Private Property and Environmental Regulatory Takings: A Forward Look into Rights and Remedies, as Illustrated by an Excursion into the Wild Rivers Act of Kentucky

Monique Duparc Winther
University of Kentucky

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INTRODUCTION

In November 1984, the Natural Resources and Environmental Protection Cabinet, Division of Water, of the Commonwealth of Kentucky, presented the Kentucky Water Management Plan to Gov. Martha Layne Collins. This Plan, developed in response to Governor Collins' concern about water quality, provides the framework for a statewide effort to prevent irreparable harm to Kentucky's waters. The Plan concentrates on several aspects of water control, one of which is the monitoring of surface waters. Specifically, the Plan calls for "more aggressive management" of the state's wild rivers. Although these streams are protected by the Kentucky Wild Rivers Act, enforcement of this legislation was

* This writer gratefully acknowledges the assistance of Don Challman, Natural Resources and Environmental Protection Cabinet, Division of Water; Thomas J. FitzGerald, Attorney; and Arthur Lee Williams, Attorney, Natural Resources and Environmental Protection Cabinet, in the collection of the wild rivers data.

1 NATURAL RESOURCES AND ENVTL. PROTECTION CABINET, DEP'T. FOR ENVTL. PROTECTION, DIV. OF WATER, KENTUCKY WATER MANAGEMENT PLAN, PROPOSAL TO GOVERNOR MARTHA LAYNE COLLINS (Nov. 1984).

2 Id. at 1, 7-10.

3 These aspects include the protection of water—drinking, surface and groundwater—floodplains and dams, by means of planning, financing, controlling water pollution, educating the public and encouraging participation. See id. at 2-5.

4 See id. at 76.

hindered for nearly nine years by legal confrontations between the state and private landowners. The Kentucky Supreme Court’s November 1984 ruling in Commonwealth v. Stearns Coal & Lumber Co., however, ends the battle. This decision, favorable to the Commonwealth, answers a number of questions concerning the future of the Act. In addition, the decision was rendered at a time of great congressional activity in the area of wilderness conservation. These events offer a timely opportunity both to reassess the virtues of environmental land use legislation in Kentucky and nationwide, and to examine how these laws have affected, and will affect, private property rights.

6 See text accompanying notes 117-28 infra.
7 678 S.W.2d 378 (Ky. 1984). Stearns Coal & Lumber filed an appeal with the U.S. Supreme Court on February 12, 1985 (docket # 84-1292); the Court denied appeal on July 2, 1985 for lack of a substantial federal question.
8 See text accompanying notes 156-60 infra.


10 For previous writings on the subject see, e.g., D. Mandelker, Environment and Equity: A Regulatory Challenge (1981); E. Murphy, Nature, Bureaucracy and the Rules of Property (1977); Dunham, Flood Control Via the Police Power, 107 U. Pa. L. Rev. 1098 (1958-59); Kulser, Open Space Zoning: Valid Regulation or Invalid Taking, 57 Minn. L. Rev. 1 (1972-73); Metzger, Private Property and Environ-
Private property has been regulated for decades, but land use legislation has recently become more complex and more intrusive on the freedom to use one's land. Historically, government action affecting private property was well-defined and circumscribed. It included two major independent concepts, each covered by a separate constitutional provision: eminent domain—with its “flip side” of inverse condemnation—and


See notes 31-33 infra and accompanying text.

Eminent domain is controlled by the just compensation clause of the fifth amendment: “... nor shall private property be taken for public use, without just compensation.” U.S. CONST. amend. V. The fifth amendment is made applicable to the states by the fourteenth amendment. See Chicago, B.& Q. R.R. v. Chicago, 166 U.S. 226, 239 (1897).

Nearly half the states have a just compensation clause in their constitution. See 2A J. SACKMAN, NICHOLS' THE LAW OF EMINENT DOMAIN § 6.26 (rev. 3d eds. 1980 & 1983). For a list of those states, see id. See also Comment, Inverse Condemnation and the Alchemist’s Lesson: You Can’t Turn Regulations Into Gold, 21 SANTA CLARA L. REV. 171 n.l (1981) (for corresponding constitutional cites).

For example, the Kentucky Constitution Bill of Rights states in relevant part: “[N]or shall any man’s property be taken or applied to public use without the consent of his representatives, and without just compensation being previously made to him.” KY. CONST. § 13. Also, § 242 provides: “Municipal and other corporations . . . taking private property for public use shall make just compensation for property taken, injured or destroyed by them.” KY. CONST. § 242.

It should be noted that the just compensation clause historically applies solely to physical encroachments over property. The fifth amendment has its source in the Magna Carta, where only a physical appropriation of land by government was considered a taking. See COUNCIL ON ENVIRONMENTAL QUALITY, THE TAKING ISSUE 319-20 (1973).

The constitutional limitation on the police power of the state is the due process clause of the fourteenth amendment which states in pertinent part: “... nor shall any State deprive any person of life, liberty, or property, without due process of law . . . .” U.S. CONST. amend. XIV, § 1.

When a government physically takes private land for public use, it exercises its power of eminent domain by instituting condemnation proceedings and compensating the owner. The purchase of land by government for highway purposes is a common instance of condemnation. See, e.g., Commonwealth v. Bradley, 483 S.W.2d 150 (Ky. 1972); Commonwealth v. Gisborne, 391 S.W.2d 714 (Ky. 1965).

“Inverse condemnation is a monetary remedy sought by landowners alleging a deprivation of property by a public agency without just compensation. It is a private cause of action invoking the eminent domain clause of the federal or state constitutions.” Mandelker, Land Use Takings: The Compensation Issue, 8 HASTINGS CONST. L.Q. 491, 492 n.4 (1980-81).

An injured landowner has this remedy even in the absence of a statute since the constitutional provision is self-executing. See notes 38-49 infra. See also Haigher, McNerny & Rhodes, The Legislature's Role in the Taking Issue, 4 FLA. ST. U.L. REV. 1,
The viability of this dichotomy was gradually tested in the early part of the twentieth century, both by the demands of a changing economy and by the landmark decision.

Inverse condemnation can be used when the taking is in the form of direct occupation of the land. See Kaiser Aetna v. United States, 444 U.S. 164, 180 (1979) ("[E]ven if the Government physically invades only an easement in property, it must nonetheless pay just compensation."); United States v. Causby, 328 U.S. 256 (1946) (frequent plane flights over plaintiff's land is a taking); Portsmouth Harbor Land & Hotel Co. v. United States, 260 U.S. 327 (1922) (military firing over plaintiff's property is a taking).

Inverse condemnation also applies when the taking is the result of actions which indirectly affect a piece of land. See Pumpelly v. Green Bay Co., 80 U.S. (13 Wall.) 166, 174 (1871) (construction of a dam "by the State itself or by its express authority" permanently flooding plaintiff's property); Keck v. Hafley, 237 S.W.2d 527 (Ky. 1951) (diversion of a creek for highway construction purposes flooding private land); Commonwealth v. Kelley, 236 S.W.2d 695 (Ky. 1951) (improper management of highway culverts caused flooding of adjoining land); Lincoln Loan Co. v. State, 545 P.2d 105 (Or. 1976) (creation of an atmosphere of condemnation near plaintiff's property is a taking).

The police power is not a physical appropriation of land for a public use, but a regulatory tool used by governments to prevent or curb abusive private land uses. It is "that power [of the state] required to be exercised in order to effectively discharge, within the scope of constitutional limitations, its paramount obligation to promote and protect the health, safety, morals, comfort and general welfare of the people." La Salle Nat'l Bank of Chicago v. City of Chicago, 125 N.E.2d 609, 612 (Ill. 1955). The exercise of police power can never be a taking since no land is physically taken, and relief for abuses is invalidation, not monetary compensation.


The historical contrast between eminent domain and the police power is described in a number of cases. See, e.g., Vartelas v. Water Resources Comm'n, 153 A.2d 822, 824 (Conn. 1959) (a line established by the commission beyond which no structure is allowed, and which encroaches on private land, is an exercise of the police power).

The police power underwent the greatest upheaval, and its scope continues to
of the United States Supreme Court in *Pennsylvania Coal Co. v. Mahon.*

*Mahon* introduced the doctrine of regulatory taking: a law or zoning regulation can be so excessive that it amounts to a taking of property. As a result, the difference between police power and eminent domain became not one of kind, but one of degree. While this concept appears simple enough, its announcement created chaos because in *Mahon* the Supreme Court neither overruled its past decisions nor clarified what it meant by an "excessive" exercise of the police power or what remedy would be available to an injured property owner. These ques-

broaden. The Supreme Court has held: "[W]hile the meaning of constitutional guaranties never varies, the scope of their application must expand or contract to meet the new and different conditions which are constantly coming within the field of their operation. In a changing world, it is impossible that it should be otherwise." Village of Euclid v. Ambler Realty Co., 272 U.S. 365, 387 (1926). See Note, Eldridge v. City of Palo Alto: *Aberration or New Direction in Land Use Law*, 28 Hastings L.J. 1569, 1570-71 (1976-77) [hereinafter cited as Note, Eldridge v. City]; Note, supra note 15, at 132.

In *Mahon*, a homeowner used a state law, prohibiting mining where it endangers the surface support of dwellings, to have the coal company enjoined from mining under his property. *Id.* at 412.


Before *Mahon*, a due process challenge only could be raised for excessive police power. Cases such as Lawton v. Steele, 152 U.S. 133 (1894) (challenge to a state's fishing regulations), and Mugler v. Kansas, 123 U.S. 623 (1887) (challenge to a state's regulations of liquor manufacture), are still good law.

In *Mahon*, Justice Holmes stated: "[W]hile property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking." 260 U.S. at 415.

Subsequently, a "diminution of value test" to measure excessive police power was developed and used by many state courts. *See, e.g.*, Dooley v. Town Planning & Zoning Comm'n, 197 A.2d 770 (Conn. 1964); State v. Johnson, 265 A.2d 711 (Me. 1970); Comm'r of Natural Resources v. S. Volpe & Co., 206 N.E.2d 666 (Mass. 1965).

tions remain unanswered. In addition, while federal and state courts have decided a number of land use cases, few have devised creative solutions, particularly in the area of relief. Many courts appear to be waiting for their legislatures to provide a remedy, or for the Supreme Court to finally come forward. Since the latter has not occurred, ad hoc determination is the rule to this point.

Some general principles, however, can be abstracted from Supreme Court decisions. This Note will analyze these principles in general and as they are applied to the area of environmental controls, and will discuss the significant problems these principles have engendered. The Note will then illustrate these issues by focusing upon Kentucky and the impact of the Wild Rivers Act upon its citizens and its courts. Finally, the Note will attempt to anticipate the continuing impact of the Act as well as the trend of remedies to excessive land use regulation in general.

I. THE TAKING QUESTION AND ENVIRONMENTAL CONTROLS

Penalizing a private landowner for damaging his neighbor’s property is not a new idea. What is new is the concept that

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24 E.g., Florida has a statutory remedy. After exhausting administrative remedies, an injured landowner may ask for judicial review of environmental permit decisions. Relief may be: 1) issuance of the permit; 2) award of monetary damages; or, 3) modification of the decision. FLA. STAT. ANN. § 373.617 (West Supp. 1984).

25 See notes 180-99 infra and accompanying text.

26 The Court admits candidly that it “has been unable to develop any ‘set formula’ for determining when ‘justice and fairness’ require that economic injuries caused by public action be compensated by the government ....” Penn Cent. Transp. Co. v. City of New York, 438 U.S. at 124. This sentence is repeated almost word for word in Ruckelshaus v. Monsanto Co., 104 S. Ct. 2862, 2874 (1984).

27 A history of the Supreme Court’s handling of the issue is found in Annot., 57 L. Ed. 2d 1254 (1979). See Sax, Takings and the Police Power, 74 YALE L.J. 36 (1964-65); Note, Reexamining the Supreme Court’s View of the Taking Clause, 58 TEX. L. REV. 1447 (1979-80).

28 See note 23 supra.

ownership spawns not only rights but also responsibilities to the public as a whole. Society's values encourage economically successful enterprises, but the average citizen does not want them to be noxious to the general welfare. As a result, most people now accept a measure of public control over private land through the exercise of police power. This is especially true in the area of conservation: the public desires a clean and healthful environment and is aware that this cannot be attained without legal interference.

A. The Right to a Healthful Environment: Constitutional and Statutory Sources and Applications

As described earlier, property enjoyment is protected by constitutional rights, and remedies exist against violations of these rights. Constitutional dignity was recently bestowed upon ecological general welfare in some states, with eleven states adding an environmental "Bill of Rights" to their constitutions between 1969 and 1973. The greatest protection is offered by a self-executing clause, such as that found in the Constitution of Pennsylvania. Less protection is found where the state con-

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31 The growing awareness that land is not solely a tool for making money is well expressed by this statement: "We are continually being made aware that our vital natural resources, our whole ecology, and the quality of human life, may no longer be considered limitless or indestructible . . . . [T]he right to use land should be carefully measured against the environment's capacity to tolerate such a use." Usdin v. State, 414 A.2d 280, 289 (N.J. Super. Ct. Law. Div. 1980), aff'd, 430 A.2d 949 (N.J. Super. Ct. App. Div. 1981).

32 See generally Note, supra note 15, at 132-134. This suggests that property rules can no longer remain static. See E. Murphy, supra note 10, at 168-206.

33 For an overview of the evolution of the concept of private property in the western world, see Metzger, supra note 10, at 802-07.

34 See E. Murphy, supra note 10, at 236-40.

35 See notes 12-15 supra and accompanying text.


38 The state constitution holds:

The people have a right to clean air, pure water, and to the preservation of the natural, scenic, historic and esthetic values of the environment. Pennsylvania's public natural resources are the common property of all
stitution merely sets forth public policy and delegates implementation of the mandate to the legislative body.\(^{39}\)

The U.S. Constitution does not offer explicit protection of the environment, and those who have found it in the ninth amendment\(^ {40}\) remain a minority.\(^ {41}\) Statutes, therefore, are the cornerstones of conservation at the federal level.\(^ {42}\) States have been equally active in environmental legislation, passing laws and zoning regulations covering a wide range of public concerns, including the preservation of historical landmarks,\(^ {43}\) open spaces,\(^ {44}\) sensitive lands (especially floodplains and wetlands),\(^ {45}\) wild

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the people, including generations yet to come. As trustee of these resources, the Commonwealth shall conserve and maintain them for the benefit of all the people.


\(^{39}\) For example, the New Mexico Constitution declares:

The protection of the state's beautiful and healthful environment is hereby declared to be of fundamental importance to the public interest, health, safety and the general welfare. The legislature shall provide for control of pollution and control of despoilment of the air, water and other natural resources of this state, consistent with the use and development of these resources for the maximum benefit of the people.

\textit{N.M. Const.} art. XX, § 21.

A clause such as this one is called "implementing," whereas the one found in the Pennsylvania Constitution is called "self-executing" because it needs no statute to be passed in order to be enforced. See text accompanying notes 125-26 \textit{infra} for an example from Kentucky.

\(^{40}\) "The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people." \textit{U.S. Const.} amend. IX.

\(^{41}\) Environmentalists had entertained great hopes after the holding in Griswold v. Connecticut, 381 U.S. 479 (1965), which confirmed the ninth amendment "as a source of previously unenumerated rights." Tobin, \textit{supra} note 36, at 474.


\(^{45}\) See \textit{generally} Candlestick Properties Inc. v. San Francisco Bay Conservation & Dev. Comm'n, 89 Cal. Rptr. 897 (Cal. Ct. App. 1970) (protection of shoreline); Brec-
rivers, forests and wildlife.

The constitutional and statutory protection of both private property rights and the general welfare makes conflict inevitable. In addition, the emergence of ecological concerns has stretched the boundaries of the legitimate exercise of police power even further. Police power gives states the authority to enact laws to promote "health, safety, convenience, morals or welfare." These laws are implemented through zoning ordinances or regulations by municipalities and, more recently, by administrative agencies.

The goal of preventing harm to the public is easier for regulated landowners to accept than that of the pursuit of a public benefit, since environmental legislation forces the landowners to bear the physical burden of the control while the advantage goes to the public. It is precisely this harm/benefit distinction which pervaded early conservation efforts. Laws


See generally Steel Hill Development, Inc. v. Town of Sanbornton, 469 F.2d 956 (1st Cir. 1972) (ordinance reducing lot sizes in forest conservation zone); West Virginia Highlands Conservancy v. Island Creek Coal Co., 441 F.2d 232 (4th Cir. 1971) (prohibition of mining and logging in wilderness area); McMichael v. United States, 355 F.2d 283 (9th Cir. 1965) (prohibition of motor vehicles in primitive area of national forest).


The focus of this Note is on state government resolution of these conflicts. Of course, the federal government has also played a major role, as demonstrated by the legislative citations in note 42 supra.

Turnpike Realty Co. v. Town of Dedham, 284 N.E.2d at 896.

An example of such procedure is the Wild Rivers Act of Kentucky. See notes 113-16 infra and accompanying text.

See Mandelker, supra note 14, at 499-500.

explicitly benefitting the public were regularly struck,\textsuperscript{54} while laws expressly aimed at protecting the public from potential physical harm were usually upheld.\textsuperscript{55} However, a change in attitude gradually developed during the 1970s.\textsuperscript{56} Courts, in particular, realized that when one talks of either harm or benefit, one is presenting two sides of the same coin.\textsuperscript{57} One commentator eloquently describes this interdependency:

[W]hen estuaries are polluted, the polluter profits, but the shellfish industry suffers. When acid rain falls upon the forest, the emitter profits but the forest industry suffers. When biocides are massively sprayed, the agrochemical industry profits but the honey-gatherer suffers. The common profit is as non-existent as the common cost.\textsuperscript{58}

Along with this recognition grew an awareness that the burdened landowners themselves are members of the public and, therefore, also benefit from the regulations.\textsuperscript{59}


\textsuperscript{55} See Candlestick Properties, Inc. v. San Francisco Bay Conservation & Dev. Comm'n, 89 Cal. Rptr. at 897 (permit required before filling San Francisco Bay); Potomac Sand & Gravel Co. v. Gov'r of Maryland, 293 A.2d 241 (Md.), cert. denied, 409 U.S. 1040 (1972) (sand and gravel company prohibited from dredging and taking away sand and gravel, in order to protect marshland); Turnpike Realty Co. v. Town of Dedham, 284 N.E.2d at 891 (zoning to prohibit residence in areas subject to flooding).

\textsuperscript{56} For a history of this change of attitude, see Usdin v. State, 414 A.2d at 284-90.

\textsuperscript{57} The Supreme Court of New Jersey realized this as early as 1974: "[V]ital ecological and environmental considerations of recent cognizance have brought about rather drastic land use restrictions in furtherance of a policy designed to protect important public interests wide in scope and territory . . . . Cases arising in such a context may properly call for a reexamination of some [earlier] statements. . . ." AMG Assocs. v. Township of Springfield, 319 A.2d 705, 711 n.4 (N.J. 1974). See also Rose, \textit{When are Environmental Restrictions on Land Use Compensable?}, 9 REAL EST. L.J. 233, 237-38 (1980-81).

\textsuperscript{58} E. MURPHY, \textit{supra} note 10, at 177.

\textsuperscript{59} See Penn Cent. Transp. Co. v. City of New York, 438 U.S. at 134-35 (plaintiff citizen benefits from historical landmarks); Kralh v. Nine Mile Creek Watershed Dist., 283 N.W.2d 538, 543 (Minn. 1979) (riparian feeholder gains from flood control); Usdin v. State, 414 A.2d at 290 (plaintiff's employees will be protected through floodplain regulation).
This philosophical shift, resulting in greater acceptance of land use control legislation, has expressed itself in different ways. Some jurisdictions continue to pay lip-service to the harm/benefit dichotomy, but they manipulate the labels carefully to characterize the intent of all environmental legislation under review as harm avoidance.60 Others have abandoned the traditional distinction and have focused their attention on the legitimacy of the governmental scheme.61 Despite these ideological approaches to the problem, there is mainstream acceptance of a two-prong test to assess whether or not a particular land use control is within the constitutional requisites for exercising police power. The first prong analyzes the kind of interference wrought by the legislation, while the second prong analyzes the degree of interference with specific land.62

Environmental land use control is regularly found to meet the first prong because there is a presumption of its rational relationship to a legitimate objective of police power.63 Because police power is an elastic concept,64 because general welfare authorizing its use is a label that can be affixed to a wide range of concerns,65 and because the rational basis test provides only

60 See Graham v. Estuary Properties, Inc., 399 So. 2d 1374 (Fla.), cert. denied, 454 U.S. 1083 (1981) (denial of development of wetland area to prevent adverse ecological impact is permissible); Usdin v. State, 414 A.2d at 280 (designation of plaintiff's property as flood land valid because protection of public against harm); Just v. Marinette County, 201 N.W.2d at 761 (good discussion of the dichotomy).


63 The rational basis test for economic due process challenges was spelled out in Nebbia v. New York, 291 U.S. 502 (1934), and has often been repeated. See, e.g., Pruneyard Shopping Center v. Robins, 447 U.S. 74, 84-85 (1980); Jackson v. Metropolitan Edison Co., 419 U.S. 345, 353-54 (1974).

64 See Note, supra note 15, at 132.

minimal scrutiny, the general rule is that environmental land use laws will be presumed constitutional.

However, the second prong of the test offers the injured landowner an opportunity to rebut this presumption. A plaintiff might demonstrate that a regulation, even though legitimate and constitutional on its face, works an unfair degree of interference with his or her property. In the area of environmental control, the exercise of police power is considered excessive when its impact is confiscatory, discriminatory, or arbitrary. Land use control is confiscatory when it totally and permanently destroys all economic uses of the land—it is not enough that the land was devalued, that owners have lost the right to choose how to use their property or are deprived of an existing use, or

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*66 The Supreme Court has said:

We refuse to sit as a "superlegislature to weigh the wisdom of legislation," and we emphatically refuse to go back to the time when courts used the Due Process Clause "to strike down state laws, regulatory of business and industrial conditions, because they may be unwise, improvident, or out of harmony with a particular school of thought."


*67 Should the law be found unconstitutional, invalidation is the traditional remedy. See note 15 supra.

*68 Whereas the U.S. Supreme Court has not looked at an "as applied" case since Nectow v. City of Cambridge, 277 U.S. 183 (1928) (involving the inclusion of a piece of private business property into a residential district by municipal ordinance), state courts for the most part handle "as applied" cases. See D. Mandelker, Land Use Law 23, 30 (1982).


*70 Regulation and prohibition are two completely different things. See Benenson v. United States, 548 F.2d 939 (Ct. Cl. 1977) (all alternative uses taken away from plaintiff in order to preserve historic building); Burrows v. City of Keene, 432 A.2d 15 (N.H. 1981) (amending zoning deprived plaintiff of all profitable uses of his property); Salamar Builders Corp. v. Tuttle, 275 N.E.2d 585 (N.Y. 1971) (regulation is confiscatory when it takes away all reasonable uses for which land is adapted).

*72 In particular, a landowner does not have a vested right to change the "essential natural character" of his land. See Just v. Marinette County, 201 N.W.2d at 768. Neither does he have a vested right in a prior zoning classification. See HFH, Ltd. v. Superior Court, 542 P.2d 237, 240 (Cal. 1975), cert. denied, 425 U.S. 904 (1976).

*73 The Supreme Court has held that "the destruction of one 'strand' of the bundle is not a taking, because the aggregate must be viewed in its entirety." Andrus v. Allard,
even that owners are denied the best and most profitable use. Discriminatory land use regulation is found in the absence of a comprehensive plan equally affecting all similarly situated realty. Land use control is arbitrary when it is an abuse of police power—that is, when its purpose and manner of implementation indicate that the regulator is acting in bad faith and is solely interested in facilitating a uniquely public function at the expense of private constituents.

The injured landowner may have a cause of action if he can prove one of these excesses. Proof, however, is a difficult task.

See Brecciaroli v. Connecticut Comm’r of Envtl. Protection, 362 A.2d at 948 (prevention of land fill in wetlands is permitted because other uses are still possible); Vartelas v. Water Resources Comm’n, 153 A.2d 822 (Conn. 1959) (plaintiff deprived of only one activity on his land along river bank); State v. Lake Lawrence Public Lands Protection Ass’n, 601 P.2d at 494 (protection of eagle habitat; only one use taken away from landowner).

See Manor Dev. Corp. v. Conservation Comm’n, 433 A.2d 999 (Conn. 1980) (economically optimum use of land taken away by wetlands regulation); S.A. Healy Co. v. Town of Highland Beach, 355 So. 2d 813, 814 (Fla. Dist. Ct. App. 1978) (downzoning to slow down “headlong plunge toward wall-to-wall concrete” permissible even though it precludes the most economically advantageous use of the land); Turner v. Town of Walpole, 409 N.E.2d 807 (Mass. App. Ct. 1980) (floodplain zoning is not confiscatory if private property cannot be shown to be free from flooding hazard).


Many examples of abuse of police power could be cited. See, e.g., Urbanizadora Versalles, Inc. v. Rivera Rios, 701 F.2d 993 (1st Cir. 1983) (local government “froze” use of private-land for fourteen years in anticipation of public use without condemnation); Hager v. Louisville & Jefferson County Planning & Zoning Comm’n, 261 S.W.2d 619 (Ky. 1953) (city had no statutory authority to incorporate plaintiff’s property into its flood protection plan); Schwing v. City of Baton Rouge, 249 So. 2d 304 (La. Ct. App. 1971) (city allowed no building in an area where it had no present plans of public use); Maryland-National Capital Park & Planning Comm’n v. Chadwick, 405 A.2d 241 (Md. 1979) (land frozen for three years in anticipation of use as a public park was a taking); Gordon v. City of Warren Planning & Urban Renewal Comm’n, 199 N.W.2d 465 (Mich. 1972) (city passed a no-building ordinance in anticipation of street building, and then did nothing); Jensen v. City of New York, 369 N.E.2d 1179 (N.Y. 1977) (official street map made it impossible for plaintiff to obtain financing, or sell property, for indefinite period); San Antonio River Authority v. Garrett Bros., 528 S.W.2d 266 (Tex. Civ. App. 1975) (utility permit refused in order to keep land value down for future purchase by agency); Howell Plaza Inc. v. State Highway Comm’n, 226 N.W.2d 185 (Wis. 1975) (landowner may have been deprived of beneficial use of his property in anticipation of highway building).
because the landowner’s idea of excess is likely to be broader than that of those whose property is not directly affected by the regulation. An illustration of this problem is offered by the concept of aesthetic controls.

B. The Special Place of Aesthetics

The public has become aware that the preservation of some virgin lands and streams plays a major role in maintaining general health and comfort. However, the private landowner, who is determined to challenge the environmental regulation of his property, might attempt to downplay this important function. He or she could instead focus on and attack another facet of ecological controls—the protection of natural beauty. This prospect needs to be addressed initially, therefore, so that the legitimacy of ranking beauty among the rationales for conservation may be assessed.

In order to ascertain whether aesthetic controls are a valid exercise of the police power, one must first determine the kind of interference they create. In Berman v. Parker, the U.S. Supreme Court declared that “[t]he concept of public welfare is broad and inclusive. The values it represents are spiritual as well as physical, aesthetic as well as monetary.” This statement, however, did not reflect widespread belief at the time. Early cases indicate that considering aesthetics as on a par with other concerns, such as health and morals, was not palatable to many landowners. Landowners argued that beauty is a subjective concept escaping a universally agreed upon definition, and objected to abridging their property rights for the mere sake of

77 See RATHKOPF, supra note 53, at § 14.01; Rowlett, supra note 65, at 603; Leighty, Aesthetics as a Legal Basis for Environmental Control, 17 WAYNE L. REV. 1347 (1971).
81 See Williams, Subjectivity, Expression, and Privacy: Problems of Aesthetic Regulation, 62 MINN. L. REV. 1, 4-5 (1977-78); Rowlett, supra note 65, at 606.
public enjoyment. In short, they relied on the traditional harm/benefit dichotomy.\(^82\)

However, landowners did not challenge all land use legislation ostensibly based on aesthetics. For example, the public did not object strongly when local governments started regulating billboard advertising on highways.\(^3\) This reaction can be partially explained by the safety element of the legislative intent: billboards are not only unsightly, they are also dangerous and capable of distracting a driver’s concentration.\(^4\) Nevertheless, aesthetic controls were soon brought within the definition of general welfare, thereby increasing the range of acceptable regulation. As a result, these controls became a legitimate exercise of the police power\(^5\) and benefitted from the aforementioned judicial presumption of constitutionality.\(^6\) However, it is still extremely rare for aesthetics alone to justify a restraint upon private property, and only a few states accept such an argument.\(^7\) More typically, aesthetic concerns must be coupled with economic and social considerations in order to be acceptable to the public. Consequently, regulating authorities point out to

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\(^5\) See notes 50-58 \textit{supra} and accompanying text.


\(^8\) There is a growing judicial recognition of the power ... to impose ... restrictions which can be justified solely upon the ground that they will tend to prevent or minimize discordant and unsightly surroundings .... The change may be ascribed ... to the judicial expansion of the police power to include within the concept of “general welfare” the enhancement of the citizen’s cultural life.

Oregon City v. Hartke, 400 P.2d 255, 261 (Or. 1965).


It is noteworthy that much disagreement exists among commentators regarding the number of states which have actually endorsed “aesthetics alone” as a legitimate exercise of police power. The reason is that courts have not always expressed their position very clearly. See Bufford, \textit{Beyond the Eye of the Beholder: A New Majority of Jurisdictions Authorize Aesthetic Regulation}, 48 UMKC L. REV. 125 (1979-80); Rowlett, \textit{supra} note 65, at 605-06 n.16.
landowners that the protection of beautiful surroundings helps raise property values, makes people happier and more productive, and attracts tourism and business to their area.88

Although including aesthetics within the definition of the general welfare makes it a proper subject for the exercise of police power, the degree of interference which aesthetic controls impose on a particular piece of property must also be legitimate. A land use regulation will be invalid as applied if it permanently confiscates all beneficial uses of the land, discriminates among feeholders, or is an abuse of governmental authority for the pursuit of self-serving goals.89

Kentucky is an appropriate focus for an analysis of the legitimacy of aesthetic values as applied to land use because the Commonwealth belongs to the small number of states supporting regulations based upon aesthetics alone.90 In Jasper v. Commonwealth,91 the Kentucky Supreme Court upheld the "Junk Yard Act,"92 stating:

The obvious purpose of this Act is to enhance the scenic beauty of our roadways by prohibiting the maintenance of unsightly vehicle graveyards within the view of travellers thereon. While there may be a public safety interest promoted, the principal objective is based upon aesthetic considerations. Though it has been held that such considerations are not sufficient to warrant the invocation of the police power, in our opinion the public welfare is not so limited.93

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88 See Rowlett, supra note 65, at 621-38; Williams, Planning Law in the 1980s: What Do We Know About It?, 7 Vt. L. Rev. 205, 220-21 (1982); Leighty, supra note 77, at 1392-94.
90 See note 87 supra and accompanying text. Note however that Kentucky is listed as a state where aesthetic regulation is an open question. See Bufford, supra note 87, at 151, 153-54.
91 375 S.W.2d 709 (Ky. 1964).
92 KRS §§ 177.905-.990.
93 375 S.W.2d at 711.
The court has affirmed this position many times, extending it, for example, to billboard advertising and other commercial enterprises.94

II. THE KENTUCKY WILD RIVERS ACT

Kentucky's progressive stance towards aesthetics is truly remarkable, and so it is not surprising that Kentucky is one of twenty-five states which, between 1965 and 1975, adopted legislation aimed at protecting the scenic and aesthetic values of wild rivers.95

A. Federal and State Wild Rivers

In 1968, Congress responded to public concern over the danger of extinction threatening the nation's nonnavigable fresh waters96 by enacting the Wild and Scenic Rivers Act.97 Several

94 See, e.g., Commonwealth v. Stephens, 539 S.W.2d 303 (Ky. 1976) (preservation of aesthetic values under Wild Rivers Act held constitutional); Moore v. Ward, 377 S.W.2d at 881 (billboard advertising). In Department for Natural Resources & Envtl. Protection v. No. 8 Limited of Virginia, 528 S.W.2d 684 (Ky. 1975), the court said in dicta "that the General Assembly . . . might strike a balance between the 'energy crunch' and the necessity to . . . protect aesthetic beauty." Id. at 686.
95 See J. Kusler, Regulating Sensitive Lands, 35-37 (1980); Comment, supra note 5, at 730.
96 In addition to legislation, wild rivers have also received the support of the common law public trust doctrine. This doctrine, which holds that certain natural resources are kept in trust by the government for public benefit, formerly applied solely to commercially-used navigable waters, their shores and resources. Recently, it has been extended to include wild rivers and recreational, ecological, scientific and aesthetic uses. See W. Rodgers, Handbook on Environmental Law 170 (1977); Sax, The Public Trust Doctrine in Natural Resource Law: Effective Judicial Intervention, 68 Mich. L. Rev. 471 (1969-70). Additional information is also found in The Public Trust Doctrine in Natural Resources Law and Management: A Symposium, 14 U.C.D. L. Rev. 181 (1980-81).
98 This Congressional declaration of policy reads:
It is hereby declared to be the policy of the United States that certain selected rivers of the Nation which, with their immediate environments, possess outstandingly remarkable scenic, recreational, geologic, fish and wildlife, historic, cultural, or other similar values, shall be preserved in free-flowing condition, and that they and their immediate environments shall be protected for the benefit and enjoyment of present and future generations.
states followed suit,\textsuperscript{98} supporting the federal system with their own network of protected rivers and streams.\textsuperscript{99} Kentucky is one of those states.\textsuperscript{100} The General Assembly has recognized that it has a “strong obligation to the people of Kentucky to preserve these remnants of their proud heritage.”\textsuperscript{101} In order to carry out this obligation, the legislature sanctioned the protection of “certain streams of Kentucky possess[ing] outstanding and unique scenic, recreational, geological, fish and wildlife, botanical, historical, archeological and other scientific, aesthetic, and cultural values.”\textsuperscript{102}

Contrary to the federal wild rivers system which is based upon governmental acquisition of fee title to,\textsuperscript{103} or scenic easements over,\textsuperscript{104} sensitive riverside lands,\textsuperscript{105} the state wild rivers statutes do not generally rely on eminent domain. Zoning is the more commonly used tool, usually permitting existing uses to continue and closely supervising future uses.\textsuperscript{106} It has served environmental concerns well in jurisdictions where the affected land is being kept mostly in its natural state or being used for

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\textsuperscript{99} See Goodell, \textit{supra} note 96, at 44.

\textsuperscript{100} See the Kentucky Wild Rivers Act, KRS §§ 146.200-.360. The language of KRS § 146.220 (1982) indicates that Kentucky subscribes to the public trust doctrine to further protect the wild rivers. See note 95 \textit{supra} for a discussion of the doctrine.

\textsuperscript{101} KRS § 146.220.

\textsuperscript{102} Id. As indicated earlier, the wild rivers also play a key role in the preservation of water quality statewide. See notes 1-4 \textit{supra}.

\textsuperscript{103} By acquiring the land, the government seeks to form a protective “corridor, approximately one-quarter mile in width, along either side of the designated river.” Goodell, \textit{supra} note 96, at 50.

\textsuperscript{104} For cases discussing scenic easements see Kiernat v. County of Chisago, 564 F. Supp. 1089 (D. Minn. 1983) and United States v. Hanten, 500 F. Supp. 188 (D. Or. 1980).


\textsuperscript{106} See, e.g., KRS § 146.290 (1982) (land uses permitted in stream area).
residential, agricultural or timber purposes only. In Kentucky, however, wild river regulation has two unique problems which are potentially more harmful to fragile waters than a farm or a small logging operation: (1) the presence of mineral resources in the stream area and (2) private commercial facilities interested in the most profitable use of the land. The private residents in the zones designated for protection by the General Assembly objected strongly to new constraints on their activities. Although all interested parties agreed the Wild Rivers Act is constitutional, the disputes raised the issue of whether the implementation of the Act by the Natural Resources and Environmental Protection Cabinet (the Cabinet) created an unconstitutional regulatory taking.

B. The Kentucky Wild Rivers Act and the Taking Question

The Kentucky Wild Rivers Act was enacted in 1972. It gives the Cabinet’s Secretary the responsibility for administering the system, and the Secretary is empowered to “adopt such rules or regulations necessary for the preservation and enhancement of the stream areas.” While the Act was later modified considerably by several amendments, in particular as to the land uses permitted in the protected zone, the Supreme Court of Kentucky, in both Commonwealth v. Stephens, and Common-
wealth v. Stearns Coal & Lumber Co., construed only the 1972 version of the Act.

Morris Stephens owned an amusement town bordering on the Cumberland River, one of the waterways protected by the Act. When he attempted to clear land close to the river, the Commonwealth sought an injunction in Franklin Circuit Court. Stearns Coal & Lumber Co. is involved in mining, leasing and selling coal and timber lands in southern Kentucky and northern Tennessee. Stearns challenged the Cabinet by indicating its plans to engage in all the land uses then prohibited by the Act. When the Cabinet attempted to stop the company, Stearns sued the Commonwealth in McCreary Circuit Court and obtained a ruling in its favor.

Stephens and Stearns Coal & Lumber both came to the Supreme Court on appeal from circuit court holdings that the Act had effectuated a compensable taking of property. The Supreme Court held that there was no taking as a matter of law, because the Wild Rivers Act was enabling and not self-executing legislation and had yet to be implemented by the Commonwealth. Despite their general holding, these cases, particularly Stearns Coal & Lumber, contain dictum which is of great significance to this discussion. This dictum reveals the Court’s approach to future litigation regarding not only wild rivers legislation, but also land use regulations in general.

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118 678 S.W.2d 378.
119 See KRS § 146.241.
120 539 S.W.2d at 304. See Comment, supra note 5, at 741-46 for a detailed analysis of the case.
121 Appellee’s Brief, supra note 111, at 1.
122 678 S.W.2d at 380.
123 Id.
125 678 S.W.2d at 381; 539 S.W.2d at 306-07.
126 Stearns Coal & Lumber argued that the Act had been implemented: they pointed out that signs had been erected along the streams, some of them on their property, indicating the protected status of the spot, that these activities had been broadcast, and that maps and brochures of the area were circulating publicly. Appellee’s Brief, supra note 111, at 5-6. To this, the Court replied Stearns Coal & Lumber could have sued for trespass and obtained an injunction, but these actions by the Commonwealth did not amount to implementation of the Act.
127 See 678 S.W.2d at 381-82.
Indeed, the Court in *Stearns Coal & Lumber* stated that "[i]n Kentucky, the Wild Rivers Act, if it had been fully executed, could have been a taking." Thus, the question is clearly raised.

Before trying to ascertain what the Court meant and whether the potential ills of the original Wild Rivers Act were cured by the Amendments, it is necessary to review the Kentucky Supreme Court's definition of a regulatory taking. Although *Pennsylvania Coal Co. v. Mahon* introduced the concept of regulatory taking, the U.S. Supreme Court has not faithfully followed its precedent and has avoided enunciating a general rule in subsequent decisions. Kentucky's highest court has stated that *Mahon* is generally regarded as "an extreme case," and has demonstrated a willingness to grant broad police power to state and local governments. Nonetheless, the Court also stated that *Mahon* "vividly illustrates the superiority of constitutional rights." In Kentucky, as elsewhere, a valid exercise of police power does not violate these constitutional rights because it is never a taking of property without due process or without just compensation. As described in *Moore v. Ward*,

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128 *Id.* at 381.
129 For a description of the main weaknesses of the 1972 Act see text accompanying note 164 infra.
130 260 U.S. 393 (1922).
131 See notes 26-28 *supra* and accompanying text.
133 As early as 1938, the Court stated:
Increasing contacts, antagonisms and conflict of human interests have produced a growing general recognition of the desirability of the exercise of, and the necessity for, mutually cooperative action and restraint by fellowmen and neighbors for the common good and welfare of each other, as well as the general public, which more and more impels the courts to uphold police regulatory measures, the mere mention of which in the not far distant past would have caused a genuine case of constitutional "jitters" on the part of lawyers and courts.
*Whitaker v. Green River Coal Co.*, 122 S.W.2d 1012, 1016 (Ky. 1938)(state power to regulate mining held not violative of miner's constitutional right to due process).
134 211 S.W.2d at 873.
136 See 122 S.W.2d at 1016.
137 See *Shively v. Illinois Cent. R.R.*, 349 S.W.2d 682, 685 (Ky.) (city ordinance requiring railroad to finance and install safety devices at street crossings is valid exercise of police power and, therefore, not a taking), *appeal dismissed*, 369 U.S. 120 (1961).
138 377 S.W.2d 881 (Ky. 1964) (regulation of billboards on highways is legitimate exercise of police power).
the attributes of a valid exercise of police power are a legitimate public purpose and a reasonable application. Kentucky courts have consistently applied the majority rule of self-imposed judicial restraint. They do not evaluate the wisdom of a regulation but, instead, presume its validity.

However, this does not mean that all land use regulations will pass constitutional muster. There will be cases where a landowner can challenge and rebut the presumption of validity. Specifically, in Kentucky, a regulation cannot interfere "with the legally protected use to which land has been dedicated, which destroys that use or places a substantial and additional burden on the landowner to maintain that use. . . ."

Stearns used this argument by claiming that the Act had obliterated all reasonable uses of its land. The Supreme Court rejected the claim, listing the many activities which Stearns engaged in throughout the period of the alleged taking. However, assuming that the Act had been implemented, had the Court found that Stearns' sole existing activity at the time of the law's enactment was the extraction and removal of coal in the area, 

139 Id. at 883. In Blancett v. Montgomery, 398 S.W.2d 877 (Ky. 1966), the city of Calhoun issued an ordinance prohibiting oil and gas exploration within its boundaries. When oil was discovered in the vicinity of the protected zone and removed, the restricted landowners claimed their property had been taken without due process since the oil beneath their soil, which they could not drill, was pumped away from the neighboring, unrestricted land. The Court stated that the ordinance sought to avoid pollution and the destruction of vegetation and was a valid exercise of police power.

140 377 S.W.2d at 883. See Stephens v. Bonding Ass'n, 538 S.W.2d 580, 583 (Ky. 1976) (statute prohibiting bail bonding is not unconstitutional); Blancett v. Montgomery, 398 S.W.2d at 880.

141 Ratliff v. Fiscal Ct. of Caldwell County, 617 S.W.2d 36, 38 (Ky. 1981); Asbury v. Robinson, 409 S.W.2d 508, 510 (Ky. 1966).

142 617 S.W.2d 36; 409 S.W.2d 508. See also notes 62-67 supra and accompanying text.

143 Commonwealth v. Kelley, 236 S.W.2d 695, 697 (Ky. 1951) (action against state for negligent maintenance of highways).

144 Appellee's Brief, supra note 111, at 11.

145 The Court found that, during the period of the alleged taking, Stearns had signed two private leases and a lease with the Commonwealth for hunting and wildlife protection, and had conducted profitable logging operations as well. See 678 S.W.2d at 382.

146 Mr. Bob Gable, Chairman of the Board of Stearns Coal & Lumber stated in his deposition, that his company "never engaged in any strip mining within the boundaries of either wild river in issue" and that it "had no plans to mine coal in the early 1970s as it was not economically feasible." See Brief on Behalf of Appellant at 28, Commonwealth v. Stearns Coal & Lumber Co., 678 S.W.2d 378 [hereinafter cited as Appellant's Brief].
it is possible that the Act’s prohibition of deep and strip mining would be a taking of Stearns’ property. In addition, because the Act did not permit the construction of new roads, if Stearns had, consequently, lost access to its coal, mining of the land then would have been totally destroyed. However, these facts were not before the Court, and the Court’s decision was based first and foremost on the lack of implementation of the Act.

In 1976, the Wild Rivers Act was amended and moderated. In addition, the Act was formally implemented by the Cabinet. The question now arises: What holding can be expected when another case, similar to Stearns Coal & Lumber, comes before the Supreme Court of Kentucky? In 1979, Stearns sold to the United States Government 12,227 acres of its property affected by the Wild Rivers Act. However, the company still owns 15,105 acres in the area. In addition, private property is found along other streams also protected by the Act: Martins Fork, Big and Little South Forks of the Cumberland, Red River and Rockcastle River. Further controversy is clearly possible.

\[1972 Act contained this strong language: "Nothing in this Act shall be construed to deprive a landowner of his property or any interest or right therein without just compensation." KRS § 146.280 (1972)(amended 1976). That such was the legislature’s intent was acknowledged many times by the Natural Resources and Environmental Protection Cabinet. See Appellee’s Brief, supra note 111, at 10. Appellee also referred to a formal opinion written by the Attorney General to the Courier-Journal stating that "private property owners would be compensated." See id. at 6 (emphasis in original). So, the statute would have required the Commonwealth to compensate Stearns Coal & Lumber had it been deprived of its property.

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\[1976 Ky. Acts ch. 197 (amending KRS §§ 146.210-.290 (1972)).

\[678 S.W.2d at 380.

\[Appellee’s Brief, supra note 111, at 37-38. The United States Government does not have to comply with the Act. 678 S.W.2d at 382.

\[Appellee’s Brief, supra note 111, at 2.

\[The following private land ownership pattern may be gleaned from the Kentucky Wild River Management Plans (1980) obtained from the Department for Natural Resources and Environmental Protection, and from conversations recently conducted with the legal and technical personnel overseeing the Kentucky Wild Rivers:

Martins Fork (Cumberland River): The wild rivers corridor is 100% privately-owned; there are 10-11 private tracts. Coal, sandstone, siltstone and shale are found in the vicinity.

Big South Fork (Cumberland River): Private property ownership has greatly decreased since Stearns Coal & Lumber Co.'s sale of a large portion of its property to the
The major change brought by the 1976 amendments is a clarification of the language of the original Wild Rivers Act. The amendments indicate that the Commonwealth does not intend to use the power of eminent domain to a great extent and will carry out its Wild Rivers mandate mostly through the exercise of police power. Another important change is an increase in land uses permitted in the stream areas: all uses existing at the time a stream was included in the system are now allowed; roads and structures may be built to facilitate a per-

United States Government. No exact percentage is available. Coal is present in the corridor.

*Little South Fork (Cumberland River):* There are about 50 private landowners in the corridor, or 100% private ownership. Coal, oil, limestone, sandstone and shale are found in the corridor.

*Red River:* More than 60% of the corridor is privately-owned; there are 14 tracts. No mineral resources exist in the corridor itself, but coal, oil, natural gas, limestone and clay are in close vicinity.

*Rockcastle River:* 50% of the land in the corridor is owned by 30 landlords. The corridor holds coal, sandstone and limestone.

All above figures are approximate. Each Wild River Management Plan indicates that land ownership information within the corridor "is not readily available due to the absence of property ownership maps in the county tax or property valuation offices." Kentucky Wild Rivers Management Plans. It is noteworthy that additional litigation has occurred in the area. In Vaughn v. Commonwealth, No. 82-CI-189 (McCreary Cir. Ct. December 31, 1983), 14 landlords initiated an action against the Commonwealth for the denial of strip mining permits; however, the case was dismissed as barred by the statute of limitations.

Before amendment, KRS § 146.220 (1972) provided:

> It is not the intent of KRS 146.200 to 146.360 to require or to authorize acquisition of all lands or interests in lands within the boundaries of the stream areas but to assure preservation of the scenic, ecological and other values and to provide proper management of the recreational, wildlife, water and other resources.

The 1976 amendments reinforced this section by the addition of the following:

> It is the intent of KRS 146.200 to 146.360 to impose reasonable regulations as to the use of private and public land within the authorized boundaries of wild rivers for the general welfare of the people of the Commonwealth, and where necessary, to enable the department to acquire easements or lesser interests in or fee title to lands within the authorized boundaries of the wild rivers, so that the public trust in these unique natural rivers might be kept.

KRS § 146.220 (1976).

Amended KRS § 146.280 clearly provides for monetary compensation for exercises of eminent domain: "Nothing [in this Act] shall be construed to deprive a landowner of the fee simple to or lesser interest in his property without just compensation." KRS § 146.280(1)(1976). These modifications evince legislative intent to implement the Act through regulation of use, and not through acquisition of land.

KRS § 146.290(1)(1976).
mitted use;\textsuperscript{157} strip mining remains prohibited, but deep mining is allowed;\textsuperscript{158} motor vehicles are tolerated for existing uses;\textsuperscript{159} and lastly, a landowner may now apply for a change of use permit in order to engage in an activity such as "the select-cutting of timber, a resource removal or an agricultural use upon his property located within the area. . . ."\textsuperscript{160}

In \textit{Stearns Coal & Lumber} the Court adopted the test\textsuperscript{161} announced by the United States Supreme Court in \textit{Penn Central Transportation Co. v. New York City}\textsuperscript{162} to ascertain the existence of a taking of property:

The economic impact on the claimant and, particularly, the extent to which the regulation has interfered with distinct investment-backed expectations are, of course, relevant considerations. . . . So, too, is the character of the government action. A "taking" may more readily be found when the interference with property can be characterized as a physical invasion by government, . . . than when interference arises from some public program adjusting the benefits and burdens of economic life to promote the common good.\textsuperscript{163}

The Kentucky Supreme Court identified the restrictions contained in the 1972 Wild Rivers Act which, had it been implemented, could have frustrated Stearns' "investment-backed expectations": no new roads, no deep mining, no clear-cutting of timber.\textsuperscript{164} Because all these activities are now allowed,\textsuperscript{165} the Court could conclude that the Act is "reasonable and the purpose of the law is within the overall scope of a public purpose."\textsuperscript{166}

However, one might anticipate situations, under either the Act or other land use regulations, where application of the law

\textsuperscript{157} KRS § 146.290(2)(1976).
\textsuperscript{158} \textit{Id.}
\textsuperscript{159} \textit{Id.}
\textsuperscript{160} KRS § 146.290(3)(1976). The statute also provides for administrative and judicial review. \textit{See} KRS § 146.290(4)(1976).
\textsuperscript{161} \textit{See} 678 S.W.2d at 381.
\textsuperscript{162} 438 U.S. 104 (1978) (statute's designation of a building as an "historic site" is not an unconstitutional taking).
\textsuperscript{163} \textit{Id.} at 124 (citations omitted).
\textsuperscript{164} \textit{See} 678 S.W.2d at 381.
\textsuperscript{165} \textit{See} notes 156-59 \textit{supra} and accompanying text.
\textsuperscript{166} 678 S.W.2d at 382.
to a particular piece of property will exceed permissible limits.\textsuperscript{167} In such a situation, a taking will be found. Thus, it is important to consider the remedies available to any landowner challenging excessive regulations.\textsuperscript{168} This is a difficult question because, for many years, there has been disagreement regarding proper relief for regulatory takings. The debate concerns the suitability of inverse condemnation and, if suitable, whether it should be limited to damages for the period of the taking or extended to actual acquisition by the government of land unreasonably made a total loss.

III. REMEDIES: INVALIDATION OR MONETARY COMPENSATION

Since the Court found no taking, the remedy available for environmental regulatory takings in Kentucky was not addressed in either \textit{Commonwealth v. Stephens}\textsuperscript{169} or in \textit{Commonwealth v. Stearns Coal & Lumber Co.}\textsuperscript{170} Preferred relief for regulatory takings traditionally is an injunction; the court invalidates the regulation as applied to the particular property.\textsuperscript{171} As one commentator explains, "there has never been an absolute right to

\textsuperscript{167} As stated by the United States Supreme Court: "[t]he Constitution measures a taking of property not by what a State says, or by what it intends, but by what it does." Hughes v. Washington, 389 U.S. 290, 298 (1967) (Stewart, J., concurring).

So, even though the Wild Rivers Act is constitutional, its enforcement might still raise constitutional problems. See Hamilton Bank v. Williamson County Regional Planning Comm'n, 729 F.2d 402, 408 (6th Cir.) ("[A] constitutional violation has occurred as soon as an uncompensated taking is effected. The government's duty to pay compensation then arises from the constitutional violation, not from any implied promise or agreement.").


\textsuperscript{169} 539 S.W.2d 303 (Ky. 1976).

\textsuperscript{170} 678 S.W.2d 378 (Ky. 1984).

compensation, even in cases in which an interference with property rights sufficient to constitute a taking is clear.” But such relief is anomalous because the general rule is that equitable relief is extraordinary and is granted only when there is no adequate remedy at law or when the equities of the case justify it. However, public policy is the controlling factor in the area of land use regulations, and an injunction is granted or rejected on the basis of its social utility. Kentucky courts have long agreed with this traditional view and have awarded injunctive relief in regulatory taking situations.

However, language used by the Kentucky Supreme Court in both Stephens and Stearns Coal & Lumber suggests that monetary compensation may be possible for an illegal application of the Wild Rivers Act and, by implication, for any unconstitutional exercise of the police power. In Stephens, the Court stated: “We hold the act to be enabling legislation and, as such, the Commonwealth is required by Section 13 of the Kentucky Constitution to pay for what it takes before the taking.” Stearns Coal & Lumber was termed “an inverse or reverse condemnation action,” and nowhere did the opinion repudiate the propriety of these proceedings in a regulatory taking situation. On the contrary, the Court called the existence of a taking a “threshold issue.” Despite holding that there was no taking as a matter of law, the Court discussed the issue of pre- and post-judgment interest awarded by the trial court. The award was reversed, but the remedy itself was not challenged. A few other states have adopted the same position.

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172 Mandelker, supra note 14, at 495.
174 See notes 138-42 supra and accompanying text.
175 For a discussion of this reversed remedial hierarchy, see Mandelker, supra note 14, at 491-92.
176 See, e.g., Hager v. Louisville & Jefferson County Planning & Zoning Comm’n, 261 S.W.2d 619 (Ky. 1953) (zoning regulation contested).
177 Id. at 620.
178 See also Ky. Const. § 242.
179 Id. at 382.
180 See id. at 383.
181 See id.
182 See id.
183 See id.
184 See, e.g., Duffield v. DeKalb County, 249 S.E.2d 235 (Ga. 1978) (inverse condemnation action against county for negligent maintenance of water pollution plant); Ventures in Property I v. City of Wichita, 594 P.2d 671 (Kan. 1979) (restriction on property uses of private landowners); Mattoon v. City of Norman, 617 P.2d 1347 (Okla. 1980) (city flood plain ordinance dispute); Fifth Avenue Corp. v. Washington County, 581 P.2d 50 (Or. 1978) (recovery allowed for damages arising out of zoning ordinance).
The question of what constitutes inverse condemnation remains open. Kentucky does not view this remedy as an exact replica of eminent domain proceedings. In Kentucky, one receives damages but does not sell the land to the regulating authority. Other states treat the remedial aspects of inverse condemnation in various ways. There might even be cases where a court invalidates the regulation and grants damages. This is an unsettled area of land use law.

The U.S. Supreme Court has neither endorsed nor rejected inverse condemnation as a federal constitutional remedy, but many commentators read Justice Brennan’s dissent in *San Diego Gas & Electric Co. v. City of San Diego* as indicative of the future. Justice Brennan acknowledged that a government’s exercise of police power, although constitutional, could be so applied to effect a taking of property. Stressing the “essential similarity” between regulatory takings and other taking categories, he concluded that monetary compensation is obligatory.

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185 *Cf. Commonwealth v. Widener, 388 S.W.2d 583 (Ky. 1965)* (failure of State to provide lateral support of lane during highway work is a ground for recovery in reverse condemnation action).

186 The McCreary Circuit Court stated: “The State does not receive a deed or acquire title to the property . . . . Title remains in the property owner . . . . Our case law clearly does not require the delivery of a deed in a reverse condemnation case.” Appellant’s Brief, *supra* note 146, at 24a (quoting *Stearns Coal & Lumber Co. v. Commonwealth*, Civil Action No. 2994 (McCreary Cir. Ct. January 19, 1982)).

187 It appears that Kansas favors condemnation proceedings, while Georgia and Oklahoma favor damages. See the cases cited *supra* note 184.

188 *See Duffield v. DeKalb County, 249 S.E.2d at 235.* Although the parties were suing for a nuisance (which generally commands monetary relief), the court found the nuisance (odors and noise from the county’s water pollution control plant) to be a taking of property for public purposes. Therefore, theoretically, the Court would allow both monetary and injunctive relief.

189 *450 U.S. 621, 636-61 (1981)* (Brennan, J., dissenting). The city of San Diego downzoned the utility’s property to limit industrial use and included it in an open-space plan. San Diego Gas & Electric sued the city and sought damages in inverse condemnation. This relief was rejected by the California Supreme Court. For procedural reasons the United States Supreme Court’s plurality opinion did not reach the merits. However, four Justices dissented, and Justice Rehnquist concurred on the procedure but implied he would have joined the dissent had the plurality reviewed the merits of the case. See *id.* at 633-34.


191 *See 450 U.S. at 647-50* (Brennan, J., dissenting).

192 *See id.* at 651.
because a landowner is not made whole by invalidation of an offending regulation. However, Justice Brennan does not believe that local governments should be compelled to acquire title to unreasonably regulated property. The regulator might choose to amend or rescind the challenged regulation; the taking would then be temporary, and just compensation would be required only for the period of injury. Only if the regulator chose not to modify the regulation would the taking become permanent. In this situation, since the Constitution does not impose a particular remedy, Justice Brennan believes the states should remain free to tailor relief according to their needs. He concluded that "the landowner must be able meaningfully to challenge a regulation that allegedly effects a ‘taking’, and recover just compensation if it does so."

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193 See id. at 655-57.
194 See id. at 658. This idea also appears in the case law of many states. See, e.g., McShane v. City of Faribault, 292 N.W.2d 253 (Minn. 1980) (airport zoning ordinance); Rippley v. City of Lincoln, 330 N.W.2d 505 (N.D. 1983) (land placed in "public use zone" by zoning ordinance).
195 450 U.S. at 657.
196 Id. at 657-58.
197 Id. at 658.
198 See id. at 660.

This statute provides:
Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.


Municipalities and local governments are "persons" as defined by the statute and can be sued for constitutional and statutory violations. Monell v. Department of Social Services, 436 U.S. 658 (1978) (mandatory unpaid maternity leave is an actionable deprivation under § 1983). Plaintiffs may get declaratory or monetary relief under § 1983. For the various classes of damages that can be sought, see Rockwell, Constitutional Violations in Zoning: The Emerging Section 1983 Damage Remedy, 33 FLA. L. REV. 168, 191-93 (1980-81). However, here too, injunctions are preferred over damages, and a prayer for compensation is not satisfied automatically. See Hernandez v. City of Lafayette, 643 F.2d 1188 (5th Cir. 1981), cert. denied, 455 U.S. 907 (1982) (city not immune from damages in situation of excessive regulation); Jacobson v. Tahoe Regional Planning Agency, 474 F. Supp. 901 (D. Nev. 1979), aff’d, 661 F.2d 940 (1981) (only an injunction may be obtained from an authority which does not have eminent domain
Although Justice Brennan’s dissent in *San Diego Gas & Electric* suggests inverse condemnation as a possible federal remedy,\(^2\) it is not obvious that this remedy will be adopted by the Court. First, such a holding would apply only to federal courts hearing federal questions.\(^2\) State courts would be free to choose a different path.\(^2\) Consequently, injured landowners eager to sue in inverse condemnation might be forced to go to federal court for relief. However, a litigant doing so might risk having his case dismissed as a result of the federal abstention doctrine. Federal courts prefer to allow state courts to settle matters of state and local policy without ever deciding the alleged federal constitutional questions.\(^2\) A federal inverse condemnation remedy would also be subject to this doctrine.\(^2\)

The United States Supreme Court has yet to consider application of the abstention doctrine to land use takings,\(^2\) but several federal courts have done so. The First Circuit held in *Pamel Corp. v. Puerto Rico Highway Authority*\(^2\) that “[f]ederal enforcement of the inverse condemnation remedy would be a singularly inappropriate intrusion into the states’ traditional domain of property law and land use policy.”\(^2\) While this does

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Significantly, a § 1983 cause of action is not available against the states, which frees most land use laws, such as the Wild Rivers Act, from such attack. Quern v. Jordan, 440 U.S. 332, 338-45 (1979). Therefore, a § 1983 complaint may not be useful in a great number of instances.

\(^2\) Some federal courts have already taken Justice Brennan’s advice, and have awarded compensation for inverse condemnation. See, e.g., Martino v. Santa Clara Valley Water Dist., 703 F.2d 1141 (9th Cir. 1983) (provisions in city flood plan constitute an unconstitutional taking), cert. denied, 104 S.Ct. 151; Hernandez v. City of Lafayette, 643 F.2d at 1200.

\(^2\) For a discussion of the abstention doctrine in the eminent domain context, see Muskegon Theatres, Inc. v. City of Muskegon, 507 F.2d 199, 201-05 (6th Cir. 1974).

\(^2\) See Burrows v. City of Keene, 432 A.2d at 15 (damages awarded in inverse condemnation); Rippley v. City of Lincoln, 330 N.W.2d at 505 (compensation for temporary and permanent takings can be obtained from local government); Zinn v. State, 334 N.W.2d 67 (Wis. 1983) (compensation awarded for temporary taking).

\(^2\) For discussion of the abstention doctrine in the eminent domain context, see Muskegon Theatres, Inc. v. City of Muskegon, 507 F.2d 199, 201-05 (6th Cir. 1974).


\(^2\) See Mandelker, *supra* note 14, at 514.

\(^2\) 621 F.2d 33 (1st Cir. 1980) (no “taking” of property without some statement of government displacement of ownership).

\(^2\) *Id.* at 36. Accord Santa Fe Land Improvement Co. v. City of Chula Vista, 596 F.2d 838 (9th Cir. 1979) (if a controversy can be settled by ruling on a state issue, constitutional adjudication should be avoided).
not mean that federal courts will always refuse jurisdiction in land use matters,\textsuperscript{208} since the Supreme Court has shown such reluctance in providing a federal solution to land use disputes,\textsuperscript{209} it is fair to say that the abstention doctrine will continue being used by many federal courts, especially those sitting in states demonstrating ingenuity in land use regulation.\textsuperscript{210}

Other serious problems cloud the future of regulatory inverse condemnation. For example, allowing courts to order inverse condemnation could be a judicial usurpation of legislative power.\textsuperscript{211} Also, the spectre of huge money judgments may have a chilling effect on local government attempts at innovative zoning.\textsuperscript{212} The disbursements could create pandemonium in local budgets and cause fiscal catastrophies.\textsuperscript{213} On the other hand, advocates of regulatory inverse condemnation point out that invalidation neither remedies the landowner for past losses nor penalizes the local government.\textsuperscript{214} The government can effect a slight change in the regulation and resume control of the land, while the landowner remains burdened and uncompensated.\textsuperscript{215}

Both sides have strong cases and the debate continues. In Kentucky, however, the trend is apparent. The state's judiciary, with its long tradition of liberal interpretation of the boundaries of police power,\textsuperscript{216} will not be likely to strike general welfare legislation. Nevertheless, when it encounters excessive regulations, the Court will not have its hands tied and will be able to order compensation whenever justified.\textsuperscript{217}

**CONCLUSION**

This Note is predicated upon three principles: The first is that the only unquestioned instance of taking is a physical ap-

\textsuperscript{208} See note 201 supra.
\textsuperscript{209} See note 189 supra.
\textsuperscript{210} For a presentation of the values behind a "general policy of abstention" see Note, *Land Use Regulation, the Federal Courts, and the Abstention Doctrine*, 89 *Yale L.J.* 1134 (1980).
\textsuperscript{211} See Shedd, supra note 62, at 345-46; Note, supra note 28, at 1471-72. See also Davis v. Pima County, 590 P.2d at 461; Agins v. Tiburon, 598 P.2d at 28; Eck v. City of Bismark, 283 N.W.2d at 200.
\textsuperscript{212} See 598 P.2d at 30-31; 283 N.W.2d at 200.
\textsuperscript{213} See 598 P.2d at 30-31; 283 N.W.2d at 200.
\textsuperscript{214} See Note, supra note 28, at 1471.
\textsuperscript{216} See notes 133-42 supra and accompanying text.
\textsuperscript{217} See notes 142-43 supra and accompanying text.
propriation of property by government. Regulatory takings are rare and are found only on a case-by-case basis. The second is that economic due process violations, such as excessive land use legislation, are tested by determining whether they are rationally related to a valid objective of the state's police power. The third is that aesthetic concerns are part of the general welfare and can be legitimately included in comprehensive regulatory public programs.

All three principles were recently affirmed by the United States Supreme Court. In *Loretto v. Teleprompter Manhattan CATV Corp.*, the Court stated: "Our holding today is very narrow. We affirm the traditional rule that a permanent physical occupation of property is a taking. . . . We do not, however, question the equally substantial authority upholding a State's broad power to impose appropriate restrictions upon an owner's use of his property."

In its latest term, the Supreme Court decided two other relevant cases. The Court reviewed the Hawaii Land Reform Act of 1967 in *Hawaii Housing Auth. v. Midkiff*, and confirmed the traditional deference to state legislatures acting within their spheres of authority, as well as the necessity to avoid "empirical debates over the wisdom of takings." The rational basis test was once more declared the only acceptable level of scrutiny. In another case, *Members of the City Council of Los Angeles v. Taxpayers for Vincent*, the Court reaffirmed that "the state may legitimately exercise its police powers to advance aesthetic values."

These cases show that the Court, since *Pennsylvania Coal Co. v. Mahon*, remains reluctant to break new ground. The ideological significance attributed by many to the substantial dissent in *San Diego Gas & Electric v. City of San Diego*
might be affected by the replacement of Justice Stewart by Justice O'Connor. What appears certain, however, is that the Supreme Court will not readily limit the states’ vast freedom to legislate in the area of land use. The creative approach will continue in a number of state legislatures and state courts while more traditional attitudes will survive in others. Kentucky is a member of the first group, and there are no signs that this flexible stance towards land use legislation will take a different turn in the future.

Monique Duparc Winther