

# TOO SAT TAKINGS, AND TSAT TAKINGS. THE HISTORY AND POTENTIAL OF REGULATORY TAKINGS CHALLENGES TO THE ENDANGERED SPECIES ACT

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## I. INTRODUCTION

Few federal statutes inspire as much public reaction, both negative and positive, as the Endangered Species Act (“ESA” or “the Act”).<sup>1</sup> Much of this attention has manifested itself in federal courtrooms, where litigants have tried to either expand or contract the scope of federal powers under the Act. Significant attention has been paid to the legal arguments made by those bringing litigation, especially those arguments that focus on the Commerce Clause.<sup>2</sup> While such attention is clearly merited and Commerce Clause challenges to ESA are far from being things of the past, such challenges have generally proved to be unsuccessful in federal courts. Those challenging the implementation of ESA occasionally turn toward regulatory takings challenges to combat what they see as an unfair imposition of a public demand on the property rights of a single individual.

The concept of regulatory takings is based on the Takings Clause of the Fifth Amendment. Whenever the government takes an individual’s property, it must do so under three constitutionally mandated guidelines: (1) the property must be put to public use, (2) the taking of the property must be through due process, and (3) just

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1. 16 U.S.C. § 1531 (2000).

2. See, e.g., Sara D. Van Loh, *The Latest and Greatest Commerce Clause Challenges to the Endangered Species Act*, 31 *ECOLOGY L.Q.* 459 (2004); Bradford C. Mank, *Protecting Intrastate Threatened Species*, 36 *GA. L. REV.* 723 (2002); Maya R. Moiseyev, *Solid Waste Agency of Northern Cook County*, 7 *HASTINGS W.-N.W. J. ENV. L. & POL’Y* 191 (2001); Omar N. White, *The Endangered Species Act’s Precarious Perch*, 27 *ECOLOGY L.Q.* 215 (2000); J. Blanding Holman VI, *After United States v. Lopez*, 15 *VA. ENVTL. L.J.* 139 (1995).

compensation must be paid to the original owner.<sup>3</sup> When a property owner claims that a regulation, while leaving the property in his or her possession, effectively diminishes the property's value or limits a particular right in that property, that owner is claiming a regulatory taking that demands compensation.

While it is generally recognized on all sides of the debate that property rights "are enjoyed under an implied limitation and must yield to the police power"<sup>4</sup> in light of certain "background principles of the State's law of property and nuisance already placed upon land ownership,"<sup>5</sup> the exact placement of the boundary line between property rights and legitimate governmental powers is hotly contested. At stake is the effectiveness of regulatory regimes that often collide with private property rights and interests: "Often the mere threat of a lawsuit raising a takings challenge is enough to dissuade legislators and city councils from passing environmental measures, even where the proposed regulation clearly would comply with judicial takings tests."<sup>6</sup>

This article begins by examining the statutory framework of ESA, which was enacted in 1973 and gave certain regulatory powers to federal agencies. Specifically, it provided that the United States Fish and Wildlife Service ("FWS") would regulate individual, commercial, and governmental activities to protect endangered species. Central to this statute is the prohibition of a "take," which means to kill, harm, harass, capture, etc. an endangered species.<sup>7</sup> The next section examines the judicial history of ESA, addressing the legal context in which regulatory takings challenges are currently fought. This article then discusses the history of regulatory takings jurisprudence.<sup>8</sup> Finally, the last two sections cover the history of regulatory takings challenges to ESA, as well as the potential for such challenges in the near future.

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3. U.S. CONST. amend. V.

4. *Pa. Coal v. Mahon*, 260 U.S. 393, 413 (1922).

5. *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1029 (1992).

6. ZYGMUNT J.B. PLATER ET AL. *ENVIRONMENTAL LAW AND POLICY: NATURE, LAW, AND SOCIETY* 1051 (2d ed. 1998).

7. 16 U.S.C. § 1532(19) (2000).

8. At this point, it is important to remind the reader not to confuse the context of the term "take," in the above discussed context of ESA, with the other type of "take," which refers to the taking of property for which compensation is required.

## II. STATUTORY FRAMEWORK OF THE ENDANGERED SPECIES ACT

Congress enacted ESA in 1973 for the stated purpose of “provid[ing] a means whereby the ecosystems upon which endangered species and threatened species depend may be conserved.”<sup>9</sup> Through the enactment of the Act, Congress recognized that a diversity of “species of fish, wildlife, and plants are of esthetic, ecological, educational, historical, recreational, and scientific value,”<sup>10</sup> and declared that such threats to biodiversity are “a consequence of economic growth and development untempered by adequate concern and conservation.”<sup>11</sup> ESA casts a wide net to promote conservation, focusing on everything from individual species to habitats, and from private citizens to the government itself.

In Section 4, Congress authorized the Secretary of the Interior to exercise powers aimed at determining the species and habitats that need government protection. In addition to the power to declare whether a particular species is endangered or threatened,<sup>12</sup> the Secretary is also authorized to declare “critical habitat”<sup>13</sup> and promulgate regulations necessary for the survival of the species. While the Act certainly grants the Secretary significant power in the listing of endangered and threatened species, the Act also places upon the Secretary guidelines and restrictions in the use of this power. For instance, the Act establishes a timetable for the declaration of petitioned species and the review of such declarations, making negative declarations open to judicial review.<sup>14</sup> More significantly, while the Act allows the Secretary to take “into consideration the economic impact”<sup>15</sup> of a critical habitat designation, determinations of species listings are to be made “solely on the basis of the best scientific and commercial data available.”<sup>16</sup> In addition to these listing powers, Section 5 of the Act authorizes the Secretaries of Agriculture and the Interior “to acquire by purchase, donation, or otherwise, lands, waters, or interest therein”<sup>17</sup> as a way to set aside critical habitat.

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9. 16 U.S.C. § 1531(b).

10. *Id.* § 1531(a)(3).

11. *Id.* § 1531(a)(1).

12. *Id.* § 1533(a)(1).

13. *Id.* § 1533(a)(3).

14. *Id.* § 1533(b)(3).

15. *Id.* § 1533(b)(2).

16. *Id.* § 1533(b)(1).

17. *Id.* § 1534(a)(2).

The acquisition of habitat lands, while deemed by Congress as an important part of a larger policy of protecting endangered species, would be cost prohibitive if implemented as the sole means of achieving the goals of ESA. The Act, therefore, also restricts behaviors that further threaten endangered species. The Section 7 provisions of ESA require that all federal agencies “insure that any action authorized, funded, or carried out by such agency . . . [does not] jeopardize the continued existence of any endangered species or threatened species or result in the destruction or adverse modification of habitat of such species.”<sup>18</sup>

In addition to the Section 7 provisions regarding federal agency actions, Section 9 of ESA governs the actions of private individuals. Along with prohibiting the importation, exportation, and interstate sale of endangered species,<sup>19</sup> the Act also prohibits the “taking” of any endangered species within the United States or upon the high seas by anyone under United States jurisdiction.<sup>20</sup> While the Section 9 prohibitions against takings can be interpreted as both broad and draconian, Section 10 allows for so-called “incidental takings.” In this section of ESA, Congress authorized the Secretary of the Interior to establish Habitat Conservation Plans (“HCP”), which allow for limited takings of endangered or threatened species provided that the “taking is incidental to, and not the purpose of, the carrying out of an otherwise lawful activity.”<sup>21</sup> To acquire a permit for such takings, the applicant must demonstrate the incidental nature of the taking, that procedures will be in place to minimize the taking, and that alternatives have been considered but are demonstrably less favorable.<sup>22</sup> These various provisions and components of ESA have been thoroughly examined and interpreted by the courts, thereby heavily embedding ESA’s statutory history within the U.S. judiciary.

### III. ESA IN THE COURTS

While regulatory takings challenges to ESA are a fairly recent phenomenon, they have not developed, nor do they take place within, a legal and political environment absent a contextual history. A long observed characteristic of the American judiciary is “that it can only

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18. *Id.* § 1536(a)(2).

19. *Id.* § 1538(a)(1)(A, E-F).

20. *Id.* § 1538(a)(1)(B-C).

21. *Id.* § 1539(a)(1)(B).

22. *Id.* § 1539(a)(2)(A-B).

act when it is called upon, . . . it does not pursue criminals, hunt out wrongs, or examine evidence of its own accord.”<sup>23</sup> This means that the very evolving political forces in which ESA was created was also the context in which its challenges occurred. Therefore, regulatory takings challenges arise in a context dependent upon the successes and failures of other challenges pursued for reasons ranging from changes in political climate to changes in the law itself. Whereas a regulatory takings challenge focuses, by legal necessity, upon a “concrete controversy,”<sup>24</sup> other legal challenges may be made more efficacious with the addition of broader goals. For example, legal challenges to ESA apart from regulatory takings challenges have included cases involving statutory interpretation and interstate commerce.

#### A. *Statutory Interpretation*

While Congress was clear in its reasons for passing ESA,<sup>25</sup> the guidelines for implementation of the Act are considerably less specific. Ambiguous terms leave the Secretary of the Interior with considerable leeway when following these congressional directives. The extent of this discretion, and the decisions made with it, rapidly brought ESA before the courts for judicial interpretation of the Act. Two cases stand out as foundational in shaping the way courts would interpret the meaning and requirements of ESA, and together they form “the bedrock upon which most subsequent U.S. Fish and Wildlife Service implementation actions have been based.”<sup>26</sup>

The first of these cases involves the well known halting of construction of the Tellico Dam on the Little Tennessee River, an area that had been declared critical habitat for a small fish called the snail darter. In *TVA v. Hill*,<sup>27</sup> construction on the nearly completed dam was halted by the Supreme Court despite the large amount of federal dollars already spent on the program and the continued issuance of funds by Congress, which had been made aware of the presence of the snail darter in committee meetings.<sup>28</sup> Even with such

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23. ALEXIS DE TOCQUEVILLE, *DEMOCRACY IN AMERICA* 73 (Richard D. Heffner, ed. Penguin Books 1956) (1835).

24. *Hodel v. Va. Surface Mining & Reclamation Assn.*, 452 U.S. 264, 295 (1981).

25. 16 U.S.C. § 1531(a-c).

26. Lynn Dwyer et al., *Property Rights Case Law and the Challenge to the Endangered Species Act*, 9 *CONSERVATION BIOLOGY* 725, 728 (1995).

27. 437 U.S. 153 (1978).

28. *Id.* at 163-67.

economic impacts, the Court argued that an “examination of the language, history, and structure of the legislation under review here indicates beyond doubt that Congress intended endangered species to be afforded the highest of priorities.”<sup>29</sup> The presumption had been made by all involved in the case that “operation of the Tellico Dam will either eradicate the known population of snail darters or destroy their critical habitat.”<sup>30</sup> Since the TVA operated as a recipient of federal funds, judicial recourse to balancing the economic interests of the TVA and taxpayers to the value of an endangered species calculated by Congress as “incalculable” would be impossible.<sup>31</sup> As far as Section 7 provisions on agency actions are concerned, *TVA* established a judicial view of ESA as a “mandate to protect species notwithstanding economic effects.”<sup>32</sup>

Whereas *TVA* interpreted ESA as strongly enforceable against the actions of the federal government, a district court decision one year later “formally expanded the scope of the Act to nonfederal actions on private lands.”<sup>33</sup> In *Palila v. Hawaii Department of Land and Natural Resources*,<sup>34</sup> several nongovernmental organizations brought suit on behalf of, and in the name of, the endangered palila (*Psittirostra bailleui*), a six-inch long bird named by the FWS as a “high priority species.”<sup>35</sup> The critical habitat of the palila was threatened by a state program that maintained feral sheep and goats for game-hunting purposes on the land, thereby causing over-consumption of the plants on which the palila depends.<sup>36</sup>

In ruling that the state program violated ESA, and that the Act extends federal power over the states, the District Court for the District of Hawaii, after considering the economic feasibility of removing the feral animals from the critical habitat,<sup>37</sup> based its decision on two legal considerations. First, the District Court argued that the Commerce Clause gives Congress the authority to establish a law regulating state actions regarding endangered species. Even though the Hawaii state program used no federal funds, and did not

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29. *Id.* at 173.

30. *Id.* at 171.

31. *Id.* at 187.

32. Dwyer, *supra* note 26, at 728.

33. *Id.*

34. 471 F. Supp. 985 (D. Haw. 1979).

35. *Id.* at 987-88.

36. *Id.* at 989.

37. *Id.* at 990-91.

involve any species directly in interstate commerce, the Supreme Court had long established that intrastate actions that affect interstate commerce are also under federal authority.<sup>38</sup> Although the regulation of wildlife has historically been regarded as falling under state sovereignty, the District Court found substantial precedence stating that when a conflict between federal and state law is present, “a state’s control over wildlife within its borders must yield to the federal commerce power.”<sup>39</sup> Therefore, the enforceability of ESA extends into state jurisdiction, since the Act “preserves the possibilities of interstate commerce in . . . species and of interstate movement of persons, such as amateur students of nature or professional scientists who come to a state to observe and study these species, that would otherwise be lost by state inaction.”<sup>40</sup> Second, the District Court also relied upon the Act’s citizen suit provisions, which give private citizens the right to sue “any . . . governmental instrumentality or agency.”<sup>41</sup> By participating in federally legislated activities, the State of Hawaii implicitly consented to Congress’ abrogation of the state’s sovereign immunity.<sup>42</sup>

These two cases together establish a judicial interpretation of ESA as a strongly enforceable manifestation of congressional will to protect endangered and threatened species, regardless of economic impact. Such an interpretation of ESA would not be long lived, however, as the interpretation of the Act underwent changes not from the judiciary, but from Congress itself. Public reaction to these two cases, in particular the well-publicized *TVA* decision, prompted Congress to review the Acts provisions on agency actions in 1978. Eventually Congress allowed agencies to consider economic factors, and in 1982, Congress established the HCP components of Section 10, allowing for incidental takes.<sup>43</sup> Despite this congressional clarification, the courts continue to be called upon to engage in statutory interpretation of ESA.

One specific area of ESA which was subjected to the statutory interpretation of the District Court in *Palila* was the Section 9

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38. See, e.g., *United States v. Darby*, 312 U.S. 100 (1941); *Wickard v. Filburn*, 317 U.S. 111 (1942); *Perez v. United States*, 402 U.S. 146 (1971).

39. *Palila*, 471 F. Supp. at 992. See also *Missouri v. Holland*, 252 U.S. 416 (1920); *Douglas v. Seacoast Prod., Inc.*, 431 U.S. 265 (1977); *Hughes v. Oklahoma*, 441 U.S. 322 (1979).

40. *Palila*, 471 F. Supp. at 995.

41. 16 U.S.C. § 1540(g)(A) (2000).

42. *Palila*, 471 F. Supp. at 987.

43. Dwyer, *supra* note 26, at 729.

prohibitions on the taking of endangered species.<sup>44</sup> The Act defines “take” as “to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect.”<sup>45</sup> While this definition is expansive, it is not clear that the modification of critical habitat, especially in a manner as indirect as not removing feral species, fits within the statutory definition. In *Palila*, the District Court relied upon federal regulations that expanded the definition to include “significant environmental modification or degradation.”<sup>46</sup> This definition, however, comes from the Secretary of the Interior, not Congress. Furthermore, this definition was used prior to 1982,<sup>47</sup> when Congress added incidental take provisions to ESA, thus allowing for a degree of habitat modification under the guidance of an HCP. All of this left the interpretation of a fundamental term of ESA up in the air.

In 1995, the Supreme Court heard a challenge to the authority of the Secretary of the Interior to apply the terms “take” and “harm” to habitat, and not just direct actions against species themselves. The Court’s decision in *Babbitt v. Sweet Home Chapter of Community for a Great Oregon*<sup>48</sup> dealt with a facial challenge to the regulatory definition of “harm,” which includes significant habitat modification and degradation. Respondents in the case, an interest group representing logging companies and the communities and families that depend on the jobs they provide, “alleged that application of the ‘harm’ regulation to the red-cockaded woodpecker, an endangered species, and the northern spotted owl, a threatened species, had injured them economically.”<sup>49</sup>

Although the Court acknowledged that the Act’s legislative history demonstrates a congressional consideration and removal of habitat modification language from a definition of harm,<sup>50</sup> the Court argued that the actual text of ESA supports the Secretary’s definition. The Court stated that “an ordinary understanding”<sup>51</sup> of the word and the Act’s stated broad purpose<sup>52</sup> both require an interpretation of harm to include habitat modification “to provide a means whereby

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44. 16 U.S.C. § 1538(a)(1)(B).

45. *Id.* § 1532(19).

46. *Palila*, 471 F. Supp. at 995 (citing 50 C.F.R. § 17.3 (2005)).

47. Pub. L. No. 93-205, 87 Stat. 884 (1973).

48. 515 U.S. 687 (1995).

49. *Id.* at 691.

50. *Id.* at 691-92.

51. *Id.* at 695.

52. *Id.* at 698.



the ecosystems upon which endangered species and threatened species depend may be conserved.”<sup>53</sup> Furthermore, the 1982 addition of the incidental taking provisions led the Court to argue that Congress must have interpreted ESA to cover indirect, as well as direct, takings because an incidental direct taking would not make sense.<sup>54</sup>

### B. *Commerce Clause Challenges*

The District Court in *Palila* recognized that Congress’ authority over the legislation of endangered species rests in its commerce power,<sup>55</sup> or its constitutional authority to “regulate commerce with foreign nations, among the several States, and with Indian tribes.”<sup>56</sup> While basing the protection of endangered species, which both the Supreme Court and Congress have described as “incalculable,”<sup>57</sup> on something as economically specific as commerce may seem tenuous, the Court has interpreted Congress’ Commerce Clause powers to extend beyond the tradable and sellable things in themselves and to the channels of commerce, the instrumentalities of commerce, and activities that substantially affect commerce.<sup>58</sup>

Under this Commerce Clause jurisprudence, the Supreme Court exercised strong judicial restraint and a low level of scrutiny when asked to evaluate congressional authority within federal statutes based upon Congress’ commerce power.<sup>59</sup> This position is favorable to advocates of ESA, as the low population numbers of endangered species, by definition, make them more susceptible to being located entirely within one state, thus giving rise to challenges arguing that the regulation of some endangered species lies outside of Congress’ authority. Although the Supreme Court itself has not directly evaluated ESA’s relation with interstate commerce, three cases

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53. *Id.*; 16 U.S.C. § 1531(b) (2000).

54. *Babbitt*, 515 U.S. at 698-99.

55. *Palila v. Haw. Dep’t of Land & Natural Res.*, 471 F. Supp. 985, 999 (D. Haw. 1979).

56. *Id.*; U.S. CONST. art. 1, § 8, cl. 3.

57. *Tenn. Valley Authority v. Hill*, 437 U.S. 153, 187 (1978).

58. *Perez v. United States*, 402 US 146, 150 (1971).

59. *See Hodel v. Va. Mining & Reclamation Ass’n*, 452 U.S. 264, 312 (1981) (Rehnquist, J., concurring) (expressing concern over the Court’s omission of “substantial” from the “substantially affects” test); *Equal Employment Opportunity Comm’n v. Wyoming*, 460 U.S. 226 (1983); *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528, 555 (1985) (“[T]he national political process systematically protects states from the risk of having their functions . . . handicapped by Commerce Clause regulations.”); *Presault v. ICC*, 494 U.S. 1, 17 (1990) (“[W]e must defer to a congressional finding that a regulated activity affects interstate commerce.”).

demonstrate a potential shift in the highest court's Commerce Clause jurisprudence, which may weaken ESA's defense against Commerce Clause scrutiny.

In 1995, the Supreme Court decided *United States v. Lopez*,<sup>60</sup> with *United States v. Morrison* following five years later.<sup>61</sup> Together, these two cases mark a departure from the Court's deference to Congress in its interpretation of the extent of its Commerce Clause powers. Both cases dealt with acts passed by Congress that, respectively, federally criminalized the possession of a firearm within a school zone<sup>62</sup> and provided a federal civil remedy for victims of gender based violence.<sup>63</sup> These decisions, both of which were authored by Chief Justice Rehnquist, determined that Congress had exceeded its constitutional reach under the Commerce Clause in enacting the legislation.<sup>64</sup> Furthermore, in both cases the Court concluded that the questioned legislation failed to meet the Court's test of substantially affecting commerce<sup>65</sup> primarily because the legislation did not deal with an economic activity,<sup>66</sup> a point reemphasized in the *Morrison* decision.<sup>67</sup> In both opinions, Chief Justice Rehnquist characterized the statutes as products of a Congress in the historical moment of exercising "considerably greater latitude in regulating conduct and transactions under the Commerce Clause than . . . previous case law permitted."<sup>68</sup>

In determining that the activity in question in *Lopez* did not substantially affect interstate commerce, the Court established a set of factors to more fully articulate the substantial effects test. The *Lopez* substantial effects test involves determining whether the questioned activity is economic in nature,<sup>69</sup> whether it contains an "express jurisdictional element which might limit its reach to . . . an explicit connection with or effect on interstate commerce,"<sup>70</sup> and

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60. 514 U.S. 549 (1995).

61. 529 U.S. 598 (2000).

62. *Lopez*, 514 U.S. at 551.

63. *Morrison*, 529 U.S. at 601-02.

64. *Lopez*, 514 U.S. at 552; *Morrison*, 529 U.S. at 602.

65. *Lopez*, 514 U.S. at 552; *Morrison*, 529 U.S. at 602.

66. *Lopez*, 514 U.S. at 561; *Morrison*, 529 U.S. at 613.

67. *Morrison*, 529 U.S. at 615; see also Jacalyn R. Fleming, Comment, *The Scope of Federal Authority Under the Endangered Species Act: Implications for Local Land Use Planning*, 65 ALB. L. REV. 497, 506 (2001).

68. *Morrison*, 529 U.S. at 608; see also *Lopez*, 514 U.S. at 556.

69. *Lopez*, 514 U.S. at 561.

70. *Id.* at 562.

whether the legislative history demonstrates that Congress discovered a connection to interstate commerce.<sup>71</sup> Finally, the Court also recognized that the complexity of society connects every activity, in some way, to interstate activity. Therefore, the question becomes not whether there is a connection to interstate commerce, but to what degree.<sup>72</sup> These factors are now examined in each and every judicial determination of the constitutionality of congressional action based on Commerce Clause authority.<sup>73</sup>

The third case that may weaken ESA against Commerce Clause challenges is actually neither an ESA case nor a Commerce Clause case. In 2001, the Supreme Court issued its decision in *Solid Waste Agency v. Army Corps of Engineers* (“SWANCC”),<sup>74</sup> a case that challenged the Army Corps of Engineers as having overstepped the bounds established by Congress in the Clean Water Act (“CWA”). In this case, petitioners argued that the Army Corps’ CWA jurisdiction, which enables the Corps to require and issue permits for the dumping of dredge and fill materials into “navigable waters,”<sup>75</sup> did not extend to “an abandoned sand and gravel pit,”<sup>76</sup> which had subsequently filled with water and which petitioners had purchased for the dumping of solid waste. The Corps argued that they did have CWA jurisdiction because of the Corps’ “Migratory Bird Rule,” a promulgated regulation interpreting the CWA as extending to cover intrastate waters used by migratory birds.<sup>77</sup>

The case hinged upon the interpretation of “navigable waters,” the term used in the Clean Water Act to define jurisdiction. In the majority opinion authored by Chief Justice Rehnquist, the Court acknowledged that the term “navigable” need not be strictly interpreted, and it was Congress’ intention that CWA should apply to some waters that may not be technically navigable, such as non-navigable tributaries to navigable waters.<sup>78</sup> Although the Court argued that the Corps was not limited to a strict definition of the

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71. *Id.*

72. *Id.* at 566-67.

73. Sara D. Van Loh, *The Latest and Greatest Commerce Clause Challenges to the Endangered Species Act: Rancho Viejo and GDF Realty*, 31 *ECOLOGY L.Q.* 459, 464-65 (2004).

74. 531 U.S. 159 (2001).

75. 33 U.S.C. § 1344(a) (2000).

76. *SWANCC*, 531 U.S. at 162.

77. *Id.* at 164.

78. *Id.* at 172; *see also* *United States v. Riverside Bayview Homes*, 474 U.S. 121 (1985).

word, the Court also pointed out that “it is one thing to give a word limited effect and quite another to give it no effect whatever.”<sup>79</sup>

To determine the accuracy of the Corps’ statutory interpretation, the Court turned to its own Commerce Clause jurisprudence, declaring that when “an administrative interpretation of a statute invokes the outer limits of Congress’ power, we expect a clear indication that Congress intended that result.”<sup>80</sup> Citing its own recent *Lopez* and *Morrison* decisions, the Court evaluated the Corps’ claim that “the ‘Migratory Bird Rule’ falls within Congress’ power to regulate intrastate activities that ‘substantially affect’ interstate commerce.”<sup>81</sup> While not answering definitively whether migratory birds have a substantial nexus with interstate commerce, the Court stated that the “arguments raise significant constitutional questions.”<sup>82</sup> Therefore, while the Court did not answer whether the protection of various types of species would pass Commerce Clause muster, it may have tipped its hand by declaring such issues to be, at least, at the “outer limits of Congress’ power.”<sup>83</sup>

Despite the evolution of Supreme Court Commerce Clause jurisprudence to a state of increased scrutiny of Congress’ commerce power, ESA has not been weakened in the courts by Commerce Clause challenges. The primary reason is that the Supreme Court has not heard any Commerce Clause challenges to ESA. Lower federal courts have, however, heard such challenges, and have ruled that various applications of ESA are not only within Congress’ Commerce Clause power, but are also consistent with the *Lopez* and *Morrison* decisions.

Shortly after *Lopez*, the Court of Appeals for the D.C. Circuit heard *National Ass’n of Home Builders* (“NAHB”) v. *Babbitt*,<sup>84</sup> a case brought by the County of San Bernardino, CA, against the FWS. The County challenged the constitutionality of hospital construction requirements meant to protect the endangered Delhi Sands Flower-Loving Fly. While there were some disagreements between the

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79. *SWANCC*, 531 U.S. at 172.

80. *Id.*

81. *Id.* at 173.

82. *Id.*

83. *Id.* at 172.

84. 130 F.3d 1041 (D.C. Cir. 1997).

majority and concurring opinions,<sup>85</sup> a concise argument upholding ESA against the Commerce Clause challenge remained.

Most significant was the conclusion that ESA satisfied the substantial effects test. The D.C. Circuit Court first looked to the congressional record of the Act, which was not available to the Court in *Lopez*, and determined that Congress had envisioned a connection between the preservation of genetic diversity and interstate commerce.<sup>86</sup> This satisfied one of the factors that the *Lopez* decision established for the substantial effects test, but a rational basis for Congress' decision was still needed to consider the actions constitutional. The D.C. Circuit Court argued that Congress could regulate the taking of endangered species "as an activity that substantially affects interstate commerce because it is the product of destructive interstate competition, . . . [which] Congress is empowered to act to prevent."<sup>87</sup> To further satisfy the *Lopez* criteria for the substantial effects test, a footnote pointed out the jurisdictional limit to ESA, stating that the Act only "prevents activities that are likely to cause the elimination of species."<sup>88</sup> All of these factors were used together by the D.C. Circuit Court to hold the challenged enforcement of ESA consistent with the substantial effects test. According to Jacalyn R. Fleming, "[t]his was a reasonable interpretation of *Lopez*. However, since *Morrison*, [which further emphasized the need for an activity to be economic in nature to satisfy the substantial effects test,] the argument that the activity being regulated need not be economic in nature is more difficult to make."<sup>89</sup>

Faced with the Supreme Court's reiteration of the economic components of its substantial effects test, lower courts continued to find enforcement of ESA to be constitutional by focusing on the economic and commercial nature of the protection of endangered species. Shortly after the *Morrison* decision, the Fourth Circuit Court

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85. For example, the majority opinion found the Act protected the channels of interstate commerce (*id.* at 1046), whereas the concurring opinion did not. *Compare id.* at 1048, *with id.* at 1058. Furthermore, the majority opinion considered endangered species as "potential resources." *Id.* at 1051. However, the concurring opinion considers this "incalculable." *Id.* at 1058. For a full conversation on the various opinions in *Nat'l Ass'n of Home Builders*, see Fleming, *supra* note 67, at 406.

86. *Nat'l Ass'n of Home Builders*, 130 F.3d at 1051.

87. *Id.* at 1054.

88. *Id.* at 1052.

89. Fleming, *supra* note 67, at 511.

of Appeals heard *Gibbs v. Babbitt*,<sup>90</sup> which involved a FWS regulation limiting the taking of endangered red wolves on private land. In considering whether the challenged regulations substantially affected interstate commerce, the Fourth Circuit Court expansively read the economic requirements of *Lopez* and *Morrison*. As the court noted, “[a]lthough the connection to economic or commercial activity plays a central role in whether a regulation will be upheld under the Commerce Clause, economic activity must be understood in broad terms.”<sup>91</sup> This reading was seen as consistent with *Lopez* and *Morrison* because the activities in those cases were only tenuously related to economic activity and were in areas traditionally reserved for states’ police powers.<sup>92</sup> With this reading of the substantial effects test, the Fourth Circuit Court found a plain and direct relationship between the protection of red wolves and commercial activity: Farmers were shooting wolves for economic reasons (protecting livestock), and activities such as tourism, research, and the pelt trade are directly connected to the wolves.<sup>93</sup>

More recently, two federal appellate decisions, *Rancho Viejo v. Norton*<sup>94</sup> and *GDF Realty Investments, Ltd. v. Norton*,<sup>95</sup> argued before the Courts of Appeals for the D.C. District and the Fifth Circuit, respectively, further challenged the constitutionality of the application of ESA to intrastate species. In *Rancho Viejo*, the protection of the endangered arroyo southwestern toad by FWS conflicted with a proposed real estate development. “Rather than accept an alternative plan proposed by the Service, Rancho Viejo filed suit challenging the application of the Endangered Species Act . . . to its project as an unconstitutional exercise of federal authority under the Commerce Clause.”<sup>96</sup> Likewise, the *GDF Realty* conflict involved development plans hampered by the presence of endangered species—six species of cave dwelling invertebrates.<sup>97</sup> Instead of denying outright the incidental take permits for which the petitioners applied, FWS communicated to the petitioners that the

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90. 214 F.3d 483 (4th Cir. 2000).

91. *Id.* at 491.

92. *Id.*

93. *Id.* at 492.

94. 323 F.3d 1062 (D.C. Cir. 2003).

95. 326 F.3d 622 (5th Cir. 2003).

96. *Ranch Viejo*, 323 F.3d at 1064.

97. *GDF Realty*, 326 F.3d at 625 (referring to the Bee Creek Cave Harvestman, the Bone Creek Harvestman, the Tooth Cave Pseudoscorpion, the Tooth Cave Spider, the Tooth Cave Ground Beetle, and the Kretschmarr Cave Mold Beetle).

proposed development would result in a take, and the permits would be denied. However, no denials were ever issued, effectively preventing petitioners from challenging FWS permit denials.<sup>98</sup> After being compelled by a district court ruling to either issue the denials or state alternatives that would allow the permits to be granted,<sup>99</sup> FWS denied the permits and, subsequently, GDF Realty challenged the constitutionality of those actions.<sup>100</sup>

In both cases, lower court decisions stating that the application of ESA to intrastate species is within the bounds of Congress' Commerce Clause powers were affirmed.<sup>101</sup> Interestingly, "the courts used very different rationales in coming to their conclusions—the Fifth Circuit explicitly rejected the reasoning used by the D.C. Circuit. The key distinction between the courts' rationales is their diverging definitions of the 'regulated activity' for the purposes of ascertaining the impact on interstate commerce."<sup>102</sup>

In *Rancho Viejo*, the D.C. Circuit Court defined the activity regulated by ESA in this instance to be the actual construction of the housing development, which the court further described as a clearly economic enterprise. Thus, the *Lopez* emphasis on economic activities being more suitable for the substantial effects test was satisfied.<sup>103</sup> The D.C. Circuit Court found neither a jurisdictional element to ESA, nor congressional findings connecting housing development construction to interstate commerce. The court, however, declared that these factors, when absent, are not fatal to a substantial effects argument.<sup>104</sup> The more than attenuated relationship between interstate commerce and commercial development provided the court a rational basis to accept the existence of such a relationship.<sup>105</sup>

In contrast, the Fifth Circuit declared that the regulated activity "is plaintiffs' alleged take of the Cave Species *by their planned development of the Property*."<sup>106</sup> While the court recognized the essential connection between the construction of the proposed

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98. *Id.* at 626.

99. *GDF Realty, Ltd. v. United States*, No. 98-CV-772 (W.D. Tex. 1998).

100. *GDF Realty*, 326 F.3d at 626.

101. *Id.* at 624; *Rancho Viejo*, 323 F.3d at 1064.

102. Van Loh, *supra* note 73, at 461-62.

103. *Rancho Viejo*, 323 F.3d at 1068.

104. *Id.* at 1068-69.

105. *Id.* at 1069-70.

106. *GDF Realty*, 326 F.3d at 633 (emphasis added).

development and subsequent taking of endangered species, the court specified that, although “the *effect* of regulation of ESA takes may be to prohibit such development . . . , Congress, through ESA, is not directly regulating commercial development.”<sup>107</sup>

The Fifth Circuit provided two arguments to justify its decision to treat the taking of cave species as the regulated activity, as opposed to the actual development of the habitat. First, the court argued that classifying the commercial development of the property as the regulated activity, “would ‘effectually obliterate’ the limiting purpose of the Commerce Clause.”<sup>108</sup> Given the clearly economic nature of real estate development, such an interpretation would enable Congress to “pile inference upon inference”<sup>109</sup> and infinitely extend its constitutional power, resulting in a jurisprudence under which the facial challenges in *Lopez* and *Morrison* would fail.<sup>110</sup> Second, the court was concerned that such an analysis would establish a strict foundation of congressional authority over commercial actors, while leaving noncommercial actors unaffected.<sup>111</sup> This would be inconsistent with Congress’ intent in ESA, an act that protects endangered species from commercial and noncommercial activities, such as “a homeowner clearing brush from her property . . . [or a] lone hiker in the woods who may inadvertently harm an endangered species.”<sup>112</sup>

In arguing that the direct regulation of the taking of endangered species substantially affects interstate commerce, the Fifth Circuit provided both direct and indirect effects. Regarding direct effects on interstate commerce, the court argued that a substantial degree of interstate travel of research scientist exists for these species, but found claims for the possibility of future economic use of these species to be too hypothetical and too attenuated.<sup>113</sup> Although the cave species have no commercial value,<sup>114</sup> the taking of the cave species would indirectly, but substantially, affect interstate commerce when one considers the aggregate of such a taking with all other such

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107. *Id.* at 634.

108. *Id.* (citing *Nat’l Labor Relations Bd. v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 36 (1937)).

109. *United States v. Lopez*, 514 U.S. 549, 567 (1995).

110. *GDF Realty*, 326 F.3d at 635.

111. *Id.* at 634.

112. Van Loh, *supra* note 73, at 480.

113. *GDF Realty*, 326 F.3d at 637-38.

114. *Id.* at 625.



takings. ESA, as a whole, is economic in nature, given Congress' substantial concern with the commercial impacts, among others, of species extinction.<sup>115</sup> The regulation of even commercially valueless species is an essential component of that regulatory scheme, because the role such species play ecologically is key to ESA's central concern for ecosystem health.<sup>116</sup> For this reason, the Fifth Circuit argued that the regulation of the taking of the cave species passed Commerce Clause muster.

The Supreme Court has not evaluated Commerce Clause challenges to ESA, either facially or as pertaining to specific instances of its implementation. Defenders of ESA may consider this a victory by default, albeit a temporary one. However, even in an atmosphere of heightened scrutiny for acts of Congress, lower courts have been quite reluctant to rule that the regulation of endangered species is outside of Congress' constitutional authority under the Commerce Clause. While dissenting opinions were issued in *NAHB* and *Gibbs*, those dissents focused on a perceived lack of a connection between interstate commerce and the specific challenged activities, but still allowed for an "obvious economic character and impact . . . with other wildlife resources."<sup>117</sup> The lower courts' reluctance to declare the enforcement of ESA unconstitutional on Commerce Clause grounds should neither be overstated nor guaranteed, as more Commerce Clause challenges continue to be heard in lower courts.<sup>118</sup>

However, the grounds of precedence may not be as frozen as often perceived. The Supreme Court, despite issuing in a new era of heightened scrutiny, has demonstrated a willingness to strongly construct federal commerce power against state power, even in policy areas frequently considered as traditional state powers.<sup>119</sup> Furthermore, a judicial environment full of precedence supporting ESA against Commerce Clause challenges may direct challengers to other avenues perceived as more inviting to challenges to ESA.

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115. *Id.* at 639.

116. *Id.* at 640.

117. *Gibbs v. Babbitt*, 214 F.3d 483, 508 (4th Cir. 2000); *see also* Fleming, *supra* note 67, at 512-14, 518.

118. *See, e.g., Drake v. Norton*, No. 04-CV-01147 (C.D. Utah 2004) (case dismissed Oct. 28, 2005).

119. *See, e.g., Granholm v. Heald*, 544 U.S. 460 (2005) (declaring that state laws prohibiting the direct sale of wine from out of state producers violate the Commerce Clause and the Webb-Kenyon Act); *Gonzales v. Raich*, 125 S.Ct. 2195 (2005) (declaring the Commerce Clause enables Congress to outlaw production of medical marijuana even where state law allows it).

#### IV. JURISPRUDENCE OF REGULATORY TAKINGS

The origins of regulatory takings lie in the Fifth Amendment protection of property rights, which prohibits “private property be[ing] taken for public use, without just compensation.”<sup>120</sup> This constitutional protection clearly requires compensation when the government uses its eminent domain powers to physically seize private property for public use. However, the Amendment has been increasingly interpreted to include nonphysical takings of property, where regulations leave property in the hands of the owner but either remove economic value or particular types of property rights.

When a property owner believes that such regulations have basically taken his or her property, the owner can argue that the government action does not properly serve a public purpose, is not rationally related to the government’s stated ends, imposes an unfair private burden in the achievement of such public ends, and/or has not satisfied basic procedural requirements.<sup>121</sup> In such instances, the owner should be compensated for his or her loss. With the high incidence of endangered species on private lands and the often high level of costs needed to protect such species, the potential for conflicts between the enforcement of ESA and private property rights is rather great.<sup>122</sup> While “the legal tests of validity and invalidity are indeed not clear,”<sup>123</sup> an overview of the Supreme Court’s self-admittedly inconsistent regulatory takings jurisprudence<sup>124</sup> is possible and can help put that potential into perspective.

Although the ability of property owners to seek compensation for government intrusion upon their property dates as far back as the Bill of Rights, such litigation has been rare throughout the majority of American history. Indeed, “[f]ew cases were litigated under the clause, and there was no such thing as a ‘regulatory taking’ . . . although state and local governments had been regulating private land uses, sometimes quite stringently, since the colonial era.”<sup>125</sup> In the rare occurrence of a regulatory taking claim, early federal courts were unwilling to engage in judicial review under the Fifth

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120. U.S. CONST. amend. V.

121. PLATER ET AL., *supra* note 6, at 1037-38.

122. Robert Innes et al., *Takings, Compensation and Endangered Species Protection on Private Lands*, 12 J. ECON. PERSP. 35-52 (1998).

123. PLATER ET AL., *supra* note 6, at 1051.

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

125. DANIEL H. COLE, POLLUTION AND PROPERTY: COMPARING OWNERSHIP INSTITUTIONS FOR ENVIRONMENTAL PROTECTION 155 (2002) (citations omitted).

Amendment. In 1887, a Kansas statute prohibiting the production of alcohol was challenged before the Supreme Court as a taking of private property.<sup>126</sup> Although the Court emphasized that such a remedy should be sought in the state courts,<sup>127</sup> the Court also declared that the “right to compensation . . . of private property taken for public uses is foreign to the subject of preventing or abating public nuisances.”<sup>128</sup> The earliest regulatory takings cases also demonstrate an acknowledgement of the limits of private property and a recognition of a nuisance exception to the takings clause.

The Supreme Court’s first effort at qualifying the nuisance exception occurred in *Pennsylvania Coal v. Mahon*<sup>129</sup> in 1922. This decision declared that the Kohler Act, a Pennsylvania statute requiring coal companies to leave enough coal as not to threaten the surface structure, constituted a compensable taking. Takings jurisprudence would henceforth be seen as a balancing act focusing on the “extent of the diminution.”<sup>130</sup> While still providing nothing more than vague generalities, *Pennsylvania Coal* established the regulatory takings framework under which future conflicts would be fought. “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.”<sup>131</sup>

Although the Supreme Court continues to recognize the simultaneous claims of property owners to their property rights and governments to their need to regulate property, the Court has articulated tests to measure this balance more specifically than simply asking whether the state has “gone too far.” After seeing its regulatory takings jurisprudence as being based on “essentially *ad hoc*, factual inquiries,”<sup>132</sup> the Court declared that it had historically “been unable to develop any ‘set formula’ for determining when ‘justice and fairness’ require that economic injuries caused by public action be compensated by the government, rather than remain disproportionately concentrated on a few persons.”<sup>133</sup>

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126. *Mugler v. Kansas*, 123 U.S. 623 (1887).

127. *Id.* at 672.

128. *St. Louis v. Stern*, 3 Mo. App. 48, 53 (Mo. Ct. App. 1876); *Mugler*, 123 U.S. at 667.

129. 260 U.S. 393 (1922).

130. *Id.* at 413.

131. *Id.* at 415 (emphasis added).

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

133. *Id.* See also *Kaiser Aetna v. United States*, 444 U.S. 164, 175 (1979).

The Court, therefore, established the three-pronged *Penn Central* test: Whether government action constitutes a compensable taking depends on (1) the economic impact of the regulation, (2) its interference with investment-backed expectations, and (3) the nature of the government's action, ranging from outright invasion to protection of the common good.<sup>134</sup> These tests are, of course, heavily dependent upon interpretation and have given the Court ample opportunity to produce rulings with a high degree of variance:

First, the Court has defined each factor in a variety of ways, without acknowledging the shifts in definition. Second, it is difficult to predict what weight the Court will give to each factor. At different times the Court has actually regarded each one of these so-called "factors" as dispositive of whether a taking occurred.<sup>135</sup>

Two years after establishing its *Penn Central* test, the Court established a new, two-pronged takings test, referred to as the *Agins* test.<sup>136</sup> This test required the state to "substantially advance legitimate state interests" and to not "den[y] an owner economically viable use of his land."<sup>137</sup> The purpose of this new test and its relationship to *Penn Central* was not clarified, and subsequent use of the test failed to establish a proper interpretation of both parts of the *Agins* test and their relationship to one another.<sup>138</sup> Furthermore, the Court demonstrated confusion regarding the priority of each test over the other.

In a series of cases heard in the 1980s, the Court considered whether a number of property limiting regulations affected takings. In 1981, the Supreme Court evaluated a facial challenge to the constitutionality of the Surface Mining Control and Reclamation Act of 1977.<sup>139</sup> In determining whether environmental regulations that limited the extent of coal mining essentially took property from owners of coal mineral rights, the Court used the *Agins* test, asking whether the "economically viable use" of the land is denied to the owner.<sup>140</sup> Additionally, in a partial dissent in *Pennell v. City of San Jose*, Justice Scalia argued that the *Agins* test should be used to find a

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134. *Penn Cent. Transp. Co.*, 438 U.S. at 124.

135. Andrea L. Peterson, *The Takings Clause: In Search of Underlying Principles, Part I—A Critique of Current Takings Clause Doctrine*, 77 CAL. L. REV. 1301, 1317 (1989).

136. *Agins v. Tiburon*, 447 U.S. 255 (1980).

137. *Id.* at 260.

138. Peterson, *supra* note 135, at 1328-30.

139. *See Hodel v. Va. Surface Mining & Reclamation Ass'n*, 452 U.S. 264, 295 (1981).

140. *Id.* at 296.

taking in certain rent control ordinances.<sup>141</sup> However, in cases dealing with zoning ordinances<sup>142</sup> and pesticide data disclosure,<sup>143</sup> the Court relied on *Penn Central*.

Despite such inconsistencies, certain trends are evident in this period of regulatory takings jurisprudence. The most obvious trend is a strong spirit of judicial deference to lawmaking bodies when determining whether a regulation or statute provides a public use, an inquiry required by both the Fifth Amendment and the first prong of the *Agins* test. While determining whether the regulation of private property satisfied the public use requirement, the Court regarded the term “public use” as coterminous with state police powers, and deferred to the reasoning of state legislatures as better able to determine whether such a requirement has been met.<sup>144</sup> The Court further demonstrated a strong commitment to the ripeness standard, requiring that cases demonstrate a “concrete controversy.”<sup>145</sup> In addition, property owners were required to receive a final decision from the agency and seek a possible variance to the regulation, which would allow the public good to be sought while leaving the property owner with economic productivity.<sup>146</sup> One consequence of the Court’s focus on ripeness in regulatory takings cases is that the strategic use of the Takings Clause as the foundation for constitutional challenges to entire pieces of regulation has not been successful.

Victories have been achieved lately, however, at the Supreme Court level by advocates of strong private property rights. With these victories comes a jurisprudential shift in regulatory takings cases visible in four areas: (1) the level of judicial deference, (2) the role of economics, (3) the understanding of the nature of property, and (4) the degree of scrutiny applied to questions of ripeness. This string of recent cases, beginning in the late 1980s, has been argued in an atmosphere less deferential to state legislatures and agencies, which seek to create and enforce policies that limit the use of private property.

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141. 485 U.S. 1, 18 (1988).

142. *See, e.g.,* Williamson County Planning Comm’n v. Hamilton Bank, 473 U.S. 172, 191 (1985); MacDonald, Sommer & Frates v. Yolo County, 477 U.S. 340, 349 (1986).

143. *See, e.g.,* Ruckelshaus v. Monsanto Co., 467 U.S. 986, 1005 (1984).

144. *See, e.g.,* Haw. Hous. Auth. v. Midkiff, 467 U.S. 229, 240 (1984); *Ruckelshaus*, 467 U.S. at 1014.

145. *Hodel*, 452 U.S. at 295; *see also Pennell*, 485 U.S. at 10.

146. *See Williamson County*, 473 U.S. at 186; *MacDonald*, 477 U.S. at 348.

In 1987, the Court considered whether a requirement by the California Coastal Commission that a specific property owner provide lateral beach access as a condition to a building permit for a parcel of beachfront property affected a taking.<sup>147</sup> Instead of interpreting the Commission's discretion as coterminous with its power to protect the common good in coastal land, the Court evaluated the wisdom of the Commission's policy, and determined that a lateral easement served neither the function of beach access nor the elimination of psychological barriers to such access, as claimed by the Commission.<sup>148</sup>

Five years later, the Court would provide a clear justification for its willingness to second guess the policy decisions of legislatures and agencies when those decisions limit a property owner's use of his or her property.<sup>149</sup> Such limits are generally justified as serving not only a public purpose, but also the essential purpose of preventing harm to the public and its property. The Court argued, however, that "[s]ince such a justification can be formulated in practically every case, this amounts to a test of whether the legislature has a stupid staff."<sup>150</sup> Therefore, the Supreme Court has taken on the self-imposed responsibility of doing "more than insist upon artful harm-preventing characterizations."<sup>151</sup>

Although the Court became decidedly less likely to facially accept a state's argument that it was preventing a public harm and, therefore, was not constitutionally required to compensate the property owner, this did not mean that states were prohibited entirely from such actions. The Court continues to recognize the limited nature of property rights, and further recognizes uncompensated limits can be placed upon property "if the logically antecedent inquiry into the nature of the owner's estate shows that the proscribed use interests were not part of his title to begin with."<sup>152</sup> In other words, the right to endanger the public is not part of the bundle of rights in a specific piece of property; therefore, when such action is regulated away, property owners deserve no compensation, because what was taken was not the property owner's in the first place.

The recent willingness of the Supreme Court to limit property by such means, however, should not be overstated. The Court has stated

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147. *Nollan v. Cal. Coastal Comm'n*, 483 U.S. 825 (1987).

148. *Id.* at 839-40.

149. *See Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1029 (1992).

150. *Id.* at 1025, n.12.

151. *Id.*

152. *Id.* at 1027.

that “[a]ny limitation so severe cannot be newly legislated or decreed (without compensation), but must inhere in the title itself, in the restrictions that background principles of the State’s law of property and nuisance already place upon land ownership.”<sup>153</sup> In addition to limiting the nature of harms legislatures and agencies can declare, the Court also established standards by which policies aimed at protecting the public from such harms could limit property rights.<sup>154</sup> While prior decisions looked for a rational basis to justify policies that limit private property, the *Dolan* Court introduced a stricter scrutiny for evaluating such policies.<sup>155</sup> Short of supplying a precise mathematical calculation, the Court now requires a policy to demonstrate a “rough proportionality” between the nature of the prevented harm and the extent of the requirements placed upon property owners.<sup>156</sup>

Increased scrutiny placed upon governments and their ability to limit the use of private property is indicative of a Court that has shifted its understanding of the nature of property and increased the significance of economic factors within that understanding. While the *Penn Central* and *Agins* tests stress both economic factors and the nature of regulatory action, including that which is regulated and the manner in which it is regulated, the Rehnquist Court increased the emphasis on the economic impacts of regulation in determining the existence of a regulatory taking, much in the way that it increased its emphasis on the economic nature of legislation in its Commerce Clause jurisprudence.<sup>157</sup>

In *Lucas v. South Carolina Coastal Council*, the Court took a step toward clarifying the relationship between economic and noneconomic factors in regulatory takings cases.<sup>158</sup> While property rights remain limited in the face of background principles of the common good, a *per se* taking occurs when regulation deprives the owner of all economically viable uses of the property.<sup>159</sup> The Court was particularly interested in protecting property in land, arguing that the “historical compact recorded in the Takings Clause that has become part of our constitutional culture” is inconsistent with the

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153. *Id.* at 1029.

154. *Id.* at 1027.

155. *Dolan v. City of Tigard*, 512 U.S. 374, 390 (1994).

156. *Id.* at 391.

157. *Morrison*, 529 U.S. at 615.

158. *See Lucas*, 505 U.S. at 1027-30.

159. *Id.* at 1020.

elimination by regulation of all economic value,<sup>160</sup> that is, without compensation.

The Court does give examples of land uses that could be legally prohibited, even to the point of a total economic loss, which would not require compensation.<sup>161</sup> Such regulations limit the use of property to those uses that do not harm others or their property and simply “make the implication of those background principles of nuisance and property law explicit.”<sup>162</sup> As stated above, however, such limitations on property cannot be “newly legislated,”<sup>163</sup> leaving it unclear how a legislature can make background principles explicit, while also strengthening takings claims by property owners who can demonstrate a complete economic loss.

This increased focus on the role of economic factors in regulatory takings cases is correlated with a shift in the Court’s doctrine on the nature of property. Throughout the history of its regulatory takings jurisprudence, the Court has sought the balancing of private property rights and public interests. One of the most significant facets of property rights considered by the Court is the right to exclude others, which the Court has regarded as “one of the most essential sticks in the bundle of rights that are commonly characterized as property.”<sup>164</sup> In cases involving outright physical occupation, the Court has generally required the use of the states’ eminent domain powers and the compensation of property owners.<sup>165</sup> In cases involving transition across private property, instead of physical occupation on such property, to guarantee public access to some public good, the private property right has been weighted more heavily by the Court in recent decisions.<sup>166</sup> Furthermore, the Court has regarded development as land’s “essential use,”<sup>167</sup> requiring governments to provide stronger defenses for public and environmental protections.

During the aforementioned period of judicial deference in regulatory takings cases, the chronological order of the acquisition of property and the imposition of a regulatory limit on the use of

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160. *Id.* at 1028.

161. *Id.* at 1029.

162. *Id.* at 1030.

163. *Id.* at 1029.

164. *Kaiser Aetna v. United States*, 444 U.S. 164, 176 (1979).

165. *See id.* *See also* *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982).

166. *See* *Nollan v. Cal. Coastal Comm’n*, 483 U.S. 825, 831 (1987); *Dolan v. City of Tigard*, 512 U.S. 374, 383 (1994).

167. *Lucas*, 505 U.S. at 1031 (quoting *Curtin v. Benson*, 222 U.S. 78, 86 (1911)).



property affected the legitimacy of a taking claim. Acquiring property under pre-existing regulations was generally understood as preventing the owner from having reasonable investment-backed expectations.<sup>168</sup> This so-called “notice rule” functions to define the background principals of property alluded to in *Lucas* by claiming that, “the underlying background principles of property must include all existing regulatory constraints at the time of acquisition.”<sup>169</sup>

Under such jurisprudence, property rights are positive rights, with origins in political processes, and the Takings Clause exists as a foundational law that governs the further maintenance of those rights. This position, however, has been recently challenged by the Court, which has stated that if the notice rule exception is seen as absolute, then “the postenactment transfer of title would absolve the State of its obligation to defend any action restricting land use, no matter how extreme or unreasonable [and a] State would be allowed, in effect, to put an expiration date on the Takings Clause.”<sup>170</sup> By explicitly rejecting a Hobbesian understanding of the relationship between the state and property, and accepting a Lockean construction,<sup>171</sup> the Court has placed property rights into the realm of natural rights, which exist independent of and prior to the state.

It should be stated that the majority in *Palazzolo*, in keeping the seemingly required ambiguity found throughout regulatory takings jurisprudence, provided confusion over the role of the notice rule in a pair of concurring opinions. While the majority determined that *Palazzolo*’s acquisition of the property after the regulations had been enacted did not proscribe his taking claim, Justices Scalia and O’Connor disagreed as to the role of chronology more generally. Justice Scalia argued that timing has no bearing on the question, claiming that “[a] *Penn Central* taking . . . is not absolved by the transfer of title.”<sup>172</sup> While Justice O’Connor agrees that post-enactment acquisition of title is “not talismanic under *Penn Central*,”<sup>173</sup> she did not appear ready to fully reject the notice rule, arguing that “the regulatory regime in place at the time the claimant

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168. See *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 1006 (1984).

169. James S. Burling, *Private Property Rights and the Environment After Palazzolo*, 30 B.C. ENVTL. AFF. L. REV. 1, 31 (2002).

170. *Palazzolo v. Rhode Island*, 533 U.S. 606, 627 (2001).

171. *Id.*

172. *Id.* at 637 (Scalia, J., concurring).

173. *Id.* at 634 (O’Connor, J., concurring).

acquires the property at issue helps to shape the reasonableness of [investment-backed] expectations.”<sup>174</sup>

Finally, rulings in regulatory takings cases by the Rehnquist Court have potentially altered the environment in which the Court considers the question of ripeness, or whether a case is ready for review. The jurisprudence of regulatory takings demonstrates a tendency of the judiciary to view itself as a last resort to resolving takings questions, preferring to allow other branches of government to resolve the issue first. Prior ripeness decisions by the Court have supported this view, requiring that a taking claimant demonstrate a concrete controversy<sup>175</sup> and a final administrative decision, exhausting alternative options,<sup>176</sup> before the case can be judicially decided on the merits. By and large, these same rules and requirements have remained as guidelines for the current Court, and were used to declare *Palazzolo* ripe, since “the government entity charged with implementing the regulations [had] reached a final decision regarding the application of the regulations to the property at issue.”<sup>177</sup> Furthermore, subsequent plan filing was not required, according to the Court, because the “unequivocal nature” of the wetlands regulations would not have permitted any building in the disputed area.<sup>178</sup>

Some view the *Palazzolo* decision as a shift in the Court’s ripeness jurisprudence that benefits regulatory taking claimants, noting “that once a landowner has a meaningful permit application denied, the burden shifts to the government to indicate what, if any, other uses of the property may be available.”<sup>179</sup> There is little evidence supporting this position, however, and the Court’s focus on the state’s strict regulations, with little administrative leeway, makes *Palazzolo* a “specific ripeness ruling [which] is tied to the facts of the case and is thus unlikely to have much precedential effect adverse to government officials.”<sup>180</sup>

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174. *Id.* at 633 (O’Connor, J., concurring).

175. *See* *Hodel v. Va. Surface Mining & Reclamation Ass’n*, 452 U.S. 264, 295 (1981); *Pennell v. City of San Jose*, 485 U.S. 1, 10 (1988).

176. *See* *Williamson County Planning Comm’n v. Hamilton Bank*, 473 U.S. 172, 186 (1985); *MacDonald, Sommer & Frates v. Yolo County*, 477 U.S. 340, 348 (1986).

177. *Palazzolo v. Rhode Island*, 533 U.S. 606, 618 (2001) (quoting *Williamson County*, 473 U.S. at 186).

178. *Id.* at 619.

179. *Burling*, *supra* note 169, at 23.

180. Timothy J. Dowling, *On History, Takings Jurisprudence, and Palazzolo: A Reply to James Burling*, 30 B.C. ENVTL. AFF. L. REV. 65, 84 (2002).

The ruling in *Palazzolo* does not fundamentally alter the Court's ripeness jurisprudence. In fact, the Court "emphatically reaffirmed its existing ripeness doctrine as set forth in *Williamson County*, *MacDonald*, and other leading ripeness precedents."<sup>181</sup> Furthermore, the Court has subsequently defended its ripeness doctrine in light of claims of temporary takings. Historically, the Court has stated that temporary restrictions must involve "extraordinary delays" instead of "mere fluctuations" in value before the claim can achieve ripeness.<sup>182</sup> After *Palazzolo*, the Court ruled that even lengthy and complete building moratoria can be justified due to "[t]he interest in facilitating informed decisionmaking by regulatory agencies."<sup>183</sup> Therefore, despite shifts in the Court's regulatory takings jurisprudence that have placed stricter scrutiny upon governmental actions that seek to limit private property, the presence of a final administrative decision must still be present for a taking claim to be considered ripe. Nonetheless, one cannot ignore the majority's finding in *Palazzolo* that a final decision had been made. Neither can one ignore the voices of dissenting justices still on the bench in cases where such claims have been ruled not ripe.<sup>184</sup> While the rules of ripeness have not changed, there is clearly wide disagreement between the individual justices as to what level of agency action satisfies those rules, which makes the ripeness doctrine highly susceptible to even slight changes in justices' philosophies or the composition of the Court.

## V. REGULATORY TAKINGS CHALLENGES TO ESA

While Commerce Clause and regulatory takings challenges to ESA may functionally act in political concert seeking the same end—lessening the federal government's authority over endangered species protection—the legal arguments behind each challenge are fundamentally different. When a Commerce Clause challenge to ESA is made, plaintiffs argue that, in at least a particular instance, the enforcement of ESA is outside of the federal government's authority, which rests on Congress' power over interstate commerce. While

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181. *Id.*

182. *Agin v. Tiburon*, 447 U.S. 255, 263 (1980).

183. *Tahoe-Sierra Pres. Council v. Tahoe Reg'l Planning Agency*, 535 U.S. 302, 338 (2002).

184. See *MacDonald, Sommer & Frates v. Yolo County*, 477 U.S. 340 (1986) (Burger, C.J., and White, J., dissenting); *Pennell v. City of San Jose*, 485 U.S. 1 (1988) (Scalia & O'Connor, JJ., dissenting); *Tahoe-Sierra Pres. Council*, 535 U.S. 302 (Rehnquist, C.J., and Scalia & Thomas, JJ., dissenting).

plaintiffs making regulatory takings challenges against ESA may also question the government's authority to regulate endangered species, arguing that it fails to satisfy the public use requirement of the Fifth Amendment, the inability to make such an argument does not significantly damage the regulatory takings challenge. "At issue, then, is not whether the federal government has the authority to protect . . . [endangered species] under the Endangered Species Act, but whether it may impose the costs of their protection solely on plaintiffs."<sup>185</sup>

Since the focus of such cases centers simultaneously on the extent of the government's authority and the expense of an individual's property rights, different relationships between endangered species and property will invite different regulatory takings challenges. Such challenges have been made against the enforcement of ESA under three different types of relationships between endangered species and property: (1) species as property, (2) species as a threat to property, and (3) the regulation of property to protect endangered species. Such cases have been heard only before lower courts, not before the Supreme Court.

#### A. *Endangered Species as Property*

Since the ESA includes both "capture" and "collect" within its statutory definition of "take,"<sup>186</sup> one would assume that regulatory challenges involving endangered species as property would be rather rare. After all, legal prohibition of such ownership would establish an easily recognized background principle to ownership and diminish any reasonable investment-backed expectation. One would have to challenge for the right to own an endangered species before it could become property that was taken by regulation. If, however, the particular species was already owned prior to it being protected, then ESA extends only to limitations on its ownership, prohibiting such actions as keeping the species for commercial use<sup>187</sup> or subjecting the species to interstate commerce.<sup>188</sup>

In 1976, the Sixth Circuit Court of Appeals heard a case involving this rare set of circumstances. In *United States v. Kepler*,<sup>189</sup> the respondent challenged his arrest for transporting an endangered

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185. *Tulare Lake Basin Water Storage Dist. v. United States*, 49 Fed. Cl. 313, 318 (Fed. Cl. 2001).

186. 16 U.S.C. § 1532(19) (2000).

187. *Id.* § 1538(b)(1).

188. *Id.* § 1538(a)(1)(E).

189. 531 F.2d 796 (6th Cir. 1976).

leopard from Florida to Kentucky, as well as the subsequent seizure of the animal by the Department of the Interior. The respondent argued that ESA was unconstitutional because its prohibition of such an attempted sale had the effect of taking his property without just compensation.<sup>190</sup> In a *per curiam* decision, the Sixth Circuit Court pointed out that ESA does allow for the transportation and sale of endangered species, but only for acceptable scientific and ecological purposes, and if permits are obtained from the Secretary.<sup>191</sup> Kepler's actions did not qualify for this exception.<sup>192</sup> Furthermore, the court argued that ESA "does not effect an unconstitutional taking of property within the meaning of the Fifth Amendment because the statute does not prevent all sales of endangered wildlife, but only those sales in interstate or foreign commerce."<sup>193</sup> Since the court focused on the interstate nature of this particular case, "it is unclear whether the court would apply the same test to other scenarios—for instance, one involving only intrastate activity."<sup>194</sup> In the unlikely future event that an individual might own individual species at the time it is declared endangered, future courts might interpret ESA's prohibition against the ownership of animals for commercial purposes<sup>195</sup> as a deprivation of economically viable use and, therefore, a *per se* taking.<sup>196</sup>

### B. *Endangered Species as Threats to Property*

The ESA, together with a larger regulatory scheme intended for the protection of wildlife, makes the ownership of endangered species, and subsequent regulatory takings challenges to limits on that property, unlikely. Far more common are situations where a perceived conflict exists between the public's interest in the preservation of species and individual interest in a separate form of property. One such manifestation involves property owners protecting their property from species that the public has sought to protect. Historically, such conflicts have been quite common.

Prior to the enactment of ESA, several cases were litigated seeking compensation from the government for damages done to

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190. *Id.* at 796-97.

191. *Id.* at 797.

192. *Id.*

193. *Id.*

194. Fleming, *supra* note 67, at 528.

195. 16 U.S.C. § 1538(b) (2000).

196. *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1019 (1992).

private property by species protected by early federal wildlife statutes, such as the Migratory Bird Act,<sup>197</sup> or by state game laws.<sup>198</sup> The basic argument brought by property owners in such cases is generally that the action or inaction of a particular government entity has one or several consequences, including, but not limited to, failure to protect private property, creation of a property damaging nuisance, engagement in actions which result in foreseeable damages, damage caused by an entity which is owned by the government, and evasion of responsibility by the government through inaction.<sup>199</sup> Such arguments, however, are unpersuasive. The courts have ruled that the government is not responsible for compensating damages made to property by protected species. A strong precedence has been established by the courts: Since wildlife is not property, the government is not responsible for the actions taken by wild animals;<sup>200</sup> such actions are, in fact, “incidental to the state regulation;”<sup>201</sup> and legislatures make better judges of the efficacy of their wildlife programs, thus making them better suited to weigh the public benefits of wildlife protection against foreseeable property losses.<sup>202</sup>

Such precedence proved influential when claimants challenged ESA in federal court, arguing that protections for endangered species resulted in property owners not being able to protect their property and they should, therefore, be compensated for their losses. This was the argument in *Christy v. Hodel*, a case in which the Ninth Circuit Court of Appeals heard an argument that ESA regulations, aimed at protecting grizzly bears, prevented ranchers from protecting their sheep, thus resulting in a Fifth Amendment taking.<sup>203</sup> In its opinion, the court relied heavily on a decision from the Tenth Circuit two years earlier, *Mountain States Legal Foundation v. Hodel*.<sup>204</sup> This earlier case involved an argument similar to that in *Christy*, but focused on the potential property rights impact that implementation

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197. 16 U.S.C. § 703 (2000); *Sickman v. United States*, 184 F.2d 616 (7th Cir. 1950); *Bishop v. United States*, 126 F. Supp. 449 (Ct. Cl. 1954).

198. *Barrett v. New York*, 220 N.Y. 423 (N.Y. 1917) (challenged that state laws protecting beavers resulted in damage to wooded property); *Jordan v. Alaska*, 681 P.2d 346 (Alaska Ct. App. 1984) (challenged state game laws regarding bears resulted in a loss in property interest in a hunted moose carcass).

199. *Sickman*, 184 F.2d at 617-18.

200. *Barrett*, 220 N.Y. at 430; *Sickman*, 184 F.2d at 618.

201. *Jordan*, 681 P.2d at 350, n.3.

202. *Barrett*, 220 N.Y. at 427-28; *Bishop*, 126 F. Supp. at 452-53.

203. 857 F.2d 1324 (9th Cir. 1988).

204. 799 F.2d 1423 (10th Cir. 1986).

of the Wild Free-Roaming Horses and Burros Act of 1971<sup>205</sup> might impose on grazing interests. While *Mountain States* was not directly decided under ESA, it considers ESA and the Wild Horses Act to be analogous statutes.<sup>206</sup> Although the court acknowledges ESA to be “more pervasive, more sweeping, and more restrictive,”<sup>207</sup> the court’s analysis of the regulatory taking claim against the Wild Horses Act would still prove useful in *Christy*.<sup>208</sup>

In *Mountain States*, the standards and tests of regulatory takings cases were applied directly to regulatory actions designed to protect certain species—in this case, wild horses—that have caused damage to private property. Recognizing that “[t]here is no abstract or fixed point at which judicial intervention under the Takings Clause becomes appropriate,”<sup>209</sup> the court attempted to determine which direction the balance should lean between property rights in grazing access and public interest in wild horse protection. To do so, the court relied on both *Agins* and *Penn Central* criteria. To satisfy the *Agins* test, the court argued that the preservation of wild horses advances a legitimate state interest on aesthetic and biodiversity grounds, and petitioners never challenged that there was a denial of economically viable use. Instead, petitioners argued that the loss alone justified compensation.<sup>210</sup> In applying the petitioners’ claims to the standards set forth in *Penn Central*, the court stated that the regulations and the subsequent economic impact on property value, when compared to the property as a whole, do not interfere with investment-backed expectations. The property owners still maintain the investment value of the property, and could still fence the property to keep the wild horses out.<sup>211</sup>

Relying heavily on the analysis in *Mountain States*, the Ninth Circuit focused its analysis in *Christy* on two separate components of the Takings Clause: the requirements of due process and just compensation. The court began its due process analysis by determining the standard that should be applied in assessing the regulations prohibiting the plaintiffs from shooting grizzly bears to

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205. 16 U.S.C. § 1331 (2000).

206. *Mountain States*, 799 F.2d at 1427-28.

207. *Id.* at 1428.

208. *Christy*, 857 F.2d at 1334-35.

209. *Mountain States*, 799 F.2d at 1429.

210. *Id.* at 1430; *see also* *Kleppe v. New Mexico*, 426 U.S. 529 (1976).

211. *Mountain States*, 799 F.2d at 1431.

protect their sheep.<sup>212</sup> If such a prohibition allegedly violated a constitutionally protected right, then the standard of strict scrutiny would be applied. The government would need to prove that its pursued interest, the protection of grizzly bears, is more important than the plaintiffs' property rights. If, however, the allegedly impinged right was less than fundamental, all the government would have to prove is the existence of a legitimate state end, rationally related to the regulation.<sup>213</sup>

The court determined that the right in question is the "right to kill federally protected wildlife in defense of property,"<sup>214</sup> which was determined not to be a fundamental right on two grounds. First, since ESA provides exceptions to its prohibitions if the person is defending his or her own life, or someone else's life, but provides no such exception for the protection of property, Congress must not have considered such a property right to be as essential as a right to personal self defense.<sup>215</sup> Second, "[t]he U.S. Constitution does not explicitly recognize a right to kill federally protected wildlife in defense of property."<sup>216</sup> While the Ninth Circuit recognized that the Supreme Court has inferred such constitutional rights,<sup>217</sup> the Ninth Circuit also referred to an expressed reluctance on the part of the Supreme Court to do so.<sup>218</sup> Ultimately, heeding "the Supreme Court's admonition . . . [to] exercise restraint in creating new definitions of substantive due process, . . . [the Ninth Circuit] decline[d] plaintiffs' invitation to construe the fifth amendment as guaranteeing the right to kill federally protected wildlife in defense of property."<sup>219</sup>

Turning to a regulatory takings analysis, the court first determined whether the alleged taking of property was a physical taking, as argued by plaintiffs, or if it was more appropriately understood as a potential regulatory taking, as argued by counsel for the Department of the Interior. The court concluded that any physical taking of the plaintiffs' property in sheep was performed not by the state, but by the bears.<sup>220</sup> As the government does not own the

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212. *Christy*, 857 F.2d at 1329.

213. *Id.*

214. *Id.*

215. *Id.* See also 16 U.S.C. § 1540(a)(3) (2000).

216. *Christy*, 857 F.2d at 1329.

217. *Id.* at 1330. See also *Griswold v. Connecticut*, 381 U.S. 479 (1965).

218. *Christy*, 857 F.2d at 1330. See also *Bowers v. Hardwick*, 478 U.S. 186 (1986).

219. *Christy*, 857 F.2d at 1330.

220. *Id.* at 1334.



bears, nor is it responsible for their actions, there is no taking of property attributable to government actions.<sup>221</sup>

Relying on precedence stating that property damage caused by protected species does not constitute a regulatory taking,<sup>222</sup> the court ruled that while the goal of the Fifth Amendment is “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,”<sup>223</sup> the regulations in this case do not “‘force’ plaintiffs to bear any burden. The losses sustained by the plaintiffs are the incidental, and by no means inevitable, result of reasonable regulation in the public interest.”<sup>224</sup> It is the incidental nature of these regulations—that they regulate the taking of endangered species instead of the use of property—that has insulated ESA from regulatory takings claims founded on alleged damage done to property by protected species. While federal courts have not attached regulatory takings to conflicts concerning actions taken by property owners to protect their property from endangered species, one court has attached regulatory takings to regulations aimed at protecting endangered species from the effects of the use of private property.<sup>225</sup>

### C. *Regulation of Property to Protect Endangered Species*

As discussed above, judicial verdicts to Commerce Clause challenges to ESA may be impacted by whether the court elects to view the regulated activity as the taking of endangered species or the economic activity that results in the taking.<sup>226</sup> If the regulated activity is considered to be the economic activity, such as development construction, Congress’ authority might invasively extend to any and all economic activities, or ESA may prove powerless against noneconomic activities. Furthermore, if the regulated activity is considered to be the taking of protected species, then ESA may be interpreted as failing to achieve the substantial effects test.<sup>227</sup>

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221. *Id.* at 1335. *See also* *Douglas v. Seacoast Prod., Inc.*, 431 U.S. 265 (1977).

222. *See e.g.*, *Barrett v. New York*, 220 N.Y. 423 (N.Y. 1917); *Bishop v. United States*, 126 F. Supp. 449 (Ct. Cl. 1954); *Sickman v. United States*, 184 F.2d 616 (7th Cir. 1950); *Jordan v. Alaska*, 681 P.2d 346 (Alaska Ct. App. 1984); *Mountain States Legal Found. v. Hodel*, 799 F.2d 1423 (10th Cir. 1986).

223. *Christy*, 857 F.2d at 1335; *Armstrong v. United States*, 364 U.S. 40, 49 (1960).

224. *Christy*, 857 F.2d at 1335. *See also supra* note 222 and accompanying text.

225. *Tulare Lake Basin Water Dist. v. United States*, 49 Fed. Cl. 313 (Fed. Cl. 2001).

226. *See supra* note 102 and accompanying text.

227. *Van Loh, supra* note 73, at 480.

A similar situation is found in ESA cases involving regulatory takings challenges. When ESA is used to prevent the direct taking of an endangered species, even if that taking is to protect property, ESA has proven to be insulated from claims of regulatory takings: The regulations were incidental to the property rights, and the property owner still had ways to protect his or her property in ways that did not violate ESA.<sup>228</sup> However, if the regulations in question are designed to protect the endangered species from otherwise legal activities involved in the use of one's property, the incidental nature of the relation of the regulation to the property no longer holds. While the purpose of the regulation is the same, for example, to protect an endangered species, its impact on property is generally a far more central and essential component of the regulation. While "ESA is not a land law, . . . in many cases the only efficacious way to protect an endangered species is to protect habitat."<sup>229</sup>

This is the most conceivable form of conflict between property rights and endangered species. It is only in this area, where a judicially determined constitutional limit has been found, which requires compensation for property owners for losses attributed to enforcement of ESA. This should not be too surprising, however, considering that it is in this area that property interests and endangered species concerns are most interwoven. Congress recognized that such conflicts would be inevitable—that questions about endangered species invariably become questions about property—and designed ESA to at least address that concern.

Section 5 of ESA authorizes various federal departments "to acquire by purchase, donation, or otherwise, lands, waters, or interest therein,"<sup>230</sup> for the purpose of species protection as part of a special program within those agencies. Some property rights advocates have argued that Section 5 indicates "that Congress intended to address the problem of habitat modification exclusively through federal land acquisition."<sup>231</sup> According to this position, Congress had rational reasons for limiting ESA's regulatory power over habitats in such a manner. Not only does "[e]nforcing the just compensation requirement always [reduce] the appetite that government officials

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228. *Christy*, 857 F.2d at 1335.

229. Bruce Babbitt, *ESA and Private Property: The Endangered Species Act and 'Takings': A Call for Innovation Within the Terms of the Act*, 24 ENVTL. L. 355, 360 (1994).

230. 16 U.S.C. § 1534(a)(2) (2000).

231. *Sweet Home Ch. of Cmty. for a Great Or. v. Babbitt*, 806 F. Supp. 279, 283 (D.D.C. 1992); *Babbitt v. Sweet Home Ch. of Cmty. for a Great Or.*, 515 U.S. 687, 691 (1995).

have for private property, . . . [but it also] forces government experts to rank the habitat for preservation in accordance with the objectives of its program.”<sup>232</sup> For these reasons, regulatory takings plaintiffs argue that ESA regulations that limit one’s use of private property are “not only contrary to the spirit and intent of ESA, [but they] also contradict the Fifth Amendment’s prohibition against government takings of private property for public use without payment of just compensation.”<sup>233</sup>

Two recent cases tested the above argument before the U.S. Court of Federal Claims. The first of these cases, heard by the Federal Claims Court in 2001, is *Tulare Lake Basin Water District v. United States*.<sup>234</sup> Significantly, it is the first case where a federal court ruled that the enactment of ESA constituted a taking. The case deals with ESA protections for two species of fish: the delta smelt and the winter-run Chinook salmon.<sup>235</sup> These species of fish rely on water supplies that also feed California’s private water needs. Through this system, the State Water Resources Control Board, the Bureau of Reclamations, and the state Department of Water Resources issue and distribute permits to county water districts.<sup>236</sup> These permits are for specific water entitlement allotments, and are based on the contingency that the state cannot be held liable for shortages beyond its control.<sup>237</sup> Not to threaten the existence of the two endangered fish species, the agencies adopted a “reasonable and prudent alternative” (“RPA”), which “restricted the time and manner in which water could be pumped . . . , thereby limiting the water otherwise available to the water distribution systems.”<sup>238</sup>

The water districts argued “that their contractually-conferred right to the use of water was taken from them when the federal government imposed water use restrictions under the Endangered Species Act,”<sup>239</sup> and sought compensation for their property in water rights. The court considered three arguments to determine whether the water districts had a compensable property interest taken from

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232. Brief of the Institute for Justice as Amicus Curiae Supporting Respondents at 24-25, *Babbitt*, 515 U.S. 687 (1995) (No. 94-859), 1994 U.S. Briefs 859 (Lexis).

233. Brief of the Pacific Legal Foundation as Amicus Curiae Supporting Respondents at 3, *Babbitt*, 515 U.S. 687 (No. 94-859), 1994 U.S. Briefs 859 (Lexis).

234. 49 Fed. Cl. 313 (Fed. Cl. 2001).

235. *Id.* at 314.

236. *Id.* at 314-15.

237. *Id.* at 315.

238. *Id.* at 316.

239. *Id.* at 314.

them. First, the court asked whether the contract that the water districts had with the various agencies was appropriated, or simply frustrated.<sup>240</sup> Next, the court determined whether any background principles had preempted the plaintiffs' property title claims.<sup>241</sup> Finally, the court applied a *Penn Central* test to the economic losses incurred by the plaintiffs.<sup>242</sup>

To determine what actually happened to the water district's property rights upon enactment of the ESA regulations, the Claims Court articulated its understanding of contractual rights. This analysis relied heavily upon a distinction between the contract, which is an obligation to perform some task, and the subject matter of the contract, or in this case, water.<sup>243</sup> Defendants argued that if the contract right "remains separate and distinct"<sup>244</sup> from the contract's subject matter, as the defendants argued was the case here, then "the limitations imposed by the RPA's represent a legitimate exercise of federal authority that does no more than frustrate . . . plaintiff's rights in water."<sup>245</sup> In other words, the contract only required the agencies to give the district access to a specified amount of water. If the water is not there to be accessed, the contract is still intact.

The court, however, disagreed with this assessment. The court argued that the contract transferred from the state to end-users title for exclusive use for a specified amount of water.<sup>246</sup> Because the contract was not for access to water, but for water itself, any removal of water from that contractually specified amount appropriates the contract to the state, making "plaintiff's contract rights in the water's use . . . superior to all competing interests."<sup>247</sup>

Defendants also argued that the plaintiffs' contract rights, like all property rights, are couched in and limited by certain background principles of ownership, such as "the public trust doctrine, the doctrine of reasonable use, and common law principles of nuisance, all of which provide for the protection of fish and wildlife."<sup>248</sup> The

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240. *Id.* at 316-17.

241. *Id.* at 317-18.

242. *Id.* at 318-20.

243. *Id.* at 317. *See also* *Omnia Commercial Co. v. United States*, 261 U.S. 502, 510-11 (1923).

244. *Tulare Lake*, 49 Fed. Cl. at 317.

245. *Id.*

246. *Id.* at 318.

247. *Id.*

248. *Id.* at 320.

court acknowledged that the rights of the districts to the use of the water required that they use it in a manner consistent with these background principles. “The difficulty with defendant’s argument, however, is that the water allocation scheme . . . specifically allowed for the allocations of water defendant now seeks to deem unreasonable.”<sup>249</sup> Framing its argument in terms of judicial deference, the court stated that if the water allotments had to be lowered to keep the districts’ water usage from harming the endangered fish or violating certain background principles of ownership, it would be up to the agencies to make that determination and, most importantly, put it in the contract. The agency, however, did neither.<sup>250</sup>

Although the court set out to assess the plaintiffs’ loss of water rights via a *Penn Central* analysis focusing specifically on the regulations’ economic impact and interference with reasonable investment-backed expectations,<sup>251</sup> such analysis was never performed because the court found such an analysis to be unnecessary.<sup>252</sup> The court determined the case involved a physical taking, which is accompanied by a different set of Fifth Amendment requirements than a regulatory taking. When a court determines that a regulation that limits the use of private property functionally amounts to a physical taking of the property, compensation has often been required, regardless of the extent to which public ends are met.<sup>253</sup> “The regulatory taking doctrine, on the other hand, applies to government actions that prevent a property owner from making a particular use of his or her property that otherwise would be permissible.”<sup>254</sup>

The Claims Court was presented with arguments to consider this case under a regulatory takings doctrine. These arguments against the application of the physical taking *per se* rule focused on two *Penn Central* factors: the limited reasonable expectations a contract holder could have in light of regulatory background principles, and the less-than-complete economic losses suffered by the plaintiffs.<sup>255</sup> This argument for the defendants highlighted that the federal government

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249. *Id.* at 321.

250. *Id.* at 324.

251. *Id.* at 318.

252. *Id.* at 318-20.

253. *Id.*

254. Brief of the Natural Heritage Institute & the Environmental Law Foundation as Amici Curiae Supporting Defendants at 30, *Tulare Lake*, 49 Fed. Cl. 313 (No. 98-101L).

255. *Tulare Lake*, 49 Fed. Cl. at 318.

did not “[assert] a *proprietary interest* in the water . . . in derogation of all other private interests,” but instead “merely regulated the timing and rate of . . . [the] appropriation of water,” which left the plaintiffs with the ability “to use the remainder of those rights ‘in gainful fashion.’”<sup>256</sup>

While defendants argued that “[a] usufructuary interest in water is simply not susceptible to physical possession, much less invasion or occupation,”<sup>257</sup> the court sided with plaintiffs on this issue by stating that, “[i]n the context of water rights, a mere restriction on use—the hallmark of a regulatory action—completely eviscerates the right itself since plaintiffs’ sole entitlement is to the use of the water.”<sup>258</sup> Even though the economic loss suffered by the contract holder was “a fraction of the master contract’s overall value,”<sup>259</sup> the court held that “the government has essentially substituted itself as the beneficiary of the contract rights with regard to *that* water and totally displaced the contract holder.”<sup>260</sup> The court’s application of a physical taking status to Tulare Lake, and with it a categorical granting of the right to compensation, demonstrates the key role that the determination of property baselines plays in regulatory takings cases.

One issue discussed in *Palazzolo v. Rhode Island*, but not fully explored, was how courts should interpret the base property from which regulations appropriate in cases involving regulatory takings, or as the Court puts it, determining “what is the proper denominator in the takings fraction.”<sup>261</sup> At issue in *Palazzolo* was whether regulations that would not allow development in wetland parcels of property could result in a *Lucas per se* taking of the entirety of *that* portion of the property, or whether allowable construction on upland portions must be included, thus preventing claims of an economic wipeout. In *Palazzolo*, the majority opinion states that the remaining presence of the upland section prevents a ruling of a categorical taking.<sup>262</sup> This approach remains consistent with the Court’s traditional jurisprudence regarding property baselines in takings cases, which “does not divide a single parcel into discrete segments

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256. Brief of the Natural Heritage Institution, *supra* note 254, at 32-33 (quoting Penn Cent. Transp. Co. v. New York City, 438 U.S. 104, 135 (1978)).

257. *Id.* at 31.

258. *Tulare Lake*, 49 Fed. Cl. at 319.

259. *Id.* at 318-19.

260. *Id.* at 319 (emphasis added).

261. 533 U.S. 606, 631 (2001).

262. *Id.*

and attempt to determine whether rights in a particular segment have been entirely abrogated.”<sup>263</sup> The *Tulare Lake* court, however, viewed the property claim abrogated by the government as separate from the water rights as a whole, which is an essential component to the court’s physical taking construction.<sup>264</sup>

The second case to bring a regulatory takings challenge to property controlling regulations of ESA is currently waiting to be heard before the Court of Federal Claims. As mentioned above, the 2003 Fifth Circuit Court of Appeals decision in *GDF Realty Investments v. Norton* found that FWS regulation of intrastate cave species was consistent with Congress’ Commerce Clause power.<sup>265</sup> While the plaintiffs in *GDF Realty* failed to convince the Fifth Circuit Court of Appeals with their Commerce Clause challenge, that challenge was one of two challenges made by the plaintiffs to the federal courts regarding this specific conflict. Apart from challenging ESA’s implementation as beyond the scope of Congress’ commerce powers, the plaintiffs also challenged the implementation as an uncompensated and unconstitutional taking of their property.<sup>266</sup>

On May 10, 2004, the Court of Federal Claims ordered this case stayed pending final resolution of the Commerce Clause challenge discussed above.<sup>267</sup> After the Fifth Circuit ruled that the government’s actions passed Commerce Clause scrutiny, the plaintiffs appealed the decision to the U.S. Supreme Court. Their petition for a writ of certiorari was denied on June 13, 2005.<sup>268</sup> With that judicial obstacle out of the way, the Court of Federal Claims can proceed with hearing arguments for and against compensation for the economic impacts of the FWS’s implementation of ESA to protect six species of subterranean invertebrates.

## VI. ASSESSING THE SUSTAINABILITY OF REGULATORY TAKINGS CHALLENGES TO THE ENDANGERED SPECIES ACT

Although regulatory takings challenges to ESA have been incredibly rare,<sup>269</sup> the sudden success of the challenge in *Tulare Lake*,

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263. Penn Cent. Transp. Co. v. New York City, 438 U.S. 104, 130-31 (1978).

264. *Tulare Lake*, 49 Fed. Cl. at 319.

265. 326 F.3d 622, 643-44 (5th Cir. 2003).

266. *Id.* at 626-27.

267. *GDF Realty Inv., Ltd. v. Norton*, No. 99-CV-513 (Fed. Cl. 2004).

268. *GDF Realty Inv., Ltd. v. Norton*, 125 S. Ct. 2898, 2899 (2005).

269. Babbitt, *supra* note 229, at 360 (Former Secretary of the Interior Bruce Babbitt, reacting to allegations of “egregious abuse” under ESA, expressed some surprise that as of 1994 “there

combined with the future hearing of *GDF Realty*, indicates a possible shift in that trend. If the sudden emergence of two cases in one court indicates a change in litigious strategies aimed at challenging the implementation of ESA, then two questions arise. First, why, only after more than thirty years of enforcement, during a time span that overlaps the above described evolution of regulatory takings jurisprudence, are regulatory takings challenges being made? Second, how successful could such challenges eventually be?

The short answer to the first question could focus on the sporadic nature of regulatory takings jurisprudence, which the Supreme Court itself has described as lacking any kind of set formula.<sup>270</sup> The resulting uncertainty may have motivated property owners who have felt unduly inconvenienced by ESA to pursue more certain legal avenues. Such an explanation, though, does nothing to explain why regulatory takings challenges have frequently occurred in other areas. This section will focus on both of those questions, paying special attention to the facts in the upcoming *GDF Realty* challenge.

#### A. *Agins* Criteria

The two-pronged *Agins* test has not experienced the same degree of judicial popularity as the *Penn Central* test, and the Supreme Court has recently ruled that the “substantially advances” component of *Agins* suggests a means/ends testing inconsistent with the inquiry into whether property has been taken.<sup>271</sup> This ruling thus indicates that the Court will likely utilize the *Penn Central* test in future cases involving less than total diminishment of property value through regulation.<sup>272</sup> The possibility does remain, however, that the Court could be asked to evaluate property use regulations, wherein “the failure of a regulation to accomplish a stated or obvious objective would be relevant”<sup>273</sup> to general property rights challenges to the government’s authority to enact specific property restrictions. Although now considered outside the realm of regulatory takings determinations, challenges to the asserted public purpose of ESA implementation could still remain as parts of a larger property rights movement against ESA.

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has not been a single case filed in that [Federal Claims] court alleging a taking under the ESA.”).

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

271. *Lingle v. Chevron, U.S.A. Inc.*, 125 S. Ct. 2074, 2084 (2005).

272. *Id.* at 2078.

273. *Id.* at 2087 (Kennedy, J. concurring).



The second component requires that the property owner not be deprived of the economically viable use of his or her property.<sup>274</sup> While not possessing the same constitutional certainty as the public use requirement, the creation by the Supreme Court of the *per se* taking in *Lucas* has created a judicial commitment to the principle that total economic wipeouts caused by regulation of the property be compensated “no matter how minute the intrusion, no matter how weighty the public purpose behind it.”<sup>275</sup> In light of ESA precedence and practice, implementation of the statute should be fairly well insulated from the *Agins* test.

One thing that the ongoing Commerce Clause challenges to ESA may have accomplished is the establishment of a strong precedence defending ESA as substantially advancing a public purpose. Regardless of the type of regulatory takings challenge brought before a court, past rulings on ESA have strongly supported the idea that the protection of endangered species serves a public purpose. The findings in *NAHB*, *Gibbs*, *Rancho Viejo*, and *GDF Realty* that ESA is consistent with the powers granted to Congress by the Constitution strongly support the argument that the Act serves a public purpose. This is significant because public purpose scrutiny is less stringent than Commerce Clause scrutiny, which additionally requires meeting the substantial effects test.<sup>276</sup> Furthermore, in *Tulare Lake*, which required compensation for the implementation of ESA, the Claims Court held the public purpose of ESA as a given, choosing not to question “whether the federal government has the authority to protect . . . [the species], but whether it may impose the costs of their protection solely on plaintiffs.”<sup>277</sup>

Despite strong judicial precedence for the public purpose behind ESA, particular regulations are still subject to the question of whether they substantially advance that purpose, which is a determination that can only be made on a case by case basis. The facts in the *GDF Realty* case are consistent with the *Agins* requirement that regulations substantially advance a legitimate state interest. The Fifth Circuit found a strong public and state interest when it heard the case, arguing that a taking of the species could impact biodiversity and research interests,<sup>278</sup> and there should be no

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274. *Penn Cent.*, 438 U.S. at 138.

275. *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1015 (1992).

276. *United States v. Lopez*, 514 U.S. 549, 561-567 (1995).

277. *Tulare Lake Basin Water Storage Dist. v. United States*, 49 Fed. Cl. 313, 316 (2001).

278. *GDF Realty Inv., Ltd. v. Norton*, 326 F.3d 622, 639 (5th Cir. 2003).

doubt that the proposed restrictions would substantially advance that interest.

To fully pass the *Agins* test, a regulation must also not deny the owner economically viable use of his or her property. While conditions are imaginable whereby the only available options that could protect an endangered species involve ceasing all economic activity on an individual's property, such situations are actually less likely to occur, given Congress' addition of Section 10 provisions for incidental takes. Section 10 allows FWS to issue permits to property owners that allow for economic activity and incidental takes of endangered species, provided that a Habitat Conservation Plan ("HCP") limits both such takes and economic activity to sustainable levels.<sup>279</sup> Such provisions, which are designed to accommodate both economic and biological interests, serve as a statutory directive to avoid situations where economic viability is completely eradicated.

These provisions were also in place in the *GDF Realty* conflict. The facts of the case indicate that implementation of an HCP was a possibility, because the plaintiffs were notified by the agency that the property "could be developed without causing a take if development, among other things, [was] scaled back from the canyons, and surface and subsurface drainage and nutrient exchange [was] provided for."<sup>280</sup> This would indicate that the ESA regulations put in place to protect the cave species would still allow for some construction and, therefore, not deny the owner of some economically viable use.

One issue that could greatly impact this component of the *Agins* test as it is applied to ESA is the question of the baseline discussed above. In the *GDF Realty* case, the property involved consisted of 216 acres, six of which were deeded for conservation purposes.<sup>281</sup> When the plaintiffs' incidental take permits were denied by FWS, it was on the grounds that "FWS decided that the deeded preserves were inadequate to protect the Cave Species."<sup>282</sup> Combined with the potential HCP provisions described above, these statements draw a picture of a conflict wherein the participants are going back and forth, trying to determine how big of a chunk they can secure for their interests.

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279. 16 U.S.C. § 1539 (2000).

280. *GDF Realty*, 326 F.3d at 626.

281. *Id.* at 624-25.

282. *Id.* at 626.

When that determination would be made, the court would have to decide where to draw the baseline: How much of the original 216 acres should be counted as plaintiff's property? If the Claims Court declares the original 216 acres as the property baseline, and the plaintiffs are allowed economic use of more than just a token amount of that property, then the *Agins* test will be passed. If, however, the Claims Court only considers the property that plaintiffs were not allowed to develop, then the ESA regulations will likely fail *Agins*. If the Claims Court follows *Palazzolo*, the developable property should not be ignored in determining "the proper denominator in the takings fraction."<sup>283</sup>

### B. Penn Central Criteria

The three-pronged *Penn Central* test has been more commonly used by the courts in regulatory takings cases, as most cases deal with "a regulation [that] places limitations on land that fall short of eliminating all economically beneficial use, [in which] a taking nonetheless may have occurred, depending on a complex of factors."<sup>284</sup> The first prong of the *Penn Central* test looks to the economic impact that a regulation imposes upon individual property owners.<sup>285</sup> Generally speaking, the higher the economic impact, the more likely a court will rule that the particular regulation comes with a cost that, out of a sense of fairness, should be carried by the tax paying public.<sup>286</sup>

Combined with this focus on the economic nature of property controlling regulations, any interference with investment-backed expectations also increases the likelihood of a finding of a regulatory taking.<sup>287</sup> These expectations, however, must meet a standard of reasonableness, shaped in part, albeit not determined, by the common law and existing regulations.<sup>288</sup>

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283. *Palazzolo v. Rhode Island*, 533 U.S. 606, 631 (2001).

284. *Id.* at 617.

285. *See Penn Cent. Transp. Co. v. New York City*, 438 U.S. 104, 124 (1978) ("The economic impact of the regulation on the claimant, and, particularly, the extent to which the regulation has interfered with distinct investment-backed expectations are, of course, relevant considerations.") (citations omitted).

286. *See Armstrong v. United States*, 364 U.S. 40, 48-49 (1960) (holding that the total destruction by the government of all value of privately held property has every possible element of a Fifth Amendment taking).

287. *See Penn Cent.*, 438 U.S. at 124.

288. *See Palazzolo*, 533 U.S. at 632-35 (O'Connor, J., concurring) (stating that the regulatory regime in place shapes the reasonableness of the owner's expectations.).

Lastly, a court using a *Penn Central* analysis must also consider the nature of the government's action, which distinguishes between legitimate government actions taken with the aim of serving the public good, and "a land-use decision which arbitrarily singles out a particular parcel for different, less favorable treatment than the neighboring ones."<sup>289</sup> Of course, each of these prongs still carries with it a degree of ambiguity, and the courts have not been particularly clear in stating what is meant by each factor, how they are weighted, and how they relate to one another.<sup>290</sup> Due to this ambiguity, as opposed to in spite of it, a regulatory takings challenge to ESA analyzed under *Penn Central* certainly has a chance of success that should not be ignored.

Without a doubt, implementation of ESA can be costly. Costs associated with HCP's, which must be imposed upon either private individuals or the public as a whole, can potentially cost hundreds of millions of dollars.<sup>291</sup> When those impacts intersect with the economic investment-backed expectations of the property owner, the likelihood increases that the *Penn Central* criteria for a regulatory taking will be met. Much of this strongly hinges on the case by case variance in facts.

In the upcoming *GDF Realty* case, these factors will likely have a strong influence on the outcome. The property in question in *GDF Realty* was purchased in 1983 while the listing of five of the six cave species did not occur until 1988, and the sixth was listed in 1993.<sup>292</sup> The Claims Court, in this particular situation, may be sympathetic to the plaintiffs' argument, interpreting the situation as a case of investment with reasonable expectations thwarted by subsequent regulations. The Claims Court's reading of *Palazzolo* could prove influential on this point. Although the chronological relationship between the moments of property acquisition and regulation creation is not at issue in *GDF Realty*, the Supreme Court's interpretation of investment-backed expectations in *Palazzolo* is related. The majority decision in *Palazzolo*, authored by Justice Kennedy, posits property rights as so fundamental that a simple "post-enactment transfer of title" should not deprive the latter owner of his or her "right to challenge unreasonable limitations on the use and value of land."<sup>293</sup>

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289. *Penn Cent.*, 438 U.S. at 132.

290. Peterson, *supra* note 135, at 1317 (1989).

291. See, e.g., Robert Innes, *Takings, Compensation and Endangered Species Protection on Private Lands*, 12 J. ECON. PERSPECTIVES 35, 35-36 (1998).

292. *GDF Realty Inv., Ltd. v. Norton*, 326 F.3d 622, 625 (5th Cir. 2003).

293. *Palazzolo*, 533 U.S. at 627.

Even under such absolutist terms, however, property rights still remain “subject to the reasonable exercise of state authority, including the enforcement of valid zoning and land-use restrictions.”<sup>294</sup>

Concerned that the judicial scales might be tipped too far in the direction of either of these values, Justice O’Connor issued a concurring opinion in *Palazzolo* emphasizing that the timing of regulations were neither “dispositive” nor “talismanic” of economic expectations.<sup>295</sup> O’Connor ultimately concluded that the *Palazzolo* decision “does not remove the regulatory backdrop against which an owner takes title to property from the purview of the *Penn Central* inquiry. It simply restores balance to that inquiry.”<sup>296</sup> The fact that the plaintiffs in *GDF Realty* purchased the property in a regulatory regime absent any regulations on species on that property certainly lends credence to the claim that their reasonable investment-backed expectations were thwarted. However, the fact that the property was purchased in a regulatory regime containing background principles limiting property rights to protect endangered species, in general, certainly contextualizes those expectations.

The final component of the *Penn Central* test—an assessment of the nature of the government’s action—is intended to protect owners of private property from their property unjustly “being pressed into some form of public service under the guise of mitigating serious public harm.”<sup>297</sup> Like the two previous economic factors, this third factor is contingent upon the facts of each particular case. However, the nature of government actions factor may present a more daunting hurdle than the two previous factors, especially for ESA regulations facing regulatory takings challenges.

ESA sparks much heated debate from those on both sides of the issue. In addition, property conflicts spark equally charged public responses, as evidence by the recent public and media outcry over the Supreme Court’s *Kelo v. New London*<sup>298</sup> decision, which has been

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294. *Id.*

295. *Id.* at 634 (O’Connor, J., concurring).

296. *Id.* at 635 (O’Connor, J., concurring).

297. *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1018 (1992). *See also Penn Cent. Transp. Co. v. New York City*, 438 U.S. 104, 124 (1978) (noting that the character of the governmental action is one of the factors relevant in considering whether public action taken by the government must compensate economic injuries); *Tahoe-Sierra Pres. Council v. Tahoe Reg’l Planning Agency*, 535 U.S. 302, 350 (2002) (quoting *Lucas*).

298. 125 S. Ct. 2655 (2005).

excessively, and in a manner devoid of nuance, referred to as “disturbing,”<sup>299</sup> “a decision that makes it too easy for the government to seize your bedroom,”<sup>300</sup> and “another giant step toward classical corporatism or fascism in America.”<sup>301</sup> Together, these policy issues, both of which are already susceptible to being interpreted as fundamentally connected to government intrusion by public opinion, easily raise calls for heightened judicial scrutiny of government actions.

The facts presented in *GDF Realty* before the Fifth Circuit Court of Appeals provide not only a good example of the category of behavior on which the third prong of the *Penn Central* test focuses, but also grounds on which the Claims Court could base a finding for a regulatory taking. The facts in this case revealed FWS acting in a highly suspicious manner. After the plaintiffs filed for incidental take permits, and after FWS had determined that the areas reserved to protect the species were insufficient, the plaintiffs were notified by FWS that their permits would not be approved. The final denials, however, were never issued, leaving the issue unripe for challenge.<sup>302</sup> The denials were only declared issued *de facto* in the District Court, which “admonished FWS for delaying the denials when it had never intended to grant the permits.”<sup>303</sup> While the facts still may be presented differently in the upcoming trial before the Claims Court, the presence of a judicial record portraying FWS as an agency using stall and delay tactics to avoid having their decisions challenged increases the likelihood that the Claims Court will find the government’s actions of a nature sufficient to fail *Penn Central*. These events also affect a potential ripeness ruling, which must be met before *Agins* or *Penn Central* become relevant.

### C. Ripeness

As discussed above, the U.S. Supreme Court has established a ripeness doctrine for cases dealing with regulatory takings, requiring

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299. Robert Trigaux, *Your Home Could Be up for Grabs*, ST. PETERSBURG TIMES, June 24, 2005, at D1.

300. Debra J. Saunders, *Your Home Could Be Pfizer’s Castle*, SAN FRANCISCO CHRON., June 30, 2005, at B9.

301. Edward Hudgins, *Your Castle No More*, WASH. TIMES, June 27, 2005, at A20.

302. See MacDonald, Sommer & Frates v. Yolo County, 477 U.S. 340, 348-351 (1986) (requiring a final administrative decision before a challenge can be considered ripe); *GDF Realty Inv., Ltd. v. Norton*, 326 F.3d 622, 626 (5th Cir. 2003) (noting that the lack of a final denial from FWS prevented plaintiffs from challenging FWS’s action).

303. *GDF Realty*, 326 F.3d at 626.

that a case is not ripe for review unless it deals with a concrete controversy<sup>304</sup> and the particular agency has administered its final decision.<sup>305</sup> While such criteria may seem straight forward, there is still a great deal of ambiguity in those terms. Much of that ambiguity has been demonstrated in subsequent Supreme Court decisions.

In *Palazzolo*, the Court found the case to be ripe, although the state agency had not issued a final decision regarding the amount of allowable construction. The agency had made it clear that no wetland construction would be allowed and “federal ripeness rules do not require the submission of further and futile applications with other agencies.”<sup>306</sup> This rule is called the “futility exception,” and it removes the necessity of seeking subsequent decisions when an initial decision “makes it clear that no project will be approved.”<sup>307</sup>

In *Tahoe-Sierra*, the Court ruled that the case was not ripe, despite the length in time needed by the regional planning committee, during which no construction could occur. The Court ruled that to simultaneously require the fundamental rules of ripeness, including awaiting the final decision, with a requirement to compensate property owners for the time, “would create a perverse system of incentives.”<sup>308</sup> The ripeness doctrine does allow for delays in the agency decisionmaking process, requiring compensation only for “extraordinary delays.”<sup>309</sup> While this rule helps to clarify the relationship between time and ripeness, it is still open to interpretation, demonstrated by the dissent in *Tahoe-Sierra* that argued that “a ban on all development lasting almost six years does not resemble any traditional land-use planning device.”<sup>310</sup>

The ripeness doctrine also plays a significant role in regulatory takings cases involving ESA. In 2004, the Court of Appeals for the

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304. *Hodel v. Va. Surface Mining & Reclamation Ass'n*, 452 U.S. 264, 295 (1981). *See also* *Pennell v. San Jose*, 485 U.S. 1, 18 (1988) (clarifying that premature claims may not be considered on the merits, while the relevant regulations or statutes themselves may be challenged as facially unconstitutional).

305. *See Williamson County Planning Comm'n v. Hamilton Bank*, 473 U.S. 172, 186 (1985) (overturning jury decision in favor of respondent because the taking claim lacked ripeness in the absence of a final administrative decision); *MacDonald, Sommer & Frates*, 477 U.S. at 351.

306. *Palazzolo v. Rhode Island*, 533 U.S. 606, 626 (2001).

307. *S. Pac. Transp. Co. v. City of Los Angeles*, 922 F.2d 498, 504 (9th Cir. 1990); *Heck v. United States*, 134 F.3d 1468, 1472 (Fed. Cir. 2000).

308. *Tahoe-Sierra Pres. Council v. Tahoe Reg'l Planning Agency*, 535 U.S. 302, 340 (2002).

309. *Boise Cascade Corp. v. United States*, 296 F.3d 1339, 1349-50 (Fed. Cir. 2002).

310. *Tahoe-Sierra*, 535 U.S. at 343 (Rehnquist, C.J., dissenting).

Federal Circuit heard *Morris v. U.S.*<sup>311</sup> on appeal from the Court of Federal Claims. In this case, the plaintiffs had purchased a half-acre lot in Northern California, adjacent to a river, with the plans of harvesting six old-growth redwood trees. The plaintiffs asserted “that this is the property’s only economically viable use.”<sup>312</sup> After being told by the National Marine Fisheries Service (“NMFS”) that they should obtain incidental take permits in the event that the harvesting of the trees impacted endangered fish species, the plaintiffs determined that the application cost exceeded the value of the property and filed suit, arguing that the required permit process effectively took their property.<sup>313</sup> The court found the taking claim unripe; not only had the agency not issued a final decision about the costs involved, but the plaintiffs also had not availed themselves to remaining administrative remedies.<sup>314</sup> In particular, NMFS has the discretion to provide technical assistance in the incidental take permitting process and the HCP process, leaving the final application cost “unknowable until the agency has had some meaningful opportunity to exercise its discretion to assist in the process.”<sup>315</sup>

In the *GDF Realty* case, the ripeness doctrine has already played a role. Prior to the cases involving the endangered cave species, the same plaintiffs, on the same piece of property, challenged FWS regulations on their property, this time concerning two species of birds: the black-capped vireo and the golden-cheeked warbler.<sup>316</sup> The plaintiffs argued that they did not need to apply for an incidental take permit to develop their property, because the development of their property would not result in a taking of the species.<sup>317</sup> Relying on the *Williamson County* requirement of a final administrative decision, the District Court determined that FWS had not been able to issue its final decision as to whether a take would occur, and the court was not prepared to do that job for FWS.<sup>318</sup> Furthermore, the court stated that, if the plaintiffs were right, and their actions were not a danger to the endangered species, “then no ‘case or controversy’ is before this

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311. 392 F.3d 1372 (Fed. Cir. 2004).

312. *Id.* at 1374.

313. *Id.* at 1374-75.

314. *Id.* at 1376-77.

315. *Id.* at 1377.

316. *Four Points Utility Joint Venture v. United States*, 40 Env’t Rep. Cas. (BNA) 1509, 1510 (W.D. Tex. 1994).

317. *See id.* at 1511 (noting that it is not the role of a United States District Court to make final administrative decisions).

318. *Id.*



Court, as is required by Article III of the Constitution.”<sup>319</sup> This also would have violated the *Hodel* requirement for a “concrete controversy.”<sup>320</sup>

Furthermore, in this District Court case, the plaintiffs alleged that FWS “attempted to prevent the development by coercion and by threatening criminal penalties if a ‘take’ occurs.”<sup>321</sup> As noted above, this same court criticized FWS for refusing to issue final permit decisions.<sup>322</sup> While such information may construct the nature of the government’s action in an unfavorable light, this case also demonstrates that the conflict between the two parties has been exceptionally confrontational.

As far as the ripeness of *GDF Realty* is concerned, the result will hinge on whether the Claims Court determines that FWS has issued its final decision. FWS has stated that development can occur on the property, provided that canyon areas and drainage concerns are addressed.<sup>323</sup> The permit application made by plaintiffs, however, was denied on the basis of inadequate deeded preserves.<sup>324</sup> The higher the level of disparity between these two plans, the less likely the case will be considered ripe. While FWS has stated what sort of property development would be permissible, the plaintiffs must approach that goal meaningfully. The further apart these two proposals are, the less likely the Claims Court will conclude that sufficient conversation has occurred between the plaintiffs and the agency administration to determine “how far the regulation goes.”<sup>325</sup>

## VII. CONCLUSION

Given the “essentially ad hoc, factual”<sup>326</sup> bases on which regulatory takings jurisprudence rests, it is difficult to determine exactly how “courts [will] apply the abstract legal rules and principles currently at play in regulatory takings case” to the “tangible, often

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319. *Id.*

320. *Hodel v. Va. Surface Mining & Reclamation Assn.*, 452 U.S. 264, 295 (1981).

321. *Four Points*, 40 Env’t Rep. Cas. (BNA) at 1510.

322. *GDF Realty Inv., Ltd. v. Norton*, 326 F.3d 622, 626 (5th Cir. 2003); *see also supra* note 300 and accompanying text.

323. *GDF Realty*, 326 F.3d at 626.

324. *Id.*

325. *MacDonald, Sommer & Frates v. Yolo County*, 477 U.S. 340, 348 (1986).

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

fragile realm”<sup>327</sup> of diverse ecosystems, interacting with diverse property interests. The ways that courts rule on various regulatory takings challenges to the Endangered Species Act will depend not only on the specific facts of each case, but also on the divergent ways in which judges can apply the rules of regulatory takings jurisprudence to those facts. Ultimately, little advice can be given to regulatory agencies on how to avoid such takings challenges. Apart from tempering the nature of the government’s actions to satisfy part of *Penn Central*, or delaying just enough to postpone the ripeness of a case, most of the other factors are economic in nature, and those components vary from case to case. Judges, in fact, have more control over the economic impacts of regulatory takings cases, where they have a degree of flexibility in defining investment-backed expectations and the property baseline.

Another factor that must be considered here is the set of various political factors affecting regulatory takings cases and jurisprudence. Apart from the more obvious factors, such as the political ideologies of appointed judges and executive branch administrators, the latter of which partially determines the level of activity pursued by the agencies in charge of implementing ESA, one should also consider the role of litigation based interest groups. Groups on both sides of any issue help to determine the frequency and manner in which such challenges come to the courts. Since the groups that represent plaintiffs’ interests, however, are closer to the facts of the conflict and involved with the parties more directly, their influence is likely to be greater.

In 1995, when the Supreme Court heard *Babbitt v. Sweet Home*,<sup>328</sup> several groups filed amicus briefs for both petitioners and respondents. The case before the Court dealt only with the definition of “harm,” but property rights challenges were present in plaintiffs’ discussion on Section 5 land acquisitions.<sup>329</sup> Of the briefs filed on behalf of the plaintiffs, all of them addressed regulatory takings jurisprudence and precedence.<sup>330</sup> Of all the groups to file amicus briefs

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327. Lise Johnson, *After Tahoe-Sierra, One Thing is Clearer: There is Still a Fundamental Lack of Clarity*, 46 ARIZ. L. REV. 353, 354 (2004).

328. *Babbitt v. Sweet Home Ch. of Cmty. for a Great Or.*, 515 U.S. 687 (1995).

329. *Id.* at 700-01.

330. *See, e.g.*, Brief for Pacific Legal Foundation, *supra* note 233, at 30-31 (arguing that FWS’s regulations violate the Fifth Amendment). Other groups filing briefs supporting respondents as Amici Curiae include: Institute for Justice, Florida Legal Foundation, Southeastern Legal Foundation, and Mountain States Legal Foundation.

on behalf of FWS, only one addressed regulatory takings arguments in a manner that addressed the legal components of the debate.<sup>331</sup> While interest groups seeking judicially imposed limitations on ESA have historically chosen tactics other than the use of regulatory takings challenges, that tactic has long been one part of a multifaceted argument put forward by those groups. Shifts in the political environment, including, but not limited to, the appointment of justices with property rights-based interpretations of the takings jurisprudence, public backlash to perceived threats to private property, or a salient case with facts favorable to a regulatory takings interpretation, have the potential to make regulatory takings a far more commonly used tool against the Endangered Species Act.

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331. See Brief for Friends of Animals, Inc. as Amici Curiae Supporting Petitioners at 8, *Babbitt*, 515 U.S. 687 (No. 94-859), 1994 U.S. Briefs 859 (Lexis) (addressing the regulatory takings debate); Brief of Amici Curiae for National Wildlife Federation, Trout Unlimited, Sierra Club, et. al. Supporting Respondents at 16, *Babbitt*, 515 U.S. 687 (No 94-859), 1994 U.S. Briefs 859 (Lexis) (simply referencing “the dearth of Fifth Amendment takings cases”); Brief for The Environmental Law Committee of the Ass’n of the Bar of the City of New York Supporting Petitioners, *Babbitt*, 515 U.S. 687 (No. 94-859), 1994 U.S. Briefs 859 (Lexis) (making no reference to regulatory takings debate).