Transferable Public Rights: Reconciling Public Rights and Private Property

Michael Neiderbach

Follow this and additional works at: https://digitalcommons.law.buffalo.edu/buffalolawreview

Part of the Legislation Commons

Recommended Citation
Transferable Public Rights: Reconciling Public Rights and Private Property*

The "key-log" which must be moved to release the evolutionary process for an ethic is simply this: quit thinking about decent land-use as solely an economic problem. Examine each question in terms of what is ethically and esthetically right, as well as what is economically expedient. A thing is right when it tends to preserve the integrity, stability, and beauty of the biotic community. It is wrong when it tends otherwise.

Aldo Leopold**

I. INTRODUCTION

The American system of property encompasses both public and private ownership of land and other natural resources.1 While opinions differ as to which type of ownership is best for society,2 private land ownership remains protected by the takings clause of the fifth amendment to the United States Constitution, which forbids the taking of private property for public use without just compensation.3

The Supreme Court's interpretations of the takings clause are controversial because these decisions necessarily define the nature and extent

---

* This research was sponsored in part by the New York Sea Grant Institute under a grant from the Office of Sea Grant, National Oceanic and Atmospheric Administration (NOAA), U.S. Department of Commerce. The United States Government and the New York Sea Grant Institute are authorized to produce and distribute reprints for governmental purposes notwithstanding any copyright notation that may appear herein.


1. For an historical discussion of how public and private land ownership evolved in America see Freyfogle, Land Use and the Study of Early American History (Book Review), 94 YALE L.J. 717 (1985).

2. See, e.g., A. LEOPOLD, A SAND COUNTY ALMANAC AND SKETCHES HERE AND THERE viii (1968) (Suggesting that "[w]e abuse land because we regard it as a commodity belonging to us."); Hardin, The Tragedy of the Commons, 162 SCIENCE 1243 (1968) (Resources held in common will be wasted or destroyed by individuals seeking to maximize individual utility, since the negative utility of individual conduct will be absorbed by all members of the commons); Rose, The Comedy of the Commons: Custom, Commerce, and Inherently Public Property, 53 U. CHI. L. REV. 711, 723 (1986) (Raising the possibility that "properties devoted to such noncommercial uses as recreation or speech could achieve their highest value when they are accessible to the public at large.").

3. "[N]or shall private property be taken for public use, without just compensation." U.S. CONST. amend. V. The takings clause has been incorporated against the states through the fourteenth amendment. See Chicago, B.& Q. Railroad Co. v. Chicago, 166 U.S. 226, 238-39 (1897).
of property rights for the entire nation. The definition of property rights chosen by the Court reflects its attitudes towards the relationship between individuals, society, and the environment. Since these attitudes undergo change, the nature of property rights and takings jurisprudence also changes over time.⁴

Recent Supreme Court decisions indicate that a significant transformation in takings doctrine is in progress. If the constitutional dimensions of land use are radically altered, the consequences will affect private property owners, local governments, coastal zone management programs, and the public at large. Therefore, this article will examine the history of takings doctrine, and how the Supreme Court’s 1987 Takings Trilogy is likely to affect land use planning in the years to come. It will be suggested that the Court should utilize a new theory, which I call Transferable Public Rights, in order to harmonize public and private interests in natural resources.

II. EARLY SUPREME COURT TAKINGS JURISPRUDENCE

While private ownership of real property is constitutionally protected, it is also well established that property owners are not absolutely free to do what they wish with their property. Under the tenth amendment to the United States Constitution, the states retain the police power, which authorizes them, and their political subdivisions, to restrict land use in order to protect the health, safety, and welfare of their citizens.⁵ The police power functions as a constitutional counterweight to

---

⁴. "In a dynamic economy like the American [one,] the bundle of legal claims called 'property' never remains stable: a change in technical processes, a shift in consumption habits, a new invention in technology or managerial practice, a depression or a war, may give new value to claims hitherto ignored or diminish others hitherto cherished." 1 M. Lerner, America as a Civilization 297 (1957). However, changes are not necessarily linear. As a consequence, some have referred to the Supreme Court’s takings jurisprudence as “muddled.” See, e.g., Rose, Mahon Reconstructed: Why the Takings Issue is Still a Muddle, 57 S. Cal. L. Rev. 561 (1984).

⁵. "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." U.S. Const. amend. X. See, e.g., Railroad Co. v. Richmond, 96 U.S. 521, 528-529 (1877); Mugler v. Kansas, 123 U.S. 623 (1887); Village of Euclid v. Ambler Realty Co., 272 U.S. 365 (1926).

The police power had to be used for reasons of health, safety or the general welfare, and not in an arbitrary or discriminatory manner. But, in Mugler, Justice Harlan stated that:

[It does not at all follow that every statute enacted ostensibly for the promotion of these ends, is to be accepted as a legitimate exertion of the police powers of the State. There are, of necessity, limits beyond which legislation cannot rightfully go. . . The courts are not bound by mere forms, nor are they to be misled by mere pretences. They are at liberty—indeed, are under a solemn duty—to look at the substance of things, whenever they enter upon the inquiry whether the legislature has transcended the limits of its authority.]
the takings clause, since *valid* exercises of the police power are not takings, even if they reduce a property's value.

Initially, the Court appeared uninterested in curbing the uses of the police power. In *Munn v. Illinois*, an early police power case which upheld the price regulation of grain elevators, the Court implored the "people" to "resort to the polls, not the courts" for protection from legislative abuses of the police power. Judicial review of the police power gradually became more prevalent in later cases, although the Court frequently deferred to legislative objectives.

In *Mugler v. Kansas*, a Kansas Prohibition statute banned the "manufacture and sale of intoxicating liquors, except for medical, scientific, and mechanical purposes. . . ." Mugler owned a brewery before and after the enactment of the Prohibition statute, and appealed from a misdemeanor conviction for its violation on grounds that the statute violated the fourteenth amendment. In an opinion by Justice Harlan, the Court declared that the prohibition statute was a constitutional exercise of the police power and not a taking for the public benefit.

Justice Harlan reasoned that regulations promulgated under the police power could not be considered a taking because they merely prohibited uses which were harmful to the public interest. He indicated that there was a clear distinction between taking for public use and an exercise of the police power. According to Harlan, uses of property, con-

---

*Mugler, 123 U.S. at 661.*

6. 94 U.S. 113 (1877).

7. On the grounds that the owners of an elevator had "clothed the public with an interest in their concerns." *Munn, 94 U.S. at 133.*

8. 94 U.S. at 134.


11. 123 U.S. at 654.

12. See Dunham, *A Legal and Economic Basis for City Planning (Making Room for Robert Moses, William Zeckendorf, and a City Planner in the Same Community)*, 58 *Columbia L. Rev.* 650, 666 (1958). A significant expansion upon Harlan's ideas on the police power, (compensation is unnecessary when the public prevents a property owner "from imposing a cost upon others," although it is required for regulations which "obtain" public benefits) *Id.*

13. Harlan stated, in what is now a famous passage, that:

A prohibition simply upon the use of property for purposes that are declared, by valid legislation, to be injurious to the health, morals, or safety of the community, cannot, in any just sense, be deemed a taking or an appropriation of property for the public benefit.

Such legislation does not disturb the owner in the control or use of his property for lawful purposes, nor restrict his right to dispose of it, but is only a declaration by the State that its use by any one, for certain forbidden purposes, is prejudicial to the public interests.

*Mugler, 123 U.S. at 668-69.*
trary to legislative determinations of what was in the public interest, were
abatable common nuisances, whereas takings deprived "innocent" own-
ers of "unoffending property." This circular reasoning had the effect of
making legislatures the final arbiters of the takings clause. Furthermore,
Harlan's public nuisance analysis failed to precisely define the notions of
public harm and public benefit, nor was it capable of resolving more
complex situations where the prevention of a public harm also resulted in
a public benefit.

An important development in the Court's takings jurisprudence oc-
curred in Lawton v. Steele, where the destruction of fishing nets, which
were used to violate state conservation laws, was upheld as a valid exer-
cise of the police power. In that case, the Court reaffirmed that, contrary
to Munn, legislative exercises of the police power would be subject to
judicial review. According to the majority opinion written by Justice
Brown, in order for the use of the police power to be valid, "it must
appear, first, that the interests of the public generally, as distinguished
from those of a particular class, require such interference; and, second,
that the means are reasonably necessary for the accomplishment of the
purpose, and not unduly oppressive upon individuals."

Later decisions, such as Reinman v. Little Rock, also placed few
restrictions upon the police power but continued to follow Harlan's ap-
proach. In Reinman, the Court upheld an ordinance which designated

14. 123 U.S. 669. Under Harlan's analysis, a regulation was valid under the Fourteenth Amend-
ment, unless it was "apparent that its real object [was] not to protect the community, or to promote
the general well-being. . . ." Id.
15. See Michelman, Property, Utility, and Fairness: Comments on the Ethical Foundations of
16. 152 U.S. 133 (1894).
17. The legislature may not, under the guise of protecting the public interests, arbitrarily
interfere with private business, or impose unusual and unnecessary restrictions upon
lawful occupations. In other words, its determination as to what is a proper exercise of
its police powers is not final or conclusive, but is subject to the supervision of the courts.
Lawton v. Steele, 152 U.S. at 137.
18. 152 U.S. at 137. Modern takings cases utilize analyses similar to the one in Lawton. Cf: Penn
20. Cf: Smyth v. Ames, 169 U.S. 466 (1898) Justice Harlan displayed less deference to legisla-
tive policy. He declared:

The idea that any legislature, state or Federal, can conclusively determine for the people
and for the courts that what it enacts in the form of law, or what it authorizes its agents
to do, is consistent with the fundamental law, is in opposition to the theory of our Insti-
tutions. The duty rests upon all courts, Federal and state, . . . to see to it that no right
secured by the supreme law of the land is impaired or destroyed by legislation.

livery stables in certain areas as a nuisance. The Court declared that as long as the regulation was not arbitrary or discriminatory, it did not violate the due process and equal protection clauses of the fourteenth amendment.21

The Court continued to defer to the police power in Hadacheck v. Sebastian,22 and acknowledged that the only limitation upon the police power under Mugler and Reinman was that it could not be used in an arbitrary or discriminatory fashion. Hadacheck was convicted for violating a Los Angeles city ordinance prohibiting the manufacture of brick within the city limits. Interestingly, Hadacheck’s brick factory had existed outside the city limits without criticism until the city decided to expand its boundaries due to the pressures of increased development. Even though the newer development was inconsistent with existing land use, it was Hadacheck who was forced to bear the costs of curtailing his business activities. The Court boldly announced that “[t]here must be progress, and if in its march private interests are in the way they must yield to the good of the community.”23

Justice Holmes had a different perspective in Pennsylvania Coal v. Mahon24 and attempted to analyze the police power in terms of its effect on the value of property rights.25 In Mahon, the Court concluded that a Pennsylvania statute designed to prevent mine subsidence was an unconstitutional use of the police power.26 In the majority opinion, Holmes

21. While such regulations are subject to judicial scrutiny upon fundamental grounds, yet a considerable latitude of discretion must be accorded to the law-making power; and so long as the regulation in question is not shown to be clearly unreasonable and arbitrary, and operates uniformly upon all persons similarly situated in the particular district, the district itself not appearing to have been arbitrarily selected, it cannot be judicially declared that there is a deprivation of property without due process of law, or a denial of the equal protection of the laws, within the meaning of the Fourteenth Amendment. 237 U.S. at 177 (citations omitted).

22. 239 U.S. 394, 411 (1915).


conceded that all property is held under implied limitations and is subject to the exercise of the police power. However, he reasoned that if the implied limitations on property ownership were not circumscribed, certain protections of the Constitution, such as the contract and due process clauses, would become meaningless.\textsuperscript{27} Thus, Holmes concluded that under an exercise of the police power, when "the extent of the diminution...reaches a certain magnitude, in most if not in all cases there must be an exercise of eminent domain and compensation to sustain the act."\textsuperscript{28} That statement of Justice Holmes, however, never indicated at what point an alleged police power regulation crossed the threshold and became a taking.\textsuperscript{29}

Only four years later, the Supreme Court decided to uphold a zoning ordinance which had severely diminished a property's value in \textit{Village of Euclid v. Ambler Realty Co.}\textsuperscript{30} In \textit{Euclid}, the owner of a parcel brought suit against a village because part of his tract had been zoned from industrial to residential and other less intensive uses. Allegedly, this re-zoning significantly reduced the property's value. However, the Court found that increases in population density justified additional restrictions on land use.

In its decision, the Court likened zoning regulations to exercises of the police power to control nuisances. The extent of the zoning power depended upon the "circumstances and conditions" of the locality, including the cumulative impact that intensified development would have on an area. In particular, the Court feared that an apartment house would act as a "parasite" upon the aesthetically pleasing environment and open spaces of detached home neighborhoods.\textsuperscript{31} Since intensified development threatened to destroy exclusive residential neighborhoods, the Court concluded that the reasons behind the ordinance were "sufficiently cogent to preclude" finding the ordinance an arbitrary or unreasonable

\textsuperscript{27} 260 U.S. at 413.
\textsuperscript{28} \textit{Id.}.

Holmes suggests here [in \textit{Mahon}] and in other cases that 'diminution of value' is an indicator of when a regulation goes 'too far.' However, this diminution of value test is certainly not applicable to situations where the police power is exercised to protect the public from immoral, unsafe, or similar noxious or nuisance activities.

To the extent that professor McGinley is correct about this point, Holmes' analysis suffers from the same weakness as Harlan's nuisance approach.

\textsuperscript{30} 272 U.S. 365 (1926).
\textsuperscript{31} 272 U.S. at 394.
exercise of the police power.\textsuperscript{32} \textit{Euclid} became a landmark constitutional decision. It not only justified zoning regulations as police power legislation on the usual health and safety grounds, but also on aesthetic grounds such as preserving open spaces.

III. MODERN SUPREME COURT TAKINGS JURISPRUDENCE

A. Penn Central and TDRs

In \textit{Penn Central Transportation Co. v. New York City},\textsuperscript{33} the takings issue arose from an application of New York City's landmark preservation law, which prevented the owners of Grand Central Station from building a 55-story office building on top of the station.

The landmark preservation law was upheld because the Court concluded that it was "reasonably necessary to the effectuation of a substantial public purpose" and did not have "an unduly harsh impact upon the owner's use of the property".\textsuperscript{34} It was also significant to the Court that Penn Central had made a reasonable return on the terminal for many years, and that investment-backed expectations had not been disturbed by the law.

The decision focused upon the economic impact of the regulation because the Court equated the landmark law with other valid land use regulations concerning aesthetics, and because Penn Central did not contest that the landmark law had a permissible governmental goal.\textsuperscript{35} The Court's assessment of the hardship imposed by the regulation emphasized that the nature of the government action, and its effect on the property rights of the parcel in the aggregate, did not constitute a taking.\textsuperscript{36}

New York City's landmark preservation law added an interesting consideration to the Court's analysis by providing affected property owners with transferable development rights (TDRs). The TDRs allowed a property owner to exceed zoning restrictions on other property in the

\textsuperscript{32} 272 U.S. at 395. While the Court acknowledged the constitutionality of zoning ordinances as a general practice, in Nectow v. City of Cambridge, 277 U.S. 183 (1928), the application of a particular zoning ordinance to a property owner's parcel was found to violate the fourteenth amendment, where the zoning restrictions did not "bear a substantial relation to the public health, safety, morals, or general welfare." (citation omitted) 277 U.S. at 188.

\textsuperscript{33} 438 U.S. 104 (1978).

\textsuperscript{34} 438 U.S. at 127 (citations omitted).

\textsuperscript{35} 438 U.S. at 129.

\textsuperscript{36} 438 U.S. at 130-131; see also Andrus v. Allard, 444 U.S. 51, 65-66 (1979) (Destruction of one "strand" in a "bundle" of property rights does not necessarily amount to a taking because "the aggregate must be viewed in its entirety.").
vicinity, up to the value of the landmark property's development rights.\textsuperscript{37} According to the Court, TDRs alleviated the concern expressed in \textit{Mahon} that police power regulations might sometimes have unduly harsh consequences for property owners. The Court reasoned that while TDRs might not have been "just compensation if a 'taking' had occurred," they served to "mitigate" any impact that the law might have had on Penn Central.\textsuperscript{38}

B. \textit{Physical Invasions: Loretto, Kaiser Aetna, and Pruneyard}

As in other areas of constitutional law, the Court's classification of a government activity in takings jurisprudence can be extremely important. The right to exclude others is considered a fundamental attribute of property which cannot be terminated without just compensation.\textsuperscript{39} Therefore, when the Court characterizes a government activity as a physical invasion, it is prepared to declare the action unconstitutional.\textsuperscript{40}

In \textit{Kaiser Aetna v. U.S.},\textsuperscript{41} a private marina was constructed on the island of Oahu, Hawaii and connected to a bay with the permission of the Army Corps of Engineers. After the multi-million dollar marina was connected to the bay, a dispute arose as to whether the public had to be given access to the marina under a navigational servitude. The United States alleged that the marina was subject to the servitude, because it was connected to, and as a consequence had become part of, the navigable waters of the United States. The Court held that the government's action had produced certain "expectancies," i.e., investment-backed expectations, and that under such circumstances, a navigational servitude would amount to a physical invasion.

In order to accommodate freedom of speech considerations, the physical invasion reasoning of \textit{Kaiser Aetna} was relaxed in \textit{Pruneyard Shopping Center v. Robins}.\textsuperscript{42} In \textit{Pruneyard}, high school students, who were distributing pamphlets and asking people to sign petitions, were told by a security guard that a shopping center policy prohibited such activity unless it was related to the center's commerce. The California Supreme Court ruled that under the California Constitution the Center

\begin{itemize}
\item \textsuperscript{37} This was subject to a twenty percent limit per property. \textit{Penn Central}, 438 U.S. at 114.
\item \textsuperscript{38} 438 U.S. at 137.
\item \textsuperscript{39} See \textit{Kaiser Aetna v. United States}, 444 U.S. 164, 179-80 (1979).
\item \textsuperscript{40} See \textit{Pumpelly v. Green Bay Co.}, 80 U.S. (13 Wall.) 166 (1872) (invasions authorized by government which impair or destroy a property's usefulness are takings) [hereinafter \textit{Pumpelly}].
\item \textsuperscript{41} 444 U.S. 164 (1979).
\item \textsuperscript{42} 447 U.S. 74 (1980).
\end{itemize}
had to allow the students to express themselves.\textsuperscript{43} The Supreme Court of the United States affirmed the California Supreme Court on the ground that the Shopping Center owners "failed to demonstrate that the 'right to exclude others' is so essential to the use or economic value of their property that the state-authorized limitation of it amounted to a 'taking.'"\textsuperscript{44}

The Court was not as lenient in \textit{Loretto v. Teleprompter Manhattan CATV Corp.}\textsuperscript{45} In \textit{Loretto}, a New York statute required landlords to allow cable television facilities to be installed upon their premises. The price that landlords could charge the cable companies for installation was regulated by a state commission, and it determined that a single one dollar charge was reasonable for the cable equipment attached to Loretto's building. The Court ruled that the government had authorized a permanent physical occupation of Loretto's property, and that "a permanent physical occupation authorized by government is a taking without regard to the public interests that it may serve."\textsuperscript{46} In effect, the \textit{Loretto} decision reduced the threshold at which physical invasions would be tolerated by the Court, since there was no showing that the installation of cable wires would impair the use or economic value of Loretto's building.\textsuperscript{47}

\section*{C. Keystone: Investment Expectations, the Contract Clause, and Due Process Revisited}

In the spring of 1987, the Court re-examined several old takings jurisprudence issues—investment-backed expectations, the contract clause and the control of mine subsidence—in \textit{Keystone Bituminous Coal Association v. DeBenedictis}.\textsuperscript{48} In \textit{Keystone}, the Court upheld a subsidence statute similar to the one struck down in \textit{Pennsylvania Coal v. Mahon}. It

\begin{footnotesize}
\textsuperscript{43} \textit{Pruneyard}, 447 U.S. at 78. In Hudgens v. NLRB, 424 U.S. 507, 517-18 (1976), the Supreme Court emphasized that under Lloyd Corp. v. Tanner, 407 U.S. 551 (1972) there is no Federal constitutional right of access to shopping centers under the first amendment. Hudgens effectively overruled Amalgamated Food Employees Union v. Logan Valley Plaza, 391 U.S. 308 (1968), which had guaranteed the right of access to peacefully picket in private shopping centers under the first amendment.

\textsuperscript{44} \textit{Pruneyard}, 447 U.S. at 84.

\textsuperscript{45} 458 U.S. 419 (1982).

\textsuperscript{46} 458 U.S. at 426.

\textsuperscript{47} N.Y. EXEC. LAW § 828(1)(a)(iii) (McKinney Supp. 1981-1982) provided as follows:

1. No landlord shall

a. interfere with the installation of cable television facilities upon his property or premises, except that a landlord may require: . . .

iii. that the cable television company agree to indemnify the landlord for any damage caused by the installation, operation or removal of such facilities. \textit{quoted in Loretto}, 458 U.S. at 423 n.3.

\textsuperscript{48} 480 U.S. 470 (1987).
\end{footnotesize}
did this by distinguishing the Kohler Act, struck down in *Mahon* as an act which served only private interests, not public health or safety.\(^{49}\) Holmes' concern about protecting the validity of the contract and due process clauses was to a large extent ignored. The Court declared "[t]hat private individuals erred in taking a risk cannot estop the Commonwealth from exercising its police power to abate activity akin to a public nuisance." \(^{50}\)

*Keystone* did not really expand the scope of the police power beyond modern sensibilities; mine subsidence is a serious public health and safety threat which most people consider an abatable public nuisance. The significance of *Keystone* was its divergence from the modern trend of emphasizing investment-backed expectations. This aberation was probably due to the Court's perception that *Keystone* involved unreasonable investment expectations and did not reflect the nation's relatively new political consensus on environmental safety and quality.

D. First Lutheran Church: *Temporary Takings*

The Court's decision in *First Lutheran Church v. Los Angeles County*\(^{51}\) indicated that *Keystone* did not usher in a new era where the police power would reign supreme, as it had during the tenure of the first Justice Harlan. In *First Lutheran Church*, Los Angeles County established a flood protection area in the Mill Creek Canyon after a flood in the canyon destroyed a campground owned by a church. The county's interim ordinance prohibited the reconstruction of destroyed buildings or the construction of new ones in the designated flood protection zone.\(^{52}\) As a consequence, the church filed an inverse condemnation suit seeking damages in the Superior Court of California, claiming that the ordinance deprived the church of all use of the campground.\(^{53}\)

The Superior Court and the California Court of Appeal both refused to accept the church's inverse condemnation claim. They based their decisions upon the rule established by the California Supreme Court in

\(^{49}\) 480 U.S. at 486.

\(^{50}\) 480 U.S. at 488.

\(^{51}\) 482 U.S. 304 (1987) [hereinafter *First Lutheran Church*].

\(^{52}\) *First Lutheran Church*, 482 U.S. at 307.

\(^{53}\) Inverse condemnation has been referred to as "the remedy which a property owner is permitted to prosecute to obtain the just compensation which the Constitution assures him when his property, without prior payment therefor, has been taken or damaged for public use." Van Alstyne, *Statutory Modification of Inverse Condemnation: The Scope of Legislative Power*, 19 STAN. L. REV. 727, 730 (1967). See also, United States v. Clarke, 445 U.S. 253, 257 (1980).

\(^{54}\) *First Lutheran Church*, 482 U.S. at 308.
Agins v. Tiburon, which held that, in the State of California, landowners may not maintain suits for inverse condemnation on the grounds that a regulatory taking has occurred.\textsuperscript{55} Rather, in such circumstances, the California Supreme Court established that the proper action is for declaratory relief or a writ of mandamus.\textsuperscript{56}

Not surprisingly, the California Supreme Court denied the church's request for review. The church appealed to the United States Supreme Court where certiorari was granted. In an opinion by Chief Justice Rehnquist, the Supreme Court reversed the California Court of Appeal and remanded the case with instructions to the effect that temporary takings must be compensable in order to satisfy the dictates of the fifth and fourteenth amendments to the United States Constitution.\textsuperscript{57} In reaching the temporary takings question, the Court specifically refused to address whether the church had been denied all use of the campground by the interim ordinance. If the majority had considered the merits of the case, it would have been difficult to find that the flood protection ordinance was an improper use of the police power or a taking.\textsuperscript{58} Instead, the Court simply declared that the California Supreme Court's rule against the doctrine of inverse condemnation "truncated the rule" established in Pennsylvania Coal.\textsuperscript{59}

While the Court tried to limit the holding of First Lutheran Church to the facts presented—that is, a situation where an ordinance denied a party all use of its property—it has clearly opened the door to increased litigation in an area already fraught with disputes. In stating that it was


\textsuperscript{56} In Agins v. Tiburon, the California Supreme Court explicitly disapproved of the doctrine of inverse condemnation as a matter of public policy. "[T]he need for preserving a degree of freedom in the land-use planning function, and the inhibiting financial force which inheres in the inverse condemnation remedy, persuade us that on balance mandamus or declaratory relief rather than inverse condemnation is the appropriate relief under the circumstances." Agins v. Tiburon, 24 Cal. 3d, at 276-277, 598 P.2d at 31, 157 Cal. Rptr. at 378. Under this scenario, if a county decided that it wanted to maintain the flood protection zone's development prohibition after the regulation had been declared a taking, then at that point eminent domain would have to be exercised and compensation paid.


\textsuperscript{59} First Lutheran Church, 482 U.S. at 316-17; Pumpelly, 80 U.S. (13 Wall.) at 177-78.
not dealing with the issues arising from "normal delays in obtaining building permits, changes in zoning ordinances, variances, and the like", the Court has left in question whether abnormal delays, however they may be defined, would be subject to a temporary takings analysis.  

First Lutheran Church may impair the ability of government officials to engage in careful deliberations over the long-term consequences of competing land use plans. Since the Supreme Court decides takings questions on a case-by-case basis, land use regulators must now ascertain the unascertainable: whether their control of private property will result in a future Supreme Court decision finding that a temporary taking has occurred. This new liability may have a chilling effect upon informed decision-making by agencies in charge of implementing coastal zone management programs.

IV. Takings Jurisprudence Applied: Preserving Public Access Through Coastal Zone Management

Throughout the 1950s and 1960s, as development, industrialization, and recreation along the nation’s coasts intensified, coastal zone management became an imperative. Congress responded to the conflicting demands being made upon coastal resources by enacting the Coastal Zone Management Act of 1972 (CZMA). The CZMA declared "that it is the national policy... to preserve, protect, develop, and where possible, to restore or enhance, the resources of the Nation’s coastal zone for this and succeeding generations." It was the objective of the CZMA to achieve

60. First Lutheran Church, 482 U.S. at 321. Exec. Order No. 12,630, § 3(d), 53 Fed. Reg. 8859, 8861, discussed infra, has recognized this potential liability and has cautioned agencies and departments that:

While normal governmental processes do not ordinarily effect takings, undue delays in decision-making [which interfere with private property use] carry a risk of being held to be takings. Additionally, a delay in processing may increase significantly the size of compensation due if a taking is later found to have occurred.

61. An example of this is a directive contained in Exec. Order No. 12,630, § 4(c), which states as follows:

When a proposed action involves a permitting process or any other decision-making process that will interfere with, or otherwise prohibit, the use of private property pending the completion of the process, the duration of the process shall be kept to the minimum necessary. 53 Fed. Reg. at 8861.


64. 16 U.S.C. § 1452(1).
these broad policy goals by providing financial and technical assistance to the states, who would implement their own coastal management programs (CMPs). The provisions of the CZMA are currently administered by the Office of Ocean and Coastal Resource Management (OCRM) in the National Oceanic and Atmospheric Administration (NOAA).

The voters of California also enacted coastal zone management legislation in 1972, by passing the Coastal Initiative of 1972 or Proposition 20. The Coastal Initiative established a state Coastal Zone Conservation Commission with six regional coastal commissions. The commissions prepared CMPs for submission to the state legislature and were given temporary authority to issue development permits. Proposition 20 and the California Coastal Zone Conservation Commission were replaced by the California Coastal Act of 1976 (Coastal Act) and the California Coastal Commission (Commission).

Since its inception, the Commission has been fairly aggressive in its implementation of the public access requirements of section 30212 of the Coastal Act and has encountered serious criticism from conservative

---

65. 16 U.S.C. § 1455. In 1976, the CZMA was amended by adding section 305(b)(7), codified at 16 U.S.C. § 1454(b)(7), in order to emphasize the already existing implicit requirement that state CMPs protect public access to beaches. See LEGISLATIVE HISTORY OF THE CZMA, at 759. Section 305(b)(7) read as follows:

(b) The management program for each coastal state shall include each of the following requirements: . . .

(7) A definition of the term 'beach' and a planning process for the protection of, and access to, public beaches and other public coastal areas of environmental, recreational, historical, esthetic, ecological, or cultural value. LEGISLATIVE HISTORY OF THE CZMA, at 583-84.


68. CAL PUB. RES. CODE § 27001(d) quoted in M. MOGULOF, SAVING THE COAST: CALIFORNIA'S EXPERIMENT IN INTERGOVERNMENTAL LAND USE CONTROL 116 (1975) [hereinafter SAVING THE COAST].

69. CAL. PUB. RES. CODE §§ 27001(b) & 27300 quoted in SAVING THE COAST, at 116, 123.

70. CAL. PUB. RES. CODE §§ 30000-30900 (West 1986). Under CAL. PUB. RES. CODE §§ 30500-30504, the regional commissions were eliminated. They are being replaced by local coastal programs (LCPs) certified by the California Coastal Commission.

71. See Tabor, The California Coastal Commission and Regulatory Takings, 17 PAC. L.J. 863,
commentators. In *Nollan v. California Coastal Commission*, the United States Supreme Court attempted to answer the cries of the critics by applying a takings analysis to some of the Commission's practices.

In *Nollan*, the Court placed new limitations on the power of land use regulators to require developer exactions. These exactions are conditions which developers must satisfy in order to gain approval for their construction projects from planning authorities. *Nollan* set forth new, stringent nexus requirements for conditions placed upon the granting of permits, thereby restricting the use of exactions. If permit conditions do not meet *Nollan*'s nexus requirements, the Court will declare them a taking. Permit conditions have been used by coastal zone management programs to ensure that development in the coastal zone does not violate the public interest. Therefore, the *Nollan* decision may adversely affect programs which protect public rights in the coastal zone.

A. *Nollan v. California Coastal Commission*

The Nollans owned beachfront property situated between two public beach areas in Ventura County, California. They originally leased the property and a 504 square foot, single story bungalow which was located on the parcel. After years of being rented to other parties, the bungalow's condition had deteriorated, and the Nollans' purchase option to their lease required the construction of a new bungalow on the prem-
In order to build the proposed new structure, the Nollans had to apply for a development permit from the California Coastal Commission. The Commission granted the permit for the intensified development of the lot, on the condition that the Nollans record a public access easement across their beach between their eight-foot seawall and the historic mean high tide line.

The Nollans subsequently filed for a writ of administrative mandamus in the Ventura County Superior Court to have the access condition invalidated. The trial court remanded the case for a full evidentiary hearing, on the ground that the condition for the development permit could not be required by the Coastal Commission unless there was evidence that the proposed construction would "have a direct adverse impact on public access to the beach." After the hearing, the Commission found that such direct adverse impact would occur in the form of reduced visual and psychological access to the foreshore of the beach to which the public had access rights.

According to the Commission, the reductions in visual and psychological access would result from the cumulative effect of the Nollans' development plan, when considered in conjunction with other neighboring development activities. The Commission concluded that the Nollans' new home would decrease the public's ability to see the coastline by "contributing to the development of 'a wall of residential structures' that would prevent the public 'psychologically... from realizing a stretch of

---

77. 483 U.S. at 827, 828.
78. This was pursuant to CAL. PUB. RES. CODE §§ 30106, 30212, and 30600 (West 1986) cited in Nollan v. California Coastal Comm'n., 483 U.S. 825, 828 (1987).
79. The seawall separated the beach from the rest of the property which would undergo development. Id. at 827.
80. Id. at 828.
81. Id.
82. The public right of access to navigable waters has historically included the right of access to areas between the high and low water marks of tidelands, commonly referred to as the foreshore. For an excellent history of the development of the public's right to the foreshore in American jurisprudence see Deveney, *Title, Jus Publicum, and the Public Trust: An Historical Analysis*, 1 SEA GRANT L.J. 13, 41-79 (1976).
83. The Nollans' proposed development plan would replace the one-story bungalow of approximately 500 square feet with a two-story home covering approximately 2,400 feet. Nollan v. California Coastal Comm'n., 483 U.S. 825, 856 (1987) (Brennan, J., dissenting). While these figures were in dispute, it suffices to say that the Nollans wanted to expand the development of their land by over two times the previous square footage. The Nollans' brief claimed that "[t]he true lot coverage by the new house and garage is 1,236 square feet, not 2,464 square feet." See Brief of Appellants at 9, n.9, Nollan v. California Coastal Commission 483 U.S. 825 (No. 86-133) (1987).
coastline exists nearby that they have every right to visit.'"

The Nollans sought another writ of administrative mandamus from the Superior Court to contest the factual findings of the Commission in the evidentiary hearing. This writ was granted, and the permit condition eliminated, on the ground that there was insufficient factual basis in the record to determine that the Nollans' new development plan would burden public access to the coastline. The Commission appealed to the California Court of Appeal which reversed the Superior Court. In its decision, the California Court of Appeal interpreted section 30212 (a) and (b)(2) of the Coastal Act to require a building permit to be conditioned upon a provision of public access. The Court of Appeal also dismissed the Nollans' taking claim, because the building permit condition merely diminished the value of the Nollans' property and did not constitute a deprivation of all "reasonable use." The California Supreme Court denied review, and the Nollans appealed to the Supreme Court of the United States.

The Supreme Court found that the building permit condition violated the takings clause, incorporated against the States by the fourteenth

84. Nollan, 483 U.S. at 828, 829 (quoting the California Coastal Commission's factual findings from the evidentiary hearing conducted on remand from the Ventura County Superior Court).

The public's right of access is conferred by CAL. CONST., art. X, § 4 (West 1989) which provides:

No individual, partnership, or corporation, claiming or possessing the frontage or tidal lands of a harbor, bay, inlet, estuary, or other navigable water in this State, shall be permitted to exclude the right of way to such water whenever it is required for any public purpose, nor to destroy or obstruct the free navigation of such water; and the Legislature shall enact such laws as will give the most liberal construction to this provision, so that access to the navigable waters of this State shall be always attainable for the people thereof. (emphasis added).

85. Nollan, 483 U.S. at 829.

86. While the case was on appeal, the Nollans went ahead with their development plan without providing notice to the Commission. Id. at 829, 830.

87. 177 Cal. App. 3d 719, 223 Cal. Rptr. 28 (2d Dist. 1986). Section 30212 of the Code provides, in relevant part, as follows:

(a) Public access from the nearest public roadway to the shoreline and along the coast shall be provided in new development projects except where . . . (2) adequate access exists nearby . . .

(b) For purposes of this section, 'new development' does not include: . . . (2) The demolition and reconstruction of a single-family residence; provided, that the reconstructed residence shall not exceed either the floor area, height or bulk, of the former structure by more than 10 percent . . . CAL. PUB. RES. CODE § 30212.

It appears that the California Court of Appeal misinterpreted the plain meaning of the statute in this instance, since public access to the shoreline is to be provided "from the nearest public roadway," not laterally across a beach.

88. 177 Cal. App. 3d at 723.
amendment, and reversed the California Court of Appeal. In a 5-4 opinion by Justice Scalia, the Court reasoned that the condition as applied to the Nollans was a taking for two reasons. First, the Court declared that a public access easement across the Nollans' beach would result in a "permanent physical occupation" of the property, and that this was a taking under Loretto v. Teleprompter Manhattan CATV Corp. Second, the Court found that the condition did not "substantially advance legitimate state interests," as required by Agins v. Tiburon.

While the Court was willing to assume, for the sake of argument, that preserving the public's view of the beach and surmounting the psychological barrier to using the beach were legitimate state interests, it nevertheless imposed severe nexus requirements on the development permit condition. The Court viewed the permit condition as unconstitutional because there was a lack of sufficient nexus between the lateral access easement and the legitimate state interest in preservation of the coastal view and psychological access.

The Court reasoned that, hypothetically, the Commission could place height or width restrictions on the proposed construction or require that "the Nollans provide a viewing spot on their property for passersby with whose sighting of the ocean their new house would

---

90. 458 U.S. 419 (1982). The Court stated:

We think a 'permanent physical occupation' has occurred, for purposes of [the rule in Loretto], where individuals are given a permanent and continuous right to pass to and fro, so that the real property may continuously be traversed, even though no particular individual is permitted to station himself permanently upon the premises.

Nollan, 483 U.S. at 832.

The Court in Loretto, however, took a contrary position with respect to the passage of persons to and fro across a property. It quoted St. Louis v. Western Union Telegraph Co., 148 U.S. 92, 98-99, 101-102 (1893), which established that the passage of foot and vehicle traffic across city streets did not constitute a permanent physical occupation of the city's property, whereas the installation of telegraph poles on the streets did.

The use which the [company] makes of the streets is an exclusive and permanent one, and not one temporary, shifting and in common with the general public. The ordinary traveler, whether on foot or in a vehicle, passes to and fro along the streets, and his use and occupation thereof are temporary and shifting. The space he occupies one moment he abandons the next to be occupied by any other traveler. . . .

Loretto, 458 U.S. at 428-29 (quoting St. Louis v. Western Union Telegraph Co., 148 U.S. at 98)(emphasis added).

It appears that the Court tried to pigeon-hole Nollan into the category of a permanent physical occupation, but decided to confront the balancing test anyway. This was probably due to some insecurity about whether a right-of-way easement across the Nollans' beach, which did not permit any member of the public to station themselves upon the premises, could reasonably be classified as a permanent physical occupation.

These were seen as permissible exercises of the police power because the means employed were directly related to the advancement of a legitimate state interest; whereas, the Court perceived the condition placed upon the Nollans as having nothing to do with the legitimate interest put forth to justify it.

The Court acknowledged, however, that its hypothetical coastal viewing spot condition would create "a permanent grant of continuous access to the property." This grant would be as much a permanent physical occupation as the Commission's condition, which the Court claimed violated Loretto. The contradiction in the Court's analysis demonstrates that the Court has yet to develop a precise definition as to what will constitute a physical occupation of property. The term "physical occupation" does little to clarify what in fact is a per se taking, and the Court's use of this term in the Nollan case showed that a physical occupation can mean almost anything.

92. Nollan, 483 U.S. at 836.
93. Id.
94. Cf, United States v. Causby, 328 U.S. 256 (1946) and Griggs v. Allegheny County, 369 U.S. 84 (1962) (both of which held that the noise and vibrations from frequent overflights of aircraft constituted a taking, because they completely destroyed the use of the properties for farming and residential purposes).
95. The growth of the Court's physical occupation classification may encourage local governments to increase their use of impact fees. For example, instead of requiring a public dedication of land by a developer which might constitute a physical occupation, a local government could exact impact fees for the construction of parks and purchase the land for the parks from the developer through eminent domain. The result would be the same in both instances, except that in the latter, the Agins balancing test would be the most important consideration. Cf. Builders Ass'n v. Guilderland, 141 AD2d 293, 534 N.Y.S.2d 791 (3d Dept. 1988) (invalidating a transportation impact fee law because the law was not reasonably related to the promotion of public safety, but rather a device to raise revenue).
96. See Penn Central, and Loretto as examples of the doctrine in use. While the Court did not find that a physical occupation or a taking had occurred in Penn Central, there is theoretical debate over whether the Transferable Development Rights (TDRs) given to Penn Central, prevented a takings problem from actually occurring or were compensation for a taking that had occurred. See Penn Central Transp. Co. v. City of New York, 438 U.S. 104, 137 (1978); Marcus, The Grand Slam Grand Central Terminal Decision: A Euclid for Landmarks, Favorable Notice for TDR and a Resolution of the Regulatory Taking Impasse, 7 Ecology L.Q. 731, 747 (1979); Malone, The Future of Transferable Development Rights in the Supreme Court, 73 Kentucky L.J. 759, 783-784 (1985).

The Court could easily have found that a physical occupation had occurred in Penn Central if it decided that the regulation had gone too far, since it could be argued that denying the owner the use of the airspace above its property constituted a physical occupation. The central point of the argument would, of course, have to be that at least some portion of the airspace had been occupied. But this would not be such an unreasonable assumption since this was the practical effect of the regulation. See, e.g., United States v. Causby, 328 U.S. 256 (1946); Griggs v. Allegheny County, 369 U.S. 84 (1962).
97. See, e.g., Fresh Pond Shopping Center, Inc. v. Callahan, 464 U.S. 875 (1983) (Rehnquist, J., dissenting from dismissal of appeal for want of substantial federal question) arguing that the applica-
B. Public Rights are Fungible Public Commodities

The Nollans could have built a new home without a permit from the Coastal Commission if the new structure did not exceed the size of the previous home by more than ten percent. Therefore, the Nollans could have rejected the Commission's public access easement by building a home approximately the same size as their old bungalow.

According to the Supreme Court, the Coastal Commission could have imposed height and width restrictions upon the Nollans' proposed construction of a larger house or even required an access site on their property, if preserving the public's view of the coast was a legitimate state objective. In such a scenario, the Commission's power to impose building permit conditions would have had a profound economic impact upon the value of the Nollans' property. Therefore, the Commission's ability to impose development restrictions or requirements would have been a public commodity worth a great deal to the Nollans.

Since the value of the hypothetical restrictions could have been worth more than the public access easement, the Nollans might have decided that they would benefit by making a trade if they wanted a larger house. Of course, due to intangibles which cannot be measured in economic terms, it would have been equally plausible for the Nollans to prefer to exclude people from their beach by accepting other limitations. In that instance, they could have accepted regulations such as height and width restrictions or decided to build a similar sized house, but the choice would have been theirs to make, not the Supreme Court's.⁹⁸

The Court was concerned that conditioned building permits have sometimes been used by planning authorities in an unjustifiably coercive manner. Yet, the Court failed to assess whether or not the Commission would substantially advance a legitimate state objective by denying a permit outright due to reductions in visual access. Therefore, the Court missed a crucial step in its analysis, because a fair exchange of rights can only exist if both parties actually have rights to exchange.

The Court should not have applied a rational nexus test to the substantial advancement of a legitimate state objective and to an exchange of public and private rights. Unreasonable building permit conditions can

⁹⁸ Of course, a determination that the public has a right to view the coast, and that this right should be protected via zoning restrictions instead of by alternative means, would necessarily be a political decision. See Schlag, An Appreciative Comment on Coase's The Problem of Social Cost: A View From the Left, 1986 Wis. L. REV. 919, 923-925 (1986).
be safeguarded against by determining whether public rights actually exist in each particular situation. In cases such as Nollan, construction permit denials by the Commission must substantially advance the goal of protecting visual access, and that goal must be a legitimate state interest or public right, for a later exchange of rights to be possible. If these conditions are not satisfied, then a rational exchange of rights cannot take place, since the Commission cannot exchange what it does not possess.\textsuperscript{99}

C. \textit{Cumulative effects}

Assessments of whether a public right has been infringed can be inaccurate if the cumulative effects of development have not been considered. For example, if the impact of the Nollans' development was not considered in conjunction with the impact of their neighbors' development, then denying the Nollans a permit might not appear to substantially advance protection of visual access to the coast.\textsuperscript{100} Nevertheless, individual actions, which by themselves might not impose upon public rights, can significantly harm public rights through their cumulative effects.\textsuperscript{101}

It is important to recognize that the Nollans' parcel was in an area whose scenic beauty could easily have been destroyed by intensive development, and that scenic views are valuable to the public. By virtue of the parcel's location in the coastal zone, the externalities\textsuperscript{102} arising from the Nollans' construction proposal were greater than those of "ordinary" land-owners seeking development permits and, as such, should have been

\textsuperscript{99} The assumption that the public has a right of visual access to the beach is not undisputed. However, there appears to be significant and widespread recognition that the public does have rights in preservation of natural resources (such as scenic areas) or open spaces. The Euclid case and New York State's Adirondack Park are examples which support the assumption that the public has a right in preserving scenic areas and open spaces. See Horizon Adirondack Corp. v. State of New York, 88 Misc.2d 619, 388 N.Y.S.2d 235 (Ct.Cl. 1976); People v. Goodman, 31 N.Y.2d 262, 266, 338 N.Y.S.2d 97, 290 N.E.2d 139 (1972); Wulfsohn v. Burden, 241 N.Y. 288, 298, 150 N.E. 120, 43 A.L.R. 651 (1925); Just v. Marinette County, 56 Wis.2d 7, 17, 201 N.W.2d 761, 768 (1972). Cf. State v. Johnson, 265 A.2d 711, 716, 46 A.L.R.3d 1414 (Me. 1970).


\textsuperscript{101} Professor Sax has referred to these as "spillover effects." See Sax, \textit{Takings, Private Property and Public Rights}, 81 YALE L.J. 149, 161 (1971).

\textsuperscript{102} For the purposes of this article, an externality is land use which deprives someone, without their consent, of an amenity to which they are entitled. This is based upon the definition of externalities adopted in a book by James E. Meade, see \textit{Meade, The Theory of Economic Externalities: The Control of Environmental Pollution and Similar Social Costs} 15 (1979). Of course, whether someone has been deprived of an amenity is necessarily a subjective determination, since what is an amenity to one person may be an "eyesore" to another.
treated differently.103

California's ten percent limit on unapproved development was an effort to protect a vulnerable coastal zone from the cumulative effects of development.104 After Nollan, this governmental interest continues to be valid. Furthermore, the Court did not nullify the requirement that the Commission approve new development exceeding ten percent of an original structure.

It would be logical for the Court to acknowledge that, as with the large-scale development of a single tract, substantial environmental degradation can arise from the cumulative impact of many small individual development projects. Land use restrictions employed to prevent cumulative impacts adverse to public rights should be considered valid in their application to groups of individuals as a whole, in the same manner as they would apply to subdivision developers. To draw a distinction between the two, emphasizes form rather than substance.105

D. A Lesson From Aquaculture Leasing

Proposed salmon aquaculture projects in Maine have demonstrated that aesthetic values should be considered more seriously in the Court's future takings jurisprudence. In Maine, private property owners along the coast have been opposed to salmon aquaculture out of fear that the projects will reduce the scenic splendor of the coast and their property values.106 Even though Maine's Site Location of Development Act107 may require that visual impact be considered for large aquaculture projects,108 private property owners have remained concerned about the possible detrimental effects of state aquaculture leasing proposals. Thus, in Maine, aquaculture leasing has raised a problem exactly opposite to

103. This is why the Coastal Act was passed in the first place. See Rieser, Managing the Cumulative Effects of Coastal Land Development: Can Maine Law Meet the Challenge?, 39 ME. L. REV. 321, 372-385 (1987) for a discussion of the California Environmental Quality Act and the California Coastal Act.

104. 15 C.F.R. § 923.11(c)(2) (1987) instructs states to consider the cumulative impacts of residential and commercial development in identifying "those land and water uses that will be subject to the terms of the management program." 15 C.F.R. § 923.11(b)(1) (1987).


106. Burrowes, How Are You Going to Get Them Down to the Farm? Legal Obstacles to Salmon Farming in Maine, 8 TERRITORIAL SEA—LEGAL DEVELOPMENTS IN THE MANAGEMENT OF OCEAN AND COASTAL RESOURCES 1, 9 (1988)[hereinafter TERRITORIAL SEA].

107. ME. REV. STAT. ANN. tit.38, § 484(3) cited in TERRITORIAL SEA, at 9 n.61.

108. TERRITORIAL SEA, at 9 n.61. In Washington State, under the state's CMP, San Juan County has drafted provisions in its "Master Plan" which recognize and regulate the potential visual impacts of salmon aquaculture. Id. at 10, n.66-73 with accompanying text.
the one presented in the Nollan case; there is the spectre of public land use infringing on the visual rights of private property owners. The Maine aquaculture leasing experience demonstrates that scenic rights are valuable both to the public and to private property owners, alike. Therefore, the Supreme Court's failure to affirm public scenic rights in its vindication of private property rights in Nollan may become a double-edged ideological sword.

E. Public Rights and a "Rational" Nexus

Even though the Nollan Court implicitly acknowledged the public's right to view the foreshore in its analysis, the practical effect of the decision was to deny the existence of public rights.109 Perhaps Justice Scalia was disturbed that the public would have received more than just another view under the Commission's condition. Of course, the Nollans' would also have gained according to the Court's reasoning, since it was hypothetically assumed by the Court that the Commission could have denied the permit altogether under the police power.110 In other words, a more optimal equilibrium of coastal rights could have been achieved.

When a developer's actions impose costs or externalities upon local governments or the public at large, a rational-nexus requirement should concern itself with making certain that a developer pays only for the problems caused by the development. Therefore, the issue, which is two-fold, is actually one of making certain that public rights are genuinely being infringed, and that the correct price is paid by the developer as compensation.111

The essential problem with categorizing the Commission's action

109. The Court implicitly recognized the public's right to view the foreshore in the following hypothetical:

The Commission argues that a permit condition that serves the same legitimate police-power purpose as a refusal to issue the permit should not be found to be a taking if the refusal to issue the permit would not constitute a taking. We agree. Thus, if the Commission attached to the permit some condition that would have protected the public's ability to see the beach notwithstanding construction of the new house—for example, a height limitation, a width restriction, or a ban on fences—so long as the Commission could have exercised its police power (as we have assumed it could) to forbid construction of the house altogether, imposition of the condition would also be constitutional.


The Court's assumption that the Commission could have prohibited the construction of the proposed house was logical, since such a prohibition would not have denied the Nollans economically viable use of their property; the Nollans could have constructed a house that was up to ten percent larger than their previous one without Commission approval.

110. Id.

111. Query, how would the Court analyze the denial of a permit followed one or perhaps five
concerning the Nollans as a taking was that the state did not appropriate the easement, nor did the state force the Nollans to give the easement to the state. The logic of the Court's holding that there was a taking was, therefore, premised upon an assumption that the Commission did not have the right to deny the Nollans a permit. Under its rational-nexus test, the Court must have presumed that denying the Nollans a permit to construct a two-story structure would not (rationally) substantially advance a legitimate state interest. In fact, the legitimate state interest, protecting visual access, would be substantially and directly advanced by denying the Nollans a permit to expand their structure beyond ten percent of its previous size. The Court's reasoning in Nollan forecloses the possibility that a logical and reasonable exchange of public and private property rights may take place, unless there is a rational-nexus between the exchange and the substantial advancement of the legitimate state interest. As a consequence, economically inferior transactions are likely to occur to the detriment of private and public interests.

Permit denials should be required to substantially advance a particular legitimate state interest, such as preserving visual access; however, a rational-nexus requirement should not apply to an actual exchange of public and private rights. While the Court claimed that the state sought to take an easement for public benefit, a more plausible analysis indicates that the state sought to receive the easement as compensation for externalities associated with a private benefit. The Court should acknowledge that public rights are as transferable as development rights (TDRs).

If Transferable Public Rights (TPRs) were recognized as legitimate by the Court, a state could allow externalities to be imposed upon the public, provided adequate compensation was paid. In future situations years later by a negotiated exchange of rights? Should the Court's finding of "extortion" really be dependent upon the juxtaposition in time?

112. This was true even though the Court assumed, for the sake of argument, that the Commission had the right to deny the permit.

113. CAL. PUB. RES. CODE § 30212 (West 1986) supra note 87. See also Comment, Public Beach Access Exactions: Extending the Public Trust Doctrine to Vindicate Public Rights, 28 UCLA L. REV. 1049, 1086 (1981) (by Jonathan M. Hoff) (arguing that traditional exaction analyses should not apply to beach access exactions, because "[t]he underlying objective sought to be achieved is the vindication of a latent public right of access to, and use of, the tidelands across the uplands.").

114. The logic of Transferable Public Rights is supported by Justice Scalia's observation in Nollan:

[T]he Commission's assumed power to forbid construction of the house in order to protect the public's view of the beach must surely include the power to condition construction upon some concession by the owner, even a concession of property rights, that serves the same end. If a prohibition designed to accomplish that purpose would be a legitimate exercise of the police power rather than a taking, it would be strange to con-
similar to the Nollans' case, if courts refuse to consider TPRs, land use regulators will have no choice but to veto proposed development, in order to protect the public's property rights in the coast's scenic beauty.\textsuperscript{115} This trend could result in increased takings litigation. TPRs would enable coastal zone management authorities to resolve the conflicting goals of the CZMA; namely, TPRs would enable them to encourage development and conservation of coastal resources at the same time.

F. Transferable Public Rights

Transferable Public Rights (TPRs) can protect public rights, promote optimal use of natural resources, and place practical limits on the police power. If a permit condition is imposed when an externality does not exist (that is to say, the externality is a bureaucratic fabrication) or the required compensation to the public exceeds the harm caused by the private benefit, then a taking has occurred. Of course, this approach may ultimately require the Court to define public and private property rights more specifically and make value judgments about competing rights and uses.\textsuperscript{116} Although imperfect, it would at least provide an intellectually honest approach to the taking issue.

The Court's rational-nexus test may guard somewhat against fabricated harms to the public, and as a consequence, strengthen the "substantially advance a legitimate government interest" prong of the Agins-Penn Central test. It does not, however, protect landowners from being required to pay compensation to the public which exceeds the

\textsuperscript{115} See \textit{SAVING THE COAST}, supra note 68, at 13 (coastal commissions engage in negotiations over zoning restrictions and development conditions in order to escape the "dilemma of approving nothing or everything. . . .")

\textsuperscript{116} See, e.g., \textit{Miller v. Schoene}, 276 U.S. 272, 279 (1928), where the Court held that it was a permissible exercise of the police power for the state to order the destruction of privately-owned cedar trees, to prevent the transmission of cedar rust to neighboring apple orchards. The Court declared "[w]hen forced to such a choice the state does not exceed its constitutional powers by deciding upon the destruction of one class of property in order to save another which, in the judgment of the legislature, is of greater value to the public." \textit{Id.} at 279. Cf. \textit{Department of Agric. & Consumer Serv. v. Mid Florida Growers, Inc.}, 521 So.2d 101 (Fla. 1988) (taking occurred when state destroyed healthy trees), \textit{cert. denied}, 109 S.Ct. 180 (1989). As in \textit{Miller v. Schoene}, since an infinite number of optimal equilibriums of property rights are possible with exchanges utilizing TPRs, deciding which equilibrium to adopt necessarily requires the use of normative values.
harm caused by the private benefit. As in the Nollans' case, it would be difficult to argue that they were denied "economically viable" use of their land by the Commission's condition. Yet, the Commission's condition might, in such a circumstance, be excessive compensation to the public.

The Court's analysis overcompensates for a weak economic prong of the test by making planning authorities pass through the eye of a needle in order to substantially advance a legitimate government interest. The application of a takings test, which does not contemplate an exchange of rights, is bound to yield inferior results in a situation where such an exchange is the central focus of the controversy.

An approach which utilizes TPRs strengthens both prongs of the Penn Central-Agins analysis without overcompensating on either side. First, the government must demonstrate that an externality has or will be caused by the private benefit. Second, TPRs afford landowners greater protection than the "economically viable use" prong of the test by requiring that the compensation to the public be commensurate with the harm caused by the private benefit. Individuals such as the Nollans, who need not fear reprisals by planning authorities on future development projects, can enforce the second part of the test themselves by turning down an exchange. Developers, who might be coerced by the potential for adverse action by planning authorities on future projects, can rely on the courts to determine if an exchange was "rational." Courts have proven extremely effective in assessing harm in economic terms.

V. EXECUTIVE ORDER 12,630

During his last spring in the White House, President Reagan issued Executive Order 12,630 in order to acquaint federal departments and agencies with the Supreme Court's new positions on takings and governmental regulation. Under the Executive Order, executive departments

---

117. For examples of coercive techniques which have been used by planning authorities against developers, see Johnston, Constitutionality of Subdivision Control Exactions: The Quest For a Rationale, 52 CORNELL L.Q. 871, 880-881 (1967).
119. Several policy directives of the Order specifically articulate the Supreme Court's recent positions on takings. For example, Section 3(b) advises that "[A]ctions undertaken by governmental officials that result in a physical invasion or occupancy of private property, and regulations imposed on private property that substantially affect its value or use, may constitute a taking of property." 53 Fed. Reg. at 8860-8861. Section 3(d) of the Order addresses the temporary takings issue in First Lutheran Church as follows:
While normal governmental processes do not ordinarily effect takings, undue delays in decision-making [which interfere with private property use] carry a risk of being held to
and agencies must utilize "Guidelines for the Evaluation of Risk and Avoidance of Unanticipated Takings," which are published by the Attorney General, when "proposing, planning, and implementing" policies with "takings implications." The Order specifies that regulations which require licensing, permitting, dedications, exactions, or other limitations on private property, are policies with "takings implications."

In order to comply with Executive Order 12,630, federal departments and agencies must designate a takings officer who will ensure compliance. Departments and agencies must also "identify the takings implications of proposed regulatory actions and address the merits of those actions in light of the identified takings implications, if any, in all required submissions made to the Office of Management and Budget." Under Executive Order 12,291, the Office of Management and Budget (OMB) has reviewed the merits of regulation using cost-benefit analyses that federal agencies and departments have submitted to OMB for regulatory approval. Significant regulatory battles may occur between fed-


Section 4(c) attempts to minimize temporary takings liability for Executive departments and agencies by requiring that:

When a proposed action involves a permitting process or any other decision-making process that will interfere with, or otherwise prohibit, the use of private property pending the completion of the process, the duration of the process shall be kept to the minimum necessary. Id.

Of course, Federal departments and agencies may wonder: the "minimum necessary" for what? Section 4(a)(1)&(2) addresses the nexus issue raised in Nollan, by stating that:

Executive departments and agencies shall adhere, to the extent permitted by law, to the following criteria when implementing policies that have takings implications:

(a) When an Executive department or agency requires a private party to obtain a permit in order to undertake a specific use of, or action with respect to, private property, any conditions imposed on the granting of a permit shall:

(1) Serve the same purpose that would have been served by a prohibition of the use or action; and

(2) Substantially advance that purpose.

120. § 1 (c), Id. at 8859.

121. § 2, Id. at 8859-60.

122. § 5(a), Id. at 8862.


125. See Sagoff, At the Shrine of Our Lady of Fatima or Why Political Questions Are Not All Economic, 23 ARIZ. L. REV. 1283, 1288-89, n.22 (1981) which argues in part that "[t]o the extent that economic factors are permissible considerations under enabling statutes, agencies should engage in cost-effectiveness analysis, which aids in determining the least costly means to designated goals, rather than cost-benefit analysis, which improperly determines regulatory ends as well as means." (citation omitted).
eral regulators and the OMB if the requirements of Executive Order 12,630 are strictly enforced with a controversial measure like Executive Order 12,291, mandating the use of cost-benefit analysis to evaluate regulations.

VI. THE SUPREME COURT'S IMAGE IN THE FUN-HOUSE MIRROR

The cases which have been decided in the wake of the Supreme Court's recent takings decisions have left regulators unable to anticipate whether or not their actions will constitute takings of private property. Presently, great uncertainty exists in takings jurisprudence, and the results of several recent lower court cases must have surprised the Supreme Court.

A. The Ninth Circuit

In *Lai v. City and County of Honolulu*, public visual rights once again clashed with a proposed development project. The Lais owned a leasehold interest in a 30,000 square foot lot located near the scenic Punchbowl Crater in Honolulu. In 1974, they planned to build a condominium apartment building within the then existing 350-foot height limitation for which the City of Honolulu's zoning ordinance provided. However, in 1975, the City enacted a new zoning ordinance which restricted construction higher than 25 feet above ground level. "The City's expressed purpose in enacting the ordinance was to establish a scenic easement to protect one view of the Punchbowl Crater from the H-1 Freeway." The Lais filed suit in federal district court after the City Council denied the Lais' developer's application for a "Certificate of Appropriateness". The Ninth Circuit eventually held that the taking claim was not ripe for review because the plaintiffs had not sought a variance.

However, before the Ninth Circuit dismissed the case, it engaged in a takings analysis. In dicta, the court declared that the trial revealed that "a scenic easement had diminished the value of the plaintiffs' prop-

126. 841 F.2d 301 (9th Cir. 1988), cert. denied, 109 S.Ct. 560 (1988).
128. *Id.*
129. *Id.*
130. *Id.*
131. *Lai*, 841 F.2d at 302. The district court dismissed the action and the Ninth Circuit reversed and remanded the case. After the district court entered a judgment for the developer, another appeal was made to the Ninth Circuit. 841 F.2d at 301.
Yet, the court observed that the Supreme Court in "its decisions sustaining land-use regulations that 'are reasonably related to the promotion of the general welfare, uniformly reject[s] the proposition that diminution in property value, standing alone, can establish a taking,'" The court then concluded its takings analysis with a remarkable reading of Nollan, which declared that "the Supreme Court expressly stated that a height limitation preserving the public's scenic view is not a 'taking'." So much for the "Supreme" Court.

Another Ninth Circuit case also reveals the reluctance of some lower courts to apply Nollan's standards. In Citizen's Association of Portland v. International Raceways, the plaintiffs alleged, among other theories, that the noise from a city-owned racetrack was so great that it constituted a taking of their property under the fifth and fourteenth amendments. Apparently, the association was unsuccessful in convincing the city to enforce a noise ordinance which would have prohibited racing in the area. After the association filed suit in federal district court, the city granted the raceway a variance to the noise ordinance. The district court dismissed the case for failure to state a claim.

On appeal, the Ninth Circuit affirmed the dismissal and held that the members of the association failed to exhaust available state remedies. The court also declared that the members were not deprived of "economically viable use" of their property, and that any "diminution" in value which might have occurred was "rationally related to the governmental interest in the raceway." In a flashback to Munn v. Illinois, the court observed "[w]here, as here, the ordinance promotes a legitimate

132. Lai, 841 F.2d at 301, 302.
134. Lai, 841 F.2d at 303 (construing Nollan v. California Coastal Comm'n, 483 U.S. 825 (1987)).
135. 833 F.2d 760 (9th Cir. 1987).
137. Id.
138. Id.
139. Id.
governmental interest and is rationally related to that interest, any burden some property owners must bear is better left to be resolved by the democratic process."\(^{142}\)

B. The California Coastal Commission: Walking Tall

The Supreme Court’s decision in *Nollan* has not prevented the California Coastal Commission from placing conditions on building permits. In *Jonathan Club v. California Coastal Commission*,\(^{143}\) the Commission imposed a permit condition which required that the Jonathan Club issue a non-discrimination statement before its proposed project would be approved.\(^{144}\) Since the project was partially on a state-owned beach, the California Court of Appeal upheld the condition on the grounds that it was required by state and federal constitutional provisions on equal protection. The court reasoned that since the Jonathan Club was required to pay $40,000 per year under its lease with the state, there was sufficient state action to invoke state and federal equal protection guarantees.\(^{145}\)

Furthermore, the court concluded that the Commission had the authority to impose the condition under the California Coastal Act and the California Constitution’s beach access provisions.\(^{146}\) In its analysis of the Commission’s permit condition, the court argued that the language in *Nollan* supported the condition.\(^{147}\) The court distinguished *Nollan* to a certain extent by claiming that unlike the case it was deciding, the majority in *Nollan* had found “no rational connection between the expressed governmental purpose” and the “imposed condition.”\(^{148}\) The court declared the following:

Here, in contrast, there is a direct connection between the governmental purpose of maximizing public access to state beach lands and the condition

\(^{142}\) 833 F.2d at 762 (citation omitted).


\(^{144}\) The condition read as follows: “Prior to transmittal of a permit, the Jonathan Club shall deliver to the Executive Director a statement that the Club will not discriminate on the basis of race, sex or religion. The certification of membership policy shall remain in effect during the life of this project.” 197 Cal. App.3d at 885; 243 Cal. Rptr. at 171.

\(^{145}\) *Id.* at 175.

\(^{146}\) See CAL. CONST., art. X, § 4, CAL. PUB. RES. CODE §§ 30001.5(e) & 30210, and § 54091 of the CAL. GOV’T. CODE, cited at 243 Cal. Rptr. at 177.

\(^{147}\) The court quoted a passage from *Nollan* which stated that the Commission’s “assumed power to forbid construction of the house in order to protect the public’s view of the beach must surely include the power to condition construction upon some concession by the owner, even a concession of property rights, that serves the same end.” 243 Cal. Rptr. at 177-78 (quoting *Nollan*, 483 U.S. at 836). The Supreme Court’s statement also supports the logic of TPRs.

\(^{148}\) 197 Cal. App.3d 887; 243 Cal. Rptr. at 178.
which was imposed. Again, by precluding discrimination against minorities in the Club’s membership policies, the Commission maximized the possibility that all segments of the public will have access to the leased land.\textsuperscript{149}

The California Court of Appeal arrived at a strained but laudable decision. It indicates that, at times, some California courts are willing to give the \textit{Nollan} "nexus" requirements for permit conditions the most "liberal" interpretation possible, in all senses of the word.

VII. CONCLUSION

Executive Order 12,630 and several lower court decisions indicate that the Supreme Court has introduced great uncertainty into planning law and coastal zone management. As a result of the \textit{First Lutheran Church} decision, planners and coastal zone managers will now have to worry about temporary takings liability for their regulations, with little guidance from the Supreme Court and lower courts as to what will constitute such a taking.\textsuperscript{150}

Coastal zone management does not require a moratorium on coastal zone development; however, coastline conservation is also a significant imperative in Coastal Management Programs. Transferable Public Rights would allow development while protecting the public's rights in coastal areas. In \textit{Nollan}, the Coastal Commission sought to trade the public's right to view the tidelands for the Nollans' exclusionary right to the beach. The Court's opinion should have focused on whether the public had a right to view the coast. It makes sense to accord the public this right. Since the public has the right to use the tidelands\textsuperscript{151}, it certainly must have the right to see them. The beauty of the coastline should be seen, not only heard.

MICHAEL NEIDERBACH

\textsuperscript{149} Id.

\textsuperscript{150} To make matters worse, "local governments and state agencies must accept controversial decision-making roles in a decentralized [coastal zone management] system that does not sufficiently guide their decisions." D. MANDELKER, \textit{ENVIRONMENT AND EQUITY: A REGULATORY CHALLENGE} 148 (1981).