Catholic University Law Review

Volume 40
Issue 3 *Spring 1991*

Article 16

1991

Loveladies Harbor, Inc. v. United States: The Claims Court Takes a Wrong Turn – Toward a Higher Standard of Review

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LOVELADIES HARBOR, INC. v. UNITED STATES: THE CLAIMS COURT TAKES A WRONG TURN—TOWARD A HIGHER STANDARD OF REVIEW

The just compensation clause of the fifth amendment to the United States Constitution prohibits the federal government from taking "private property . . . for public use, without just compensation."[1] The principle goal of that clause is to indemnify a property owner whose land is taken by the government.[2] A landowner's entitlement to compensation is warranted when a regulation effects a taking.[3] Nevertheless, the United States Supreme Court has not developed a clear test to determine when a regulation constitutes a taking.[4] Rather, the Court evaluates each case according to its unique facts.[5]

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1. U.S. CONST. amend. V. The fifth amendment is applicable to the states through the due process clause of the fourteenth amendment. Chicago, B. & Q. R.R. Co. v. Chicago, 166 U.S. 226, 241 (1897).

2. *See* Armstrong v. United States, 364 U.S. 40, 49 (1960) (stating that the fifth amendment "was designed to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole"). For an excellent discussion of the historical development of the just compensation clause, see Note, *The Origins and Original Significance of the Just Compensation Clause of the Fifth Amendment*, 94 YALE L.J. 694 (1985).

3. *See, e.g.*, United States v. Central Eureka Mining Co., 357 U.S. 155, 168 (1958) (recognizing that "action in the form of regulation can so diminish the value of property as to constitute a taking"); Pennsylvania Coal Co. v. Mahon, 260 U.S. 393, 415-16 (1922) (stating that "if [a] regulation goes too far it will be recognized as a taking"); *see also* Michelman, *Takings, 1987*, 88 COLUM. L. REV. 1600, 1625-29 (1988) (analyzing constitutional limitations on land use regulations); Sax, *Takings, Private Property and Public Rights*, 81 YALE L.J. 149, 151-55 (1971) (same).

4. *See* Peterson, *The Takings Clause: In Search of Underlying Principles, Part I—A Critique of Current Takings Clause Doctrine*, 77 CALIF. L. REV. 1299, 1303 (1989). Professor Peterson suggests that the Supreme Court has failed to establish a clear test to determine when a taking occurs because the Court has not developed an explicit definition of property. *Id.* at 1308-16. In Penn Cent. Transp. Co. v. New York City, 438 U.S. 104, 130-31 (1978), for example, the Supreme Court considered the "parcel as a whole" the relevant property. In contrast, the Court in Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419, 438 & n.16 (1982), determined that a specific area of a building was the relevant property. Thus, without a clear definition of property, determining when a taking of property occurs is difficult. Peterson, *supra*, at 1308. Professor Peterson posits that subjective notions of fairness help to explain when the Court will conclude that compensation is warranted. *Id.* at 1305 n.13.

5. *See infra* note 59 and accompanying text.

The Clean Water Act (Act), enacted in 1972 to safeguard the quality of the Nation's waters,[6] has recently generated takings litigation.[7] Section 404 of the Act[8] grants the Army Corps of Engineers (Corps) the authority to regulate the amount of dredge or fill material discharged into the Nation's navigable waters[9] by issuing permits to control the discharge of dredge or fill material.[10] The term "navigable waters" includes wetlands.[11] Thus, to develop property classified as wetlands, a landowner must first seek the Corps' approval.[12] The Corps then either issues a permit to the landowner permit-

6. Federal Water Pollution Control Act, Pub. L. No. 92-500, 86 Stat. 816 (codified as amended at 33 U.S.C. §§ 1251-1376 (1988)) (commonly referred to as the Clean Water Act). The Clean Water Act's purpose is "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters." 33 U.S.C. § 1251; *see also* United States v. Riverside Bayview Homes, Inc., 474 U.S. 121, 132-33 (1985) (indicating that the purpose of the Clean Water Act is to protect the Nation's waters); 1902 Atlantic, Ltd. v. Hudson, 574 F. Supp. 1381, 1388 (E.D. Va. 1983) (same).

7. *See, e.g.*, Florida Rock Indus., Inc. v. United States, 21 Cl. Ct. 161, 175-76 (1990) (holding that a denial of a fill permit under the Clean Water Act constitutes a taking); Loveladies Harbor, Inc. v. United States, 21 Cl. Ct. 153, 160-61 (1990) (same); Formanek v. United States, 18 Cl. Ct. 785, 790-93 (1989) (finding ripe for review a landowner's claim that a denial of a Clean Water Act permit effected a taking); Beuré-Co. v. United States, 16 Cl. Ct. 42, 49-52 (1988) (same).

8. 33 U.S.C. § 1344. *See* Avoyelles Sportsmen's League v. Alexander, 473 F. Supp. 525, 530-37 (W.D. La. 1979) (discussing § 404 of the Clean Water Act), *aff'd in part and rev'd in part sub nom.* Avoyelles Sportsmen's League, Inc. v. Marsh, 715 F.2d 897 (5th Cir. 1983). *See generally* Blumm, *The Clean Water Act's Section 404 Permit Program Enters Its Adolescence: An Institutional and Programmatic Perspective,* 8 ECOLOGY L.Q. 409 (1980) (addressing the scope and early applications of § 404); Significant Development, *The Clean Water Act—More Section 404: The Supreme Court Gets Its Feet Wet,* 65 B.U.L. REV. 995, 1012-18 (1985) (discussing the Corps' wetland regulations).

9. The Act defines navigable waters as "waters of the United States, including the territorial seas." 33 U.S.C. § 1362(7) (1988). The Corps defines waters of the United States as all waters which are capable of being used in interstate or foreign commerce, including wetlands. 33 C.F.R. § 328.3(a) (1990).

10. 33 U.S.C. § 1344.

11. 33 C.F.R. § 328.3 (wetlands considered navigable waters); *see also* Save Our Wetlands, Inc. v. Sands, 711 F.2d 634, 647 (5th Cir. 1983) (same). The term wetlands is defined as "those areas that are inundated or saturated by surface or ground water at a frequency and duration sufficient to support, and that under normal circumstances do support, a prevalence of vegetation typically adapted for life in saturated soil conditions. Wetlands generally include swamps, marshes, bogs and similar areas." 33 C.F.R. § 328.3(b).

12. To secure a § 404 permit, an applicant must submit an application to a Corps district engineer. 33 C.F.R. § 325.1(c) (1990). The applicant must provide a comprehensive description of the proposed development, "including necessary drawings, sketches, or plans . . . the location, purpose and need for the proposed activity; scheduling of the activity; the names and addresses of adjoining property owners; . . . and a list of authorizations required by the other federal, interstate, state, or local agencies . . . ." *Id.* § 325.1(d); *see also id.* §§ 325.1(d)(2)-(9) (specifying other information needed in a permit application). After the application is submitted, the district engineer issues a notice soliciting comments. *Id.* § 325.2(a)(2). Subsequently, the district engineer determines whether a permit should be issued. *Id.* § 325.2(a)(6). The district engineer must balance the favorable and detrimental impacts of the proposed activity.

ting him to fill the wetlands for development or refuses to issue a permit.[13] Without a permit, landowners cannot develop wetland property.[14] Unable to develop their property, many landowners complain that denial of a permit constitutes a compensable taking.[15] Until recently, however, a landowner unable to obtain a federal fill permit was not entitled to compensation under the fifth amendment.[16] The courts reasoned that a taking had not occurred because the property owners were not deprived of all economic use of their land.[17] In *Loveladies Harbor, Inc. v. United States*,[18] the United States Claims Court disregarded prior case law, and awarded compensation to a builder who was denied a section 404 permit.[19]

Id. § 320.1(a). The district engineer then submits the determination to a higher official within the Corps, who in turn decides whether a permit should be issued. *Id.* § 325.2(a)(6). Also, the Corps must enforce Environmental Protection Agency regulations. *See id.* §§ 230-231 (Environmental Protection Agency's guidelines); *see also Formanek*, 18 Cl. Ct. at 788-89 (discussing regulations pertaining to fill permits).

13. *See* 33 U.S.C. § 1344; 33 C.F.R. § 323.3(a) (1990) (permit requirements); *see also* United States v. Riverside Bayview Homes, Inc., 474 U.S. 121, 123 (1985) (analyzing wetland permit requirements).

14. *See* 33 C.F.R. § 323.3(a).

15. *See infra* note 16.

16. Under prior law, the denial of a federal fill permit was not considered a taking. Deltona Corp. v. United States, 657 F.2d 1184 (Ct. Cl. 1981) (holding that a denial of a fill permit was not a taking because the landowner's property contained uplands which could be developed without a permit), *cert. denied*, 455 U.S. 1017 (1982); American Dredging Co. v. State Dept. of Environmental Protection, 161 N.J. Super. 504, 391 A.2d 1265 (Ch. Div. 1978) (holding that a denial for a state wetland permit did not constitute a taking because the amount of property effected by the denial was minimal), *aff'd*, 169 N.J. Super. 18, 404 A.2d 42 (App. Div. 1979); Smithwick v. Alexander, 12 Envtl. L. Rep. (Envtl. L. Inst.) 20,790 (E.D.N.C. Mar. 23, 1981) (holding that a permit denial did not constitute a taking because the property had remaining economic value). *But see Riverside Bayview Homes*, 474 U.S. at 127 n.4 (announcing in dictum that the denial of a fill permit would constitute a taking, if a landowner were denied economically viable use of his property). Because Riverside Bayview Homes did not introduce evidence bearing on whether it was denied economic use of its property, the Court did not consider whether a taking occurred. *Id.* at 129 n.6. *See generally* Significant Development, *supra* note 8, at 997-1023 (analyzing the Supreme Court's holding in *Riverside Bayview Homes*).

17. *Deltona*, 657 F.2d at 1191-94; *Smithwick*, 12 Envtl. L. Rep. at 20,792; *American Dredging*, 161 N.J. Super. at 514, 391 A.2d at 1270-71.

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

19. *Id.* at 161. On the same day the Claims Court issued its opinion in *Loveladies*, the Claims Court decided *Florida Rock Indus, Inc. v. United States*, 21 Cl. Ct. 161, 175-76 (1990) (holding that the denial of a fill permit constituted a taking). *See infra* note 219 (discussing the court's holding in *Florida Rock*).

The Tucker Act, 28 U.S.C. § 1491 (1988), grants the United States Court jurisdiction "to render judgment upon any claim against the United States." *Id.* Further, the Tucker Act also grants the Claims Court exclusive jurisdiction over suits against the United States where the amount in controversy exceeds $10,000. *Id.* § 1491(a)(1). For claims not exceeding $10,000, the Claims Court has concurrent jurisdiction with the district courts. *See* 28 U.S.C. § 1346(a)(2) (1988); *see also* Burke v. United States, 5 Cl. Ct. 759, 760 (1984) (holding that

In the late 1950's, two builders, Loveladies Harbor, Inc., and Loveladies Harbor Unit D, Inc. (Loveladies), acquired 250 acres of undeveloped land for $300,000 on Long Beach Island in New Jersey.[20] Most of the property was wetlands, which had to be filled before it could be developed.[21]

Before Loveladies developed the entire property, the New Jersey legislature adopted the Wetlands Act of 1970 (Wetlands Act).[22] The Wetlands Act requires an owner of wetlands to apply to the New Jersey Department of Environmental Protection (DEP) for a permit prior to developing wetlands.[23] Pursuant to the Wetlands Act, Loveladies applied for a permit to fill and dredge approximately fifty-one acres of land to build 108 homes.[24] DEP denied a wetland permit for the full fifty-one acres but offered Loveladies an alternative permit authorizing development of twelve and one-half of the fifty-one acres and construction of thirty-five houses.[25] Loveladies appealed the decision to the Commissioner of DEP arguing that the denial of

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because a district court does not have jurisdiction over claims against the United States for more than $10,000, its decision was not binding). Thus, due to the Claims Court's exclusive jurisdiction, it is particularly well suited to decide takings cases. *See* Marzulla & Marzulla, *Regulatory Takings in the United States Claims Court: Adjusting the Burdens That in Fairness and Equity Ought to be Borne by Society as a Whole*, 40 CATH. U.L. REV. 549-50 (1990) (stating that the Claims Court is well equipped to handle takings suits).

The Tucker Act, however, only grants the Claims Court jurisdiction over monetary claims against the United States. *See* 28 U.S.C. § 1491. The Claims Court does not have jurisdiction under the Tucker Act to grant equitable relief. Lee v. Thornton, 420 U.S. 139, 140 (1975). Thus, a landowner must seek declaratory relief in a district court and pursue separately a claim for money damages in the Claims Court. Some commentators term this the "Tucker Act Shuffle." Marzulla & Marzulla, *supra*, at 566 n.108.

20. Loveladies Harbor, Inc. v. United States, 15 Cl. Ct. 381, 383 (1988) (*Loveladies Harbor*).

21. *Loveladies Harbor*, 15 Cl. Ct. at 383. By 1972, approximately 199 acres of the property had been dredged and filled for residential homes. *Id.*

22. Pub. L. No. 1970, ch. 272, § 1 (codified as amended at N.J. STAT. ANN. § 13:9A-1 to A-10 (West 1979 & Supp. 1990)) (effective Nov. 4, 1970).

23. N.J. STAT. ANN. § 13:9A-4 (West Supp. 1990) (amending N.J. STAT. ANN. § 13:9A-4 (West 1979)). This statute states:

> a. For purposes of this section "regulated activity" includes but is not limited to draining, dredging, excavation or removal of soil, mud, sand, gravel, aggregate of any kind or depositing or dumping therein any rubbish or similar material or discharging therein liquid wastes . . . .
>
> b. No regulated activity shall be conducted upon any wetland without a permit.

Id.

24. Of these 51 acres, 36 were wetland and 15 were tideland. *See In re* Loveladies Harbor, Inc., 176 N.J. Super. 69, 71, 422 A.2d 107, 108 (App. Div. 1980) (*Loveladies Harbor, Inc.*), *cert. denied*, 85 N.J. 501, 427 A.2d 588 (1981).

25. *Loveladies Harbor*, 15 Cl. Ct. at 384. DEP also denied Loveladies' application for a waterfront development permit because of the adverse effects the proposed construction would have on the environment. The Appellate Division upheld the denial of that permit. *See Loveladies Harbor, Inc.*, 176 N.J. Super. at 77, 422 A.2d at 11.

the wetland permit constituted a taking.[26] The Commissioner found that the permit denial did not constitute a taking because DEP had suggested an alternative proposal.[27] Loveladies then appealed the decision to the Appellate Division of the Superior Court of New Jersey.[28]

Agreeing with DEP, the appellate court held that the denial of the wetland permit did not amount to a taking.[29] The court reasoned that DEP's proposed settlement enabled Loveladies to develop part of its property and, therefore, a taking had not occurred.[30] Thus, it was unnecessary to consider, in the abstract, the validity of the Wetlands Act because the application of that Act did not constitute a taking.[31] Accordingly, the court did not consider whether a taking would have occurred had DEP not offered a settlement.

In 1981, Loveladies applied for a permit consistent with DEP's development proposal to fill twelve and one-half acres of its fifty-one acre tract.[32] While DEP recognized that Loveladies' initial proposal to construct 108 houses did not satisfy pollution control requirements,[33] the agency neverthe-

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26. *Loveladies Harbor,* 15 Cl. Ct. at 384.

27. *Loveladies Harbor Inc.,* 176 N.J. Super. at 72, 422 A.2d at 108. The Commissioner reasoned that the proposed construction did not satisfy the necessary statutory and regulatory standards. *Id.*

28. *See In re Loveladies Harbor, Inc.,* 176 N.J. Super. 69, 422 A.2d 107 (App. Div. 1980).

29. *Id.* at 73, 422 A.2d at 109.

30. *Id.* This is one of the first instances in the history of Claims Court decisions where the court suggested that the dredging or filling of wetlands was a public nuisance. The Claims Court based its decision on Penn Cent. Transp. Co. v. New York City, 438 U.S. 104 (1978), and *American Dredging,* 161 N.J. Super. 504, 391 A.2d 1265 (Ch. Div. 1978), *aff'd,* 169 N.J. Super. 18, 404 A.2d 42 (App. Div. 1979). The Appellate Division, however, could have held that dredging and filling falls within the public nuisance exception to the fifth amendment just compensation clause, as enunciated in Mugler v. Kansas, 123 U.S. 623 (1887). *See infra* note 78 (discussing the public nuisance exception).

31. *Loveladies Harbor, Inc.,* 176 N.J. Super at 73, 422 A.2d at 109.

32. 15 Cl. Ct. 381, 384 (1988).

33. *See* N.J. ADMIN. CODE tit. 7, ch. 7A (Supp. 1988). To mitigate the effects of pollution, state law imposes stringent controls on wetlands development. For example, section 7:7-2.2 provides:

> (a) Wetlands permits are required for almost all activities in coastal wetlands delineated and mapped pursuant to the Wetlands Act, and are divided into two categories:
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> 1. Type "A" Wetland permits are required for:
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> i. The cultivation and harvesting of naturally occurring agricultural products. . . .;
>
> . . . .
>
> iii. The maintenance or repair of bridges, roads, highways, railroad beds or the facilities of any utility or municipality. . . .;
>
> iv. The construction of catwalks, piers, docks, landings, footbridges and observation decks.

less approved the application, believing that its original settlement offer was binding.[34] DEP, however, did not give permission to Loveladies to develop the full twelve and one-half acres. Instead, DEP granted a permit for eleven and one-half acres, finding that one acre qualified as uplands and had already been filled.[35] After obtaining the state permit, Loveladies sought a federal permit from the Corps under the Clean Water Act.[36] On May 5, 1982, the Corps denied the permit because of the negative effects the proposed housing construction would have on the environment.[37]

After unsuccessfully challenging the validity of the permit denial in the United States District Court for the District of New Jersey,[38] Loveladies filed suit in the United States Claims Court.[39] Loveladies alleged that the denial of the permit was an unconstitutional taking of the twelve and one-half acres of property that could not be developed.[40] Under the theory of inverse condemnation,[41] Loveladies sought compensation for the value of the eleven and one-half acres of wetlands as well as for the one acre of upland that otherwise could have been developed.[42]

The government then moved for summary judgment maintaining that, as a matter of law, a taking had not occurred.[43] In response, Loveladies filed a cross-motion for summary judgment, reiterating its claim that the permit denial constituted a taking.[44] The United States Claims Court denied the government's motion.[45] To evaluate the merits of the government's motion, the court balanced the public factors underlying the denial of the fill permit

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2. Type "B" Wetland permits are required for:
   i. The installation of utilities;
   . . . .
   viii. Filling, excavation or the construction of any structure.

Id. § 7:7-2.2.

34. *Loveladies Harbor*, 15 Cl. Ct. at 384.

35. *Id.*

36. *Id.*; *see* 33 U.S.C. §§ 1251-1376.

37. *Loveladies Harbor*, 15 Cl. Ct. at 384. The specific reason for denying the permit "was the government's desire to preserve the wetlands along with its attendant wildlife and vegetation." *Id.* The Claims Court stated that the pollution in *Loveladies Harbor* was not harmful because it was "a kind merely incidental to any human action undertaken," but did not state why it reached that conclusion. *Id.* at 389. However, it is not the court's role to determine the effects of pollution—that is a responsibility of the Corps. *See* 33 U.S.C. § 1254.

38. *See* Loveladies Harbor, Inc. v. Baldwin, No. 82-1948 (D.N.J. Mar. 12, 1984) (LEXIS, Genfed library, Dist file), *aff'd mem.*, 751 F.2d 376 (3d Cir. 1984).

39. *Loveladies Harbor*, 15 Cl. Ct. 381 (1988).

40. *Id.* at 383.

41. *See infra* note 66 (defining inverse condemnation).

42. *Loveladies Harbor*, 15 Cl. Ct. at 384.

43. *Id.* at 383.

44. *Id.*

45. *Id.* at 393-96.

against the ensuing economic harm to the landowners resulting from the denial of the permit.[46] The court struck the balance in favor of Loveladies, finding that there was a lack of a legitimate state interest underlying the denial of the wetland permit.[47] The court also found that the denial of the permit lowered the value of Loveladies' property.[48] The Claims Court, however, did not award compensation to Loveladies and denied its cross-motion for summary judgment, reasoning that there were factual issues in dispute concerning the remaining uses of Loveladies' property.[49]

Nearly two years later, after a trial on the merits of the takings claim, the Claims Court held that the denial of the fill permit constituted a taking.[50] After comparing the preregulation value of the wetlands to their postregulation value,[51] the court concluded that Loveladies was denied virtually all economic use of its property because the Corps refusal to issue the permit hampered Loveladies' attempts to develop its land.[52] The Claims Court also based its decision on an earlier finding that the permit denial did not substantially advance a legitimate state interest.[53]

The Claims Court's balance of public and private factors to determine whether the permit denial advanced a legitimate state interest[54] entails a higher standard of review for takings claims than prior case law. In the wake of *Loveladies,* land use regulations will receive closer scrutiny. Regulators will have to meet a higher burden to demonstrate that a regulation of

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46. *Id.* at 388-89. The Claims Court stated:

> The determination of whether there is a substantial advancement of a legitimate governmental interest necessarily requires that the governmental regulation was intended to promote the public welfare, rather than some private interest. However, the mere fact that the governmental regulation was intended to promote a public benefit is not sufficient to satisfy the test. This determination must also involve the court's weighing of that intended public benefit against the harm inflicted upon the landowner involved.

Id. at 388 (citations omitted).

47. *Id.* at 389-90.

48. *Id.* at 393-96.

49. *Id.* at 396-98; *see also id.* at 397 n.14 ("Defendant initially accepted plaintiffs' post-denial estimation of the land's value and use. Defendant then changed its position a few days before oral argument and introduced two affidavits indicating that the land was left with much greater potential.") (citing Loveladies Harbor, Inc. v. United States, 15 Cl. Ct. 375 (1988)).

50. *Loveladies,* 21 Cl. Ct. 153, 160 (1990).

51. *Id.* at 155-59.

52. *Id.* at 160. Accordingly, the plaintiffs were awarded nearly $3,000,000 in compensation. *Id.* at 161.

53. *Id.* at 161.

54. *Loveladies Harbor,* 15 Cl. Ct. 381, 388-89 (1988).

privately owned land is not tantamount to a taking. As a result, *Loveladies* will probably generate an influx of takings litigation in the Claims Court.[55]

This Note analyzes the court's holding in *Loveladies,* focusing upon the standard of review which the court created. The author begins with an examination of the Supreme Court's approach to regulatory takings. Next, the author compares the *Loveladies* opinion with the Supreme Court's takings doctrine and suggests that the Claims Court implicitly prescribed a higher standard of review. This Note concludes that the result reached in *Loveladies* was proper because it is consistent with the fairness concerns underlying the fifth amendment. Nonetheless, the court's reasoning stood on analytically weak ground and misapplied Supreme Court precedent.

I. THE SUPREME COURT'S ANALYSIS OF TAKINGS

When a regulation significantly interferes with a landowner's use and enjoyment of his property, the fifth amendment mandates compensation.[56]

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55. From January 1, 1989, to September 30, 1990, the Claims Court decided 34 takings cases. *See* UNITED STATES CLAIMS COURT, 1990 ANNUAL REPORT (1991). The court awarded compensation in only six cases, but damages totalled approximately $91,000,000. *Id.* As a result of the higher level of scrutiny the Claims Court adopted, landowners subject to land use regulations are more likely challenge the government's regulations and win. In 1988, however, President Reagan issued Executive Order 12,630 (Order), entitled, "Governmental Actions and Interferences with Constitutionally Protected Property Rights." Exec. Order No. 12,630, 3 C.F.R. 554 (1990). The Order directs administrative agencies to conduct a preissuance review to determine whether a regulation or policy constitutes a taking. *Id.* One reason that President Reagan issued the Order was to ensure that agencies comply with the Supreme Court's holdings in *First English Evangelical Lutheran Church v. County of Los Angeles,* 482 U.S. 304, 310 (1987) (holding that money damages are the appropriate remedy for temporary regulatory takings) and *Nollan v. California Coastal Comm'n,* 483 U.S. 825 (1987) (requiring a close nexus between a regulation and the purposes underlying it). *See* 3 C.F.R. 554. As a result of the Order, there may be a decrease in takings suits because the Order should force agencies to consider specifically the possibility that a regulation will work a taking. Nevertheless, issuance of the Order is no guarantee that agencies will comply with it. *See* Steinberg, *Can EPA Sue Other Federal Agencies?,* 17 ECOLOGY L.Q. 317, 329 n.80 (1990) (noting that "there may be circumstances in which agencies fail or refuse to comply with . . . Executive orders"). Thus, notwithstanding the Order, *Loveladies* will probably increase takings litigation in the Claims Court. *See generally* Marzulla & Marzulla, *supra* note 19, at 566-69 (discussing Executive Order 12,630); W.L. WANT, LAW OF WETLANDS REGULATION § 10.07 (1989) (same).

56. U.S. CONST. amend V. As an alternative to the fifth amendment, the due process clause of the fourteenth amendment may also provide a landowner limited protection against an intrusive government regulation. *See* Mugler v. Kansas, 123 U.S. 623 (1887). In *Mugler,* Mugler was arrested, pursuant to a Kansas statute, for selling alcohol without a license. Mugler maintained that the statute was invalid because it contravened the due process clause of the fourteenth amendment. The Supreme Court rejected this argument, maintaining that the statute was "fairly adapted to the end of protecting the community against the evils which confessedly result from the excessive use of ardent spirits." *Id.* at 662. The *Mugler* majority did not consider the impact of the regulation on the property owner. *Cf.* Pennsylvania Coal

The amendment requires the government to indemnify a landowner where a regulation effects a taking of his property. Thus, the compensation prevents a landowner from shouldering costs, which in fairness, society should bear.[57] The United States Supreme Court, however, has been unable to develop a clear test to determine when a regulation gives rise to a taking.[58] According to the Court, the only generally accepted precept of takings law is that each case involves an ad hoc inquiry into the specific facts of the case.[59]

Where a regulation negatively affects a landowner's property, the landowner can attack either the application of the state action or its facial validity.[60] The standards the Supreme Court has enunciated in takings cases, however, do not distinguish facial and "as applied" challenges.[61] Instead, the Court has applied three tests to determine whether a regulation constitutes a taking. Under one test, the Court balances a property owner's investment-backed expectations, the economic impact of a regulation, and the character of the governmental action to decide whether a regulation has worked a taking.[62] Another test examines whether a regulation either substantially advances a legitimate state interest or denies a property owner economically viable use of the property.[63] Still a third test holds that a taking occurs where state action results in a permanent physical invasion of a land-

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Co. v. Mahon, 260 U.S. 393 (1922); *see infra* notes 66-83 and accompanying text. Rather, the Court engaged in a substantive due process analysis where it analyzed the statute's efficacy. Under that analysis, the Court examined the extent to which the statute achieved its objectives. *See* Lawrence, *Means, Motives, and Takings: The Nexus Test of* Nollan v. California Coastal Commission, 12 HARV. ENVTL. L. REV. 231, 233-35 (1988) (suggesting that "the *Mugler* approach threatened to read the takings clause out of the Constitution" because the Court did not consider the negative effects of the regulation on the value of the landowner's property).

57. Armstrong v. United States, 364 U.S. 40, 49 (1960); *see* Note, *supra* note 2, at 708-16 (describing the development of the just compensation clause); *see also infra* note 65 and accompanying text (suggesting that principles of fairness underly the fifth amendment).

58. *See supra* note 4.

59. *See, e.g.*, Connolly v. Pension Ben. Guar. Corp., 475 U.S. 211, 224 (1986) (stating that the Court has not developed a clear test to determine when a regulation effects a taking, instead the Court relies on ad hoc factual inquiries); Hodel v. Virginia Surface Mining & Reclamation Ass'n, 452 U.S. 264, 295 (1981) (same); Kaiser Aetna v. United States, 444 U.S. 164, 174-75 (1979) (same).

60. *See* Peterson, *supra* note 4, at 1360 (discussing facial and "as applied" challenges). *Compare* Penn Cent. Transp. Co. v. New York City, 438 U.S. 104 (1978) ("as applied" challenge) *with* Agins v. City of Tiburon, 447 U.S. 255 (1980) (facial challenge). *See also Hodel*, 452 U.S. at 295-96 (stating that the economic viability test of *Agins* applies in a facial challenge to a law, whereas the three part *Penn Central* test applies in an "as applied" challenge).

61. Peterson, *supra* note 4, at 1360.

62. *See Penn Central*, 438 U.S. at 124; *see also infra* text accompanying notes 84-114 (discussing the Court's holding in *Penn Central*).

63. *See Agins*, 447 U.S. at 260; *see also infra* text accompanying notes 116-31 (discussing the Court's decision in *Agins*).

owner's property.[64] Unfortunately, it is unclear which test the Court will apply to evaluate a takings claim. Nevertheless, principles of fairness appear to be at the heart of the Supreme Court's takings jurisprudence.[65]

A. A Deferential Standard of Review

1. Pennsylvania Coal Co. v. Mahon: *The Reduction In Value Test*

Under the doctrine of inverse condemnation,[66] a landowner is entitled to compensation when a regulation affecting his property is overly intrusive.[67] The genesis of this doctrine is traced to the landmark case of *Pennsylvania Coal Co. v. Mahon*.[68] In *Pennsylvania Coal*, Mahon unsuccessfully brought a suit in equity to enjoin the Pennsylvania Coal Co. (Pennsylvania Coal) from mining coal near his property.[69] Mahon alleged that the mining would

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64. *See* Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419 (1982); *see also infra* note 99 (discussing the Court's holding in *Loretto*).

65. For example, in Pruneyard Shopping Center v. Robins, 447 U.S. 74 (1980), the Court stated that:

> [T]he Fifth Amendment "prevents the public from loading upon one individual more than his just share of the burdens of government, and says that when he surrenders to the public something more and different from that which is exacted from other members of the public, a full and just equivalent shall be returned to him."

Id. at 83 n.7 (citing Monongahela Navigation Co. v. United States, 148 U.S. 312, 325 (1893)); *see also Penn Central*, 438 U.S. at 124 (stating that the Court has not developed a clear test "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"); *see* Peterson, *supra* note 4, at 1306 ("After all, the ultimate question in every takings case . . . is whether fairness requires that the burden be borne by the public as a whole, rather than by the particular claimant."); Comment, *Just Compensation or Just Damages: The Measure of Damages for Temporary Regulatory Takings in* Wheeler v. City of Pleasant Grove, 74 IOWA L. REV. 1243, 1258 (1989) (observing that "[a] primary purpose of the fifth amendment's just compensation clause is to distribute losses when the government appropriates private property for public use" and that courts follow "a principle of fairness in promoting this purpose") (footnotes omitted).

66. 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." United States v. Clarke, 445 U.S. 253, 257 (1980); *see* San Diego Gas & Elec. Co. v. City of San Diego, 450 U.S. 621, 638 n.2 (1981) (Brennan, J., dissenting) (inverse condemnation is "a cause of action against a government defendant in which a landowner may recover just compensation for a 'taking' of his property under the Fifth Amendment, even though formal condemnation proceedings . . . have not been instituted"). *See generally* 7A P. ROHAN & M. RESKING, NICHOLS' THE LAW OF EMINENT DOMAIN § 14.03 (3d ed. 1990) (defining inverse condemnation as a suit brought by a landowner challenging a regulation that negatively affects the value of his property).

67. A plaintiff usually bases an inverse condemnation claim upon the just compensation clause of the fifth amendment. *See San Diego Gas*, 450 U.S. at 638 n.2.

68. 260 U.S. 393 (1922). *See generally* Rose, Mahon *Reconstructed: Why the Takings Issue is Still a Muddle*, 57 S. CAL. L. REV. 561 (1984) (analyzing the parameters of the *Pennsylvania Coal* decision).

69. *Pennsylvania Coal*, 260 U.S. at 412.

cause the subsidence of his house.[70] He relied on a Pennsylvania statute,[71] which prohibited mining coal when its removal would cause the subsidence of houses and related structures near the mines.[72] Pennsylvania Coal countered that the statute was unconstitutional because it effected a taking of its property, the unmined coal, without just compensation.[73]

To determine whether the statute constituted a taking, the Supreme Court balanced the extent to which Pennsylvania Coal's property diminished in value as a result of the statute against the purposes underlying the regulation.[74] Writing for the majority, Justice Holmes conceded that preventing subsidence was a valid public purpose.[75] He noted, however, that the public interest the statute furthered was minimal.[76] Nevertheless, the Court held that the statute resulted in a taking because it significantly reduced the value of Pennsylvania Coal's property.[77] Accordingly, to demonstrate a taking

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70. *Id.*

71. The Kohler Act, 1921 Pa. Laws 1198.

72. *Pennsylvania Coal*, 260 U.S. at 412.

73. *Id.* at 395 (Argument for Plaintiff in Error).

74. *Id.* at 413. Prior to *Pennsylvania Coal*, land use regulations were usually challenged on the basis of the due process clause of the fourteenth amendment. *See Mugler v. Kansas*, 123 U.S. 623 (1887); *see supra* note 56 (discussing *Mugler*); *see also* Lawrence, *supra* note 56, at 235 (suggesting that the *Pennsylvania Coal* Court abandoned the *Mugler* approach because *Mugler* "gave no weight to a regulation's impact on property owners").

75. *Pennsylvania Coal*, 260 U.S. at 416. The majority opinion stated: "We assume . . . that the statute was passed upon the conviction that an exigency existed that would warrant it, and we assume that an exigency exists that would warrant the exercise of eminent domain." *Id.*

76. *Id.* at 413-14. Specifically, Justice Holmes stated: "The extent of the public interest is shown by the statute to be limited, since the statute ordinarily does not apply to land when the surface is owned by the owner of the coal. Furthermore, it is not justified as a protection of personal safety." *Id.*

77. *Id.* at 415-16. Justice Holmes reasoned that "[w]hile property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking." *Id.* at 415. In dissent, Justice Brandeis argued that a regulation that prohibits a noxious use of property does not constitute a taking. *Id.* at 417 (Brandeis, J., dissenting). Justice Brandeis further argued that the Court should have deferred to the legislature's determination that the statute was necessary to promote public safety. *Id.* at 416-22.

Cf. United States v. Causby, 328 U.S. 256 (1946) (expounding upon the reduction in value test developed in *Pennsylvania Coal*). The plaintiff in *Causby* owned a chicken farm which was located adjacent to an airport leased by the United States. *Id.* at 258. Noise generated by low flying aircraft forced the plaintiff to discontinue his business. *Id.* at 259. Consequently, Causby sued the United States alleging that the flights constituted an easement. *Id.* at 258.

As in *Pennsylvania Coal*, the Supreme Court ruled that a taking had occurred because the flights rendered useless the plaintiff's property. *Id.* at 261-62. In addition to examining the diminution in value, the Court analyzed the "character" of the government's action. The Court declared that "it is the character of the invasion, not the amount of damage resulting from it, so long as the damage is substantial, that determines the question whether it is a taking." *Id.* at 266 (quoting United States v. Cress, 243 U.S. 316, 328 (1917)).

under the *Pennsylvania Coal* reduction in value test, a landowner must show that a regulation severely diminishes the value of the property.[78] The extent the property must diminish in value to rise to the level of a taking is unclear, however.[79]

The *Pennsylvania Coal* Court scrutinized the objectives of the regulation, and, thus, employed a standard for reviewing the state action that was not deferential.[80] By balancing the public purposes underlying the regulation against the economic harm to the landowner, the Court substituted its view

78. Justice Holmes also observed that the mining of coal caused the subsidence of only one house and, therefore, did not constitute a public nuisance. *Pennsylvania Coal,* 260 U.S. at 413. Under prior case law, statutes prohibiting property owners from conducting activities found to be public nuisances were upheld and, thus, did not warrant compensation. *See Mugler,* 123 U.S. at 668 ("[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"). This exemption from compensation is termed the noxious use or public nuisance exception to the fifth amendment. The result reached in *Pennsylvania Coal* may have been different if the mining of coal rose to the level of a public nuisance. *See generally* Comment, *Reexamining 100 Years of Supreme Court Regulatory Taking Doctrine: The Principles of "Noxious Use," "Average Reciprocity of Advantage," and "Bundle of Rights" From* Mugler *to* Keystone Bituminous Coal, 14 B.C. ENVTL. AFF. L. REV. 653, 658-66 (1987) (providing an excellent overview of the noxious use exception).

79. *See* Rose, *supra* note 68, at 566 (stating that the *Pennsylvania Coal* reduction in value test "fails to answer the most obvious question: how much diminution in value is too much?"); *Recent Cases,* 36 HARV. L. REV. 753, 753 (1923) (to what degree property must diminish in value to constitute a taking is unclear). *See generally* Clarke, *Regulatory Takings, Laissez Faire and Two Coal Cases From Pennsylvania,* 13 OKLA. CITY U.L. REV. 37, 77 (suggesting that *Pennsylvania Coal* "really holds that state reduction of the profits of one group of property owners to a reasonable level to ensure the economic welfare of another group or the entire public is ordinarily not a legitimate objective of the police power").

A regulation furthering the public interest promotes "the health, morals and safety of the people." *See Mugler,* 123 U.S. at 668-69. Cases after *Pennsylvania Coal,* upheld regulations that served the public interest, regardless of the extent to which the value of a landowner's property declined. *See, e.g.,* Goldblatt v. Town of Hempstead, 369 U.S. 590, 595-96 (1962) (holding that a zoning ordinance which prohibited a property owner from mining sand and gravel due to safety concerns did not constitute a taking); Miller v. Schoene, 276 U.S. 272, 280 (1928) (holding that a law requiring a property owner to cut down red cedar trees to prevent harm to apple trees was not a taking); Village of Euclid v. Ambler Realty Co., 272 U.S. 365, 395-96 (1926) (holding that a zoning law that reduced the value of a landowner's property by nearly 76% was not a taking because the law furthered the public interest). *But cf.* Nectow v. City of Cambridge, 277 U.S. 183, 188-89 (1928) (holding that zoning ordinances severely diminishing the value of a landowner's property effected a taking).

80. *Pennsylvania Coal,* 260 U.S. at 412-13. Justice Holmes stated that "[t]he greatest weight [should be] given to the judgment of the legislature, but it always is open to interested parties to contend that the legislature had gone beyond its constitutional power." *Id.* at 413. Nevertheless, the Court did not defer to the legislature's determination that the statute promoted public safety. Instead, the Court reasoned that providing notice to the affected parties could have ensured personal safety. *Id.* at 414.

of the regulation for the view of the Pennsylvania Legislature.[81] That mode of analysis entangles the judiciary in second-guessing legislative determinations.[82] The substitution of judgment approach was struck down in later cases in favor of a deferential standard of review.[83]

2. Penn Central Transportation Co. v. New York City: *The Three Part Test*

In *Penn Central Transportation Co. v. New York City,*[84] the Supreme Court supplemented the *Pennsylvania Coal* diminution in value test to consider whether a state action is a taking. The Penn Central Transportation Co. (Penn Central) challenged the application of New York City's Landmarks Preservation Law (Landmarks Preservation Law),[85] alleging that it violated the fifth and fourteenth amendments.[86] The law granted the Landmarks Preservation Commission (Commission) the authority to designate certain buildings in the city as landmarks.[87] If a building were a listed landmark, the law required the landowner to obtain a permit from the Commission before making any structural changes to the building.[88] In 1967, the Commission earmarked Grand Central Terminal as a landmark.[89] Pursuant to the Landmarks Preservation Law, Penn Central applied for a permit to construct office buildings over Grand Central Terminal.[90] The Commission

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81. Lawrence, *supra* note 56, at 236.

82. *Id.*

83. *See infra* text accompanying notes 132-36.

84. 438 U.S. 104 (1978).

85. *Id.* at 109 (New York City's Landmarks Preservation Law (Landmarks Preservation Law) is currently codified at NEW YORK CITY, ADMIN. CODE ch. 3 (1986)). The Court noted that this regulation

> foster[s] "civic pride in the beauty and noble accomplishments of the past"; protect[s] and enhance[s] "the city's attractions to tourists and visitors"; "support[s] and stimulate[s] business and industry"; "strengthen[s] the economy of the city"; and promote[s] "the use of historic districts, landmarks, interior landmarks and scenic landmarks for the education, pleasure and welfare of the people of the city."

Penn Central, 438 U.S. at 109.

86. *Penn Central,* 438 U.S. at 119.

87. *See* Landmarks Preservation Law, *supra* note 85. *See generally* Rankin, *Operation and Interpretation of the New York City Landmarks Preservation Law,* 36 LAW & CONTEMP. PROBS. 366, 366-68 (1971) (discussing the application of the Preservation Law).

88. *See supra* note 85. The Landmarks Preservation Law requires landowners to keep the exterior of their buildings in good repair. *Id.*

89. *Penn Central,* 438 U.S. at 115-16.

90. *Id.* at 116-17. Penn Central actually submitted two proposals to the Landmarks Preservation Commission (Commission). The first proposal entailed constructing a 55-story office building on the roof of Grand Central Terminal. *Id.* at 116. The second proposal entailed tearing down a portion of the existing building to construct a 53-story office building. *Id.* at 116-17.

denied Penn Central's application.[91] As a result, Penn Central sought compensation under the fifth and fourteenth amendments, maintaining that its loss of the development rights above Grand Central Terminal effected a taking.[92]

In *Penn Central,* the Supreme Court acknowledged that neither the Constitution nor prior precedent provided a formula to determine when a regulation amounts to a taking.[93] Rather, the Court determined that the facts of each case must be assessed.[94] The Court, however, identified three factors from its survey of prior cases to determine whether a taking had occurred.[95] First, the Court noted that the "economic impact of a regulation" on a property owner should be measured.[96] If the regulation impairs the economic viability of the property, as opposed to merely diminishing its value, the Court will probably conclude that the regulation constitutes a taking.[97] Second, the Court stated that the degree to which the regulation interferes with an owner's "investment-backed expectations" should be determined.[98]

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91. *Id.* at 117. The Commission denied both proposals, desiring to preserve the historical architecture of the Grand Central Terminal. *Id.* at 117-18.

92. *Id.* at 119.

93. *Id.* at 123-24.

94. *Id.* at 124 (citing United States v. Central Eureka Mining Co., 357 U.S. 155, 168 (1958)). *See* B. ACKERMAN, PRIVATE PROPERTY AND THE CONSTITUTION 236 n.9 (1977) (stating that courts have "proceeded immediately to a particularistic weighing-up of factors whose character and weight are never clearly assessed").

95. *Penn Central,* 438 U.S. at 124. The Court cited Goldblatt v. Town of Hempstead, 369 U.S. 590, 594 (1962) (in which the Court considered the economic impact of a regulation as well as the degree to which the regulation interfered with the property owner's investment expectations to ascertain whether a taking occurred) and United States v. Causby, 328 U.S. 256 (1946) (in which the Court considered the character of the governmental action to analyze the takings issue).

96. *Penn Central,* 438 U.S. at 124. *See generally* Peterson, *supra* note 4, at 1325-27 (analyzing the economic impact prong of the *Penn Central* test); Peterson, *Land Use Regulatory "Takings" Revisited: The New Supreme Court Approaches,* 39 HASTINGS L.J. 335, 340-45 (1988) (same). Under that factor, compensation may not be compelled even if a regulation prohibits the most profitable use of property. *See* Andrus v. Allard, 444 U.S. 51, 64-65 (1979) (holding that every regulation which may affect the value of private property does not constitute a taking because that would require the government to pay compensation for the effects of every regulation).

In comparison, the Supreme Court in Hodel v. Irving, 481 U.S. 704 (1987), held that a federal statute that prohibited both devise and descent, but allowed *inter vivos* transfer, of certain property effected a taking. *Id.* at 717. While the Court did not expressly overrule *Andrus,* it held that a partial diminution in value may constitute a taking. *Id.* In dissent, Justice Scalia argued that *Irving* effectively limited *Andrus* to its facts. *Id.* at 719 (Scalia, J., dissenting). *But see id.* at 718 (Brennan, J., dissenting) (stating that the majority's opinion would not limit *Andrus* to its facts).

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

98. *Id.* at 124.

Third, the Court indicated that the character of a governmental action should be considered.[99]

The Court first addressed the character of the governmental action.[100] Explaining that factor, the Court stated that if the regulation were a physical invasion rather than a public program that intangibly interferes with the property,[101] then the Court may find the regulation to be a taking.[102] By contrast, if the law interferes with a landowner's property, but otherwise furthers a broader common good,[103] then the law would probably not be a taking.[104] Yet, after describing the character of the governmental action prong, the Court failed to consider that factor when determining whether the application of the law effected a taking.

Next, the Court considered the economic impact of the regulation, particularly the extent to which it interfered with Penn Central's investment-backed expectations. The Court reasoned that if the impact of the regulation severely interfered with the owner's use of the property, then the action was a taking for which the fifth and fourteenth amendments required compensation.[105] Although the regulation in *Penn Central* denied the owner of the Grand Central Terminal the most profitable use of its property, the Court found that the New York City law did not deprive Penn Central of all eco-

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99. *Id.; accord* Connolly v. Pension Ben. Guar. Corp., 475 U.S. 211, 224-25 (1986) (delineating the three *Penn Central* factors as the appropriate test for a regulatory taking).

In Loretto v. Teleprompter Manhattan CATV Corp, 458 U.S. 419 (1982), the Supreme Court, relying on the character of the governmental action prong of the *Penn Central* test, fashioned a *per se* test to determine whether a taking occurred. *Id.* at 441. The Supreme Court held that "a permanent physical occupation authorized by government is a taking without regard to the public interest it may serve." *Id.* at 426. *See generally* Hall v. City of Santa Barbara, 833 F.2d 1270 (9th Cir. 1986) (applying the *Loretto* physical invasion rule), *cert. denied,* 485 U.S. 940 (1988).

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

101. The appropriate inquiry to determine whether a regulation interferes with an owner's property is whether the regulation frustrates an owner's current use of property. The Court stated that "the New York City law does not interfere in any way with the present uses of the Terminal." *Id.* at 136. Accordingly, the Court concluded that the Landmarks Preservation Law did "not interfere with what must be regarded as Penn Central's primary expectation concerning the use of the parcel." *Id.*

102. *Id.* at 124.

103. *See, e.g.,* Miller v. Schoene, 276 U.S. 272 (1928) (upholding a law that required a property owner to cut down ornamental red cedar trees because of harm they caused to neighboring apple trees); Village of Euclid v. Ambler Realty Co., 272 U.S. 365 (1926) (upholding a zoning law that prohibited an industrial use of property). *But cf.* Nectow v. City of Cambridge, 277 U.S. 183 (1928) (striking down a zoning ordinance found to be intrusive). Thus, it appears the character of the governmental action test is similar to the public nuisance exception. *See supra* note 78 (discussing the public nuisance exception).

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

105. *Id.* at 136-37.

nomic use of the property.[106] Because the law did not completely eliminate Penn Central's economic use of the Terminal, the Court concluded that the extent of interference did not impinge on Penn Central's reasonable investment expectations.[107] Therefore, the impact was not so severe as to require compensation.[108] The Court's opinion is unclear, however, regarding the weight to give to the three factors.[109] Later cases have attempted to flesh out the importance of each factor but have reached inconsistent results.[110]

Despite the Supreme Court's use of a balancing test to determine whether the Landmarks Preservation Law constituted a taking, the Court sanctioned a deferential standard of review by accepting the legislature's determination that the law furthered a substantial public purpose.[111] Notably, the Court pointed out that "a use restriction on real property may constitute a 'taking' if not reasonably necessary to the effectuation of a substantial public purpose."[112] Accordingly, the Supreme Court did not require a close correla-

106. *Id.* A judicial balancing test, such as the three part test espoused in *Penn Central,* sometimes leads to inconsistent results. *See* McFadden, *The Balancing Test,* 29 B.C.L. REV. 585, 643 (1988) (stating that "[w]hen the judge weighs the elements to be balanced, the weights will be assigned in accordance with the judge's view of what is important. Whether one interest or set of interests 'outweighs' another . . . depends on which of them the judge values more highly").

107. *Penn Central,* 438 U.S. at 136.

108. Specifically, the Court stated:

> While the Commission's actions in denying applications to construct an office building in excess of 50 stories above the Terminal may indicate that it will refuse to issue a certificate of appropriateness for any comparably sized structure, nothing the Commission has said or done suggests an intention to prohibit *any* construction above the Terminal.

Id. 136-37 (emphasis in original).

109. Indeed, the Court appears to have combined the economic impact prong with the investment-backed expectations prong. *See id.* at 136.

110. *Compare* Hodel v. Irving, 481 U.S. 704, 715 (1987) (where the investment-backed expectations test was not dispositive concerning whether a taking occurred) *with* Ruckelshaus v. Monsanto Co., 467 U.S. 986 (1984) (where the Court held that a taking had not occurred by relying solely on the investment-backed expectations test); *see also* Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419, 426 (1982) (apparently viewing the economic impact of the law as irrelevant, and stating that " 'the character of the government action' not only is an important factor in resolving whether the action works a taking but also is determinative"). *Id.* at 426.

111. *See* Lawrence, *supra* note 56, at 238.

112. *Penn Central,* 438 U.S. at 127 (citing Nectow v. City of Cambridge, 277 U.S. 183, 188 (1928)); *cf.* Agins v. City of Tiburon, 447 U.S. 255, 260 (1980) (where the Court cited *Nectow* for the proposition that a regulation must substantially advance a legitimate state interest).

factors. Consequently, whether a plaintiff must satisfy both requirements to demonstrate a taking is unclear.[131]

Taken together, *Penn Central Transportation Co. v. New York City*[132] and *Agins v. City of Tiburon*[133] indicate the difficulty aggrieved landowners face in successfully challenging intrusive regulations. The Court deferred to the legislature in both cases,[134] and, therefore, the Court employed a deferential standard to review land use regulations. Less than ten years later, however, the Supreme Court abandoned its respectful approach and, as in *Pennsylvania Coal Co. v. Mahon,*[135] returned to closely scrutinizing land regulations.[136]

B. An Intensified Standard of Review

In a series of cases decided in the 1986-1987 term,[137] the Supreme Court significantly departed from previous case law and suggested that it was imposing a higher standard of review for evaluating regulatory taking claims.[138]

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131. Prior to Keystone Bituminous Coal Ass'n v. DeBenedictis, 480 U.S. 470 (1987), the Supreme Court did not apply the first prong of the two part *Agins* test. *See, e.g.,* Williamson County Regional Planning Comm'n v. Hamilton Bank, 473 U.S. 172, 191 (1985) (where the Court failed to address the substantial advancement prong of the *Agins* test); Kirby Forest Indus., Inc. v. United States, 467 U.S. 1, 14 (1984) (where the Court noted in dicta that a taking occurs where a zoning ordinance deprives a landowner of economically viable use of his land); Hodel v. Virginia Surface Mining & Reclamation Ass'n, 452 U.S. 264, 295-96 (1981) (where the Court applied only the economic viability prong of the *Agins* test in a case challenging the facial validity of a law). In contrast, at least one federal court has applied the legitimate state interest test. *See* Pompa Constr. Corp. v. City of Saratoga Springs, 706 F.2d 418, 422-23 (2d Cir. 1983) (applying both prongs of the *Agins* test). Under the economic viability prong, a taking will be found when a regulation denies an owner of all economic use of his property. *See supra* notes 116-31. *See generally* Peterson, *supra* note 4, at 1327-33 (analyzing the two part *Agins* test); Note, Agins v. City of Tiburon: *Open Space Zoning Prevails—Failure to Submit Master Plan Prevents a Cognizable Decrease in Property Value,* 8 PEPPERDINE L. REV. 839 (same); Note, *Filling in the* Pennsylvania Coal Mine: Agins v. City of Tiburon *and Supreme Court Approval of Open Space Zoning,* 1981 WIS. L. REV. 790 (same).

132. 438 U.S. 104 (1978).

133. 447 U.S. 255 (1979).

134. *See supra,* text accompanying notes 111, 127.

135. 260 U.S. 393 (1922).

136. *See infra* note 137.

137. *See* Nollan v. California Coastal Comm'n, 483 U.S. 825 (1987); First English Evangelical Lutheran Church v. County of Los Angeles, 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).

138. In *First English,* 482 U.S. at 310-11, Chief Justice Rehnquist stated that regulatory takings claims are based on the fifth amendment's just compensation clause, rather than on the fourteenth amendment's due process clause. In prior regulatory takings cases, it was unclear which amendment supported the Court's holdings. *E.g.,* Penn Cent. Transp. Co. v. New York City, 438 U.S. 104, 119 (1978). Thus, one commentator maintains that because the *First English* decision was based only on the fifth amendment, the *Nollan* Court was "free to argue that

1. Keystone Bituminous Coal Association v. DeBenedictis: Pennsylvania Coal *Revisited*

Keystone Bituminous Coal Association v. DeBenedictis[139] presented the Supreme Court with a situation closely analogous to *Pennsylvania Coal Co. v. Mahon.*[140] However, the results of the two cases differ. Like the mining company in *Pennsylvania Coal,* Keystone Bituminous Coal Association (Keystone) challenged the validity of a statute that prohibited mining coal where its extraction would cause the subsidence of houses and other buildings.[141] Keystone, however, did not allege that the impact of the statute effected a taking.[142] Instead, it maintained that the statute was facially invalid.[143]

The Supreme Court first applied the character of the governmental action test developed in *Penn Central Transportation Co. v. New York City.*[144] The Court acknowledged that the statute furthered an important public interest, namely, preventing the subsidence of houses and other similar structures.[145]

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the standards for review of takings challenges may be quite different from those applied in the due process and equal protection context." Lawrence, *supra* note 56, at 253 (footnote omitted). In response to the *Nollan* decision, one author argues that regulatory takings challenges should be based on the fourteenth amendment's due process clause to promote judicial deference. *See* Shepard, *Land Use Regulation in the Rehnquist Court: The Fifth Amendment and Judicial Intervention,* 38 CATH. U.L. REV. 847, 847 (1989).

139. 480 U.S. 470 (1987).

140. 260 U.S. 393 (1922).

141. *Keystone,* 480 U.S. at 478. The Bituminous Mine Subsidence and Land Conservation Act, PA. STAT. ANN. tit. 52, § 1406.4 (Purdon Supp. 1990) (hereinafter the Subsidence Act), prohibits mining coal "so as to cause damage as a result of the caving-in, collapse or subsidence of . . . [public buildings, houses and cemeteries]."

142. *Keystone,* 480 U.S. at 493-94.

143. *Id.* The Supreme Court stated:

> The posture of the case is critical because we have recognized an important distinction between a claim that the mere enactment of a statute constitutes a taking and a claim that the particular impact of a government action on a specific piece of property requires the payment of just compensation.

Id. at 494.

144. *Id.* at 485 (citing Penn Cent. Transp. Co. v. City of New York, 438 U.S. 104, 124 (1978)); *see supra* notes 84-114 and accompanying text.

145. *Keystone,* 480 U.S. at 485-86. The *Keystone* Court, however, did not overrule Pennsylvania Coal Co. v. Mahon, 260 U.S. 393 (1922). Rather, the *Keystone* Court differentiated the statutes at issue in the two cases, reasoning that the Subsidence Act "[did] not merely involve a balancing of private economic interests of coal companies against the private interests of the surface owners." *Keystone,* 480 U.S. at 485. Unlike the statute in *Pennsylvania Coal,* the Court reasoned that the Subsidence Act promoted the public safety. *Id.* at 488. Further, the Court distinguished *Pennsylvania Coal* by stating that the regulation in that case primarily served private interests. *Id.* at 486-88. In *Pennsylvania Coal,* however, Justice Holmes acknowledged that the regulation furthered the public interest. *Pennsylvania Coal,* 260 U.S. at 416.

In particular, the Court deferred to the legislature's finding that the statute provided for "the conservation of surface land areas"[146] that removal of the coal would otherwise damage.[147] The Court ruled that even though the enforcement of the law would have required it to leave twenty-seven million tons of coal in the ground, the twenty-seven million tons comprised only two percent of Keystone's property.[148]

Next, Keystone argued that the statute rendered its support estate[149] devoid of value and was a taking requiring compensation.[150] The Supreme Court rejected that argument. The Court reasoned that " 'where 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.' "[151] The support estate is recognized as a distinct estate in land. Nonetheless, the Court found that the support estate is not a separate segment of property.[152] Thus, the Court concluded that the support estate had value insofar as it augmented the value of either the mineral or surface estate.[153]

Accordingly, the Court held that the limit on mining was not a taking because Keystone did not show that the law denied Keystone all economically viable use of the property.[154] Because Keystone attacked the facial validity of the statute, the Court did not determine at what point diminution

146. *Keystone,* 480 U.S. at 485 (quoting the Subsidence Act § 1406.2).

147. *Id.* at 486.

148. *Id.* at 496.

149. In Pennsylvania there are three estates in land: the mineral estate, the support estate, and the surface estate. *See id.* at 478; *see also* Montgomery, *The Development of the Right of Subjacent Support and the "Third Estate" in Pennsylvania,* 25 TEMP. L.Q. 1 (1951). An owner of land in Pennsylvania "is entitled to the absolute support of his land in its natural state." *Id.* at 1. Thus, the support estate lies beneath the surface estate. The landowner is free, however, to contract away his right to subjacent support. *Id.* In that respect, all three estates in land are severable from one another.

150. *Keystone,* 480 U.S. at 497.

151. *Id.* at 497 (quoting Andrus v. Allard, 444 U.S. 51, 65-66 (1979)). The concept of property as a bundle of rights is widely accepted. *See* Hodel v. Irving, 481 U.S. 704, 717 (1987) (holding that the ability to devise and descend property are important property rights, and a complete abrogation of those rights constitutes a taking); Pruneyard Shopping Center v. Robins, 447 U.S. 74, 82 (1980) (noting that "one of the essential sticks in the bundle of property rights is the right to exclude others"); Kaiser Aetna v. United States, 444 U.S. 164, 179-80 (1979) ("we hold that the 'right to exclude,' so universally held to be a fundamental element of the property right, falls within this category of interests that the Government cannot take without compensation") (footnote omitted). *See generally* Comment, *supra* note 78, at 693-713 (providing an excellent analysis of the Court's bundle of rights concept).

152. *Keystone,* 480 U.S. at 501.

153. *Id.*

154. *Id.* at 499; *see* Lawrence, *supra* note 56, at 250-51 (arguing that the Court introduced a higher, non-deferential standard of review in *Keystone* because it examined the purposes underlying the Subsidence Act).

in value rises to the level of a taking. The Court's opinion, however, clearly indicates that *de minimis* losses are not takings.[155]

Although the Court deferred to the legislature, the Court adopted a higher standard of review by analyzing the effectiveness of the statute.[156] As Chief Justice Rehnquist noted in dissent, the majority should have followed precedent and maintained a deferential standard of review.[157] In other words, according to the Chief Justice, the Court should have inquired only into whether the legislature could have rationally believed that the statute met its stated aims.[158] By analyzing the means of the statute, however, the Court adopted a nondeferential standard of review.[159]

2. Nollan v. California Coastal Commission: *The Nexus Test*

In *Nollan v. California Coastal Commission,*[160] Justice Scalia, writing for the majority, breathed new life into the first prong of the two part inquiry set forth in *Agins v. City of Tiburon*.[161] In *Nollan,* the Court held that unless a regulation substantially advanced a legitimate state interest, regardless of the level of intrusion, the regulation would constitute a taking.[162]

The Nollans, owners of a beachfront lot in California, applied for a coastal permit pursuant to the California Coastal Act,[163] authorizing them to re-

155. *Keystone,* 480 U.S. at 498-99 (2% loss of property not a taking); *cf.* Village of Euclid v. Ambler Realty Co., 272 U.S. 365 (1926) (upholding a regulation that reduced the value of a landowner's property by 75% against a takings challenge); Hadacheck v. Sebastian, 239 U.S. 394 (1915) (rejecting a takings claim where a regulation reduced the value of a landowner's property from $800,000 to $60,000).

156. *See Keystone,* 480 U.S. at 511 n.3 (Rehnquist, C.J., dissenting).

157. *Id.*

158. As Chief Justice Rehnquist stated, " 'whether *in fact* the provisions will accomplish the objectives is not the question: the [constitutional requirement] is satisfied if . . . the . . . [State] Legislature *rationally could have believed* that the [Act] would promote its objective.' " *Id.* (emphasis in original) (alterations in original) (quoting Hawaii Housing Auth. v. Midkiff, 467 U.S. 229, 242 (1984)). *See generally* Clarke, *supra* note 79 (discussing the *Keystone* decision); Comment, Keystone Bituminous Coal Association v. DeBenedictis: *Toward Redefining Takings Law,* 64 N.Y.U. L. REV. 877 (1988) (same).

159. *See supra* text accompanying notes 84-131.

160. 483 U.S. 825 (1987).

161. 447 U.S. 255, 260 (1980) (holding that a regulation constitutes a taking if it does not substantially advance a legitimate state interest or if it denies landowners economic use of the property).

162. *Nollan,* 483 U.S. at 834. The Court noted that prior to *Nollan,* "[o]ur cases have not elaborated on the standards for determining what constitutes a 'legitimate state interest' or what type of connection between the regulation and the state interest satisfies the requirement that the former 'substantially advance' the latter." *Id.*

163. *See* CAL. PUB. RES. CODE §§ 30,000-30,900 (Deering 1986). Section 30,212 of the California Coastal Act ensures

> [p]ublic access from the nearest public roadway to the shoreline and along the coast shall be provided in new development projects . . . . Dedicated accessway shall not be

place an existing bungalow with a three bedroom house.[164] The California Coastal Commission (California Commission) issued the permit,[165] conditioned upon the Nollans granting to the public an easement across their property.[166] The California Commission maintained that the condition ensured the public's continued lateral access to the beach as well as its view of the beach.[167] The Nollans countered that the condition amounted to a taking of their property because it resulted in an uncompensated physical appropriation of a portion of their land.[168]

Justice Scalia stated that if an easement were imposed unilaterally, then a taking clearly would have occurred.[169] The Court reasoned that a landowner has a right to exclude others from his property and characterized an easement as a permanent physical occupation infringing on that right.[170] In other words, the imposition of an easement would have been a taking per se.[171] Next, Justice Scalia found that the condition, unlike the direct imposition of an easement, would have been valid if two requirements were met. First, the California Commission must have the authority to deny the development permit.[172] Second, the condition imposed must advance the same purpose that the denial of the permit would have furthered.[173]

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required to be opened to public use until a public agency or private association agrees to accept responsibility for maintenance and liability of the accessway.

Id. at § 30,212.

164. 483 U.S. at 828.

165. *Id.*

166. *Id.*

167. *Id.* The California Costal Commission (California Commission) reasoned that the easement would increase the public's access to the beach because a county park was located close to the Nollan's property. *Id.*

168. *Id.* at 829.

169. *Id.* at 831. Justice Scalia characterized the imposition of an easement as a permanent physical occupation for which compensation would have been warranted. *Id.* at 832; *see also supra* note 99 (discussing the physical invasion test enunciated in *Loretto*). Under prior case law, the appropriation of an easement constitutes a taking. *See* Kaiser Aetna v. United States, 444 U.S. 164 (1979); United States v. Virginia Elec. & Power Co., 365 U.S. 624 (1961).

170. Nollan v. California Coastal Comm'n, 483 U.S. 825, 831-32 (1987).

171. *Id.* at 831; *see* Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419 (1982) (holding that a permanent physical occupation by the government constitutes a taking); *see also* Michelman, *supra* note 3, at 1608 (noting that *Nollan* "seems most satisfactorily understood as a further manifestation, albeit in somewhat surprising form, of the talismanic force of 'permanent physical occupation' in takings adjudication").

172. *Nollan*, 483 U.S. at 836. If the authority to deny a permit is within the California Commission's police powers, then the denial would not effect a taking. *Id.* In dissent, Justice Brennan noted that the California Commission could have constitutionally denied the permit without effecting a taking because the property would have had remaining economic uses. *Id.* at 844-45 (Brennan, J., dissenting).

173. *Id.* at 836-37 ("If a prohibition designed to accomplish that purpose would be a legitimate exercise of the police power rather than a taking, it would be strange to conclude that

Addressing the first requirement, Justice Scalia stated that the California Commission could deny the permit if the proposed house created a "psychological barrier" that dissuaded people from using the beach.[174] Thus, denial of the permit to increase the public's view of the beach would have been within the California Commission's police powers.[175] Accordingly, requiring the Nollans to provide a viewing spot on their property which would allow the public to see the beach would have been constitutional.[176]

Analyzing the second requirement, the Court found a fatal flaw in the California Commission's order. The Court ruled that there was a weak nexus between the lateral access condition and the purposes underlying the development restrictions.[177] Justice Scalia reasoned that the condition would only benefit people already on the beach—it would not increase the public's view of the beach.[178] Accordingly, Justice Scalia's opinion concluded that the purpose of the condition was to obtain an uncompensated easement.[179] As a result, the Supreme Court held that the lateral access condition was invalid.[180]

Prior to *Nollan,* the appropriate standard of review of a state's exercise of police power was whether the action was reasonably related to the purported state interest.[181] Under that standard of review, the *Nollan* Court should

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providing the owner an alternative to that prohibition which accomplishes the same purposes is not.").

174. *Id.* at 835-36. The development of houses along the shore may have created the appearance that the beach was private, thereby dissuading public use. *See id.* at 849 (Brennan, J., dissenting).

175. *Id.* at 835-36.

176. *Id.* at 836. Alternatively, the California Commission could have required a height limitation, a width restriction or a ban on fences, and remained within constitutional bounds. *Id.*

177. *Id.* at 837.

178. *Id.* at 838.

179. *Id.* at 837.

180. *Id.* at 839.

181. *See* Hawaii Housing Auth. v. Midkiff, 467 U.S. 229, 242-43 (1984) (stating that "[w]hen the legislature's purpose is legitimate and its means are not irrational, our cases make clear that empirical debates over the wisdom of takings—no less than debates over the wisdom of other kinds of socioeconomic legislation—are not to be carried out in the federal courts"); Schad v. Mount Ephraim, 452 U.S. 61, 68 (1981) (concluding that a zoning ordinance is not a taking "if it is rationally related to legitimate state concerns and does not deprive the owner of economically viable use of his property"); Moore v. City of East Cleveland, 431 U.S. 494, 514 (1977) (Stevens, J., concurring) (noting that "[w]ith one minor exception, between [1928 and 1974], this Court did not review the substance of any zoning ordinances"); Goldblatt v. Town of Hempstead, 369 U.S. 590, 595 (1962) (courts should not substitute their judgment concerning the efficacy of a statute for that of a legislative body); *see also Nollan,* 483 U.S. at 843 (Brennan, J., dissenting) ("[i]t is also by now commonplace that this Court's review of the rationality of a State's exercise of its police power demands only that the State *'could rationally have decided'* that the measure adopted might achieve the State's objective") (emphasis in

not have found that the condition constituted a taking because the conditional easement would have provided more public access to the beach.[182] Nonetheless, by refusing to defer to the California Commission's findings that the conditional easement preserved the public's lateral access to the beach, the Supreme Court implicitly prescribed a higher, intermediate standard of review.[183] Consequently, courts must now scrutinize the degree to which a regulation advances the purposes underlying it.[184] This was the state of takings law when the United States Claims Court decided *Loveladies Harbor, Inc. v. United States.*

II. *LOVELADIES HARBOR, INC. V. UNITED STATES*

In *Loveladies Harbor, Inc. v. United States (Loveladies),*[185] Loveladies purchased 250 acres of property along the New Jersey Shore for the purpose of constructing residential homes.[186] The property included wetlands which Loveladies had to fill to develop the site.[187] To begin development, Loveladies applied for a permit to fill and develop twelve and one-half acres of wetlands. The Corps denied the permit, reasoning that the intended construction would harm the wetlands.[188] Accordingly, Loveladies filed suit in the United States Claims Court, alleging that the denied permit constituted a taking under the fifth amendment.[189] In 1988, both parties filed summary judgment motions which the court denied. Nearly two years later, a trial was held on the merits.[190]

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original) (quoting Minnesota v. Clover Leaf Creamery Co., 449 U.S. 456, 466 (1981)); *cf. id.* at 835 n.3 (stating that "there is no reason to believe . . . that so long as the regulation of property is at issue the standards for takings challenges, due process challenges, and equal protection challenges are identical"). *See generally* Michelman, *supra* note 3, at 1607 (concluding that prior to *Nollan* the Court employed a deferential standard of review).

182. 483 U.S. at 847 (Brennan, J., dissenting).

183. *See generally* Michelman, *supra* note 3, at 1607-08 (stating that the "*[Nollan]* Court expressly endorsed a form of semi-strict or heightened judicial scrutiny of regulatory means-ends relationships").

184. *See, e.g.*, Florida Rock Indus., Inc. v. United States, 21 Cl. Ct. 161 (1990) (where the Claims Court found that the denial of a fill permit was a taking because of the minimal connection between the protection of the wetlands and the ban on mining); *see also* Marzulla & Marzulla, *supra* note 19, at 558-60 (discussing *Florida Rock*).

185. 21 Cl. Ct. 153 (1990).

186. Loveladies Harbor, Inc. v. United States, 15 Cl. Ct. 381, 383 (1988).

187. *Id.*

188. *Id.* at 384.

189. *Id.* at 383.

190. Loveladies Harbor Inc. v. United States, 21 Cl. Ct. 153 (1990).

A. Some Preliminary Questions

In *Loveladies Harbor,* the Claims Court denied the parties' motions for summary judgment because there were material facts in dispute concerning the remaining uses of Loveladies' property.[191] Hence, the court did not hold that the denial of the section 404 permit constituted a taking.[192] Nevertheless, when denying the government's claim that a taking had not occurred as a matter of law, the court evaluated the merits of the takings claim.[193] As a preliminary matter, Chief Judge Smith stated that a taking can occur in two ways. First, a taking can result when a regulation fails to substantially advance a legitimate state interest.[194] Second, a taking can occur when a governmental regulation deprives an owner's land of all economic value.[195]

The court first addressed the substantial advancement test[196] created in *Agins v. City of Tiburon.*[197] The Claims Court departed from prior case law which held that a regulation constitutes a taking if it does not substantially advance a legitimate state interest or if it denies a landowner economic use of his property.[198] The court instead applied a two part test.[199] First, the court examined whether the regulation promoted either the public welfare or a private interest.[200] Next, the court balanced the "intended public benefit

191. *Loveladies Harbor,* 15 Cl. Ct. at 396-398. Before evaluating the takings claim, the Claims Court first addressed the jurisdictional issue of ripeness raised by the defendant. *Id.* at 385-86. Under the doctrine of ripeness, there must be an actual controversy before a court, and the controversy must be one which affects the legal interests of the parties. *See, e.g.,* Lake Carriers' Ass'n v. MacMullan, 406 U.S. 498, 506-08 (1972) (discussing ripeness doctrine); United Public Workers v. Mitchell, 330 U.S. 75, 89 (1947) (same); Maryland Casualty Co. v. Pacific Coal & Oil Co., 312 U.S. 270, 273 (1941) (same). *See generally* R. ROTUNDA, J. NOWAK & J. YOUNG, TREATISE ON CONSTITUTIONAL LAW: SUBSTANCE AND PROCEDURE § 2.13(d) (1986) (same). In the context of takings, a claim is not ripe "where the private litigant never submitted a plan or application for development to the governing body whose approval was required." *Loveladies Harbor,* 15 Cl. Ct. at 385. Even though Loveladies did not submit an alternative plan, the Claims Court held that the claim was ripe. *Id.* at 387. The court reasoned that Loveladies' submission of a less intensive proposal for developing fewer than 12.5 acres would be futile because the Corps would probably deny the alternative proposal as well. *Id.* at 386-87.

192. *Loveladies Harbor,* 15 Cl. Ct. at 398.

193. *Id.* at 387-93.

194. *Id.* at 387 (citing Keystone Bituminous Coal Ass'n v. DeBenedictis, 480 U.S. 470, 485 (1987)).

195. *Id.*

196. This test examines whether a regulation substantially advances a legitimate state interest. Agins v. City of Tiburon, 447 U.S. 255, 260 (1980).

197. 447 U.S. 255 (1980).

198. *See supra* notes 116-31 and accompanying text (discussing the two part *Agins* inquiry).

199. *Loveladies Harbor,* 15 Cl. Ct. at 388.

200. *Id.*

against the harm inflicted upon the landowner involved."[201] Resolution of the latter part of the test became the crucial issue in *Loveladies*.[202]

The Claims Court acknowledged that the fill permit requirement furthered the public welfare because it preserved wetlands.[203] The court found, however, that because Loveladies was unable to obtain a fill permit, the value of its property severely depreciated.[204] Consequently, because Loveladies' property had virtually no remaining economic use, the court ruled that the harm to Loveladies outweighed the public benefit of the regulation.[205]

Nevertheless, the court did not rely on the first prong alone.[206] Instead, the court held that "no court has ever found that a taking has occurred solely because a legitimate state interest was not substantially advanced."[207] Thus, the Claims Court viewed the "lack of a legitimate state interest in this case"[208] as one factor among many to consider.[209]

Next, the court analyzed the extent to which the wetlands diminished in value and questioned whether the property had any remaining economic use.[210] By comparing the preregulation fair market value of the property to its postregulation fair market value, the court concluded that the property diminished in value by ninety-eight percent.[211] Citing a series of Supreme Court cases holding that reduction in value by itself does not require compensation,[212] the Claims Court reiterated that a diminution in value alone

201. *Id.*

202. *See infra* text acompanying notes 247-65.

203. *Loveladies Harbor,* 15 Cl. Ct. at 388.

204. Loveladies estimated that the value of its property depreciated from $3,790,000 to $13,725.50 as a result of not obtaining a fill permit. *Id.*

205. *Id.* at 389. Only one other case stands for this proposition. *See* Florida Rock Indus., Inc. v. United States, 791 F.2d 893 (Fed. Cir. 1986), *cert. denied,* 479 U.S. 1053 (1987); *see also infra* note 219 (summarizing the Claims Court's disposition of *Florida Rock*).

206. *Loveladies Harbor,* 15 Cl. Ct. at 389.

207. *Id.* at 390 (footnote omitted). Another reason why the Claims Court did not hold that a taking occurred—even though it found that the harm suffered by the plaintiff outweighs the public interest—was due to the ambiguous nature of balancing public and private interests. *Id.* at 389; *see also Florida Rock,* 791 F.2d at 904 (illustrating this ambiguity). As the Claims Court related, *Florida Rock* "found the balance in favor of the landowner because the Clean Water Act's preservation of wetlands was not for the prevention of a public harm but rather for the maintenance of a public benefit." *Loveladies Harbor,* 15 Cl. Ct. at 388. That distinction, however, is unclear because determining whether the Government is promoting a public benefit or preventing a public harm is often difficult. *Id.* at 389.

208. *Loveladies Harbor,* 15 Cl. Ct. at 390.

209. *Id.*

210. *Id.* at 390-93.

211. *Id.* at 394.

212. *E.g.,* Kirby Forest Indus., Inc. v. United States, 467 U.S. 1, 14-15 (1984); Penn Cent. Transp. Co. v. New York City, 438 U.S. 104, 131 (1978); Goldblatt v. Town of Hempstead, 369 U.S. 590, 594 (1962); Euclid v. Ambler Realty Co., 272 U.S. 365, 384 (1926); Hadacheck v. Sebastian, 239 U.S. 394, 405 (1915).

does not constitute a taking.[213] According to the court, a landowner must show that the government action deprived him of all economic use of the property.[214] Because Loveladies' property could neither be developed nor used for recreational purposes, the court concluded that the property had no remaining economic use.[215] Accordingly, as a matter of law, the court denied the defendant's motion for summary judgment.[216] Additionally, the Claims Court denied Loveladies' cross-motion for summary judgment[217] because material facts remained in dispute concerning the remaining usefulness of the twelve and one-half acres of wetlands and whether the property had any remaining economic value.[218]

B. Compensation Required

Nearly two years after the Claims Court denied the parties' motions for summary judgment, Chief Judge Smith, writing for the court, held that the denial of the fill permit constituted a taking under the fifth amendment.[219]

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213. *Loveladies Harbor*, 15 Cl. Ct. at 398; *see also* Andrus v. Allard, 444 U.S. 51, 66 (1979).

214. *Loveladies Harbor*, 15 Cl. Ct. at 394.

215. *Id.* at 395.

216. *Id.* at 396.

217. *Id.* at 398

218. The parties contested the value remaining in the Loveladies' land after the permit denial. *Id.* at 397. The government contended that the one acre of upland could be used for residential development. *Id.* It also contended that the 11.5 acres of wetlands could be used "as a lagoon access to and from the one acre of uplands [sic]" *Id.* (footnote omitted). By contrast, the plaintiff alleged that the property had absolutely no remaining value. *Id.*

219. Loveladies Harbor, Inc. v. United States, 21 Cl. Ct. 153, 160 (1990). On the same day the Claims Court issued *Loveladies*, the Claims Court decided a companion case holding that refusal to grant a permit constituted a taking. Florida Rock Indus., Inc. v. United States, 21 Cl. Ct. 161 (1990). Like the plaintiff in *Loveladies*, Florida Rock sued the United States, alleging that the denial of a fill permit constituted a taking under the fifth amendment. *Id.* at 164. On remand from the United States Court of Appeals for the Federal Circuit, *see* Florida Rock Indus., Inc. v. United States, 791 F.2d 893 (Fed. Cir. 1986), the United States Claims Court first considered whether the proposed activity, the mining of limestone, fell within the public nuisance exception to the fifth amendment. Finding that the activity would not endanger the environment, the court concluded that the nuisance exception was inapplicable. *Florida Rock*, 21 Cl. Ct. at 167; *Cf. Loveladies*, 21 Cl. Ct. at 154 n.3 (public nuisance exception inapplicable); *see supra* note 78 (discussing the public nuisance exception). Next, the court compared the preregulation value of the plaintiff's property with its postregulation value to determine whether a taking occurred. *Florida Rock*, 21 Cl. Ct. at 168. The court found that the denial of the permit substantially reduced the value of the plaintiff's property, and it severely impinged on the plaintiff's investment-backed expectations. *Id.* at 175-76. Accordingly, the Claims Court awarded the plaintiff damages totalling a little over $1,000,000 to compensate the taking. *Id.* at 176.

Prior to *Loveladies* and *Florida Rock*, the Claims Court never awarded compensation to a landowner who was denied a fill permit. *But see* Formanek v. United States, 18 Cl. Ct. 785 (1989) (suggesting that the denial of a fill permit constitutes a taking); Beuré-Co. v. United States, 16 Cl. Ct. 42 (1988) (same). Thus, when viewed together, *Loveladies* and *Florida Rock*

1. Nuisance Exception is Inapplicable

Throughout the course of the *Loveladies* litigation, the government maintained that filling the wetlands fell within the public nuisance exception to the fifth amendment, thus, precluding the finding of a taking.[220] The Government inferred that the proposed activity constituted a public nuisance because the Corps denied the permit to prevent harm to the wetlands.[221] The Claims Court rejected that argument.[222] Instead, the court deferred to the DEP finding that the proposed activity would not adversely affect the quality of New Jersey's waters.[223] Therefore, the state's pollution findings effectively preempted the Corps' determination that the filling of wetlands should be prohibited as a nuisance.[224]

2. Economic Impact

To determine whether a taking occurred, the Claims Court relied on the test created in *Agins v. City of Tiburon*.[225] In *Agins*, the Court held that a

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suggest that the parameters of inverse condemnation have expanded. For a thorough discussion of the Federal Circuit's earlier opinion in *Florida Rock*, see Note, Florida Rock Industries, Inc. v. United States, 36 AM. U.L. REV. 999 (1987).

In a case similar to *Loveladies*, Deltona Corp. v. United States, 657 F.2d 1184, 1188 (Ct. Cl. 1981), Deltona Corporation (Deltona) was denied a permit to fill and develop wetlands. Consequently, Deltona sued the government, maintaining that the denial of the permit rendered its property devoid of all economic use. *Id.* at 1191. Alternatively, Deltona argued that the denial of the permit deprived the land of its highest and best economic use. The government contended that the property did have remaining economic uses, and that Deltona's alternative argument had no legal basis. *Id.*

After declaring that diminution in value by itself does not constitute a taking, *see id.*, the *Deltona* court applied the two part test created in *Agins*. Unlike the *Loveladies* court, the court in *Deltona* first held that the wetland regulations substantially advanced legitimate interests. *Id.* at 1192. The court, however, failed to explain *why* the regulations advance legitimate interests, stating: "we take as given that [the regulations] . . . substantially advance legitimate and important federal interests." *Id.* Next the court found that the property had remaining economic uses, noting that Deltona could still develop 11 acres of uplands. *Id.* Moreover, the court rejected Deltona's contention that the permit denial effected a taking because it deprived Deltona of the highest and best use of its property. The court reasoned that this argument was simply another way of saying that the property had dimininished in value, a proposition insufficient to warrant compensation. *Id.* at 1193.

220. *See Loveladies*, 21 Cl. Ct. at 154 n.3; *Loveladies Harbor*, 15 Cl. Ct. at 388-90; *see also supra* note 78 (discussing the public nuisance exception).

221. *Loveladies*, 21 Cl. Ct. at 154 & n.3.

222. *Id.* at 154 n.3.

223. *Id.* In reaching his decision, Chief Judge Smith stated that because land use regulation is within a state's police powers, "it is reasonable to defer to the state's findings concerning pollution, and to read the Corps' findings as a permissible exercise of their jurisdiction over federally-regulated wetlands." *Id.*

224. Despite DEP's findings, the Claims Court concluded that the proposed filling of wetlands would not constitute a public nuisance. *Id.*

225. 447 U.S. 255 (1980).

regulation effects a taking "if it does not substantially advance legitimate state interests, or if it 'denies an owner economically viable use of his land.' "[226] As to the first requirement, the court reiterated that a lack of a legitimate state interest was only one factor among others to consider.[227] As to the second requirement, the court considered the regulation's economic impact, the degree of interference with the property owner's investment-backed expectations, as well as the character of the governmental action.[228] While the Claims Court addressed the economic impact factor by comparing the preregulation value of the wetlands to its postregulation value,[229] it virtually ignored the latter two factors.[230]

3. *Preregulation and Postregulation Value*

Loveladies contended that in the absence of the fill permit requirement, "the highest and best use"[231] of its property would have been for a forty-lot residential development.[232] The Claims Court accepted Loveladies' contention[233] because its proposal would have been "physically possible and financially feasible"[234] and because the government was unable to suggest an alternative "highest and best use."[235] Accordingly, the fair market value of the property totalled $2,658,000, representing the sales price of the proposed forty houses.[236] By contrast, in the absence of a fill permit the highest and best use of Loveladies' property was for recreation and conservation, with a corresponding fair market value of $12,500.[237]

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226. *Agins*, 447 U.S. at 260 (citations omitted).

227. *Loveladies*, 21 Cl. Ct. at 155.

228. *Id.* (citing Connolly v. Pension Ben. Guar. Corp., 475 U.S. 211, 225 (1986)).

229. *Id.*

230. Although the Claims Court listed three factors to consider, the court explicitly acknowledged that its analysis did not consider the character of the government action or the effect of the regulation on the plaintiffs' investment-backed expectations. *Id.* at 160 n.9. Rather than applying all the factors, the court declared that the three factors are merely guidelines to aid in determining whether a taking occurred, and are not dispositive of the issue. *Id.*

231. The "highest and best use" of property is defined as " '[t]he reasonably probable and legal use of vacant land or an improved property, which is physically possible, appropriately supported, financially feasible, and that results in the highest value.' " *Id.* at 156 (quoting AMERICAN INSTITUTE OF REAL ESTATE APPRAISERS, THE APPRAISAL OF REAL ESTATE 19 (9th ed. 1987)).

232. *Id.* The plaintiffs based this contention on an appraisal that their expert witness performed. *See id.*

233. *Id.* at 157.

234. *Id.*

235. *Id.* at 156.

236. *Id.*

237. *Id.* at 158-59. The Corps continuously maintained that a taking had not occurred because the plaintiff did not apply for a permit to fill less than 12.5 acres. Thus, the Corps reasoned that the property had remaining economic uses. *Id.* at 157. Nevertheless, the Claims

Even though the Claims Court recognized that more than mere diminution in value is required to prove a taking,[238] it held that a taking had occurred.[239] The holding was based on the "drastic economic impact on the plaintiffs' property, coupled with the court's earlier determination of a lack of a countervailing substantial legitimate state interest."[240] Thus, the Claims Court awarded to Loveladies $2,659,000 plus interest as just compensation.[241] The court's ultimate decision rested on the lack of a legitimate state interest in denying the fill permit, as well as the severe effect that the permit denial had on the value of the plaintiffs' property.

III. TOWARD A HIGHER STANDARD OF REVIEW

A. The Wrong Road to the Right Place

1. The Right Place

Given the drastic impact that the permit denial had on the value of Loveladies' property, the Claims Court's result comports with the fairness goals of takings jurisprudence.[242] Loveladies purchased its property for the purpose of constructing residential homes before the wetland regulations were enacted.[243] Hence, the denied permit severely impaired Loveladies' investment-backed expectations. At the time that Loveladies purchased the property, Loveladies could not have foreseen that a future regulation would interfere with its development plans.[244] Therefore, the finding of a taking was consistent with *Penn Central Transportation Co. v. New York City.*[245] Moreover, the conclusion reached in *Loveladies* accords with the economic use prong of the test created in *Agins v. City of Tiburon.*[246] The permit denial did not merely diminish the value of Loveladies' property, it stripped the property of all economic value. Accordingly, Loveladies should have been compensated.

Court rejected that argument, finding that it would have been futile for the plaintiffs to have applied for another permit because the Corps had denied similar permits in the past. *Id.*

238. The Claims Court estimated that the plaintiff's property diminished in value by over 99%. *Id.* at 160.

239. *Id.*

240. *Id.*

241. *Id.* at 161.

242. *See supra* note 65.

243. *Loveladies,* 21 Cl. Ct. at 153.

244. One commentator suggests that foreseeability is the standard for determining whether a regulation interferes with a landowner's expectations. Peterson, *supra* note 4, at 1320.

245. *See supra* note 84-114.

246. *See supra* notes 115-31.

2. *The Wrong Road*

The result reached in *Loveladies* is sound but the Claims Court's reasoning deviated from Supreme Court precedent. For example, by comparing the public's interest in preserving wetlands with Loveladies' interest in developing its property,[247] the Claims Court determined that a legitimate state interest was lacking.[248] To reach that conclusion, the court relied on *Agins v. City of Tiburon.*[249] A careful reading of *Agins,* however, indicates that the Claims Court's reliance was misplaced.[250] The *Agins* Court recognized that "no precise rule determines when property has been taken," and that the analysis of a takings claim required a balancing of private and public interests.[251] However, the balancing of public and private interests under the first prong of *Agins* does not bear on whether a legitimate state interest was substantially advanced.[252] Rather, the appropriate inquiry to determine the legitimacy of a state action requires an examination of the degree to which the regulation advances the underlying state interest.[253] If the regulation is sub-

247. *See* Loveladies Harbor, Inc. v. United States, 15 Cl. Ct. 381, 388-90 (1988).

248. *Id.* at 390.

249. 447 U.S. 255 (1980).

250. By balancing public and private interests, the Claims Court improperly applied the substantial advancement test set forth in Agins v. City of Tiburon, 447 U.S. 255, 260 (1980). One reason the court balanced competing interests, rather than focusing solely on the economic impact of the permit denial, may have been because the court was concerned with promoting economic efficiency. *See* A. POLINSKY, AN INTRODUCTION TO LAW AND ECONOMICS 12 (1983) (one goal of efficiency is to find the least-cost solution to a problem). After all, cost-benefit analysis is a fundamental method for determining whether an outcome is efficient. *See* R. POSNER, ECONOMIC ANALYSIS OF LAW (2d ed. 1977); J. SENECA & M. TAUSSIG, ENVIRONMENTAL ECONOMICS (1974).

The ideal approach to awarding compensation to aggrieved landowners combines a landowner's expectations with principles of economic efficiency. Under current takings law, a landowner whose property is taken is awarded the fair market value of the property's highest and best use. *See* United States v. 564.54 Acres of Land, 441 U.S. 506 (1979); Danforth v. United States, 308 U.S. 271, 283 (1939); Loveladies Harbor, Inc. v. United States, 21 Cl. Ct. 153, 156 (1990). If awarding compensation were based on efficiency, the amount of any external costs, such as pollution, would probably reduce the fair market value. Therefore, in addition to internalizing external costs, that approach would account for a landowner's expectations. As a result, an aggrieved landowner would not be entitled to compensation for any harm the landowner caused to the environment. Thus, the *Loveladies* court should not have awarded Loveladies' the full fair market value of the property as just compensation, but should have offset the award to reflect the value of the highest and best use of the property *less* clean-up costs. If this approach is adopted, the compensation landowners receive would reflect their expectations, and the damages that the government pays would be substantially reduced. *See generally* Sax, *Takings, Private Property and Public Rights,* 81 YALE L.J. 149, 155-60 (1971) (suggesting that an efficient system of compensation would internalize external costs).

251. Agins v. City of Tiburon, 447 U.S. 255, 260-61 (1980).

252. *See* Nollan v. California Coastal Comm'n, 483 U.S. 825, 834 (1986) (where the Court applied the legitimate state interest test without balancing public and private interests).

253. *Id.*

stantially tailored to the state interest underlying it, a court should not invalidate the regulation.

Prior to *Nollan v. California Coastal Commission,*[254] the Supreme Court employed a deferential standard of review to determine when a regulation effects a taking.[255] By contrast, in *Loveladies,* the Claims Court's analysis was far from deferential. In *Penn Central,* for example, even though the Supreme Court applied a balancing test, it still deferred to the legislature's finding that the state action served a valid public purpose to determine the legitimacy of a law.[256] Unlike the Claims Court, the *Penn Central* Court did not balance public and private interests. Instead, the Court focused on the economic harm that the landowner had suffered.[257] Similarly, in *Agins,* the Supreme Court did not utilize a balancing test to assess whether the zoning ordinances were valid.[258] Further, even following the intermediate level of scrutiny developed in *Nollan,* the Claims Court did not employ the proper standard of review. In *Nollan,* the Supreme Court required a close nexus between a regulation and the state interest upon which it is based.[259] Again, the Supreme Court did not balance the state interest against the economic harm to the landowner.

B. The Right Road to the Right Place

Wisely, the Claims Court did not rest its decision solely on the legitimate state interest prong of *Agins v. City of Tiburon.*[260] Instead, the Claims Court only considered the lack of a legitimate state interest in conjunction with the economic impact of the permit denial.[261] Rather than weighing public and private interests to determine whether the permit denial advanced a legitimate state interest, the better approach would have conceded a legitimate governmental objective and focused on the economic impact of the denied permit. The *Agins* test was framed in the disjunctive, and, therefore, a taking can be found if either prong is satisfied.[262] Accordingly, because Loveladies was denied virtually all use of its property,[263] the Claims Court would have reached the same result under that approach. By contrast, under the

254. 483 U.S. 825 (1988).

255. *See supra* note 181.

256. *See supra* text accompanying note 111.

257. Penn Cent. Transp. Co. v. New York City, 438 U.S. 104, 124 (1978).

258. *See* Agins v. City of Tiburon, 447 U.S. 255 261 (1980) (where the Court deferred to the legislature's determination that the zoning ordinances furthered legitimate purposes).

259. Nollan v. California Coastal Comm'n, 483 U.S. 825, 834 1986).

260. 447 U.S. 255 (1979).

261. Loveladies Harbor, Inc. v. United States, 21 Cl. Ct. 153, 160 (1990).

262. *Agins,* 447 U.S. at 260.

263. *Loveladies,* 21 Cl. Ct. at 160.

Claims Court's balancing test, if the economic harm to a landowner outweighs public interest factors, the court would find that the law does not substantially advance a legitimate state interest. Thus, if the court were to rely solely on the legitimate state interest test, a taking could be found based only on economic harm, without determining whether the property owner's land was denied economically viable use and without examining whether the governmental action substantially advances a legitimate state interest.

In view of the closer scrutiny that land use regulations will receive after *Loveladies,* an increase in takings litigation filed in the Claims Court will probably result.[264] Thus, the higher standard of review adopted in *Loveladies,* coupled with large damage awards granted to landowners in other takings cases,[265] should induce an increase in takings litigation in the Claims Court.

IV. CONCLUSION

In *Loveladies Harbor, Inc. v. United States,* the United States Claims Court for the first time awarded nearly $3,000,000 as compensation to a builder who was denied a permit under section 404 of the Clean Water Act. Disregarding prior case law, the Claims Court implicitly adopted a higher standard to review takings claims.

While the result reached in *Loveladies* was proper, the Claims Court's reasoning stands on weak ground. Rather than balancing public and private interests, the Claims Court should have assessed only the economic impact of the government action. Nevertheless, *Loveladies* should provide a springboard for other wetland owners who were denied economic use of their property, now enabling them to receive compensation. Moreover, by initiating a higher standard of review, other courts may strike down other similar environmental regulations that have the effect of denying a property owner viable use of property. Thus, *Loveladies* is likely to prompt an increase in takings cases filed in the Claims Court.

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264. Notably, Executive Order 12,630 may partially negate the effect of *Loveladies* due to the takings impact analysis that agencies should undertake prior to regulating land. *See supra* note 55.

265. *See* UNITED STATES CLAIMS COURT, 1990 ANNUAL REPORT (1991) (listing the damages awarded in takings cases).