp 323 U.S. 373, 377-78 (1944)) (emphasis added); *see infra* notes 119-26 and accomp. ying text.

14. *See, e.g.*, United States v. Stafford, 727 F.2d 1043, 1052 (11th Cir. 984) (bundle of rights); Standard Oil Co. v. Clark, 163 F.2d 917, 930 (2d Cir. 947) (bundle of rights or other legal relations); People v. Walker, 33 Cal. App. 18, 20, 90 P.2d 854, 855 (1939) (complex bundle of rights, duties, powers ar im- munities); Clifton Hills Realty Co. v. Cincinnati, 60 Ohio App. 443, 451, 2 N.E. 2d 993, 998 (1938) (bundle of privileges); Barclay White Co. v. Unemplc nent Compensation Bd. of Review, 159 Pa. Super. 94, 99, 46 A.2d 598, 602 946) (bundle of rights).

15. Cohen, *Dialogue on Private Property*, 9 RUTGERS L. REV. 357. 374 (954).

16. *See infra* notes 23-59 and accompanying text.

17. *See infra* notes 60-68 and accompanying text.

18. *See infra* notes 68-73 and accompanying text.

19. *See infra* notes 23-59 and accompanying text.

20. *See infra* notes 60-68 and accompanying text.

21. *See infra* notes 69-144 and accompanying text.

which has developed simultaneously though not always at the same pace, has been described as an implied contract.[22]

A. The Right to Physical Possession

The relationship between the citizen and the state is most easily perceived in the interaction between the first stalks in each of the bundles. The individual's first stalk, the right to physical possession, may include both permanent and temporary possession, the right to exclude others, and freedom from physical invasion. The state's first stalk is the right to take private property for public use.

1. Freedom From Permanent and Temporary Takings

When the state takes permanent physical possession of property for public use it must simultaneously recognize the individual's right to just compensation. Assuming that the state is legitimately exercising its police power, the "implied contract" requires that the individual relinquish his rights in favor of the state. At the same time, the contract requires the state to pay for this surrender.

This concept of exclusive physical possession has a long history in United States case law. In the earliest cases, the state took a portion of an individual's property for such classic purposes as constructing roads, railroads, and military installations.[23] More re-

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22. Implied contract has been defined in the following manner:

> A contract inferred from the conduct of the parties, although not expressed in words. Implied in fact:—a real contract but one *inferred from the circumstances*, the conduct, acts, *or relation of the parties*, rather than from their spoken words.

BALLENTINE'S LAW DICTIONARY 588 (3d ed. 1969) (emphasis added) (citations omitted).

The law is rich with circumstances and relationships that imply an agreement. For example, a contract to marry can be deduced from the relationship and conduct of the parties even absent express promissory words. *See* Homan v. Earle, 53 N.Y. 267 (1873). As between a public utility and its consumers, a contract to furnish a particular amount of its product will be implied without an express agreement. *See* Humphreys v. Central Kentucky Natural Gas Co., 190 Ky. 733, 229 S.W. 117 (1921). When no express contract exists, the rendering of services by an attorney to a client who accepts such benefits will create an implied contract. *See* Royal Crown Bottling Co. v. Chandler, 226 S.C. 94, 83 S.E.2d 745 (1954).

23. *See, e.g.*, Rindge Co. v. Los Angeles County, 262 U.S. 700 (1922) (highways); United States v. Joint Traffic Ass'n, 171 U.S. 505 (1898) (railroads); Secombe v. Milwaukee & St. Paul Ry., 90 U.S. (23 Wall.) 108 (1874) (railroads); Olcott v. Fond du Lac County, 83 U.S. (16 Wall.) 678 (1872) (railroads); Mills v. St. Clair County, 49 U.S. (8 How.) 569 (1850) (roads and ferry landings); Iriarte v. United States, 157 F.2d 105 (1st Cir. 1946) (military installation); City of Oakland v. United States, 124 F.2d 959 (9th Cir. 1942) (military installation), *cert. denied*, 316 U.S. 679 (1942); United States v. Certain Lands, 78 F.2d 684 (6th Cir. 1935) (public buildings), *cert. denied*, 297 U.S. 726 (1936); *In re* Military Training Camp, 260 F. 986 (E.D. Va. 1919) (military installation).

cently, the state has taken large tracts of land to create or protect public parks, forests and national monuments.[24] In *Loretto v. Teleprompter Manhattan CATV Corp.*,[25] the physical possession at issue constituted merely a few inches on the roof and a few inches along the side of a building.[26] Nonetheless, the Court held that under the fifth amendment, this *de minimis* physical possession constituted a taking and required just compensation.[27] Thus, it is well established that whether permanent physical possession consists of an entire parcel, a significant part of it, or a slender six-inch box and one-half-inch cable, under the circumstances, the state violates the individual's right to possession and must fulfill its duty to pay just compensation.

Moreover, an occasional or temporary taking by the state also entitles the individual to just compensation. For example, in time

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24. *See, e.g.*, United States *ex rel.* Tennessee Valley Auth. v. Welch, 327 U.S. 546 (1946) (national park); Roe v. Kansas *ex rel.* Smith, 278 U.S. 191 (1928) (historical site); United States v. Gettysburg Elec. Ry., 160 U.S. 668 (1896) (historical site); Barnidge v. United States, 101 F.2d 295 (8th Cir. 1939) (historical site); Coggeshall v. United States, 95 F.2d 986 (4th Cir. 1938) (national forest); United States v. 546.03 Acres, More or Less, of Land Situated in Union Tp., 22 F. Supp. 775 (W.D. Pa. 1938) (national park).

25. 458 U.S. 419 (1982). The case involved a New York law requiring landlords to permit cable television installations on their property for the benefit of their tenants, but limiting the landlords' compensation to a one-time, $1 payment. The Court made the following statements:

> Few would disagree that if the State required landlords to permit third parties to install swimming pools on the landlords' rooftops for the convenience of the tenants, the requirement would be a taking. If the cable installation here occupied as much space, again, few would disagree that the occupation would be a taking. But constitutional protection for the rights of private property cannot be made to depend on the size of the area permanently occupied.

Id. at 436-37. "[W]hether the installation is a taking," the Court continued, "does not depend on whether the volume of space it occupies is bigger than a breadbox." *Id.* at 438 n.16.

The Court narrowed the application of this holding in F.C.C. v. Florida Power Corp., 107 S. Ct. 1107 (1987), finding that the utility company's rights had not been taken by a federal regulation limiting the amount the company could charge CATV companies, under contracts the utilities chose to enter, for use of the utility company's poles. The Court distinguished *Loretto* from *Florida Power*:

> [W]hile the statute we considered in Loretto specifically required landlords to permit permanent occupation of their property by cable companies, nothing in the Pole Attachments Act . . . gives cable companies any right to occupy space on utility poles, or prohibits utility companies from refusing to enter into attachment agreements with cable operators.

Id. at 1112.

26. *Loretto*, 458 U.S. at 422.

27. *Id.* at 436-37.

of war the state's need becomes superior to that of the individual; the state then acts within its authority to take property to further the war effort.[28] Nonetheless, the contractual relationship does not cease to exist: such action entitles the individual to just compensation. Thus, in *United States v. General Motors Corp.*,[29] the federal government took space within a warehouse for a period of just over one year. The Supreme Court found that the government had the right to take the space for public use and that the individual had the right to compensation for the interference with his possession.[30] The Court noted:

> The courts have held that the deprivation of the former owner rather than the accretion of a right or interest to the sovereign constitutes the taking. Governmental action short of acquisition of title or [permanent] occupancy has been held, if its effects are so complete as to deprive the owner of all or most of his interest in the subject matter, to amount to a taking.[31]

2. *The Right to Exclude*

When governmental action restricts the right to exclude others but technically leaves the owner in possession, the parties' rights and duties are not always clear. For example, in *Kaiser Aetna v. United States*,[32] the government was denied the right to force a marina owner to allow access to the public without compensation. After obtaining the necessary Army Corps of Engineers permits, the owner dredged a shallow lagoon to create a private marina surrounded by a housing community.[33] The government claimed that the lagoon was included within the navigable waters of the United States and thus the owners could not lawfully exclude the public.[34] The Supreme Court agreed that the marina fell within navigable waters and therefore was subject to a navigational servitude.[35] But the Court had

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28. *See* Annotations, *Compensation for Property Confiscated or Requisitioned During War*, 149 A.L.R. 1451 (1944), 148 A.L.R. 1384 (1944), 147 A.L.R. 1295 (1943) and 137 A.L.R. 1290 (1942).

29. 323 U.S. 373 (1944).

30. *General Motors* primarily involved the issue of what constitutes just compensation—more particularly, future loss of profits, moving expenses, loss of good will, cost of removing fixtures or consequential damages, etc.

31. *General Motors*, 323 U.S. at 378.

32. 444 U.S. 164 (1979).

33. *Id.* at 167.

34. *Id.* at 170.

35. *Id.* at 171. The government imposed a navigational servitude when "the public acquired a right of access to what was once petitioner's private pond." *Id.* at 166.

never specifically held that a navigational servitude created a blanket exception to the taking clause that subjected the land to a public right of access.[36] The Court thus rejected the government's contention that by investing "substantial amounts of money in making improvements [in] what was once a private pond . . . the owner ha[d] somehow lost one of the most essential sticks in the bundle of rights that are commonly characterized as property—the right to exclude others."[37]

The Court concluded that the government must pay just compensation if it wished to take the servitude for the public's benefit:

> [T]he "right to exclude," so universally held to be a fundamental element of the property right, falls within [the] category of interests that the [g]overnment cannot take without compensation. . . . [T]he imposition of the navigational servitude in this context will result in an actual physical invasion of the privately owned marina.[38]

This fundamental element of the property right, the right to exclude, however, may finish a poor second when such exclusion is found to infringe on what courts consider a more fundamental right. For example, in *Pruneyard Shopping Center v. Robins*,[39] the right to exclude fell victim to a higher fundamental right—the right to free speech. Based on state constitutional provisions,[40] the California Supreme Court upheld the solicitation of signatures for a political petition at a privately-owned shopping center. In affirming the decision, the Supreme Court pointed out that the center owner "may restrict expressive activity by adopting time, place, and manner regulations that will minimize any interference with its commercial functions."[41] The Court concluded that the center had "failed to demonstrate that the 'right to exclude others' is so essential to the use or economic value of [its] property that the state-authorized limitation of it amounted to a 'taking.' "[42]

In other cases, the interference with the right to possession and the right to exclude others arose incidentally from regulations aimed at a different purpose. In *Hall v. City of Santa Barbara*,[43] the Ninth

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36. *Id.* at 172-73.
37. *Id.* at 176.
38. *Id.* at 179-80.
39. 447 U.S. 74 (1980).
40. 23 Cal. 3d 899, 910, 592 P.2d 341, 347, 153 Cal. Rptr. 854, 860, *aff'd*, 447 U.S. 74, 79 (1979) (citing CAL. CONST. art. 1, §§ 2-3).
41. 447 U.S. at 83.
42. *Id.* at 84.
43. 813 F.2d 198 (9th Cir. 1986).

Circuit found that a city ordinance designed to control rents on mobile home parking spaces resulted in a transfer of a possessory estate to the park tenants.[44] The court concluded that the ordinance—which gave tenants an indefinite, transferable lease—in effect left landlords "with the right to collect reduced rents while tenants [had] practically all other rights in the property . . . [which] oversteps the boundaries of mere regulation and shades into permanent occupation of the property for which compensation is due."[45]

Justice Rehnquist made a similar argument in dissent in *Fresh Pond Shopping Center, Inc. v. Callahan*,[46] which also involved a rent control ordinance.[47] The Chief Justice found that the combination of the ordinance's anti-eviction and anti-demolition provisions "deprive[d] [the owner] of the use of its property in a manner closely analogous to a permanent physical invasion."[48] Justice Rehnquist observed that the "power to exclude is 'one of the most treasured strands in an owner's bundle of property rights [because] even though the owner may retain the bare legal right to . . . the occupied space, . . . the permanent occupation of that space by a stranger would ordinarily empty the right of any value . . . .' "[49] Thus, he concluded, the ordinance resulted in a compensable taking of property.

In a dissenting opinion in *Nash v. City of Santa Monica*,[50] California Supreme Court Justice Mosk addressed an ordinance similar to the one in *Fresh Pond Shopping Center*.[51] Mosk pointed out that the majority in *Nash* relied on *Fresh Pond Shopping Center*, "a case that has produced no prevailing written opinion at any level,"[52] only Rehnquist's dissent. But in finding that the ordinance only

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44. *Id.* at 204. Tenants could transfer their lease to a new tenant without the owner's permission when they sold their mobile homes. The owner could terminate the leases only for cause, and had no say in the tenants' selection of buyers for their homes. *Id.*

45. *Id.* at 206-07.

46. 464 U.S. 875 (1983) (Rehnquist, J., dissenting).

47. *See infra* notes 263-69 and accompanying text.

48. *Fresh Pond Shopping Center*, 464 U.S. at 877 (Rehnquist, J., dissenting).

49. *Id.* at 878 (Rehnquist, J., dissenting) (quoting Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419, 435-36 (1982)).

50. 37 Cal. 3d 97, 111, 688 P.2d 894, 904, 207 Cal. Rptr. 285, 295 (1984) (Mosk, J., dissenting).

51. *Id.* at 112, 688 P.2d at 905, 207 Cal. Rptr. at 296 (Mosk, J., dissenting). He found: "If the city forces this owner to involuntarily transfer his property to a third person, the result is no less a taking than if the municipality itself were to assume title to the property." *Id.*

52. *Id.* at 112, 688 P.2d at 905, 207 Cal. Rptr. at 296 (Mosk, J., dissenting).

imposed an "indirect and minimal burden" on Nash, the majority "ignore [Rehnquist's] conclusion: *i.e.*, that the rent control ordinance is the equivalent of 'a physical occupation of the appellant's property,' which . . . constitutes a taking without just compensation."[53]

3. Freedom From Physical Invasion

The government action may sometimes constitute an invasion of property rather than a physical possession; thus, the Court must first determine the extent of the owner's right to possession before deciding whether the government has interfered with that right. The Latlin, *Est solum ejus est usque ad coelum*, expresses the ancient common law principle that land extends to the edge of the universe.[54] This doctrine did not anticipate modern air transportation. Nonetheless, flights over land may in certain instances constitute a temporary and occasional interference with physical possession that entitles the individual to just compensation.

For example, *United States v. Causby*[55] presented an interesting problem of physical invasion rather than physical possession. Causby's chicken farm was located directly under the flight path of an airport runway. When the chickens began dying of fright from aircraft noise, plaintiffs brought suit.[56] Writing for the majority, Justice Douglas observed that "airspace is a public highway." He reasoned, however, that it is obvious that "if the landowner is to have full enjoyment of the land, he must have exclusive control of the immediate reaches of the enveloping atmosphere."[57] The Court affirmed *Causby* in another overflight case, *Griggs v. Allegheny County*,[58] emphasizing that "the use of land presupposes the use of some of the airspace above it . . . otherwise no home could be built, no tree planted, no fence constructed, no chimney erected."[59]

The Court has thus recognized the right of freedom from an invasion of possession. While the Court's language has often focused on an interference with the individual's right-of-use stalk, a stalk in which the relationship between the state and the individual is

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53. *Id.* at 113, 688 P.2d at 905, 207 Cal. Rptr. at 296 (Mosk, J., dissenting).

54. E. COKE, INSTITUTES (19th ed. 1832); 2 W. BLACKSTONE, COMMENTARIES (Lewis ed. 1902).

55. 328 U.S. 256 (1946).

56. The runway was used 4% of the time for take-offs and 7% of the time for landings. *See id.* at 259.

57. *Id.* at 264.

58. 369 U.S. 84, *reh'g denied*, 369 U.S. 857 (1962).

59. *Id.* at 89 (citation omitted).

quite complex, the decisions rest equally upon the individual's right-of-possession (including the right to exclude) stalk. In short, the well-established relationship between the state's right to take the property and the individual's right to receive just compensation for a physical *possession* of the property includes a physical *invasion* of the property.

In sum, courts have clearly delineated the contractual relationship between the individual and the government with respect to the right to possession, which includes: (1) both permanent and temporary possession; (2) the right to exclude others; and (3) freedom from physical invasion.

B. The Right to Alienate

The right to alienate property is another clearly discernable stalk in the owner's bundle of rights. Surely, ownership of property includes the right to sell or give that property to another. The government has its parallel stalk—the right to require fees and taxes for such transactions. But, when the government's regulations go beyond the collection of reasonable fees or limited restrictions on sale and actually preclude the sale or transfer of the property to anyone but the government, such regulation constitutes a compensable taking.

For example, a federal regulation that required escheat, or reversion to the tribe, by the individual of certain interests in Indian land was declared unconstitutional in *Hodel v. Irving*.[60] The purpose of the regulation was to prevent further fractionation of interests and allow for consolidation and more profitable uses of the land.[61] Writing for the majority, Justice O'Connor stated:

> [T]he regulation here amounts to virtually the abrogation of the right to pass on a certain type of property—the small undivided interest—to one's heirs. In one form or another, the right to pass on property—to one's family in particular—has been part of the Anglo-American legal system since feudal times. . . . Even the United States concedes that total abrogation of the right to pass property is unprecedented and likely unconstitutional.[62]

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60. 107 S. Ct. 2076 (1987).

61. *Id.* at 2081; *see* Indian Land Consolidation Act, Pub. L. No. 97-459, tit. II, 96 Stat. 2519 (1983).

62. *Irving*, 107 S. Ct. at 2083-84 (citations omitted). Justice O'Connor continued:

> In holding that complete abolition of both the descent and devise of a particular class of property may be a taking, we reaffirm the continuing

In *Plainfield v. Borough of Middlesex*[63] and *Rippley v. City of Lincoln*,[64] land use regulations restricted the plaintiffs' property to use for governmental purposes such as creating schools, parks or governmental facilities. In addition to denying the owners any reasonable use of the property, the restrictions denied them the right to sell the property to anyone but the governmental agency that enacted the restrictions. This loss of the right to alienate the property thus destroyed that stalk in the owner's bundle of property rights and resulted in a compensable taking.

In *Sheerr v. Evesham Township*,[65] a regulation restricted property to an environmental protection zone where private development was not allowed. Again, the plaintiff had lost the right to alienate the property because there would be no viable market for the land. Similarly, in *Corrigan v. City of Scottsdale*,[66] property was placed in a conservation zone that precluded development. As the Arizona Supreme Court noted: "As long as the property was 'zoned' in the [c]onservation [a]rea, there was no reasonable hope that anyone would purchase the property . . . ."[67] Loss of the right of alienation was also a factor considered by the California courts in *San Diego Gas & Elec. v. San Diego*,[68] since the rezoning of 141 of the utility's acres to open space not only made them unusable for the utility's purposes, but also unmarketable.

Interference with this stalk in the property owner's bundle of rights often arises from a land use restriction—rarely from a specific

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> vitality of the long line of cases recognizing the States', and where appropriate, the United States', broad authority to adjust the rules governing the descent and devise of property without implicating the guarantees of the [j]ust [c]ompensation [c]lause. The difference in this case is the fact that both descent and devise are completely abolished; indeed, they are abolished even in circumstances when the governmental purpose sought to be advanced, consolidation of ownership of Indian lands, does not conflict with the further descent of the property. . . . Accordingly, we find that this regulation in the words of Justice Holmes, "goes too far."

Id.

63. 69 N.J. Super. 136, 173 A.2d 785 (L. Div. 1961). *See infra* notes 131-32 and accompanying text.

64. 330 N.W.2d 505 (N.D. 1983). *See infra* notes 115-16 and accompanying text.

65. 184 N.J. Super. 11, 445 A.2d 46 (L. Div. 1982). *See infra* notes 133-35 and accompanying text.

66. 149 Ariz. 538, 720 P.2d 513 (1986).

67. *Id.* at 544 n.3, 720 P.2d at 519 n.3.

68. 450 U.S. 621, 626-27 (1981). The state court's opinion is at 81 Cal. App. 3d 844, 146 Cal. Rptr. 103 (1978).

prohibition on alienation as in *Irving*. Nonetheless, a compensable taking will result if the owner loses the right to sell or transfer the property, whether it is a complete restriction or merely a restriction of sale only to a governmental agency.

C. Freedom of Use

Freedom of use, the most complex stalk in the bundle of owner's rights, presents a difficult problem in establishing the individual/governmental relationship. Much of the complexity results from the interrelationship between the fourteenth amendment's due process clause,[69] the tenth amendment's police power,[70] and the fifth amendment's taking clause.[71] Courts are not always clear as to which provision they are addressing.

This confusion is unnecessary. There should be no constitutional conflict between the government's right to regulate health, safety and welfare pursuant to the police power embodied in the tenth amendment, and the individual's right to be compensated under the fifth amendment for the taking of property. Citing Justice Holmes, Chief Justice Rehnquist has observed that "the protection of private property in the [f]ifth [a]mendment presupposes that it is wanted for public use, but provides that it shall not be taken for such use without compensation."[72] Provided the regulation actually falls within the constitutional limits of the police power,[73] analysis can focus on whether the regulation constitutes a taking.

The problem of interference with the freedom to use property has created much more difficulty for the courts than the problem of interference with possession or alienation. If the interference with use is total, it can be equated with physical possession and result in a compensable taking. However, short of a complete interference, what will constitute a compensable taking? It is this problem that has been the focus of much of the courts' attention. As the next

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69. U.S. CONST. amend. XIV, § 1. Section 1 of the amendment provides: "nor shall any State deprive any person of . . . property, without due process of law . . . ."

70. U.S. CONST. amend. X. "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."

71. U.S. CONST. amend. V; *see supra* note 7 and accompanying text.

72. Keystone Bituminous Coal Ass'n v. DeBenedictis, 107 S. Ct. 1232, 1255 (1987) (Rehnquist, C. J., dissenting) (quoting Pennsylvania Coal Co. v. Mahon, 260 U.S. 393, 415 (1922)).

73. This Article presumes that the regulation falls within constitutional limitations unless otherwise noted.

part of this Article will illustrate, this attention has resulted in a variety of tests which, rather than solving the problem, has added to the confusion.

III. A Potpourri of Tests: Sixty-Five Years of Confusion

A. The Nuisance Theory

Many early land-use regulation cases indicated that any regulation enacted to prevent a harm did not result in a compensable taking. The foundation for this theory was the concept of nuisance. Throughout history, both society and individuals have been able to prevent property owners from unduly burdening others with activities on their land. When a property owner has created a harm, the government's role is to prevent that harm so that adjoining property owners, or—in the case of a public nuisance—society, do not suffer this nuisance. In effect, through regulations, the government directs this burden away from other property owners back to the originator.

In an early case, *Mugler v. Kansas*,[74] a state law prohibiting the manufacture and sale of liquor except for certain medicinal purposes was upheld. The statute at issue declared all places where liquor was made, stored or sold to be common nuisances subject to abatement. The state sought to shut down a brewery as a common nuisance; the owners contended that the buildings were specially designed only for use as a brewery and asserted that the nuisance abatement provision of the statute was unconstitutional under the fourteenth amendment.[75]

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74. 123 U.S. 623 (1887).

75. The owners asserted that the fourteenth amendment reserved certain rights to the citizen with which the state cannot interfere without violating the due process clause. The owners made the following argument:

> [T]he [s]tate may control the tastes, appetites, habits, dress, food, and drink of the people; our system of government, based upon the individuality and intelligence of the citizen, does not claim to control him, except as to his conduct to others, leaving him the sole judge as to all that only affects himself.

Id. at 660. They then asserted that the right to manufacture liquor for their own use or for sale outside the state was one of those interests of which they should be the sole judges. *Id.* The Court was querulous:

> [B]y whom, or by what authority, is it to be determined whether the manufacture of particular articles of drink, either for general use or for the personal use of the maker, will injuriously affect the public? Power to determine such questions, so as to bind all, must exist somewhere; else society will be at the mercy of the few, who, regarding only their own appetites and passions, may be willing to imperil the peace and security of the many, provided only they are permitted to do as they please.

Id. at 660-61.

The Supreme Court reversed and remanded the case to grant the state the requested nuisance abatement relief.[76] The Court found that prohibiting the sale of liquor was within the state's police power to protect the public health, safety and welfare, but that the power was limited by provisions of the Constitution.[77]

Another early case decided on a nuisance theory was *Hadacheck v. Sebastian*,[78] in which the plaintiff operated a quarry and brickyard on the outskirts of Los Angeles. Eventually, as the property was gradually surrounded by a burgeoning residential community, the City of Los Angeles decided that the brickyard was a nuisance. To prevent public harm to the surrounding residential communities, the state court prohibited the use of the property as a brick smelter. Hadacheck then claimed that the property was being taken without just compensation. The Supreme Court not only held that this was a proper regulation but that it did not constitute a compensable taking.[79]

Hadacheck stands for the proposition that preventing a nuisance does not result in a taking. Although the restriction prevented the owner from using the property as a brick smelter, he could still remove clay from the ground or use the land for some other purpose.[80]

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76. *Id.* at 675.

77. *Id.* at 668-69. The Court stated:

> A prohibition simply upon the use of property for purposes that are declared, by valid legislation, to be injurious to the health, morals or safety of the community, cannot, in any just sense, be deemed a taking or an appropriation of property for the public benefit. Such legislation does not disturb the owner in the control or use of his property for lawful purposes, nor restrict his right to dispose of it, but is only a declaration by the [s]tate that its use by any one, for certain forbidden purposes, is prejudicial to the public interests. . . . The power which the [s]tates have of prohibiting such use by individuals of their property . . . is not—and, consistently with the existence and safety of organized society, cannot be—burdened with the condition that the state must compensate such individual owners for pecuniary losses they may sustain, by reason of their not being permitted, by a noxious use of their property, to inflict injury upon the community.

Id.

The Court drew the following conclusion:

> The exercise of the police power by the destruction of property which is itself a public nuisance, or the prohibition of its use in a particular way, whereby its value becomes depreciated, is very different from taking property . . . without due process of law. In the one case, a nuisance only is abated; in the other, unoffending property is taken away from an innocent owner.

Id. at 669.

78. 239 U.S. 394 (1915).

79. *Id.* at 410-11.

80. *Id.* at 411.

Thus, while the Court based its decision on preventing a harm, the fact that the interference with the owner's freedom of use was not complete or absolute contributed to the Court's decision not to find a taking.

In *Goldblatt v. Town of Hempstead*,[81] a company was dredging in an area around which a community grew when legislation was passed to prevent the company from continuing to use the property in such a manner. As in Hadacheck, the restriction on use was partial, and thus valid, because the property could be used for other purposes.[82]

Spur Indus. Inc. v. Del E. Webb Dev. Co.,[83] decided in 1972, resulted in a permanent injunction against the operation of a feedlot that created a public nuisance to the residents of Sun City, an adjacent community. The feedlot, however, pre-existed the development of Sun City, which was settled with full knowledge of the nearby feedlot. Therefore, the state court held that "[h]aving brought people to the nuisance to the foreseeable detriment of [the feedlot owner], [the developer] must [provide reimbursement] for a reasonable amount of cost of moving or shutting down."[84] The court noted that "[i]n addition to protecting the public interest, . . . courts of equity are concerned with protecting the operator of a lawful, albeit noxious, business from the result of a knowing and willful encroachment by others near his business."[85] Thus, the court limited the nuisance theory: " 'a party cannot justly call upon the law to make that place suitable for his residence which was not so when he selected it.' "[86]

In 1987, in *Keystone Bituminous Coal Ass'n v. DeBenedictis*,[87] the Supreme Court found that coal mine operators' underground activities resulting in subsidence of the surface of the land constituted a nuisance, despite the fact that the surface owners had contracted away their rights in the "support estate."[88] The majority observed: "[P]rivate individuals that erred in taking a risk cannot estop the

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81. 369 U.S. 590 (1962).

82. *Id.* at 593.

83. 108 Ariz. 178, 494 P.2d 700 (1972).

84. *Id.* at 186, 494 P.2d at 708.

85. *Id.* at 184, 494 P.2d at 706.

86. *Id.* at 185, 494 P.2d at 707 (quoting Gilbert v. Showerman, 23 Mich. 448, 455 (1871)).

87. 107 S. Ct. 1232 (1987). See *infra* notes 149-83 and accompanying text for a more thorough discussion of this case.

88. 107 S. Ct. at 1250-51. See *infra* notes 154-88 for a detailed discussion of this case.

[s]tate from exercising its police power to abate activity akin to a public nuisance."[89]

B. The Harm/Benefit Theory

As land use regulation moved beyond merely preventing nuisances, courts had to develop approaches that would balance the intended objective of the regulation against its impact on individuals' property rights. One early attempt was the *harm/benefit theory*. Under this theory, the threshold question focused on whether the regulation causing an interference with use arose from the governing body's desire to prevent harm to society, or to bestow a benefit on society. This distinction is important. When the regulation was intended to prevent a harm, courts have traditionally permitted substantial interference with use on a nuisance theory without considering the interference a taking. When the regulation aims at promoting a benefit, however, courts have traditionally been more willing to rule the interference a taking.

The harm/benefit analysis, however, frequently does not resolve the problem. It is quite simple to argue that the purpose of the regulation is both to prevent a harm and to benefit society. For example, a city regulation creates an open space buffer zone between itself and a neighboring urban community. Is the purpose of this zoning to prevent a harm to the populace due to over-urbanization and its resulting problems? Is the purpose to promote the benefit of open space and preservation of the natural landscape for future generations? Or is the purpose to accomplish both of these objectives?

One case that specifically addressed the harm/benefit dichotomy was *Just v. Marinette County*.[90] The Justs' property fell within a shoreland zoning restriction designed to preserve and protect waterfront properties. To facilitate development, Just filled a portion of his lakefront property in violation of the ordinance. He then contended that the restrictions on his land were unconstitutional; that is, they restricted his use so severely that they amounted to a taking.

The Supreme Court of Wisconsin noted the distinction between the need to promote a benefit and the need to prevent a harm:

> It may be said that the state takes property by eminent domain because it is useful to the public, and under the police power

89. 107 S. Ct. at 1243.
90. 56 Wis. 2d 7, 201 N.W.2d 761 (1972).

> because it is harmful. . . . From this results the difference between the power of eminent domain and the police power; that the former recognizes a right to compensation, while the latter on principle does not. Thus the necessity for monetary compensation for loss suffered to an owner by police power restriction arises when restrictions are placed on property in order to create a public benefit rather than to prevent a public harm.[91]

Evaluating the zoning ordinance, the court found a predominant purpose of preventing a harm to the public by restricting the property owners' rights to change the natural character of the land.[92] The court held that the ordinance did not result in a taking of the Justs' property because it did "not create or improve the public condition but only preserve[d] nature from the despoilage and harm resulting from the unrestricted activities of humans."[93]

In contrast, the Supreme Judicial Court of Maine, in *State v. Johnson*,[94] found that the purpose of a similar prohibition on the filling of coastal wetlands was to promote a benefit (the preservation of a valuable natural resource) and therefore resulted in a taking of the defendants' property.[95] The court concluded:

> As distinguished from conventional zoning for town protection, the area of Wetlands representing a "valuable natural resource of the [s]tate," . . . is of state-wide concern. The benefits from its preservation extend beyond town limits and are state-wide. The cost of its preservation should be publicly borne. To leave appellants with commercially valueless land in upholding the restriction presently imposed, is to charge them with more than their just share of the cost of this state-wide conservation program . . . .[96]

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91. *Id.* at 16, 201 N.W.2d at 767 (quoting E. FREUND, THE POLICE POWER § 511 (1904)).

92. *Id.* at 17, 201 N.W.2d at 768. The court cited a letterhead from the county zoning department: "The land belongs to the people . . . a little of it to those dead . . . some to those living . . . but most of it belongs to those yet to be born . . . ." *Id.* at 24 n.6, 201 N.W.2d at 771 n.6.

93. *Id.* at 24, 201 N.W.2d at 771.

94. 265 A.2d 711 (Me. 1970).

95. *Id.* at 716. After being denied the requisite fill permit under the state's Wetlands Act, the Johnsons nonetheless filled their land in order to make it usable for residential development. Without fill, the land had no commercial value. The [c]ourt identified the issue as being "[b]etween the public interest in braking and eventually stopping the insidious despoliation of our natural resources which have for so long been taken for granted, on the one hand, and the protection of appellants' property rights on the other." *Id.*

96. *Id.* The court went on to say that the Johnsons' "compensation by sharing in the benefits which this restriction is intended to secure is so disproportionate to their deprivation of reasonable use that such exercise of the [s]tate's police power is unreasonable." *Id.*

C. *Pennsylvania Coal*: The Confusion Begins

As land use regulation continued to become more pervasive and sophisticated, courts moved beyond the threshold question of whether the purpose of enacting a regulation was to prevent a harm or to promote a benefit to society. To determine what constitutes a taking, a variety of tests developed. Nonetheless, the problem still remains: when do such restrictions on use constitute a taking?

The 1922 landmark case of *Pennsylvania Coal Co. v. Mahon*[97] is the source of most of the regulatory takings tests utilized by courts today. Justice Holmes laid the groundwork for a variety of tests: a confiscatory test, a substantial interference with use test, a diminished value test, and a reciprocity of advantage test. All involve the extent to which there is an interference with the freedom of use rather than with possession. Unfortunately, much of the confusion in the courts for the past sixty-five years over the regulatory takings issue goes back to the broad brush approach employed both by Holmes in the majority opinion, and by Justice Brandeis in his dissent[98] in *Pennsylvania Coal*. In fact, the Supreme Court today continues to rely almost exclusively on the language of Holmes and Brandeis in deciding land use and regulatory takings cases. The case thus provides a convenient framework for examining the current theories employed in analyzing regulatory takings cases, particularly in light of the Court's 1987 decision in the closely parallel case of *Keystone Bituminous Coal*.[99]

Pennsylvania Coal dealt with the coal company's rights to remove coal from land which it owned. The company conveyed the surface estate to the plaintiff in 1878 but expressly reserved the right to remove coal from the property.[100] In 1921, the Pennsylvania Legislature passed the Kohler Act[101] which prohibited the mining of coal in such a way as to cause the subsidence of any structure used as a human habitation. Thus, the case presented a classic confrontation between owners' property interests and the government's right to regulate land use to promote homeowners' welfare. Application of the statute would destroy the coal company's property interest in the support estate, with the result that it could not mine coal from the property.

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97. 260 U.S. 393 (1922).
98. *Id.* at 416 (Brandeis, J., dissenting).
99. 107 S. Ct. 1232 (1987). *See infra* notes 149-83 and accompanying text.
100. *Pennsylvania Coal*, 260 U.S. at 412.
101. *See* 1921 PA. STAT. ANN. tit. 52, §§ 661-672.10 (Purdon 1966).

Justice Brandeis' dissent laid out the nuisance theory, which was the controlling approach at that time. Finding that the purpose of the regulation was to prevent a harm,[102] he concluded:

> [T]he right of the owner to use his land is not absolute. He may not so use it as to create a public nuisance; and uses, once harmless, may, owing to changed conditions, seriously threaten the public welfare. Whenever they do, the legislature has power to prohibit such uses without paying compensation. . . . But restriction imposed to protect the public health, safety or morals from dangers threatened is not a taking.[103]

Writing the majority opinion that was apparently at least in part a response to Brandeis' dissent, Justice Holmes asserted that the purpose of the Kohler Act was to secure a public benefit. He expressed his conclusion in harm/benefit theory language: "[A] strong public desire to improve the public condition is not enough to warrant achieving this desire by the shorter cut than the constitutional way of paying for the change."[104]

Nonetheless, Holmes also peppered his opinion with a potpourri of approaches to the regulatory takings problem that subsequent courts have used as the foundation for today's melange of takings tests.

The clearest of the several tests enunciated by Justice Holmes has been given a variety of names, but will be referred to in this Article as a *confiscatory test*. In essence, this test states that if the regulation in question interferes with an individual's freedom of use to the extent that there is no feasible way to use the property (or property interest), it is a confiscation of the property and therefore must be considered a "taking."[105] Factually, what the Kohler Act did to the coal company's property right (the right to remove coal from beneath the surface of the land) was to destroy it entirely.[106]

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102. Whether this harm can be characterized as a public nuisance or as merely a private nuisance is arguable, and could have been a factor in determining whether to apply a nuisance-like test. Justice Holmes, in fact, alluded to this problem when he said: "If we were called upon to deal with the plaintiffs' position alone we should think it clear that the statute does not disclose a public interest sufficient to warrant so extensive a destruction of the defendant's constitutionally protected rights." *Pennsylvania Coal*, 260 U.S. at 414.

103. *Id.* at 417 (Brandeis, J., dissenting).

104. *Id.* at 416.

105. *Id.* at 414 ("the extent of the taking is great. It purports to abolish what is recognized in Pennsylvania as an estate in land—a very valuable estate—and what is declared by the [c]ourt below to be a contract hitherto binding the plaintiffs").

106. *Id.*

Less clear was Justice Holmes' reference to what may be called the *substantial interference with use test*.[107] "The general rule . . . is that while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking."[108] His attempt to define this standard also fell short of a workable formula: "When it reaches a *certain magnitude*, in most if not in all cases there must be an exercise of eminent domain and compensation to sustain the act."[109]

Possibly the most frequently used test introduced by Holmes is the *diminished value test*.[110] Again, he took a broad brush approach, and left for future courts the job of creating a usable standard:

> Government hardly could go on if to some extent values incident to property could not be diminished without paying for every such change in the general law. As long recognized, some values are enjoyed under an implied limitation and must yield to the police power. But obviously the implied limitation must have its limits, or the contract and due process clauses are gone. One fact for consideration in determining such limits is the extent of the diminution.[111]

Justice Holmes used another expression, "commercially impracticable,"[112] which some modern courts have applied as one of the indicators of whether property values have diminished to that "certain magnitude" that constitutes a compensable taking under the fifth amendment.

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107. This test is intended to be a catch-all solution that does not rely on economics as does the diminished value test, on complete interference with use as does the confiscatory test, or on an expectation of ownership as does the contract approach. For an example of this test's modern application by the courts, see *infra* notes 115-16 and accompanying text.

108. *Pennsylvania Coal*, 260 U.S. at 415.

109. *Id.* at 413 (emphasis added).

110. The courts have given this test a variety of names, including "reasonable beneficial use" in Penn Cent. Transp. Co. v. New York City, 438 U.S. 104, 119 (1978); "economically viable use" in Agins v. Tiburon, 447 U.S. 255, 260 (1980); "economic value" in Plainfield v. Borough of Middlesex, 69 N.J. Super. 136, 138, 173 A.2d 785, 787 (L. Div. 1961); "economic return" in Sheerr v. Evesham Township., 184 N.J. Super. 11, 445 A.2d 46, 69-70 (L. Div. 1982); "profitable use" in Arverne Bay Constr. Co. v. Thatcher, 278 N.Y. 222, 225, 15 N.E.2d 587, 589 (1938); and "reasonable income productive or other private use" in Fred F. French Inv. Co. v. City of New York, 39 N.Y.2d 587, 591, 350 N.E.2d 381, 383 (1976). Modern applications of this approach are discussed at length at notes 119-42 and accompanying text.

111. *Pennsylvania Coal*, 260 U.S. at 413.

112. *Id.* at 414.

Justice Holmes made vague reference to yet another test when he distinguished this case from an earlier coal company case, *Plymouth Coal Co. v. Pennsylvania*.[113] In that case, legislation required the coal company to leave pillars of coal to protect the safety of employees of that mine and adjoining mines. Holmes recognized the contractual relationship between individuals possessed of property and the government. He stated that the law at issue "was a requirement for the safety of employees invited into the mine, and secured an *average reciprocity of advantage* that has been recognized as a justification of various laws."[114]

Where did *Pennsylvania Coal* leave the courts? Since the Court articulated these diverse theories, the issue of regulatory takings has remained unresolved despite the fact that courts have struggled in a series of cases to create a formula to use in determining whether a taking has occurred. Much of today's confusion arises from the fact that the courts are still using the tests—all of them—articulated in *Pennsylvania Coal*. For example, in *Rippley v. City of Lincoln*,[115] the city, intending eventually to use Rippley's property for a school and other governmental facilities, rezoned the property for public use only. The court referred to the substantial interference with use approach and simply used reasonable use as its basis for finding a taking.[116]

The Supreme Court applied the average reciprocity of advantage test in *Hodel v. Irving*,[117] a 1987 case involving the right to alienate certain interests in Indian lands. Justice O'Connor stated:

> [T]here is something of an "average reciprocity of advantage" . . . to the extent that owners of escheatable interests maintain a nexus to the Tribe. . . . The owners of escheatable interests often benefit from the escheat of others' fractional interests. Moreover, the whole benefit gained is greater than the sum of the burdens imposed since consolidated lands are more productive than fractionated lands.[118]

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113. 232 U.S. 531 (1914).

114. *Pennsylvania Coal*, 260 U.S. at 415 (emphasis added). The most recent land use cases have referred to this reciprocity of advantage to support an ill-defined diminished value theory.

115. 330 N.W.2d 505 (N.D. 1983).

116. *Id.* at 508 (footnote omitted). The court stated that "Lincoln's zoning ordinance . . . destroys all reasonable use of the Rippleys' property leaving the Rippleys at the mercy of [the city] as to a future date, if ever, that the latter may be willing to purchase the property . . . ." *Id.*

117. 107 S. Ct. 2076 (1987).

118. *Id.* at 2083 (citation omitted).

Another *Pennsylvania Coal* approach still used today is the diminished value test. In attempting to define this test, one of the economic formulas that courts have used is the beneficial use approach which provides that depriving the owner of the most beneficial use of his property may constitute a taking. For example, the New York courts applied the concept of "reasonable beneficial use" in *Penn Central Transp. Co. v. New York City*.[119] After New York City's Landmarks Preservation Law designated Grand Central Terminal a "landmark,"[120] the owners had to acquire a special certificate before they made any changes or additions to the structure. To increase their profits from the property, they wanted to build a fifty-five-story office tower on top of the terminal. Because the structure was within the zoning restrictions for the area, the owner would most likely have secured approval had the terminal not been designated a landmark. The state court held that the owners "could sustain their constitutional claims only by proof that the regulation deprived them of all reasonable beneficial use of the property,"[121] a burden Penn Central was not able to sustain.

In holding that no taking had occurred, the Supreme Court noted that Penn Central did not lose all use of the property,[122] since use of the terminal itself still generated income to the owners.[123] Moreover, the Act provided for transfer of development rights.[124] Since Penn Central owned several other properties eligible to receive these development rights, a showing that the owners "had been deprived of the property's most profitable use . . . did not establish that appellants had been unconstitutionally deprived of their property."[125] The Court concluded that "[t]he restrictions imposed are substantially

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119. 438 U.S. 104 (1978).

120. *Id.* at 115-16.

121. *Id.* at 119; *see* Penn Cent. Transp. Co. v. City of New York, 42 N.Y.2d 324, 366 N.E.2d 1271, 397 N.Y.S.2d 914 (1977), *aff'd*, 438 U.S. 104 (1978).

122. *Penn Central*, 438 U.S. at 138. Here again is a reference to the confiscatory test which continues as one of the undercurrents contributing to the complexity of the problem.

123. *Id.* at 136.

124. For a discussion of transferable development rights, see Boast, *Transferable Development Rights*, 1984 N.Z.L.J. 339; Delaney, Kominers & Gordon, *TDR Redux: A Second Generation of Practical Legal Concerns*, 15 URB. LAW. 593 (1983); Malone, *The Future of Transferable Development Rights in the Supreme Court*, 73 KY. L.J. 759 (1985); Marcus, *Air Rights in New York City: TDR, Zoning Lot Merger and the Well-Considered Plan*, 50 BROOKLYN L. REV. 867 (1984); Pedowitz, *Transferable Development Rights*, 19 REAL PROP. PROB. & TR. J. 604 (1984); Richards, *Transferable Development Rights: Corrective, Catastrophe, or Curiosity?*, 12 REAL EST. L.J. 26 (1983).

125. *Penn Central*, 438 U.S. at 120.

related to the promotion of the general welfare and not only permit reasonable beneficial use of the landmark site but also afford appellants opportunities further to enhance not only the terminal site proper but also other properties."[126]

In *Agins v. City of Tiburon*,[127] the plaintiff owned five acres of land that were bought for residential development. The defendant-city rezoned the land for residential planned development and open space. Theoretically, the plaintiff could build up to five houses on the property, but he had submitted no development plans.

The Court concluded that application of the ordinance was premature in light of the plaintiff's ability to build one to five houses. Also, the plaintiff had not yet submitted and been turned down for a building permit. Furthermore, the Court held that the mere enactment of the ordinance did not constitute a taking of the plaintiff's property:

> 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. The determination that governmental action constitutes a taking is, in essence, a determination that the public at large, rather than a single owner, must bear the burden of an exercise of state power in the public interest.
>
> The zoning ordinances benefit the appellants as well as the public. . . . Appellants . . . will share with other owners the benefits and burdens of the city's exercise of its police power. In assessing the fairness of the zoning ordinances, these benefits must be considered along with any *diminution in market value* that the appellants might suffer. . . . Although the ordinances limit development, they neither prevent the best use of appellants' land, . . . nor extinguish a fundamental attribute of ownership.[128]

In 1985, in *United States v. Riverside Bayview Homes, Inc.*,[129] in determining when federal wetlands regulations under the Clean Water Act may constitute a taking, the Court again stated that before it found a taking, it first had to determine the extent to which the regulation denied the owner economically viable use of the property. For a unanimous Court, Justice White stated:

> A requirement that a person obtain a permit before engaging in a certain use of his or her property does not itself "take" the

126. *Id.* at 138 (footnote omitted).
127. 447 U.S. 255 (1980).
128. *Id.* at 260-62 (citations omitted) (emphasis added).
129. 474 U.S. 121 (1985).

> property in any sense: after all, the very existence of a permit system implies that permission may be granted, leaving the landowner free to use the property as desired. Moreover, even if the permit is denied, there may be other viable uses available to the owner. Only when a permit is denied and the effect of the denial is to prevent "*economically viable*" use of the land in question can it be said that a taking has occurred.[130]

In *Plainfield v. Borough of Middlesex*,[131] the New Jersey court attempted to define the diminished value test by using an economic value approach. The city had zoned plaintiffs' property for only school or park purposes. In finding that a taking had occurred, the court stated:

> [A]s a practical matter the effect of the zoning ordinance is to limit the purchaser to defendant borough or to the Board of Education. . . . The net result of the ordinance is to destroy for all practical purposes the full value of plaintiffs' property and to leave plaintiffs at the mercy of defendant as to the price that the latter may be willing to pay.[132]

In *Sheerr v. Evesham Township*,[133] the same court found that private property placed in an environmental protection zone had been taken because the "ordinance denied any private use of the property . . . ." As such, all *economic return* from the property was prevented.[134] The court stressed that "diminution in value is a consideration but

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130. *Id.* at 127 (emphasis added). As to the facts of this particular case, the Court issued the following statement:

> Because the Corps has now denied respondent a permit to fill its property, respondent may well have a ripe claim that a taking has occurred. . . . [H]owever, . . . no evidence has been introduced that bears on the question of the extent to which denial of a permit to fill this property will prevent economically viable uses of the property or frustrate reasonable investment-backed expectations.

Id. at 129 n.6. As to the available remedies, the Court stated:

> We have held that, in general, "[e]quitable relief is not available to enjoin an alleged taking of private property for a public use, . . . when a suit for compensation can be brought against the sovereign subsequent to a taking." . . . This maxim rests on the principle that so long as compensation is available for those whose property is in fact taken, the governmental action is not unconstitutional.

Id. at 127-28 (citations omitted). The Court clarified its position on the availability of compensation for temporary takings in *First English Evangelical Church*. *See infra* notes 184-95.

131. 69 N.J. Super. 136, 173 A.2d 785 (L. Div. 1961).

132. *Id.* at 141, 173 A.2d at 787.

133. 184 N.J. Super. 11, 37, 445 A.2d 46, 60 (L. Div. 1982).

134. *Id.*

it is the denial of beneficial *use* (obviously affecting value) that counts most."[135]

The New York courts considered profitable use in *Arverne Bay Const. Co. v. Thatcher*.[136] There, the city had placed the plaintiff's property in a residential zone, although the plaintiff claimed, and had conclusively shown, that "at no time since the amendment of the zoning resolution could its property be profitably used for residential purposes."[137] While conceding that the long-term goal of the zoning restriction was to benefit the public, the court concluded that "the plaintiff's land *cannot* at present or in the immediate future *be* profitably or reasonably used without violation of the restriction." The court noted that "the situation, of course, might be quite different where it appears that within a reasonable time the property can be put to a profitable use."[138] Because any "prognostication that the district will in time become suited for residences rests upon hope and not upon certainty,"[139] the court found there was no expectation that a profitable use within the zoning restrictions would be available to plaintiff within the foreseeable future.

In *Fred F. French Inv. Co., Inc. v. City of New York*,[140] the city's "rezoning of buildable private parks exclusively as parks open to the public, thereby *prohibiting all reasonable income productive or other private use* of the property,"[141] resulted in a taking. The court observed that "[t]he [s]tate may not, under the guise of regulation by zoning . . . destroy all but a bare residue of its economic value."[142]

In summary, the courts have yet to develop an all-encompassing formula for judging regulatory takings that works beyond the limited facts of the specific case. The nuisance or benefit/burden test, the confiscatory test, the substantial interference with use test, and the diminished value/economic impact test all have inherent limitations, exacerbated by the inconsistency of application both among and within the various jurisdictions. The Supreme Court decided *Pennsylvania Coal* before *Euclid v. Ambler Realty*,[143] at a time when municipalities had not yet contemplated, let alone attempted, many

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135. *Id.* at 53-54, 445 A.2d at 68-69 (emphasis in original).
136. 278 N.Y. 222, 15 N.E.2d 587 (1938).
137. *Id.* at 228, 15 N.E.2d at 590.
138. *Id.* at 232, 15 N.E.2d at 592 (emphasis added).
139. *Id.*
140. 39 N.Y.2d 587, 350 N.E.2d 381, 385 N.Y.S.2d 5 (1976).
141. *Id.* at 590-91, 350 N.E.2d at 383, 385 N.Y.S.2d at 7 (emphasis added).
142. *Id.* at 591, 350 N.E.2d at 383, 385 N.Y.S.2d at 7.
143. 272 U.S. 365 (1926) (validating zoning as within scope of police power).

currently accepted land use restrictions. Yet the Supreme Court continues to rely almost exclusively on the language of Justices Holmes and Brandeis in deciding land use and regulatory takings cases.[144]

IV. The 1987 Decisions: The Confusion Continues

In 1987, the Supreme Court handed down three regulatory takings decisions: *Keystone Bituminous Coal Ass'n v. DeBenedictis*,[145] *First English Evangelical Lutheran Church of Glendale v. County of Los Angeles*,[146] and *Nollan v. California Coastal Comm'n*.[147] These decisions continue the confusion begun by *Pennsylvania Coal*.

Keystone presented a factual situation nearly identical to that in *Pennsylvania Coal*, but resulted in the opposite conclusion, *i.e.*, that no taking had occurred. *First English* addressed the question whether compensation must be paid for temporary regulatory takings, with the Court deciding that compensation must be paid, an approach to temporary takings first proposed by Justice Brennan in his dissent to *San Diego Gas & Elec. Co. v. San Diego*.[148] *Nollan* addressed whether a regulatory taking occurs when public land dedications are required as a precondition to the issuance of a building permit. The Court found that a taking will result unless the dedication requirement is sufficiently tailored to the alleged public purpose.

A. *Keystone Bituminous Coal Ass'n v. DeBenedictis: Pennsylvania Coal* Revisited

In *Keystone Bituminous Coal Ass'n v. DeBenedictis*,[149] the Court confronted the same conflict between surface land owners and coal companies that Justices Holmes and Brandeis addressed in *Pennsylvania Coal*. Both cases involved the problem of potential subsidence of the surface land above the mining operations, and state legislation designed to prevent such subsidence. While the 1922 case dealt with the Kohler Act,[150] the 1987 case dealt with the Bituminous Mine Subsidence and Land Conservation Act.[151] Both cases also

144. *See supra* notes 97-114 and accompanying text.
145. 107 S. Ct. 1232 (1987).
146. 107 S. Ct. 2378 (1987).
147. 107 S. Ct. 3141 (1987).
148. 450 U.S. 621, 636 (1981) (Brennan, J., dissenting).
149. 107 S. Ct. 1232 (1987).
150. *See* PA. STAT. ANN. tit. 52, §§ 661-672.10 (Purdon 1966).
151. *See id.* tit. 52, §§ 1406.1-1406.21 (Purdon Supp. 1987).

involved property in which the mineral and support estates had been severed from the surface estate by contract. Pennsylvania law has long recognized these three separate estates in land.

Justice Stevens, writing for the majority in *Keystone*, stated that *Pennsylvania Coal* did not control.[152] The Court concluded that the Subsidence Act did not effect a taking of the coal companies' interest in the mineral and support estates, despite the factual similarities to *Pennsylvania Coal*.[153]

Chief Justice Rehnquist's dissent opened by protesting the majority's attempt to "dismiss the precedential value"[154] of Justice Holmes' decision. Rehnquist pointed out that "the holding in *Pennsylvania Coal* today discounted by the Court has for [sixty-five] years been the foundation of our 'regulatory takings' jurisprudence."[155]

The majority did not actually dismiss the precedential value of the *Pennsylvania Coal* opinion. Rather, it picked through the variety of approaches to regulatory takings suggested in the decision and then selected those that supported its conclusion. In dissent, Chief Justice Rehnquist did the same.

This hunt-and-peck method aptly points out both the strengths and weaknesses of *Pennsylvania Coal*: The case suggested so many approaches that it created confusion by giving subsequent jurists too much with which to work, and none of it precise. Justice Rehnquist said: "I would have no doubt that our repeated reliance on that opinion establishes it as a cornerstone of the jurisprudence of the [f]ifth [a]mendment's [j]ust [c]ompensation [c]lause."[156] A five-to-four decision[157] by the Court always generates some question about the factors motivating each of the Justices' opinions. Thus, these two very similar cases, decided sixty-five years apart, can be evaluated to determine why they resulted in opposite conclusions based on the same facts.

At the time of the earlier decision, coal was America's most important energy product. Thus, the coal companies' influence upon the economy was far greater than today. This is not to say that

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152. *Keystone*, 107 S. Ct. at 1240.
153. *Id.* at 1242-43.
154. *Id.* at 1253 (Rehnquist, C.J., dissenting).
155. *Id.* at 1254 (Rehnquist, C.J., dissenting).
156. *Id.* (Rehnquist, C.J., dissenting).
157. Justice Stevens delivered the Court's opinion, in which Justices Brennan, White, Marshall and Blackmun joined. Justices Powell, O'Connor and Scalia joined Chief Justice Rehnquist's dissent.

the Supreme Court was affected by a particular special interest group, but rather that the Justices must consider society as a whole in making their decisions. One wonders whether the Court would have reached the same decision in *Keystone* had the case involved the oil industry rather than the coal industry.

In 1922, the weighing of benefits and burdens was the most common approach to judging regulatory takings. The public benefit reasons cited by the Pennsylvania Legislature for passing the Kohler Act tipped the balance in favor of compensation to the coal companies. As Justice Holmes said, "a strong public desire to improve the public condition is not enough to warrant achieving the desire by the shorter cut than the constitutional way of paying for the change."[158]

But in 1987, reciprocity of advantage was gaining acceptance as the appropriate balancing test for regulatory takings problems. In the words of the *Keystone* Court:

> Under our system of government, one of the state's primary ways of preserving the public weal is restricting the uses individuals can make of their property. While each of us is burdened somewhat by such restrictions, we, in turn, benefit greatly from the restrictions that are placed on others.[159]

The *Keystone* majority referred to the Pennsylvania Legislature's "conclusion that . . . existing mine subsidence legislation had failed to protect the public interest in safety, land conservation, preservation of affected municipalities' tax base, and land development . . . ."[160] Chief Justice Rehnquist stated that "[t]he central purposes of the Act, though including public safety, reflect a concern for the preservation of buildings, economic development, and maintenance of property values to sustain the Commonwealth's tax base."[161] In recent years, such concerns have increasingly motivated the courts to uphold land use restrictions that probably would have been overturned under a benefit/burden analysis.[162]

Another factor that has changed considerably over the past sixty-five years is the heightened interest in consumer protection. At the

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158. *Pennsylvania Coal*, 260 U.S. at 416.

159. *Keystone*, 107 S. Ct. at 1245.

160. *Id.* at 1236 (referring to bases for new legislation).

161. *Id.* at 1257 (Rehnquist, C.J., dissenting).

162. Rehnquist warned against this trend: "We should hesitate to allow a regulation based on essentially economic concerns to be insulated from the dictates of the [f]ifth [a]mendment by labeling it nuisance regulation." *Id.* (Rehnquist, C.J., dissenting).

time of the enactment of the Kohler Act, the individual whose property value may have been reduced or whose homesite might have been completely destroyed by the subsidence of the land would have been told, "*caveat emptor.*"[163] Today's society is more likely to say, "vendor beware."

For example, in *Pennsylvania Coal*, the coal company had bargained for and paid value to Mahon for the rights to the support estate. Mahon later claimed this bargain was unfair. Expressing the attitude of his day, Justice Holmes stated that "[s]o far as private persons and communities have seen fit to take the risk of acquiring only surface rights, we cannot see that the fact that their risk has become a danger warrants the giving to them greater rights than they bought."[164]

For at least the past thirty years, however, the Court has recognized protection of the consumer, even after a valid contract has been formed.[165] Considering these social and economic changes, the Court's conclusion does not appear so anomalous.

In *Keystone*, the Court first differentiated the Kohler Act from the Subsidence Act on the basis of legislative intent. The Court found the Kohler Act was primarily a "private benefit" statute designed to protect individual property owners.[166] In contrast, the Subsidence Act was intended to protect a wider public interest.[167] But in dissent, Chief Justice Rehnquist objected to this distinction between the purposes of the two acts. In his view, the Kohler Act was passed " 'as remedial legislation designed to cure existing evils

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163. *Caveat emptor* has been defined in the following manner:

> Let the buyer beware. This maxim summarizes the rule that a purchaser must examine, judge and test for himself. This maxim is more applicable to judicial sales, auctions, and the like, than to sales of consumer goods where strict liability, warranty, and other consumer protection laws protect the consumer-buyer.

BLACK'S LAW DICTIONARY 202 (5th ed. 1979).

164. *Pennsylvania Coal*, 260 U.S. at 416.

165. *Keystone*, 107 S. Ct. at 1243. As Justice Stevens pointed out in *Keystone*:

> That private individuals erred in taking a risk cannot estop the [s]tate from exercising its police power to abate an activity akin to a public nuisance. The Subsidence Act is a prime example that "circumstances may so change in time . . . as to clothe with such a [public] interest what at other times . . . would be a matter of purely private concern."

Id. (quoting Block v. Hirsh, 256 U.S. 135, 155 (1921)).

166. *Id.* at 1242 (quoting Holmes in *Pennsylvania Coal*, 260 U.S. at 414).

167. *Id.* at 1242-43. Justice Stevens stated in part, "Unlike the Kohler Act, . . . the Subsidence Act does not merely involve a balancing of the private economic interests of coal companies against the private interests of the surface owners." *Id.* at 1242.

and abuses.' " Because these were public " 'evils and abuses,' "[168] Rehnquist saw little or no difference in the public purposes behind the two acts.

In its analysis, the Court provided a complete shopping list of regulatory takings tests, starting with one of the original bulwarks, the nuisance theory. Citing a litany of nuisance cases, the Court stated that "since no individual has a right to use his property so as to create a nuisance or otherwise harm others, the state has not 'taken' anything when it asserts its power to enjoin the nuisance-like activity."[169] The Court applied the nuisance analysis to the facts of this case, and linked it to Justice Holmes' reciprocity of advantage language.[170]

Justice Rehnquist cited the same nuisance cases, but to support his contention that application of the nuisance theory was inappropriate in this case.[171] The Chief Justice concluded that "[a] broad exception to the . . . [j]ust [c]ompensation [c]lause based on the exercise of multifaceted health, welfare and safety regulations would surely allow government much greater authority than we have recognized to impose societal burdens on individual landowners" because "nearly every action the government takes is intended to secure for the public an extra measure of health, safety and welfare."[172]

Disagreement between the majority and the dissent centered on the issue of how to measure the diminution of the coal companies' property value resulting from the Subsidence Act. The majority maintained that the coal required to be left in the ground, as well as the value of the separate support estate, should be balanced against the companies' entire interest in the property. The dissent, on the other hand, opined that each segment of the companies' interest in the property should be weighed separately.

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168. *Id.* at 1255 (quoting the Act) (Rehnquist, C.J., dissenting) (emphasis in original). Rehnquist continued, pointing out that the *Pennsylvania Coal* Court "did not ignore the public interests served by the Act. When considering the protection of the 'single private house' owned by the Mahons, the Court noted that '[n]o doubt there is a *public* interest even in this.' [260 U.S. at 413 . . . (emphasis added)]." *Id.* (Rehnquist, C.J., dissenting).

169. *Id.* at 1245 n.20.

170. *Id.* at 1245. The Court stated:

> The Court's hesitance to find a taking when the state merely restrains uses of property that are tantamount to public nuisances is consistent with the notion of "reciprocity of advantage" that Justice Holmes referred to in *Pennsylvania Coal*. . . . These restrictions are "properly treated as part of the burden of common citizenship."

Id.

171. *Id.* at 1256 (Rehnquist, C.J., dissenting).

172. *Id.* (Rehnquist, C.J., dissenting).

The Court disagreed with the plaintiffs' argument that the coal required to be left in the ground under the provisions of the Act should be considered a separate segment of property for takings purposes.[173] The majority focused on diminishing the value of the coal companies' property interest by denying them the right to mine approximately two percent of the available coal.[174] The Court's argument was persuasive under the diminished value approach. The Subsidence Act's restrictions did not so substantially interfere with the coal companies' property use that mining the remaining coal became economically infeasible. Stating that the coal companies "may continue to mine coal profitably even if they may not destroy or damage surface structures at will in the process,"[175] the Court concluded that the Subsidence Act did not effect a compensable taking of the companies' interests.

In dissent, Justice Rehnquist considered separately each segment of the property interest in determining whether a taking had occurred. With regard to the coal required to be left in the ground, he found "no question that this coal is an identifiable and separable property interest."[176] In Rehnquist's view, the coal companies should have been compensated for the total value of the coal left in place, regardless of whether the remaining coal could be profitably mined.[177]

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173. Justice Stevens quoted *Andrus v. Allard*: "[W]here an owner possesses a full 'bundle' of property rights, the destruction of one 'strand' of the bundle is not a taking because the aggregate must be viewed in its entirety." *Andrus*, 444 U.S. 51, 65-66 (1979), *quoted in Keystone*, 107 S. Ct. at 1248.

Andrus concerned the right to sell avian artifacts from species protected by federal law, but in which the petitioners, American Indians, claimed a conflicting religious and cultural interest. The Court pointed out that loss of the right to *sell* the artifacts did not deprive the owners of their full bundle of rights, because they could still profit from such uses as displaying the artifacts.

The Court in *Keystone* may have been stretching to find a quote that met its purposes, because *Andrus* was not concerned with separating two feathers from a group of 200 feathers, but rather with the variety of interests that one might have in the ownership of avian artifacts. *Id.* at 1248.

174. *Keystone*, 107 S. Ct. at 1248.

175. *Id.* at 1250.

176. *Id.* at 1259 (Rehnquist, C.J., dissenting). Rehnquist went on to say:

> Unlike many property interests, the "bundle" of rights in this coal is sparse. " 'For practical purposes, the right to coal consists in the right to mine it.' " . . . From the relevant perspective—that of the property owners—this interest has been destroyed every bit as much as if the government had proceeded to mine the coal for its own use.

Id. (quoting *Pennsylvania Coal*, 260 U.S. at 414).

177. Rehnquist did, however, acknowledge some difference between his separate treatment of each property segment and previous Court analysis.

> There is admittedly some language in Penn Central Transportation Co.

Not as well reasoned as its diminished value argument is the majority's analysis of the "support estate," or "a separate interest in land that can be conveyed apart from either the mineral estate or the surface estate."[178] In both *Keystone* and *Pennsylvania Coal* the coal companies had conveyed the surface estate while retaining both the mineral and support estates. In *Pennsylvania Coal*, the Court concluded that the surface estate purchasers had taken a calculated risk when they failed also to obtain the support interest. Furthermore, they ought to have known that courts would not step in after the fact to save them from a bad bargain. In *Keystone*, however, the Court determined that "the support estate has value only insofar as it protects or enhances the value of the estate with which it is associated."[179] Since the coal companies could continue profitably to mine coal despite the Subsidence Act's requirements of providing surface support, the Court held that "the burden the Act places on the support estate does not constitute a taking."[180]

In contrast, Justice Rehnquist considered the support estate as a separate property interest in determining the effect of the Subsidence Act on the coal companies' property rights.[181] Since the support estate holder would not find his interest to be without value, "for surely the owners of the mineral or surface estates would be willing buyers of this interest,"[182] Rehnquist concluded that the effect of the Subsidence Act was to extinguish the support estate in violation of the just compensation clause of the fifth amendment.[183]

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v. New York City, 438 U.S. 104, 130-31, 98 S. Ct. 2646, 57 L. Ed. 2d 631 (1978), that suggests a contrary analysis: " 'Taking' jurisprudence does not divide a single parcel into discrete segments and attempt to determine whether rights in a particular segment have been entirely abrogated. In deciding whether a particular governmental action has effected a taking, this Court focuses rather both on the character of the action and on the nature and extent of the interference with rights in the parcel as a whole." The Court gave no guidance on how one is to distinguish a "discrete segment" from a "single parcel."

Id. at 1259 n.5 (Rehnquist, C.J., dissenting) (quoting *Penn Central*, 438 U.S. at 130-31).

178. *Id.* at 1250.

179. *Id.*

180. *Id.*

181. *Id.* at 1259-60 (Rehnquist, C.J., dissenting).

182. *Id.* at 1260 (Rehnquist, C.J., dissenting).

183. *Id.* at 1260-61 (Rehnquist, C.J., dissenting). The Chief Justice delivered the following statement:

> Purchase of this right [the support estate] . . . shifts the risk of subsidence to the surface owner. Section 6 of the Subsidence Act, by making the coal mine operator strictly liable for any damage to surface structures

B. *First English Evangelical Lutheran Church of Glendale v. County of Los Angeles:* Compensation for "Temporary Takings"

Since the 1980 decision in *Agins v. City of Tiburon*,[184] the Court had left unresolved the problem of whether compensation should be awarded for temporary regulatory takings. The issue was whether property owners have the right to compensation for loss of property use resulting from restrictions that are either later struck down by the courts, or repealed or amended by a governmental body. After avoiding this issue on procedural grounds in a series of cases, the Court handed down its long-awaited decision in *First English Evangelical Lutheran Church of Glendale v. County of Los Angeles.*[185]

In 1957, the First English Evangelical Lutheran Church of Glendale (church) purchased a twenty-one-acre parcel of land, which it used as a camp for retarded children. After flooding destroyed the camp in 1978, the property was included in an interim flood protection area where no construction was allowed.[186] The church sought damages in inverse condemnation for the loss of use of its property.

In a six-to-three opinion authored by Chief Justice Rehnquist,[187] the Court noted that the just compensation clause "does not prohibit the taking of private property, but instead places a condition on the exercise of that power . . . ."[188] That condition requires the

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> caused by subsidence, purports to place this risk on the holder of the mineral estate regardless of whether the holder also owns the support estate. Operation of this provision extinguishes the petitioners' interests in their support estates, making worthless what they purchased as a separate right under Pennsylvania law . . . and must be accompanied by just compensation.

Id. (Rehnquist, C.J., dissenting).

184. 447 U.S. 255 (1980).

185. 107 S. Ct. 2378 (1987).

186. *Id.* at 2381-82.

187. Justices Brennan, White, Marshall, Powell and Scalia joined Chief Justice Rehnquist. Justices Blackmun and O'Connor joined Justice Steven's dissent in part.

188. *First English*, 107 S. Ct. at 2385. The Court stated that "[w]hile the typical taking occurs when the government acts to condemn property in the exercise of its power of eminent domain, the entire doctrine of inverse condemnation is predicated on the proposition that a taking may occur without such formal proceedings." *Id.* at 2386. Quoting the 1872 case of *Pumpelly v. Green Bay Company*, the Court said:

> It would be a very curious and unsatisfactory result if . . . it shall be held that if the government refrains from the absolute conversion of real property to the uses of the public it can, . . . in effect, subject it to total destruction without making any compensation, because in the narrowest sense of that word, it is not *taken* for the public use.

Id. at 2386-87 (quoting Pumpelly v. Green Bay Co., 80 U.S. (13 Wall.) 166, 177-78 (1872) (emphasis in original).

payment of compensation for the taking. Reviewing a series of cases involving temporary government occupations in time of war, Justice Rehnquist pointed out that these " 'temporary' takings . . . are not different in kind from permanent takings, for which the Constitution clearly requires compensation."[189] Noting that eight years had elapsed since the church filed suit on the flood protection ordinance but that the courts had not yet addressed the merits of the church's claim, Rehnquist found that "[t]he United States has been required to pay compensation for leasehold interests of shorter duration than this," and "invalidation of the ordinance . . . after this period of time . . . is not a sufficient remedy to meet the demands of the [j]ust [c]ompensation [c]lause."[190]

In response to anticipated protests from land-use planners and financially distressed municipalities, the Court quoted the state court's justification for disallowing damages that occurred prior to the invalidation of the challenged regulation: " 'the need for preserving a degree of freedom in the land-use planning function, and the inhibiting financial force which inheres in the inverse condemnation remedy.' "[191] Insisting that the decision did not limit the government's options, such as withdrawing the regulation or proceeding with a formal condemnation action,[192] the Court concluded "that where the

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189. *Id.* at 2388.

190. *Id.*

191. *Id.* at 2387 (quoting *Agins*, 24 Cal. 3d 266, 276-77, 598 P.2d 25, 31, 157 Cal. Rptr. 372, 378, *aff'd on other grounds*, 447 U.S. 255 (1980)).

192. *Id.* at 2389. The Court made the following argument:

> Nothing we say today is intended to abrogate the principle that the decision to exercise the power of eminent domain is a legislative function, " 'for Congress and Congress alone to determine.' " Hawaii Hous. Auth. v. Midkiff, 467 U.S. 229, 240, 181 L. Ed. 2d 186, 104 S. Ct. 2321 (1984) (quoting Berman v. Parker, 348 U.S. 26, 33, 99 L. Ed. 27, 75 S. Ct. 98 (1954)). Once a court determines that a taking has occurred, the government retains the whole range of options already available—amendment of the regulation, withdrawal of the invalidated regulation, or exercise of eminent domain. Thus we do not, as the Solicitor General suggests, "permit a court, at the behest of a private person, to require the . . . [g]overnment to exercise the power of eminent domain . . . ." Brief for United States as Amicus Curiae 22. . . .
>
> We limit our holding to the facts presented, and of course do not deal with the quite different question that would arise in the case of normal delays in obtaining building permits, changes in zoning ordinances, variances, and the like which are not before us. We realize that even our present holding will undoubtedly lessen to some extent the freedom and flexibility of land-use planners and governing bodies of municipal corporations when enacting land-use regulations. But such consequences necessarily flow from any decision upholding a claim of constitutional

government's activities have already worked a taking of all use of property, no subsequent action by the government can relieve it of the duty to provide compensation for the period during which the taking was effective."[193]

In dissent, Justice Stevens was concerned with what he perceived a need for a "dividing line . . . between everyday regulatory inconveniences and those so severe that they constitute takings."[194] Conceding that he was "willing to assume that some cases may arise in which a property owner can show that prospective invalidation of the regulation cannot cure the taking,"[195] he concluded:

> Why should there be a constitutional distinction between a permanent restriction that only reduces the economic value of the property by a fraction—perhaps one-third—and a restriction that merely postpones the development of a property for a fraction of its useful life—presumably far less than a third? In the former instance, no taking has occurred; in the latter case, the Court now proclaims that compensation for a taking must be provided.[196]

Stevens questioned whether the regulation interfered with the church's reasonable expectations as to its future use of the property.[197] He also sounded a cautionary note as to future litigation likely to result from the Court's decision.[198]

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right; many of the provisions of the Constitution are designed to limit the flexibility and freedom of governmental authorities and the [j]ust [c]ompensation [c]lause of the [f]ifth [a]mendment is one of them.

Id.

193. *Id.* at 2389.

194. *Id.* at 2393-94 (Stevens, J., dissenting).

195. *Id.* at 2394 (Stevens, J., dissenting).

196. *Id.* at 2395 (Stevens, J., dissenting).

197. *Id.* at 2392 (Stevens, J., dissenting). Stevens stated:

> Nor did [the church] allege any facts indicating how the ordinance interfered with any future use of the property contemplated or planned by appellant. In light of the tragic flood and the loss of life that precipitated the safety regulations here, it is hard to understand how appellant ever expected to rebuild on Lutherglen.

Id.

198. *Id.* at 2399 (Stevens, J., dissenting). Stevens issued a warning:

> The policy implications of today's decision are obvious and, I fear, far reaching. Cautious local officials and land-use planners may avoid taking any action that might later be challenged and thus give rise to a damage action. Much important regulation will never be enacted, even perhaps in the health and safety area. Were this result mandated by the Constitution, these serious implications would have to be ignored. But the loose cannon the Court fires today is not only unattached to the Constitution, but it also takes aim at a long line of precedents in the regulatory

C. *Nollan v. California Coastal Comm'n*: Building Permit Conditions as Takings

The Court's third 1987 land use decision, *Nollan v. California Coastal Comm'n*,[199] addressed the issue of whether the state could impose uncompensated public dedication requirements on the issuance of building permits within the heavily-regulated California coastal zone. It was hoped that the decision would provide some guidance as to which of the regulatory takings tests would be favored by the new Court. Instead, it applied the tests from *Pennsylvania Coal*— and introduced a new one.

The Nollans had been renting beachfront property with an option to buy. Their option was subject to their promise to demolish the existing bungalow which had fallen into disrepair, and to replace it with a new structure. The California Coastal Commission conditioned issuance of a building permit for this new home on the Nollans' allowing the public an easement to pass across their privately-owned beach between the mean high tideline and an eight-foot concrete seawall.[200] In a five-to-four decision, the Supreme Court found that such a condition constituted a compensable taking.[201]

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takings area. It would be the better part of valor simply to decide the case at hand instead of igniting the kind of litigation explosion that this decision will undoubtedly touch off.

Id. at 2399-2400. Stevens also expressed concern over the additional burden of constitutional analysis he sees the Court laying on the shoulders of land-use planners:

> It is no answer to say that "[a]fter all, if a policeman must know the Constitution, then why not a planner?" To begin with, the Court has repeatedly recognized that it itself cannot establish any objective rules to assess when a regulation becomes a taking. How then can it demand that land planners do any better? However confusing some of our criminal procedure cases may be, I do not believe they have been as open-ended and standardless as our regulatory takings cases are . . . .
>
> Another critical distinction between police activity and land-use planning is that not every missed call by a policeman gives rise to civil liability; police officers enjoy individual immunity for actions taken in good faith. . . . In the land regulation context, however, I am afraid that any decision by a competent regulatory body may establish a "policy or custom" and give rise to liability after today.

Id. at 2399-2400 n.17 (Stevens, J., dissenting) (citations omitted).

199. 107 S. Ct. 3141 (1987).

200. *Id.* at 3143-44. The Superior Court of Ventura County granted the Nollans' requested writ of mandamus and directed that the permit condition be struck. While the case was being appealed by the Coastal Commission, the Nollans exercised their purchase option, tore down the bungalow, and built a two-story, 1,674-square-foot residence with an attached two-car garage.

The court of appeals reversed the superior court, holding the access requirement valid under the constitution because the access condition was sufficiently related

Writing for the majority, Justice Scalia made three points. First, had the state required the easement outright rather than in exchange for a building permit, the easement clearly would have resulted in a compensable taking. To support this conclusion, Scalia pointed out that such action constituted more than a " 'mere restriction on its use,' "[202] but rather destroyed the property owner's basic rights of exclusion and freedom from permanent physical invasion. In effect, the state granted the public "a permanent and continuous right to pass to and fro"[203] across the Nollans' property.

Second, Justice Scalia urged the Court to apply a more stringent standard when the invasion of the owner's property interest was in exchange for a requested governmental concession. In *Nollan*, for example, the government insisted on an easement in exchange for the requested building permit. To guide the Court, Justice Scalia detailed a stricter two-step standard of review for state actions. Pursuant to this standard, he required that the regulatory action substantially advance legitimate state interests, rather than merely being reasonably related thereto.[204]

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to the burdens placed on public beach access created by the project. The court also rejected the Nollans' takings claim because they failed to establish loss of all reasonable use of the property. *Id.* at 3144.

201. Justice Scalia, joined by Chief Justice Rehnquist and Justices White, Powell and O'Connor, delivered the Court's opinion. Justice Brennan wrote a dissent in which Justice Marshall joined. Justices Blackmun and Stevens filed separate dissents, the latter of which Blackmun also joined.

202. *Nollan*, 107 S. Ct. at 3145 (quoting *id.* at 3154 n.3 (Brennan, J., dissenting)). The Court went on to say:

> Indeed, one of the principal uses of the eminent domain power is to assure that the government be able to require conveyance of just such interests, so long as it pays for them. Perhaps because the point is so obvious, we have never been confronted with a controversy that required us to rule upon it, but our cases' analysis of the effect of other governmental action leads to the same conclusion. We have repeatedly held that, as to property reserved by its owner for private use, "the right to exclude [others is] 'one of the most essential sticks in the bundle of rights that are commonly characterized as property.' "

Id. (citations omitted). For a further discussion of the right to exclude others, see *supra* notes 32-53 and accompanying text.

203. *Nollan*, 107 S. Ct. at 3145.

204. *Id.* at 3150. Scalia observed:

> [O]ur cases describe the condition for abridgement of property rights through the police power as a "*substantial* advanc[ing]" of a legitimate state interest. We are inclined to be particularly careful about the adjective where the actual conveyance of property is made a condition to the lifting of a land use restriction, since in that context there is heightened risk that the purpose is avoidance of the compensation requirement, rather than the stated police power objective.

Id. (emphasis in original).

Further, Scalia required a nexus or tailored fit between the state interest and the condition imposed to advance it.[205] In *Nollan*, Justice Scalia did not find a close fit between the condition and the burden.[206] Instead, he found that the easement allowing people already on the beach to walk across the Nollans' property did not serve the Commission's purported purpose of reducing the "psychological barrier"[207] to public beach access created by new developments blocking the public's view of the beach from the street above.

Third, Justice Scalia warned that this heightened scrutiny test would require more than casual compliance by governmental agencies.[208] In fact, the Commission's attempt to tailor its justification more closely to the easement condition did not convince Justice Scalia:

> [T]he Commission's justification for the access requirement . . . [is that it] is part of a comprehensive program to provide continuous public access along Faria Beach as the lots undergo development or redevelopment. . . . The Commission may well be right that it is a good idea, but that does not establish that the Nollans (and other coastal residents) alone can be compelled to contribute to its realization. Rather, California is free to advance its "comprehensive program," if it wishes, by using its power of eminent domain for this "public purpose," (citation omitted) but if it wants an easement across the Nollans' property, it must pay for it.[209]

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205. *Id.* at 3148. He stated:

> The evident constitutional propriety disappears . . . if the condition substituted for the prohibition utterly fails to further the end advanced as the justification for the prohibition. . . . [H]ere, the lack of nexus between the condition and the original purpose of the building restriction converts that purpose to something other than what it was. . . . In short, unless the permit condition serves the same governmental purpose as the development ban, the building restriction is not a valid regulation of land use but "an out-and-out plan of extortion."

Id.

206. *Id.* at 3148-49.

207. *Id.* at 3147.

208. *Id.* at 3150. He continued:

> We do not share Justice Brennan's confidence that the Commission "should have little difficulty in the future in utilizing its expertise to demonstrate a specific connection between provisions for access and the burdens on access," . . . that will avoid the effect of today's decision. We view the [f]ifth [a]mendment's property clause to be more than a pleading requirement, and compliance with it to be more than an exercise in cleverness and imagination.

Id.

209. *Id.*

In dissent, Justice Brennan objected to the "Court's insistence on a precise fit between the forms of burden and condition on each individual parcel" because it "would penalize the Commission for its flexibility . . . [in trying] to balance private and public interests and to accept tradeoffs: [that is] to permit development that reduces access in some ways as long as other means of access are enhanced."[210] But the main thrust of his dissent dealt with the landowners' "reasonable expectations" as to how the Commission would allow them to use their property, and the Court's seeming misinterpretation of those expectations:

> The Court's demand for this precise fit is based on the assumption that private landowners in this case possess a reasonable expectation regarding the use of their land that the public has attempted to disrupt. In fact, the situation is precisely the reverse: it is private landowners who are the interlopers.[211]

Brennan pointed out that the California Constitution has contained a beach-access mandate since 1879.[212] Moreover, the Nollans, along with all other lessees in the same beach tract, had never "interfered with public use of the beachfront, . . . so long as public use was limited to pass and re-pass lateral access along the shore."[213] Thus, he concluded:

> [A]ppellants can make no reasonable claim to any expectation of being able to exclude members of the public from crossing the edge of their property to gain access to the ocean. . . . California . . . has clearly established that the power of exclusion for which appellants seek compensation simply is not a strand in the bundle of appellants' property rights, and appellants have never acted as if it were. Given this state of affairs, appellants cannot claim that the deed restriction has deprived them of a reasonable expectation to exclude from their property persons desiring to gain access to the sea.[214]

Brennan reminded the Court that "[t]he fact that the Commission's action is a legitimate exercise of the police power does not, of course, insulate it from a takings challenge."[215] Then applying traditional takings tests to the facts in this case, he included the diminished

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210. *Id.* at 3153 (Brennan, J., dissenting).
211. *Id.* (Brennan, J., dissenting).
212. *See* CAL. CONST. art. X, § 4.
213. *Nollan*, 107 S. Ct. at 3159 (Brennan, J., dissenting).
214. *Id.* at 3158-59 (Brennan, J., dissenting).
215. *Id.* at 3156 (Brennan, J., dissenting).

value test, the investment-backed expectations test and the reciprocity of advantage test.[216]

Finally, Justice Brennan returned to his expectations analysis, and found that when appellants requested a new development permit they "were clearly on notice . . . [that] stringent regulation of development along the California coast had been in place at least since 1976."[217] Because the state had imposed the same public access requirements on forty-three other developments in the same beach tract since 1979, the Nollans "could have no reasonable expectations of, and had no entitlement to, approval of their permit application without any deed restriction ensuring public access to the ocean."[218]

In a separate dissent, Justice Stevens cautioned the Court on its current direction in land-use rulings. He also pointed out the confusion in this area of the law. Referring to the Court's adoption in *First English* of Brennan's dissenting view in *San Diego Gas & Elec.*, concerning compensation for temporary takings, Justice Stevens expressed his concern over the lack of coherent policy in balancing public and private interests in land use regulation:

> I write today to identify the severe tension between that dramatic development in the law and the view expressed by Justice Brennan's dissent in this case that the public interest is served by encouraging state agencies to exercise considerable flexibility in responding to private desires for development in a way that threatens the preservation of public resources. . . . I like the hat that Justice Brennan has donned today better than the one he wore in *San Diego*, and I am persuaded that he has the better of the legal arguments here. Even if his position prevailed in this case, however, it would be of little solace to land-use planners who would still be left guessing about how the Court will react to the next case, and

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216. *Id.* at 3158 (Brennan, J., dissenting). As to this last test, Brennan said:

> Allowing appellants to intensify development along the coast in exchange for ensuring public access to the ocean is a classic instance of government action that produces a "reciprocity of advantage." . . . Such development obviously significantly increases the value of appellants' property. . . . Furthermore, appellants gain an additional benefit from the Commission's permit condition program. They are able to walk along the beach beyond the confines of their own property only because the Commission has required deed restrictions as a condition of approving other new beach developments. Thus, appellants benefit both as private landowners and as members of the public from the fact that new development permit requests are conditioned on preservation of public access.

Id. (footnote omitted).

217. *Id.* at 3159-60 (Brennan, J., dissenting).

218. *Id.* at 3160 (Brennan, J., dissenting).

> the one after that. . . . Like Justice Brennan, I hope "that a broader vision ultimately prevails."[219]

Justice Brennan's dissent did not provide the clarity desperately needed in this area of law. He applied many of the now-standard tests and introduced a new element of reasonable expectations not previously utilized by the Court. On the other hand, the majority's opinion created an additional element of a "tailored fit" without clarifying or eliminating any of the existing takings tests, which were conspicuous by their absence from Justice Scalia's opinion. Brennan's reasonable expectations analysis, however, may guide the Court in fashioning a predictable yet flexible standard for judging regulatory takings cases.

V. A Contract Approach to Regulatory Takings: A Viable Alternative

How can the takings problem be resolved? The various and inconsistent approaches of the state and federal courts have not provided an answer. The solution is not to limit takings to those situations in which a physical possession or invasion occurs. It is clear that the bundle of rights that is associated with property goes far beyond physical possession or the right to exclude others from the property. Within that bundle is an essential stalk which includes the freedom to use property in any lawful manner provided it does not constitute a nuisance. Moreover, limitations on the freedom of use that go beyond preventing a nuisance must be considered not only in light of whether they are constitutionally permissible under the tenth and fourteenth amendments, but also in light of whether the interference is such that it constitutes a taking for which compensation must be given under the fifth amendment.[220]

The solution is to view the relationship between the government and the individual property owner as a contract. Thus, in analyzing the rights of private individuals and the government, courts can apply well-founded contractual principles.

This contract approach to property problems is not new. As early as 1798, the Supreme Court explained the relationship between the state and the individual in the ownership of property in contract terms:

> It seems to me, that the right of property, in its origin, could only arise from compact express or implied, and I think it the

219. *Id.* at 3163-64 (Stevens, J., dissenting).

220. *See supra* notes 69-73, 97-144 and accompanying text.

> better opinion, that the right, as well as the mode, or manner of acquiring property, and of alienating or transferring, inheriting, or transmitting it, is conferred by society; is regulated by civil institution, and is always subject to the rules prescribed by positive law. When I say, that a right is vested in a citizen, I mean, that he has the power to do certain actions; or to possess certain things, according to the law of the land.[221]

Fifty years later, the Court expressly called the relationship a contract and indicated that without this relationship "the law of property would be simply the law of force":

> Under every established government, the tenure of property is derived mediately or immediately from the sovereign power of the political body. . . . [I]t is undeniable, that the investment of property in the citizen by the government . . . is a contract between the state, or the government acting as its agent, and the grantee; and both parties thereto are bound in good faith to fulfill it.[222]

The Court went on to discuss the conditions attached to performance of this contract, and the government's rights and obligations under the taking clause:

> But into all contracts . . . there enter conditions which arise not out of the literal terms of the contract itself; they are superinduced by the pre-existing and higher authority of the laws of nature, of nations, or of the community to which the parties belong; they are always presumed, and must be presumed, to be known and recognized by all, are binding upon all, and need never, therefore, be carried into express stipulation, for this could add nothing to their force. Such a condition is the right of eminent domain. This right does not operate to impair the contract effected by it, but recognizes its obligations in the fullest extent, claiming only the fulfilment of an essential and inseparable condition. Thus, in claiming a resumption or qualification of an investiture, it insists merely on the true nature and character of the right invested.[223]

In a variety of cases in which the property of an individual has been condemned by the government, the courts have recognized that such an implied contract exists. For example, in *United States v. Great Falls Mfg. Co.*,[224] the Court stated:

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221. Calder v. Bull, 3 U.S. (3 Dall.) 386, 394 (1798).
222. West River Bridge v. Dix, 47 U.S. (6 How.) 507, 531-32 (1848).
223. *Id.*
224. 112 U.S. 645 (1884).

> The law will imply a promise to make the required compensation, where property, to which the government asserts no title, is taken, pursuant to an [A]ct of Congress, as private property to be applied for public use[s]. Such an implication being consistent with the constitutional duty of the government, as well as with common justice, the claimant's cause of action is one that arises out of implied contract . . . .[225]

Similarly, it was held, in *Danforth v. United States*,[226] that where the government takes land for flood control and the value of the land taken exceeds any possible flood benefit, a contract to pay the value of that land will be implied. Again, in *United States v. Georgia Marble Co.*,[227] where the government seized and converted to its own use property in the possession of a defaulting contractor but which was owned by a third party, the court held that the owner could recover against the United States upon a theory of implied contract. This contractual interpretation of the relationship between the state and the individual property owner applies equally to inverse condemnation or regulatory takings.

A. The Contract Approach

In all contractual relationships, there are certain expectations on the part of the parties involved and certain risks that they either have assumed, or as reasonable people, should have assumed.[228] The relationship between the individual land owner and the government is similar to a contract in which each party recognizes there is some risk of loss and expectation of gain. It is this expectation, or awareness of risk, that should be the focal point of the courts' decisions. Thus, where the governmental action or regulation goes beyond the risks that a reasonable person should have anticipated, or eliminates an expectation that a reasonable individual would have contemplated, then such governmental action or regulation constitutes

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225. *Id.* at 656-57 (emphasis added).
226. 308 U.S. 271 (1939).
227. 106 F.2d 955 (5th Cir. 1939).
228. One scholar has concisely described this situation:

> One who is considering whether or not to make a contract ordinarily makes a number of assumptions in assessing the benefits he will receive and the burdens he will shoulder under the proposed exchange of performances. Some assumptions relate to facts that exist at the time the contract is made. . . . Other assumptions relate to events that are expected to occur or circumstances that are expected to exist at some later time.

E. FARNSWORTH, CONTRACTS § 9.1 (1982).

a taking. In pursuing the contract approach, one must resolve two problems: (1) when do the property owner's expectations and contemplated risks arise; and (2) what are those risks and expectations?

1. When Risks and Expectations Arise

In any contract, risks and expectations may arise before formation, at formation, or during the performance of the contract. However, the most obvious time that risks and expectations are contemplated is when the contract is formed. Except in a written contract dated and signed by both parties, however, the exact time of formation may not be clear. Normally, the contract between the property owner and the government has not been expressly stated, dated or signed. Few, if any, words have passed between the two parties. Nevertheless, the conduct of the parties creates this relationship, traditionally called an implied-in-fact contract.[229]

To determine the risks and expectations of an implied-in-fact contract, courts must consider several well established contractual principles: (1) "usage"[230]—the circumstances that existed prior to the contract's formation; and (2) "course of dealing"[231] or "course of performance"[232]—the conduct of the parties both before and after the creation of the implied agreement.

2. The Scope of Risks and Expectations

The second step in a contract analysis is to determine the risks and expectations of the property owner, which the courts must

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229. J. CALAMARI & J. PERILLO, THE LAW OF CONTRACTS 19 (3d ed. 1987) [hereinafter CALAMARI & PERILLO]; *see also supra* note 22 and accompanying text.

230. "Usage is habitual or customary practice." RESTATEMENT (SECOND) OF CONTRACTS § 219 (1979). "Scope of Usage. . . . A particular usage may be more or less widespread. It may prevail throughout an area, and the area may be small or large—a city, a state or a larger region. . . . Usages change over time . . . ." *Id.* § 219 comment a.

"An agreement is interpreted in accordance with a relevant usage if each party knew or had reason to know of the usage . . . ." *Id.* § 220.

"An agreement or term thereof need not be stated in words if the parties manifest assent to it by other conduct, and such assent is often manifested by conduct in accordance with usage." *Id.* § 220 comment c.

231. "A course of dealing is a sequence of previous conduct between the parties to a particular transaction which is fairly to be regarded as establishing a common basis of understanding for interpreting their expressions and other conduct." *Id.* § 223; *see also* U.C.C. § 1-205(1) (1978).

232. "Where the contract . . . involves repeated occasions for performance . . . with . . . opportunity for objection to it by the other, any course of performance accepted or acquiesced in without objection shall be relevant to determine the meaning of the agreement." U.C.C. § 2-208 (1978).

consider in evaluating the governmental regulation. Courts should include in this analysis the nature of the property owner. Contract law has long recognized that the competence, education, background and expertise of the individual entering into the contract are factors to be considered in determining the risks and expectations of the contracting parties.[233] For example, a sophisticated owner, such as a developer, has more experience with land use regulation than the individual who has owned the same family residence for forty years.

These criteria are not precise. Courts, however, have successfully applied them in contract law, particularly where the Uniform Commercial Code distinguishes between merchants and non-merchants.[234]

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233. Much of the law of contracts rests on an ethic of self-reliance. When negotiating an agreement, each individual is charged with the burden of looking out for his own self-interest.

> The self-reliance ethic presupposes, as a model, parties who understand the legal consequences of the agreement and who have equal bargaining power or, at least, who are equally free to refuse to bargain unless their terms are met. Today however, the realities of the market often are at variance with that presupposition. (N.2. W. MAGNUSON & J. CARPER, THE DARK SIDE OF THE MARKETPLACE: THE PLIGHTS OF THE AMERICAN CONSUMER (1969); D. CAPLOVITZ, THE POOR PAY MORE (1963); *cf.* K. LLEWELLYN, THE COMMON LAW TRADITION 401-41 (1960); Rothschild & Throne, *Criminal Consumer Fraud: A Victim-Oriented Analysis*, 74 Mich. L. Rev. 661 (1976)).

CALAMARI & PERILLO, *supra* note 229, at 429.

Recognition of the lack of education, expertise or bargaining ability has, in our modern society, led to the enactment of a variety of legislation that addresses this imbalance. Some examples are the Consumer Credit Protection Act, the Truth in Lending Simplification and Reform Act, the Fair Credit Billing Act, the Interstate Land Sales Full Disclosure Act, the Magnuson-Moss Act, the Real Estate Settlements Procedures Act, and the Uniform Commercial Code, particularly § 2-302 dealing with unconscionability.

234. The Uniform Commercial Code defines "merchant" in the following manner:

> "Merchant" means a person who deals in goods of the kind or otherwise by his occupation holds himself out as having knowledge or skill peculiar to the practices or goods involved in the transaction or to whom such knowledge or skill may be attributed by his employment of an agent or broker or other intermediary who by his occupation holds himself out as having such knowledge or skill.

U.C.C. § 2-104(1) (1978). Comment 1 provides that "[t]his Article assumes that transactions between professionals in a given field require special and clear rules which may not apply to a casual or inexperienced seller or buyer . . . ." *Id.* § 2-104 comment 1.

As Official Comment 2 to § 2-104 points out, the term merchant can be applied in several ways. It can be applied broadly to include "almost every person in business . . . under the language 'who . . . by his occupation holds himself out as having knowledge or skill peculiar to the practices . . . involved in the transaction . . . .' " *Id.* § 2-104 comment 2. The term can also be applied more narrowly to relate to only a particular kind of goods: "if the seller is a merchant with

Thus, there is no reason to doubt that they can be applied to a fifth amendment takings problem. In fact, as early as 140 years ago Justice Daniel voiced this concept in the property-ownership context.[235]

Part of a property owner's conception of risks and expectations includes the expectation that the property will not be physically possessed or invaded by another. Thus, the owner has the right to exclude others from possession of his property. An owner can also expect to be able to alienate the property and to use the property in any lawful manner. Such use, however, may not constitute a nuisance, or violate any existing governmental regulations. Further, the owner should anticipate future reasonable governmental regulations.

The concepts of good faith and fair dealing also apply to the conduct of both the state and the individual.[236] This thread is not only woven throughout the fabric of contracts, but within the entire fabric of the law. For example, since property often constitutes an investment, its ownership involves such expectations as the hope of increasing the value of the property by developing it. On the other hand, every investment involves risks. Thus, owners should contemplate that governmental action, changes within the community, or a variety of other factors can result in a decline in property values.

But when governmental action either fails to recognize the contemplated risks and expectations of the individual property owner, or exceeds those contemplated risks, then this action breaches the implied covenant of good faith and fair dealing implicit in every contract. Conversely, when the property owner contemplated, or should have contemplated, the risk/expectation of governmental action, such action does not breach the implied covenant.

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respect to goods of that kind." *Id.*

Whether the term is applied broadly or narrowly, the government falls squarely within the merchant definition (of course, only if the U.C.C. applied to land sale contracts—which it does not). Through its various state, county and municipal agencies the government holds itself out as having knowledge as to these particular goods (real property) and to the practices involved in these transactions (regulations concerning real property).

See U.C.C. §§ 2-103(1)(b), 2-201(2), 2-205, 2-207, 2-209, 2-314, 2-327(1)(c), 2-402(2), 2-403(2), 2-509, 2-603, 2-605, 2-609 (1978), for provisions specifically applicable to merchants.

235. *See supra* note 223 and accompanying text.

236. Justice Daniel included these elements in his contractual analysis: "[B]oth the parties thereto are bound *in good faith* to fulfil it." *West River Bridge*, 47 U.S. (6 How.) 507, 532 (1848) (emphasis added).

The Supreme Court touched on this risk/expectation concept in *Penn Central*:

> Unlike the governmental acts in *Goldblatt*, . . . *Causby*, *Griggs*, and *Hadacheck*, the New York City law does not interfere in any way with the present uses of the [t]erminal. Its designation as a landmark not only permits but contemplates that appellants may continue to use the property precisely as it has been used for the past [sixty-five] years; as a railroad terminal . . . . So the law does not interfere with what must be regarded as Penn Central's *primary expectation* concerning the use of the parcel.[237]

Of course, when the government recognizes the risks and expectations contemplated by the property owner, but proceeds to regulate in disregard of them, then the government has acted in bad faith. For example, in *Sheerr v. Evesham Township*,[238] the New Jersey Superior Court cited numerous occasions on which counsel warned township officials that their restrictive zoning of Sheerr's property was probably unconstitutional. Despite these repeated warnings, the council continued to restrict Sheerr's property to an environmental protection zone. This restriction constituted a clear breach of good faith and fair dealing on the council's part, especially since several members admitted in depositions that their intent was to acquire the property for public use without paying for it—despite advice of counsel.[239]

Another significant area of expectation is the concept of free alienability. Each and every property owner expects to be able to sell his or her property. When governmental action creates a situation in which a sale is virtually impossible, the action goes beyond the risk/expectation formula of the contract approach. For example, in the *Plainfield*[240] and *Rippley*[241] cases, the zoning ordinances limiting use to school purposes and public use purposes respectively resulted in takings. Both courts considered the fact that the plaintiffs were left in such a position that the zoning entity was the only possible purchaser for their property, and, therefore, could name its own price.[242] Such action negates the owners' reasonable expectation of alienability and clearly exceeds their risks.

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237. *Penn Central*, 438 U.S. at 136 (1978) (emphasis added).

238. 184 N.J. Super. 11, 445 A.2d 46 (L. Div. 1982); *see supra* notes 133-35 and accompanying text.

239. *Sheerr*, 184 N.J. Super. at 21, 445 A.2d at 51.

240. 69 N.J. Super. 136, 173 A.2d 785 (L. Div. 1961). *See supra* notes 63, 131-32 and accompanying text.

241. *Rippley v. City of Lincoln*, 330 N.W.2d 505 (N.D. 1983). *See supra* notes 64, 115-16 and accompanying text.

242. *See* Plainfield v. Borough of Middlesex, 69 N.J. Super. 136, 173 A.2d 785, 787 (L. Div. 1961); Rippley, 330 N.W.2d at 508.

In *Corrigan v. City of Scottsdale*,[243] the ordinance at issue placed Corrigan's property in a Conservation Area in which no development was allowed. The Arizona Supreme Court noted that "[a]s long as the property was 'zoned' in the Conservation Area, there was no reasonable hope that anyone would purchase the property . . . ."[244] Again, this exceeds contemplated risks and, under the contract approach, constitutes a taking.

More difficult to analyze is the expectation of fitness for an intended purpose. In commercial law, when the sellers are aware of that purpose, they impliedly warrant that the product will be suitable, assuming the buyer has relied on the expertise of the seller in selecting the most suitable product for the buyer's purpose. Similarly, in light of the implied contract between the government and property owners, the government can be considered to be a party to every property transaction. Thus, a property owner who makes known his intended use of the property, and who relies on governmental assurances thereto, should be entitled to the same warranty, particularly if those assurances are active rather than passive.

In the area of land use and development law, this idea takes the form of development agreements. What is a development agreement, after all, but a contract negotiated between the property owner and the government? In the agreement, each side states its expectations and enumerates the risks it is accepting in order to attain those expectations. The concept of fitness for an intended purpose enters the agreement when the developer and the governmental agency specify the type of development permitted, and the type(s) of permits to be issued. For example, if the agreement states that the property is to be rezoned for multi-family housing in exchange for the developers' dedications of open space, the agency is warranting that the rezoning will be given, provided the developers keep their end of the bargain.

The concept of developers' vested rights is another example of the contract theory in practice. Some states now provide for vested tentative maps.[245] Similarly, case law has established the concept of

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243. 149 Ariz. 538, 720 P.2d 513 (1986); *see supra* note 66 and accompanying text.

244 *Id.* at 544 n.3, 720 P.2d at 519 n.3.

245. For a slightly higher filing fee, these maps guarantee certain privileges to the landowner to continue development under whatever land use restrictions existed at the time of vesting, regardless of subsequent rezonings. The fee in exchange for the guarantee supplies the necessary contractual consideration.

vesting once actual development has begun.[246] At a certain point, the developer is deemed to have expended such time, effort and money on his project that it would be inequitable to force him to conform to subsequent changes in land use restrictions upon his property. Again, this kind of reliance is analogous to the reliance upon an implied warranty of fitness for an intended purpose. Having issued the permits that enable the developer to reach this stage of construction, the governmental agency certainly knows the proposed use of the property. Thus, having that knowledge and having approved the project up to this point, the agency is estopped from disclaiming the warranty that the project will be allowed to proceed to completion.

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246. *See* Tankersley Bros. Indus. v. City of Fayetteville, 227 Ark. 130, 296 S.W.2d 412 (1956) (city estopped from requiring demolition of building built under building permit but in violation of zoning ordinances); Aries Dev. Co. v. California Coastal Zone Conservation Comm'n, 48 Cal. App. 3d 534, 122 Cal. Rptr. 315 (1976) (developer's right not vested despite issuance of grading permit and commencement of grading of site because building permit not issued before enactment of Coastal Act), *cert. denied*, 431 U.S. 951 (1977); Anderson v. City Council, 229 Cal. App. 2d 79; 40 Cal. Rptr. 41 (1964) (purchase of property and expenditure of funds before application for building permit does not give owner vested right as against future changes in applicable zoning laws); Hollywood Beach Hotel Co. v. City of Hollywood, 329 So. 2d 10 (Fla. 1976) (owner's rights had vested in continuation of current zoning because of good faith reliance on building permit and substantial expenditures, although construction had not commenced); Schulman v. Fulton County, 249 Ga. 852, 295 S.E.2d 102 (1982) (owner acquired vested right in special use permit by constructing lighting system in accordance with modifications required by such permit, and issuing entity cannot reconsider its decision or revoke permit); Osina v. City of Chicago, 28 Ill. App. 3d 955, 329 N.E.2d 498 (1975) (nursing home owner had vested right in *continuing same use* despite change in zoning, and despite having made no substantial change in position or expenditure of funds in reliance on previous zoning); Pailet v. City of New Orleans, 433 So. 2d 1091 (La. 1983) (owners' acquiring renovation permit for questionable nonconforming use did not give them vested right to make renovations far beyond scope of permit); Dingeman Advertising, Inc. v. Algoma Tp., 393 Mich. 89, 223 N.W.2d 689 (1974) (to determine substantiality of reliance, court should consider all work done in reliance on building permit up to time owner is *notified* permit is being revoked, not just to date zoning ordinance is changed); Ridgewood Dev. Co. v. State, 294 N.W.2d 288 (Minn. 1980) (no vested right can be acquired in privilege granted by statute, such as availability of tax-free municipal bonds to finance private housing project); Henry & Murphy, Inc. v. Town of Allenstown, 120 N.H. 910, 424 A.2d 1132 (1980) (developer's right to complete entire project, as planned and 70% constructed, vested and was unaffected by change in minimum lot size ordinance); Turner v. Martz, 42 Pa. 328, 401 A.2d 585 (1979) (owners acquired vested right in erroneously issued municipal sewer permit because they had no means by which to determine that permit was improperly issued, they obtained permit and used it in good faith, and they made large financial investment in reliance on validity of permit).

In summary, the risks and expectations of the property owner include: (1) the expectation of exclusive physical possession; (2) the right to lawful use that does not constitute a nuisance; (3) the expectation that both parties' actions under the contract will be governed by the concepts of good faith and fair dealing; (4) the right of free alienability; (5) the expectation of fitness for an intended purpose if so warranted; and (6) the risk that changes in circumstances or in governmental regulation will reduce the profitability or allowable uses of the property.

B. Applying the Contract Approach

To end sixty-five years of confusion in the area of regulatory takings, courts should apply well-founded principles that permit a high degree of predictability, yet maintain the flexibility so important to land-use planning. The contract approach provides this balance of flexibility and predictability. The remainder of this Article applies contract theory to cases in three areas of land use regulation: (1) dedication for public use; (2) rent control; and (3) growth management.

1. Dedication for Public Use

One of the most dramatic developments of the past two decades has been the government's insistence that, in exchange for the necessary official approvals, developers dedicate a portion of their private property for open space and other traditionally government-financed improvements, facilities and services. This requirement not only adds cost to the project, but often adds such a degree of uncertainty as to make the project either infeasible or unprofitable.

In *Grupe v. California Coastal Comm'n.*,[247] for example, the plaintiffs purchased their undeveloped beach-front lot in 1979 in a private residential community between two public beaches. The beach above the high tide line in front of plaintiffs' and their neighbors' lots, however, was privately owned.[248] When the Grupes applied for a permit to build a large single-family home, they were told that, under the provisions of the 1972 California Coastal Zone Conservation Act,[249] the permit would issue only if they would irrevocably

247. 166 Cal. App. 3d 148, 212 Cal. Rptr. 578 (1985).

248. *Id.* at 155, 212 Cal. Rptr. at 581.

249. CAL. PUB. RES. CODE §§ 27000-27650 (Deerings 1976). The California Coastal Zone Conservation Act of 1972 was passed by initiative. *See* CAL. CONST. art. X, § 4. It was replaced by the California Coastal Act of 1976. CAL. PUB. RES. CODE §§ 30000-30900 (Deerings 1976 & 1987 Supp.).

dedicate their beach area above the high tide line to the public. This area comprised approximately two-thirds of their lot.[250] The California courts found a legitimate exercise of the police power in the Act, which was enacted to prevent the destruction of California's coastal areas through overdevelopment, and to guarantee maximum public access to the beaches.[251]

The California Court of Appeal used several of the classic takings tests to find that the dedication did not constitute a taking. Applying the diminution in value test, the court found no evidence that the dedication decreased the value of the plaintiffs' property.[252] Discussing reciprocity of advantage, the court found that the Grupes had received the substantial benefit of being allowed to proceed with the development of his property along the coast.[253]

Under the contract approach, what would the result have been? One must first examine when Grupe formed his expectations. Accompanied by much public and media discussion, the Coastal Act had been passed seven years prior to his purchase of the property. Thus, Grupe should have been aware at the time of purchase that his property was within the special coastal zone subject to the provisions of the Act. The Coastal Commission had consistently applied the Act's conditions to new coastal development. Based on this usage,[254] Grupe's expectations and risks should not have changed since buying the property. Second, one must ask what Grupe's risks and expectations were. Grupe would undoubtedly emphasize his expectation of exclusive physical possession, but given the consistent application of the then-existing Coastal Act, he should not have expected exclusive physical possession of his coastal property in the event he requested a building permit. Grupe assumed the risk that upon application for a permit, the Act would require him to give up a portion of his exclusive possession.

Any viable argument Grupe could propose regarding his risks and expectations as to exclusive possession would focus on the extent to which that possession was invaded. Certainly, complete loss of possession or loss of any reasonable beneficial use would go beyond

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250. *Grupe*, 166 Cal. App. 3d at 156, 212 Cal. Rptr. at 581.

251. *Id.* at 160, 212 Cal. Rptr. at 584 (citing CAL. PUB. RES. CODE § 30210 (Deering 1976 & 1987 Supp.)).

252. *Id.* at 175, 212 Cal. Rptr. at 596.

253. *Id.* at 176-77, 212 Cal. Rptr. at 596-97.

254. According to customary contract language, "[a]n agreement is interpreted in accordance with a relevant usage if each party knew or had reason to know of the usage . . . ." RESTATEMENT (SECOND) OF CONTRACTS § 220 (1979). The Grupes clearly had reason to know of this usage.

the risks assumed by him, even in light of the Act. The facts indicate, however, that despite the requirement that he dedicate two-thirds of his lot, Grupe could still construct a home on the remainder of that lot; thus, he did not lose all beneficial use.[255]

The contract approach to *Grupe* yields the same result as the more traditional tests. A contract analysis, however, would have given both parties a clearer idea of their rights and liabilities and would have provided guidance to both the private property owners affected by the Coastal Act and the governmental agencies administering the Act's provisions. In fact, such an approach might have precluded a law suit altogether.

Similarly, in *Nollan v. California Coastal Comm'n.*,[256] the Nollans had to dedicate a public beach area in order to obtain a building permit under the provisions of the Coastal Act. In certain respects, however, *Nollan* differed from *Grupe*: the condition of public dedication had been applied to most of the surrounding property; a much smaller part of the property was involved; and the Nollans had allowed the public to cross their beach area freely for many years before they applied for the building permit.

Two questions must be asked: (1) when did the Nollans' risks and expectations arise; and (2) what were they? The facts are not clear as to when the Nollans acquired their option to purchase the subject property. It is possible, however, that they had acquired the option prior to the enactment of the Coastal Act. Thus, in contrast to Grupe, the Nollans acquired the property interest at a time when

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255. Also, the Act specifically mandates public access requirements for any new development within the zone. CAL. PUB. RES. CODE § 30212(a) (Deering 1976 & 1987 Supp.). In Grupe's particular circumstances, the offer to dedicate was irrevocable for 21 years, during which time the beach shall "not be . . . opened to public use until a public agency or private association agrees to accept responsibility for maintenance and liability of the accessway." *Grupe*, 166 Cal. App. 3d at 160, 212 Cal. Rptr. at 584-85 (quoting CAL. PUB. RES. CODE § 30212(a) (Deering 1976 & 1987 Supp.)). Further, acceptance of the offer would only occur if similar dedications could be procured from adjoining landowners, an event viewed as unlikely by the court. "If the events do not occur within the prescribed 21-year period, the condition will simply expire." *Id.* at 184, 212 Cal. Rptr. at 602. Therefore, the risk was reasonably foreseeable but not probable that he would be required to create a public beach, and, thus, an expected incident of this contract. In the *Grupe* case, the Regional Coastal Commission acknowledged that the possibility of its being able to acquire the surrounding beach for public use by the imposition of similar uncompensated dedications was unlikely. But the remoteness of the possibility did not relieve the Commission of its duty to make the effort within the provisions of the Act.

256. 107 S. Ct. 3141 (1987). *See supra* notes 199-219 and accompanying text. The appellate court decision is at 177 Cal. App. 3d 719, 223 Cal. Rptr. 31 (1986).

they may not have initially contemplated the circumstance or usage, *i.e.*, the enactment of the Coastal Act.

Contractual risks and expectations, however, are perceived not only when the relationship is formed but also throughout its performance: "Where the contract . . . involves repeated occasions for performance . . . with . . . opportunity for objection to it by the other, any course of performance accepted or acquiesced in without objection shall be relevant to determine the meaning of the agreement."[257]

Even if a landowner can establish that he could not earlier perceive such a risk or expectation, subsequent conduct that is inconsistent with an earlier understanding may waive or modify the earlier understanding.[258]

The Nollans applied for their permit in 1982. By that time, the state court found, the Nollans' property was located "in an area where numerous dedications for public access have been made on nearly all the beach front parcels."[259] In addition to three more years of public debate, numerous law suits had not succeeded in prohibiting the application of the Coastal Act. Finally, the Nollans had for some years permitted public access to the portion of the property in question.

In light of the Nollans' course of performance which appeared to accept or acquiesce in these factors, the Nollans could not deny that the risk of this type of changed circumstances was contemplated. Even if one cannot accept that the Nollans' course of performance establishes their acceptance of the risk, it would be relevant in establishing a waiver or modification of the terms of the original implied contract.

As in *Grupe*, the risk or expectation in *Nollan* involved exclusive possession. Moreover, as in *Grupe*, the loss of exclusive possession in *Nollan* does not surpass the risks that the Nollans should have contemplated in light of the circumstances and their course of performance, specifically, their continuing failure to object to the public's access to this property.

A different situation arose in *First English Evangelical Lutheran Church of Glendale v. County of Los Angeles*.[260] The church had

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257. U.C.C. § 2-208 (1978).

258. *Id.* § 2-208(3). "[S]uch course of performance shall be relevant to show a waiver or modification of any term inconsistent with such course of performance." *Id.*

259. *Nollan*, 177 Cal. App. 3d at 724, 223 Cal. Rptr. at 31 (1986).

260. 107 S. Ct. 2378 (1987). *See supra* notes 184-98 and accompanying text.

owned the property and used it as a children's camp for twenty-one years before the buildings were destroyed in a flood. Since the threat of flooding continued, the county adopted an ordinance that created an interim flood protection area where all construction was prohibited. The camp was located in this restricted area.

Ordinarily, a complete restriction on the use of the property would clearly exceed the risks assumed by the property owner and result in a compensable taking. Thus, on its face, the ordinance in *First English* effected a taking of the church's property. Unlike the facts in *Grupe* and *Nollan*, the church did not even enjoy the "reciprocity of advantage" of receiving a building permit in exchange for the loss of use of its property. But a closer analysis under the contract approach results in a different interpretation. Again, one must ask two questions: (1) when did the owners' risks and expectations arise; and (2) what were they?

In this case, the church's risks and expectations arose in 1957, when it bought the property. But the issue of what those risks and expectations were poses some problems. The church's property was described as within "the natural drainage channel for a watershed area."[261] As a result, did the church have notice of the risk of flooding when they bought the property? Assuming the church had notice of such a risk, the county's ordinance may well have been a foreseeable risk as well. The church could certainly expect that the county would take the necessary safety measures to prevent loss of life in an area of potential flooding—*especially* if the proposed use of the property was as a camp for handicapped children.

Justice Stevens' dissent raised another troublesome point: what did the church reasonably expect to be able to do with the property?[262] Knowing that there was a danger of future flooding, the church could not reasonably expect to rebuild its camp in the same location. In fact, the only imaginable uses for the property in such a condition would be for agriculture or forestry, both of which would involve no construction and, moreover, would contribute to the abatement of the flooding danger. The flood control ordinance did not prohibit these uses.

In summary, at the time it bought the property, the church should have anticipated the risk that the property would become uninhabitable due to flooding. If flooding became a continuing danger,

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261. *Id.* at 2381.
262. *See supra* note 197.

the church should have known that the county would need to pass a public safety ordinance such as the flood protection plan. Furthermore, the church should not reasonably have expected that the property would remain usable for even intermittent residential use. As Justice Stevens pointed out, the church had not suggested any other use to which it might have wanted to put the property. Thus, until the church established with *what* expectation the county's ordinance had interfered, the contract approach would not require that a taking be found and compensation awarded.

2. Rent Control

In a society with a rapidly increasing urban population, frequently of limited economic means, housing becomes a critical problem. One approach to the problem, which has had mixed results, is rent control. Obviously, such regulations significantly reduce landlord incentives and profits.

In *Fresh Pond Shopping Center, Inc. v. Callahan*,[263] the Supreme Court dismissed without opinion the property owner's appeal of a decision upholding the denial of permits that would have allowed plaintiff to evict tenants from rent-controlled residential property and to demolish the building. The shopping center acquired the six-unit apartment building on adjoining land with the intent to demolish the building and pave the property as an extension of its parking lot.[264] Between the time the center entered into the purchase contract and the date the sale actually occurred, the city passed an ordinance requiring a removal permit before any rental units could be eliminated from the housing market. Although only one of the units was occupied, the city denied the center's applications to evict that tenant and tear down the building.[265]

In applying a contract approach to this case, one must ask when the center formed its expectations and what those expectations were. Fresh Pond entered the agreement prior to the enactment of the ordinance. Moreover, unlike the situation in *Nollan*, nothing in their course of performance indicated that such a change in circumstances was acquiesced in or contemplated.

The city's acts also violated both the good faith and the intended purpose expectations, and arguably constituted a physical invasion.

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263. 464 U.S. 875 (1983).
264. *Id.* at 875 (Rehnquist, J., dissenting).
265. *Id.* (Rehnquist, J., dissenting).

Having earlier condemned a portion of the center's parking lot, the city was aware that the center needed parking spaces to replace those lost as a result of the condemnation. Nevertheless, knowing that the center intended to demolish the building and replace the parking spots lost by the condemnation, the city made no objection to the center acquiring the adjoining apartment building. An integral participant in this transaction, the city failed to make the shopping center aware of its intent to deny the permit to demolish the building. In so doing the city breached the implied warranty of fitness for the intended purpose.

Dissenting from the dismissal, Justice Rehnquist reviewed the restrictions in the state and city regulations applicable to the property. He observed that the shopping center could not evict the tenant. Furthermore, even if the tenant voluntarily vacated, there was no certainty that the board would allow the building to be demolished. It was clear, however, that "until the tenant decides to leave of his own volition, appellant is unable to possess the property."[266]

Rehnquist also pointed out that the ordinance did not contain the time limitation that enabled the Court to uphold a similar ordinance in the wartime case of *Block v. Hirsh*.[267] He concluded that " 'even though the owner may retain the bare legal right to dispose of the occupied space by transfer or sale, the permanent occupation of that space by a stranger would ordinarily empty the right of any value . . . .' "[268] Such permanent occupation would result in the owner losing the right to exclude others—" 'one of the most treasured strands in an owner's bundle of property rights . . . .' "[269]

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266. *Id.* at 877 (Rehnquist, J., dissenting). Rehnquist stated:

> The combined effect of the limitations . . . is to deny appellant use of his property. . . . [T]he Rent Control Board has determined that until the remaining tenant decides to leave, appellant will be unable to vacate and demolish the building. In my view this deprives appellant of the use of its property in a manner closely analogous to a permanent physical invasion. . . . [In *Teleprompter* w]e . . . called a permanent physical occupation of another's property "the most serious form of invasion of an owner's property interest."

Id. at 876-77 (quoting Loretto v. Teleprompter, 458 U.S. 419, 435 (1982) (citations omitted)).

Rehnquist continued, "As the Cambridge ordinance operates in this case, I fail to see how it works anything but a physical occupation of appellant's property." *Id.* at 877.

267. *Id.* at 878 (Rehnquist, J., dissenting) (citing Block v. Hirsh, 256 U.S. 135, 157 (1921)).

268. *Id.* at 878 (Rehnquist, J., dissenting) (citations omitted).

269. *Id.* (Rehnquist, J., dissenting) (citations omitted).

Rehnquist compared the owner's right to possession and, by extension, his right to exclude others to the owner's right to freedom from physical invasion. This strong argument, if accepted by the remainder of the Court, would have produced a contrary result. But the Court has rarely treated the right to exclude with the same sanctity as the loss of physical possession. Thus, Justice Rehnquist might have had more success in convincing the majority if he had employed a contract theory argument.

The inability to close one's business is normally not a risk contemplated in purchasing real property. Therefore, assuming that the ordinance was not reasonably foreseeable by the center at the time it entered into the contract, and assuming that changed circumstances together with an inconsistent course of performance did not establish its foreseeability, the governmental regulation would then violate the contract approach and require just compensation.

If the enactment of the regulation and its resulting limitations on the future property uses were reasonably foreseeable at the time the individual purchased the property, and both parties had acted in good faith, the contract approach would not compensate the owner for the alleged taking since the owner chose to gamble by purchasing the property despite the anticipated regulatory change. Thus, assuming no bad faith on the part of the government, the majority's dismissal would be compatible with the contract approach.

In a California case, *Nash v. City of Santa Monica*,[270] the majority of the court applied a number of contract theory concepts in balancing the parties' expectations and the burdens imposed on them by the subject ordinance. As in *Fresh Pond Shopping Center*, this ordinance prohibited the removal of rental units from the housing market by conversion or demolition without a removal permit from the city.[271] On these facts alone, denying a person the right to demolish the building and retain the vacant land would be so sub-

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270. 37 Cal. 3d 97, 688 P.2d 894, 207 Cal. Rptr. 285 (1984).

271. *Id.* at 99, 688 P.2d at 898-99, 207 Cal. Rptr. at 288-90. The court introduced its opinion with the following statement:

> As is so often the case in constitutional litigation, the issues appear different depending upon one's perspective. For Santa Monica, the challenged provision is nothing more than a land use regulation designed to effectuate the purposes of the city's rent control ordinance of which it is a part, while Nash views it as a means of forcing him to remain a landlord despite his wish to "go out of business"—an interest which he asserts is among the "basic values 'implicit in the concept of ordered liberty'. . . ." There is a degree of merit in both perspectives, but neither

stantial a violation of the risks and expectations normally associated with the purchase, ownership and sale of real property as to constitute a taking under the contract approach. A number of additional facts, however, supported the majority's conclusion that no taking had occurred.

First, Nash's mother had purchased the apartment building for him. One year later, Santa Monica passed its ordinance because the city was facing a severe shortage of rental property, especially for persons in low and moderate income brackets. Under the provisions of the law:

> Where the landlord both owns habitable property and does not wish to rebuild, a demolition permit will be granted only upon a finding that: (1) the building is not occupied by persons of low or moderate income; (2) cannot be afforded by persons of low or moderate income; (3) removal will not adversely affect the housing supply; and (4) the owner cannot make a reasonable return on his investment.[272]

Second, Nash conceded that he was earning a fair return on his investment from the rents being paid by his tenants, and that demolishing the building would have an adverse effect on the housing supply.[273] But he told the court: "There is only one thing I want to do, and that is to evict the group of ingrates inhabiting my units, tear down the building, and hold on to the land until I can sell it at a price which will not mean a ruinous loss on my investment."[274]

> is adequate to resolve the issue presented. Rather, . . . what is required is a realistic appraisal of the impact of the challenged provision upon Nash and the alternatives available to him, on the one hand, and of the relationship of that provision to the objectives of the rent control ordinance, on the other.

Id. at 99-100, 688 P.2d at 896, 207 Cal. Rptr. at 287 (citations omitted).

272. *Id.* at 101, 688 P.2d at 897, 207 Cal. Rptr. at 288 (quoting Santa Monica City Charter art. XVIII, § 1803, subd. (t)).

273. *Id.* at 101-02, 688 P.2d at 897, 207 Cal. Rptr. at 288.

274. *Id.* Nash based his principal argument against the application of the ordinance on the thirteenth amendment to the United States Constitution, which prohibits involuntary servitude. The court did not find this argument persuasive, stating that "Nash remains free to minimize his personal involvement . . . " in the duties necessary to a landlord. *Id.* at 103, 688 P.2d at 898, 207 Cal. Rptr. at 289. In light of the state's police power to regulate to protect the public health, safety and welfare, the court found that Nash had no absolute right to demolish the building and retain the land as an investment. Therefore, Nash had not been unconstitutionally deprived of his property because the ordinance in question clearly was a permissible regulation under the tenth amendment's police power. Thus, the Court reversed the judgment below. *Id.* at 109, 688 P.2d at 903, 207 Cal. Rptr. at 294.

Since persons of low and moderate income occupied the building, the court found that he was not qualified to receive a demolition permit.[275]

The contract approach results in the same conclusion. At the time Nash's mother bought the property in 1978, public concern was already being actively voiced over the rental housing shortage in Santa Monica. It certainly is not improbable that Mrs. Nash purchased the property with the hope of being able to convert it to condominiums and thereby increase the potential profits from her investment.[276] But in view of the housing emergency that existed and of the growing public and governmental concern, the possibility of the rent control initiative and resulting regulations on rental properties must have been reasonably foreseeable to the average prudent property investor at the time Mrs. Nash acquired the building.[277]

Upon attaining majority, Nash took title to the property from his mother, and because she had bought it on his behalf, he retained the risks and expectations attendant to ownership of this building that existed at the time she purchased it. As the court pointed out, Nash continued to draw a reasonable return from his property as an investment, and also retained the right to dispose of the property. Unlike cases where the only possible purchaser for the property was the governmental agency imposing the restrictions on the property, here there is no indication that the property was unsaleable because of the ordinance.

Under the contract approach, the majority's opinion can also be supported by questioning the good faith of the Nashes. In light of a long-standing Santa Monica rent-control ordinance, Nash's stated intent[278] indicated that he was not acting in good faith. Such lack of good faith would prevent him from prevailing. Just as the Court questioned the good faith of the government in *Fresh Pond Shopping Center*, it should do no less with the individual.

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275. *Id.* at 102-03, 688 P.2d at 897, 207 Cal. Rptr. at 288-89. In his dissent, Justice Mosk argued that requiring one to remain a landlord is not a foreseeable risk. " 'A proposition that a single businessman cannot choose to go out of business if he wants to would represent such a startling innovation that it should not be entertained without the clearest manifestation of legislative intent or unequivocal judicial precedent . . . . ' " *Id.* at 111, 688 P.2d at 904, 207 Cal. Rptr. at 295 (Mosk, J., dissenting) (quoting Justice Harlan's unanimous opinion in Textile Workers v. Darlington Co., 380 U.S. 263, 270 (1965)).

276. The facts in the case were silent on the question of whether Mrs. Nash intended to convert the property into condominiums at the time she bought it.

277. *See Nash*, 37 Cal. 3d at 101, 688 P.2d at 896, 207 Cal. Rptr. at 288.

278. *Id.* at 101, 688 P.2d at 897, 207 Cal. Rptr. at 288.

It appears that Mrs. Nash, and by implication her son, gambled in a highly volatile market and lost. Since the risks were foreseeable, and the regulations did not deprive Nash of all his reasonable expectations concerning the property, no compensable taking of his property occurred.

Hall v. City of Santa Barbara[279] dealt with a rent-control ordinance which gave tenants the right to "leases of unlimited duration."[280] Applied to mobile home parks, the ordinance required that park space leases be terminable at will by the tenants, but only for cause by the park operator.[281] Unlike apartments, mobile homes are usually sold by the tenants, and the buyers then succeed the sellers as tenants of the mobile home park.[282]

The Halls owned and operated a mobile home park. They challenged the ordinance as effecting a taking of their property. Their claim was novel—they argued that "by giving tenants the right to a perpetual lease at a below-market rental rate, the ordinance transferred to each of them a possessory interest in the land on which their mobile home is located."[283] This interest, the Halls argued, had a market value and was transferrable by the tenants without any right of control remaining in the park owner.[284]

In finding that the district court had abused its discretion by dismissing the complaint rather than giving the Halls an opportunity to amend,[285] the court noted that motions to dismiss inverse condemnation complaints must be reviewed with particular skepticism since "the Supreme Court itself has admitted its inability to develop any 'set formula' for determining when compensation should be paid, . . . resorting instead to 'essentially ad hoc, factual inquiries' to resolve this difficult question."[286]

In analyzing the case, the court found that "certain features of the Santa Barbara ordinance, . . . make it peculiarly susceptible to the claim presented by the Halls."[287] The tenants were in a position to determine who their successors to the leasehold estate would be, and the landlord probably couldn't even go out of business in order

279. 833 F.2d 1270 (9th Cir. 1986).
280. *Id.* at 1273.
281. *Id.* at 1273-74.
282. *Id.* at 1273.
283. *Id.* at 1273-74.
284. *Id.* at 1274.
285. *Id.* at 1274 n.6.
286. *Id.* at 1274 (citation omitted).
287. *Id.* at 1276.

to recover control of his property.[288] The court concluded that "it would be difficult to say that the ordinance does not transfer an interest in [the Halls'] land to others."[289]

The contract approach yields the same conclusion. That is, it would surely be beyond the reasonable expectations of a property owner that the government would vest a greater property interest in his tenants than in the owner of the underlying fee.

3. *Growth Management*

Land is one of the most precious and limited natural resources. As a growing population shifts to areas of the country considered most desirable, land's value becomes even more apparent. Land use planning addresses the important conundrum of how society deals with this resource and the strains placed upon it.

Ramapo, New York, is a town within commuting distance of New York City.[290] "Experiencing the pressures of an increase in population and the ancillary problem of providing municipal facilities and services,"[291] the town adopted amendments to its comprehensive zoning ordinance "for the alleged purpose of eliminating premature subdivision and urban sprawl."[292] In order to obtain building permits for residential development, developers first had to obtain a special permit which was contingent upon the availability of five essential facilities or services specified under the statute. If the developer wanted to speed up the process, and not wait for the city to put the services and facilities in place, the developer could obtain the special permit by putting in the facilities at his own expense.

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288. *Id.* at 1279 n.18. In a footnote, the court made the following observation:

> State and local laws seem to pose considerable obstacles to going out of the mobile park business. State law allows the mobile park owner to evict tenants in order to put the park to a different use only upon six months' notice; such notice may only be given after all necessary local permits have been obtained. . . . Santa Barbara in turn requires that a mobile home park owner obtain a permit to convert a park to another use. . . . An applicant for such a permit must file a plan outlining the use to which the property is to be put, describing the impact of the removal on displaced residents, and disclosing the relocation assistance to be provided.

Id. (citations omitted).

289. *Id.* at 1227.

290. Golden v. Planning Bd. of Ramapo, 30 N.Y.2d 359, 285 N.E.2d 291, 334 N.Y.S.2d 138 (1972).

291. *Id.* at 366, 285 N.E.2d at 294, 334 N.Y.S.2d at 142.

292. *Id.* at 367, 285 N.E.2d at 295, 334 N.Y.S.2d at 143 (footnote omitted).

The court found that "[w]ithout a doubt restrictions upon the property in the present case are substantial in nature and duration, especially in light of the fact that they threaten to burden individual parcels for as long as a full generation."[293] Nevertheless, the city's ordinance was upheld.

An analysis under the "when" prong of the contract approach shows that the developers in *Ramapo* all purchased property prior to the enactment of the ordinance. The question, however, is whether the developers contemplated or should have contemplated significant restrictions on their freedom to develop the property as a result of the town's need to manage growth. Certainly, by the mid to late 1960's, in an area within commuting distance to New York City, growth management must have been a familiar concept and thus a recognizable risk, especially to developers who—like merchants in commercial contracts[294]—should have had a more sophisticated understanding of the relationship between the property owner and the government.

The more vital question focuses on the extent of this contemplated risk. The court in *Ramapo* acknowledged that a permanent restriction on all reasonable use of the property must be recognized as a taking. In contrast, a temporary restriction that would allow profitable use within a reasonable time would not result in a taking unless "the measure is either unreasonable in terms of necessity or the [resulting]

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293. *Id.* at 382, 285 N.E.2d at 304, 334 N.Y.S.2d at 155.

294. See *supra* note 237 for the U.C.C. definition of merchant. Except for the obvious fact that the U.C.C. and the term "merchant" deal with "goods" rather than real property, the above definition of merchant could easily apply to a developer—one who in the field of real property has knowledge or skill peculiar to the practices involved in the transaction or to whom such knowledge may be attributed by his employment of an agent or broker. The government, particularly as to the various agencies that deal with real property planning and development, is no less a "merchant" in the field.

The official comment to U.C.C. § 2-104 describes a "merchant" as a professional and "assumes that transactions between professionals in a given field require special and clear rules which may not apply to a casual or inexperienced seller or buyer." U.C.C. § 2-104 comment 1 (1977).

It can be said that professionalism, special knowledge and common experience are to be used in determining whether a person in a particular situation is to be deemed a "merchant." Decatur Cooperative Ass'n v. Urban, 219 Kan. 171, 547 P.2d 323 (1976). Further, a person who holds himself out as having knowledge or skill involved in the transaction will be considered a merchant as defined by U.C.C. § 2-104 whether he actually has such knowledge or skill. William Aupperle & Sons, Inc. v. American Indem. Co., 75 Ill. App. 3d 722, 394 N.E.2d 725 (1979). Even familiarity with trade practices has been sufficient to confer merchant status on a contractor. Pecker Iron Works, Inc. v. Sturdy Concrete Co., 96 Misc. 2d 998, 410 N.Y.S.2d 251 (1978).

diminution in value is such as to be tantamount to a confiscation."[295]

The court's approach, however, only answers part of the question. Unlike a permanent restriction on all reasonable use, a so-called temporary restriction does not always escape being deemed a taking—particularly when the restriction lasts as long as eighteen years, as it did in *Ramapo*. Thus, the better approach would be to ask whether such a temporary limitation was reasonably foreseeable or within the contemplation of the parties when they formed their risks and expectations.

In light of *Ramapo*, a growing number of ordinances imposing similar restrictions, and a national interest in growth management, community developers should currently contemplate such a risk. Decided in 1972, *Ramapo* reflected a new direction in growth management: a temporary but nonetheless lengthy moratorium on the development of property. Up to the time of this decision, however, this risk was not within the contemplation of the developers. Thus, enforcement of the regulations constituted a taking, pursuant to the contract approach.

Further, the ordinance in *Ramapo* permitted the developer to speed up the approval process by installing some or all of the needed facilities and services himself.[296] This was another novel concept in 1972 and thus not foreseeable at that time. Since *Ramapo*, requiring developers to provide essential services and facilities before building permits will issue has become the norm. Therefore, developers today would be expected to anticipate this cost when planning their projects. Since it is now foreseeable, post-*Ramapo* cases would not result in a taking under the contract approach.[297]

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295. *Ramapo*, 30 N.Y.2d at 381, 285 N.E.2d at 304, 334 N.Y.S.2d at 153 (citation omitted).

296. *Id.* at 382, 285 N.E.2d at 304, 334 N.Y.S.2d at 155.

The contract approach involves not only contemplated risks but also traditional expectations including the requirement of good faith. The *Ramapo* court briefly addressed this requirement as well:

> [T]he [t]own will put its *best effort forward* in implementing the physical and fiscal timetable outlined under the plan. Should subsequent events prove this assumption unwarranted, or should the [t]own because of some unforeseen event fail in its primary obligation to these landowners, there will be ample opportunity to undo the restrictions upon default. . . . Prognostication on our part in upholding the ordinance proceeds upon the presently permissible inference that within a reasonable time the subject property will be put to the desired use at an appreciated value.

Id. (emphasis added).

297. Although requiring developers to install public facilities and services may now be foreseeable, whether this exceeds the scope of the police power is another question too complex to be addressed here.

Livermore, California, a suburb of San Francisco, was the subject of a voter initiative prohibiting the "issuance of further residential building permits until local educational, sewage disposal, and water supply facilities compl[ied] with specified standards."[298] The California Supreme Court described the case of *Associated Home Builders, Inc. v. City of Livermore* as "symboliz[ing] the growing conflict between the efforts of suburban communities to check disorderly development, with its concomitant problems of air and water pollution and inadequate public facilities, and the increasing public need for adequate housing opportunities."[299]

The California court found that local growth management was a valid exercise of the police power, provided that its purpose did not conflict with an overall regional scheme. The majority, however, failed adequately to address the fifth amendment takings problem. As Justice Mosk pointed out in his dissenting opinion, that ordinance provided no timetable or dates by which the public services were to be made adequate. Thus, the moratorium on permits was likely to continue for decades, or at least until attrition ultimately reduced the present population.[300]

In *Livermore*, the risk to the developer was no development at all for the foreseeable future with no means of speeding up the development approval process. A complete moratorium of unlimited duration on building permits is not a reasonably contemplated risk. Thus, under the contract approach, the Livermore ordinance would be unforeseeable because of its unlimited duration, and this, combined with the lack of good faith and fair dealing on the part of the city in not providing either flexibility or a specific timetable, would constitute a breach of the implied contract.[301]

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298. Associated Home Builders, Inc. v. City of Livermore, 18 Cal. 3d 582, 588, 557 P.2d 473, 475, 135 Cal. Rptr. 41, 43 (1976).

299. *Id.* at 589, 557 P.2d at 475-76, 135 Cal. Rptr. at 43-44.

300. *Id.* at 617, 557 P.2d at 493, 135 Cal. Rptr. at 61 (Mosk, J., dissenting).

> [T]he ordinance prohibited the issuance of building permits for residential purposes until certain conditions are met, but the measure does not provide that any person or agency is required to expend or commence any efforts on behalf of the city to meet the requirements. *Nor is the city itself obliged to act within any specified time to cure its own deficiencies.* Thus, in these circumstances procrastination produces its own reward: continued exclusion of new residents.

Id. (Mosk, J., dissenting) (emphasis added).

301. What if the enacting city is "an isolated, substantially rural area, . . . which wants to preserve its character or at least guard against unforeseen, adverse consequences of too rapid development"? Sturges v. Town of Chilmark, 380 Mass.

VI. Conclusion

After sixty-five years of confusion, it is time for a more clearly defined and more easily applied approach to the regulatory takings problem. The 1987 decisions of the Supreme Court merely continue the confusion—they do not resolve it.

At the same time, the need to resolve this increasingly complex issue is critical. Developers must be able to calculate their risks with a reasonable degree of certainty. If not, they will look elsewhere to invest their resources. In some areas of the country, developers are already seeking alternative investments because the uncertainties of

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246, 254, 402 N.E.2d 1346, 1351 (1980).

Chilmark is a Martha's Vineyard community "with a permanent residential population of approximately 400 people, . . . an area of 10,500 acres, and only five paved public ways." *Id.* at 260, 402 N.E.2d at 1354. It adopted a "rate of development" amendment to its zoning by-laws that restricted issuance of building permits to one-tenth of the lots in each subdivision each year for ten years. The court pointed out the differences between this case and a situation such as existed in *Ramapo*:

> Although the difference between suburban and rural development may be only a matter of degree and the basic constitutional principles are the same, the considerations, and the weight to be given to various factors, may differ. Regional needs, which are often important considerations . . . may differ between suburban and rural areas, and the exclusionary impact of the municipality's action may be significantly reduced. Thus, in a rural . . . setting, . . . the public interest in preserving the environment and protecting a way of life may outweigh whatever undesirable economic and social consequences inhere in partly "closing the doors" to affluent outsiders primarily seeking vacation homes.

Id. at 254-55, 402 N.E.2d at 1351-52.

The court found that "public interest in the preservation of the qualities of Martha's Vineyard . . ." had been expressed by the "creation of a statutory commission to assist in that preservation . . . ." *Id.* at 256, 402 N.E.2d at 1352. Further, the town itself had expressed the desire to have an opportunity to explore "whether it had a problem."

> The need for time for study provides a rational reason for the by-law's sequential restrictions, at least during the years immediately following its adoption. . . . We address a partial and annually relaxing restriction on the construction of what will for the most part be second, or vacation, homes.

Id. at 259-60, 402 N.E.2d at 1354 (footnote omitted).

And, as in *Ramapo*, the court implied a duty of good faith on the town's part:

> We assume, in the absence of a contrary showing, that a period of ten years is reasonably necessary to complete all necessary studies and to implement recommendations and that the town will proceed with its studies in good faith. . . . A very different case would be presented if it were determined that the town was not proceeding with the necessary studies which are said to be the basis for the enactment of the rate of development by-law.

Id. at 259 n.16, 402 N.E.2d at 1354 n.16.

the various regulations have left them unable to calculate the risks.

The development industry should not have to shoulder the burden of correcting the various ills of society, including environmental deterioration, inner city decay and shrinking natural resources. Unless government develops equitable guidelines for land use planning, this industry could, like the rail and steel industries of a generation ago, become unprofitable and require significant government support.

The contract approach suggests a dramatic yet not radical new direction. Contractual principles are familiar to and more easily understood by individuals, development companies and governmental agencies. Contractual principles provide a proven method of flexibility that the variety of currently used takings tests cannot provide. Most importantly, contractual principles provide a body of existing theories against which both the government and the private property owner can measure risks and expectations. Why try to fix a broken and poorly made wheel when a sturdy and serviceable one is readily available?