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The Regulatory Takings Bill: A Cure With Unintended Side Effects

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I. Introduction

In 1922, Justice Holmes set the stage for a jurisprudential battle, the dimensions of which are still being defined in 1995. The issue is regulatory takings, and the stakes are high. In the years since 1922, the Supreme Court has elaborated on what a taking is and when one occurs. The process, however, has been slow, and unsteady, and has left a lot of questions yet to be answered. In the meantime, many Americans have turned to the legislature to resolve the issue.

Part II of this Article traces the evolution of the takings issue in the Supreme Court since Justice Holmes' controversial 1922 opinion. Part III of this Article describes how opponents of regulatory takings, particularly members of the private property rights movement, are fighting back by filing cases in the United States Court of Claims and by proposing federal compensation legislation. Part IV of this Article reveals how an obscure but potentially powerful remnant of the common law could act to frustrate the goals of many private property rights supporters, especially with respect to coastal landowners. Finally, Part V of this article reveals how one state in particular, New Jersey, has used the concept of the public trust to aggressively reclaim lands once thought to have been private.

II. Takings Jurisprudence in the Supreme Court

Justice Holmes began the modern controversy over takings with his now infamous majority opinion in *Pennsylvania Coal Co. v. Mahon*.[1] In determining the constitutionality of a Pennsylvania statute designed to prevent subsidence caused by underground coal mining, Justice Holmes discussed the parameters and limitations of the police power. After stressing the considerable latitude the police power provides government, Justice Holmes set out his fateful proposition: "The general rule at least

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[1] 260 U.S. 393 (1922).

is that while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking."[2] Was Justice Holmes speaking literally or symbolically? Did he foresee compensation for regulatory takings?

For decades, there was considerable uncertainty over what Justice Holmes meant. Some state courts took the position that the use of the word "taking" was merely an expression signifying that the remedy for an illegal regulation was invalidation.[3] Under this view, the word "taking" referred to a violation of due process, but one that did not require compensation as the remedy.[4] Other state courts, led by New Hampshire, interpreted the language more literally and decided that the word "taking" meant that an invalid regulation could be cured only by compensation under the Fifth Amendment's Just Compensation Clause.[5]

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[2] *Id.* at 415. Justice Holmes recognized that government could not function without often diminishing the value of property. Therefore, payment in the vast majority of cases would not be necessary. *Id.* at 413. Justice Brandeis in dissent expressed the same thesis but went further in asserting that the statute was constitutional.

> Every restriction upon the use of property imposed in the exercise of the police power deprives the owner of some right theretofore enjoyed, and is, in that sense, an abridgement by the state of rights in property without making compensation. But restriction imposed to protect the public health, safety or morals from dangers threatened is not a taking. The restriction here in question is merely the prohibition of a noxious use.

Id. at 417

[3] *See, e.g.*, HFH, Ltd. v. Superior Court of Los Angeles County, 542 P.2d 237 (Cal. 1975.) The diminution in value in *HFH* was substantial. Before the regulation, the property was worth $400,000; after, $75,000. *Id.* at 240. In Agins v. Tiburon, 598 P.2d 25 (Cal. 1979), *aff'd*, 447 U.S. 255 (1980), the California Supreme Court discussed the meaning and relevance to constitutional law of Pennsylvania Coal Co. v. Mahon, *supra* note 1, and concluded:

> This Supreme Court opinion has generated some confusion and has even been cited erroneously for the proposition that inverse condemnation is readily available as a remedy in zoning cases because of Justice Holmes' statement that "the general rule at least is, that while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking." It is clear both from context and from the disposition in *Mahon*, however, that the term "taking" was used solely to indicate the limit by which the acknowledged social goal of land control could be achieved by regulation rather than by eminent domain. . . . The court did not attempt, however, to transmute the illegal governmental infringement into an exercise of eminent domain and *the possibility of compensation was not even considered.*

598 P.2d at 29 (citation omitted).

[4] *Agins, supra* note 3, at 29; *see also* Gold Run, Ltd. v. Board of County Comm'rs, 554 P.2d 317 (Colo. App. 1976), and Eck v. City of Bismark, 283 N.W.2d 193 (N.D. 1979).

[5] The Fifth Amendment provides in part "[N]or shall private property be taken for public use, without just compensation." U.S. CONST. amend. V. The just compensation requirement has been made applicable to the states through the Fourteenth Amendment. Chicago Burlington & Quincy R.R. v. Chicago, 166 U.S. 226 (1897); Burrows v. City of Keene, 432 A.2d 15 (N.H. 1981). The *Burrows* court considered a land conservation and preservation system which

Following a series of regulatory takings cases beginning in 1978,[6] the United States Supreme Court revolutionized takings jurisprudence when it finally settled the dispute in *First English Evangelical Lutheran Church*

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effectively denied Burrows permission to develop a subdivision. In discussing the proper remedies to apply upon invalidation of the regulation, the New Hampshire Supreme Court said:

> This is not to say that every regulation of private property through the police power constitutes a taking. Reasonable regulations that prevent an owner from using his land in such a way that it causes injury to others or deprives them of the reasonable use of their land may not require compensation . . . . But arbitrary or unreasonable restrictions which substantially deprive the owner of the "economically viable use of his land" in order to benefit the public in some way constitute a taking within the meaning of our New Hampshire Constitution requiring the payment of just compensation. It is a matter of degree. The owner need not be deprived of all valuable use of his property. If the denial of use is substantial and is especially onerous, a taking occurs (citations omitted).

Burrows, 432 A.2d at 19-20. *See also* Zinn v. State, 334 N.W.2d 67 (Wis. 1983), and Corrigan v. City of Scottsdale, 720 P.2d 513 (Ariz. 1986).

[6] *See* Penn Cent. Transp. Co. v. New York City, 438 U.S. 104 (1978); San Diego Gas & Elec. Co. v. City of San Diego, 450 U.S. 621 (1981); and Williamson County Regional Planning Comm'n v. Hamilton Bank of Johnson City, 473 U.S. 172 (1985).

Two footnotes in *San Diego Gas* illustrate the growing frustration the Court and landowners had with insensitive land use planners. Justice Brennan, in dissent, addressed first the often lengthy delays a landowner was forced to endure before he/she could throw off the yoke of an invalid regulation:

> The instant litigation is a good case in point. The trial court, on April 9, 1976, found that the city's actions effected a "taking" of appellant's property on June 19, 1973. If true, then appellant has been deprived of all beneficial use of its property in violation of the Just compensation Clause for the past seven years.
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> Invalidation hardly prevents enactment of subsequent unconstitutional regulations by the government entity. At the 1974 annual conference of the National Institute of Municipal Law Officers in California, a California City Attorney gave fellow City Attorneys the following advice:
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> "IF ALL ELSE FAILS, MERELY AMEND THE REGULATION AND START OVER AGAIN."
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> "If legal prevention maintenance does not work, and you still receive a claim attacking the land use regulation, or if you try the case and lose, don't worry about it. All is not lost. One of the extra 'goodies' contained in the recent [California] Supreme Court case of Selby v. City of San Buenaventura, 10 C.3d 110, appears to allow the City to change the regulation in question, even after trial and judgment, make it more reasonable, more restrictive, or whatever, and everybody starts over again."
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> "See how easy it is to be a City Attorney. Sometimes you can lose the battle and still win the war. Good luck." Longtin, Avoiding and Defending Constitutional Attacks on Land Use Regulations (Including Inverse Condemnation), in 38B NIMLO MUNICIPAL LAW REVIEW 192-93 (1975).

San Diego Gas, 450 U.S. at 656 n.22.

Brennan also rejected the argument that compensation would discourage innovation in land use planning. *Id.* at 661 n.26.

of Glendale v. Los Angeles County.[7] In *First English*, the Court held that compensation was the constitutionally mandated remedy for regulations which "went too far." The cases which followed *First English* outlined and applied the test to be used to determine when such a compensable taking had occurred. To be successful, a landowner who files an inverse condemnation[8] action must prove that the regulation either deprives him or her of all economically viable use of his or her property or that the regulation fails to "substantially advance a legitimate state objective."[9]

III. The Private Property Rights Movement

This revolution in takings jurisprudence coincided with the birth of a very vocal and highly organized property rights movement.[10] Frustrated by more aggressive federal land use regulations, affected property owners became increasingly agitated.[11] Much of the frustration centered around the proposed use of fragile ecosystems such as wetlands and endangered species habitat. With neither side willing to compromise, battle lines were drawn.[12] In the typical dispute, the government seeks to preserve a resource by denying the landowner permission to fill or use his property in a manner which would destroy the physical integrity of the resource.[13] The use of pollution control statutes for this purpose has drawn the ire of both landowners and the courts. Landowners have struck back against

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[7] 482 U.S. 304 (1987).

[8] Cases filed by landowners to recover compensation for regulatory takings are called inverse condemnation actions.

[9] *Agins*, *supra* note 3, at 29. This formulation has been reiterated in two recent regulatory takings cases: Nollan v. California Coastal Commission, 483 U.S. 825, 834 (1987), where the formulation inadvertently appeared using "and" not "or" at page 834; and Lucas v. South Carolina Coastal Council, 505 U.S. 1003 (1992). In *Lucas*, the Court again used "or" and has continued to use "or" since.

[10] *See* Brad Knickerbocker, *Property Rights Movement Gains Ground In Congress*, THE CHRISTIAN SCIENCE MONITOR, Sept. 21, 1993, at 1; John C. Van Gieson, *Landowner's Bill Advances*, ORLANDO SENTINEL TRIB., Mar. 5, 1993, at B1; and H. Jane Lehman, *Property Rights Drive Picks Up Ground*, LOS ANGELES TIMES, Oct. 11, 1992, at K6.

[11] *Id.* and *see HFH*, *supra* note 3, at 240.

[12] For a fascinating early regulatory taking case involving such a dispute, see Just v. Marinette County, 201 N.W.2d 761 (Wis. 1972), and *see supra* note 10.

[13] *Just*, *supra* note 12, is a good example. The Justs had filled an area 20 feet wide and 600 feet long. No one argued that Just had not violated a county ordinance requiring permission before filling wetlands. The Justs claimed that the shoreline zoning ordinance was unconstitutional. The court rejected their argument. The case has become famous for its principle that resources should be valued in their natural state.

For an interesting examination of the case, see David P. Bryden, *A Phantom Doctrine: The Origins and Effects of* Just v. Marinette County, AM. B. FOUND. RES. J. 397 (1978).

such government regulation on two fronts, each of which will be discussed in turn. The first effort focused on litigation. The second approach has centered on legislation. Litigants have been particularly busy in the United States Claims Court, at times recovering significant amounts from agencies such as the United States Corps of Engineers.[14]

A. Federal Regulatory Takings Cases

Dozens of cases claiming regulatory takings have been filed in the Court of Claims.[15] Two cases involving the Corps of Engineers (hereinafter the COE) illustrate the potential costs of adverse decisions to government. These costs are not entirely monetary either. The reality of recent regulatory takings jurisprudence has produced fear in land use regulators that mistakes will bankrupt their agencies. This fear may make regulators less aggressive than they should be in their management of environmentally sensitive areas.[16]

In *Florida Rock Industries, Inc. v. United States*, the COE denied a crushed stone company a dredge and fill permit.[17] Finding that the denial

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[14] *See e.g.* Loveladies Harbor, Inc. v. United States, 21 Cl. Ct. 153 (1990); Florida Rock Indus., Inc. v. United States, 791 F.2d 893 (Fed. Cir. 1986); Plantation Landing Resort, Inc. v. United States, 30 Fed. Cl. 63 (1993); Formanek v. United States, 26 Cl. Ct. 332 (1992).

[15] A search of the LEXIS Genfed library claims file produced 67 cases using the search terms: "Inverse Condemnation" and "Corps Engineers". While representing a variety of situations, this number demonstrates that there is significant use of the regulatory takings doctrine.

[16] *See San Diego Gas, supra* note 6, at 660-61, and *Agins, supra* note 3, at 29-30.

> In the half century since *Euclid* the foregoing abstract principles under the force of experience have coalesced into a specific functional requirement. Community planners must be permitted the flexibility which their work requires. As we ourselves have recently observed, "If a governmental entity and its responsible officials were held subject to a claim for inverse condemnation merely because a parcel of land was designated for potential public use on one of these several authorized plans, the process of community planning would either grind to a halt, or deteriorate to publication of vacuous generalizations regarding the future use of land." [Citation omitted.]
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> Other commentators have recognized that the utilization of an inverse condemnation remedy would have a chilling effect upon the exercise of police regulatory powers at a local level because the expenditure of public funds would be, to some extent, within the power of the judiciary. "This threat of unanticipated financial liability will intimidate legislative bodies and will discourage the implementation of strict or innovative planning measures in favor of measures which are less stringent, more traditional, and fiscally safe." (Barbara J. Hall, Eldridge v. City of Palo Alto: *Aberration or New Direction in Land Use Law?* 28 HASTINGS L.J. 1569, 1507 (1977)).

Agins, supra note 3, at 30.

[17] Florida Rock Indus., Inc. v. United States, 8 Cl. Ct. 160, 162-64 (1985). The Corps grants permission to dredge or fill in the waters of the United States pursuant to 33 U.S.C. § 1344.

effectively destroyed the economic value of Florida Rock's property, the Court of Claims determined that a regulatory taking had occurred. After an appeal to the Federal Circuit Court of Appeals, the Claims Court reconsidered its decision.[18] The property in question was made up of wetlands which possessed significant environmental value as well as considerable economic worth. In its second opinion, the Claims Court again applied the Supreme Court's *Agins* two-prong formulation, and again determined that the Corps had "taken" 98 acres of property worth $1,029,000.[19] While the *Florida Rock* case still is winding its way through the courts and may eventually be determined in favor of the Corps, it is a current controversy that illustrates the immensity of the amounts of money that can be involved.[20] Planning agencies, especially local ones, cannot afford to take these kinds of cases lightly.

A case similar to *Florida Rock* is *Loveladies v. United States*.[21] Developers in New Jersey had purchased 250 acres for $300,000.[22] They improved 199 acres for homesites and planned to develop the additional 51 acres upon receipt of approval from the COE and the state.[23] After reducing their request to 12.5 acres and receiving state approval, the COE denied their application for a dredge and fill permit.[24] The landowners appealed the denial to the Federal District Court and following affirmance of the COE decision, filed the Claims Court case.[25] The Claims Court found that a regulatory taking had occurred and held the COE liable for $2,658,000 plus interest from the date of the taking.[26]

Florida Rock and *Loveladies* are by no means isolated instances.[27] Coupled with the Supreme Court's taking jurisprudence, these cases establish that governmental entities involved in regulatory programs affecting land use have large potential liability when their regulations go

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[18] *Id.* at 179. On appeal, this decision was affirmed in part, vacated in part and remanded for further proceedings at 791 F.2d 893 (Fed. Cir. 1986). The Appeal Court stated, however, that there was a "substantial possibility that a taking" had occurred. *Id.* at 905.

[19] Florida Rock Indus., Inc. v. Corps of Engineers, 21 Cl. Ct. 161, 168, 176 (1990).

[20] *See also* Thomas Hanley, Comment, *A Developer's Dream: The United States Claims Court New Analysis of Section 404 Takings Challenges,* 10 B.C. ENVTL. AFF. L. REV. 317 (1991).

[21] 21 Cl. Ct. 153, 161 (1990).

[22] *Id.* at 153.

[23] *Id.*

[24] *Id.* at 154.

[25] *Id.*

[26] 21 Cl. Ct. at 161.

[27] *See also*, Formanek v. United States, *supra* note 14, another Corps of Engineers inverse condemnation case which resulted in a determination that $933,921 plus interest was owed.

too far.[28] Because federal, state, and local government agencies each have land use powers, the potential for large monetary awards applies to all levels of government.

Instances where agencies deny landowners permission to use their property under the guise of preventing pollution have been especially controversial. In the *Florida Rock* case, the court addressed this concern:

> The pollution of the water, though the necessary hook for jurisdiction of the Army engineers, is not claimed in the district engineer's decision to be by itself very serious. The decrease in water quality due to turbidity will be "short term." "Water pollution does not appear to be a problem" at (water supply) wells adjacent to similar pits. No difference in water quality appears. Thus, when appellant characterizes the regulatory action as one to prevent pollution, it is really elevating form over substance. The concern of the district engineer is almost exclusively the continued existence of the wetland, not the temporary and moderate pollution incident to the occurrence of actual mining. It would be forensic semantics to characterize his decision as one against pollution, and the action has to be analyzed more carefully to weigh the private and public interests.
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> The Clean Water Act covers many types of pollution. We may assume, arguendo, that one who wanted to put toxic wastes in drinking water would encounter a balancing of public and private interests most unfavorable to his position and not likely to result in a compensation award. Denial of the permit frustrates him in doing harm. On the other hand, a moderate and *pro forma* polluter such as Florida Rock does no harm. Denial of the permit requires it to maintain at its own expense a facility, the wetlands, which by presently received wisdom operates for the public good, and benefits a large population who make no contribution to the expense of maintaining such facility. This appears to be a situation where the balancing of public and private interests reveals a private interest much more deserving of compensation for any loss actually incurred. The private interest, unless relieved by a Tucker Act award, sustains what may well be a permanent obligation to maintain property for public benefit, to carry the taxes and other

[28] If one takes the liabilities from *Florida Rock, Loveladies Harbor,* and *Formanek*, one can begin to appreciate the potential cost.

expenses, and not to receive business income from the property in return.[29]

B. Proposed Compensation Legislation

Not every court, however, has been as receptive as the Court in *Florida Rock* to landowners' arguments that compensation is deserved. Accordingly, landowners are pursuing their quest for compensation in the legislature as well as in the courts. The most important result of this legislative effort is evidenced by a takings bill introduced, and passed, this term in the House of Representatives. The bill is designed to provide compensation to a landowner when his property's fair market value is decreased more than twenty percent by governmental action.[30] Ironically, landowners may find that such legislative efforts result in a backlash. In fact, the cure sought by members of the property rights movement may cause a result that in some instances is worse than that of the original illness.

Landowners living near the coast are particularly vulnerable to unexpected consequences from private property compensation legislation. Coastal property is often most valuable if it can be either filled or dredged for commercial or recreational purposes, including the construction of homes, hotels, marinas, and harbors.[31] In fact, a considerable amount of construction in the coastal areas of the United States has occurred upon land that once was covered by water and subject to the ebb and flow of the tide.[32] The proposed compensation legislation coupled with a very powerful, but often overlooked, common law doctrine known as the Public Trust could spell trouble for the nation's coastal property owners.

IV. The Public Trust

The public trust was originally a Roman doctrine that came to the United States via England. The doctrine reflects the practical inability of Roman era nations to effectively occupy and possess submerged lands in

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[29] *Florida Rock*, 791 F. 2d at 904.

[30] H.R. 925, 104th Cong., 1st Sess. (1995).

[31] *See, e.g.*, Loveladies Harbor, Inc. v. United States, 21 Cl. Ct. 153 (1990), and *Bryden*, *supra* note 13.

[32] *See, e.g.*, City of Berkeley v. Superior Court of Alemeda, 606 P.2d 362 (Cal. 1980), and *see* the discussion of state public trust claims for filled property in Ellington et al., *State Riparian Claims: A New Direction In Revenue Sharing*, 2 DICK. J. ENVTL. L. & POL'Y 35, 71-87 (1992).

any traditional sense.[33] Accordingly, these lands became recognized as being properly reserved for navigational, commercial and fishing uses by all.[34] As it exists today, the public trust is based on the concept that submerged lands are unique and absolutely essential to the well being of the public.[35] Thus, the underlying principle provides that submerged lands must remain in the control of the government for public use.[36] Although these three basic uses recognized in Roman times still form the core of the trust's purpose, modern courts have expanded these uses to include others such as recreation, bathing, aesthetics and environmental preservation.[37] The common thread running through all public trust cases,

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[33] *Arnold v. Mundy*, 6 N.J.L. 1, 71 (1821). There, the New Jersey Supreme Court stated:

> Every thing susceptible of property is considered as belonging to the nation that possesses the country, and as forming the entire mass of its wealth. But the nation does not possess all those things in the same manner. By very far the greater part of them are divided among the individuals of the nation, and become *private property*. Those things not divided among the individuals still belong to the nation, and are called *public property*. Of these, again, some are reserved for the necessities of the state, and are used for the public benefit, and those are called "*the domain of the crown or of the republic*;" others remain common to all the citizens, who take of them and use them, each according to his necessities, and according to the laws which regulate their use, and are called *common property*. Of this latter kind, according to the writers upon the law of nature and of nations, and upon the civil law, are the air, the running water, the sea, the fish, and the wild beasts. *Vattel lib. i*, 20. 2 *Black. Com.* 14. But inasmuch as the things which constitute this *common property* are things in which a sort of transient usufructuary possession, only, can be had; and inasmuch as the title to them and to the soil by which they are supported, and to which they are appurtenant, cannot well, according to the common law notion of title, be vested in all the people; therefore, the wisdom of that law has placed it in the hands of the sovereign power, to be held, protected, and regulated for the common use and benefit. But still, though this title, strictly speaking, is in the sovereign, yet the use is common to all the people.

6 N.J.L. at 71.

[34] DAVID SLADE ET AL., PUTTING THE PUBLIC TRUST DOCTRINE TO WORK 130-32 (1990).

[35] *See Arnold v. Mundy*, 6 N.J.L. 1,71 (1821), for one of the most important American public trust cases. For a good overall discussion of the trust, see COMMITTEE OF THE OFFICE OF THE ATTORNEY GEN., NAT'L ASS'N OF ATTORNEYS GEN., LEGAL ISSUES IN PUBLIC TRUST ENFORCEMENT (1977) [hereinafter LEGAL ISSUES IN PUBLIC TRUST ENFORCEMENT]. The integrity of trust property is important because it allows public access to the waters and lands underlying them for navigation, fishing and commerce. Of particular importance to the original thirteen colonies, the public trust doctrine ensured communal ownership and access to the bounties of the sea. *See also* SLADE, *supra* note 34.

[36] SLADE, *supra* note 35, at xvii and xxx.

[37] In Marks v. Whitney, 491 P.2d 374 (Cal. 1971), the California Supreme Court found the scope of the trust to include the right to hunt, bathe, swim, and preserve the tidelands as ecological units for scientific study.

however, is a recognition that except in unusual circumstances, public trust property cannot be conveyed to individuals.[38]

In the leading Supreme Court public trust case, *Illinois Central Railroad Co. v. Illinois*,[39] the Court set out the jurisprudential foundations of the American public trust doctrine. At the request of the State of Illinois, the Court overturned a conveyance of over 1,000 acres of submerged land that had been made previously to the railroad company by the Illinois state legislature.[40] In effect, the entire Chicago waterfront had been given to the railroad in perpetuity.[41] In holding that the land had to be given back, the Court recognized the restricted alienability of public trust land:

> The control of the state for the purposes of the trust can *never* be lost, except as to such parcels as are used in promoting the interests of the public therein, or can be disposed of without any substantial impairment of the public interest . . . .[42]

The decision made general transfers of land impressed with the trust from states to private landowners revocable.[43] Presumably, property taken from the corpus by citizens without official sanction and used for private purposes can also be revoked. In fact, the equities seem much less compelling in cases of outright conversion than in instances of misguided authority such as *Illinois Central.*

Significant controversy and hardship have arisen where states have applied the trust principles set out in *Illinois Central* in an effort to reclaim or receive present day market value for properties previously conveyed or seized in violation of the trust.[44] To reclaim the trust successfully, a state must have control of the trust corpus and must know what land it includes. Over the years, the United States Supreme Court has surprised many observers with its views on the scope of the trust's res.

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[38] California v. Superior Court of Lake County, 29 Cal.3d 210, 226 (1981), and *Arnold*, 6 N.J.L. at 39. Limited conveyances are tolerated if they advance trust purposes. *See* Illinois Cent. R.R. Co. v. Illinois, 146 U.S. 387, 453 (1992).

[39] 146 U.S. 387 (1892).

[40] *Id.* at 433-34, 454. *See also* LEGAL ISSUES IN PUBLIC TRUST ENFORCEMENT, *supra* note 35, at 14.

[41] *Illinois Central,* 146 U.S. at 433-34.

[42] *Id.* at 453.

[43] *Id.* at 455.

[44] *See* Ellington et al., *supra* note 32, at 71-87. The Ellington article provides an examination of New Jersey's efforts to recover public trust property.

Originally, most people believed that the res of the trust was co-extensive with submerged land underlying navigable waters.[45] In other contexts, the concept of navigable waters has been interpreted to encompass large areas (*e.g.*, Clean Water Act, etc.); however, most people believed that in the context of the public trust doctrine the area included was limited to submerged lands underlying waters that were navigable in

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[45] There was ample justification for this view. The term "navigable waters" is used in a number of contexts: cases involving admiralty jurisdiction, commerce clause cases and public trust cases. In *The Propeller Genesee Chief*, 53 U.S. 443, 455 (1841), the Court threw off the strictures of the Old English test of navigability which limited jurisdiction to waters subject to the ebb and flow of the tide. Instead, the Court determined that admiralty jurisdiction extended to all waters that supported maritime activities. It is easy to understand how people interpreted this case as rejecting the ebb and flow test as the basis for trust delimitation areas. The Court in public trust cases used the term "navigable waters" to define the extent of the corpus. In *Illinois Central*, 146 U.S., at 435-36, the court stated:

> In England the ebb and flow of the tide constitute the legal test of the navigability of waters. There no waters are navigable in fact, at least to any great extent, which are not subject to the tide. There, as said in the case of *The Genesee Chief*, 12 How. 443, 455, "tide water and navigable water are synonymous terms, and tide water, with a few small and unimportant exceptions, meant nothing more than public rivers, as contradistinguished from private ones;" and writers on the subject of admiralty jurisdiction "took the ebb and flow of the tide as the test because it was a convenient one, and more easily determined the character of the river. Hence the established doctrine in England, that the admiralty jurisdiction is confined to the ebb and flow of the tide. In other words, it is confined to public navigable waters."
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> But in this country the case is different. Some of our rivers are navigable for great distances above the flow of the tide; indeed, for hundreds of miles, by the largest vessels used in commerce. As said in the case cited: "There is certainly nothing in the ebb and flow of the tide that makes the waters peculiarly suitable for admiralty jurisdiction, nor anything in the absence of a tide that renders it unfit. If it is a public navigable water, on which commerce is carried on between different States or nations, the reason for the jurisdiction is precisely the same. And if a distinction is made on that account, it is merely arbitrary, without any foundation in reason; and, indeed, would seem to be inconsistent with it."
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> The Great Lakes are not in any appreciable respect affected by the tide, and yet on their waters, as said above, a large commerce is carried on, exceeding in many instances the entire commerce of States on the borders of the sea. When the reason of the limitation of admiralty jurisdiction in England was found inapplicable to the condition of navigable waters in this country, the limitation and all its incidents were discarded. So also, by the common law, the doctrine of the dominion over and ownership by the crown of lands within the realm under tide waters is not founded upon the existence of the tide over the lands, but upon the fact that the waters are navigable, tide waters and navigable waters, as already said, being used as synonymous terms in England.

It was presumed that lands underlying nonnavigable waters were excluded from the trust. Justice O'Connor, writing in dissent in Phillips Petroleum Co. v. Mississippi, 484 U.S. 469 (1988), stated: "In my view, the public trust properly extends only to land underlying navigable bodies of water. . . . This Court has defined the public trust repeatedly in terms of navigability." *Id.* at 485-86 (citations omitted).

fact.[46] In order for water to be navigable in fact, most courts agree, some sort of actual navigation in interstate commerce is necessary.[47] Accordingly, this limitation was thought to have made the trust less extensive than the area subject to the ebb and flow of the tide.[48] The popular view, however, has turned out to be erroneous. In *Phillips Petroleum Co. v. Mississippi*, a case which has received remarkably little attention, the United States Supreme Court dramatically expanded the scope of the public trust res underlying salt water and reaffirmed that its size was to be set as of the date the state entered the Union.[49] The dispute in *Phillips* centered on 42 acres of land underlying a small bayou and a number of small streams.[50] The land's value came from its potential for oil production. The Court was asked to determine whether the State of Mississippi held title to lands underlying waters that were influenced by the ebb and flow of the tide but were not navigable in fact.[51] Tracing ownership to the land through its predecessors in title, Phillips claimed that its title went all the way back to Spanish land grants predating statehood.[52] Mississippi, however, claimed the property under the equal footing doctrine.[53] The equal footing doctrine holds that upon admission to the Union, new states are entitled to the same rights and emoluments of statehood as the original thirteen. To the amazement of most knowledgeable observers, Mississippi claimed the property as part of its public trust land despite its being covered by nonnavigable water.[54]

Predictably, Phillips urged the Court to reject Mississippi's argument, citing cases such as *The Genessee Chief*[55] and *Martin v. Waddel*[56] as having rejected public trust status for lands underlying nonnavigable waters.[57] The Court, however, chose to apply the ebb and flow of the tide test for salt water trust delineation purposes. The Court also

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[46] SLADE, *supra* note 34, at 23.

[47] *Id.*

[48] Much property subject to the ebb and flow of the tide cannot be used as a practical matter for navigation due to its shallowness or location. For all practical purposes, it is nonnavigable.

[49] *Phillips Petroleum*, 484 U.S. at 473-81

[50] *Id.*

[51] *Id.* at 472.

[52] *Id.*

[53] *Id.*; *see* Pollard v. Hagan, 44 U.S. (3 How.) 212 (1845).

[54] *Phillips Petroleum*, 484 U.S. at 472.

[55] *The Propeller Genesee Chief*, 53 U.S. at 455.

[56] 41 U.S. (16 Pet.) 367 (1842).

[57] *Phillips*, 484 U.S. at 477-79.

reiterated prior pronouncements that the date of entry into the Union was the date to be used to determine the extent of the trust corpus.[58]

There was sharp disagreement between the majority and minority opinions concerning the practical effects of the *Phillips* ruling. Justice O'Connor, acknowledging that a victory for either party would have disruptive consequences, wrote in her dissenting opinion that "today's decision could dispossess thousands of blameless record owners and leaseholders of land that they and their predecessors in interest believed was lawfully theirs."[59] Justice White, who wrote for the majority, rejected the dissent's claim that thousands of innocent owners would be affected.[60]

Although the effects of the *Phillips Petroleum* ruling have yet to be fully determined, the expanded test outlining the extent of state public trust property promises considerable benefits to state and federal agencies, such as the Corps of Engineers, at the expense of coastal property owners. A re-examination by a state of what should be included in its trust res will identify significant amounts of dry land and wet land that was wrongfully claimed by private landowners. Although much of this land is undoubtedly claimed by private landowners who are innocent of any wrongdoing, it is still impressed with the public trust. There is no question that there are significant tracts of land which are presently dry and above the mean high tide line because of unauthorized filling. Similarly, significant portions of swamps were filled in and reclaimed because swamps were once believed to cause diseases such as yellow fever and malaria. Land was also filled to build ports and port facilities.

While natural erosion and accretion have changed coastlines over the years, much of the original trust corpus is identifiable even when filled.[61]

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[58] *Id.* at 479.

[59] *Id.* at 493:

> What evidence there is suggests that the majority's rule is one that will upset settled expectations. *For example, the State of New Jersey has decided to apply the Court's test. It now claims for its public trust all land underlying nonnavigable tidal waters, and all land that has been under tidal waters at any time since the American Revolution.*
>
> *Due to the attempted expansion of the [public trust] doctrine, hundreds of properties in New Jersey have been taken and used for state purposes without compensating the record owners or lien holders; prior homeowners of many years are being threatened with loss of title*; prior grants and state deeds are being ignored; properties are being arbitrarily claimed and conveyed by the State to persons other than the record owners; and hundreds of cases remain pending and untried before the state courts awaiting processing with the National Resource Council.

Alfred A. Porro Jr. & Lorraine S. Teleky, *Marshland Title Dilemma: A Tidal Phenomenon*, 3 SETON HALL L. REV. 323, 325-26 (1972) (emphasis added).

[60] *Phillips*, 484 U.S. at 477, 479.

[61] SLADE, *supra* note 35, at 91-119.

Wetlands were not always as ecologically prized as they are today and considerable amounts of them were destroyed. Although the unauthorized conversions may have been well-intentioned, they cannot change the nature of the land's character as trust property. Therefore, if the illegitimately converted land becomes the subject of a takings dispute of the type discussed above or if the individual states simply decide they want to take it back, states can demand its return using the public trust doctrine. An examination of the approach taken by the State of New Jersey illustrates how this can be done.

V. The New Jersey Program

Landowners' worst nightmares became real as New Jersey began claiming properties that were being used by what Justice O'Connor called "innocent landowners."[62] The New Jersey approach is overwhelmingly aggressive in seeking the return of trust property or a recoupment of fair market value. It demonstrates how government can go about reclaiming its lands.[63] The public trust doctrine set out in *Illinois Central* and applied in programs like the New Jersey riparian program requires recoupment either in kind or in present day fair market value regardless of hardships.[64]

New Jersey's program is fairly complicated. It involves legislative enactments requiring a survey of trust resources.[65] Maps are then produced and inspected by the public.[66] Lands to be surveyed and mapped are defined as follows:

> (a) "Meadowlands" means those lands, now or formerly consisting chiefly of salt water swamps, meadows, or marshes.
>
> (b) "Improved meadowlands" means such meadowlands as have been reclaimed by fill or other material thereon, and may include the erection of structure.

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[62] *Phillips*, 484 U.S. at 493.

[63] New Jersey has been one of the most active of the jurisdictions with respect to the public trust. In fact, the Supreme Court of New Jersey has intimated that the public may have the right to cross private upland property to reach trust property, an extension far beyond what other state courts have determined. Matthews v. Bay Head Improvement Ass'n, 471 A.2d 355, 365 (N.J. 1984).

[64] Ellington et al., *supra* note 32, at 45-48.

[65] N.J. STAT. ANN. § 13:1B-13.2 (West 1991).

[66] N.J. STAT. ANN. § 13:1B-13.4 (West 1991).

(c) "Virgin meadowlands" means such meadowlands that are still in their natural state and upon which no diking, fill or structure have been placed.[67]

Although unsuccessful, numerous challenges to the program delayed implementation for years.[68] Presently, however, cases are being filed and settled at a significant rate. Persons aggrieved by a designation as stated can challenge the determination,[69] and landowners can clear title by proof of ownership, purchase or lease.[70] Funds derived from sale or lease of public trust lands go into a fund for the support of free public schools.[71] While the benefits of the reclamation program to the public school system are substantial, the consequences of trust reclamation to the individual landowner can be dramatic, as the following excerpts illustrate:

Mr. and Mrs. Ralph Grieco live in Spring Lake, New Jersey. In 1957 Mr. Grieco purchased three lots for $2,500, part of which happened to be filled tideland. The property is four and one-half blocks from the ocean and backs onto a pond. Mr. Grieco built a house on two of the lots and left the third lot open. Mr. Grieco, who is retired, dreamed of building a ranch on the vacant lot so that he and his wife would not have to climb stairs. Their intention was to sell their house and use the proceeds to build a new house. With this idea in mind, Mr. Grieco went to examine copies of the State claim maps at the borough hall. The maps stated that portions of his property had once been underwater and therefore, the State owned the land.

Before the Griecos could build their new home, they would have to clear title to the land. A State appraiser estimated the market value of their filled land, which amounted to 0.29 acres, at $95,525. In addition to this amount, additional fees, such as legal

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[67] N.J. STAT. ANN. § 13:1B-13.1(a)(c) (West 1991).

[68] *See* Ellington et al., *supra* note 32, at 49. The Ellington article refers to a statement made by William E. Anderson, Deputy Attorney General and Special Counsel to the Tidelands Resource Council of the State of New Jersey, to the effect that in recent years the sale of tidelands brings in $3-4 million a year. *Id.* at 59. During a presentation to an Ocean and Coastal Law class at The Dickinson School of Law, Mr. Anderson stated that in one calendar year, an anomaly, $20 million was recovered at a cost of $1.6 million. Anderson, William E., Esq., State Tidelands in New Jersey and the Public Trust Doctrine, (Nov. 24, 1992), Lecture at The Dickinson School of Law.

[69] N.J. STAT ANN. § 13.1B-13.5(a) (West 1991).

[70] N.J. STAT. ANN. § 13.1B-13.7-13.12 (West 1991).

[71] N.J. STAT. ANN. § 13.1B-13:13 (West 1991).

> costs, paying an engineer to survey the land, paying the State to prepare the document formally granting the landowner ownership and paying the State for a permit to legalize the filling of the property which had occurred years before, added nearly $8,000 to the Grieco's bill.
>
> The Griecos borrowed the money needed to pay the State to clear title to the land. After borrowing the money, they sold the vacant lot to repay the loan. The Griecos paid the State approximately $75,000 to clear title to their property. In the process, they gave up their dream of building a ranch home.[72]

Another excerpt is just as telling:

> In 1972 Mary Grace Keen and her husband bought a pie shaped lot in Avalon [New Jersey.]. The price in 1972 for the lot was $25,000. Nobody told them that the State might have a claim on their property at the closing. In the mid-1980s, the Keens received their first notification that the State claimed ownership of part of the Keens' property. Specifically, the State claimed that a creek had flowed over 42% of their property and this therefore belonged to the State. The State told the Keens that they could obtain clear title to their property by paying the State "something like $27,000."[73]

Despite the likelihood of individual horror stories such as these, other states are being enticed by the potential revenues from converted public trust property.[74] These states should be aware that mapping the resources in their trust property and prosecuting their recoupment claims is an expensive and difficult undertaking.[75] However, both landowners and regulators will benefit from knowing who owns the property. For regulators, there are obvious benefits in terms of resource retrieval and enhanced revenues. Landowners will benefit from the security of knowing whether they actually own the property they think they do. Revenues

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[72] Ellington et al., *supra* note 32, at 53 (footnotes omitted).

[73] *Id.* at 55.

[74] *Id.* at 71-86.

[75] One only needs to envision trying to determine what land was covered by water at the time the state came into the Union to begin to understand the difficulty. Add to that the task of determining what has or hasn't been eroded, accreted or filled, and the problem begins to define itself.

saved by preventing four or five *Loveladies* cases, for example, would be considerable and could be used to purchase more property for the trust.

The incentive for states to map and reclaim trust property are even greater in light of H.R. 925 and similar compensation proposals.[76] A regulatory takings bill would require the federal government to compensate owners of property whose "use of any portion of that property has been limited by an agency action, under a specified regulatory law, that diminishes the fair market value of that portion by 20 percent or more."[77] H.R. 925 would effectively circumvent current regulatory takings jurisprudence, which has always held that mere reduction in value of property does not, by itself, result in a taking.[78] This bill substitutes the rather infrequently found regulatory taking for a simple statutory damage right based on a relatively slight reduction of value.

While there are relatively few federal programs that can be classified as classic land use programs, the list of "specified regulatory programs" contained in H.R. 925 portends problems for federal environmental preservation and protection efforts. The following are defined as specified regulatory programs:

> (A) section 404 of the Federal Water Pollution Control Act (33 U.S.C. 1344);
> (B) the Endangered Species Act of 1979 (16 U.S.C. 1531 et seq.);
> (C) title XII of the Food Security Act of 1985 (16 U.S.C. 3801 et seq.); or
> (D) with respect to an owner's right to use or receive water only
>
> > (i) the Act of June 17, 1902, and all Acts amendatory thereof or supplementary thereto, popularly called the "Reclamation Acts" (43 U.S.C. 371 et seq.);
> > (ii) the Federal Land Policy Management Act (43 U.S.C. 1701 et seq.); or
> > (iii) section 6 of the Forest and Rangeland Renewable Resources Planning Act of 1974 (16 U.S.C. 1604);[79]

H.R. 925 defines fair market value as:

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[76] H.R. 925, *supra* note 30.
[77] *Id.*
[78] See Penn Cent. Transp. Co., 438 U.S. 104, 124 (1978).
[79] H.R. 925, *supra* note 30.

> The most probable price at which property would change hands, in a competitive and open market under all conditions requisite to a fair sale, between a willing buyer and a willing seller, neither being under any compulsion to buy or sell and both having reasonable knowledge of relevant facts, at the time the agency action occurs.[80]

Inverse condemnation cases have made previously cavalier government regulators more cautious about the consequences to landowners of land use regulations. Nevertheless, passage of legislation such as H.R. 925 would restrict regulators much further. For example, the denial of a dredge and fill permit will decrease land values substantially in almost every case. The monetary cost to government of all these denials compiled would be staggering. The only way for government regulators to avoid these costs, however, would be to permit the destruction of resources.

While the passage of compensation bills like H.R. 925 could be devastating to efforts at natural resource conservation, this article illustrates how some of the adverse effects of this legislation could be offset by a reexamination of the states' public trust property. If this examination is undertaken, property owners may be unpleasantly surprised. Many landowners would find that they actually do not own what they thought they did. At the very least, the cloud produced from mapping programs might convince reluctant landowners to agree to environmentally favorable compromises rather than resort to costly litigation.

VI. Conclusion

Landowners have become increasingly frustrated by a government that seemingly ignores their complaints about the burdens of land use enactments. The position of landowners is bolstered by recent Supreme Court cases giving them the authority to sue when land use regulations go too far, and property owners have had some success in receiving compensation for inverse condemnation claims. Landowners have been particularly successful in attacking regulatory programs used to preserve fragile ecosystems.

Many of these cases have centered on coastal areas where economic potential and ecologic fragility often coexist in an uneasy balance. Several disputes would have ended differently if title to the properties in controversy were actually in the state. Lands that were submerged at the

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[80] *Id.*

time of the entry of a state into the Union and which were once subject to the ebb and flow of the tides are often the focus of such suits. The public trust doctrine prevents wholesale conveyance of any such property to private concerns. In fact, trust property may as a general rule never be transferable. Because much property meeting these conditions has been illegally filled or claimed by landowners, and because of the dynamic nature of the coast itself, title to significant amounts of coastal property is legitimately in question.

The purpose of this Article is to show how certain regulatory takings claims and potential compensation claims under bills such as H.R. 925 could be repulsed through the use of the Public Trust doctrine. Compensation claims of disgruntled "landowners" would become moot once they discovered that they were actually trespassers on lands that they thought they owned. Ironically, regulatory takings cases and proposed compensation bills such as H.R. 925 provide states with economic incentives nonexistent fifteen years ago to map and reclaim their trust property.