The Endangered Species Act and Fifth Amendment Takings: Constitutional Limits Of Species Protection

Blaine I. Green

In a political climate increasingly sensitive to the property owners’ rights to be free from regulatory intrusions by the federal government, the Endangered Species Act (ESA) has become a popular symbolic target for property rights advocates. This Article suggests that the ESA is a far less significant threat to private property owners than is often supposed. First, the Supreme Court’s takings jurisprudence protects property owners from excessive ESA enforcement by influencing the way in which environmental regulations are drafted and implemented. Second, the ESA itself contains provisions embodying the Fifth Amendment guarantee against uncompensated takings. The Article demonstrates that as the Court has become more willing to find regulatory takings in recent years, the ESA has been administered with increasing regard to the protection of private property.

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† Associate, Pillsbury Madison & Sutro LLP, Los Angeles; B.A., 1994, Harvard University; J.D., 1997, Harvard Law School; Berkeley Exchange Program, 1996-97. The author is indebted to Boalt Professors John Dwyer and Trent Orr for their suggestions and encouragement in this endeavor. The author is likewise grateful to Robert Kry, Eric Biber and the other members of the Yale Journal on Regulation whose editorial comments were supremely helpful in revising this Article for publication.

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Introduction

A. Background

Hailed by some as the most successful environmental law in the last quarter century,1 reviled by others as an unjustified intrusion on private property rights,2 the Endangered Species Act of 1973 (ESA or the Act)3 is nothing if not controversial. The rhetoric over the ESA has been particularly vitriolic in recent years as the Act has come to epitomize, for some,4 the excesses of the federal regulatory state. Accordingly, current debate over the ESA is as much about the role of government in general, and the federal government in particular, as it is about the need to protect endangered species. The Republican party’s takeover of Congress in 1994 and its inclusion of the Private Property Protection Act in its Contract with America further polarized discussion of the ESA, shifting focus from species preservation to private property protection. Though attempts to make compensable any significant reduction in property value occasioned by the ESA (or other federal regulation) were ultimately unsuccessful in the 104th Congress,5 similar efforts are being considered in the 105th Congress.6

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1. Secretary of Interior Bruce Babbitt describes the Endangered Species Act as “undeniably the most innovative, wide-reaching, and successful environmental law which has been enacted in the last quarter century.” Bruce Babbitt, The Endangered Species Act and “Takings”: A Call for Innovation Within the Terms of the Act, 24 ENVTL. L. 355, 356 (1994).

2. U.S. Representative Charles H. Taylor, a supporter of the Private Property Protection Act (which, had it been passed, would have required government compensation when government action or regulation resulted in a reduction in property value of 10% or more), criticized the ESA as “sav[ing] few species, discourag[ing] good stewardship, and [being] economically unjust.” Charles H. Taylor, Property Rights Debate Frames Arguments for Regulatory Reform, 31 WAKE FOREST L. REV. 779, 785 (1996).


4. See, e.g., Taylor, supra note 2.

5. In March of 1995, the House of Representatives passed The Private Property Protection Act of 1995, H.R. 925, 104th Cong. (1995). Had it been signed into law, H.R. 925 would have required payments to property owners whenever the value of any portion of land or water rights was diminished by 20% or more as a result of federal endangered species or wetlands laws. See id. § 3(a). The Omnibus Property Rights Act of 1995, S. 605, 104th Cong. (1995), failed to come to a vote in the Senate. S. 605 was similar to H.R. 925 in requiring compensation for diminution in property owners' value; compensation, however, would have been available for diminution resulting from any federal action, but only when value was diminished by one third or more. See id. § 204(a)(2)(D).

6. Although it is too early to know for sure whether the 105th Congress will succeed in passing a landowner compensation bill, there are indications that such a bill will face significant political opposition. Given the success of conservation groups at portraying the Republican-led 104th Congress as anti-environmental (14 of 18 House Republicans who lost were on the Sierra Club's environmental "hit list"), this Congress has been seen as taking a more moderate approach to the environment. Indeed, conservative Republican Senator Dirk Kempthorne (Idaho) has spearheaded an effort to reauthorize (rather than repeal) the ESA. A bill to reauthorize the Endangered Species Act, S. 1180, 105th Cong. (1997), has won the support of moderate Republicans, as well as the Clinton Administration. See F.
The ESA is an important symbolic target for the property rights movement and for opponents of big government because it dramatizes the impact of federal regulations on individuals, providing anecdotes of property owners whose livelihood is, one way or another, threatened by the government’s mandate to save some little-known bird, bug or rodent. In Texas, for example, 74-year old Margaret Rector lost the chance to build her retirement home because use of her property would harm the endangered golden-cheeked warbler. For property rights advocates, this is a clear case of compensable “takings” under the Fifth Amendment, which provides, in pertinent part, that “private property [shall not] be taken for public use, without just compensation.”

The difficulty for the property rights movement, however, is that while there are many examples of landowners harmed by the ESA, no court has recognized a Fifth Amendment taking as a result of an ESA regulation. Property rights advocates, therefore, simultaneously advance alternative positions. On the one hand, they argue that ESA regulations constitute constitutional takings when private property is affected. On the other hand, because the courts have not recognized takings claims based on ESA regulations, the property rights movement advocates legislation which would expressly declare any reduction in property value as compensable. In this Article I develop the first of the alternative positions. I will argue that the Supreme Court’s takings jurisprudence, by serving as the backdrop against which environmental regulation is made, does in fact protect landowners from the ESA. I will demonstrate that the ESA itself contains provisions—the newly popular section 10 habitat conservation planning (HCP) process, in particular—which are the practical embodiments of the Fifth Amendment

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8. U.S. CONST. amend. V.
9. Some of the staunchest property rights advocates are the first to admit that there has been no successful regulatory takings claim under the ESA. See, e.g., Robin L. Rivett, Why There Are so Few Takings Cases Under the Endangered Species Act, or, Some Major Obstacles to Takings Liabilities, SB14 A.L.I.-A.B.A. 507, 523 (1996). This said, it is important not to confuse a lack of precedents with the more serious problem of adverse authority: In point of fact, no case has squarely addressed the propriety of takings challenges to the ESA. Of course environmentalists interpret the absence of such takings challenges as a clear signal that they are obviously frivolous. While this is one permissible inference, I will argue that successful takings claims under the ESA are not out of the question, see infra Part I, and I will offer alternative explanations for why such claims have yet to be litigated on the merits, see infra Part II.
10. Habitat conservation planning (discussed in more detail infra Subsection I.A.6), provided for
guarantees. I will show that as the Court has become more willing to find
regulatory takings in recent years, so the ESA has been administered with
increasing sensitivity to its effects on private property. I conclude that the
Interior Department's concern for the ESA's impacts on private landowners is
not only prudent, but required by the Court's current interpretation of the
Takings Clause. Accordingly, the potential for a radical application of the
ESA—one that ignores the dictates of private property—is precluded by the
Court's takings jurisprudence, lessening the need for landowner compensation
legislation.11

B. Questions to be Considered

After briefly introducing the ESA and summarizing the current state of
takings jurisprudence (Part I), I will endeavor to answer three questions: first,
whether regulations pursuant to the ESA may effect regulatory takings (Part
II); second, why there have been no regulatory takings claims under the ESA,
if (as I argue in Part II) such claims are at least legally plausible (Part III); and
third, what influence regulatory takings law has had and should have on
administration of the ESA (Part IV). I will conclude by arguing that only
minor amendments to the ESA are necessary to assure that the Act continues
to be administered with due respect to private property.

The ESA should be considered on its own terms, not as a symbol of the
larger concern over "big government." Newspaper accounts of ruined
landowners notwithstanding, a careful consideration of the ESA and takings
jurisprudence will show that property owners are not left unprotected. As a
practical matter, regulatory takings claims have not been heard under the ESA,
but this is because the Court's Fifth Amendment jurisprudence silently

in section 10 of the ESA, permits the affected landowner to incidentally "take" (i.e., harm) a listed
species as long as such "taking" is pursuant to an incidental take permit granted by the Secretary of
Interior. In exchange for an incidental take permit, the landowner must agree to a habitat conservation
plan (HCP) that minimizes and mitigates the landowner's impacts on concerned species. See Endangered
Species Act § 10(a), 16 U.S.C. § 1539(a) (1994). Section 10 (added in 1982) was not part of the original
ESA and has been frequently employed only in the last five years. It is a controversial program,
criticized by property rights advocates and environmentalists alike, since it is absolute neither in its
protection of property nor in its protection of species.

11. I do not mean to suggest that the Court's takings jurisprudence negates all arguments for
landowner compensation legislation. While I have limited my research to takings law in the federal
courts since the ESA is administered by the federal government, commentators have observed that some
state courts are more reluctant to recognize regulatory takings. See, e.g., James S. Burling, Property
Rights, Endangered Species, Wetlands and Other Critters: Is It Against Nature To Pay for a Taking? 27
be justified on the grounds that even the current takings doctrine is underprotective of property rights.
This view is best stated by Richard A. Epstein who, on Lockean principles, would treat any regulation
affecting private property as a taking subject to the eminent domain clause. See RICHARD A. EPSTEIN,
guarantees that the ESA is administered with due regard to property rights. Indeed, habitat conservation planning (hereinafter “HCP”)—an opportunity for landowners to use their property as they like, as long as they minimize and mitigate the impacts on concerned species—is available precisely because of that Fifth Amendment jurisprudence. If HCPs were not available, then regulatory takings claims would be more common and judicial findings of compensable takings more likely. While protecting property rights is a worthy objective, landowners do not require additional protection from the ESA to receive the level of protection required by current Court precedent: Sufficient safeguards are already directly provided by the HCP process and indirectly guaranteed by the Court’s interpretation of the Takings Clause of the Fifth Amendment.

I. The Endangered Species Act and Takings Jurisprudence

Prior to exploring the Fifth Amendment takings implications of the ESA, it is instructive to consider separately the purposes and policies behind these distinct bodies of law. Indeed, since there are no reported cases involving takings claims based on ESA regulations, it is necessary that the topics be introduced separately. This part will elaborate the distinct and sometimes conflicting purposes of the ESA and the Fifth Amendment: on the one hand, to protect species wherever found and at whatever cost; on the other hand, to provide just compensation when private land is taken for a public purpose.

A. The Endangered Species Act

While there is much controversy over what the scope of the ESA should be, there is broad agreement as to the breadth of the current Act. In *Tennessee Valley Authority v. Hill*, for example, the Court, considering the Act for the first time, described it as “the most comprehensive legislation for the preservation of endangered species ever enacted by any nation.” The *TVA* Court went on to observe that “[t]he plain intent of Congress in enacting this statute was to halt and reverse the trend toward species extinction, whatever the cost.” Only three years ago, in *Babbitt v. Sweet Home Chapter*
of Communities for a Great Oregon, the Court, on its way to upholding the Secretary of Interior's broad definition of harm (as including habitat modification or degradation) under the ESA, quoted liberally from TVA as to the scope of the Act, observing that "[w]hereas predecessor statutes . . . had not contained any sweeping prohibitions against the taking of endangered species except on federal lands, the 1973 Act applied to all land in the United States . . . ." Indeed, it is the Act's broad mandate—to protect species wherever found and at whatever cost—which has engendered fear and distrust among many private landowners.

1. Section 2: ESA Purposes and Policies

In the ESA's introductory section declaring purposes and policies, the breadth of the Act is foreshadowed: "The purposes of [the ESA] are to provide a means whereby the ecosystems upon which endangered species and threatened species depend may be conserved . . . ." The Act's stated intention is thus to protect not only species, but ecosystems on which such species depend. Although environmentalists have frequently criticized the ESA for not taking an ecosystem approach toward species protection, just such an approach is contemplated by the express terms of the Act. Particularly in recent years, the Interior Department and Fish and Wildlife Service (FWS) have exhibited a strong resolve to protect habitat and ecosystems, invoking the purposes of the ESA to the fullest extent. Habitat of endangered species is now expressly protected by an FWS regulation defining harm as, among other things, "significant habitat modification or degradation." Indeed, it was the FWS's broad definition of harm that was recently litigated and upheld in the Sweet Home decision. Furthermore, current Secretary of Interior Bruce Babbitt has repeatedly and forcefully advocated an ecosystem approach to species protection. Habitat conservation planning, the primary tool for ecosystem-based species protection, has increased dramatically in the last five years.

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17. Id. at 2413 (emphasis added) (citation omitted).
20. Respectively, the Interior Department and the Fish and Wildlife Service are the department and agency responsible for administering the ESA.
23. Between the 1982 enactment of section 10 (providing for habitat conservation planning) and
Ecosystem protection is only triggered by the presence of a concerned species, so the actual scope of the Act depends on what constitutes a protected species. Two categories of species are protected under the Act: endangered species and threatened species. While an endangered species is defined as “any species which is in danger of extinction throughout all or a significant portion of its range,” a threatened species refers to “any species which is likely to become [endangered] within the foreseeable future.” Moreover, not only does the Act protect threatened as well as endangered species, the ESA protects distinct population segments of any such species. For example, the grizzly bear and gray wolf are protected in the continental United States even though the animals are not threatened or endangered in Alaska. Similarly, distinct populations of the steelhead and coho salmon have been proposed for listing in many rivers throughout the West.

The ESA’s substantive protections go into effect only once an endangered or threatened species, or a distinct population thereof, has been formally listed as such. The Secretary of the Interior makes the determination of whether to list “solely on the basis of the best scientific and commercial data available.” As to the threshold issue of species-listing, the Secretary may not consider any interest—for example, the effect on private landowners or the impact on jobs in the local economy—besides that of the species. When the Secretary decides to list a species, the Secretary must at the same time designate critical habitat for it. Critical habitat may include not only “areas within the geographical...
area occupied by the species," but also lands outside those currently occupied by the species when such additional habitat is "essential for the conservation of the species."31 Unlike the decision of whether to list a species, the Secretary, in deciding to what extent to designate critical habitat, may consider "the economic impact, and any other relevant impact" of such designation.32

Listing of a species not only triggers the duty to designate critical habitat, but also requires the Secretary to issue protective regulations33 and implement recovery plans for the species.34 As long as a species is listed, it is entitled to the substantive protections of the Act. A species may be delisted only when it is found to be no longer threatened or endangered.35 In fact, while more than fifteen hundred species have been listed since the ESA’s enactment, only eleven species have recovered in the twenty-five year history of the Act.36

4. Section 7: Prevention of Jeopardy from Federal Activity

Under this section, all federal agencies have the affirmative responsibility to conserve listed species. In practice, this means that each agency must consult with the FWS to ensure that any action that the agency funds, authorizes, or carries out does not "jeopardize the continued existence" or "result in the destruction" or "adverse modification" of the critical habitat of any protected species.37 Private property interests can be affected by Section 7 in that permits issued by federal agencies (including wetlands fill permits as well as habitat conservation plans) constitute "actions" subject to the consultation process and a potential jeopardy finding. The consultation process begins with an inquiry into whether a protected species is present. The action agency has 180 days to complete a biological assessment for the purpose of identifying any endangered or threatened species which might be affected by the proposed action.38 If such a species is present, a "formal" consultation is required, and the FWS has ninety days in which to prepare a biological opinion as to whether the proposed action will jeopardize the species.39 While the FWS prepares its biological assessment, the acting agency may not make any "irreversible or irretrievable commitment of resources" to the project.40 If the FWS consultation results in a finding of jeopardy, the FWS

31. Endangered Species Act § 3(5).
33. See Endangered Species Act § 4(d).
34. See Endangered Species Act § 4(f).
35. See Endangered Species Act § 4(c)(2).
38. See Endangered Species Act § 7(c)(1).
39. See Endangered Species Act § 7(b)(1).
40. See Endangered Species Act § 7(d).
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must suggest those “reasonable and prudent alternatives” pursuant to which the proposed action could be conducted without jeopardy to the species. 41

When a finding of “no jeopardy” is made, the action agency may proceed with its proposed action without limitation. If, however, the FWS issues a finding of jeopardy, the action agency, if it is determined to go forward with its project, is presented with two alternatives. First, the agency may go forward with its action as long as its taking of species is incidental and in compliance with the terms and conditions of “the reasonable and prudent alternatives” mandated by the FWS’s biological opinion. 42 Second, the action agency, if it is determined not to comply with the FWS’s suggested alternatives, may apply to the Endangered Species Committee, an independent review board, for an exemption from the section 7 consultation requirements. 43

5. Section 9: Prohibited Acts Under the ESA

This provision makes it unlawful for a person or agency to engage in a number of specific activities involving a listed species. Sweeping in its application, section 9 applies against federal and nonfederal actors and protects listed species on both public and private lands. Among the prohibited acts are the import or export, sale or purchase, or possession of a listed species, as well as the “taking” of such a species. 44 Section 3(19) of the Act defines the statutory term “take” as “to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct.” 45 In its regulations pursuant to the ESA, the FWS has further elaborated the concept of “harm” as encompassing “significant habitat modification or degradation.” 46 The FWS’s expansive interpretation of take or harm has been upheld by the Supreme Court in Sweet Home. 47 As a consequence of the FWS’s broad understanding of “take,” many activities not

42. See Endangered Species Act § 7(b)(4). These “reasonable and prudent alternatives” are laid out in an “incidental take statement,” id., not unlike the incidental take permits issued to private landowners pursuant to section 10 habitat conservation plans. See infra Subsection I.A.6.
43. See Endangered Species Act § 7(g)(1). While an exemption from the requirements of section 7 is perhaps the best possible outcome from the action agency’s perspective in that it allows the action agency to proceed with its project as initially envisioned, applications for such exemptions are quite infrequent (successful applications rarer still) because the standard for the exemption is very strict and because five of the seven committee members must approve. See Endangered Species Act § 7(h)(1). “The process has been invoked only six times and the committee has convened just three times[,] granting an exemption twice.” Rivett, supra note 9, at 517.
46. See 50 C.F.R. § 17.3(c) (1997).
intended to affect listed species are nonetheless prohibited to the extent that they disrupt habitat of such species, in effect, resulting in an "incidental take."

6. **Section 10: Habitat Conservation Planning and Incidental Take Permits**

Added to the ESA in 1982, the section 10 HCP process offers to private landowners the same opportunity that section 7 provides to federal agencies: the opportunity to carry out a project, the *purpose* of which is *not* to harm listed species, even though the action may result in the incidental taking of such species. "The Secretary may permit, under terms and conditions as he shall prescribe. . . any taking otherwise prohibited by [section 9] if such taking is incidental to, and not the purpose of, the carrying out of an otherwise lawful activity."

Incidental take permits may be issued to private parties upon their submission and the Secretary’s approval of a conservation plan (HCP) that specifies: (i) the impacts likely to result from the taking; (ii) steps the applicant will take to minimize and mitigate such impacts; (iii) alternative actions to such taking that have been considered and why they have not been utilized; (iv) such other measures as the Secretary may require. In sum, the proposed HCP must demonstrate that the applicant will, to the maximum extent practicable, minimize and mitigate the impacts of its incidental taking, and that the taking will not appreciably reduce the likelihood of the survival of the species in the wild.

7. **Overview of the ESA**

An analysis of the specific provisions of the ESA thus reveals a statute that is sweeping in its protection of endangered or threatened species. By embracing a broad definition of "species" as including subspecies and distinct population segments of a given species, the Act takes a maximalist approach toward species protection. These species, in turn, are protected against everyone—federal agencies as well as private landowners—and wherever found—on private as well as on public lands. Moreover, species are preserved

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51. Why protect subspecies and distinct populations instead of drawing the line at species? The concept of subspecies is the subject of much uncertainty and debate within the scientific community. Biodiversity expert Edward O. Wilson concedes that "[t]he classification [of subspecies] works so long as we recognize that dicing up the whole species geographically is imprecise and to a large degree arbitrary. Depending on the criteria used, there could be one subspecies of [a given species] or there could be hundreds." *Edward O. Wilson, The Diversity of Life* 66 (1992). Given the background uncertainty in the science of subspecies, it is clear that the authors of the ESA chose to err on the side of maximum species protection.
indirectly as well as directly, as demonstrated by the provision for designation of critical habitat (which may include habitat even beyond the actual range of the concerned species) and the prohibition on habitat modification or degradation. Finally, it is not only the pervasiveness of ESA protections, but also their duration that is remarkable. In light of the fact that less than one percent of listed species have actually recovered since the Act’s inception nearly twenty-five years ago, the ESA’s mandate to protect species until recovered effectively results in indefinite regulatory protection.

In summary, given the broad scope of the ESA’s regulatory mandate, it should not be surprising that private property is frequently and significantly affected. However, while the ESA’s authors were primarily motivated by species protection, the ESA is not single-minded in its pursuit of species protection. Whereas the listing decision must be based solely on the best scientific and commercial data, the decision to designate critical habitat must be made with reference to the economic impact of such designation; moreover, the Act’s prohibition on the taking of species is not absolute, since incidental taking by agencies or private actors may be allowed as long as efforts are made to minimize and mitigate the impacts of such actions. Indeed, the various provisions of the ESA that consider, and to some extent mitigate, the impact of regulations on landowners, should perhaps be viewed as a recognition of the constitutional limits of environmental regulation: to wit, the Takings Clause of the Fifth Amendment.

B. Fifth Amendment Takings Jurisprudence

The text of the Takings Clause of the Fifth Amendment is deceptively simple and apparently clear: "nor shall private property be taken for public use, without just compensation." Indeed, there are many easy takings cases.

52. See Klinger, supra note 36, at E9.
53. U.S. CONST. amend. V.
54. Twenty years ago, the concept of regulatory takings was all but forgotten. By contrast, it has been one of the most rapidly evolving areas of law in the 1980s and 1990s. As one commentator recently observed, "[a]cademic mulling over the matter has generated an unsurprisingly large accumulation of ‘solutions’ to or ‘theories’ about the problem." James E. Krier, Takings From Freund to Fischel, 84 GEO. L.J. 1895, 1895 (1996). For classic articles on takings, see Frank I. Michelman, Property, Utility, and Fairness: Comments on the Ethical Foundations of "Just Compensation" Law, 80 HARV. L. REV. 1165, 1224-25 (1967) (viewing "demoralization costs" of property taken without compensation as the principal evil the Takings Clause is designed to address); Joseph L. Sax, Takings and the Police Power, 74 YALE L.J. 36, 61-63 (1964) (distinguishing between cases in which the state acts in its own self-interest and those in which it acts as an arbitrator among private interests, and finding takings in the former, but not the latter cases). More recent comprehensive analyses have been undertaken by RICHARD A. EPSTEIN, TAKINGS: PRIVATE PROPERTY AND THE POWER OF EMINENT DOMAIN 35-106, 161-330 (1985) (asserting that all regulation is a taking subject to Fifth Amendment analysis, but that compensation is not always required by the Just Compensation Clause) and WILLIAM A. FISCHEL, REGULATORY TAKINGS: LAW, ECONOMICS, AND POLITICS 289-324 (1995) (asserting that the role of the
For example, it is uncontroversial that if the government decides to build a highway across your property, you are entitled to compensation—the government must pay.\textsuperscript{55} Similarly, if the government appropriates a private business for public use, the government must also pay.\textsuperscript{56} For that matter, even the seemingly trivial government-authorized placement of cable television connection boxes on the roof of an apartment building has been held to constitute a taking.\textsuperscript{57} In each of these cases, a taking is found because there is an appropriation or physical invasion of property. This is the traditional physical occupation theory of Fifth Amendment takings: The government's physical occupation of private property, no matter how small, effects a taking.

1. Origins of Regulatory Takings Law

Takings law, however, loses its clarity when the challenged government action is regulatory, rather than physical, in nature. The idea of regulatory takings dates to Justice Holmes's opinion in the 1922 case of \textit{Pennsylvania Coal Co. v. Mahon}.\textsuperscript{58} At issue in \textit{Mahon} was whether the Kohler Act—a Pennsylvania law forbidding the mining of coal in such a way as to cause the subsidence of human habitation—effected a constitutional taking of Penn Coal's property rights in subsurface mining.\textsuperscript{59} On his way to finding a compensable taking, Justice Holmes announced the oft-quoted principle behind regulatory takings: “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.”\textsuperscript{60} Though Holmes was concerned by the prospect of “regulation going too far,” he nonetheless made clear that it is impractical for government to pay every time a law affects property: “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.”\textsuperscript{61} Finally, Justice Holmes did not attempt to provide a bright line for what is
“too far.” It was, rather, “a question of degree—and therefore cannot be disposed of by general propositions.”\textsuperscript{62}

For more than half a century following Mahon, the Court was silent as to the possibility of regulatory takings, in effect limiting Fifth Amendment compensation to cases of physical invasion or appropriation. It was not until the late 1970s and early 1980s that the concept of regulatory takings was revived. In a dissenting opinion, Justice Brennan provided the logical leap from traditional physical takings doctrine to the modern regulatory takings idea:

Police power regulations such as zoning ordinances and other land-use restrictions can destroy the use and enjoyment of property in order to promote the public good just as effectively as formal condemnation or physical invasion of property. From the property owner’s point of view, it may matter little whether his land is condemned or flooded, or whether it is restricted by regulation to use in its natural state, if the effect in both cases is to deprive him of all beneficial use of it.\textsuperscript{63}

For Brennan, while the character of the governmental action might be relevant to the takings inquiry, the touchstone of Fifth Amendment jurisprudence is the effect of governmental action on the property owner.\textsuperscript{64} Simply put, property interests can be harmed equally as much by regulation as by physical invasion or appropriation.

2. The Rebirth of Regulatory Takings: The Penn Central Case

While in the last two decades the Court has consistently recognized the possibility of regulatory takings, there is no unified doctrine. Indeed, the Court itself has frequently acknowledged the difficult and ad hoc nature of the takings question: “The question of what constitutes a ‘taking’ for purposes of

\begin{itemize}
  \item \textsuperscript{62} Id. at 416.
  \item \textsuperscript{64} In his dissent in San Diego Gas, Brennan is above all concerned with the effect (rather than the nature) of governmental action on the property owner: “if the effect in both cases is to deprive him of all beneficial use” then there is a taking. \textit{Id}. It should be noted, however, that “effect on the landowner” is only one-third of the three-fold inquiry Brennan had announced just three years earlier in Penn Central Transportation Co. v. City of New York, 438 U.S. 104, 124 (1978) (holding that takings analysis depends on (i) the character of the governmental action, (ii) economic impact of regulation, and (iii) interference with reasonable investment-backed expectations). Brennan’s emphasis, in San Diego Gas, on the economic impact on the landowner to the exclusion of other factors (such as the nature of the governmental action), foreshadows the concept of per se regulatory takings (where the landowner is deprived of all economic value) developed in Lucas v. South Carolina Coastal Council, 505 U.S. 1003, 1014-19 (1992).
\end{itemize}
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the Fifth Amendment has proved to be a problem of considerable difficulty...[T]his Court, quite simply has been unable to develop any 'set formula'... The Court thus concedes that "whether a particular restriction will be rendered invalid by the government's failure to pay for any losses proximately caused by it depends largely 'upon the particular circumstances [in that] case.'"

Notwithstanding the Court's characterization of the takings issue as a fact-sensitive inquiry, the Court, at various times over the last twenty years, has announced several tests to determine whether a taking has occurred. While each of the tests will be separately addressed in the next section, it is instructive to begin the analysis by reviewing the Court's decision in *Penn Central Transportation Co. v. City of New York*. *Penn Central* is important, not only because it is the first time since *Mahon* that the Court considered the possibility of a regulatory taking, but also because it provides the foundation from which regulatory takings analysis has evolved over the last two decades.

At issue in *Penn Central* was whether the City of New York—or more specifically, the City's Landmarks Preservation Committee—had effected a taking by denying, pursuant to its historic landmarks law, Penn Central's application to construct a high rise office tower above the train station. The Court found that no taking had occurred. The Court cited several factors in support of its holding. First, owners could not establish a taking merely by showing that they had been denied the right to exploit their airspace, irrespective of the remainder of the parcel. Second, the mere fact that some owners are more seriously affected than others does not necessarily result in a taking. Third, there is no taking because the law did not interfere with the owner's present use or prevent it from realizing a reasonable rate of return on its investment. The Court, in rejecting the plaintiffs' takings claim, relied particularly on the fact that Penn Central was to some extent compensated, in the form of transferable development rights, for not being able to build its high rise.

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66. *Id.* at 124 (quoting United States v. Central Eureka Mining Co., 357 U.S. 155, 168 (1958)).
68. This is the earliest modern expression of the so-called "parcel as a whole" rule. For a thorough review of cases considering this rule, see John M. Groen, *The Relevant Parcel Issue*, C872 A.L.I.-A.B.A. 167 (1993) (stressing the need for a case-by-case analysis to determine the relevant parcel for purposes of the regulatory takings inquiry).
69. *See Penn Central*, 438 U.S. at 137. Transferable development rights (TDRs) are granted to property owners in a "preservation" area in exchange for their forgoing development in that area. TDRs are valuable in that they may be used in "growth" areas to permit development beyond that which would be allowed under the existing zoning regulations. TDRs may be used by the landowner to whom they are originally granted (if that landowner has property in a growth area that it seeks to develop further) or may be sold on the market to other parties. For a more in-depth discussion of how TDRs work, including case studies of two TDR programs, see James T. B. Tripp & Daniel J. Dudek, *Institutional Guidelines*
Penn Central, however, is less known for its holding than for its identification of three factors that are relevant to the inquiry of whether a regulatory taking has occurred: the character of the governmental action, the economic impact of the regulation on the claimant, and the extent to which the regulation has interfered with distinct investment-backed expectations. It is from these three factors that subsequent regulatory takings tests have been drawn. While Penn Central, at first blush, may seem to provide a workable, common-sense approach to resolving regulatory takings challenges, in practice the decision adds little certainty to the takings inquiry because the Penn Central factors are not self-defining.

Does the “nature of governmental action” factor refer to the physicalness of the intrusion—that is, the more the action is like a physical invasion, the more likely it is to be considered a taking? Or is it about whether the action is pursuant to a legitimate public purpose within the traditional police power? Or is it, instead, concerned with whether there is a nexus between the landowner-caused harm sought to be prevented and the regulatory action or requirement?

How should the “economic impact” factor be measured? Is the impact to be compared to the entire property as a whole or only to the section of property affected by the regulatory action? If a property owner is deprived of all economic value, does this in itself result in a taking?

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70. According to the Court, 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.” Penn Central, 138 U.S. at 124 (citation omitted). Thus, at least for the Penn Central Court, the governmental action factor, in effect, simply reflects the origins of Fifth Amendment takings law: that physical invasions are the paradigmatic taking.

71. See id.

72. This appears to have been the intention of the Penn Central Court. See supra note 70; see also Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419 (1982) (finding a taking based on the government’s authorization of the placement of cable box connectors on a privately-owned apartment building). In subsequent takings cases, however, the nature of the governmental action factor has seemingly acquired a significance independent of the act’s “physicalness.” See, e.g., Nollan v. California Coastal Comm’n, 483 U.S. 825 (1987) (finding a taking because of a lack of nexus between the governmental action and the harm to be prevented); Keystone Bituminous Coal Ass’n v. Benedictis, 480 U.S. 470 (1987) (nature of the governmental action inquiry focused on the legitimate public purpose behind the action).

73. See, e.g., Agins v. City of Tiburon, 447 U.S. 255, 260 (1980) (“The application of a general zoning law to particular property effects a taking if the ordinance does not substantially advance legitimate state interests . . . .”).

74. See Nollan, 483 U.S. at 831-37.

75. The Penn Central Court made it clear that it was the “extent of the interference with rights in the parcel as a whole” that was the relevant inquiry. Penn Central, 438 U.S. at 130-31. Although subsequent decisions have not rejected this statement, the so-called “parcel as a whole” rule has not always been followed. See cases cited infra note 105.

76. While courts consistently acknowledge the parcel as a whole rule, in practice it is not always
What is meant by the landowner’s reasonable, investment-backed expectations? What property owner’s expectations are “reasonable?” Is there an objective standard for reasonable expectations, such as expectations (as to permissible activities) that do not offend principles of state nuisance law? Or is what constitutes a reasonable expectation simply whatever the court decides is consistent with the common good of society—a sort of reasonable person’s idea of reasonable expectations?

Finally, the Court provides little guidance as to how the factors should be considered in relation to each other. May any single one of them be decisive? If a consideration of the factors leads to opposite conclusions, which is controlling? Or if none controls, is it the best two out of three?

Manifestly, the Penn Central factors raise more questions than they answer—questions that the Court has struggled to resolve (with limited success) in its repeated reformulations of the takings inquiry.

3. Uncertainty in Regulatory Takings: Competing Analyses

Although the Court, in the last two decades, has not directly criticized or disavowed the three-factor Penn Central test, it has declined to apply the Penn Central test in the context of many regulatory takings challenges. Instead, the Court has, on various occasions, used other criteria—or perhaps, similar criteria, but under different labels—to decide regulatory takings cases. It decisive. For example, a court solicitous of property owners might take the position of the Claims Court which, after acknowledging the validity of the parcel as a whole rule, decided that “[i]n this case, however, the critical issue is how to define what the whole parcel includes.” Loveladies Harbor v. United States, 15 Cl. Ct. 381, 391 (1988) (deciding that the relevant parcel—against which the economic impact is measured—was the 12.5 acres for which a permit to fill wetlands was denied, not the landowner’s original holding of 250 acres).

In Lucas v. South Carolina Coastal Council, 505 U.S. 1003, 1027-31 (1992), the Court found a per se taking because the property owner had been deprived of all economic value. With Lucas, thus, originates the idea of a per se or categorical regulatory taking. There is not, however, any indication in Penn Central that a deprivation of all economic value would automatically result in a taking—it is, after all, just one of three Penn Central factors.

Although the Court, in Penn Central, used the phrase “distinct investment-backed expectations,” Penn Central, 438 U.S. at 124, it has since generally referred to “reasonable, investment-backed expectations.” See, e.g., Ruckelshaus v. Monsanto Co., 467 U.S. 986, 1005 (1984); PruneYard Shopping Center v. Robins, 447 U.S. 74, 83 (1980).

Lucas is notable for two reasons: first, for its analysis of per se regulatory takings when all economic value is deprived; and second, for its limiting of the police power exemption from takings to the bounds of a state’s property and nuisance law.

This view is perhaps embodied in the idea of “average reciprocity of advantage”—that is, a regulation of general application, “designed to promote the common good,” does not effect a taking even if some landowners are incidentally harmed and suffer a diminution in value, since it is presumed that these owners at the same time receive some benefit (even if in a given case, they are more harmed than benefited), to the extent they share in the common good. Zoning regulations are the classic example of mutual reciprocity of advantage. See Euclid v. Amber Realty Co., 272 U.S. 365 (1926) (upholding the prohibition of industrial use of land).
comes as little surprise, then, given the uncertainty of regulatory takings law
and the resultant multiplicity of available takings tests, that the Court’s recent
takings jurisprudence has spawned a large amount of commentary. Professor
Andrea Peterson, a critic of “the chaotic state of current Takings Clause
document,”81 identifies four separate takings standards: the three-factor Penn
Central test, the two-part Agins test, the “no economically viable use” test of
Lucas, and the Loretto per se rule.82 In addition to the four tests Peterson
alludes to, at least one other should be considered: the substantial nexus test of
Nollan. What follows is a summary review of the various takings analyses
employed by the Court since Penn Central.

In Agins v. City of Tiburon83, just two years after Penn Central, the Court
created a new, two-part takings inquiry: first, whether the regulation
substantially advances a legitimate state purpose; and second, whether the
owner is denied economically viable use of his land.84 In Agins, the plaintiff-
landowner, a residential developer, challenged a zoning ordinance limiting the
density of residential development. Although the Agins Court formulated its
own takings analysis rather than simply relying on the Penn Central factors,
the Court arrived at a similar result, denying the takings claim.85 Agins
nonetheless represents a departure from Penn Central in two respects. First,
whereas in Penn Central, the “nature of governmental action” factor pertains
to the “physicalness” of the action or regulation, the Agins “legitimate state
interest” test focuses on whether the government has a valid reason for its
actions, or more narrowly, on whether the government is preventing nuisance-
like conduct.86 Second, whereas the Penn Central Court gives little guidance
on how the factors are to be considered, the Court in Agins, declares that a
taking occurs if either of the conditions—lack of legitimate state interest or
denial of all economic use—is met.87

Two years after Agins and four years after Penn Central, the Court
decided Loretto, finding that the government’s authorization of the placement
of cable television connectors on privately-owned apartment buildings
constituted a taking. The Court’s analysis in Loretto is quite distinct from
Penn Central or Agins: rather than employing a multi-prong test, the Loretto

81. Andrea L. Peterson, The Takings Clause: In Search of Underlying Principles, Part I—A
82. See id. at 1316.
84. See id. at 260.
85. See id. at 260-63.
86. See Peterson, supra note 81, at 1327-28.
87. See Agins, 447 U.S. at 260. For an extended discussion of whether the takings test in Agins
should be read in the conjunctive or disjunctive, see Robert K. Best, All Dressed Up But Where Do We
Go?, C997 A.L.I.-A.B.A. 223, 229-30 (1995) (concluding that a taking occurs if either circumstance is
met).

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Court finds a per se taking based on the government-authorized physical invasion.\textsuperscript{88}

Yet another innovation in regulatory takings analysis was provided by the Court's decision in \textit{Nollan v. California Coastal Commission}.\textsuperscript{89} In \textit{Nollan}, the California Coastal Commission, acting under the authority of the California Coastal Act, prohibited the Nollan family from building a residence on their beachfront property unless they granted an easement allowing the public to walk along the beach across their land. \textit{Nollan} is thus unlike \textit{Penn Central} and \textit{Agins} where development was flatly denied; the Nollans' exercise of their property rights was not prohibited but made conditional. The Court began its analysis by noting that, while outright appropriation of a public-access easement would amount to a taking, requiring such an easement as a building permit condition did not \textit{necessarily} effect a taking.\textsuperscript{90} Indeed, had the Court considered the \textit{Nollan} case in light of the \textit{Penn Central} factors, perhaps no taking would have been found since the Nollans were deprived of far less than all economic value and since they did not have a reasonable expectation that their land would be free from regulation, including building permit conditions.\textsuperscript{91}

\textit{Nollan}, however, turned on the nature of the governmental action—but \textit{not} in the sense that \textit{Penn Central} (physicalness of the action) or \textit{Agins} (legitimacy of the state interest) understood the phrase. For the \textit{Nollan} Court, the permit condition effected a taking because it lacked an adequate "nexus" with the harm the state sought to prevent. The Commission's permit condition—a public-access easement—was not closely related to the harm—blocking the public's view of the beach—caused by the owner's proposed action.\textsuperscript{92} Thus, in the context of permit conditions, \textit{Nollan}, in effect, establishes a presumption of takings, rebuttable only by showing a nexus between the alleged harm and the permit condition.\textsuperscript{93}

\textsuperscript{88} See \textit{Loretto v. Teleprompter Manhattan CATV Corp.}, 458 U.S. 419, 426 (1982).
\textsuperscript{89} 483 U.S. 825 (1987).
\textsuperscript{90} See \textit{id.} at 834-36.
\textsuperscript{91} The Nollans exercised their option to buy the subject property (on the condition that they would demolish the existing bungalow and replace it with a three-story home) even \textit{after} they had applied for a building permit and were \textit{told} they would be required to grant an easement. See \textit{id.} at 828.
\textsuperscript{92} See \textit{Nollan}, 483 U.S. 838-39.
\textsuperscript{93} Indeed, the importance and weight of the apparent presumption that permit conditions effect takings has been borne out in subsequent decisions. In \textit{Dolan v. City of Tigard}, 512 U.S. 374 (1994), the Court agreed with the city that there was a nexus between a landowner's contemplated harm—increased commercial development which would lead to increased traffic—and the permit condition—creation of a dedicated bike path on the property—but \textit{still} found a taking because the city's findings as to the reasonable relation between the harm and the permit condition (i.e., that the additional number of vehicle trips generated by commercial development would be offset by the use of the bike path) were inadequate. The Court announced a "rough proportionality" requirement between the permit condition and the subject harm. See \textit{id.} at 391; see also Marshall S. Sprung, \textit{Taking Sides: The Burden of Proof Switch} in \textit{Dolan v. City of Tigard}, 71 N.Y.U. L. Rev. 1301 (1996) (demonstrating how the burden of
In 1992 the Court decided *Lucas v. South Carolina Coastal Council*, its most recent and significant regulatory takings case. Instead of clarifying the various takings tests announced in the previous decade and a half, however, the Court created a new takings standard and questioned (but did not resolve) the premises of earlier decisions. At issue in *Lucas* was a developer's challenge to a South Carolina law prohibiting the development of certain beachfront property in order to prevent beach erosion. All of Lucas's land was within the newly protected zone. Although the Court did not itself find a taking, instead remanding the case to the South Carolina Supreme Court, the majority nevertheless seized the opportunity to articulate a new takings standard: that a taking is effected when all economic value is deprived—in effect, a per se regulatory taking.

While *Lucas* is most often associated with its ruling that a deprivation of all value constitutes a taking, it is the case's holding on two subsidiary issues that is perhaps most innovative. First, the *Lucas* decision seriously narrows the nuisance exception to takings, and in so doing, adds substance to the notion of a property owner's reasonable expectations. Also known as the "noxious use" doctrine, the nuisance or police power exception allows the taking of property without compensation when the act or regulation is aimed at preventing harm rather than procuring a benefit. Whereas prior to *Lucas* the government could readily avoid takings liability by invoking the police power, the *Lucas* decision requires that the regulation be consistent with "background principles of the State's law of property and nuisance already placed upon land ownership." By adopting a historically confined definition of nuisance, *Lucas* effectively limits the nuisance exception to harms that proof can be determinative in the takings context).

96. The Court remanded to the South Carolina Supreme Court to determine whether state common law had already proscribed Lucas's intended uses. The Court hinted, however, that a taking should probably be found, observing that "[i]t seems unlikely that common law principles would have prevented the erection of any habitable or productive improvements on [Lucas's] land." *Lucas*, 505 U.S. at 1031.
97. See id. at 1019.
98. Indeed, the *Lucas* rule that a deprivation of all economic value effects a per se taking is not especially novel. Deprivation of economic value is among the *Penn Central* factors and deprivation of all economic value is the second half of the *Agins* test.
99. See *Lucas*, 505 U.S. at 1016 n.7.
100. In *Mugler v. Kansas*, 123 U.S. 623 (1887), for example, no taking was found as a consequence of the dramshops being put out of business by statewide prohibition. See also *Hadacheck v. Sebastian*, 239 U.S. 394 (1915) (regulation prohibiting brickyards within city limits was part of police power and thus no taking occurred).
would have been actionable at common law. In other words, "new" harms\(^{103}\) may be regulated only as long as the government pays compensation for deprivation of economic value.

The second way in which Lucas departs from prior takings jurisprudence occurs almost as an aside. Responding to Justice Stevens' dissenting criticism of the deprivation-of-all-economic-use rule as arbitrary,\(^{104}\) the Court calls into question the Penn Central "parcel as a whole" rule\(^{105}\) and raises the possibility of "partial takings." Writing for the majority, Justice Scalia observes that the dissent "errs in its assumption that the landowner whose deprivation is one step short of complete is not entitled to compensation."\(^{106}\) The Court's view of deprivation of all, or nearly all, value as a per se taking, when juxtaposed against the "parcel as a whole" rule, highlights a tension underlying regulatory takings law. If the Court were really serious in requiring all economic value to be deprived prior to finding a taking, very few such takings would be recognized. By asserting, however, that a landowner whose deprivation is less than complete may be entitled to compensation, the Court has opened the door to allegations of partial takings\(^ {107}\) and has cast doubt on the traditional regulatory takings proposition that mere diminution in value does not constitute a taking.\(^{108}\)

4. Summary: A Few Settled Principles of Regulatory Takings Law

In summary, while the Court's opinion in Penn Central broke ground by laying a framework in which to think about regulatory takings, it has been the Court's more recent decisions in Lucas and Nollan that have added substance

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103. Ecological harms, for example, might constitute "new" harms as to which the nuisance exception to takings liability would not apply. See id.

104. See Lucas, 505 U.S. at 1064 (Stevens J., dissenting) ("A landowner whose property is diminished in value 95% recovers nothing, while an owner whose property is diminished 100% recovers the land's full value.").

105. While the Court has since affirmed the "parcel as a whole" rule in Concrete Pipe & Products of California, Inc. v. Construction Laborers Pension Trust, 508 U.S. 602, 642-44 (1993), the rule has not been consistently applied by the lower federal courts. See, e.g., Florida Rock Indus. v. United States, 18 F.3d 1560 (Fed. Cir. 1994) (recognizing the possibility of a partial taking and remanding to Claims Court for balancing of competing interests); Yancey v. United States, 915 F.2d 1534 (Fed. Cir. 1990) (finding compensable taking where an owner had lost 77% of the value of a flock of turkeys due to a federal government quarantine).

106. Lucas, 505 U.S. at 1019 n.8.

107. "The question remains, does a partial deprivation resulting from a regulatory imposition, that is, a situation in which a regulation deprives the owner of a substantial part but not essentially all of the economic use or value of the property, constitute a partial taking, and is it compensable as such? . . . The Court's decisions to date have not provided an answer." Florida Rock, 18 F.3d at 1568. The court went on to find that not all economic value had been deprived, and that therefore the case should be remanded to the lower court to see if a taking had nonetheless occurred. See id. at 1572-73.

108. See, e.g., Euclid v. Amber Realty Co., 272 U.S. 365 (1926) (75% diminution in value caused by zoning law did not effect a taking).
to the *Penn Central* factors.\(^{109}\) Although regulatory takings law has been in a state of flux for the better part of the last two decades, there are nonetheless several settled principles. First, a regulation that does not substantially advance a state interest, or that in the context of permit conditions does not do so in a way that is closely related to the harm to be prevented, effects a taking. Second, a deprivation of all or nearly all economic value automatically triggers Fifth Amendment compensation (while in a case where less than all value is deprived, the economic impact of the regulation is just one among several factors—such as state interest in the action and expectations of owners—to be balanced). Third, the police power exception to takings liability is limited to prevention of harms cognizable under the common law background principles of nuisance or property.

II. The Potential for Takings Effected by the ESA

Having outlined the broad scope of the ESA and having considered the recent revitalization and strengthening of the regulatory takings doctrine, the question is ready to be posed: May the ESA effect regulatory takings?\(^{110}\)

A. Regulatory Takings Doctrine Applied to ESA Regulations

As a preliminary matter, it should be observed that the following analysis is concerned with ESA regulations (for example, the listing of an endangered species or the designation of critical habitat) and not with other non-regulatory or physical actions carried out pursuant to the Act. While such other actions may also occasion takings,\(^{111}\) they would be analyzed under the more

\(^{109}\) This is, of course, not to say that *Nollan* and *Lucas* have resolved all questions or doubts about regulatory takings law. Indeed, in some respects they have raised as many questions as they have answered, for example, whether partial takings are compensable and what role the "parcel as a whole" rule plays in the doctrine.

\(^{110}\) A more straightforward question would of course be, *Does* the ESA effect takings? The answer is no—at least, there is at present no record of takings claims having been litigated under the ESA. (Indeed, *why* takings cases have not been litigated under the ESA is the focus of the next part.) However, the mere absence of suits does not mean that any such claim is meritless as a matter of law. The dearth of takings claims under the ESA may be a function of several circumstances: Perhaps, for example, it is because of the way the Act is administered—that is, by avoiding direct, all-or-nothing conflicts with property owners—that in most circumstances, takings claims under the ESA are at once not worth bringing and not justified on the merits. See infra Part III. While the mere lack of takings suits under the ESA does not negate the possibility of such suits, it does make the ESA takings analysis largely conjectural. Absent the concrete details of actual cases, the analysis must inevitably depend on an application of general propositions to imaginable but hypothetical factual contexts.

\(^{111}\) See, e.g., Christy v. Hodel, 857 F.2d 1324 (9th Cir. 1988), *cert. denied sub nom.* Christy v. Lujan 490 U.S. 1114 (1989). In *Christy*, the Ninth Circuit denied compensation to a sheep rancher when—because of the section 9 prohibitions on harming listed species—he was powerless to prevent protected grizzly bears from devouring 20 of his sheep. Justice White, dissenting from the denial of certiorari, appeared sympathetic to the rancher’s takings claim: "There can be little doubt that if a federal statute authorized park rangers to come around at night and take petitioner’s livestock to feed the bears,
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traditional rubric of takings by physical invasion or appropriation.\textsuperscript{112} In any event, it is generally ESA regulation of private property that engenders the most controversy—as well as the loudest calls for congressional reform—and that is, therefore, the primary focus of this part.

Since it is \textit{regulation} pursuant to the ESA that most commonly affects private property, it is the Court’s regulatory takings doctrine that is implicated: How do ESA regulations—to wit, listing of species and designation of critical habitat—fare in view of the regulatory takings factors announced in \textit{Penn Central} and elaborated in subsequent jurisprudence?

1. \textit{The Nature of the Governmental Action}

In the case of either a species listing or a designation of critical habitat, application of the governmental action factor suggests that a taking would \textit{not} result. Whether analyzed in terms of the physicalness of the regulation (as in \textit{Penn Central}) or in terms of whether the regulation substantially advances a legitimate state interest (as in \textit{Agins}), the “nature of the governmental action” factor militates against finding a taking.\textsuperscript{113}

First, neither the listing of a species nor the designation of habitat is readily amenable to being characterized as a physical invasion. These regulatory actions do not, for example, authorize the placement of a thing into or on top of private property as in \textit{Loretto}.\textsuperscript{114} At most, it might be argued that species listing or habitat designation legally recognizes a species’s physical occupation of private land. This hardly rises to the level of a government-backed physical invasion, however, since the endangered species may occupy private land irrespective of government protection.\textsuperscript{115} Moreover, while takings case law is scarce under the ESA, the possibility of a physical taking pursuant

\textsuperscript{112} See \textit{Loretto v. Teleprompter Manhattan CATV Corp.}, 458 U.S. 419 (1982).

\textsuperscript{113} Note that the \textit{Nollan} test (whether there is an adequate nexus between the regulatory requirements and the harm to be prevented) is not applicable in the context of species listing or habitat designation decisions, without more. However, as discussed \textit{infra} Subsection IV.B.3, the \textit{Nollan} nexus requirement is not entirely irrelevant to the ESA, and in fact may hold important implications for habitat conservation plans.

\textsuperscript{114} See supra note 57 and accompanying text.

\textsuperscript{115} A landowner might be able to make a colorable argument for a physical taking when the government actually \textit{introduces} a population of animals on or around her land. Just such an argument was rejected, however, by a California court in \textit{Moerman v. California}, 21 Cal. Rptr. 2d 329 (Cal. Ct. App. 1993). In \textit{Moerman}, plaintiff-landowner alleged the state had damaged his property by relocating tule elk that destroyed his fences and ate forage intended for his livestock. The court found that “tule elk are not instrumentalities of the state nor controlled by the state,” and that therefore, there had been no physical taking. \textit{Id.} at 334.
to ESA regulation has been considered and rejected in *Christy v. Hodel*.\(^{116}\) In *Christy*, the Ninth Circuit, disagreeing with the assertion that the ESA turned grizzly bears into government agents, rejected a rancher’s claim that the government was responsible for the acts of grizzly bears (a protected species in the lower forty-eight states) in devouring his sheep.\(^{117}\)

Second, not only does the ESA fail to work anything like a physical invasion, actions pursuant to the Act are almost certainly justified under *Agins* as substantially advancing a legitimate state interest. In practice, a legitimate state interest can almost always be found to support a regulation, since the Court is extremely deferential to the legislative purposes and findings of duly-enacted statutes.\(^{118}\) Among the sorts of state interests recognized by courts as legitimate—despite their effect on private property—are zoning,\(^{119}\) historic preservation,\(^{120}\) flood plain regulation,\(^{121}\) and wetlands protection.\(^{122}\) Moreover, the Court has already approved the legitimacy and importance of the public interest embodied in the ESA—"the most comprehensive legislation for the preservation of endangered species"—as "support[ing] the permissibility of the Secretary’s [definition of harm] regulation."\(^{112}\) There is thus little doubt that in the takings context, a court would find that regulations pursuant to ESA advance a legitimate state interest.

### 2. Economic Impact of the Regulation: A Hypothetical Illustration

While it is fairly clear that the governmental action factor points toward the ESA’s not effecting takings, it is much less clear whether the economic impact factor argues for or against an ESA-caused taking. Indeed, whereas in

\(^{116}\) *Christy v. Hodel*, 857 F.2d 1324 (9th Cir. 1988), *cert. denied sub nom. Christy v. Lujan*, 490 U.S. 1114 (1989); *see also Mountain States Legal Foundation v. Hodel*, 799 F.2d 1423 (10th Cir. 1986) (holding that damage to private property caused by federally protected wild burros did not constitute a taking). It should be noted that Justice White, dissenting from the Court’s denial of certiorari in *Christy*, was at least sympathetic to the rancher’s arguments. *See Christy*, 490 U.S. at 1115-16.

\(^{117}\) *See Christy*, 857 F.2d at 1335.

\(^{118}\) *See, e.g., Euclid v. Amber Realty Co.*, 272 U.S. 365, 388 (1926) ("If the validity of the legislative classification for zoning purposes be fairly debatable, the legislative judgment must be allowed to control."). Emblematic of the deference recent courts typically accord to legislative judgments of public interest is the finding of the Court of Claims in *Deltona Corp. v. United States*, 657 F.2d 1184 (1981), that wetlands preservation is a legitimate state interest: "In this case we take as given . . . that the regulations . . . and the entire body of federal navigational and environmental laws to which they give effect, substantially advance legitimate and important federal interests." *Id.* at 1192 (emphasis added).

\(^{119}\) *See, e.g., Euclid*, 272 U.S. at 394.


\(^{121}\) *See, e.g., Dolan v. City of Tigard*, 512 U.S. 374, 387 (1994).

\(^{122}\) *See Deltona*, 657 F.2d at 1192.


any given case an ESA regulation will likely be found to advance a state interest, such generalization is not possible with respect to the economic impact factor. Depending upon the particular facts of each case, the economic impact factor may work for or against the finding of a taking. For the barely affected landowner, application of this factor will militate against and almost surely preclude the possibility of a taking; for a substantially affected landowner, the economic impact factor may point toward a taking, but not conclusively so; for the landowner whose economic value is entirely dissipated, this factor will be determinative of a taking.

Since the economic impact of an ESA regulation depends upon the specific facts of a given case, it is instructive to evaluate the impact of a species’s listing or habitat designation on several hypothetical landowners. Imagine a rural county that is home to a dwindling population of “rarebird,” a species of bird that nests only in trees on the banks of Rarebird Creek. Private land in the county is held by just four separate owners: Acme Lumber, which owns timberland throughout the county (500 acres, including 100 acres in the creek basin); Larry Logger, who runs a tree farm that straddles a portion of Rarebird Creek (50 acres, one half of which are in the creek basin); Larry’s sister, Lonnie Logger, who owns timber in the rugged and remote upper reaches of the creek basin (50 acres, all in the creek basin); and Holly Homeowner, who owns a house overlooking the creek and adjacent to Larry Logger (5 acres). Acme, Larry, Lonnie, and Holly each plan to cut down trees in the near future: Acme, Larry, and Lonnie as part of their business, and Holly to get an unobstructed view of the nearby creek. Suppose now that the FWS decides to list the rarebird as endangered and designate the Rarebird Creek basin as critical habitat for the bird. Such an action would effectively prohibit the cutting of trees in the Rarebird Creek basin, since FWS regulations forbid the taking (harming) of listed species, including “significant habitat modification where it . . . injures wildlife by significantly impairing essential behavioral patterns, including breeding.”

What would a court find to be the economic impact of these regulations on the respective landowners?

125. 50 C.F.R. § 17.3 (1997).
126. The takings implications of habitat designation need not be analyzed separately because critical habitat designation does not actually increase a species’s protection on private land beyond what is already provided by listing the species. See Endangered and Threatened Wildlife and Plants; Determination of Critical Habitat for the Northern Spotted Owl, 57 Fed. Reg. 1796 (1992) (codified at C.F.R. pt. 17). Formally, the only added legal protection provided by habitat designation pertains to federal lands: “[A]ny action authorized, funded, or carried out by [a federal] agency [must] not jeopardize the continued existence of any endangered species or threatened species or result in the destruction or adverse modification of habitat of such species which is determined by the Secretary . . . to be critical.” Endangered Species Act § 7(a)(2), 16 U.S.C. 1336(a)(2) (1994) (emphasis added). It should, however, be noted that a critical habitat designation may, as a practical matter, more effectively
The economic impact analysis involves a comparison of the property's pre-regulation value to its post-regulation value. Consequently, the first and perhaps most important issue in the analysis has to do with what the relevant pre-regulation property is. Is it only the land affected by the regulation—that is, land on which the rarebird is actually found? Or is it, instead, the property owner's entire holding? While a handful of recent decisions have injected an element of uncertainty into the issue, courts are nevertheless most likely to follow Penn Central's "parcel as a whole" rule. As a result, only a modest economic impact on Acme Lumber would be found (since only 100 of its 500 acres are affected by regulation), and thus, given that ESA regulation advances a legitimate state interest, Acme's takings claim would be unsuccessful. For Holly Homeowner and Lonnie Logger, on the other hand, the "parcel as a whole" rule would not present an obstacle to a takings claim since every acre of their respective properties is affected. Finally, as to Larry Logger, the "parcel as a whole" rule would diminish, but perhaps not entirely negate, his takings claim. While case law suggests that a landowner for whom less than half of the property is affected is not entitled to compensation, there is no bright line separating a mere diminution in value from a compensable taking. Whether Larry is entitled to compensation would depend on a further inquiry into the severity of the economic impact (i.e., what reasonable uses might remain on the affected portion of property) and a balancing of this impact, along with the effect on his reasonable, investment-backed expectations, against the public interest behind the regulation.

The second issue in the economic impact analysis concerns the severity of the regulation's effect on the property: that is, whether the regulation denies
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economically viable use.\textsuperscript{131} If the regulation is found to deny all economic use, then a per se taking is effected,\textsuperscript{132} if less than all value is deprived, then the extent of the deprivation, as well as the interference with the owner's reasonable expectations,\textsuperscript{133} is balanced against the public interest served.\textsuperscript{134} While the foregoing rules are plain and simple in the abstract, they are troublesome in their application. What constitutes "all" economic use and hence a per se regulatory taking is far from clear. First, it should be noted that "all" does not necessarily mean 100%. For example, the \textit{Lucas} Court—the Court responsible for the concept of per se regulatory takings—suggests that a deprivation of \textit{nearly all} value, 90% for instance, may be analyzed as a deprivation of \textit{all} economic value and thus effect a per se taking.\textsuperscript{135} Moreover, landowners have had some success alleging a per se taking—or at least a substantial economic impact, potentially outweighing the state interest—based on either of two alternative theories: that they have been denied the highest and best economic use\textsuperscript{136} or that the regulation has extinguished a fundamental attribute of their property ownership.\textsuperscript{137} Although the Supreme Court has

\begin{itemize}
  \item \textsuperscript{131} See Agins v. Tiburon, 447 U.S. 255, 260 (1979).
  \item \textsuperscript{132} See Lucas v. South Carolina Coastal Council, 505 U.S. 1003, 1015 (1992).
  \item \textsuperscript{133} See infra Subsection II.A.3.
  \item \textsuperscript{134} See Agins, 447 U.S. at 261 ("Although no precise rule determines when property has been taken, the question necessarily requires a weighing of private and public interests.").
  \item \textsuperscript{135} See Lucas, 505 U.S. at 1016 n.7.
  \item \textsuperscript{136} The deprivation-of-best-use idea was discussed in \textit{United States v. Causby}, 328 U.S. 256 (1946), where the government was found to have taken an overflight easement resulting in destruction of the plaintiff's commercial chicken farm, even though the land could still presumably be used for agriculture, for example. See id. at 262-63.
  
  The highest and best use claim, however, has been directly rejected by several lower courts. See, e.g., Deltona Corp. \textit{v. United States}, 657 F.2d 1184, 1193 (1981) ("In effect, the 'highest and best use' argument is just another way of saying that there has been some diminution in value, rather than the complete destruction of all economically viable uses of the property. The Court, however, clearly rejects the notion that diminution in value, by itself, can establish a taking."); see also William C. Haas \& Co. \textit{v. City and County of San Francisco}, 605 F.2d 1117, 1120 (9th Cir. 1979). The claim was also criticized by Justice Blackmun while dissenting in \textit{Lucas}. See \textit{Lucas}, 505 U.S. at 1044 (Blackmun, J., dissenting) (arguing that the trial court's determination of a taking through deprivation of all economic value was "an erroneous assumption" because camping and recreational uses were still available). The economic inquiry "focus[es] on the uses the regulations permit," not on the extent to which a use is prohibited. Penn Central Transp. Co. \textit{v. City of New York}, 438 U.S. 104, 131 (1978). The fact that "the most profitable use [is denied] is not dispositive." Andrus v. Allard, 444 U.S. 51, 66 (1979). Thus, the proposition that deprivation of best use results in a regulatory taking is, though not altogether unsupported, of dubious effect.

  \item \textsuperscript{137} Like the highest and best use argument, the notion that deprivation of a fundamental attribute of property may, in itself, effect a taking, is supported—but only thinly—by the Court's Fifth Amendment jurisprudence. It is undisputed that deprivation of \textit{certain} property rights results in a taking—for example, the right to exclude others, see, e.g., Kaiser Aetna Inc. \textit{v. United States}, 444 U.S. 164, 179-80 (1979), or the right to pass on property to one's heirs, see \textit{Hodel v. Irving}, 481 U.S. 704, 715 (1987).

  However, it is doubtful that deprivation of the profit right, without more, would require compensation. In \textit{Andrus v. Allard}, 444 U.S. 51 (1979), the Court rejected plaintiff's claim that the Eagle Protection Act's prohibition on selling avian artifacts effected a taking. "[D]enial of one
alluded to these doctrines in recent years, it is doubtful that these doctrines would provide the basis for a successful takings claim today.

Having briefly considered the primary modes of economic impact analysis, it is time to return to the problems of our hypothetical owners. Since the takings inquiry turns, above all, on the specific facts of the case, it should come as little surprise that application of the foregoing principles to our four property owners produces four separate results. As to Acme Lumber the analysis is simple. Since only one fifth of its property is affected (100 of 500 acres), the economic impact factor weighs strongly against a taking. The case of Larry Logger is, on the other hand, more complex since half of his property was affected (25 of 50 acres). Nonetheless, the very fact that only half of the property was impacted militates against finding a taking. Moreover, a compensable taking is unlikely to be found, since the government can argue that—even as to the 25 acres affected—not all of the economic value was taken. As Justice Brennan noted in Penn Central, the economic inquiry focuses on the uses the regulation permits. Larry’s tree farm, for example, might be turned into residential property—a potentially valuable use, even if not the highest or best use, since his land is adjacent to Holly Homeowner’s and proximate to the creek. In summary, then, ESA regulations have caused Acme (for certain) and Larry (in all probability) to suffer merely noncompensable diminutions in value.

Holly’s and Lonnie’s cases differ from Acme’s and Larry’s in several respects, not the least of which is the fact that their entire respective parcels are affected. This fact alone makes a court more likely to find a compensable taking, because the “parcel as a whole” rule—which effectively frustrates takings claims where substantially less than the entire parcel is affected—would not apply against them. However, while Holly’s and Lonnie’s claims are similar in that their entire properties are affected, their claims are traditional property right does not always amount to a taking,” the Court reasoned. Id. at 65. “At least where an owner possesses a full ‘bundle’ of property rights, the destruction of one ‘strand’ of the bundle is not a taking . . . .” Id. at 65-66. The Andrus Court concludes that “loss of future profits—unaccompanied by any physical property restriction—provides a slender reed on which to rest a takings claim.” Id. at 66. The Andrus decision may in fact be on shaky ground in the wake of the Court’s holding in Hodel. While the Hodel Court did not expressly overrule or reaffirm Andrus, a Scalia-led concurrence contended that the Court’s decision “effectively limits [Andrus] to its facts.” See Hodel, 481 U.S. at 719 (Scalia, J., concurring). But see id. at 718 (Brennan, J., concurring) (“nothing in today’s opinion . . . would limit Andrus”).

138. See Agins, 447 U.S. at 262 (“Although the ordinances limit development, they neither prevent the best use of appellants’ land . . . nor extinguish a fundamental attribute of ownership [and thus do not effect a taking].”)

139. See supra notes 136-137.

140. For examples of cases in which courts rejected takings claims where no more than half of the owner’s property was affected, see supra note 130.

141. See Penn Central, 438 U.S. at 131.

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distinguishable in at least one important respect. While Holly’s use or value of
the property as a home is merely diminished by obstruction of her creek view,
all of Lonnie’s value is taken since she may no longer use any of her property
for timber production.

Whereas Holly most likely fails to state a prima facie takings claim,
Lonnie succeeds. Although the government will surely argue that Lonnie has
not been deprived of all possible use—she could still use her property for
camping or recreation, or even for residential purposes—this defense would
likely fail on the facts and the law. Since the hypothetical fact pattern
presumes that Lonnie’s property is “rugged and remote,” residential
development is not a reasonable or viable economic use. While it may be
asserted that Lonnie could still use her land for any number of activities—for
example, picnicking, swimming, or camping—and that, after all, she retains
the right to exclude, such allegations do not necessarily defeat her takings
claim: first, because these are not necessarily “reasonable economic” uses;
second, because even if some small economic use remains, the original
economic value has been seriously affected. Thus, although a per se regulatory
taking may be unavailable, a weighing of the public and private interests
involved would result in a taking under the three-factor balancing test.

In summary, application of the Court’s economic impact analysis
demonstrates that whether ESA regulations effect a taking depends
significantly on the particular facts. In many cases, such as those of Acme,
Larry, and Holly, a taking is unlikely to be found because either much less
than the entire parcel is affected (Acme and Larry) or because much less than
all economic value is taken out of the affected portion (Larry and Holly). In
cases like Acme’s, Larry’s, or Holly’s, courts will usually find that the state
interest behind the ESA outweighs the mere diminution in value to the
property owners, and thus that no taking has been effected. However, there are
many imaginable cases like Lonnie’s where most or all of the owner’s
property is affected and where all or nearly all economic use is deprived. In
such cases, a compensable taking is likely to be found, whether pursuant to
Lucas’s per se regulatory takings analysis (if all or nearly all—perhaps 90%—

142. Note that the question is whether “reasonable” or “viable” economic uses remain. See, e.g.,
Lucas, 505 U.S. at 1009 (“prohibition deprived Lucas of any reasonable economic use”); Florida Rock
Indus., Inc. v. United States, 791 F.2d 893, 897 (Fed. Cir. 1986) (“denial of the permit for the 98 acres
was a taking because it left plaintiff with no reasonable economic uses”). Given the remoteness of
Lonnie’s property, residential housing is probably not a reasonable use.

143. These arguments were made by Justice Blackmun, dissenting in Lucas, by way of criticism
of the trial court’s decision that Lucas had in fact been deprived of all economic value. See Lucas, 505
U.S. at 1044.

144. See Agins v. City of Tiburon, 447 U.S. 255, 261 (1979) (“[T]he question necessarily
requires a weighing of private and public interests.”).
value is taken\textsuperscript{145} or as a result of \textit{Penn Central}'s three-factor balancing inquiry (if substantial, but less than all, value is taken).

3. \textit{Reasonable Expectations and the Police Power Exception to Takings}

Having seen that the governmental action factor weighs \textit{against} a taking and that the economic impact factor may argue \textit{for} or \textit{against} compensation, depending on the circumstances, only the last \textit{Penn Central} factor—the degree of interference with reasonable investment-backed expectations—remains to be considered. While the governmental action and economic impact factors are readily understandable, it is less clear what “reasonable, investment-backed expectations” means. Obviously, the factor relates to the private interest concerned. However, it is unclear how the expectations analysis differs from the economic impact inquiry. Indeed, the ambiguity surrounding the third \textit{Penn Central} prong, and its potential for overlap with the economic impact factor, have often led courts either to ignore it altogether\textsuperscript{146} or to treat it in conjunction with the economic impact analysis.\textsuperscript{147}

Given the vagueness of the expectations factor, I suggest an alternative way of understanding it that comports with the Court's recent takings jurisprudence. Although the \textit{Lucas} Court never explicitly discussed \textit{Penn Central}'s expectations factor (since a \textit{per se} regulatory taking was found), the Court \textit{did} provide its own idea of what a landowner's reasonable expectations include. This idea involves the right to continue, or receive compensation for, those economic uses not prohibited under common law principles of nuisance and property. While strictly speaking the \textit{Lucas} holding (as to the background principles of nuisance and property law) defines the bounds of the police power exception to takings, \textit{Lucas} also informs the inquiry into what sort of owner's expectations are reasonable and compensable under the Fifth Amendment. Since, in the wake of \textit{Lucas}, “background principles of the State’s law of property and nuisance”\textsuperscript{148} at the same time define the police power exception and supply substance to an owner’s reasonable expectations, the two issues are analyzed jointly throughout the remainder of the section.

\begin{itemize}
\item \textsuperscript{145} See \textit{Lucas}, 505 U.S. at 1016 n.7.
\item \textsuperscript{146} The \textit{Agins} Court, in effect, drops the third \textit{Penn Central} factor. See \textit{Agins}, 447 U.S. at 260 (“The application of a general zoning law to particular property effects a taking if the ordinance does not substantially advance legitimate state interests or denies an owner economically viable use of his land.”) (citation omitted).
\item \textsuperscript{147} Indeed, even the \textit{Penn Central} Court, which is responsible for the three-factor test, never explicitly applied the reasonable expectations prong or distinguished it from the economic impact analysis. See \textit{Penn Central}, 438 U.S. at 136 (“[T]he New York City law does not interfere in any way with the present uses of the Terminal.”) (emphasis added). It is unclear how the “interference with present use” is distinct from the regulation’s economic impact.
\item \textsuperscript{148} \textit{Lucas}, 505 U.S. at 1029.
\end{itemize}
Whereas other takings challenges before the Supreme Court have involved such traditional regulations as zoning laws\(^{149}\) or coal mining\(^{150}\) restrictions, \textit{Lucas} is a particularly important case for the ESA because the governmental purpose behind the challenged statute\(^{151}\) was ecological, a non-traditional state interest. For Professor Joseph Sax, the \textit{Lucas} decision is “invest[ed] . . . with fundamental importance,”\(^{152}\) since the Court “correctly perceives that an ecological worldview presents a fundamental challenge to established property rights, but the Court incorrectly rejects that challenge.”\(^{153}\)

In \textit{Lucas}, Professor Sax sees a conflict between what he labels the “transformative economy”—the conventional perspective of private property—and the “economy of nature”—an ecological view of property.\(^{154}\) Whereas the traditional conception of property views ownership as transformation of land out of its natural state into productive use, the ecological perspective sees such transformation as diminishing the functioning of the natural economy.\(^{155}\) Accordingly, the goal of ecologically-motivated legislation is to preserve land in its natural state. The Wisconsin Supreme Court affirmed this goal in the landmark environmental case, \textit{Just v. Marinette County},\(^{156}\) concluding that “it is not an unreasonable exercise of [police] power to prevent harm to public rights by limiting the use of private property to its natural uses.”\(^{157}\)

\textit{Lucas}, by limiting the police power exception to those harms preventable under common law nuisance or property, rejects the ecological perspective of \textit{Just} and affirms the traditional, transformative view of property that landowners have vested rights in those uses not prohibited under traditional property law. In other words, the state may regulate in the interest of ecology, but must pay compensation if such regulation prevents otherwise valid economic uses. As the Court presumes that “the erection of any habitable or productive improvements” would not have been prevented at common law,\(^{158}\) it is clear that \textit{Lucas} embraces the transformative rather than the ecological view of property. In turn, the transformative view of property gives rise to a set of reasonable expectations for the landowner, including the fundamental

\(^{149}\) See, e.g., \textit{Agins}, 447 U.S. at 257; \textit{Penn Central}, 438 U.S. at 107.


\(^{151}\) The purpose of South Carolina’s Beachfront Management Act was to preserve the beach/dune system in order to prevent erosion. \textit{See Lucas}, 505 U.S. at 1040-41.


\(^{153}\) \textit{Id.} at 1439.

\(^{154}\) \textit{See id.} at 1442.

\(^{155}\) \textit{See id.}

\(^{156}\) 201 N.W.2d 761 (Wis. 1972).

\(^{157}\) \textit{Id.} at 768.

\(^{158}\) \textit{Lucas}, 505 U.S. at 1031.
expectation that traditionally permissible property uses may not be abrogated without compensation.

One can respond to *Lucas* in one of two ways: by arguing that ecological regulation is nonetheless within the police power, as part of the public trust doctrine, and is unaffected by *Lucas*, or by conceding that *Lucas* excludes ecological regulation from the police power exception to takings, and then explaining why the case should have been decided differently.

One of the earliest applications of the public trust doctrine to wildlife resources occurred in *Geer v. Connecticut.*\(^{159}\) In *Geer*, the Court, prior to upholding a state hunting regulation, traced the history of wildlife back to Roman law and declared that "it is the duty of the legislature to enact such laws as will best preserve [game] and secure its beneficial use in the future to the people of the State."\(^{160}\) While *Geer* is helpful authority for the proposition that regulation of wildlife is within the police power, it is neither a strong authority,\(^{161}\) nor is it representative of the public trust doctrine. Traditionally, the public trust doctrine is of narrow scope. Simply put, the doctrine asserts that "states own the submerged soil and foreshore of all navigable bodies of water."\(^{162}\) Indeed, even advocates of an expansive public trust doctrine acknowledge that it is "normally limited to land that is under water or at least is wetland."\(^{163}\)

But would an expansive understanding of the public trust doctrine comport with the Court's opinion in *Lucas*?\(^{164}\) For at least one commentator, the answer is yes: "The trust acts similarly to the nuisance doctrine in restricting uses of property inconsistent with the public's interest. Therefore, the public trust doctrine embodies the type of limitation the *Lucas* Court exempted from takings claims."\(^{165}\) This analysis, however, does not heed *Lucas*’s dictate to look to the "background principles" of property law and thus fails to appreciate the historically limited scope of the public trust

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159. 161 U.S. 519 (1896).
160. Id. at 534.
161. The *Geer* idea of state ownership of wildlife was overruled by the Court in *Hughes v. Oklahoma*, 441 U.S. 322, 325 (1979).
The Endangered Species Act and Fifth Amendment Takings doctrine. The doctrine restricts private use of certain property (navigable waters), but not of natural resources in general. Professor Sax, who has written extensively on the public trust doctrine,\(^6\) concludes that Lucas endorses the transformative, private-minded view of property, antithetical to an expansive vision of the public trust doctrine.\(^6\)

While some ESA advocates contend that Lucas is not inconsistent with a public trust limitation on private use of property, Professor Sax concedes that the decision precludes such a limitation on the use of property. This is not to say that Professor Sax and like-minded ESA advocates believe that Lucas was decided correctly. On the contrary, Professor Sax simply acknowledges the importance of the decision and then goes on to explain why it should have been decided differently. For Professor Sax, Lucas is wrong to adopt a takings standard based on historically bound nuisance and property law because such a standard fails to take into account the newly important and accepted "economy of nature."\(^6\)

What effect does Lucas have on takings law generally? And more specifically, what effect does it have on takings claims against ESA regulation? Read narrowly, Lucas has a significant but not revolutionary effect on takings law. Restricted to its holding, Lucas only limits the availability of the police power exception to takings. It does not aid a landowner in making out a prima facie takings challenge; it merely narrows the government's defense to such a claim. Our hypothetical landowners, for example, would not be aided under this limited interpretation of Lucas. Acme, Larry, and Holly still most likely would not succeed in their takings claims since the public interest in ESA regulation outweighs their privately-suffered mere diminutions in value. This reading of Lucas, however, does assure that Lonnie's takings claim—otherwise successful in that it satisfies the ad hoc Penn Central test (or Lucas "all economic value" test)\(^6\)—would not be denied on the grounds that ESA regulations are justified pursuant to the takings-exempt police power.


\(^{167}\) See Sax, supra note 152, at 1433.

\(^{168}\) At the most basic level, the differing responses of the environmental community to Lucas stem from differing readings of legal history. Commentators such as Ms. Cook (who believe Lucas does not limit application of the public trust doctrine) work from the premise that traditional property law included public trust limitations on private use. See Cook, supra note 165, at 206-7. Professor Sax, on the other hand, starts from the position that traditional, "transformative" property law permitted private uses as long as they did not cause harm. Sax does not list extinction of species within this traditional concept of harm (though it may have included adverse effects on game animals). See Sax, supra note 152, at 1443-45.

\(^{169}\) See supra Subsection II.A.2.
However, a much broader reading of *Lucas* is possible. Professor Sax perceives that, "[t]hough the Lucas majority does not say so explicitly, its adoption of a standard based upon historically bounded nuisance and property law reflects a sentiment that a state should compensate landowners who, through no fault of their own, lose property rights because of scientific or social transformations." While Professor Sax clearly does not approve this sentiment, he does recognize its practical implications for takings law. If an owner is to be compensated for the economic impact occasioned by any new, non-nuisance type of property restriction, then environmental regulation—species protection in particular—could hardly go on. If *Lucas*'s underlying message (that owners have a *reasonable expectation* in continuing property uses permissible at common law) does more than simply limit the bounds of the police power exception—that is, if the *Lucas*-created expectations are imported into *Penn Central*'s "reasonable expectations" prong of inquiry—then takings claims pursuant to the three-factor balancing test could be much more likely to succeed.

*Lucas* announces that the state "may resist compensation only if the logically antecedent inquiry into the nature of the owner's estate shows that the proscribed use interests were not part of his title to begin with." In the context of the ESA, does this mean that a takings plaintiff who acquired the subject land prior to the ESA's enactment would have a strong argument that an ESA regulation interfered with his "reasonable expectations?" What about a takings plaintiff who acquired land after the ESA's enactment but prior to the challenged listing or designation? Would she also be able to claim that the ESA had interfered with her reasonable expectations? If so, then *Penn Central*'s expectations factor would, in the context of a challenged ESA regulation, almost always weigh in favor of compensation and would often tip the balance of private and public interests in favor of a taking.

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170. Sax, supra note 152, at 1449. But see Glenn P. Sugameli, *Takings Bills Threaten Laws that Protect Private Property, People, Public Lands, and Natural Resources*, SB14 A.L.I.-A.B.A. 221, 233 (1996) ("Justice Scalia's majority opinion recognized that courts, in deciding what land uses satisfy property and nuisance law, should account for newly perceived environmental dangers: 'Changed circumstances or new knowledge may make what was previously permissible no longer so.'") (footnote omitted).


172. At least one commentator reads *Lucas* to mean just that (though her observation is not specific to the ESA): "A property owner challenging restrictions that the government imposed after the owner acquired the property has a better chance of bringing a successful taking claim." Virginia S. Albrecht, *Regulatory Takings Issues in the Context of Federal Wetlands, Endangered Species, and Surface Mining Regulation*, C997 A.L.I.-A.B.A. 307, 325 (1995) (citing *Lucas*'s observation that the plaintiff was not subject to beachfront development restrictions at the time he acquired the property).

173. See id.
III. Why No Takings Claims Under the ESA?

In light of the breadth of the ESA and the liberalization of regulatory takings doctrine, it would seem logical that promulgation of regulations under the ESA would invite Fifth Amendment takings challenges. Indeed, as demonstrated in the previous part, at least several scenarios of possible takings effected by the ESA are imaginable. Why, then, is there no record of regulatory takings claims under the ESA having been litigated in federal courts? And does it follow that there will continue to be few such challenges to the ESA?

A. Some Explanations for the Lack of Takings Challenges to ESA Regulations

Immediately following is a brief consideration of various possible explanations for the dearth of regulatory takings claims under the ESA. The second half of this part will analyze, in greater detail, what I contend to be the primary reason why ESA regulations have not been challenged in court by property owners: the habitat conservation planning process.

1. Few Regulations During Early History of ESA

One explanation for the lack of takings claims during the ESA's first quarter-century is that, at least during the early years of the Act, relatively few species were listed under the Act. Even today, critical habitat has been designated for less than 15 percent of species. While as a legal matter the lack of critical habitat does not excuse a landowner from section 9 take prohibitions, as a practical matter critical habitat designation focuses landowners, environmentalists, and the FWS on the habitat in question and thus makes enforcement of the section 9 prohibition—and perhaps takings challenges—more likely to occur. The ESA is unique among regulatory statutes in that the breadth and weight of its regulatory impact are constantly changing, or more precisely, are constantly expanding as species are identified as endangered much faster than listed species are recovering. As more species are identified as endangered and as more habitat is designated, private property will be increasingly affected, and there is at least the potential for a surge in regulatory takings challenges.

174. There is at least one noteworthy suit alleging a regulatory taking by the ESA and Bald Eagle Protection Act regulations that was litigated in a Florida state court. See Florida Game and Fresh Water Fish Comm'n v. Flotilla, 636 So. 2d 761, 765-66 (Fla. Dist. Ct. App. 1994) (rejecting taking claim because only 48 of landowner's 173 acres were affected).

2. Uncertainty as to Whether Habitat Modification Was Harm Under ESA

Until the Court's decision three years ago in *Sweet Home*, it was unclear whether the FWS's broad definition of harm was within the scope of the ESA as a whole. As long as habitat modification might be understood as permissible, the section 9 take prohibition could be seen as applying only to the *direct and physical* harming of a species. Under such a restrictive interpretation of section 9, a very small amount of any person's land would be affected. While prior to *Sweet Home* a person was clearly forbidden to "pursue, hunt, shoot, wound, kill, trap, capture, or collect" a listed species, it was not certain whether destruction of habitat constituted impermissible harm. Accordingly, the FWS utilized a species-by-species approach in administering the ESA, disregarding the broader needs of the habitat or ecosystem upon which each species depended. Under the Clinton Administration, however, the FWS has begun to shift priorities from protection of individual species to preservation of ecosystems, as demonstrated by the increasing use of large-scale critical habitat designations and regional habitat conservation planning. This shift in approach, validated by the Court's *Sweet Home* decision, promises to affect land uses to a much greater degree than before and suggests that regulatory takings challenges would be more likely.

3. FWS Efforts to Avoid Impacts on Private Property

There is ample evidence to support the hypothesis that the FWS has, whenever possible, sought to avoid direct regulatory impacts on private property. Indeed, the ESA itself includes provisions designed to minimize the effect of endangered species regulation on property owners. Critical habitat, for example, is to be designated only "to the maximum extent prudent and determinable" and only "after taking into consideration the economic impact, and any other relevant impact" of such designation. Additionally, the ESA provides for a habitat conservation planning process to mitigate the impact of ESA regulations on private land uses. The FWS, in its discretionary administration of the ESA, has in many instances gone out of its

181. *See* *Endangered Species Act* § 10, 16 U.S.C. § 1539(a)-(d) (1994); *see also infra* Section III.B.
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way to shield landowners from regulation, thus triggering lawsuits from environmental organizations to require the listing of species and the designation of critical habitat. Moreover, even when the FWS has designated critical habitat, it has done so with the utmost care to avoid including private lands in the designation. In the case of the northern spotted owl, for example, the FWS initially proposed to designate 11,639,195 acres of federal, state and private lands as critical habitat. After vehement protests from private interests, the FWS’s final designation reduced the critical habitat to 6,887,000 acres, all of which was federal land. Recently, however, the FWS has shown greater willingness to designate some private land as critical habitat. Such actions may touch off—and in at least one case, have touched off—regulatory takings suits.

4. Property-Friendly Regulatory Takings Law Only a Recent Phenomenon

In addition to the ESA- or FWS-related factors that have often kept private property from being regulated pursuant to the Act, there are several reasons landowners have not brought takings suits even when their property has been substantially affected. First, regulatory takings law, until only recently, appeared stacked entirely in the government’s favor. As one commentator points out

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182. See, e.g., Natural Resources Defense Council v. Dep’t of Interior, 113 F.3d 1121, 1125 (9th Cir. 1997) (holding in part that allegations of increased threat to species from designation of critical habitat did not justify the decision not to designate habitat upon listing of gnatcatcher as threatened species); see also Ruhl, supra note 178, at 595.


184. See 50 C.F.R. § 17.95(b) (1997).

185. In May of 1996, in response to a lawsuit filed by the Sierra Club Legal Defense Fund, the FWS issued a final rule designating 3,900,000 acres as critical habitat for the threatened marbled murrelet. The FWS included 48,000 acres of privately held land in the designation, including the 30,000-acre Headwaters Forest owned by Pacific Lumber in Northern California. See Government Marks 3.9 Million Acres for Marbled Murrelet, S.F. CHRON., May 16, 1996, at A4.

186. Upon designation of critical habitat for the murrelet, Pacific Lumber, the owner of the Headwaters Forest, filed a regulatory takings claim in the Court of Federal Claims. See Todd Woody, Pacific Lumber Tries New Tack in Timber Wars, Recorder, May 10, 1996, at 1. Pacific Lumber has, for the present time, withdrawn the lawsuit, pending a settlement with the federal government. The so-called Headwaters Deal involves Pacific Lumber’s (1) trading its land in the Headwaters for state and federal land elsewhere, and (2) dropping its takings suit against the federal government. The deal, however, is contingent upon approval of a habitat conservation plan on Pacific Lumber’s remaining acres adjacent to the Headwaters Forest. Although the FWS has recently announced its “tentative agreement” to a habitat conservation plan, the details of the agreement must still be worked out by May 1998, at which time the plan will be subject to an additional two months of public review. See Carolyn Lochhead, New Deal to Save Trees at Headwaters, S.F. CHRON., February 28, 1998, at A1.
Constitutional takings protections were at their nadir when Congress passed the ESA in 1973. The Supreme Court had not found any regulatory action to be a taking for years, and most commentators viewed [Penn Central] as an outright admission that the Court would not use the takings protections to restrict governmental regulation.\footnote{Thompson, supra note 175, at 324.}

It was not until Lucas in 1992 that the Court announced a per se regulatory takings analysis, questioned the "parcel as a whole" rule, and limited the police power takings exception to background principles of nuisance law.\footnote{See supra Subsection II.A.3.} As argued here, there \textit{are} takings claims imaginable under the ESA that would be meritorious under the Court's current takings jurisprudence; perhaps these arguments will be employed by property owners affected by ESA regulations in the coming years.

5. \textit{Costliness of Takings Suits and Inducements to Settle}

Finally, a pedestrian, but not trivial, explanation for why a property owner might not prosecute a potentially meritorious takings claim has to do with the time and expense involved. As in any other litigation context, it may be rational, from an economic standpoint, to settle a claim rather than incur the legal expenses and time expenditures of litigating a case to judgment. The costs of litigating takings claims are especially high because of the fact-sensitive nature of the inquiry (which means summary judgment is seldom appropriate) and the dearth of case law on regulatory takings under the ESA (which leaves even a favorable judgment subject to an uncertain appeal). Indeed, several recently instituted regulatory takings suits under the ESA now appear likely to settle.\footnote{See discussion of Headwaters deal, supra note 186. In another case, Ben Cone, a property owner whose plans to harvest timber have been thwarted by the presence of endangered red cockaded woodpeckers, filed suit in the Court of Federal Claims. He withdrew his suit, however, once the FWS approved the incidental take permit he sought, permitting him to "kill" (incidentally) 29 woodpeckers. See Marianne Lavelle, \textit{Feds Settle to Save Act and Species}, Nati'L. L.J., Dec. 16, 1996, at A1. Given the experiences of Cone and Pacific Lumber, it appears that the potential of a successful takings claim against the ESA may serve as an ace-in-the-hole in negotiations, thus inducing the government to settle by approving the sought-after habitat conservation plan on the landowner's terms.}

6. \textit{Summary}

This section has focused on the various reasons why—assuming meritorious regulatory takings claims may arise, from time to time—there have been no regulatory takings decisions under the ESA in federal courts. However, with the exception of the last one (costliness of takings litigation),
these factors are *not* as likely to present serious barriers to takings claims in the future. The number of species listed and the amount of habitat designated increases each year, including the amount of private property designated as critical habitat; habitat modification has been found to constitute a prohibited section 9 harm; the FWS has shifted away from species-by-species management to an ecosystem approach to wildlife conservation; and, perhaps most significantly, courts are becoming more willing to find merit in regulatory takings claims. Assuming these trends continue, there will be a greater likelihood of Fifth Amendment takings challenges to the ESA in the coming years than ever before.\footnote{Thompson, supra note 175, at 327.}

Despite the fact, however, that the old reasons for the dearth of takings claims are of fading importance, there is at least one obstacle of more recent vintage that will pose perhaps the most serious barrier to future regulatory takings challenges of the ESA: the section 10 habitat conservation planning process.

B. Habitat Conservation Planning as a Barrier to Takings Claims

Added to the ESA in a 1982 amendment, the section 10 habitat conservation planning process was little used during its first decade of existence.\footnote{For a thorough analysis of how habitat conservation planning works in practice, see Lin, supra note 23. It is perhaps helpful at this time to describe an actual HCP and the process involved in obtaining it. The pros and cons of the HCP program are nicely illustrated in the case of Murray Pacific Corp. A timber company, Murray Pacific, owns a 55,000 acre tree-farm in the state of Washington. In 1990, the spotted owl was listed as an endangered species. At that time, regulations were promulgated mandating “owl protection circles” in which logging could not occur. For Murray (which had three owls on its property), the trees inside the circles amounted to 40% of the marketable timber on its land. After three years and $500,000, Murray won the FWS’s approval of its HCP by which, for a period of 100 years, Murray could clear-cut spotted owl habitat in exchange for its promise to provide certain benefits for the bird (e.g., providing a migratory corridor between owl populations, hastening the growth of forests through fertilizer, tree thinning, etc.). See Sandi Doughton, Owl Deal Gives Space to Logging and Habitat, *Morning News Trib.*, Oct. 8, 1993, at A1. Only a few months after Murray agreed to the owl HCP, a marbled murrelet (another listed species) was discovered on the property. Again, activity was stopped. In June 1995 (a year and a half after discovery of the murrelet), Murray and the FWS agreed to an HCP covering all species (28 others besides the murrelet and owl) for a duration of 100 years. Timber harvesting could be resumed, but at a high cost: Murray spent $1.75 million in developing the HCP (not counting forgone timber revenues). The company estimates that the agreed-upon protection measures (such as abiding by harvest limits and selective cutting practices) will cost more than $100,000,000 over the next 50 years. See Kim Murphy, *Timber Owners Cut a Deal to Preserve*...} Only since the beginning of the Clinton Administration has...
section 10 been of much practical significance. Whereas fewer than twenty habitat conservation plans (HCPs) were approved in the Reagan and Bush administrations, more than 200 HCPs have been negotiated since 1993. The idea behind HCPs is a simple one: Private landowners may be permitted to pursue some economic activity on their land, even though such activity may incidentally take a listed species (e.g., through adverse habitat modification). The HCP—pursuant to which an incidental take permit (ITP) is granted—must demonstrate that the applicant will, to the maximum extent practicable, minimize and mitigate the impacts of its incidental taking and that the taking will not appreciably reduce the likelihood of the survival of the species in the wild.

In sum, the section 10 HCP process is a concession to landowners—an acknowledgement that ESA regulations perhaps "go too far" from time to time, and that some land uses should be allowed, as long as their purpose is not to harm and as long as they do not seriously impact the overall survival of the species.

However, although the availability of HCPs appears to be designed for the benefit of property owners, section 10 may, in some instances, harm landowners more than it helps them, to the extent that section 10 frustrates takings claims against the ESA.

1. Availability of HCP Process as Ripeness Obstacle to Takings Suit

While to this point, the discussion of regulatory takings doctrine has been limited to the substantive law, there is a procedural hurdle to regulatory takings challenges that may prove to be the most serious obstacle to takings suits: the ripeness requirement. In the Court's leading ripeness opinion in the context of regulatory takings, Williamson County Regional Planning


192. See Lavelle, supra note 189.

193. For a more detailed and referenced discussion of the section 10 process, see supra Subsection I.A.6.

194. According to Congressman Lamar Smith:

Some claim that [HCPs] like the [Balcones Canyonland Conservation Plan (BCCP)] fix these problems with the Endangered Species Act—that they provide fairness and flexibility to landowners like Ms. Rector and improve conservation of species like the golden cheeked warbler. But close examination shows that BCCP does not correct these problems. And that they create a whole new class of endangered landowners.


Congressman Smith went on to characterize mitigation fees for use of private property as "extortion." Id. For Congressman Smith, apparently no reduction in value is justified. Implicitly, this is the position of landowners who would rather bring a regulatory takings suit for full compensation than settle for an HCP that would likely require some diminution in value.
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*Commission v. Hamilton Bank*, the majority held that a property owner must, prior to bringing suit in federal court, (1) submit a plan for development of the property to the regulatory agency, and (2) obtain a final decision from the regulatory agency as to the type and intensity of development the agency will allow. Moreover, to satisfy the finality requirement, the landowner must first exhaust all administrative remedies by applying for variances or waivers if the development plan is initially denied.

The ripeness requirement for regulatory takings is particularly significant in the ESA context because of the availability of ITPs—in effect, variances from the mandates of ESA regulations—through the section 10 HCP program. Although for the time being, there is a dearth of authority addressing ripeness in the context of takings suits under the ESA, a federal court would likely require a plaintiff to have applied for and been denied an HCP. For that matter, a landowner would perhaps be required to have submitted several HCP applications to meet *Hamilton Bank*’s strict finality requirement. If recent experience with the section 10 HCP process is any indication, virtually no property owners would meet the tough ripeness standard if that standard is strictly interpreted. This is because HCP applications are approved, almost without exception. If, therefore, the *Hamilton Bank* ripeness standard is strictly applied to ESA takings suits, then the government can prevent such

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196. *See id.* at 186.
197. *See id.* at 190. Indeed, the Court has suggested that *Hamilton Bank*’s finality requirement may require *multiple* proposals or variance applications before a landowner’s case may be considered ripe. *See MacDonald, Sommer & Frates v. Yolo County*, 477 U.S. 340, 353 n.9 (1986) ("[r]ejection of exceedingly grandiose development plans does not logically imply that less ambitious plans will receive similarly unfavorable reviews"). Only last year, the Court was urged to establish a rule that a takings plaintiff need only make a single proposal and a single request for a variance to ensure the ripeness of his claim. The Court avoided the issue on the grounds it was not presented in the case. *See Suitum v. Tahoe Regional Planning Agency*, 117 S. Ct. 1659, 1667 n.12 (1997) (holding that a landowner’s takings claim was ripe for review since agency had finally determined that the plaintiff’s land was in area where development was prohibited; the landowner’s failure to apply for potential TDRs did not preclude the finding of ripeness).
198. *See Four Points Utility Joint Venture v. United States*, 40 Env’t Rep. Cont. (AWA) 1509, 1511 (W.D. Tex. 1994) (takings claim, based on ESA regulations, was not ripe because plaintiffs failed to apply for an ESA section 10 incidental take permit); *Killington, Ltd. v. Vermont*, 668 A.2d 1278, 1283 (Vt. 1995) (takings claim unripe where permit denial contained mitigation measures that would satisfy state law endangered species concerns and allow for development).
199. According to a special quantitative report on the record of the ESA in its first two decades, the United States General Accounting Office (GAO) found that only one HCP application had been denied in the Act’s history (more precisely, in the 10-year history of the section 10 HCP provision). *See U.S. Gen. Accounting Office, Endangered Species Act: Types and Number of Implementing Actions 19 (1992).* A similarly lopsided proportion of HCPs have been approved in the last few years. *See Thompson, supra* note 175, at 377 (during 25-month period, June 1, 1994-June 30, 1996, ")over 90% of the application notices were followed later in the Federal Register by notices of permit issuance. Many of the other applications may also have been approved, although there was no formal notice in the Federal Register.")
suits virtually at will by simply approving those permit applications landowners must submit, or by denying them while suggesting mitigation measures that would allow a permit to be approved on reapplication. Indeed, this appears to be precisely how the FWS has administered section 10, and there is no indication that a change of course is imminent.

It should be noted that the Hamilton Bank ripeness requirement has been qualified to some extent by holdings of the Court of Federal Claims. This is important because, pursuant to the Tucker Act, the Court of Federal Claims has exclusive jurisdiction over takings suits against the federal government for sums in excess of $10,000. The Court of Federal Claims has shown sympathy to regulatory takings plaintiffs caught in the permit approval process, having dismissed such a claim for lack of ripeness only once in the last decade. Recognizing that the ripeness requirement could provide the government with a means of perpetually avoiding a regulatory takings challenge (by repeatedly denying permit applications but leaving open the possibility that an alternative version may be approved, thus never rendering a final decision), this court has fashioned two exceptions to the obligation of continuing pursuit of administrative remedies: first, where such pursuit would be futile, it being clear that no permit would be approved, and, second, where such pursuit would be so burdensome that the process of obtaining relief would “effectively deprive . . . the property of value.” Rather than requiring, as in Hamilton Bank, that the government reach a "final decision," the claims court merely requires that the government “reach a decision that actually affects the plaintiff.”

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200. In fact, such a strategy on the part of the FWS—rubber-stamping landowners’ HCP applications to avoid takings lawsuits—has been identified (and vociferously opposed) by many environmentalists. See, e.g., Washington Habitat Conservation Plan Draws Criticism, AMERICAN POLITICAL NETWORK-GREENWIRE, Nov. 19, 1996. As landowners seek more concessions and as environmentalists exert more pressure on the FWS to deny such concessions, the FWS will perhaps be less inclined to routinely approve HCP applications.

201. Interior Secretary Bruce Babbitt has consistently been a strong proponent of habitat conservation planning, extolling its benefits to both landowners and species. See Babbitt, supra note 1.


203. See Minority Media of Pahrump, Inc. v. United States, 27 Fed. Cl. 379, 382-83 (1992) (finding a failure to exhaust all administrative remedies); see also Thompson, supra note 175, at 326. It should, however, be noted that a recent decision of the Court of Federal Claims suggests that the court would require at least one reapplication after permit denial for a takings challenge to be ripe. See Good v. United States, 39 Fed. Cl. 81, 102-03 (1997) (“By requiring developers to make a good faith effort to satisfy permitting agency concerns after an initial denial, ripeness doctrine reflects the reality that land development often involves a process of negotiation between the permitting agency and developer.”).


207. Stearns Co. v. United States, 34 Fed. Cl. 264, 269 (1995); see also Thompson, supra note
While the futility exception is likely to be unavailing for most ESA regulatory takings plaintiffs since HCPs are almost always approved, plaintiffs may successfully argue that continued pursuit of an HCP approval would be so burdensome that the process of obtaining relief would "effectively deprive the property of value." The process of preparing an HCP and waiting for approval can be quite costly.

As a practical matter, given the FWS's lack of resources, the landowner pays the high price of hiring field scientists and environmental consultants to help develop the HCP. Moreover, while the HCP is in development and pending approval, still larger sums of money may be forfeited in lost opportunity costs. The more time the FWS takes to review a submitted HCP, the greater the economic burden on the applicant. Given the lengthy delays that are characteristic of FWS review, there is the potential in many instances that waiting for a final decision regarding an HCP may be so burdensome as to deprive the property of value, thus qualifying a takings suit as "ripe" under the Court of Federal Claims's case law.

2. Granting of HCP as Precluding Per Se Regulatory Taking

The availability of HCPs not only imposes a procedural obstacle to takings suits under the ESA, it presents a significant substantive barrier to such claims as well. By allowing some economic uses to go forward on some portion of a property owner's land, HCPs, in effect, negate the possibility of a Lucas-like, per se regulatory taking. Since section 10 requires HCP applicants merely to "minimize and mitigate" the impacts of their land use, not to curtail their activities altogether, HCP participants will probably never have all or nearly all of their property value deprived. Indeed, landowners to whom HCPs have been granted are unlikely even to raise a meritorious takings claim under the ad hoc, three-factor Penn Central test. This is because, in general, HCPs

175, at 326-27.  
208. Recall that over 90% of HCPs are approved, see supra note 199. The figure for wetlands fill permits is considerably lower: For the period October 1, 1988 to September 30, 1993, for example, just 39% of applications were approved (56% were withdrawn and 5% denied). See David Farrier, Conserving Biodiversity on Private Land: Incentives for Management or Compensation for Lost Expectations? 19 HARV. ENVTL. L. REV. 303, 360 n.265 (1995). Consequently, the futility claim is perhaps more persuasive in the context of wetlands fill permits than in the HCP context.  
209. The price tags of two recently approved HCPs dramatically illustrate the costliness of the process. See Kim Murphy, Timber Owners Cut a Deal to Preserve Wildlife Habitat Environment, L.A. TIMES, Aug. 19, 1995 at A1 (Murray Pacific Corp. spent $1,750,000 preparing an all-species, 100-year duration HCP for its 53,527 acres); Timber Agreement Either Model or Mistake, THE COLUMBIAN, July 7, 1996, available in 1996 WL 10833607 (Plum Creek Timber spent $1,300,00 on an all-species, 50-year duration HCP for its 170,000 acres of forest).  
210. Neither the ESA nor FWS regulations include deadlines for how long the FWS may take to review a permit application. Based on the accounts of property owners and government employees, HCP review can take anywhere from three months to over three years. See Thompson, supra note 175, at 317.
do not drastically affect a landowner’s economic value. Given the substantial and legitimate governmental interest in ESA regulation, landowners have little chance of meeting even the *Penn Central* takings test if an HCP permitting substantial economic uses has been approved for their property.

A recent Court of Federal Claims case suggests that the availability of HCPs may present a substantial impediment to takings challenges to the ESA. In *Good v. United States*, a developer filed an action asserting that the denial of wetlands fill permits by the Army Corps of Engineers constituted a taking for which compensation was due. The Corps denied the permits on recommendation from the FWS (pursuant to a section 7 jeopardy opinion) that the development, as proposed, would result in jeopardy to listed endangered species. The developer argued that the ESA required its property to be maintained in its natural state, thus depriving it of all economic value. The government countered that the property was not required to be maintained in its natural state because the FWS had suggested “reasonable and prudent alternatives” (RPAs) under which development could move forward. The developer had rejected these RPAs on the grounds that such development would not be economically viable, and in the alternative, on the basis that the RPAs would themselves be unlawful in that they would cause jeopardy to the species under section 7.

The court denied the takings claim because it found that the ESA did not require the property to be left in its natural state; the FWS had identified RPAs pursuant to which development would have been approved. Moreover, the court pointed out that development pursuant to RPAs would not be unlawful

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211. For example, HCPs recently approved for two timber companies (Plum Creek Timber and Simpson Timber) did not result in a dramatic reduction in economic value. Under Plum Creek Timber’s HCP, the lumber company permanently sets aside only 8% of its land as spotted owl habitat, while impact on other species is mitigated not by land set-asides but by ecologically-sensitive forest management. See Timber Agreement, supra note 209. Similarly, under Simpson Timber’s HCP, the company is required to set aside just 2,000 of its 383,100 acres in Northern California as old growth habitat for spotted owls. See Kathie Durbin, *Timber Company Wins U.S. Approval for Owl Conservation Plan*, PORTLAND OREGONIAN, Oct. 26, 1992, at A1.

212. See supra Subsection II.A.1.


214. While strictly speaking, the case arises from denial of wetlands fill permit applications, *Good* can arguably be viewed as the first reported opinion discussing a regulatory takings challenge to the ESA, in that the permits were denied after the FWS found they would result in jeopardy to endangered species.

215. See Good, 39 Fed. Cl. at 94.

216. These “reasonable and prudent alternatives” included restricting development to the upland portion of the property, limiting water access, and preventing the attraction of predators through deed and property maintenance restrictions. See id. at 92.

217. See id. at 98.

218. See id. at 99.

219. See id.
since, even if a section 9 take of a species should result, "the agency was authorized [under the section 10 HCP provision] to permit such a take."\textsuperscript{220} Although, strictly speaking, \textit{Good} involves the denial of wetlands fill permits (and not the denial of HCPs), its reasoning would seem to apply equally in the context of HCP applications.

3. \textit{Availability of HCPs as Disincentive to Takings Suits}

In some respects, this third and final point is little more than a recapitulation of the first two. The section 10 HCP process imposes obstacles, both procedural and substantive, to successful takings claims. It is, however, instructive to consider not only the legal ramifications of HCP availability, but also the effect on a landowner's incentives to bring suit—how the possibility of obtaining an HCP affects a landowner's cost-benefit calculus as to whether a takings suit is worth bringing. On the cost side of the equation, since the takings ripeness doctrine requires a plaintiff to exhaust all available administrative remedies prior to bringing suit, the availability of the HCP process has the effect of substantially \textit{increasing the cost} of bringing a takings claim. Even if the landowner does not believe a suitable HCP will be approved and thus prefers to file a takings claim, he must nonetheless go through the motions of developing, submitting and awaiting decision on an HCP. On the benefit side, the availability of HCPs \textit{reduces the benefit} of a takings suit in two important ways. First, the possibility of obtaining an HCP significantly reduces a plaintiff's probability of success on the merits of a takings suit. Second, even if a plaintiff is successful, the \textit{marginal} benefit of the suit—the recovery \textit{minus} the value or uses permitted under an approved or approvable HCP—may be less than the suit's cost in legal expenses.

In sum, the availability of HCPs reduces the value of a potential takings suit by (1) decreasing its likelihood of success, (2) decreasing its marginal return (since an HCP would have given back at least some value to the owner), and (3) increasing the costs of litigation (by requiring pursuit of an HCP, just to satisfy ripeness).

IV. The HCP Process and Recent ESA Reforms as Dictated by Takings Law

Although the HCP process is arguably the most important explanation for the dearth of regulatory takings claims under the ESA, this is not to say—as some have seemed to assert\textsuperscript{221}—that HCPs work against landowners. On the

\textsuperscript{220} Id. at 100.

\textsuperscript{221} Republican Representative Don Young (of Alaska) remarks that "HCPs will not be the salvation of private land and ESA disputes." Steve Hansen, \textit{Endangered Species Programs to Be Examined at Congressional Oversight Hearing} (visited July 23, 1997)
contrary, HCPs benefit landowners (which accounts for the rarity of takings claims) by insulating them from unduly burdensome applications of ESA regulations. The availability of HCPs notwithstanding, many critics of the ESA would like to limit the statute severely, fearing, perhaps, that the FWS will not always be so free in granting HCPs, and that, at bottom, the Court’s Fifth Amendment jurisprudence does not protect landowners from onerous ESA regulation.

The property rights movement’s worry that HCPs will not always be so generously approved may be a valid concern. However, an overhaul of the ESA—much less its repeal—is unnecessary to protect property owners’ interests because these interests are already guaranteed by the Court’s regulatory takings jurisprudence. Indeed, the addition of the HCP process to the ESA, as well as other recent reforms designed to mitigate the Act’s impacts on private property, can be seen as responsive to—and perhaps compelled by—the development of regulatory takings doctrine during the last two decades. The ESA, as currently administered (in light of FWS support for landowner-friendly habitat conservation planning), rarely deprives property owners of all or nearly all economic value. Thus, if Congress wishes the ESA

<http://www.house.gov/resources/press/1996/723esa.htm>. Representative Young is additionally worried that, “[t]he enormous costs, delays, questions about regulatory authority and litigation have contributed to the numerous questions about the use of HCPs as the cure for all of the ESA-related land use problems.” Id.

222. There are two main types of proposals for limiting the impact of the ESA on private land. First, there are proposals to expand the criteria for listing of species (and thus list fewer species) to include the potential for species recovery, the cost of recovering a species, the economic and social benefit of a species, and the loss of jobs resulting from a species listing, among other factors. See Hearing on Endangered Species Act and Lifting the Moratorium on Listings Before the House Comm. on Resources, 104th Cong. (1996) (statement of Robin L. Rivett, Pacific Legal Foundation), available in 1996 WL 10828831. Second, there are proposals for “just compensation” bills requiring the government to compensate landowners for diminutions in value (occasioned by ESA regulations) above a certain threshold. See discussion of compensation bills in the 104th Congress, supra note 5 and accompanying text.

223. Representative Charles Taylor approvingly quotes the Court’s language in Armstrong v. United States, 364 U.S. 40, 49 (1960), that the Takings Clause “was designed to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole.” Taylor, supra note 2, at 786. Taylor concludes, however, that the Court is lax in its application of the Takings Clause: “with the recent increase in what many people see as uncompensated ‘takings,’ the Court has shown that it does not always practice what it preaches.” Id.

224. One commentator has suggested that recent reforms of the HCP process—the “no surprises” policy and the three to ten-month timetable on review of proposed HCPs—could altogether prevent the approval of some HCPs:

The provisions of the No Surprises policy place enormous pressure on the limited resources of the FWS. ... [T]he FWS is also mandated to meet strict time constraints under the new directive. It is quite possible that these provisions will ... in fact prevent issuance altogether. Without having the time necessary to verify scientific information, the FWS may be reluctant to issue incidental take permits under an HCP.

to protect property interests to the fullest extent required by current jurisprudence, it should enthusiastically support habitat conservation planning and satisfy itself with making minor adjustments to improve the HCP process.

A. The HCP Process as Shaped by Regulatory Takings Jurisprudence

As noted earlier, the ESA was initially enacted at a time when regulatory takings law was virtually a dead letter. During the nearly twenty-five years of the Act’s existence, regulatory takings law has enjoyed a renaissance. At the same time, the ESA has been amended and FWS administrative policies modified in ways that have significantly changed the manner in which ESA regulations affect private property. This section will consider whether there is a cause-and-effect relationship between the revival of regulatory takings doctrine and the FWS’s increasing concern for the ESA’s effect on property owners.

1. Section 10 HCP Program as a Response to Penn Central and Agins

Decided in 1978 and 1980 respectively, Penn Central and Agins had important implications for regulatory programs, such as the ESA, that affect private property. Penn Central is notable not only for announcing the three-factor takings test, but also for its discussion and approval of the concept of transferable development rights (TDRs). Under New York City’s TDR program, landowners whose proposed development was denied by the zoning board became eligible for TDRs, which created rights to develop other parcels elsewhere in the city. The availability of TDRs is important to the regulatory takings analysis because, as the Penn Central Court observed, “the rights afforded are valuable.” Accordingly, the granting of TDRs must be taken into account as part of the inquiry into the economic impact of the regulation, the second prong of the Penn Central test. “While these rights may well not [constitute] ‘just compensation’ if a ‘taking’ [occurs], the rights nevertheless undoubtedly mitigate whatever financial burdens the law [imposes] . . . .”

The Penn Central Court—by announcing a three-factor test for regulatory takings and by endorsing the concept of TDRs—sent two distinct messages to those concerned with the constitutionality of ESA regulations. First, regulations may effect takings if their impact on private property values and reasonable expectations outweighs the state interest served. Second, the availability of a TDR or TDR-like program, by mitigating the economic

225. See supra Subsection III.A.4.
227. Id.
impact of a regulation on landowners, may insulate such regulations from takings challenges.

Close on the heels of *Penn Central*—the first case in which the Court embraced the concept of regulatory takings in several decades—came the Court’s decision in *Agins*, affirming the possibility of regulatory takings and confirming the *Penn Central* principle that if some development is permitted, then the impact of the regulation is lessened and a taking is unlikely to be found. The *Agins* Court rejected the plaintiff’s takings claim because, although he was not allowed to develop his property as intensively as he would have liked, the zoning ordinance still permitted building as many as five houses on his five-acre parcel.\(^{228}\) The ordinance, therefore, as in *Penn Central*, occasioned a diminution in value, not a taking.

In terms of function, HCPs are the conservation equivalent of TDRs. Like TDRs, HCPs mitigate the economic impact of regulation on the regulated parcel. Whereas TDRs accomplish this by providing development rights in other parcels, HCPs provide diminished, but nonetheless valuable, rights in the subject property itself. As the Court made clear in *Penn Central* and *Agins*, the affording of some rights to economic use (whether on the parcel itself, or on other parcels) mitigates the private impact of the regulation, making a taking unlikely. Moreover, the HCP program, by avoiding successful takings claims, allows the FWS to regulate more at a lower cost. Even though HCPs provide some concessions to landowners, the value of rights created in an HCP is, as in the case of the TDRs in *Penn Central*, less than the “just compensation” that would be required if a taking were found. In effect, the concessions to economic uses granted in HCPs function as an insurance premium against the possibility of a successful takings claim requiring full compensation.

Since the HCP program was instituted in 1982, the Court’s Fifth Amendment decisions have consistently reaffirmed the possibility of regulatory takings and reiterated the importance of TDR-type programs in avoiding such claims. For example, the majority and concurring opinions in the recent *Lucas* case are suggestive of how the existence of a TDR-type program (such as section 10 HCPs) negates the possibility of a per se taking and may ultimately be determinative of even the three-factor takings analysis. Justice Kennedy’s concurrence explicitly acknowledges the importance of a variance or permit program to the takings question. Upon observing the case’s “unusual posture”—that after the suit was filed but prior to its reaching the Court, South Carolina had amended its Beachfront Management Act to authorize the issuance of variances from the Act’s general limitations—Justice Kennedy remarked that “[t]he availability of this alternative [issuance of

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variances], if it can be invoked, may dispose of petitioner's claim of a permanent taking."\textsuperscript{229} The same may perhaps be said with regard to the availability of HCPs in the context of takings claims under the ESA.

In sum, the general concept behind the HCP program—that as long as some activity is allowed on some portion of the regulated parcel, the property owner will not be deprived of all economic use—is suggested by the Court’s recent regulatory takings jurisprudence. Furthermore, as the following subsections will demonstrate, recent administrative reforms of the ESA—the small landowner exemption, the safe harbor program and the “no surprises” policy—may also be seen as motivated by the Court’s takings doctrine.

2. The Small Landowner Exemption

In 1995, the FWS proposed a regulation exempting most residential and small landowners from the Section 9 take prohibition where only threatened species are involved.\textsuperscript{230} The FWS justifies the exemption on the grounds that “the relative habitat value of residential property is very limited in most cases”\textsuperscript{231} and development will have “no lasting effect on the likelihood of survival and recovery of threatened species.”\textsuperscript{232} While the stated justification is certainly plausible, it is perhaps an unstated, underlying concern that is primarily responsible for the exemption: concern over the takings implications of applying ESA restrictions against small landowners.

Simply as a matter of public opinion, applying ESA restrictions against small landowners is bad politics. But the exemption is not just a matter of public relations. Cases in which the ESA is applied against small landowners are, for several reasons, more likely to result in a meritorious takings claim. First, small landowners are more likely to have their entire property affected by a regulation and are thus likely to be deprived of all or nearly all economic value.\textsuperscript{233} Second, residential land uses are unlikely to qualify as actionable nuisances at common law and thus the nuisance exception to takings is unlikely to apply.\textsuperscript{234} Third, because of the high cost of preparing HCPs, small landowners will seldom be able to develop their own HCPs.\textsuperscript{235} The small landowner exemption thus makes legal as well as political sense.


\textsuperscript{231} Id. at 37,420.

\textsuperscript{232} Id. at 37,419.

\textsuperscript{233} See, e.g., Lucas, 505 U.S. 1003.

\textsuperscript{234} See, e.g., id.

\textsuperscript{235} See Rivett, supra note 9, at 529 (“HCPs have proven virtually cost-prohibitive for small
3. The Safe Harbor Program

The safe harbor program is, in effect, designed to align landowners’ incentives with species preservation by permitting landowners to improve the ecological value of their land (e.g., by planting trees or removing non-native species) without having to worry that they will be subject to ESA regulations if a listed species subsequently moves onto the land. Where voluntary habitat improvement would lead to a “measurable” conservation benefit, landowners are invited to contract with the FWS for the assurance that ESA regulations will not be enforced against them on the basis of their enhancement of habitat.

The safe harbor program is not only prudent policy, it is good law in that it makes administration of the ESA consistent with the policies, if not the legal standards, of recent takings cases such as Lucas. Under traditional takings law, regulations that seek to secure a benefit—e.g., preservation of species newly arrived because of habitat enhancement—are not exempt from the Fifth Amendment requirement of compensation. Although Justice Scalia, writing for the majority, criticizes the harm/benefit distinction as conclusory, the same distinction (though based on “objective” common law principles, instead of mere characterization) is embodied in Lucas's limitation of the police power takings exception to those harms cognizable at common law. Not only is it doubtful that a harm to a species is a common law harm, it is equally dubious to characterize a landowner’s withdrawal of a benefit (e.g., cutting trees she has planted) as harm. The safe harbor program thus tacitly endorses Lucas’s idea that property owners’ reasonable expectations include the right to conduct non-nuisance land use activities.

4. The “No Surprises” Policy

Consistent with its goal of “treating owners fairly” by making HCPs as attractive to property owners as possible, the FWS has recently adopted a so-
called “no surprises” policy. The policy provides that “no additional land use restrictions or financial compensation will be required of the [incidental take] permit holder with respect to species covered by the permit, even if unforeseen circumstances arise after the permit is issued indicating that additional mitigation is needed for a given species covered by a permit.”

Similar to the safe harbor program, the “no surprises” policy is informed by a conservative, Lucas-like conception of property expectations: Actions permissible in the past under an HCP will be permissible for all time (at least for the duration of the HCP) notwithstanding changed circumstances such as the listing of a species. “According to one Interior Department official, the no surprises policy is as close as one comes to a ‘federal vested development right.’”

Taken together, the safe harbor program and the “no surprises” policy bring to mind Professor Sax’s interpretation of Lucas as expressing the “sentiment that a state should compensate landowners who, through no fault of their own, lose property rights because of scientific or social transformations.” Recent FWS reforms—from small landowner exemption, to safe harbor, to “no surprises”—institutionalize the Lucas sentiment as part and parcel of the administration of the Act.

B. Proposals for ESA Reform: Adjustments to the HCP Program

The Court’s takings jurisprudence—especially as expressed in recent cases such as Lucas—protects private property from the most onerous ESA regulations. While takings cases under the ESA are virtually nonexistent, this is not because takings law fails to protect property. To the contrary, it is because of the strength of takings law that the ESA is administered—through the HCP program, in particular—with considerable respect for the impact on landowners, making takings claims unlikely. Consequently, to the extent that private property protection is the motivation behind calls for reform, there is no need to radically overhaul the ESA. By emphasizing habitat conservation planning, the FWS substantially achieves its goal of “treating landowners fairly.”

Nonetheless, to the extent that ESA reform is motivated by protection of private property—whether as an end in itself or as a means of avoiding takings

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242. Id.

243. Thompson, supra note 175, at 323 (quoting Donald J. Barry, Remarks at Conference on Biodiversity Protection: Implementation and Reform of the Endangered Species Act, University of Colorado School of Law (June 10, 1996)).

244. Sax, supra note 152, at 1449.
challenges or diffusing political pressure—there are several minor adjustments
to the HCP program that would be desirable. Moreover, these adjustments are
suggested, if not compelled, by recent regulatory takings decisions.

1. Expedite the HCP Approval Process

One of the most frequent criticisms of the HCP program relates to the
time-consuming (and thus costly) nature of the permitting process. According to FWS personnel and property owners, initial negotiations have
taken anywhere from three months to three years. Although the factors
contributing to delays are many (insufficient biological knowledge, public
controversy, and lack of FWS resources, to name only a few), such delays
are ultimately possible because neither the ESA nor FWS regulations establish
firm deadlines for FWS response. Not being legally compelled to streamline
the section 10 process, the FWS has announced as one of its non-binding
guiding principles that the “processing [of] incidental take permit applications
. . . be as expeditious and efficient as possible,” and that the permitting
process be streamlined to the “maximum extent practicable and allowable
under law.” The FWS expects to meet “processing targets” of three to ten
months, depending on the impact and size of the proposed HCP. While the
FWS’s guiding principles and processing targets are laudable, recent
experience with the HCP program demonstrates that these principles and
targets are more aspirational than realistic.

In a statute that contains deadlines for virtually every other administrative
action (e.g., ninety days to consider whether petition to list or delist a species
is justified, twelve months to find whether petitioned action is warranted,
and ninety days to produce a jeopardy finding), it is unclear why there
should not be such deadlines for the approval of HCPs. Moreover,
streamlining the HCP process is not only good policy, it may—at least in the
most egregious instances of delay—be constitutionally compelled by the
Court’s temporary regulatory takings doctrine. Announced in First English

245. See Lin, supra note 23, at 396-422 (1996) (citing delays as the number one criticism of the
HCP process and proposing reforms to avoid such delays).
246. See Thompson, supra note 175, at 317.
247. See Lin, supra note 23, at 396-411.
HANDBOOK FOR HABITAT CONSERVATION PLANNING AND INCIDENTAL TAKE PERMIT PROCESSING 5-6
(1994).
249. See id. at 8.
250. See supra note 246.
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_Evangelical Lutheran Church of Glendale v. County of Los Angeles_, the temporary takings doctrine provides that “[i]nvalidation of the ordinance . . . after a 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.” Applied to the context of HCPs under the ESA, the same logic would dictate that approval of an HCP, after a period of time, does not necessarily preclude a claim of temporary taking based on the time during which HCP review was pending.

While it is unclear to what extent the temporary regulatory takings analysis applies to permitting programs such as section 10, _First English_ at least opens up the possibility for temporary takings claims. On the one hand, the Court “limit[s] [its] holding to the facts presented, and of course [does] not deal with the quite different questions that would arise in the case of normal delays in obtaining building permits [or] variances.” In the next breath, however, the Court notes that “our present holding will undoubtedly [limit] the freedom and flexibility of land-use planners.” Although the temporary takings doctrine has not been applied successfully in cases of permit delays, _First English_ at least suggests the possibility of a successful temporary takings suit in such cases where delay is abnormal or extraordinary.

2. Modify “No Surprises” Policy to Guarantee Real Certainty for Landowners

The “no surprises” policy provides that no further mitigation will be required of a landowner when a species on his land—unlisted at the time an HCP is entered into—later becomes listed, if and only if that species had been addressed in the approved HCP. Thus, as the “no surprises” policy currently stands, a landowner may rest assured that no additional mitigation will be required for species covered in the HCP irrespective of their status under the ESA as endangered, threatened, or unlisted. Although this is not a trivial

255. Id. at 319.
256. Id. at 321 (emphasis added).
257. Id.
258. See, e.g., Tabb Lakes, Ltd. v. United States, 10 F.3d 796, 803 (Fed. Cir. 1993) (a three-year delay in developing subdivision due to improper federal assertion of jurisdiction over wetlands therein was not a taking).
259. It is not clear what constitutes an “abnormal” delay. Perhaps three, four or five years amounts to abnormal delay since the _First Evangelical_ Court found a temporary taking where the ordinance (prior to being withdrawn) deprived use for “a considerable period of years.” _First English_, 482 U.S. at 322. _But see Tabb Lakes_, 10 F.3d at 803 (temporary taking was not found after a three-year delay). For another commentator’s opinion that delays in HCP approval could perhaps give rise to legally cognizable temporary takings suits, see Robert Meltz, _Where the Wild Things Are: The Endangered Species Act and Private Property_, 24 ENVTL. L. 369, 390 (1994).
260. _See supra_ note 242 and accompanying text.
assurance, it hardly eliminates the possibility of surprise, since the burden is on the landowner to identify every species that could be listed that is present on the property. Given the limits of biological science and knowledge—renowned biologist E.O. Wilson estimates the number of species on Earth to be from 10,000,000 to 100,000,000, of which only 1,400,000 have been identified—it is quite likely that even a thorough (and costly) inspection prior to entering into an HCP would not reveal the presence of many species that might be discovered and listed at some later time. Consequently, there remains ample opportunity for surprise, particularly in the case of large, non-urban parcels of property.

If the FWS wishes to provide complete certainty with its HCPs, then it should guarantee that no further mitigation will be required in cases where a species unknown at the time an HCP was submitted is later found on the property. Under such a regime, landowners would still have the duty to account for and mitigate harm to species on their property that were listed at the time of the HCP’s creation; landowners would simply be protected against changes in the state of biological knowledge. While it is hard to argue that such a result is constitutionally compelled, a strengthening of “no surprises” is consistent with the Lucas sentiment that landowners should be compensated (or exempted) when regulation, as a result of changes in scientific understanding and through no fault of their own, deprives them of property rights.

3. Assure an HCP’s Mitigation Measures are Proportional to Expected Harms

At the heart of the HCP program is the understanding that the HCP applicant will minimize and mitigate her impacts on protected species. Neither the ESA nor FWS regulations give more definite guidance on what minimization and mitigation measures are required. Such measures, it might be said, are limited only by the imagination of the applicant and the discretion of the FWS. Again, however, the Court’s regulatory takings jurisprudence provides constitutional limits on what may be required of landowners.

The Court’s decisions in Nollan and Dolan both speak to the appropriate content of HCPs. Nollan requires that any “exaction” or mitigation measure have an essential nexus to the biodiversity impact caused by the landowner’s use. Dolan mandates that mitigation measures must be “roughly

261. See Wilson, supra note 51, at 132-33.
262. See supra note 153 and accompanying text.
263. See Nollan v. California Coastal Comm’n, 483 U.S. 825, 837 (1994); see also discussion of Nollan’s nexus requirement supra Subsection I.B.3.
proportional” to biodiversity harms. The Nollan nexus requirement would appear to be easily met in the context of HCPs, since the exaction involved is mitigation of impacts, in other words, the direct remedying of the subject harm. On the other hand, definitive guidance is lacking as to the proportionality of the mitigation measures. There is no evidence that the FWS currently demands mitigation measures disproportionate to the impacts contemplated by the property owner. However, there is no assurance, statutory or otherwise, that the FWS will not make such disproportionate demands at some point in the future, whether as a result of political pressure or other changed circumstances. Section 10 should be amended to explicitly require proportionality between the impacts of land use and the mitigation measures required.

4. **Assure Landowners of Property Rights in HCPs**

Finally, it must be recognized that the ESA’s administrators respect private property, and thus avoid constitutional takings, only as long as the government lives up to its side of the bargain under an HCP. As one commentator put it, “although the permittee appears to have legally protected rights under an HCP agreement, until a court affirms this position, certainty must come from a permittee’s belief that the government will abide by its promises.” In the event, then, that the government does not uphold its side of the bargain—for example, if, in a last-ditch attempt to save a species from extinction, the FWS requires the commitment of additional land for mitigation beyond the level originally agreed upon—the question arises as to whether a landowner then has recourse to a takings claim. The threshold issue of this takings inquiry relates to whether an HCP constitutes “property” under the

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264. Dolan v. City of Tigard, 512 U.S. 374, 391 (1994); see also supra note 93.
265. The lack of takings cases under the ESA and the near 100% approval rate for proposed HCPs, see supra note 199, both suggest that the FWS does not typically demand mitigation measures disproportionate to the expected harms.
266. For other perspectives on how Nollan and Dolan might influence the way the HCP program is administered, see Meltz, supra note 259, at 410-11 ("[I]mplicit in ‘fairness and justice’ is that the affirmative burden on the landowner be proportional to the harm that her proposed action might have, a relationship that may soon be given more precise definition [in Dolan]."); Thompson, supra note 175, at 339-43 (suggesting that Nollan and Dolan put limitations on how regional HCPs may be structured, for example, by raising doubts about the proportionality of flat rate development fees).
268. Not only might the FWS unilaterally amend the terms of an HCP, it could (and indeed, would perhaps be required to) revoke an HCP altogether if a species, for whatever reason, approaches the brink of extinction. John Engbring, FWS supervisor of conservation plans in Oregon and Washington, was paraphrased as saying, “if a species is in grave danger of extinction because of what a [landowner] is doing, the [FWS] can always issue . . . a ‘jeopardy ruling’ [under Section 7], and yank [their] permit.” Leslie Brown, Cutting a Clear, New Path, MORNING NEWS TRIB., Nov. 2, 1997, at G2.
Fifth Amendment’s Takings Clause: Do permittees have a property interest in an HCP?

Although courts have at various times embraced differing definitions of property,269 the general rule, since United States v. General Motors Corp.,270 is that property "denote[s] the group of rights inhering in the citizen’s relation to the physical thing, as the right to possess, use and dispose of it" and is not limited to physical things.271 Moreover, General Motors’s expansive definition of property has been affirmed in more recent cases, such as Ruckelshaus v. Monsanto Co.,272 where the Court recognized a property interest in a company’s trade secrets which, in turn, was protected by the Takings Clause.273 However, while the Court’s general definition of property is quite broad,274 it is less clear whether Fifth Amendment property protections are implicated in the context of government-granted permits. Neither General Motors nor Monsanto are directly applicable to the permitting context since they involved property interests in leases and trade secrets, respectively.

While there are no cases in which a court has decided whether HCPs give rise to property rights,275 courts have considered the issue of property interests in permits in several other contexts. In Hage v. United States,276 a recent case out of the Court of Federal Claims, the court found that ranchers did not have a property interest in grazing permits.277 The result in Hage is less important than the analysis it relies on in reaching its conclusion. The court identified three factors as relevant to its inquiry of whether the permit gives rise to property rights for purposes of the Fifth Amendment: congressional intent to create (or not) property rights in the permits; the extent to which the permit

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269. Among the many possible definitions of property are: property as tangible things, property as valuable rights created by positive law, property as vested rights created by positive law. See Peterson, supra note 81, at 1308-16.
270. 323 U.S. 373 (1945).
271. Id. at 378 (finding a property right in a leasehold interest).
273. See id. at 1003-04.
274. In dictum, the General Motors Court noted that the Takings Clause “is addressed to every sort of interest the citizen may possess” (emphasis added). General Motors, 323 U.S. at 378.
275. Cf. Southwest Diversified, Inc. v. City of Brisbane, 652 F. Supp. 788 (N.D. Cal. 1986). The court noted in dictum that although the developers have alleged that they have been given an entitlement, i.e., a protectable property interest, by the Section 10(a) permit, the permit itself purports to give no rights to develop but only to ‘take’ an endangered species under limited conditions. If the developers have an entitlement or protectable property interest at all, it is derived from assurances received from the City. Whether or not that conduct creates a property interest is a matter of state law.
277. Id. at 171; see also United States v. Fuller, 409 U.S. 488, 493 (1973) (holding that the Fifth Amendment does not require compensation for value added to fee lands by grazing permits which were revocable under the statute); Alves v. United States, 133 F.3d 1454, 1457 (1998) (holding that neither grazing preference nor grazing permit constitutes a compensable property interest).
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has characteristics of private property; and the source from which the permit’s value was created. The Hage court found no property interest in the grazing permits because (1) the Granger-Thye Act expressly stated that issuance of the permit did not grant “any right, title, interest or estate”; (2) the permit did not have characteristics of private property since it did not give permittees the right to exclude; and (3) the sovereign itself created the value, where there was none before, by issuing the permit.278

HCPs are readily distinguishable from grazing permits, and in fact, their issuance would appear to create property rights under the Hage analysis. First, the ESA never states, implicitly or explicitly, that issuance of an HCP does not give rise to any rights. Second, HCPs exhibit the characteristics of private property in that their owners retain the right to exclude. Third, the value in HCPs derives not from a government-conferred privilege, but from the underlying value of the property to which the HCP relates.

Based on the foregoing analysis, a court would, more likely than not, find that HCPs rise to the level of protected property. Nonetheless, insofar as proponents of habitat conservation planning advertise it as providing certainty for landowners, the ESA should be amended to explicitly assure property interests in HCPs. Without such explicit assurance, landowners have some reason to doubt the value of HCP protections and would perhaps be more inclined to file a takings suit than participate in the HCP program.

Conclusion

The relationship between the ESA and the Takings Clause is born of conflict: The Fifth Amendment protects property while the ESA protects species. This Article, however, has sought to demonstrate that the two bodies of law do not exist and develop independently of the other. Despite the absence of takings cases involving ESA regulations in federal courts, the ESA is informed and limited by the Takings Clause of the Fifth Amendment. As the Court’s takings jurisprudence over the last two decades has more vigorously protected private property from government regulation, application of the ESA to private property has been increasingly constrained. Takings cases have not resulted because the FWS and Department of Interior—by promoting the availability of HCPs and implementing programs such as the “no surprises” policy and the Safe Harbor program—have been careful not to trigger the taking of all or nearly all economic value or to interfere with reasonable, investment-backed expectations. In effect, the Fifth Amendment has subtly but significantly influenced the ways in which the ESA is administered.

278. See Hage, 35 Fed. Cl. at 169-71.