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## Hendler v. United States: Preserving Private Property Rights in the Face of Environmental Regulation

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## HENDLER v. UNITED STATES: PRESERVING PRIVATE PROPERTY RIGHTS IN THE FACE OF ENVIRONMENTAL REGULATION

### I. INTRODUCTION

In *Hendler v. United States*<sup>1</sup> the Court of Appeals for the Federal Circuit wrestled with the present status of takings jurisprudence. The court found that intrusions<sup>2</sup> of the Environmental Protection Agency (EPA) upon private property rights constituted a Fifth Amendment taking.<sup>3</sup> The government may legitimately seize property in one of two ways: (1) by eminent domain;<sup>4</sup> or (2) by the police powers-based nuisance exception to the Just Compensation Clause of the Fifth Amendment. The government action at issue in *Hendler II* falls into the second category. However, it does not necessarily follow that a government regulation, even when set forth as advancing public health, safety, or welfare, will be held as a legitimate exercise of police powers.<sup>5</sup>

The manner in which the court of appeals dealt with the takings issues in *Hendler II* may signal a growing reluctance by courts to sanction uninhibited governmental intervention onto private property without the payment of just compensation.<sup>6</sup> Judicial reluctance to sanction governmental intervention is present even

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1. 952 F.2d 1364 (Fed. Cir. 1991) [hereinafter *Hendler II*].

2. *Hendler II*, 952 F.2d at 1376. For a discussion of the particular facts of *Hendler II*, see *infra* notes 57-71 and accompanying text.

3. *Hendler II*, 952 F.2d at 1378. For an extensive discussion of the history of takings jurisprudence and recent developments, see *infra* notes 7-56 and accompanying text.

4. Eminent domain is the "right of the sovereign, federal or state or an agency or nominee thereof, to acquire title to property through the process of condemnation." 5A GEORGE W. THOMPSON, THOMPSON ON REAL PROPERTY § 2575 (1978).

5. Attempts to regulate land use in the name of preventing a public nuisance must survive some qualifying exceptions. See, e.g., *Lucas v. South Carolina Coastal Council*, 112 S. Ct. 2886 (1992) (deprivation of all economic use); *Nolan v. California Coastal Comm'n*, 483 U.S. 825 (1987) (violation of landowner's right to exclude); *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982) (physical occupation of private property owner's land). Notwithstanding the merit of the purposes behind the disputed regulation, the nuisance exception cannot be used in these three instances and the government must reimburse the landowner for his loss.

6. See Frank I. Michelman, *Property, Utility, and Fairness: Comments on the Ethical Foundations of "Just Compensation" Law*, 80 HARV. L. REV. 1165 (1967) (extensively discussing just compensation); see also William Michael Treanor, Comment, *The Origins and Original Significance of the Just Compensation Clause of the*

when the purpose of the intrusion is to cure the land of severe environmental damage. Such judicial temperament toward regulatory solutions to environmental problems in land use reflects the importance of and deference to private property rights. This disposition is significant because courts are willing to defend traditional private property rights despite the tremendous need and urgency to clean up the countless environmental tragedies that have occurred. *Hendler II* did not resolve the underlying conflict between old legal principles and the relatively recent rise of environmental law. However, the holding in *Hendler II* indicates that private property rights are not dead even though the land itself might be.

## II. BACKGROUND: STATUS OF PHYSICAL TAKINGS JURISPRUDENCE AND ITS RELATION TO REGULATORY TAKINGS

The Fifth Amendment firmly conditions any governmental taking of private property on the payment of just compensation to the land owner.<sup>7</sup> Early developments in takings jurisprudence involved the formal condemnation of private property by government.<sup>8</sup> The first extension of the takings doctrine out of this formal context and into the area of "inverse condemnation"<sup>9</sup> oc-

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*Fifth Amendment*, 94 YALE L.J. 694 (1985) (tracing historical development and theoretical underpinnings of just compensation).

7. U.S. CONST. amend. V. The Fifth Amendment reads in pertinent part that "private property [shall not] be taken for public use, without just compensation." *Id.*; see also *Nollan v. California Coastal Comm'n*, 483 U.S. 825 (1987) (requiring compensation for government demand of public easement); *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982) (requiring compensation for government allowance of cable equipment to be placed on apartment roof); *Armstrong v. United States*, 364 U.S. 40 (1960) (entitling owner to compensation when government seized boat hulls); *Narramore v. United States*, 960 F.2d 1048 (Fed. Cir. 1992) (granting owner compensation when water released from government reservoir exceeded amount allowed by easement). This restriction applies directly to the federal government and indirectly to the states through the Fourteenth Amendment. *Chicago, B. & Q.R.R. v. City of Chicago*, 166 U.S. 226 (1897).

8. See Barbara J. Hall, Note, *Eldridge v. City of Palo Alto: Aberration or New Direction in Land Use Law?*, 28 HASTINGS L.J. 1569, 1570 (1977) (discussing evolution of takings jurisprudence from solely eminent domain cases to also include regulatory takings cases).

9. See *United States v. Clarke*, 445 U.S. 253 (1980) (distinguishing formal condemnation proceedings from inverse condemnation suit). Inverse condemnation is a "shorthand description of the manner in which a landowner recovers just compensation for a taking of his property when condemnation proceedings have not been instituted." *Id.* at 257. In *Clarke*, the Court stated, "[A] 'condemnation' proceeding is commonly understood to be an action brought by a condemning authority such as the Government in the exercise of its power of eminent domain." *Id.* at 255; see also *San Diego Gas & Elec. Co. v. City of San Diego*, 450 U.S. 621, 638 n.2 (1981) (stating inverse condemnation is "a cause

curred in *Pennsylvania Coal v. Mahon*.<sup>10</sup> In *Mahon*, a property owner obtained a decree through a Pennsylvania statute<sup>11</sup> to prevent a coal mining company from extracting coal from underneath his land.<sup>12</sup> In determining the validity of the decree, the United States Supreme Court employed a balancing test, weighing the diminution in value of the mining company's property if forbidden to mine its coal against the legislative objectives and purposes of the Kohler Act.<sup>13</sup> The Court reasoned that since the public interest in the protection of a single surface rights owner's house was limited<sup>14</sup> in comparison to the commercial impracticability to the mining company of removing the coal, the ruling amounted to a taking entitling the company to compensation.<sup>15</sup> This method of balancing the parties' interests<sup>16</sup> continued un-

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of action against a government defendant in which a landowner may recover compensation for a 'taking' of his property under the Fifth Amendment, even though formal condemnation proceedings . . . have not been instituted by the government entity.") (Brennan, J., dissenting).

10. 260 U.S. 393 (1922). The Court asserted that 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." *Id.* at 415.

11. PA. STAT. ANN. tit. 52, §§ 661-672.10 (1966) [hereinafter *The Kohler Act*]. The Kohler Act prohibited the removal of anthracite coal if removal would cause the subsidence of any structure of human habitation. *Mahon*, 260 U.S. at 412-13. Subsidence is defined as "the lowering of strata overlying a coal mine, including the land surface, caused by the extraction of underground coal." *Keystone Bituminous Coal Ass'n v. DeBenedictis*, 480 U.S. 470, 474 (1987).

12. *Mahon*, 260 U.S. at 412. Mahon owned rights to occupy the surface (the surface estate), but the coal company owned the right to remove coal from underneath Mr. Mahon's land (the mineral estate). *Id.* The terms of Pennsylvania Coal's estate released them from liability with regard to Mahon's estate. Mr. Mahon, however, feared further extraction of coal would undermine the integrity of the earth supporting his house and result in great damage. *Id.*

13. *Id.* The Court framed its argument by acknowledging that when the diminution in value reached a certain point, it amounted to a governmental exercise of eminent domain. *Id.* at 413. The public interest in protecting damage to residences was characterized as a private affair where "the public interest does not warrant much of this kind of interference." *Id.* The Court further diminished the public interest argument by maintaining that such an occurrence was not common and that any safety concerns for surface property owners could be accomplished by notice. *Id.* at 413-14. Justice Holmes classified the law as "limited" since it did not apply to mining interests that owned surface rights and since it undercut basic property concepts. *Id.* at 414.

14. *Id.* at 413-14. The Court reasoned that if upheld, the statute would unconstitutionally strip Pennsylvania Coal of its property rights in the mineral estate. *Id.* at 414-15. The Court had little sympathy for Mr. Mahon and contended that he should have had more foresight when purchasing the property. *Id.* at 415. Moreover, the Court did not want to extend such rights to a property owner based on the principle that one should not be able to secure greater property rights than were originally purchased. *Id.* at 416.

15. *Id.* at 416.

16. *See, e.g., Goldblatt v. Town of Hempstead*, 369 U.S. 590 (1962) (uphold-

changed for over fifty years.<sup>17</sup>

The Court reformed its method of inquiry in *Penn Central Transportation Co. v. City of New York*.<sup>18</sup> In *Penn Central*, a local zoning ordinance prevented the owner of Grand Central Terminal, the Penn Central Transportation Company, from erecting a fifty-five story office tower on top of the station.<sup>19</sup> The ordinance was found not to be a taking, thus barring compensation for any diminution in economic value resulting from the regulation.<sup>20</sup> The Court stressed that takings inquiries were essentially "ad hoc"<sup>21</sup> and that "no set formula" could be applied to ascertain whether a taking had occurred.<sup>22</sup> The determination that a taking had transpired was made by inspecting: (1) the character of government action; (2) the reasonable investment-backed expectations of the property owner; and (3) the economic impact of such regulations.<sup>23</sup> This three-prong test employed by the *Penn Central* Court presented a more complex formula for takings jurisprudence. This heightened level of analytical complexity has managed to produce perplexing holdings in subsequent applications.

In contrast to *Penn Central*, the Court found in favor of private property rights in *Kaiser Aetna v. United States*.<sup>24</sup> In *Kaiser Aetna*, a

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ing prohibition on further commercial use of gravel pit as constitutional); *Miller v. Schoene*, 276 U.S. 272 (1928) (finding uncompensated destruction of cedar trees to save apple orchards constitutional).

17. For a discussion of the developments in this area, see *infra* notes 18-56 and accompanying text.

18. 438 U.S. 104 (1978).

19. *Id.* at 110. New York City's Landmarks Preservation Law restricts changes to buildings deemed historic and is administered by the 11 member Landmarks Preservation Commission. *Id.* The determination of a site as historic is subject to scrutiny by the New York City Board of Estimate and then to judicial review. *Id.* After designation as an historical site, the owner must keep the exterior features in good repair and submit changes to the Commission for approval. *Id.* at 111-12.

20. *Id.* at 138. The Court reasoned that although the air space above the terminal was a valuable property interest, the restrictions did not destroy the owner's primary expectations in the property or significantly diminish its value. *Id.* at 130-31, 136. The Court explained the genesis and importance of such regulations and their widespread use throughout the country to protect the historical and aesthetic value of various landmarks. *Id.* at 107-08. The Court expressed a great fear that if it invalidated this law, similar statutes preserving landmarks would be in jeopardy. *Id.* at 131.

21. *Id.* at 124.

22. *Id.* The Court stated that "this Court . . . has been unable to develop any 'set formula' for determining when 'justice and fairness' require that economic injuries caused by public action be compensated by the government, rather than remain disproportionately concentrated on a few persons." *Id.* (citing *Goldblatt v. Hempstead*, 369 U.S. 590, 594 (1962)).

23. *Penn Central*, 438 U.S. at 124.

24. 444 U.S. 164 (1979).

marina owner's right to compensation was upheld when the federal government mandated public access to its property.<sup>25</sup> The Court analyzed the character of the government's action and determined that, although the federal government had navigable servitude over the property,<sup>26</sup> requiring the owner to admit the public exceeded the regulation's necessary scope. This governmental intrusion had gone too far and was deemed a violation of the owner's foremost right to exclude others,<sup>27</sup> thus qualifying the owner for compensation.<sup>28</sup>

The *Kaiser Aetna* Court's identification of the right to exclude others from one's property reflects how property rights are actually a collection or bundle of rights in which certain sticks deserve greater court protection. For example, the right to exclude will be guarded more diligently than other less important or less fundamental property rights, such as development.<sup>29</sup>

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25. *Id.* at 180. The lagoon was private property and not accessible from the waterways of Hawaii until the owner dredged and connected it with the navigable waters of Hawaii. *Id.* at 165-66.

26. *Id.* at 174. The Court has previously described the concept of navigable servitude as follows:

"All navigable waters are under the control of the United States for the purpose of regulating and improving navigation, and although the title to the shore and submerged soil is in the various States and individual owners under them, it is always subject to the servitude in respect of navigation created in favor of the Federal government by the Constitution."

*Philadelphia Co. v. Stimson*, 223 U.S. 605, 635 (1912) (quoting *Gibson v. United States*, 166 U.S. 269, 271-72 (1897)). The Court in *Kaiser Aetna* determined that the federal government had a navigable servitude over the marina because it fell "within the definition" of navigable waters. *Kaiser Aetna*, 444 U.S. at 172.

27. *Kaiser Aetna*, 444 U.S. at 179-80. The right to exclude was found to be "universally held to be a fundamental element of the property right." *Id.*; see also *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 433 (1982) (stating that right to exclude is one of most essential property rights). For a further discussion of *Loretto* and the right to exclude others from property, see *infra* notes 37-40 and accompanying text.

28. *Kaiser Aetna*, 444 U.S. at 180. The Court categorized *Kaiser Aetna* as "not a case in which the Government is exercising its regulatory power in a manner that will cause an insubstantial devaluation of petitioners' private property; rather, the imposition of the navigational servitude . . . will result in an actual physical invasion of the privately owned marina." *Id.* Justice Rehnquist, ruling that the marina's owners were entitled to just compensation, stated that the regulation went "so far beyond ordinary regulation or improvement for navigation as to amount to a taking." *Id.* at 178.

29. *Id.* at 179-80. See *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926) (holding zoning as noncompensable constitutional taking). The Court's analysis was significant as a harbinger of the present Supreme Court's conceptualization of property as a bundle of sticks. See, e.g., *Nollan v. California Coastal Comm'n*, 483 U.S. 825 (1987); *Hodel v. Irving*, 481 U.S. 704 (1987).

Despite its advancement of the method of takings analysis it formulated in *Penn Central*, the Court, in *Agins v. City of Tiburon*,<sup>30</sup> created yet another test. The *Agins* Court declared that a taking occurred if either the regulation failed to advance a legitimate state interest or denied the property owner the economic viability of the property.<sup>31</sup> The *Agins* Court held that the particular zoning ordinance<sup>32</sup> advanced the legitimate government interest of promoting open space.<sup>33</sup> The owner was not denied enjoyment of the economic viability of his property because the property's best possible use, residential development, was still available.<sup>34</sup> The Court did not find in favor of the private property owner in *Agins* because the regulation did not interfere with a paramount stick in the bundle of rights.<sup>35</sup> Notwithstanding the public importance of regulations enacted under the nuisance exception to the Fifth Amendment,<sup>36</sup> the right to exclude would not be the only paramount stick in the bundle of rights.

Indeed, the Court defined another such paramount stick in *Loretto v. Teleprompter Manhattan CATV Corp.*<sup>37</sup> A local cable company, pursuant to a New York law,<sup>38</sup> installed two metal boxes and some cable on the roof of an apartment building.<sup>39</sup> The

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30. 447 U.S. 255 (1980).

31. *Id.* at 260.

32. *Id.* at 257. California enacted a statute requiring municipalities to plan the land use and open-space development of their communities. CAL. GOV'T CODE § 65302(a), (e) (West Supp. 1979). The City of Tiburon responded with ordinances which prevented the property owner from constructing more than five residential dwellings and mandated open-space use of the land. *Agins*, 447 U.S. at 257-59 (citing Tiburon, Cal., Ordinances Nos. 123 N.S. and 124 N.S. (June 28, 1973)).

33. *Agins*, 447 U.S. at 261-62. The regulations were held to serve the legitimate governmental purposes of "discourag[ing] the 'premature and unnecessary conversion of open-space land to urban uses.'" *Id.* at 261 (quoting CAL. GOV'T CODE § 65561(b) (West Supp. 1979)).

34. *Id.* at 262.

35. For further discussion of the concept of property rights as a bundle, see *infra* note 128 and accompanying text.

36. The nuisance exception to the Fifth Amendment Just Compensation Clause is "a narrow exception allowing the government to prevent 'a misuse or illegal use' " of property. *Keystone Bituminous Coal Ass'n v. DeBenedictis*, 480 U.S. 470, 512 (1987) (quoting *Curtin v. Benson*, 222 U.S. 78, 86 (1911)). The scope of the exception does not reach to include "the prevention of a legal and essential use" of the property. *Curtin*, 222 U.S. at 86.

37. 458 U.S. 419 (1982).

38. N.Y. EXEC. LAW § 828 (McKinney Supp. 1981-1982). The law states that a landlord may not " 'interfere with the installation of cable television facilities upon his property or premises.'" *Loretto*, 458 U.S. at 423 (quoting N.Y. EXEC. LAW § 828 (McKinney Supp. 1981-1982)).

39. *Loretto*, 458 U.S. at 422. The cable company installed " 'a cable slightly less than one-half inch in diameter and of approximately 30 feet in length along

Court held that despite the size of the intrusion, its permanence made it a taking.<sup>40</sup> Thus, the Court identified the right against permanent physical occupation of private property via regulation as a preeminent property right worthy of protection.

In 1987, the Court wrestled four times with takings jurisprudence<sup>41</sup> and revisited the right to exclude.<sup>42</sup> In *Nollan v. California*

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the length of the building about 18 inches above the roof top, and directional taps, approximately 4 inches by 4 inches by 4 inches, on the front and rear of the roof." *Id.* (quoting *Loretto v. Teleprompter Manhattan CATV Corp.*, 423 N.E.2d 320, 324 (N.Y. 1981)).

40. *Id.* at 434-35. The Court said that "when the 'character of governmental action' is a permanent physical occupation of property, our cases uniformly have found a taking to the extent of the occupation, without regard to whether the action achieves an important public benefit or has only minimal economic impact on the owner." *Id.* (citing and quoting *Penn Central*, 438 U.S. at 124).

41. *Nollan v. California Coastal Comm'n*, 483 U.S. 825 (1987); *First English Evangelical Lutheran Church v. Los Angeles County*, 482 U.S. 304 (1987); *Hodel v. Irving*, 481 U.S. 704 (1987); *Keystone Bituminous Coal Ass'n v. DeBenedictis*, 480 U.S. 470 (1987). For a full discussion of *Nollan*, see *infra* notes 43-49 and accompanying text. For a complete discussion of *First English*, see *infra* notes 50-56 and accompanying text.

In *Keystone*, the Court upheld a Pennsylvania statute, the Pennsylvania Subsidence Act, which devised formulas to ensure that proper surface support is provided to property under which mining occurs. PA. STAT. ANN. tit. 52, § 1406 (1986). These restrictions prevented a coal mining company from extracting coal from its property. *Keystone*, 480 U.S. at 493. The Subsidence Act has public safety goals similar to those of the Kohler Act scrutinized in *Mahon*. For a discussion of the Kohler Act, see *supra* note 11 and accompanying text.

Much debate occurred as to the degree of *Keystone's* injuries resulting from the denial of access to the unextracted coal. *Keystone*, 480 U.S. at 493-99. The Court assessed the amount of coal that had to be left in the mines in relation to all of *Keystone's* mines. *Id.* at 493-97. *Keystone* had argued that the unaccessible coal was an estate in and of itself and should not be viewed in relation to all of its mines. *Id.* at 499. The Court rejected this argument outright. *Id.* at 500-02. Instead, the Court opted for a harm/benefit analysis and invoked a nuisance exception to takings doctrine to justify the regulation. *Id.* at 491-93. "Courts have consistently held that a State need not provide compensation when it diminishes or destroys the value of property by . . . abating a public nuisance." *Id.* at 492 n.22 (citations omitted). The Court also pointed out that its decision was not solely based on the nuisance exception. *Id.* at 492-93. The second prong of the *Agins* test, the denial of economically viable use of the property to the property owner, was used to assert that regardless of the regulation protecting the public from nuisances, the damage to the property owner did not rise to a sufficient level. *Id.* at 493-99. For further discussion of *Keystone*, see Frank Michelman, *Takings, 1987*, 88 COLUM. L. REV. 1600, 1603-04 (1988) (describing 1987 developments in takings analysis including *Keystone*).

In *Hodel v. Irving*, 481 U.S. 704 (1987), the Court invalidated a federal statute which provided for certain Indian lands to escheat to the tribe rather than descend or be devised. *Id.* at 709. The statute reads in pertinent part:

No undivided fractional interest in any tract of trust or restricted land within a tribe's reservation or otherwise subjected to a tribe's jurisdiction shall descend [sic] by intestacy or devise but shall escheat to that tribe if such interest represents 2 per centum or less of the total acreage



*Coastal Commission*,<sup>43</sup> the Court engaged in a more stringent review of a California commission's actions when it conditioned a property owner's desire to rebuild his beachfront house upon his donation of a public easement facilitating access to the beach.<sup>44</sup> A bolder approach was taken by the Court in scrutinizing the stated purpose of the easement, which was to prevent the visual blockage of the shore.<sup>45</sup> This blockage would psychologically prevent the public from realizing the stretch of coast nearby, according to the commission.<sup>46</sup>

The *Nollan* Court ruled that the conditional nature of the easement did not justify the governmental intrusion any more than an outright governmental demand for the easement.<sup>47</sup>

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in such tract and has earned to its owner less than \$100 in the preceding year before it is due to escheat.

25 U.S.C. § 2206(a) (1983). While the Court acknowledged the federal government's interest in preventing the fractionalization of Indian lands, it held that the outright restriction on the descent or devise of such land by denying a basic property right amounted to a taking and entitled the plaintiffs to compensation. *Hodel*, 481 U.S. at 712. The government's interest in promoting the Indian tribe's more efficient and productive use of their ancestral lands was recognized and the "administrative headache" for the government to oversee these fragmented interests was also acknowledged. *Id.* at 712-13. For example, one tract of land had 439 owners, two-thirds of which were entitled to less than \$1 per year with the smallest heir receiving one cent every 177 years. *Id.* at 713; see also Michelman, *supra*, at 1606.

42. *Nollan*, 483 U.S. at 831. In *Kaiser Aetna*, the Court set out the right to exclude as a paramount stick in the bundle of property rights. *Kaiser Aetna*, 444 U.S. at 179-80. For further discussion of the right to exclude, see *supra* notes 24-29 and accompanying text.

43. 483 U.S. 825 (1987).

44. *Id.* at 828. The property owner leased the property with an option to buy. *Id.* at 827. That option was conditioned on the Nollans demolishing the present residential structure and replacing it. *Id.* at 827-28. Any development on the oceanside required the approval of the California Coastal Commission. The application to rebuild was denied unless the Nollans agreed to donate a public easement on the side of the property so that the public would have greater access to the beach. *Id.* at 828.

45. *Id.* at 828. Michelman noted the change in scrutiny from a surface "means-end" plausibility analysis to a sharper analysis of the "instrumental efficacy." Michelman, *supra* note 41, at 1607; see also Randall T. Shepard, *Land Use Regulation in the Rehnquist Court: The Fifth Amendment and Judicial Intervention*, 38 CATH. U. L. REV. 847 (1989) (discussing changed approach of Supreme Court). This differing approach represented a departure from a rational basis analysis to one of strict scrutiny.

46. *Nollan*, 483 U.S. at 828-29. The commission was also concerned with establishing a precedent for increasing private use of the California shoreline. *Id.* at 829.

47. *Id.* at 831. The Court explained:

Had California simply required the Nollans to make an easement across their beachfront available to the public on a permanent basis in order to increase public access to the beach, rather than conditioning

Moreover, the Court, specifically applying the *Agins* test, found that the requested easement did not advance any legitimate government purpose and thus constituted a taking.<sup>48</sup> Most importantly, however, the easement was characterized as a permanent physical invasion.<sup>49</sup>

In *First English Evangelical Lutheran Church v. County of Los Angeles*,<sup>50</sup> another of the 1987 cases, a local ordinance effectively forbade a church from rebuilding its campground because it was located on a flood site.<sup>51</sup> After deciding that a taking had occurred,<sup>52</sup> the Court addressed whether compensation was due to the church for the period prior to the Court's determination that the regulation amounted to a taking.<sup>53</sup> Since the Fifth Amendment is self-executing<sup>54</sup> and the characterization of the intrusion as permanent or temporary in this case was insignificant,<sup>55</sup> the church was entitled to compensation.<sup>56</sup>

The status of takings jurisprudence regarding regulations

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their permit to rebuild their house on their agreeing to do so, we have no doubt there would have been a taking.

*Id.*

48. *Id.* at 837. The condition "utterly fails to further the end advanced as the justification for the prohibition." *Id.* Justice Scalia, writing for the majority, analogized this restriction to forbidding people from yelling "fire" in a crowded theater unless they were willing to contribute \$100 to the state treasury. *Id.*

49. *Id.* at 838. The Court held that the continuous access across the Nollan property constituted a permanent invasion. *Id.*

50. 482 U.S. 304 (1987).

51. *Id.* at 307. The church's campground in Mill Creek Canyon was flooded and all buildings were destroyed in 1978. *Id.* In reaction to this flood, Los Angeles County sought to prevent any further destruction in Mill Creek Canyon by passing an ordinance. *Id.* County of Los Angeles Interim Ordinance No. 11,855 provided that "[a] person shall not construct, place or enlarge any building or structure, any portion of which is, or will be, located within the outer boundary lines of the interim flood protection area in Mill Creek Canyon." *Id.* at 307 (quoting City of Los Angeles Interim Ord. No. 11,895 (1979)). This regulation had the effect of preventing the church from rebuilding its campground facilities. *Id.*

52. *Id.* at 312.

53. *Id.* at 315-19.

54. *Id.* at 315. "A landowner is entitled to bring an action in inverse condemnation as a result of 'the self-executing character of the constitutional provision with respect to compensation.'" *Id.* (citations omitted).

55. *First English*, 482 U.S. at 318. The Court reasoned that temporary takings denying "a landowner all use of his property, are not different in kind from permanent takings, for which the Constitution clearly requires compensation." *Id.* (citations omitted).

56. *Id.* at 322. The Court also acknowledged that this decision would impact future land planning when it said that "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." *Id.* at 321.

that result in either a permanent physical occupation of private property or an interference with the right to exclude others from one's property remains in favor of the private property owner. However, the tremendous public interest in environmental regulation of land use and the abuses of the last thirty years have created imperative pressure to alter the present deference to property owners. Notwithstanding a paramount stick in the bundle of rights, critically important environmental concerns may need to take precedence. Although the Supreme Court has yet to be presented with such a question, a recent Federal Circuit case has grappled with the issue.

### III. FACTS

The dispute in *Hendler II* originated through the discovery by federal and state officials that pollutants, contaminants, and hazardous substances had seeped into the groundwater table from a toxic waste dump known as the Stringfellow Acid Pits.<sup>57</sup> This hazardous waste site was located near plaintiffs' property,<sup>58</sup> and the migratory plume of contaminants in the water table threatened a major basin for agricultural and drinking water.<sup>59</sup> EPA determined that the best strategy to track the movement of the contaminants was through the placement of groundwater monitoring wells on the toxic waste site and on the surrounding parcels of privately owned property.<sup>60</sup>

After EPA failed to have the plaintiffs voluntarily acquiesce to the installation of the wells,<sup>61</sup> the Agency acted pursuant to Comprehensive Environmental Response, Compensation and Liabilities Act<sup>62</sup> and issued an Order<sup>63</sup> requiring the plaintiffs to allow

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57. *Hendler v. United States*, 11 Cl. Ct. 91, 93 (1986) [hereinafter *Hendler I*].

58. *Id.* at 93.

59. *Id.* The Chino III Groundwater Basin supplies drinking water for the public and water to farmers for agricultural business in the Riverside County area. *Id.*

60. *Hendler II*, 952 F.2d at 1367.

61. *Hendler I*, 11 Cl. Ct. at 93. The plaintiffs refused to allow the installation of wells or presence of EPA officials on the premises. *Id.*

62. CERCLA §§ 101-157, 42 U.S.C. §§ 9601-9657 (1982 & Supp. 1992). EPA utilized §§ 104 and 106 to gain access to the *Hendler* property. *Hendler I*, 11 Cl. Ct. at 93-94. Section 104 states:

(1) Whenever (A) any hazardous substance is released or there is a substantial threat of such a release into the environment, or (B) there is a release or substantial threat of release into the environment of any pollutant or contaminant which may present an imminent and substantial danger to the public health or welfare, the President is authorized to act . . . to remove or arrange for the removal of, and provide for

wells to be installed. Under the threat of civil penalties, including punitive damages, the Order also required the plaintiffs to allow government contractors unimpeded access onto their property.<sup>64</sup> Shortly after the Order was issued, EPA had five wells placed on the plaintiffs' property and the State of California later installed thirteen more wells.<sup>65</sup>

The plaintiffs filed their original complaint in September 1984, alleging that EPA's actions constituted a taking and warranted compensation of \$4.5 million.<sup>66</sup> After stipulating that there were no issues of material fact,<sup>67</sup> both parties filed for summary judgment.<sup>68</sup> The United States Claims Court in *Hendler I*<sup>69</sup> ruled in favor of EPA and California on two of the three

remedial action relating to such hazardous substance, pollutant or contaminant at any time . . . .

CERCLA § 104(a), 42 U.S.C. § 9604(a). Section 104(b) provides that if the President is authorized to act under 104(a) then the President may:

undertake such investigations, monitoring, surveys, testing, and other information gathering as he may deem necessary or appropriate to identify the existence and extent of the release or threat thereof, the source and nature of the hazardous substances, pollutants or contaminants involved, and the extent of danger to the public health or welfare or to the environment.

CERCLA § 104(b), 42 U.S.C. § 9604(b).

Section 106(a) authorizes the President to "take other action . . . including . . . issuing such orders as may be necessary to protect public health and welfare and the environment." CERCLA § 106(a), 42 U.S.C. § 9606(a).

63. *Hendler I*, 11 Cl. Ct. at 93. EPA's Order stated in relevant part that EPA and state officials as well as authorized personnel (i.e. contractors) be given:

A. Access to [plaintiffs' property] for the following purposes: (1) locating[,] constructing, operating, maintaining, and repairing, monitoring/extraction wells; (2) taking measurements and samples from those wells; (3) performing groundwater extraction operations . . . including off-site disposal of such extracted groundwater.

C. Access to [plaintiffs' property] to conduct any and all other activities necessary to investigate, monitor, survey, test and perform information gathering to identify the existence and extent of the release of hazardous substances or the threat thereof, the source and nature of the hazardous substances, pollutants or contaminants involved, and the extent of the danger to the public health or welfare or to the environment.

*Id.* (quoting EPA's administrative Order to plaintiffs issued on Sept. 20, 1983) [hereinafter EPA's Order].

64. *Id.*

65. *Hendler II*, 952 F.2d at 1369-70. The court described the wells as "some 100 feet deep, lined with plastic and stainless steel, and surrounded by gravel and cement. Each well was capped with a cement casing lined with reinforcing steel bars, and enclosed by a railing of steel pipe set in cement." *Id.* at 1376.

66. *Id.* at 1370.

67. *Id.*

68. *Id.* The trial judge determined that the summary judgment motions presented three issues: first, whether EPA's Order facially was a taking; second,

grounds.<sup>70</sup> After this decision, battles over discovery ensued and significant delays resulted before the court of appeals ruled on the case.<sup>71</sup>

#### IV. ANALYSIS: THE FEDERAL CIRCUIT'S AVOIDANCE OF REGULATORY TAKINGS ANALYSIS AND EMBRACEMENT OF PER SE PHYSICAL TAKINGS ANALYSIS

The Federal Circuit Court began its analysis in *Hendler II* by providing a background survey of takings jurisprudence and philosophy.<sup>72</sup> The court traced the theoretical developments from feudal England<sup>73</sup> through the early years of the United States when takings were considered limited to physical intrusions onto property by the government.<sup>74</sup> The court acknowl-

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whether EPA's physical occupation of the Hendler property was a taking; and third, whether the activities of California were attributable to EPA. *Id.*

69. 11 Cl. Ct. 91 (1986).

70. *Id.* at 100. The court ruled in favor of EPA on the issues of a taking based solely on the Order and the implication of EPA for the actions of California. *Id.* The issue of whether a physical taking occurred was left for trial. *Id.* at 98.

71. *Hendler II*, 952 F.2d at 1369-70. The discovery battle lasted nearly four years and proceeded as follows:

December 1985—EPA motion to compel Hendler to answer interrogatories granted by Claims Court.

March 1986—EPA moved a second time to compel Hendler to answer interrogatories granted by Claims Court.

January 1987—Second EPA motion granted.

March 1987—EPA moved for dismissal.

March 26, 1987—Plaintiffs respond to interrogatories and EPA moved again for dismissal.

April 1987—EPA moved a third time to compel plaintiffs' response to interrogatories.

May 14, 1987—Plaintiffs responded again to interrogatories.

May 26, 1987—EPA moved for a third time for dismissal.

August 1987—Claims Court finally ordered discovery closed.

October 1987—New judge appointed to handle case.

September 1988—Plaintiffs moved to suspend based on evidence of a new type of well to be installed by EPA.

September 1989—EPA motion to dismiss granted.

*Id.*

72. *Id.* at 1371-74.

73. *Id.* at 1371. The court drew the distinction between England, where the sovereign determined when land would be taken for public purposes, and the United States, where "the Constitution does not leave that issue to the sovereign's good will." *Id.*

74. *Id.* at 1371. The court pointed out that little scrutiny was given to the purposes of such governmental intrusions, but that the main concern was the amount of compensation due to the property owner. *Id.* It was also noted that occasionally the issue became whether the government's occupation was so short-lived as to not constitute a taking. *Id.* The distinction was drawn between situations where "the government vehicle parked one day on O's land while the

edged the challenges in analyzing twentieth century government regulatory actions. The key question in the analysis, until 1978, was whether government regulations went too far.<sup>75</sup>

The court of appeals noted an increased involvement by the Supreme Court in the takings area since the 1978 decision in *Penn Central*.<sup>76</sup> The *Penn Central* three-pronged test<sup>77</sup> was characterized as "more elaborate—but perhaps no more certain" than the *Mahon* test.<sup>78</sup> The court, via Judge Plager's opinion, portrayed the Supreme Court as avoiding the issue of whether property owners are entitled to compensation for the duration of overly intrusive regulations<sup>79</sup> until *First English*.<sup>80</sup> Further exploration into what constituted a regulatory taking was deemed unnecessary by the court.<sup>81</sup> The court concluded by articulating that the core premise in its analysis is that government cannot take the essential economic value of one's property away through

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driver eats lunch, on one hand, and the entry on O's land by the government for the purpose of establishing a long term storage lot for vehicles and equipment, on the other . . . ." *Id.* The court noted that the former situation was clearly not a taking, but the latter certainly fell in the range of takings. *Id.*

75. *Id.* at 1372. The court gleaned the test from Justice Holmes' oft-cited quote in *Mahon* that "if regulation goes too far it will be recognized as a taking." *Pennsylvania Coal v. Mahon*, 260 U.S. 393, 415 (1922). The court drew the conclusion from analyzing various zoning cases. *See Nectow v. City of Cambridge*, 277 U.S. 183 (1928) (invalidating zoning ordinance); *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926) (upholding particular zoning ordinance but leaving door open for some to be overly intrusive). The court also considered the Supreme Court's deference to state court determinations on the validity of zoning ordinances. *See Fritts v. City of Ashland*, 348 S.W.2d 712 (Ky. 1961) (negating zoning ordinance for its lack of master plan and spotty application); *Kropf v. City of Sterling Heights*, 215 N.W.2d 179 (Mich. 1974) (granting local government deference in zoning).

76. 438 U.S. 104 (1978). For further discussion of *Penn Central*, see *supra* notes 18-23 and accompanying text.

77. For an enumeration and discussion of *Penn Central's* three-prong test, see *supra* note 23 and accompanying text.

78. *Hendler II*, 952 F.2d at 1372. For a discussion of the *Mahon* balancing test, see *supra* notes 13-17 and accompanying text.

79. *Hendler II*, 952 F.2d at 1372-73. The court of appeals stated that the Supreme Court passed on the question in four different cases: *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); *San Diego Gas & Elec. Co. v. City of San Diego*, 450 U.S. 621 (1981); and *Agins v. City of Tiburon*, 447 U.S. 255 (1980).

80. *First English Evangelical Lutheran Church v. County of Los Angeles*, 482 U.S. 304 (1987). The court acknowledged that government must compensate property owners for the entire duration of their intrusion. *Hendler II*, 952 F.2d at 1373.

81. *Hendler II*, 952 F.2d at 1373. The court remarked that "we need not explore in detail the various articulations of what constitutes a regulatory taking . . . ." *Id.*

regulation.<sup>82</sup>

The court then bifurcated its taking analysis, first exploring EPA's and California's actions as a regulatory taking.<sup>83</sup> Second, the court treated the federal and state actions as a traditional physical taking.<sup>84</sup>

#### A. Government Actions as a Regulatory Taking

In analyzing EPA's actions as a regulatory taking, the court of appeals quickly chastised the Claims Court for what it perceived to be an outright misreading of the Fifth Amendment.<sup>85</sup> The lower court had held that EPA's Order was not a taking because its terms were consistent with simultaneous use of the property by EPA and Hendler.<sup>86</sup>

Judge Plager adamantly declared that "[t]he government does not have the right to declare itself co-tenant-in-possession with a property owner."<sup>87</sup> Using *Nollan*<sup>88</sup> for support, the court viewed the right to exclude others as one of the prized rights in a property owner's bundle of rights.<sup>89</sup> In addition to the constitu-

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82. *Id.* The court said that "the government, under the guise of regulation, cannot take from a property owner the core economic value of the property, leaving the owner with a mere shell of shambled expectations." *Id.*

83. *Id.* at 1374-75. For a discussion of the court's regulatory takings analysis, see *infra* notes 85-95 and accompanying text.

84. *Hendler II*, 952 F.2d at 1375-78. For a further discussion of the court's physical takings analysis, see *infra* notes 96-111 and accompanying text.

85. *Hendler II*, 952 F.2d at 1374. For discussion of the court of appeals criticisms, see *infra* notes 96-101 and accompanying text.

86. *Hendler II*, 952 F.2d at 1374. The Claims Court described EPA's Order as follows:

[It] did not purport to dispossess plaintiffs or limit their use of the property. It was not functionally equivalent to seizure of the property or restraint on entry and use. While [the Order's] terms were expansive, they were not necessarily inimical to simultaneous use of the property by plaintiffs, as long as they did not interfere with defendant's admittedly beneficent activities. As a matter of fact, the property was underdeveloped and unused, so there was no possibility of conflict between the order and the plaintiff's use.

*Hendler I*, 11 Cl. Ct. at 95.

87. *Hendler II*, 952 F.2d at 1374.

88. 483 U.S. 825 (1987).

89. *Hendler II*, 952 F.2d at 1374. The court stressed the importance of this private property right by expressing sentiments such as the following: "In the bundle of rights we call property, one of the most valued is the right to sole and exclusive possession—the right to *exclude* strangers, or for that matter friends, but especially the Government." *Id.*; see also *In re Etter*, 756 F.2d 852, 859 (Fed. Cir.), *cert. denied*, 474 U.S. 828 (1985) ("[The] right to exclude . . . is but the essence of the concept of property."); *Olmstead v. United States*, 277 U.S. 438, 478 (1928) (Brandeis, J., dissenting) (declaring right to be let alone among citizen's most cherished rights). See, e.g., *Nollan v. California Coastal Comm'n*, 483

tional basis for this right,<sup>90</sup> the importance of exclusive ownership for economic development and efficiency was highlighted by the court.<sup>91</sup> The court was quick to point out that whether the breach of the plaintiffs' exclusive ownership was perpetrated by a governmental authority or private group was of no significance.<sup>92</sup> In fact, the opinion even hinted that such infringements by governmental authorities should be met with greater scrutiny.<sup>93</sup>

The court of appeals agreed with the lower court's finding that the Order alone did not constitute a taking.<sup>94</sup> Nonetheless, considering the character of the government's actions after the issuance of the Order and the plaintiffs' investment-backed expectations, the plaintiffs may have suffered sufficient economic impact to warrant compensation.<sup>95</sup>

## B. Government Actions as a Physical Taking

The court next explored whether the actions of state and federal officials constituted a traditional physical taking.<sup>96</sup> The examination focused on the wells installed on the property<sup>97</sup> in light of *Loretto's*<sup>98</sup> assertion that permanent physical occupation of one's property is a taking.<sup>99</sup> First, the court examined whether the actions of EPA and California amounted to a permanent in-

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U.S. 825, 831 (1987); *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 426 (1982).

90. For further discussion of the basis of the right to exclude, see *supra* notes 24-29 and accompanying text.

91. *Hendler II*, 952 F.2d at 1375.

92. *Id.*

93. *Id.* The court announced:

The intruder who enters clothed in the robes of authority in broad daylight commits no less an invasion of these rights than if he sneaks in in the night wearing a burglar's mask. In some ways, entry by the authorities is more to be feared, since the citizen's right to defend against the intrusion may seem less clear. Courts should leave no doubt as to whose side the law stands upon.

*Id.*

94. *Id.* The court felt that the plaintiffs did not specifically plead the facts necessary to make out such a case. *Id.*

95. *Hendler II*, 952 F.2d at 1375. The court interpreted the Claims Court's silence on this issue to mean that it was to be held over for trial. *Id.*

96. *Id.* at 1375-78. For more discussion of physical takings, see *supra* notes 37-40 and accompanying text.

97. For a description of the wells placed on the Hendler property, see *supra* note 65.

98. *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982). For a review of the *Loretto* case, see *supra* notes 37-40 and accompanying text.

99. *Hendler II*, 952 F.2d at 1375. The court reiterated that, regardless of the governmental purpose or how minimal the economic detriment to the property owner is, the occupation constituted a taking. *Id.*



trusion.<sup>100</sup> Justice Thurgood Marshall's rhetoric in *Loretto* was commandeered to establish that the character of the government's actions is "determinative" in such cases.<sup>101</sup> "Permanent" was clarified as not being forever and several cases were cited to support that proposition.<sup>102</sup>

In applying the law to the present case, a common sense approach was employed to discount the possibility that this taking was temporary. The court expounded on the obtrusive nature of the wells,<sup>103</sup> comparing the intrusion to that of the cable television equipment in *Loretto*.<sup>104</sup> Judge Plager then delineated the limits of temporary takings by referring to an earlier hypothetical regarding a truckdriver parking briefly on one's property to eat lunch.<sup>105</sup> The court hastened to note that it was not asserting what the boundaries for a *Loretto* permanent physical invasion were, but that this case certainly fit within the ambit of such parameters.<sup>106</sup>

The meaning of "permanent" was then explicitly qualified to include the periodic traffic of government vehicles onto the plaintiffs' property.<sup>107</sup> The court noted that the physical occupation need not be "exclusive, or continuous and uninterrupted."<sup>108</sup> The right to exclude, strongly expressed in *Kaiser Aetna*,<sup>109</sup> was

100. *Id.* at 1376-77.

101. *Id.* at 1376 (quoting *Loretto*, 458 U.S. at 426).

102. *Id.* The following cases were found as illustrative of how government action can constitute a compensable taking: *Kimball Laundry Co. v. United States*, 338 U.S. 1 (1949) (government appropriation of private business for public use during World War II); *United States v. Petty Motor Co.*, 327 U.S. 372 (1946) (government acquired remainder of lease for building); *United States v. General Motors Corp.*, 323 U.S. 373 (1945) (government appropriation of warehouse lease).

103. *Hendler II*, 952 F.2d at 1376.

104. *Id.*

105. *Id.* at 1371, 1377.

106. *Hendler II*, 952 F.2d at 1377. The court reasoned, "It is enough to say . . . that the occupancy by the Government was comfortably within the degree necessary to make out a taking." *Id.*

107. *Id.* EPA and state officials traveled onto the Hendler property to check and maintain the wells. *Id.* at 1367, 1377.

108. *Id.* at 1377.

109. 444 U.S. 164 (1979). The court also relied on Justice Scalia's opinion in *Nollan* for support:

To say that the appropriation of a public easement across a landowner's premises does not constitute the taking of a property interest but rather . . . "a mere restriction on its use," is to use words in a manner that deprives them of all ordinary meaning . . . We have repeatedly held that . . . "the right to exclude [others is] 'one of the most essential sticks in the bundle of rights that are commonly characterized as property.'" *Nollan*, 444 U.S. at 831-32 (citations omitted) (quoting *Loretto*, 458 U.S. at 433).

invoked to display that the intrusions by government officials amounted to takings.<sup>110</sup> The court stated that the government acted in this case as if it had acquired an easement over the Hendler property, and thus the use of *Kaiser Aetna* was appropriate.<sup>111</sup>

### C. The Holding of *Hendler II*

The court explicitly declared that the government interest to monitor the groundwater easily overcame the plaintiffs' property rights.<sup>112</sup> However, the government actions amounted to a taking and compensation was warranted.<sup>113</sup> The court ruled that the plaintiffs' motion for summary judgment in *Hendler I*<sup>114</sup> was improperly denied.<sup>115</sup> The issues of whether EPA could be held liable for the actions of California officials<sup>116</sup> and the efficacy of the discovery procedure<sup>117</sup> were also resolved.

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110. *Hendler II*, 952 F.2d at 1377.

111. *Id.* at 1378.

112. *Id.* The plaintiffs agreed that the government had a valid interest in monitoring their property. *Id.*

113. *Id.* The court cited the obtrusiveness of the wells, the duration of their presence on the property, and the indignation of government officials, entering the property at their convenience, as factors for finding a permanent physical occupation of the property. *Id.*

114. *See Hendler I*, 11 Cl. Ct. 91 (1986).

115. *Hendler II*, 952 F.2d at 1378. For a discussion of the reasons behind the Claims Court's rulings on the summary judgments, see *supra* notes 66-70 and accompanying text.

116. *Hendler II*, 952 F.2d at 1378-79. The court decided that EPA could be held responsible for the actions of California officials. *Id.* at 1379. Common law agency was eliminated as a basis for holding EPA responsible, instead California officials were viewed as acting under the power of CERCLA. The court reasoned that EPA officials could not have acted or issued an executive order without the proper legislative authority. *Id.* at 1378. Additionally, the Order itself authorized "EPA officials and other authorized personnel, including state officials." *Id.* at 1379 (citing *Hendler I*, 11 Cl. Ct. at 93). Therefore, the actions of state officials were done under the authority of the federal government through CERCLA and the EPA Order. *Id.* at 1378.

117. *Id.* at 1380-84. The court ruled that the controversial responses to EPA's interrogatories were not deserving of the lower court's rancor because either they were sufficient or EPA had the answers to such questions in their possession. *Id.* at 1380-82. The imposition of Rule 37 sanctions was held to be too harsh, as well as invalid, because of the skewed analysis that resulted after the Claims Court's erroneous denial of Mr. Hendler's motion for summary judgment on the issue of whether there was a physical taking by EPA and the state of California. *Id.* at 1382-84.

V. THE COURT OF APPEALS' DECISION: QUESTIONABLE  
APPLICATION OF PHYSICAL TAKINGS DOCTRINE AND THE EASY  
WAY OUT ON REGULATORY TAKINGS ANALYSIS

In *Hendler II*, the Federal Circuit Court of Appeals executed a laudable summary of the murky area of regulatory takings.<sup>118</sup> Its application of takings jurisprudence to this case, however, was terse and unclear. The court passed on an obvious opportunity to sufficiently and precisely guide future courts in pondering critical takings issues.

The court, following the lead of *First English*, properly tolled the period for which the plaintiffs were entitled to compensation as being from the start of the governmental intrusion.<sup>119</sup> The declaration that government "cannot take from a property owner the core economic value of the property"<sup>120</sup> was also a usefully broad characterization of how courts view the issue and helped to frame the inquiry.

The court's sifting through the meanings of "permanent" and "temporary" was entirely consistent with the analytical methods employed in takings jurisprudence. Such analysis also fits within the court's broad authority to engage in an *ad hoc* factual inquiry.<sup>121</sup>

Admittedly, the necessary facts to determine whether EPA's actions rose to the level of a regulatory taking were not present before the court.<sup>122</sup> The *Hendler II* court, however, failed to provide the lower court with any significant direction on remand.<sup>123</sup>

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118. *Id.* at 1371-74. For a discussion of the court's analysis in this area, see *supra* notes 7-36, 41-56 and accompanying text.

119. *Hendler II*, 952 F.2d at 1373. For a further discussion of the proper time frame for the calculation of damages, see *supra* notes 53-56 and accompanying text.

120. *Hendler II*, 952 F.2d at 1373.

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

122. *Hendler II*, 952 F.2d at 1375. The court held that the plaintiffs failed at any level to plead sufficient facts with regard to the economic impact of the regulation as required by *Agins. Id.*

123. *Id.* at 1374-75. For example, the Eleventh Circuit Court of Appeals remanded a regulatory takings case and supplied the district court with several factors to aid it in its decision. *Reahard v. Lee County*, 968 F.2d 1131 (11th Cir. 1992). The *Reahard* court acknowledged the questions as:

(1) [T]he history of the property—when was it purchased? How much land was purchased? Where was the land located? What was the nature of title? What was the composition of the land and how was it initially used?; (2) the history of development—what was built on the property and by whom? How was it subdivided and to whom was it sold? What plots were filed? What roads were dedicated?; (3) the history of zoning and regulation—how and when was the land classified?

The area of regulatory takings was acknowledged as a quagmire,<sup>124</sup> yet it was not apparent which, if any, of the various constructs the lower court should apply. The court hinted at a *Penn Central* analysis, with the convoluted mentioning of the three factors,<sup>125</sup> but its expression of dismay in not having economic factors to examine implied a two-pronged *Agins* review.<sup>126</sup>

In addition, the court's examination of EPA's Order as possibly being a taking on its face was puzzling.<sup>127</sup> The court's model of property as a bundle of rights squares with the Supreme Court's current view, which has been labeled "conceptual severance."<sup>128</sup> Despite such a strong critique of the lower court,<sup>129</sup>

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How was use proscribed? What changes in classifications occurred?; (4) how did development change when title passed?; (5) what is the present nature and extent of the property?; (6) what were the reasonable expectations of the landowner under state common law?; (7) what were the reasonable expectations of neighboring landowners under state common law?; and (8) perhaps most importantly, what was the diminution in the investment-backed expectations of the landowner, if any, after the passage of the regulation?

*Id.* at 1136.

124. *Hendler II*, 952 F.2d at 1371. The court described the issues arising under regulatory taking as not fitting easily into the simple framework of traditional takings. *Id.* The court also acknowledged that no set formula exists in the area. *Id.* at 1373. For a complete discussion of takings jurisprudence, see *supra* notes 7-57 and accompanying text.

125. *Hendler II*, 952 F.2d at 1375. The court asserted that [the lower court's] ruling says nothing about whether subsequent events, in light of the character of the Government's action and plaintiffs' distinct investment-backed expectations, might have had sufficient economic impact on the plaintiffs to constitute a regulatory taking. Given the fact-specific findings required for determining under current regulatory takings law when such a taking occurs, we understand the trial judge to have refrained from deciding this issue on summary judgment. It remains an issue in the case.

*Id.* The court, however, failed to discuss the issue of regulatory takings as it would apply to the facts of the instant case.

126. *Id.* See *Agins v. City of Tiburon*, 447 U.S. 255, 260-61 (1980). For a discussion of *Agins*, see *supra* notes 30-36 and accompanying text.

127. *Hendler II*, 952 F.2d at 1375.

128. Margaret Jane Radin, *The Liberal Conception of Property: Cross Currents in the Jurisprudence of Takings*, 88 COLUM. L. REV. 1667 (1988). Conceptual severance "consists of delineating a property interest of just what the government action has removed from the owner, and then asserting that that particular whole thing has been permanently taken." *Id.* at 1676; see also Michelman, *supra* note 41, at 1614-21. The Supreme Court has also considered the concept and embraced it on several occasions. See, e.g., *Nollan*, 483 U.S. at 831 (characterizing right to exclude as one such severable interest); *Kaiser Aetna*, 444 U.S. at 164 (holding that taking occurred even though several aspects of property owner's rights remained unaffected by government intrusion). But see *Keystone*, 480 U.S. at 497-502 (property owner's various property rights viewed as whole in computation of diminution in value); *Andrus v. Allard*, 444 U.S. 51, 65-66 (1979) ("[W]here an owner possesses a full 'bundle' of property rights, the destruction

this opinion provided absolutely no basis for why EPA's Order did not constitute a taking.<sup>130</sup>

While the court's regulatory takings analysis<sup>131</sup> leaves something to be desired, its application of traditional physical takings analysis was straightforward, succinct, and consistent with Supreme Court rulings which have endorsed *Loretto*.<sup>132</sup> The thorough discussion of the distinction between permanent and temporary takings<sup>133</sup> was refreshingly clear and unequivocal. The approach of placing the concept in perspective by discussing both the recent thrust of *Loretto* and the historical protection of the right to exclude worked well in framing the discussion. The court bolstered its opinion by placing more than the ten year tradition of *Loretto* behind its appraisal.<sup>134</sup> Additionally helpful in outlining the debate was the court's declaration that permanence does not mean forever and could involve a limited term.<sup>135</sup> This clarification removed a very basic ambiguity that prior cases have failed to do.

The common sense approach<sup>136</sup> taken by the court, however, has both positive and negative implications. The fact-based approach honors the ad hoc tradition applied in regulatory takings analysis<sup>137</sup> as well as logically recognizing that such intrusions<sup>138</sup> constitute a taking. Negatively, the simplification into hypotheti-

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of one 'strand' of the bundle is not a taking, because the aggregate must be viewed in its entirety.'").

129. *Hendler II*, 952 F.2d at 1374-75. For further discussion of the court's critique of the lower court's analysis, see *supra* notes 85-95.

130. *Id.* at 1375. The court noted that:

The question addressed . . . in *Hendler I* was whether that Order, standing alone, met the tests for a regulatory taking. The court concluded no. On the facts then before the court, and in light of the absence by plaintiffs of proof of facts addressed specifically to the tests for a regulatory taking based on the Order alone, we do not disagree with that ruling.

*Id.*

131. *Id.* at 1374-75.

132. See *Yee v. City of Escondido*, 112 S. Ct. 1522, 1526 (1992); *City of Lakewood v. Plain Dealer Publishing Co.*, 486 U.S. 750, 779 (1988); *Connolly v. Pension Benefit Guar. Corp.*, 475 U.S. 211, 224 (1986).

133. *Hendler II*, 952 F.2d at 1375-77.

134. *Id.* at 1375-77. The court cited three older Supreme Court cases for support: *Kimball Laundry Co. v. United States*, 338 U.S. 1 (1949); *United States v. Petty Motor Co.*, 327 U.S. 372 (1946); *United States v. General Motors Corp.*, 323 U.S. 373 (1945).

135. *Hendler II*, 952 F.2d at 1376.

136. *Id.* at 1375-78.

137. See, e.g., *Pennell v. City of San Jose*, 485 U.S. 1, 10 (1988); *Keystone Bituminous Coal Ass'n v. DeBenedictis*, 480 U.S. 470, 495 (1987); *Hodel v. Virginia Surface Mining & Reclamation Ass'n*, 452 U.S. 264, 295 (1981); *Kaiser*

calls<sup>139</sup> does not leave future courts with any guidance and, like the determination that the Order was not a taking,<sup>140</sup> was conclusory.<sup>141</sup> The nearly exclusive reliance on *Loretto* for the finding of a physical taking was troublesome in that *Loretto* did not offer the ironclad black letter law that the court suggested.<sup>142</sup>

The court's use of *Nollan* and *Kaiser Aetna* to demonstrate that the periodic intrusions of government officials and equipment constitute a physical taking was risky.<sup>143</sup> In *Nollan* and *Kaiser Aetna*, the Supreme Court analyzed the government's actions not as physical takings but as regulatory takings.<sup>144</sup> While the court properly applied these concepts, the distinguishing factors of what kind of taking was involved may cause this case to be ignored.

## VI. THE IMPACT OF *HENDLER V. UNITED STATES*

The Federal Circuit Court of Appeals' reasoning follows the

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*Aetna v. United States*, 444 U.S. 164, 175 (1979); *Penn Cent. Transp. Co. v. City of New York*, 438 U.S. 104, 124 (1978).

138. For a description of the wells placed on Hendler's property, see *supra* note 65.

139. For a discussion of the examples given by the court, see *supra* notes 104-05 and accompanying text.

140. For further discussion of the court's ruling on this point, see *supra* notes 94-95 and accompanying text.

141. See *Hendler II*, 952 F.2d at 1378. The court pointed out that:

The issue before the court in *Hendler I* was whether, on the facts before it, the Government took any property by permanent physical occupation, thus obligating it to pay plaintiffs just compensation. The trial judge thought not, absent more facts; we think nothing more needed to be shown. The trial judge denied plaintiffs' motion for summary judgment on this point; he should have granted it.

*Id.*

142. The Supreme Court itself has been careful to note the limited scope of *Loretto*. See, e.g., *FCC v. Florida Power Corp.*, 480 U.S. 245, 251 (1987) (declaring holding in *Loretto* as "very narrow"); *Kaufman v. City of New York*, 717 F. Supp. 84 (S.D.N.Y. 1989) (rejecting *Loretto* based on its narrow scope); *Gibbs v. Southeastern Inv. Corp.*, 705 F. Supp. 738, 742 (D. Conn. 1989) (explaining *Loretto's* holding is "very narrow"); *American Continental Corp. v. United States*, 22 Cl. Ct. 692, 701 (1991) ("*Loretto* cannot, and should not, be extended by mere analogy without careful analysis.").

Critics have also scrutinized the *Loretto* decision. See, e.g., Douglas W. Kmiec, *The Original Understanding of the Taking Clause Is Neither Weak nor Obtuse*, 88 COLUM. L. REV. 1630, 1658 (1988) (viewing *Loretto* as destroying distinction between physical and regulatory takings); Radin, *supra* note 128, at 1676-78 (criticizing *Loretto* for expanding scope of takings).

143. *Hendler II*, 952 F.2d at 1377-78. For a further discussion of the court's use of these cases, see *supra* notes 88-91 & 109-11 and accompanying text.

144. *Nollan*, 483 U.S. at 834; *Kaiser Aetna*, 444 U.S. at 172. For a discussion of these two cases, see *supra* notes 24-29 & 43-49.

Supreme Court's lead in finding compensation due to property owners when the government physically intrudes upon their property. Unfortunately, the *Hendler II* decision leaves lower courts without a concrete test for what constitutes such a taking.<sup>145</sup> The court's examination employed various elements of takings jurisprudence, but lacked sufficient clarity for lower courts to apply.

The court's attempt to balance the conflicting positive values of private autonomy and governmental need for intrusion for the benefit of society<sup>146</sup> was admirable. However, the result is to provide government with less incentive to actively patrol and monitor critical environmental developments. Such reluctance is likely because government must fear liability for compensation to property owners whenever its duties mandate entry onto private property. Government agencies must also consider potential legal costs in battling takings decisions, even if they are successful in fighting off a private citizen's challenge. Such disincentives to ardent environmental regulation undermine holistic attempts to regulate the environment.<sup>147</sup> Indeed, the focus of the courts' inquiries is on only one plot of land at a time.<sup>148</sup> Moreover, the

145. See, e.g., *Nollan v. California Coastal Comm'n*, 483 U.S. 825 (1987) (ruling government easement constituted physical intrusion); *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982) (holding that installation of cable television equipment was physical intrusion); *Kaiser Aetna v. United States*, 444 U.S. 164 (1979) (ruling navigable servitude was physical intrusion). Legal scholars have debated the merits of a bright-line test versus an ad hoc approach. See Michelman, *supra* note 42, at 1625-29 (arguing in favor of ad hoc method); Susan Rose-Ackerman, *Against Ad Hocery: A Comment on Michelman*, 88 COLUM. L. REV. 1697 (1988) (criticizing ad hoc approach); Frank Michelman, *A Reply to Susan Rose-Ackerman*, 88 COLUM. L. REV. 1712 (1988) (rebutting Rose-Ackerman).

Six months after *Hendler II* was decided, the Supreme Court further expanded its deference to property owners in the area of regulatory takings. *Lucas v. South Carolina Coastal Council*, 112 S. Ct. 2886 (1992). In *Lucas*, changes in the South Carolina Beachfront Management Act barred the owner of a beachfront parcel from developing his land. *Id.* at 2889. This prohibition denied Lucas all economically beneficial uses of the land, namely the development of resort residences, and thus constituted a taking. *Id.* at 2895.

146. *Hendler II*, 952 F.2d at 1376-77.

147. David B. Hunter, *An Ecological Perspective on Property: A Call for Judicial Protection of the Public's Interest in Environmentally Critical Resources*, 12 HARV. ENVTL. L. REV. 311 (1988). Hunter argues for a more ecologically concerned approach to takings jurisprudence. *Id.* at 311. Hunter states that because of the finite nature of the planet, constraints are placed upon our property-based economic freedoms and development. *Id.* at 314-15. A clamor is made for a rethinking of our property concepts to conform to changing environmental values and needs. *Id.* at 316-17.

148. *Id.* at 334; see also T. Nicholas Tideman, *Takings, Moral Evolution, and Justice*, 88 COLUM. L. REV. 1714, 1729 (1988) ("When we have achieved an un-

economic thrust of the courts' analysis, while constitutionally sound, may not be ecologically sound.<sup>149</sup>

Justice Holmes, writing for the majority in *Mahon*, stated, "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."<sup>150</sup> In order for government to go on acting as the chief protector and insurer of safe drinking water, the *per se* taking analysis performed in *Hendler II* should be abandoned. The perilous environmental threat in *Hendler II* distinguishes it from the other cases where courts found in favor of private property rights. *Hendler II* is a victory for property owners who are invaded by governmental agencies, but ultimately *Hendler II* may be a defeat for environmental policy and us all.

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derstanding that land and natural resources are our common heritage, there will be no problems of governmental actions taking these things.").

149. Hunter, *supra* note 147, at 321. This view of property in exploitative terms fosters "unchecked growth and development over stewardship and conservation." *Id.* at 332.

150. *Pennsylvania Coal v. Mahon*, 260 U.S. 393, 413 (1922).



