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Regulatory Takings: When Is Enough, Enough?

Jacqueline Kerry Heyman*

The Fifth Amendment to the United States Constitution prohibits the government from taking private property without just compensation.1 Takings cases tend to involve long-running disputes between government and private property owners as to whether a governmental regulation constitutes a partial taking2 by virtue of the regulatory restriction or a permanent physical occupation,3 and what determining test should be undertaken in drawing the distinction. The principal question becomes whether a partial deprivation stemming from a regulatory imposition that deprives the property owner of substantial, but not all economic use or value of the property constitutes a partial regulatory taking for which compensation is justified.4 Since the first time the Supreme Court announced that regulatory takings5 are compensable under the Fifth Amendment,6 this question has been the subject of intense debate. However, to date, the Court has failed to provide an adequate answer.

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1 U.S. Const. amend. V ("nor shall private property be taken for public use, without just compensation . . . ").
2 "The taking of part of an owner's property under the laws of eminent domain. Compensation must be based on damages or benefits to the remaining property, as well as the part taken." Black's Law Dictionary 362 (6th ed. 1990).
3 Occurring under "[t]he 'eminent domain' power refer[ring] to the state's prerogative to seize private property, dispossess its owner, and assume full legal right and title to it in the name of some ostensible public good," including "where real estate is actually invaded by superinduced additions of water, earth, sand, or other material" as a result of governmental action. Jeb Rubenfeld, Usings, 102 Yale L.J. 1077, 1081, 1084 (1993) (citing Pumpelly v. Green Bay Co., 80 U.S. (13 Wall.) 166 (1871)).
5 Governmental regulations that destroy the economic viability of land constitute a taking. Rubenfeld, supra note 3, at 1092 (1993) (citation omitted).
The Supreme Court readily admits there is no distinct formula or test applicable in the determination of whether the Constitution requires a property owner be provided compensation for a government imposed restriction.\(^7\) Rather, the Court has concluded the decision rests "upon the particular circumstances [in that] case."\(^8\) As such, the Court will engage in an essentially "ad hoc, factual inquir[y]."\(^9\) The Court has identified several factors that may be significant in the analysis, including the "economic impact"\(^10\) the particular claimant will bear as a result of the regulation—particularly the extent of the regulation's interference with "investment-backed expectations,"\(^11\)—and the character of the governmental action.\(^12\)

Part I of this Note provides the historical background leading to the development of the ad hoc factual inquiry. Part II explores the applicable standard of judicial review. Part III furnishes an examination of assorted judicial interpretations of partial takings as opposed to physical takings. Part IV discusses the question of whether "economic impact" and "investment-backed expectations" serve as legitimate balancing criteria for protection against uncompensated takings. The conclusion focuses on the current state of regulatory law and the potential future of regulatory restrictions.

I. HISTORICAL BACKGROUND OF THE AD HOC FACTUAL INQUIRY

Presently, there exist two lines of compensation authority: 1) the traditional physical occupation theory, and 2) the recently recognized regulatory taking theory. A physical occupation of property is found when "the physical intrusion reaches the extreme form of permanent physical occupation."\(^13\) In Loretto v. Teleprompter Manhattan CATV Corp., state legislation requiring landlords to permit the placement of cable television equipment on their buildings resulted in the occupancy of "about one-eighth of a cubic foot" of roof space.\(^14\) Nonetheless, the

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\(^8\) Id. at 124.
\(^9\) Id. (citations omitted).
\(^10\) Id.
\(^11\) Id.
\(^13\) Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419, 426 (1982) (holding that a taking had occurred where government authorized the placement of cable television cable and connection boxes on the roof of an apartment building).
\(^14\) Id. at 443.
Court held a taking had occurred.\(^{15}\) The Supreme Court did not resolve the issue regarding the proper amount of compensation.\(^{16}\) Hence, it remains insignificant in these instances whether an action is undertaken to achieve an important public purpose or results in only minimal impact on the landowner.\(^{17}\) Where a physical occupation has occurred by virtue of governmental action, compensation is required.\(^{18}\)

The traditional underpinnings of physical occupation theory do not fit comfortably with the notion of regulatory taking compensation. This difficulty was clearly stated in *Pennsylvania Coal Co. v. Mahon*\(^{19}\) in which Justice Holmes declared:

> Government hardly could go on if to some extent values incident to property could not be diminished without paying for every such change in the general law. As long recognized some values are enjoyed under an implied limitation and must yield to the police power. But obviously the implied limitation must have its limits or the contract and due process clauses are gone. One fact for consideration in determining such limits is the extent of the diminution. When it reaches a certain magnitude, in most if not all cases there must be an exercise of eminent domain and compensation to sustain the act. So the question depends on the particular facts.

> 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. . . . We are in danger of forgetting that a strong public desire to improve the public condition is not enough to warrant achieving the desire by a shorter cut than the constitutional way of paying for the change. . . .

Until 1978, the Court largely adjudicated regulatory enactments affecting land use as a question of whether the restrictions were constitutionally valid. Moreover, the Court principally left to the state courts the determination of whether the regulatory impositions passed

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\(^{15}\) Id.

\(^{16}\) Id. at 423.

\(^{17}\) *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982).

\(^{18}\) Id.

\(^{19}\) *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393 (1922).

\(^{20}\) Id. at 415-16.
In the event that the regulation was found to have gone "too far," the landowner's sole form of relief was judicial invalidation of the intrusive legislation. "Curiously, these court opinions often did not bother to mention exactly what provision of the Constitution was violated." That statement might serve as a potential explanation as to why, for over fifty years, the constitutional alternative of holding an overly intrusive regulation valid while holding that it operates as a taking requiring just compensation did not attract judicial attention.

A. *Penn Central* and the Application of the Fifth Amendment

Commencing with *Penn Central Transportation Co. v. New York City,* the Supreme Court addressed the issue of intrusive regulation as violative of the Fifth Amendment and applied the remedy applicable to a taking as opposed to striking the regulation as unlawful. Perhaps the Court's change of direction was motivated by the increasing number of regulatory restrictions on land use. Alternatively, there remains debate for Justice Brennan's expression in *Penn Central* "that the Constitution meant what it said—a taking, whether regulatory or physical, mandated that the property owner be paid just compensation. After-the-fact invalidation of the offending regulation would not satisfy the constitutional mandate."

The Court was faced with a claim from Penn Central Transportation Co. following the New York City Landmarks Preservation Commission's failure to approve a 55-story office building over Grand Central Terminal. Penn Central alleged, among other things, a taking of property without just compensation. Penn Central claimed the regulation operated as an arbitrary deprivation of the owners' property rights without due process of law.

The principal issue the Court addressed was under what operative conditions a regulatory taking occurs. Relying on Justice Holmes'
analysis in *Pennsylvania Coal Co. v. Mahon*, the Court formulated a
three factor analysis which served as the precursor to the ad hoc factual
inquiry. The analysis encompassed evaluation of: 1) the character of the
governmental action; 2) the economic impact of the regulation on the
claimant; and, 3) the extent to which the regulation has interfered with
distinct, investment-backed expectations.

One method by which Penn Central attempted to establish a taking
was by showing the owner had been denied the right to exploit the
superadjacent airspace. The Court was not persuaded by this argument
due to the transportation company's total disregard for the remaining
parcel of property.

Its designation as a landmark not only permits but contemplates
that appellants may continue to use the property precisely as it
has been used for the past 65 years: as a railroad terminal
containing office space and concessions. So the law does not
interfere with what must be regarded as Penn Central's primary
expectation concerning the use of the parcel. More impor-
tantly, on this record, we must regard the New York City law
as permitting Penn Central not only to profit from the Terminal
but also to obtain a "reasonable return" on its investment.

Because the Court held no taking had occurred, it did not address
the issue of possible remedies. The Court determined the denial of the
right to build a structure above the terminal did not serve as a denial of
Penn Central's constitutional right to just compensation. Additionally,
the Court found meritorious Penn Central's ability to transfer the
airspace rights to other parcels of property within the vicinity of the
terminal. "While these rights may well not have constituted 'just
compensation' if a 'taking' had occurred, the rights nevertheless
undoubtedly mitigate whatever financial burdens the law has imposed
and, for that reason, are to be taken into account in considering the

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30 See *supra* text accompanying notes 19-20.
32 *Id.* at 130, 135.
33 *Id.* at 135-36.
34 *Id.* at 136.
35 *Id.* at 136. The Court was further influenced by the fact that the preexisting air rights above
the terminal were made transferable to at least eight nearby parcels, one or two of which had been
determined suitable for the construction of the new office building. *Id.*
37 *Id.*
impact of the regulation." The Court concluded that the regulatory imposition did not effect a taking since the imposed restrictions were "substantially related to the promotion of the general welfare and not only permit reasonable beneficial use of the landmark site but also afford . . . opportunities [for] further enhance[ment] not only to the Terminal site proper but also other properties."39

B. First English and the Appropriate Remedy

Ultimately, debate over the issue of whether a regulatory taking could occur and require compensation resulted in the decision of First English Evangelical Lutheran Church v. County of Los Angeles.40 Here, the Court was not confronted with the issue of determining whether there had actually been a taking since the California Court of Appeals had previously assumed the original complaint sought monetary damages for the taking of all use of the landowner's property and treated the case as a takings action.41 Hence, the Supreme Court assumed the state court's disposition that a regulatory taking had occurred and isolated its review to the matter of remedy.42 At issue was a state regulation which prevented a landowner from rebuilding structures on a privately owned parcel of property following destruction by flood.43 The regulation's justification stemmed from the state's desire to prohibit construction of new buildings on floodplains.44 The Court held the Constitution required just compensation for a regulatory taking; the taking occurred from the effective date of the regulation until the time the state determined to amend or rescind the regulation.45 The Court held that compensation was owed even if the taking was temporary, and even if the regulation operated to protect the public health and safety.46 The Court reasoned that "[i]t is the owner's loss, not the taker's gain, which is the measure of the value of the property taken."47 The Court further stated:

38 Id.
39 Id.
40 First English Evangelical Lutheran Church v. County of Los Angeles, 482 U.S. at 304 (1987).
41 Id. at 311.
42 Id.
43 Id. at 307.
44 First English, 482 U.S. at 307.
45 Id.
46 Id. at 321.
47 Id. at 319 (quoting United States v. Causby, 328 U.S. 256, 261 (1946)).
Where this burden results from governmental action that amounted to a taking, the Just Compensation Clause of the Fifth Amendment requires that the government pay the landowner for the value of the use of the land during this period. . . . Invalidation of the ordinance or its successor ordinance after this period of time, though converting the taking into a "temporary" one, is not a sufficient remedy to meet the demands of the Just Compensation Clause.48

The Court appeared to be influenced by Justice Brennan’s dissent in San Diego Gas & Electric Co. v. City of San Diego,49 where he stated, “Nothing in the Just Compensation Clause suggests that ‘takings’ must be permanent and irrevocable.”50 Thus, Penn Central resolved the issue as to when a regulatory taking occurred while First English answered the question of the appropriate remedy. First English is not limited to temporary takings; rather, it stands for the premise that “[i]t is axiomatic that the Fifth Amendment’s just compensation provision is ‘designed to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole.’”51 Yet, despite the factors set forth in Penn Central regarding the determination as to whether the government has imposed a regulatory taking, the analysis remained an ad hoc, factual inquiry. The ad hoc inquiry appears to be prone to intensely subjective judicial interpretation.

An advantage of the ad hoc analysis remains in that it allows the Court to avoid the conceptual conflicts arising out of evaluating the importance of the governmental interest versus calculating the actual economic impact suffered by the landowner.52 Both of these aspects remain elements of the Penn Central test and, as such, allow the judiciary a bypass means of pitting one interest against the other. As a result, determining whether a taking has occurred, in addition to determining the applicable remedy, have produced conflicting results.

48 Id.
50 First English, 482 U.S. at 318 (citing San Diego Gas & Electric, 450 U.S. at 657).
51 Id. at 318-19 (quoting Armstrong v. United States, 364 U.S. 40, 49 (1960)). In First English, the ordinance adopted by the County of Los Angeles was promulgated and effectuated immediately, and although the petitioners filed suit within thirty days, by the time the claim was brought before the California Supreme Court, there existed a question regarding the merits of the claimant’s demand for compensation. Id. at 308, 309 n.3.
52 See Rubenfeld, supra note 3, at 1090.
II. THE APPLICABLE STANDARD OF REVIEW

A. Earlier Cases

The analysis delivered in *Penn Central* is not a strict three-pronged test to which the courts must adhere, but serves principally as a guide for conducting a balancing test. Thus, the Supreme Court has continuously delivered "takings" case opinions producing results not necessarily consistent with the *Penn Central* analysis. In *Agins v. City of Tiburon*, the Court announced a two-part test for considering whether a regulation operated as a taking. The test considered whether the regulation failed to substantially advance a legitimate state purpose and whether the property owner was deprived of economically viable use of the land. Consistent with the *Penn Central* posture was the Court's adherence to the notion of weighing private versus public interests in deciding takings cases. For a taking to be found, the Court must determine "that the public at large, rather than a single owner, must bear the burden of an exercise of state power in the public interest."

In addition, the Court continued to reevaluate the concept of property in its various analyses. *Penn Central* held that in evaluating a takings case the Court was not compelled to divide a single parcel into discrete segments and attempt to determine whether rights in a particular segment have been entirely abrogated. In deciding whether a particular governmental action has effected a taking, [the] Court focuses rather both on the character of the action and on the nature and extent of the interference with rights in the parcel as a whole . . . .

However, in subsequent decisions the Court decided rather than address the property rights issue as a "bundle of rights," the appropriate

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53 See infra text accompanying notes 104-244; see also Michael S. Greve, Property Rights At The Bicentennial: Course Correction or Constitutional Revolution?, 25 BEVERLY HILLS B.A. J. 114 (1991).
54 *Agins v. City of Tiburon*, 447 U.S. 255 (1980). At issue in *Agins* was whether the city's open-space zoning ordinance restricting the use of previously purchased property operated as a taking requiring just compensation. *Id.* at 257.
55 *Id.* at 260.
56 *Id.* at 261.
57 *Id.* at 260.
The approach was to construe property rights as "strands" in such a bundle.59

In *Andrus v. Allard*, the Supreme Court held that a complete prohibition on the sale of avian artifacts under the Eagle Protection Act and Migratory Bird Treaty Act did not constitute a taking.60 In the Court's view "[t]he denial of one traditional property right does not always amount to a taking. At least where an owner possesses a full 'bundle' of property rights, the destruction of one 'strand' of the bundle is not a taking, because the aggregate must be viewed in its entirety."61 Upon review of the regulation, the Court undeniably recognized the regulation prevented the most profitable use of the claimant's property.62 Nonetheless, the Court found that "a reduction in the value of property is not necessarily equated with a taking."63 At issue in *Andrus* was a regulation on the use of personal and not real property, and potentially the Court rested its assessment on this distinction.64 "[L]oss of future profits—unaccompanied by any physical property restriction—provides a slender reed upon which to rest a takings claim."65 The reed was not nearly as slender as perceived; in subsequent decisions this distinction was eliminated.66

The Court also found that the weight of the strands (or sticks) may be taken into consideration. *Kaiser Aetna v. United States*67 addressed a situation where the owners of private property constructed a marina and inlets that constituted navigable waterways of the United States.68 The Court held that a regulation which precluded the owner from denying the public access to an otherwise private facility constituted a physical occupation requiring just compensation.69 Essentially, the Court considered the issue in this case as a larger, weightier "stick" in the bundle of property rights than that addressed in *Andrus*. In *Kaiser Aetna*, "the owner ha[rd] somehow lost one of the most essential sticks in the bundle of rights that are commonly characterized as property—the

60 *Id.*
61 *Id.* at 65-66.
62 *Id.* at 66.
63 *Id.* at 66. It was noted that it was unclear whether other methods of economic benefit could be derived from the property, such as putting the artifacts on exhibit and charging an admission. *Id.*
65 *Id.* at 66.
66 *See infra* text accompanying notes 159-61.
68 *Id.*
69 *Id.* at 179-80.
right to exclude others."\textsuperscript{70}

This view appears to have stemmed from a perspective that the value of the right will be determined according to the apparent size or significance of the "stick." Perhaps the distinction between real and personal property offers an explanation for the different weighing of relative values.\textsuperscript{71} On the other hand, one may assume the posture that Kaiser Aetna's right to exclude was deemed substantial, as where Andrus' right to sell or convey was insignificant simply by virtue of the size or importance of the property to which the affected right was attached.

The Supreme Court applied a more straightforward test in \textit{Hodel v. Virginia Surface Mining & Reclamation Association},\textsuperscript{72} where an association of coal producers brought a pre-enforcement challenge to the constitutionality of the Surface Mining Control and Reclamation Act.\textsuperscript{73} Since the claim arose as a facial challenge to the Surface Mining Act, there was no controversy regarding the Act's effect on specific parcels of land or the bundle of rights attached thereto.\textsuperscript{74} Rather, the issue before the Court was whether the "mere enactment" of the Surface Mining Act constituted a taking.\textsuperscript{75}

Relying on \textit{Agins}, the Court determined the proper test for deciding whether a statute regulating the uses of property effects a taking is in light of whether the restriction "denies an owner economically viable use of his land. . . ."\textsuperscript{76} The Court reasoned that the Act did not prevent all beneficial use of the coal-bearing lands.\textsuperscript{77} Although the Act prohibited mining near certain locations and regulated conditions under which all mining could be conducted, it did not regulate alternative non-mining uses to which the coal bearing property could be put.\textsuperscript{78} Apparently, the

\textsuperscript{70} \textit{Id.} at 176.
\textsuperscript{71} As previously noted the Court eventually altered its position on this distinction. \textit{See supra} text accompanying notes 60-66.
\textsuperscript{74} \textit{Hodel}, 452 U.S. at 295.
\textsuperscript{75} \textit{Id.} The claims with respect to violation of the Commerce Clause, Tenth Amendment, the Due Process Clause of the Fifth Amendment, and the Act's provision for the imposition of civil penalties are not discussed herein.
\textsuperscript{76} \textit{Hodel v. Virginia Surface Mining and Reclamation Ass'n}, 452 U.S. 264, 295 (1981). (citation omitted).
\textsuperscript{77} \textit{Id.} at 296.
\textsuperscript{78} \textit{Id.} The Court concluded that the "mere enactment" of the Surface Mining Act did not deprive appellees of economically viable use of their land. There was further concern regarding whether appellees' "taking" challenge was premature. \textit{Id.} at 297.
Court gave great deference to the district court's finding that landowners could simply level the land without mining the coal because the value of level land in this steep-slope area of Virginia maintained a premium value.  

One of the principal cases addressing the issue of partial regulatory taking was *Keystone Bituminous Coal Association v. DeBenedictis.* In *Keystone*, coal companies brought an action challenging Pennsylvania's Mine Subsidence and Land Conservation Act. The Act required 50% of the coal located beneath certain structures to be kept in place to provide support for the surface estate. In line with the test employed in *Agins*, the *Keystone* analysis stipulated a regulation effected a taking if it either: 1) "does not substantially advance legitimate state interests," or 2) "denies an owner of economically viable use of his land." Here the test for a regulatory taking required comparing the value that had been taken from the property with the value that remained. For the determination of diminution in value as a result of the regulation, the Court refused to treat the coal required to be left in the ground as a separate parcel of property for which all value had been lost. Rather, the Court's central problem was that the Act had not made it commercially impracticable for the petitioner to continue mining bituminous coal. The Act merely required that less than 2% of the involved coal be left in the ground. 

The issue of compensation appeared to become focused on the extent of economic injury suffered by the landowner. Resounding the "sticks in the bundle" language employed in *Andrus*, the Court appeared to permit any rational legislative purpose, provided the size of the stick being removed from the landowner's bundle was not too significant. Given the "small percentage" of the regulated coal combined with the absence of an actual physical appropriation, the Court reasoned the landowner's reasonable investment-backed expectations were not materially affected. In the presence of any rational relationship, the 

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79 *Id.* at 297, n.38.  
81 *Id.* at 485 (quoting *Agins v. Tiburon*, 447 U.S. 255, 260 (1980)).  
82 *Id.* at 497.  
83 *Id.*  
84 *Id.* at 496. The Court was further influenced by the fact that the petitioners had failed to establish the existence of a single mine which could no longer be operated for profit. *Id.*  
85 *Keystone Bituminous Coal Ass'n v. DeBenedictis*, 480 U.S. 470, 499 (1987). The Court's emphasis on the small percentage of coal affected is somewhat confusing in consideration of its dicta stating:  

We do not suggest that the State may physically appropriate relatively small amounts of private
regulation was viewed as an authorized exercise of the state’s police power.

The Courts have continually vacillated on the issue of whether a regulation should not require compensation in the event any practicable use remained in the property. Thus, exactly what rights remain significant is unclear and unanswered. However, in *Nollan v. California Coastal Commission* the Supreme Court finally established a standard of review applicable to takings cases.

B. *Nollan* and the Requirement of a Higher Standard of Review

*Nollan* serves as the pinnacle case in takings jurisprudence. The case involved a suit brought by the owners of a bungalow on beachfront property. In an effort to obtain a rebuilding permit for the construction of a three-bedroom home, the California Coastal Commission imposed as a condition of approval the requirement that the owners provide lateral access for the public to pass across their property to the public beach. The government asserted construction of the Nollan’s new house would interfere with the public’s “visual access” to the beach, thus creating a psychological barrier to public access to the beach. The state justified the access condition as a valid exercise of its land use regulation power in preventing a “burden [to] the public’s ability to traverse to and along the shorefront.”

Had California simply required the Nollans to make an easement across their beachfront available to the public on a permanent basis . . . rather than conditioning their permit on their agreeing to do so [under the auspices of regulatory power] . . . no doubt there would have been a taking.”

The Supreme Court agreed with the Nollans’ contention that the condition imposed by California was violative of the Fifth Amendment’s takings clause. The majority opinion recognized prior cases had

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property for its own use without paying just compensation. The question here is whether there has been any taking at all when no coal has been physically appropriated, and the regulatory program placed a burden on the use of only a small fraction of the property that is subject to regulation.

*Id.* at n.27.

87 *Id.* at 827.
88 *Id.* at 828.
89 *Id.* at 838.
90 *Id.* at 829.
92 *Id.*
described the necessary condition for abridgement of property rights vis-à-vis the state police power as a "substantial advanc[ing] of a legitimate state interest."93 However, the Court noted its inclination to be particularly careful about the adjective [substantial] where the actual conveyance of property is made a condition to the lifting of a land-use restriction, since in that context there is a heightened risk that the purpose is avoidance of the compensation requirement, rather than the stated police-power objective.94

The Court concluded that in order to pass constitutional muster, a restrictive condition placed on property rights must "substantially advance" a "legitimate state interest."95 Discussion was given to the Government’s requirement to establish a close “fit” or “nexus” between the regulatory condition and purpose of the original restriction.96 In the Nollan’s case, the requisite nexus was lacking as the Court considered the Government’s claim of a legitimate state interest in the prevention of a publicly perceived “psychological barrier”97 to beach access to “not meet even the most untailored standards."98 Rather, the Court required a precise fit based upon the assumption that private landowners possess reasonable expectations regarding the use of their land.99 Among these expectations is the right to exclude others, which is "one of the most essential sticks in the bundle of rights that are commonly characterized as property."100 In sum, the facts presented in Nollan inspired the conclusion that "unless a permit condition serves the same governmental purpose as the development ban, the building restriction is not a valid regulation of land use but ‘an out-and-out plan of extortion.’"101

The end result from Nollan was the application of the nexus test and a heightened standard of review to taking cases. However, the courts continue to apply the ad hoc factual inquiry method imposed by Penn

93 Id. at 841.
94 Id.
95 Id. at 834. The Court quoted Penn Central as holding that “a use restriction may constitute a ‘taking’ if not reasonably necessary to the effectuation of a substantial government purpose.” Id. (citations omitted) (emphasis added)).
96 Nollan, 483 U.S. at 837-38.
97 Id. at 838.
98 Id. at 838.
99 See id. at 836.
100 Id. at 831 (citations omitted).
101 Nollan, 483 U.S. at 837 (citations omitted).
Central. The U.S. Claims Court has afforded the greatest deference to the Nollan heightened standard of review. The Claims Court has routinely been guided by the principles set forth in that decision. The effect of this application is demonstrated in cases concerning the question of partial regulatory takings. Although there is no theoretical rationale for the distinction, the logic that there must be a complete deprivation and denial of the "bundle of rights" prior to the need for just compensation has remained. This concept was clearly demonstrated in Penn Central where the Court concluded that since the transportation company still maintained the physical terminal and underlying property, no partial taking had been effectuated. The juxtaposition of legal conclusions respecting this matter is most readily illustrated by comparing cases on the issue.

III. JUDICIAL INTERPRETATIONS OF PARTIAL REGULATORY TAKINGS AS OPPOSED TO PHYSICAL TAKINGS

A. Lucas v. South Carolina Coastal Council

Prior to discussing the Claims Court's treatment of regulatory taking cases under the Nollan standard of review, it is worth addressing the United States Supreme Court's holding in Lucas v. South Carolina Coastal Council, given the potential implications of the case's dicta regarding partial regulatory takings. The issue in Lucas again was whether a regulatory taking was compensable under the Fifth Amendment. Although the status of permanent partial regulatory taking was not addressed, under the Lucas analysis one may be able to conclude such takings to be a noncompensable exercise of the state's police power. According to Justice Scalia, who wrote for the Majority, if the restriction is partial, the constitutional inquiry terminates and the regulation is sustained since the land use restriction has not deprived the owner of "all economically beneficial uses" of the property. However, it appears that even Justice Scalia is uncomfortable with this distinction.

102 See generally Greve, supra note 53.
103 See supra text accompanying note 35.
105 Id.
107 See id. at 1374-75.
In 1986, Lucas purchased two undeveloped waterfront residential lots on a South Carolina barrier island for $975,000. At the time of the purchase, the land was zoned for single family dwellings. Lucas intended to develop one lot for his personal use and keep the remaining lot as investment property. By 1988, South Carolina enacted the Beachfront Management Act (BMA), prohibiting any construction between the beachfront and identified setback lines. As a result, Lucas was prevented from building on either lot. Lucas filed suit in state court claiming the regulation, although perhaps a lawful exercise of the state's police power, operated to deprive him of all his land’s economic value. Additionally, Lucas contended that the property had a negative value to him due to the fact that the permissible uses under the BMA, which included tenting, recreational, or use of the property for a removable mobile home, were of less value than the real estate taxes and liability insurance he was required to pay. As previously mentioned, at no point did Lucas claim a partial taking of the property. The only reference to the partial taking issue was made by dicta in the Court’s opinion.

The state trial court held in favor of Lucas, finding the ban rendered his property “valueless” principally due to the ordinance prohibiting any construction on the property. The ordinance totally defeated any reasonable investment-backed expectations and resulted in a disparate economic impact. The Court entered a judgment in his favor for the market value of the property plus any taxes paid after the effective date of the ordinance. The South Carolina Supreme Court reversed, holding the “harmful or noxious use” akin to public nuisances exemption was applicable; thus, no compensation was required. The South Carolina Supreme Court’s finding that the nuisance exception applied rested in its acceptance of a legitimate and substantial public interest in the state legislature’s effort to mitigate damage to the South Carolina beach/dune area, a valuable public resource. “The erection of new construction ... contributes to the erosion and destruction of this public resource; and that discouraging new construction in close proximity to the beach/dune area is necessary to prevent a great public harm.”

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108 Id. at 1369-70.
109 See id. at 1374-75.
110 Id. 1372.
112 Id. at 1022.
113 Id. (citations omitted).
In its majority opinion reversing the South Carolina high court, the United States Supreme Court identified two discrete categories of regulatory action that would be compensable absent an inquiry into the public interest advanced by the restraint. First identified were regulations which cause the property owner to suffer a physical "invasion" of his land. Generally, compensation was required in these instances regardless of how infinitesimal the invasion or how pressing the public purpose in its support.

Second, categorical treatment was deemed appropriate where the regulation denies the property owner all economically beneficial or productive use of the land. Only if the regulation "does not substantially advance legitimate state interests or denies an owner economically viable use of his land" will the restriction be invalidated. It is worth noting that the language quoted from Agins makes no reference to the requirement that all economically viable use of the land be deprived. Thus, the question remains why total takings are distinguished from partial takings. The direct Agins language calls for compensation upon a finding of diminution of economically viable use and makes no distinction as to degree. As such, there exists no rational explanation why deprivation of any portion, regardless of how minute, should not be compensated.

Justice Scalia stated the notion that a total loss of all economic use may well be regarded as the "equivalent of a physical appropriation." However, he offered no explanation as to why this reasoning would not apply in the context of partial restriction imposed on land use. There seems to be no rational reason not to apply the equivalent logic in the context of a partial deprivation. After all, the landowner has been stripped of "sticks" in her bundle of property rights, and compensation for deprivation of reasonable expectations accompanying property ownership should be applicable. The Court concedes that just compensation is due in an instance of temporary taking under which the period of duration may potentially remain limited or at least undeterminable. This begs the question as to why a distinction exists for partial takings, which in most cases may be of a more permanent duration.

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114 Id. at 1015.
115 Lucas, 505 U.S. at 1015.
116 Id. (citations omitted).
117 Id. at 1016 (quoting Agins v. Tiburon, 447 U.S. 225, 260 (1980) (citations omitted) (emphasis omitted)).
118 Id. at 1017.
119 See supra text accompanying notes 40-45.
It appears that Justice Scalia recognized the weakness of his reasoning when he stated:

Regrettably, the rhetorical force of our "deprivation of all economically feasible use" rule is greater than its precision, since the rule does not make clear the "property interest" against which the loss of value is to be measured. When, for example, a regulation requires a developer to leave 90% of a rural tract in its natural state, it is unclear whether we would analyze the situation as one in which the owner has been deprived of all economically beneficial use of the burdened portion of the tract, or as one in which the owner has suffered a mere diminution in value of the tract as a whole. Unsurprisingly, this uncertainty regarding the composition of the denominator in our "deprivation" fraction has produced inconsistent pronouncements by the Court. . . . The answer to this difficult question may lie in how the owner's reasonable expectations have been shaped by the State's law of property—i.e., whether and to what degree the State's law has accorded legal recognition and protection to the particular interest in land with respect to which the takings claimant alleges diminution in (or elimination of) value. In any event, we avoid this difficulty in the present case, since the "interest in land" that Lucas has pleaded (a fee simple interest) is an estate with a rich tradition of protection at common law, and since the South Carolina Court of Common Pleas found that the Beachfront Management Act left each of Lucas's beachfront lots without economic value.120

The foregoing passage demonstrates Justice Scalia's awareness of the inherent problem with respect to the issue of partial regulatory takings; that is, partial restrictions on the whole parcel of property, or total restrictions of part of the parcel of property. Yet, rather than address the issue, the Court offers no resolution but continues to develop a theory on regulatory takings when the entire fee is at issue. "It is one thing to issue restrained utterances when it is not clear what lies ahead; it is quite another to practice evasion in the name of cautious decision making. . . . Any theory on regulatory takings that openly confesses its

120 Lucas, 505 U.S. at 1016-17 n.7 (1992) (citations omitted).
inability to come to grips with that issue is dead before it is born. . . .”

B. Whitney Benefits, Inc. v. United States

An extension of the strategy undertaken in Lucas for vitiating compensation claims for a regulatory (perceivably partial) taking, is that although the regulation deprives the owner of some uses of the property (and thus some value), a compensable taking cannot stand provided the claimant maintains other profitable uses to which the property may be put. Such an effort was undertaken by the Government in challenging the taking claim asserted in Whitney Benefits, Inc. v. United States.122 Previously, the Claims Court was quick to dispose of the Government’s contention and hold that a compensable taking had occurred entering an award of nearly $60.3 million.123 The Federal Circuit affirmed.124

Whitney Benefits, Inc., a mining company, brought suit seeking compensation for the regulatory taking of its mining property resulting from enactment of the Surface Mining Control and Reclamation Act125 (SMCRA). Whitney Benefits had purchased slightly less than 600 acres on the Tongue River in Northern Wyoming solely for the purpose of surface mining the Whitney coal located on the alluvial valley floor.126 The express SMCRA language prohibited any mining activity which would “interrupt, discontinue, or preclude farming on the alluvial valley floors . . .”127 As a result, Whitney Benefits was prohibited from mining any of the property.128

The Government argued that SMCRA regulated only one of several economically beneficial uses to which the involved property could be put.129 As one potential alternative use, the Government asserted Benefits’ ability to farm the surface land, or retain value of the coal

121 Epstein, supra note 106, at 1375.
122 Whitney Benefits, Inc. v. United States, 926 F.2d 1169 (Fed. Cir. 1991), cert. denied, 502 U.S. 952 (1991). Also at issue were the Government’s arguments that: 1) the standard of review was de novo; 2) no taking could occur until Benefits had applied for and been denied a mining permit; 3) the Surface Mining Control and Reclamation Act did not prohibit Benefits from mining “Whitney coal;” and 4) the Claims Court’s failure to consider Congress’ motivation. Id.
124 Whitney Benefits, 926 F.2d at 1178.
126 Whitney Benefits, 926 F.2d at 1172, 1174.
127 Id. at 1172.
128 Id.
129 Id. at 1174.
under the coal exchange provision. The Federal Circuit fully agreed with the Claims Court’s evaluation of this argument as “completely off the mark.” The Claims Court had seized upon the fact that Wyoming recognized a distinction between the mineral and surface estates and mineral rights clearly were property within the scope of the Takings Clause of the Fifth Amendment.

In addition, relying primarily on Penn Central, the Government contended the existence of the coal exchange preserved any economic value of the Whitney coal. The Court noted its previous distinction of Penn Central as a situation where the specific regulation was not intended to take an interest in land. Under the circumstances of Penn Central, the owner retained the railroad station, which could continue to profitably operate in the usual manner, as opposed to the case at bar in which the Claims Court had found a total deprivation of the Whitney coal property.

Furthermore, the Court found the mere existence of the statutory exchange provision confirmed the presence of a taking. On a previous appeal the Court had held:

the exchange transaction is a method of ascertaining and paying just compensation for a taking, which may be negotiated and agreed upon either before or after the taking itself, and is optional with the claimants, who may reject any exchange and pursue a money award under the Tucker Act, 28 U.S.C. §1491.

The Court reasoned there existed no logical purpose in an offer to pay unless something had been taken. Hence, to hold the presence of a

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130 Whitney Benefits, 926 F.2d at 1174.
131 Id.
132 Id. (citation omitted).
133 See 30 U.S.C. § 1260(h)(5) (1994). The coal exchange exists as a system under which there can be a previous agreement to payment of just compensation and subsequent to the taking a claimant can either accept the offered compensation or pursue and action under the Tucker Act, 28 U.S.C. § 1491 (1994).
134 Whitney Benefits, 926 F.2d at 1175.
135 Id.
136 Id.
137 Whitney Benefits, Inc. v. United States, 752 F.2d 1554, 1560 (Fed. Cir. 1985).
138 Whitney Benefits, 926 F.2d at 1176. The specific statutory provision on which the court relied states: “It is the policy of congress that the Secretary shall develop and carry out a coal exchange program to acquire private fee coal precluded from being mined by the restrictions of this paragraph (5) in exchange for federal coal which is not so precluded.” Id.
statutory provision for a coal exchange precluded the finding of a taking in a case such as this would eviscerate the constitutional guarantee of just compensation.\(^{139}\)

As such, rejection of relief under the coal exchange provision by no means served to extinguish Whitney Benefits' claim. Alternatively, the Tucker Act provides that:

The United States Court of Federal Claims shall have jurisdiction to render judgment upon any claim against the United States founded either upon the Constitution, or any Act of Congress or any regulation of an executive department, or upon any express or implied contract with the United States, or for liquidated or unliquidated damages in cases not sounding in tort. . . . \(^{140}\)

By virtue of this statutory provision, the Claims Court retained jurisdiction over Benefits' claim and remained vested with authority "[t]o provide an entire remedy and to complete the relief afforded by [a] judgment . . . ."\(^{141}\)

Perhaps the most interesting facet of the Whitney Benefits decision is the Claims Court's recognition of both surface and mineral rights, which offered an avenue by which the Supreme Court could avoid debating the total versus partial takings dichotomy. The Federal Circuit appeared to give great deference to Whitney Benefits' investment-backed expectations, in that any proffered alternative uses of the property (i.e. farming) were not of proportional value in relation to the initial investment incentive (surface mining of coal). Thus, the qualification that Whitney Benefits had been deprived of all economically viable use of its coal property was made.

C. Yancey v. United States

Yancey v. United States\(^{142}\) does not address a real property taking as is traditionally viewed under a Fifth Amendment compensation action. Rather, at issue was the award of compensation to turkey farmers who sold healthy turkey breeder stock—purchased for the purpose of selling

\(^{139}\) Id.


\(^{142}\) Yancey v. United States, 915 F.2d 1534 (Fed. Cir. 1990).
hatching turkey eggs to customers out of state—at a 77% reduction in value resulting from a poultry quarantine.\textsuperscript{143} In an effort to control an outbreak of lethal Avian Influenza, the U.S. Department of Agriculture (USDA) imposed a quarantine prohibiting the interstate shipment of live poultry, manure from poultry, litter used by poultry, carcasses, eggs, and certain equipment.\textsuperscript{144} Tests revealed that the Yanceys’ flock was unaffected by the disease.\textsuperscript{145}

After an effort to maintain the flock, the Yanceys decided that attempting to keep the birds alive indefinitely would be uneconomical.\textsuperscript{146} Upon selling the flock for meat, which was not an economically viable alternative and not the purpose for which the turkeys had been raised, the Yanceys received $20,887.\textsuperscript{147} The USDA denied the Yanceys’ claim of $63,556 for indemnity under the regulation because the flock was healthy at the time of sale.\textsuperscript{148} As a result of the USDA’s denial, the Yanceys initiated suit in the U.S. Claims Court alleging an uncompensated taking of their property under the Fifth Amendment because the regulation’s prevention of interstate travel had destroyed all the economic value of their property.\textsuperscript{149}

Applying the \textit{Penn Central} ad hoc factual inquiry, the Claims Court found the quarantine imposition resulted in a 77% reduction in the value of the turkey breeder stock.\textsuperscript{150} The Claims Court concluded that the Yanceys were entitled to just compensation under the Fifth Amendment since “a regulation ... can be a taking if its effect on a landowner’s ability to put his property to productive use is sufficiently severe.”\textsuperscript{151}

On appeal to the Federal Circuit, the Government argued that the diminution in the value of the turkeys was entirely too small to constitute

\textsuperscript{143} \textit{Id.}
\textsuperscript{144} \textit{Id.} at 1536. Initially, the outbreak had occurred in Pennsylvania and subsequently mild forms of the disease appeared in counties of Maryland and Virginia, including Rockingham County, Virginia, where the Yanceys’ turkey farm was located. \textit{Id.}
\textsuperscript{145} \textit{Id.}
\textsuperscript{146} \textit{Id.} The Yanceys spent up to $1,800 per week in effort to keep the flock alive.
\textsuperscript{147} \textit{Yancey}, 915 F.2d at 1536.
\textsuperscript{148} \textit{Id.} See 9 C.F.R. §53.2(b) (1990) (the regulation applicable to areas such as the Yanceys’ authorized payment of up to 100% of the “expense of purchase, destruction and disposition of animals and materials required to be destroyed because of being contaminated by or exposed to lethal avian influenza.”).
\textsuperscript{149} \textit{Yancey}, 915 F.2d at 1536-37.
\textsuperscript{150} \textit{Id.} at 1539. The Claims Court determined that the value of the breeder stock to be reduced from $91,616 to $20,887, the amount received from slaughter. \textit{Id.}
\textsuperscript{151} \textit{Id.} at 1540 (citing Florida Rock Industries, Inc. v. United States, 791 F.2d 893, 901 (Fed. Cir. 1986), \textit{cert. denied} 479 U.S. 1053 (1987)).
a compensable taking. However, the appellate court agreed with the trial court and did not read earlier "precedents as creating an automatic numerical barrier preventing compensation, as a matter of law, in cases involving a smaller percentage diminution in value." The Claims Court properly weighed all the relevant considerations, including percentage diminution in value under the modern Penn Central approach, and concluded the Yanceys had suffered a severe economic impact. The court determined the ultimate consequences of the Government's action could not be ignored, and as a result of the regulatory restrictions the Yanceys were left with no option other than selling their entire turkey breeder flock.

An additional objection the government waged was the Claims Court's evaluation of the fair market value of the Yanceys' breeder flock. "However, [the Federal Circuit adhered with precedent in holding] the fair market value of property under the Fifth Amendment can include an assessment of the property's capacity in negotiating a fair price for the property." Therefore, the Claims Court rejected the Government's cost-based standard entirely. The court also concluded that the Yanceys' entire flock was wiped out through no fault of their own, and because they adhered to the regulations imposed by the USDA they could no longer endure the economic impact of maintaining a live turkey breeder flock.

Interestingly, as in Andrus, the Yanceys' claim was founded on the taking of personal as opposed to real property. The Federal Circuit rejected the Government's attack on the Claims Court's principal reliance upon cases involving the ownership of real property. Rather, the court concluded that the reasoning in those cases was "equally applicable to other significant property interests besides land ownership. There is no doubt that other property interests are also protected by the Fifth Amendment. . . .[T]he Yanceys' ownership of their turkey flock deserves just as much protection as if ownership of their farm had been

\[152\] Id. at 1541 (citing Euclid v. Ambler Realty Co., 272 U.S. 365 (1926) (75% diminution in value caused by zoning not a taking); Hadacheck v. Sebastian, 239 U.S. 394 (1915) (87.5% diminution in value not a taking)).
\[153\] Yancey, 915 F.2d at 1541.
\[154\] Id. The court referred to the earlier cases cited in note 153.
\[155\] Id.
\[156\] Id. at 1542 (citations omitted).
\[157\] Id.
\[158\] Yancey, 915 F.2d at 1543.
\[159\] See supra text accompanying notes 59-65.
\[160\] Yancey, 915 F.2d at 1540.
appropriated.”

Perhaps the most pertinent aspect of *Yancey* is the fact that neither court was willing to provide compensation for what would ordinarily be deemed a “partial” regulatory taking. The Yanceys remained in absolute possession of their property. However, they were divested of their investment-backed expectations because the quarantine curtailed use of the flock for production of hatching turkey eggs. The court did not require that *all* economic value be destroyed but was satisfied with a 77% diminution. Perhaps the court’s reasoning rests in the fact that the Yanceys were left with no means by which to generate income from their poultry flock as a result of adhering to USDA regulations designed to protect the public.

D. *Loveladies Harbor v. United States*

*Loveladies Harbor v. United States* further illustrates the Claims Court’s reluctance to accept a Government defense that the property in question retains some form of residual value. In 1956, landowners purchased property consisting of approximately 250 acres located in Ocean County, New Jersey. As of May, 1982, 199 acres had been improved by dredge and fill and developed with vacation homes which were principally sold to the public. As a result of state and federal regulations governing the use of wetlands, the remaining fifty-one acres were prevented from being developed absent an authorizing permit. Subsequent to denial of the necessary permit, the landowners filed suit in the Claims Court seeking just compensation for the taking

161 Id. at 1540-41 (citing Ruckelshaus v. Monsanto Co., 467 U.S. 986 (1984) (holding that Fifth Amendment protection extended to intangible trade-secret property)).
162 This reference is to both the Claims Court and Federal Circuit Court of Appeals.
164 Id.
165 Id.
166 See 33 C.F.R. § 328.3(b) (1995) (defining wetlands as those areas where the water table is at, near, or above the land surface for a significant amount of time, creating saturated soils resulting in the production of plants which can grow absent atmospheric oxygen).
of 11.5 acres of wetlands and one acre of uplands. According to the landowners' appraisers, the real value of the property with all permits in place was estimated at $200,000 per acre. Appraisers for both the landowners and the Government agreed that following the regulatory imposition, in absence of the requisite permits, the best use of the property would be for environmental conservation or recreational purposes. Under such use, the fair market value was estimated at $1,000 per acre. Yet, the Government's appraiser concluded the upland acre may have additional value should a potential buyer perceive it as development property. It seems the Government's appraiser was basing his assessment on the chance of a potential buyer erroneously perceiving the property could be developed for any purpose. Aside from its own expert's testimony, the Government subsequently asserted the landowner's failure "to explore the possibilities of using the property as a marina, for a mitigation site, for aquaculture, and for sale to neighbors who might be interested in preserving their unobstructed water views." The court dismissed these assertions as not having been demonstrated to be reasonably probable and practicable uses.

Cross-examination revealed the appraisal of $1,000 per acre was inclusive of the property's potential value for hunting, bird watching, and growing and harvesting salt hay. The court held there was no

168 Loveladies Harbor, 21 Cl. Ct. at 154. Initially, the landowners applied for a state permit to fill the entire remaining fifty-one acres. Subsequent to a state agency settlement agreement, landowners applied for a permit encompassing 12.5 acres. Following several state agency and court reviews, landowners were granted a permit to fill 11.5 acres provided the wetlands destruction was mitigated by the creation of a corresponding amount of new wetlands. A request that an additional acre be filled was denied because it had already been filled (for a total of 12.5 acres). During this same time, the landowners had applied to the Corps for the appropriate federal permit. The permit application was amended at several points during the process but was eventually denied. Id. at 156. In determining the fair market value of the property prior to the regulatory action, the appraisers considered the gross value of the undeveloped land at $3,720,000 (taking into account variations for lot sizes, shapes, views, and proximity to the water); the cost of preparing the property for development at $900,500; and costs associated with complying with the state's mitigation compromise at $161,500. Id. at 158-59.

169 Id. at 158-159.

170 Loveladies Harbor, 21 Cl. Ct. at 158-159.

171 Id. at 158.

172 Id. at 158-159.

173 Id.

174 Id.

175 Id.

176 Id. at 158. There was further testimony which demonstrated that hunting would be prohibited due to the acreage's close proximity to a residential area, and the farming of salt hay would not be economically feasible as a result of the small parcel size and its relative inaccessibility. Id.
evidence that any of the proposed alternative uses would satisfy "the standard of reasonable probability for adaptability and demand." Even if the Government could have successfully demonstrated that bird watching served as an alternative use, there were no means by which to establish a market for that use.

As a consequence of the dramatic decline in property value, the landowners suffered a diminution of over 99%.

The significance of this impact is heightened when it is recalled that the $1,000 per acre figure represents a reasonable estimate of what a government entity could be expected to pay for the property, and is not the product of negotiations between a willing buyer and seller under no duress. As a result of government action, there is no market; the only potential buyer is a governmental unit, and the only remaining value is a nominal one.

The court continued by concluding the severe economic impact suffered by the landowners, coupled with the court's earlier determination that a legitimate state interest was lacking, substantiated that a taking had occurred. As such, the court awarded full compensation and required the landowners to deed the 12.5 acre parcel of property to the Government.

E. Florida Rock Industries v. United States

Florida Rock Industries v. United States, a companion case to Loveladies Harbor, has been in the throes of litigation since 1982 and is perhaps the most insightful case regarding the issues of partial impact and just compensation. The case commenced in 1982 when Florida Rock Industries (Florida Rock) filed suit against the Army Corps of Engineers (Corps) following the Corps' denial to issue Florida Rock a

177 Id. at 159 (citing Olson v. United States, 292 U.S. 246 (1934)).
178 Loveladies Harbor, 21 Cl. Ct. at 158.
179 Id. at 160. The value of the property before the taking was $2,658,000 and following the permit denial the value of the property stood at $12,500. Id.
180 Id. at 160 (emphasis added).
181 Id. at 160-61. As an aside, it is interesting to note that landowners had indicated at trial their intention to convey the entire remaining fifty-one acre parcel of property to the government, not merely the 12.5 acres at issue. Id.
permit to mine the limestone beneath a tract of wetlands located in Dade County, Florida. The Corps' investigation determined the proposed mining activity "would cause irremediable loss of an ecologically valuable wetland parcel and would create undesirable water turbidity." Florida Rock sought monetary compensation from the United States alleging that the Corps action constituted an uncompensated regulatory taking of its private property for public use in violation of the Fifth Amendment.

In the original action (Florida Rock I), the Claims Court concluded a regulatory taking had occurred and that compensation was due by virtue of the dredge and fill permit denial. The court applied a value of $10,500 per acre to the property prior to the taking, and it estimated the remaining value to be negligible because rock mining was the only viable economic use of the land. The court awarded Florida Rock $1,029,000 plus attorney fees and simple interest. On appeal (Florida Rock II), the Court of Appeals held the Claims Court had undertaken an inappropriate analysis for determining the value of the property. Rather than focusing on the immediate use value following the taking, the inquiry should have been into the "fair market value" for such land in the surrounding vicinity.

On remand (Florida Rock III), the issue of fair market value was highly contested. However, the Claims Court eventually conceded to...
Florida Rock's argument that the Court of Appeals' command in *Florida Rock II* required "a detailed inquiry into the motivations and sophistication of buyers of the comparable properties upon which assessment is based." Florida Rock had conducted a complex survey which concluded no similarly situated buyers possessed the requisite knowledge of the regulatory scheme to qualify their property purchases as reliably comparable. Thus, Florida Rock's assessor appraised the parcel's fair market value following the denial of the permit under the regulatory regime as negligible. The Claims Court concurred with this analysis and reinstated the $1,029,000 award with compound interest. Given the complexity and duration of this case, it is worth examining the individual stages of litigation.

1. *Florida Rock I*

In *Florida Rock I*, the Court reasoned that with respect to regulatory takings, one must examine the "substance, rather than the legal trappings, of what is left as a result of the Government's regulatory action." Since Florida Rock had purchased the property solely for the purpose of mining the underlying limestone, the Government regulation served to strip the land of its only economically viable use. Any remaining incidences of ownership, such as the right to sell, lease, or exclude others, were rendered meaningless since the property could not be put to any productive use. The court rejected the Government's argument that the property could be held for a long term investment. "Relegating plaintiff to passively holding the land in the hope that the
regulatory climate may someday change cannot be deemed a viable economic use. . . .” 200 Hence, deprivation of any realistic utility required compensation. 201

Similarly, with respect to the issue of fair market value, Florida Rock I asserts the premise that given the timeless nature of property, no regulatory action could ever entirely eliminate a market value. 202 In some circumstances there may be investors who would be willing to purchase regulated property based on the speculation that the restriction may be lifted at some time in the future. 203 However, the court concluded that an attempt to engage in speculation of this nature could not defeat a regulatory takings claim. 204 "If the existence of such a residual market for the property could defeat a claim for a regulatory taking, no regulatory taking could ever be proved and the concept would be rendered meaningless.” 205 Rather, the court relied on Florida Rock’s expert, who testified that “fair market value subject to the regulation was a myth: the only buyers who would pay any substantial sum for the property were foreigners, unaware of the physical nature of the property and of the legal restrictions on its use, victims of fraud or self-deception.” 206

Since there could be no legitimate determination of “fair market value” it was necessary to consider the immediate use value of the property. Again, upon the court’s determination that the property could not be put to a productive use, it reached the conclusion that a compensable taking had occurred. 207

2. Florida Rock II

The appellate court disapproved of several of the Claims Court’s findings, including the utilization of immediate valuation as opposed to fair market value. 208 The court found the trial judge’s interpretation of

200 Id.
201 Florida Rock I, 8 Cl. Ct. at 166.
202 Id. at 167.
203 Id.
204 Id. at 167-68.
205 Id. at 167 (citations omitted).
206 Florida Rock III, 21 Cl. Ct. at 171.
207 Id. at 179.
208 Florida Rock II, 791 F.2d 893 (1986). The Federal Circuit further rejected the trial court’s inquiry into whether the proposed activity would have polluted the waters, and application of the evidence in determining whether the case constituted an actual taking. Affirmed were the trial court’s finding that the 98 acre parcel was the only property in dispute, and the pre-taking value of
case law requiring there be no remaining immediate use of the property to be erroneous. In addition, it was deemed error for the trial court to have excluded testimony from the Government’s real estate expert, who testified that a market existed for speculators willing “to forego immediate income in hope of long-term gain.” If Florida Rock could obtain a “solid and adequate” fair market value for the property, there would be a sufficient remaining use to forestall the determination of a taking and a need for Governmental compensation.

3. Florida Rock III

On remand, the Claims Court stressed the court of appeals’ language requiring “the ultimate fact to be proven is the existence or absence of a market among knowledgeable investors, aware of all restrictions on the land.” In applying an ad hoc analysis, the court undertook a lengthy review of the appraisal reports and expert testimony, only to conclude a fair market value could not be reasonably calculated since it was impossible to step back in time and impute knowledge of the restriction to investors. Due to the absence of an investment market and any other economically viable use of the property, the Claims Court found its original value appropriate. In other words, the Claims Court relied on the same evidence and testimony, and while merely couching the analysis in different terms, it reached the same conclusion.

However, Florida Rock III reached even further by considering when a substantial reduction in property value should operate as a sufficient basis for concluding a taking has occurred. Principally, the court emphasized the necessity of evaluating the property owner’s basis, or investment in the property and the ability to recoup this investment or make a profit while subject to the regulation. Operation of this inquiry is equivalent to the Penn Central investment-backed expectations analysis. The fact that Florida Rock purchased the property was $10,500 per acre. Id.

209 Id. at 901-03.
210 Id. at 902.
211 Id.
212 Florida Rock III, 21 Cl. Ct. at 171.
213 Id. at 161-174.
214 Id.
215 Id. at 175.
216 Florida Rock III, 21 Cl. Ct. at 175.
property solely for the purpose of mining limestone and virtually no other business was available in which the initial investment be recouped, the substantial reduction in value was sufficient to sustain a regulatory taking.\textsuperscript{218}

4. \textit{Florida Rock IV}

The court of appeals vacated and remanded \textit{Florida Rock III}, holding: (1) for the purpose of determining fair market value, there was no requirement for a detailed inquiry into the motivation and sophistication of buyers of like property; (2) the evidence did not support the conclusion that all economic use or value of the property was taken; and, (3) the Claims Court would be required to undertake a balancing of competing interests to determine whether a compensable regulatory taking had occurred.\textsuperscript{219} The court quickly clarified its opinion in \textit{Florida Rock II} as not having imposed the necessity of engaging in an investigation of the particular sophistication and motivation of buyers.\textsuperscript{220} Rather, the central question was to focus on the fair market value prior to the imposition of the regulatory restraint and the extent of any variance from that value.\textsuperscript{221} To abandon the use of evaluating a speculative market was considered error because monetary compensation from a speculative market was equally as ordinary and satisfactory as any other market.\textsuperscript{222} Thus, to conclude the nonexistence of a speculative market was "at odds both with common sense and with [the court's] directions in \textit{Florida Rock II}."\textsuperscript{223}

The court recognized the ongoing debate with respect to the appropriate method of determining whether a regulatory taking had occurred. The chosen formula remained the \textit{Penn Central} test of balancing several pragmatic considerations, including: (1) the economic impact suffered by the claimant as a result of the regulation; (2) the extent of the regulation's interference with investment-backed expectations; and, (3) the character of the government action.\textsuperscript{224} Under certain conditions the economic impact factor, standing alone, can be

\textsuperscript{218} \textit{Florida Rock III}, 21 Cl. Ct. at 176.
\textsuperscript{219} \textit{Florida Rock IV}, 18 F.3d 1560 (1994).
\textsuperscript{220} \textit{Id.} at 1565-67.
\textsuperscript{221} \textit{Id.}
\textsuperscript{222} \textit{Id.} at 1567.
\textsuperscript{223} \textit{Id.} at 1567.
\textsuperscript{224} \textit{Florida Rock IV}, 18 F.3d at 1564 (citations omitted).
decisive and eliminate the need to balance any other factors. Should the regulation categorically prohibit all other economically beneficial use of the land, resulting in complete destruction of all economic value associated with private ownership, the regulatory effect is equivalent to a permanent occupation requiring compensation. However, should the regulation result merely in the partial destruction of the available economic benefit, the case will not fall within the Supreme Court's "categorical takings" rule.

It appears as though the Claims Court had satisfied the Federal Circuit's inquiry into the extent to which the regulation interferes with the investment-backed expectations of the landowner, as well as the character of the government action. Florida Rock's investment-backed expectations were to be realized through the mining of the underlying limestone. These objectives were clearly destroyed upon the denial of a mining permit. This fact is further emphasized by Florida Rock's subsequent purchase of other property to meet its mining requirements. Furthermore, it was undisputed that the Government was authorized to impose such a regulation under its police power.

Thus, the principal inquiry focused on determination of what economic use, as measured by the market value, remained following imposition of the regulation. Not until the remaining market value of Florida Rock's property was established could there be resolution of the question as to whether the economic impact on the property owner was severe enough to constitute a compensable regulatory taking.

In order to appropriately address this matter, two issues required determination: (1) "whether the regulation must destroy a certain proportion of a property's economic use or value in order for a compensable taking of property occur"; and, (2) "how to determine, in any given case, what that proportion is." Thus, the question is posed: does an owner who is denied substantial but not complete economic use and benefit from his property suffer a partial taking requiring compensation?

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225 Id. at 1564-1565 (citations omitted).
226 Id. at 1564-65. The court referred to Lucas v. South Carolina Coastal Council, 505 U.S. 1003 (1992) discussed supra part III A.
227 Id. at 1564-65.
228 Florida Rock III, 21 Cl. Ct. at 176.
229 Florida Rock IV, 18 F.3d at 1570-71.
230 Id. at 1568.
231 Id.
Logically, the amount of just compensation should be proportional to the value of the interest taken as compared to the total value of the property, up to and including total deprivation, whether the taking is by physical occupation for the public to use as a park, or by regulatory imposition to preserve property as a wetland so that it may be used by the public for ground water recharge and other ecological purposes.\textsuperscript{232}

The principal difficulty is in drawing the line between what qualifies as a partial regulatory taking and the mere "diminution in value" of otherwise legitimately regulated use.\textsuperscript{233} The court concluded the only means available of formulating a proper judgment would be through the application of an ad hoc factual inquiry.\textsuperscript{234} Although the Federal Circuit discussed the historical underpinnings of takings jurisprudence and prior case law, the only further guidance developed for the Claims Court was that in ascertaining whether the Government acted within its proper role, the Court must operate under "the working assumption that the Government will neither prejudice private citizens, unfairly shifting the burden of a public good onto a few people, nor act arbitrarily or capriciously, that is, will not act to disappoint reasonable investment-backed expectations."\textsuperscript{235} The court continued by stating that when the government acts as a middleman between private interest to further an environmental gain from which all may benefit, "the shared diminution of free choice that results may not rise to the level of constitutionally required compensation."\textsuperscript{236}

In addition, in order to demonstrate the property owner's loss of economic use resulting from the regulation, the trial court is to consider whether: (1) there exist any direct compensating benefits accruing to the property and others similarly situated as a result of the regulation; (2) the benefits are widely shared through the community, though the associated costs are focused on a few; and, (3) the alternative permitted activities are economically realistic and available given the setting and

\textsuperscript{232} Id. at 1569 (citation omitted).
\textsuperscript{233} Id. at 1569 (1994); see supra note 20 and accompanying text (the court continued by quoting Justice Holmes' declaration in Pennsylvania Coal regarding the effective operation of government and the requirement of compensable takings).
\textsuperscript{234} Florida Rock IV, 18 F.3d at 1570.
\textsuperscript{235} Id. at 1571.
\textsuperscript{236} Id.
circumstances.\textsuperscript{237}

One can hardly state that the Federal Circuit cast any bright light on resolution of the appropriate test for determining when a compensable partial regulatory taking has occurred. Rather, following a restatement of the ad hoc factual inquiry, the court pondered the appropriateness of considering whether the Government had acted fairly and reasonably.\textsuperscript{238} This discussion provided nothing more than what had previously been announced in \textit{Nollan}.\textsuperscript{239} The sum of the court's pronouncement was a requirement that the restrictive condition substantially advance a legitimate state interest.\textsuperscript{240}

The only distinction was the court's qualification that in some instances diminution may not rise to the level of constitutionally required compensation.\textsuperscript{241} The court appeared to rest this conclusion on the notion that under certain circumstances the government must act as an intermediary between the private interest and the public good.\textsuperscript{242} Yet, the court stopped short of stating when the regulation reaches the critical level of diminution to trigger the Takings Clause.\textsuperscript{243} It simply did not address the main issue at bar—the question of the requisite proportional amount of decreased value. Instead, recognizing that no clear line had been drawn, the court declared that "[o]ver time... enough cases will be decided with sufficient care and clarity that the line will more clearly emerge."\textsuperscript{244} If this statement was intended to serve as the court's critique of the majority opinion, it appears to be accurate.

IV. \textsc{Legitimacy of "Economic Impact" and "Investment-Backed Expectations" Analyses}

Of the three-pronged balancing test employed in ad hoc inquiry cases, the Supreme Court appears to grant considerable judicial weight to both the actual "economic impact" suffered by the claimant and the loss of reasonable "investment backed expectations." Frequently the Court will couch its analysis of these factors in terms of the degree to

\textsuperscript{237} \textit{Id.} at (1994).

\textsuperscript{238} This is especially curious in this case given that the appropriateness of the Government's regulatory scheme was never questioned.

\textsuperscript{239} \textit{See supra} notes 87-113 and accompanying text.

\textsuperscript{240} \textit{Florida Rock IV}, 18 F.3d at 1571 (citation omitted).

\textsuperscript{241} \textit{Id.}

\textsuperscript{242} \textit{Id.}

\textsuperscript{243} \textit{Id.}

\textsuperscript{244} \textit{Id.} (emphasis added).
which the claimant has been deprived of the economically beneficial use of the property. In fact, there should be no difference between the reduction in value or use, since the property owner has ultimately been deprived of a property right that would have otherwise accompanied ownership absent the regulatory restriction. The central problem with this form of inquiry is the Courts' continued vacillation as to whether it should focus on the current market value, or the difference between the fair market value of the property prior to the regulation and following the regulatory restrictions.

A. Economic Impact

What exactly the Court is attempting to determine in evaluating the regulatory economic impact is somewhat convoluted and confusing. In certain instances it may be possible to comprehend consideration of an economic rationale, such as the facts surrounding Penn Central. In that particular case, the property owner was permitted to continue the ordinary use and functional operation of the property as it had originally been designated. Given the legitimate state interest in preserving the terminal's physical plant as a historical structure and the owner's ability to reap the economic gain associated with superadjacent air rights by virtue of the rights' free transferability, it is difficult to perceive any consequential economic loss actually suffered by the property owners. However, most cases do not give rise to such an easily balanced exchange, but address matters in which the property owner has been legally stripped of some valuable property use for which there is no trade-off available to establish equilibrium.

Hence, the question lingers as to what extent the economic impact must devastate the landowner in order for a compensation claim to prevail. In some instances the Court has refused to avail the property owner relief absent the deprivation of all economic value. Yet, under similar circumstances the Court is clearly willing to compensate an owner for a mere diminution in property value. It is difficult, if not impossible, to align these two polar perspectives. The most unfortunate

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245 *Florida Rock IV*, 18 F.3d at 1571 (citation omitted).
246 See supra text accompanying notes 25-39.
247 See supra text accompanying note 34.
248 See supra text accompanying notes 37-38.
249 See supra text accompanying notes 104-121 and 122-141.
250 See *Yancey v. United States*, 915 F.2d 1534 (Fed. Cir. 1990), *supra* notes 152-153 and accompanying text.
aspect is the Supreme Court's unwillingness to confront the "partial" taking issue given the opportunity. Rather, the courts continuously cloak analysis under the rubric of "economic impact," which case law has routinely demonstrated as having no legitimate interpretation. As such, economic impact theory should fall squarely on its face given the fact that it operates as a loophole through which a "partial" regulatory taking can go uncompensated—under the guise that the economic impact suffered by the claimant lacks the requisite severity to trigger the Takings Clause. Since there is no measuring stick with which the courts are willing to adhere in balancing this factor, it should be either eliminated or enunciated, because presently it serves only as a superficial term permitting subjective judicial interpretation.

B. Reasonable Investment-Backed Expectations

The investment-backed expectations analysis equally fails to serve as a legitimate balancing criterion. Suppose a person purchased a piece of land with the immediate intention of raising tobacco on the property. The purchaser is aware of mineral rights accompanying the parcel; however, he desires to be a farmer. After some years of farming, the tobacco market declines drastically and tobacco farming is no longer profitable. Thus, the purchaser pursues exploration of the mineral rights and discovers vast amounts of X deposited in the property. Mining activities are undertaken and the property owner enjoys several years of reaping benefit from the land. Subsequently, the government imposes a regulation restricting the mining of X and sues to enjoin the mining operation. Under the current takings analysis, the property owner would not be entitled to compensation because the investment-backed expectations were allocated for the sole purpose of farming the land, a use that remains entirely available.251 Thus, the purchaser's expectations were not diminished because the economically viable purpose of the investment in agricultural land remains.

This notion supports the Federal Circuit's assertion in Florida Rock IV,252 in which monetary compensation from a speculative market was deemed equally as ordinary and satisfactory as any other market.253 However, the court of appeals addressed the acceptability of a

251 Naturally, the property owner could argue the investment costs associated with the mining endeavors; however, such is beyond the point of this example.

252 Florida Rock IV, 18 F.3d 1560 (1994).

253 Id. at 1567.
speculative market in the context of assessing a market value on regulated property for the purpose of determining whether a compensable taking had occurred. It hardly seems reasonable that the courts are willing to focus on the purchaser’s investment-backed expectations in resolving the initial taking question, however; if the regulatory action is decided to have affected the purchaser’s sole investment purpose, the courts want to necessarily assign a hypothetical, arbitrary market value. In this writer’s opinion, the court in Florida Rock I drew the correct conclusion:

The existence of a market for the plaintiff’s property, despite what the court has found to be its uselessness for all productive activity, is based upon speculators’ expectations that they will be able to pass the property on to hapless investors who do not understand the nature and scope of the restrictions on its use, or can be persuaded that the restrictions are transitory or can be circumvented.

As clearly expressed in Loveladies Harbor v. United States, under some circumstances the imposition of the government regulation totally eliminates any available market for the property. The only possible buyer is the government. Such a condition does not give rise to the real estate industry’s definition of market value as:

[the most probable price, as of a specified date, in cash . . . for which the specified property rights should sell after reasonable exposure in the competitive market under all conditions requisite to a fair sale, with the buyer and seller each acting prudently, knowledgeably, and for self-interest, and assuming that neither is under undue duress.

Similarly, Florida Rock IV exemplifies the circumstances under which there is no meaningful way to ascertain a market value absent the

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254 See supra notes 208-211 and accompanying text.
256 Id. at 167.
258 See supra text accompanying note 182.
259 Id.
260 See Loveladies Harbor, 21 Cl. Ct. at 156 (citation omitted).
261 Florida Rock IV, 18 F.3d 1560 (1994).
availability of any informed or willing buyers. The continued insistence on establishing a mythical market value persists as not only unreasonable but unfair.

CONCLUSION

Given the judiciary’s failure or unwillingness to establish a threshold at which the Takings Clause will be triggered, Congress has engaged in an attempt to enact legislation vastly broadening the rights of property owners through expanding the scope of what is considered a regulatory taking. On March 3, 1995, as part of the House of Representatives GOP “Contract with America,” the Republican led House successfully passed the Private Property Protection Act of 1995 by a margin of 277 to 148.\(^{262}\)

Under the terms of the Act, the federal government will be required to pay just compensation to private property owners when a regulatory restriction limits an otherwise lawful use of their property causing the “fair market value” to be devalued by 20\% or more.\(^{263}\) In addition, the Act entitles property owners to compensation if regulations imposed by the Endangered Species Act,\(^{264}\) the Clean Water Act,\(^{265}\) wetlands permit program or farm conservation and federal irrigation programs adversely affect their property values.\(^{266}\) In instances where the property is devalued by 50\% or more, the government is required to purchase the property at the owner’s request.\(^{267}\)

Only days prior to passing this legislation, the House acted to impose a moratorium on regulatory rule making.\(^{268}\) The Regulatory Transition Act of 1995\(^ {269}\) sets more stringent requirements by commanding that regulations satisfy cost-benefit and risk assessments standards, including an analysis of costs resulting from the loss of property rights.\(^ {270}\) Proponents of this legislative movement view it “as


\(^{263}\) Marianne Lavelle, Closing the Property Rights Contract, NAT’L J., Mar. 27, 1995, at A1; The original version of the bill required compensation if the property was devalued by 10\% or more.


\(^{266}\) Tom Kenworthy, House Passes Landowner Rights Bill, Environmental Enforcers Would Be Restrained, WASH. POST, Mar. 4, 1995, at A1; see also Lavelle, supra note 263.

\(^{267}\) H.R. 925, 104th Cong. § 3(a) (1995).


\(^{269}\) Id.

\(^{270}\) Id.
a way to prevent a runaway government from stripping ordinary citizens of their property through environmental restrictions, such as protecting wetlands." However, opponents assert that legislation of this nature will "create an open-ended financial entitlement and ultimately rob the government of its ability to protect wildlife and vital habitat through existing environmental laws." 

Regardless from which side of the debate one approaches, there is little room for argument that legislation of this nature would essentially serve to strip the judicial branch of constitutional interpretation of the Takings Clause. Perhaps this result could have been avoided had the Court not continuously waxed and waned over deciding the limits of governmental restriction resulting in the loss of property value. Under the legislative bills being considered, the *Penn Central* balancing test would be set aside for a straightforward appraisal of the property value prior to and following the regulatory imposition. Now at stake are valuable environmental, health, and safety regulations which could potentially be limited in enforcement or tabled indefinitely. The bottom line appears to be that since the judiciary failed to speak consistently or conclusively on regulatory takings, Congress has taken it upon itself to determine when enough is enough.

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273 See *supra* text accompanying notes 21-39.