COMMENTS

Penn Central to *Palazzolo*: Regulatory Takings Decisions and Their Implications for the Future of Environmental Regulation

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The Fifth Amendment's guarantee that private property shall not be taken for a public use without just compensation was designed to bar

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> *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.*[1]

I. INTRODUCTION

A. The Takings Clause

The Fifth Amendment to the United States Constitution prohibits the federal government from taking private property for public use without just compensation.[2] This provision, known as the Takings Clause, has generated an enormous amount of controversy in an effort to interpret what types of government actions constitute a taking.[3] The lack of precise standards has generated much legal scholarship, case law, and political analysis.[4] Despite the uncertainty of the takings clause's scope, this provision nonetheless operates as a check on the government's police power to regulate property.[5]

The Fifth Amendment takings provision applies to individual states through the Fourteenth Amendment.[6] The courts automatically find a taking when the government makes a physical occupation of a private property, regardless of the severity of the occupation and the importance of the government interest, and compensation must be paid to the landowner.[7] However, if the state is merely regulating property in a manner consistent with its police power, no compensation is required.[8] In this circumstance, even if an individual's use of his property or its value has been substantially diminished, compensation need not be paid.[9] Thus, in order for a property owner to recover compensation, it becomes important to distinguish between a "taking" and a "regulation."

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1. Armstrong v. United States, 364 U.S. 40, 49 (1960).

2. U.S. CONST. amend. V. The clause reads, "[N]or shall private property be taken for public use, without just compensation."

3. *See generally* Palazzolo v. Rhode Island, 121 S. Ct. 2448 (2001); Dolan v. City of Tigard, 512 U.S. 374 (1994); Lucas v. S.C. Coastal Council, 505 U.S. 1003 (1992); Nollan v. Cal. Coastal Comm'n, 483 U.S. 825 (1987); Keystone Bituminous Coal Ass'n v. DeBenedictis, 480 U.S. 470 (1987); First English Evangelical Lutheran Church of Glendale v. County of L.A., 482 U.S. 304 (1984); Agins v. City of Tiburon, 447 U.S. 255 (1980); Penn Cent. Transp. Co. v. New York City, 438 U.S. 104, 137 (1978); Pa. Coal Co. v. Mahon, 260 U.S. 393 (1922).

4. *See, e.g.*, THOMAS J. MICELI & KATHLEEN SEGERSON, COMPENSATION FOR REGULATORY TAKINGS: AN ECONOMIC ANALYSIS WITH APPLICATION 3 (Nicholas Mercuro ed., 1996).

5. *See* Robert K. Best, *Regulatory Takings: A Brief History*, SF64 ALI-ABA 1 (2001).

6. Chi., Burlington & Quincy R.R. Co. v. Chicago, 166 U.S. 226, 239-40 (1897).

7. *See, e.g.*, Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419, 441 (1982) (holding that a New York law requiring a landlord to allow the installation of a cable company's facilities in the landlord's building was a taking).

8. *See Pa. Coal*, 260 U.S. at 415.

9. *See generally* Lucas v. S.C. Coastal Council, 505 U.S. 1003, 1022-23 (1992).

The United States Supreme Court has attempted to give meaning to this distinction.[10] In an early landmark regulatory takings decision, Supreme Court Justice Oliver Wendell Holmes warned that "while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking."[11] Similarly, the Court in *Pennsylvania Coal* recognized that regulation, although not physically intruding on a property, can be so burdensome that it constitutes a legal taking of the property.[12] This diminution of value approach looked at the impact of the regulation on the landowner in order to determine whether or not a taking had occurred.[13] Justice Holmes, however, did not go so far as to articulate a general test for when a regulation goes "too far."[14] In declining to do so, Justice Holmes recognized that the 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."[15] Justice Holmes also acknowledged that denial of compensation for any regulation could result in over-regulation to the point where the concept of private property would disappear.[16] His solution was thus to leave regulatory takings claims to be decided on a case-by-case basis.[17]

Pennsylvania Coal represented a shift in takings doctrine. Prior to this case, takings were largely limited to physical acquisitions of property by the government.[18] The case set the tone for regulatory takings jurisprudence; many courts would go on to apply Justice Holmes' opinion as a diminution in value standard.[19] The Supreme Court, however, would do little to elaborate on the concept of regulatory takings for the next fifty-five years.[20] During that time, the United States would see a dramatic increase in the promulgation of federal and state regulations that would have regulatory effects on both public and private

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10. *See e.g.*, *Pa. Coal*, 260 U.S. at 415.

11. *See id.* Refusing to establish general propositions, Justice Holmes opined that the extent to which regulations go too far is a question of degree. *Id.* at 416.

12. *See id.* at 393.

13. *Id.* at 413.

14. *See id.* at 415-16.

15. *Id.* at 413.

16. *Id.* at 415.

17. *Id.* at 416.

18. *See* MICELI & SEGERSON, *supra* note 4, at 14.

19. *See id.*

20. *See* Nancy G. Marzulla, *The Property Rights Movements: How It Began and Where It Is Headed*, *in* LAND RIGHTS: THE 1990S PROPERTY RIGHTS REBELLION 1, 15 (Bruce Yandle ed., 1995) [hereinafter LAND RIGHTS].

lands.[21] This increase in government regulation led to what eventually became known as the "property rights movement."[22]

B. Environmental Land Use and the Property Rights Movement

Property rights advocates have declared that the property rights movement is to the 1990s what the civil rights movement was to the 1960s.[23] In 1964, the Department of the Interior announced a moratorium on the use of desert land for agricultural purposes.[24] Although such a declaration had little impact outside the American West, in states like Nevada, where roughly eighty-seven percent of the land is federally controlled, the moratorium led to outrage.[25] In an attempt to force the agency to end the moratorium, Nevada's then-attorney general, Robert List, brought suit against the Department of the Interior.[26] Dubbed by the media as the "Sagebrush Rebellion," the controversy stemmed from the notion that the federal government had a trust obligation to turn over public lands.[27] Nevada citizens felt that such a dominant federal presence lessened their state's sovereignty.[28] United States District Court of Nevada Judge Ed Reed rejected the notion that the federal government was a trustee of public lands.[29] Reed declared that Nevada had lost control over its public domain when it achieved statehood.[30] Although unsuccessful in Nevada, the Rebellion found supporters in other western states where frustrations were growing as environmental regulations continued to limit resource development in the region.[31]

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21. Beginning in the 1970s, the federal government enacted a series of environmental statutes that limited the exercise of private property rights and served as models for state and local regulations. *See* Endangered Species Act of 1973, 16 U.S.C. §§ 1533-1544 (1988); Surface Mining Control and Reclamation Act of 1977, 30 U.S.C. § 1201 (1988); Clean Water Act, 33 U.S.C. §§ 1251-1387 (1994); National Environmental Policy Act of 1969, 42 U.S.C. §§ 4321-4361 (1994); Resource Conservation and Recovery Act, *id.* §§ 6901-6991i (1988); Clean Air Act *id.* §§ 7401-7671q (1988 & Supp. 1991); Comprehensive Environmental Response, Compensation and Liability Act, *id.* §§ 9601-9675 (1994).

22. *See generally* Marzulla, *supra* note 20.

23. *Id.* at 8-11, 24.

24. *Id.* at 3.

25. *See id.*

26. *See id.*

27. *Id.* at 3-4.

28. *Id.*

29. *Id.* at 4.

30. *Id.*

31. *Id.* at 4-5.

Environmental protection policies burgeoned in the 1970s.[32] Following the first Earth Day, April 22, 1970, Congress passed a series of environmental statutes regulating many aspects of property use, in particular on lands deemed environmentally sensitive such as wetlands, coastal zones, flood plains, and endangered species' habitats.[33] Prior to this environmental renaissance, land was, for the most part, considered to be out of the reach of governmental control.[34] Over the past three decades, those thoughts have changed with the attention environmental laws have received.[35]

In addition to federal environmental protection laws, state and local governments have earned a place in the forefront of land use planning by enacting environmentally friendly regulations and ordinances.[36] Most of the federal environmental regulations passed set minimums for environmental standards and gave individual states discretion on how to obtain those minimums or, alternatively, the option to set more stringent standards.[37] Many states opted to create their own versions of the federal environmental protection laws.[38]

Not surprising, with the rise in both federal and state regulations, came a rise in costs.[39] A study by Thomas D. Hopkins of the Rochester Institute of Technology showed that environmental regulation costs rose from $41 billion annually in 1973, to $126 billion in 1993.[40] This increase in regulation, without compensation, provoked the property rights movement.[41] Landowners who felt they were bearing the burden of environmental policy attacked these regulations as an infringement of their constitutional rights.[42] While they acknowledged the benefits of environmental protection, they felt the burden for such public interest fell

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32. *Id.*

33. *See* Nancy G. Marzulla, *State Private Property Rights Initiatives as a Response to "Environmental Takings"*, *in* REGULATORY TAKINGS: RESTORING PRIVATE PROPERTY RIGHTS 87, 91 (Roger Clegg ed., 1994) [hereinafter REGULATORY TAKINGS].

34. Marzulla, *supra* note 20, at 7-13.

35. *Id.* at 5.

36. *See* James E. Holloway & Donald C. Guy, *Smart Growth and Limits on Government Powers: Effecting Nature, Markets and the Quality of Life Under the Takings and Other Provisions*, 9 DICK. J. ENVTL. L. & POL'Y 421, 435 (2001).

37. *See* Marzulla, *supra* note 20, at 94.

38. *Id.* States such as New York and California have developed stringent air pollution regulations to manage their growing populations and different climatic conditions.

39. *See, e.g.*, THOMAS D. HOPKINS, COST OF REGULATION (Rochester Institute of Technology ed., 1991).

40. *See id.* tbl. 5A.

41. *See* Marzulla, *supra* note 20, at 13.

42. *See id.*

unjustly on them.[43] Pitted against environmentalists who supported the regulations in an effort to curtail increasing environmental degradation, the scene was set for a property rights backlash.[44]

II. DEVELOPMENT OF THE REGULATORY TAKINGS CONCEPT

A. The Penn Central *Balancing Test*

Since Justice Holmes established the basic rule for regulatory takings in *Pennsylvania Coal*, courts have struggled to determine when governmental actions go "too far."[45] The Court in *Penn Central Transportation Co. v. New York City* furthered Justice Holmes' "diminution in value" concept by offering a three-factor test in making a takings determination.[46] The *Penn Central* Court, in determining that the City of New York could prevent the owners of Grand Central Station from erecting a tower over the terminal by designating it a historical landmark, set forth three criteria: (1) the regulation's economic impact on the claimant, (2) the regulation's interference with distinct investment-backed expectations, and (3) the character of the governmental action.[47] The Court held that as long as the preservation of the landmark was part of a comprehensive preservation scheme, the City could prevent development of individual landmarks without triggering a taking.[48] The Court emphasized that the three factors were not standards that absolutely defined a taking, but rather they were criteria to consider when evaluating a particular case.[49] In determining that no taking had occurred, the Court considered that New York City granted the owners "transferable development rights" (TDRs), which could be used to develop other, nonlandmark buildings that the owners held.[50] These TDRs, the court reasoned, held economic value, thus decreasing the adverse economic impact on the owner.[51]

In his dissent, Justice William Rehnquist proposed an additional factor.[52] Rehnquist considered whether the government action singled out individuals or applied broadly to a class of owners.[53] "[A] taking

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43. *See id.*
44. *See id.* at 13-14.
45. *See* Pa. Coal Co. v. Mahon, 260 U.S. 393, 425 (1922).
46. 438 U.S. 104, 124 (1978).
47. *Id.*
48. *See id.* at 132.
49. *See id.* at 124.
50. *See id.* at 114.
51. *See id.*
52. *See id.* at 138-39.
53. *Id.*

does not take place if the prohibition applies over a broad cross section of land and thereby 'secure[s] an average reciprocity of advantage.'"[54] In other words, Justice Rehnquist considered whether the burden was equitably dispersed.[55]

B. Substantially Advancing a Legitimate State Interest: Agins v. Tiburon

It is not enough for a state or local government to declare something a "regulation" in order to avoid takings liability.[56] Additionally, the public benefit must be weighed against the private loss.[57] In 1980, the Supreme Court recognized that two requirements must be met in order for a regulation to avoid being a taking.[58] In *Agins v. City of Tiburon*, the Court declared that a regulation must (1) substantially advance a legitimate state interest and (2) not deny an owner economically viable use of his land.[59] A victory for environmental advocates, the *Agins* Court upheld an ordinance that discouraged the conversion of open space to urban development in order to protect citizens from the negative impacts of urbanization.[60] *Agins* demonstrated that public purposes, such as protecting environmentally sensitive areas, may be so important and beneficial that regulations supporting them will be upheld despite the economic damage they may cause private individuals.[61] The Court had validated a city's right to protect its environment for the public benefit.[62]

C. The 1987 Anti-Environment Trilogy

While *Agins* seemingly legitimized environmental regulations, later decisions would hinder governmental authority to protect natural resources.[63] A series of three decisions handed down under the Reagan

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54. *Id.* at 147 (quoting Pa. Coal Co. v. Mahon, 260 U.S. 393, 415 (1922)).

55. *Id.*

56. *See* RICHARD J. RODDEWIG & CHRISTOPHER J. DUERKSEN, RESPONDING TO THE TAKINGS CHALLENGE: A GUIDE FOR OFFICIALS AND PLANNERS 3 (Am. Planning Ass'n ed., 1989).

57. *See id.*

58. *See* Agins v. City of Tiburon, 447 U.S. 255, 260 (1980).

59. *Id.*

60. *Id.* at 262. The court reasoned that such a zoning requirement would assure careful development and therefore appellants would be sharing, with other owners, both the benefits and burdens of the city's exercise of its police power.

61. *See id.*

62. *Id.* at 261.

63. *See* Hodel v. Irving, 481 U.S. 704 (1987); First English Evangelical Lutheran Church of Glendale v. County of L.A., 482 U.S. 304 (1987); Nollan v. Cal. Coastal Comm'n, 483 U.S. 825 (1987); Keystone Bituminous Coal Ass'n v. DeBenedictis, 480 U.S. 470 (1987). Under the Reagan Administration, a number of Westerners held key cabinet positions such as James Watt of

Administration attempted to develop further the framework guiding regulatory takings analysis.[64] Not surprising, under a President who ran on a campaign theme of "Get government off our backs! and out of our pockets," the Supreme Court, in 1987, handed down several decisions favoring property owners.[65] Environmentalists have described these decisions as the "pit bull at the throat" of good conservation efforts and land use planning.[66] Since then, the trend has been to tighten the limits on governmental entities responsible for development authority.[67] The following decisions have had major implications for local planning authorities.

First, in *Keystone Bituminous Coal Association v. DeBenedictis*,[68] the Court, by a five-to-four vote, upheld a Pennsylvania statute similar to the one struck down in *Pennsylvania Coal*.[69] The statute stipulated that fifty percent of the coal beneath public structures must be left in place to provide surface support and prevent unnecessary environmental degradation.[70] Like *Pennsylvania Coal*, the issue in *Keystone* was whether the environmental regulation was so onerous that it deprived an owner of all reasonable use of his land.[71] Using the *Penn Central* factors, the Court upheld the regulation, emphasizing that a taking will not be found when the government seeks to prevent uses that are "injurious to the community."[72] The *Keystone* Court distinguished *Pennsylvania Coal*, noting that in *Pennsylvania Coal*, the statute was struck down because it protected the property of private landowners and lacked a public purpose.[73] In *Keystone*, Justice Stevens recognized that the regulation's purpose was "to protect the public interest in health, the environment, and the fiscal integrity of the area."[74]

Keystone is consistent with the principle the *Agins* Court set forth.[75] Justice Stevens stressed the importance of restricting dangerous land uses

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Wyoming as Secretary of the Interior. Watt was the former director of the Mountain States Legal Foundation, a leader in property rights law.

64. *Id.*

65. *Id.*

66. *See* RODDEWIG & DUERKSEN, *supra* note 56, at iii.

67. *See* Anne E. Carlson & Daniel Pollak, *Takings on the Ground: How the Supreme Court's Takings Jurisprudence Affects Local Land Use Decisions*, 35 U.C. DAVIS L. REV. 103, 109-10 (2001).

68. *Keystone*, 480 U.S. at 506.

69. Pa. Coal Co. v. Mahon, 260 U.S. 393, 394 (1922).

70. *See Keystone*, 480 U.S. at 479.

71. *See id.* at 492-93.

72. *See id.* at 492 (quoting Mayler v. Kansas, 123 U.S. 623, 655 (1887)).

73. *See id.* at 485-86.

74. *See id.* at 488.

75. *See id.* at 491.

to protect the public interest.[76] He observed that "[w]hile each of us is burdened somewhat by such restrictions, we, in turn, benefit greatly from the restrictions that are placed on others."[77] But the Court did not stop there. It went on to examine the diminution in value and the investment-backed expectations.[78] Although the decision outwardly appeared to be an environmental victory, the Court went on to recognize that the more drastic the reduction in property value, the more likely a taking will have occurred.[79] Suddenly, environmental protection interests were not enough to cross the threshold into the regulatory takings safety zone.

If the *Keystone* decision did not cause panic amongst state and local planners, the next two decisions surely did. The second case, *First English Evangelical Lutheran Church of Glendale v. County of Los Angeles*, held that merely invalidating a regulation that has gone "too far" is not a sufficient remedy for a taking.[80] Money damages are required to restore the plaintiff for a temporary taking.[81] The Court held that the county of Los Angeles must compensate a church for a prohibition on reconstructing buildings destroyed by a flood, if the prohibition was found to be a taking.[82] Justice Rehnquist held that "where the government's activities have already worked a taking of all use of property, no subsequent action by the government can relieve it of the duty to provide compensation for the period during which the taking was effective."[83] Prior to *First English*, governmental authorities could eliminate a "temporary taking" by repealing the challenged regulation.[84] After this decision, local governments were now forced to deal with much higher stakes in their land use decisions, namely financial considerations.[85]

The third, and most important, land use decision handed down in 1987, *Nollan v. California Coastal Commission*, established a heightened level of scrutiny and a new constitutional standard for regulatory takings.[86] This was the first time since *Agins* that the Court elaborated on the "substantially advances" factor.[87] In another close five-to-four vote,

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76. *Id.*
77. *Id.*
78. *Id.* at 493-506.
79. *Id.* at 493.
80. 482 U.S. 304, 321 (1987).
81. *Id.* at 321-22.
82. *Id.* at 307, 321.
83. *Id.* at 321.
84. *See id.*
85. *See id.*
86. 483 U.S. 825 (1987).
87. *See id.*

the Court held that the Commission's requirement that plaintiffs grant an easement to the public across their beachfront property before they could obtain permission to rebuild a house was a taking because the means chosen did not "substantially advance" the governmental objective being pursued.[88] There must be an "essential nexus" between the proposed development and the condition imposed by the permit.[89] The Commission's exaction sought to protect coastal views. The Court did not believe there was such a nexus between the dedication and the governmental purpose.[90] There was no reason to believe that the easement would limit obstacles to coastal viewing since the easement would only help those already on beaches to the north and south of plaintiff's property.[91] As such, they required that the state pay just compensation in order for the transaction to occur.[92]

Nollan placed on local governments a "standard of precision for exercise of the police power that has been discredited for the better part of the century."[93] No longer would local planning measures be given the benefit of the doubt.[94] What was once a simple environmental protection measure was now a potential takings clause trigger. To summarize, the trilogy of 1987 decisions had three major implications for environmental regulation. First, if the regulation drastically reduces property value, it will trigger a taking (although the Court has declined to give a precise value).[95] Second, a regulatory taking requires monetary compensation. A mere repeal of the restriction is insufficient.[96] And third, the dedication or exaction must have an essential nexus to the government purpose.[97] With these new obstacles in place, environmental regulation would only become more burdened with limitations in the 1990s.

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88. *Id.* at 838-39. The Court reasoned that unless a restrictive permit serves the purpose of furthering the public interest, its limitations are nothing more than "an out-and-out plan of extortion." *Id.* at 837 (quoting J.E.D. Assocs., Inc. v. Atkinson, 432 A.2d 12, 15 (1981)).

89. *Id.* at 837.

90. *Id.*

91. *Id.*

92. *Id.* at 842.

93. *Id.*

94. *See* RODDEWIG & DUERKSEN, *supra* note 56, at 7.

95. *See* Keystone Bituminous Coal Ass'n v. DeBenedictis, 480 U.S. 470, 492-93 (1987).

96. *See* First English Evangelical Lutheran Church of Glendale v. County of L.A., 482 U.S. 304, 321 (1987).

97. *See* Nollan v. Cal. Coastal Comm'n, 483 U.S. 825, 837 (1987).

III. RECENT DECISIONS: IMPACTS AND ANALYSIS

A. Dolan's "Rough Proportionality" Requirement

The environmental protection movement did not fare any better in the early 1990s. In a 1994 case, the Supreme Court established that the mere existence of a nexus between the condition imposed and the land use sought is not enough to avoid a taking.[98] In an even more rigorous standard of review, the Court in *Dolan v. City of Tigard* extended the *Nollan* doctrine by yet another close five-to-four vote.[99] The City of Tigard granted plaintiff a permit to expand her hardware store on the condition that she dedicate a portion of her land for a bike path and improve a storage drainage system.[100] The Court held that this mandated trade-off was an unconstitutional taking of plaintiff's property.[101] The *Dolan* Court required "rough proportionality" between the degree of the exactions demanded and the impact of the proposed development.[102] Here, the City failed to show how the alleged increase of traffic caused by the hardware store expansion would be offset by the proposed bikeway.[103] The pathway dedication could potentially reduce traffic congestion, but without more certainty, the rough proportionality test was not met.[104] In a major blow to governmental planning agencies, the *Dolan* decision placed the burden of establishing the essential nexus and rough proportionality on the regulating localities.[105] The *Dolan* decision illustrated the Supreme Court's leanings towards protecting the rights of property owners. The property rights movement was winning the land use war.

Legal scholars suspect that in cases like *Nollan* and *Dolan*, the Supreme Court's conservatives are attempting to limit the land use regulation exception to the takings clause.[106] Together, *Nollan* and *Dolan* establish a two-prong test in determining the validity of an exaction required by a permit. It must (1) bear an essential nexus to the impact of the development[107] and (2) be roughly proportional to the harm that the

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98. *See* Dolan v. City of Tigard, 512 U.S. 374 (1994).
99. *See id.*
100. *Id.* at 394-96.
101. *Id.* at 391.
102. *Id.*
103. *Id.*
104. *Id.* at 395.
105. *See id.*
106. *See* Roger Clegg, *Reclaiming the Text of the Takings Clause*, *in* REGULATORY TAKINGS, *supra* note 33, at 31.
107. *See* Nollan v. Cal. Coastal Comm'n, 483 U.S. 825, 837 (1987).

development may cause.[108] While these two decisions sought to limit the expansive land use regulation exception, more recent cases would narrow the scope of the applications of the *Nollan* and *Dolan* rules.[109]

B. Crossing the "Diminution in Value" Threshold: Lucas v. South Carolina Coastal Council

The property rights movement gained a huge victory in the Supreme Court's 1992 decision in *Lucas v. South Carolina Coastal Council*.[110] David Lucas had purchased two beachfront lots for residential development.[111] However, he was later told he could not develop the property because of the enactment of the Beachfront Management Act, which barred owners from building on lots that were in designated "critical areas."[112] The law was enacted after Lucas's property purchase.[113] In a major shift backwards for environmental advocates, the *Lucas* Court held that regulations that deprived owners of all economically beneficial or productive use of their property constituted a taking despite the importance of the governmental interest.[114] *Lucas* demonstrated that a taking can exist even when a state is looking to protect environmental interests.[115] Suddenly, the "substantially advances" test was not enough. It could be trumped by a single economic factor.[116] Developing a new categorical taking, the *Lucas* decision made regulatory takings that deprive owners of all beneficial or productive use or their land the equivalent of a permanent physical occupation.[117]

After *Lucas*, regulatory authorities were not able to introduce countervailing evidence to legitimize the regulation as furthering a substantial interest.[118] This was the decision that environmental groups had feared.[119] Because they were now being subjected to potential

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108. *See Dolan*, 512 U.S. at 391.

109. *See* City of Monterey v. Del Monte Dunes at Monterey, Ltd., 526 U.S. 687, 718 (1999) (holding that the rough proportionality standard does not apply to localities decisions to deny development outright).

110. 505 U.S. 1003 (1992).

111. *Id.* at 1006-07.

112. *Id.* at 1008-09.

113. *Id.* at 1008.

114. *Id.* at 1030-31.

115. *Id.* at 1031.

116. *See id.*

117. *See* Best, *supra* note 5, at 6.

118. *See* Marzulla, *supra* note 20, at 16.

119. *See* MICELI & SEGERSON, *supra* note 4, at 17.

takings compensation, regulatory localities would have reduced abilities to protect the environment from the actions of private property owners.[120]

The *Lucas* decision, however, is not without a silver lining for environmentalists. *Lucas* also suggested a revival in nuisance law.[121] The Court went on to say that when a state could show that the plaintiff's actions would be prohibited under nuisance laws, no compensation payments were necessary.[122] This is what is known as the "nuisance exception."[123] Adding to the *Penn Central* factors, *Lucas* introduced the consideration of the regulation's extent relative to nuisance law limitations.[124] The nuisance exception offers some hope to environmentalists seeking to prohibit noxious uses of property.[125]

In addition to the nuisance exception, ambiguities in the *Lucas* decision do offer some hope for proponents of environmental protection.[126] First, as Justice Blackmun notes in his dissent, the Court neglected to describe criteria for evaluating loss of property value.[127] Will a ninety percent loss in use of property be a mere diminution in value or will it require compensation?[128] The *Lucas* decision asks these questions but offers no answers. Second, how will courts decide when an owner has been deprived of all economically beneficial uses of his property?[129] Who determines what an economically beneficial use is? Could eco-tourism be a use? *Lucas* leaves this possibility open.[130] And finally, to reiterate the nuisance exception, even if a regulation strips the property owner of all economically viable use, if a court decides that the proscribed use was not part of the title in the first place, no compensation is necessary.[131]

C. Changes in the Notice Rule: The Palazzolo *Setback*

Instead of getting clearer, another takings opinion handed down by the Supreme Court in 2001 left environmental regulatory takings even more nebulous. *Palazzolo v. Rhode Island* involved a landowner's

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120. *Id.*
121. Erin O'Hara, *Property Rights and the Police Powers of the State: Regulatory Takings: An Oxymoron?*, *in* LAND RIGHTS, *supra* note 20, at 45.
122. Lucas v. S.C. Coastal Council, 505 U.S. 1003, 1022-23 (1992).
123. *See* MICELI & SEGERSON, *supra* note 4, at 17; *see also Lucas*, 505 U.S. at 1022-28.
124. *See* O'Hara, *supra* note 121, at 45.
125. *Id.*
126. *Id.*
127. *Id.*
128. *Id.*
129. *Id.* at 47.
130. *See id.*
131. *Id.* at 49.

acquisition of title to property after the enactment of legislation that limited his development rights.[132] A divided Supreme Court held that prior legislation did not bar a takings claim against the state.[133] While the decision significantly expanded the scope of takings claims, the Court again refused to provide a specific formula for determining whether a taking has occurred.[134]

In 1971, the State of Rhode Island enacted legislation creating the Coastal Resources Management Council whose primary duty was to promulgate regulations to protect coastal wetlands.[135] Petitioner Anthony Palazzolo applied for development permits following the creation of the Management Council but was denied on the basis that his plan would have "significant impacts" upon the wetlands.[136] After the state denied additional permit requests, Palazzolo filed an inverse condemnation action[137] in state court, alleging that the State's wetlands regulations had deprived him of "all economically beneficial use" of his property and therefore required just compensation.[138] Reversing the State Court's ruling on ripeness, the Supreme Court upheld petitioner's ability to challenge regulations that were in place prior to his individual ownership.[139] The Court reasoned that barring such a claim would essentially be putting an expiration date on the takings clause.[140] A state's right to place restrictions on land is subject to a reasonable standard.[141] If the Court were to accept the reasoning that successive titleholders are barred from claiming a taking, landowners would have no way to challenge land use restrictions that are arguably unreasonable or extreme.[142] The Court further held that no regulatory taking had occurred because petitioner was not deprived of *all* economically beneficial uses of his land.[143] The regulation in place still allowed petitioner to build a

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132. *See* Palazzolo v. Rhode Island, 121 S. Ct. 2448, 2454-57 (2001).

133. *Id.* at 2459-60. The decision was divided in a 5-4 vote. Three dissenting opinions were filed from Justices Stevens (concurring in part), Ginsburg, and Breyer.

134. *See id.* at 2462-65.

135. *Id.* at 2456.

136. *Id.*

137. The Supreme Court defines "inverse condemnation" as "a cause of action against a governmental defendant to recover the value of property which has been taken in fact by the governmental defendant, even though no formal exercise of the power of eminent domain has been attempted by the taking agency." United States v. Clarke, 445 U.S. 253, 257 (1980) (quoting D. HAGMAN, URBAN PLANNING AND LAND DEVELOPMENT CONTROL LAW 328 (1971)).

138. *Palazzolo*, 121 S. Ct. at 2456.

139. *Id.* at 2457.

140. *Id.* at 2462-63.

141. *Id.*

142. *Id.*

143. *Id.* at 2464-65.

substantial residence on an upland portion of his property.[144] He was not, as the Court in *Lucas* required, left "economically idle."[145]

Although Anthony Palazzolo did not recover takings compensation, proponents of property rights are hailing the decision a victory.[146] Not only does *Palazzolo* make it easier for plaintiffs to challenge environmental regulations, it also allows property purchasers to assert takings claims based on regulations set in place prior to their property purchase.[147] Even though Palazzolo did not succeed in showing that he had been deprived of all economic use of his property, the Court made it clear that governments have a duty to control regulations and pay property owners when there has been a taking.[148]

IV. ANALYSIS: THE FUTURE OF ENVIRONMENTAL REGULATION

A. Where Are We Now?

It is still too soon to tell if the *Palazzolo* decision represents a revival in economic liberties, but the opinion does suggest that the Court is willing to expand judicial protection of private real estate interests.[149] Property rights groups view *Palazzolo* as a victory in their efforts to limit government encroachment on private lands. The decision, however, could have detrimental effects on environmental protections.[150] Environmental activists are concerned that landowners, seeking to develop their properties, will flood the courts with litigation and expose state and local governments to millions of dollars in potential takings compensation liabilities.[151] This exposure may have a chilling effect on government efforts to promulgate environmental regulations and limit environmental protections on fragile ecosystems.[152]

As state and local governments become hesitant to impose land use restrictions, we need to look for other ways to limit development on our coastal lands and other fragile ecosystems. Successful management practices will be those that limit economic harm to property owners. Environmental advocates argue that regulations seeking to eliminate the

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144. *Id.*

145. *Id.* at 2465 (citing Lucas v. S.C. Coastal Council, 505 U.S. 1003, 1019 (1992)).

146. Eric Pianin, *Landowners Given New Rights on Environmental Curbs*, WASH. POST, June 29, 2001, at A18.

147. Erwin Chemerinsky, *Expanding the Protections of the Takings Clause*, 2001 SUP. CT. REV. 70, 70.

148. Pianin, *supra* note 146, at A18.

149. Chemerinsky, *supra* note 147, at 72.

150. *Id.*

151. *Id.*

152. *Id.*

deterioration of important natural resources such as air and water are not likely to eliminate all reasonable uses of one's property.[153] Moreover, because of the nuisance exception discussed in *Lucas*, local governments may have a shield in takings compensation claims.[154]

While it is still early to determine what the effects of the *Palazzolo* decision will be, one survey suggests that the *Lucas* decision is already causing states to exercise more caution when choosing environmental policy.[155] A survey was sent out to all fifty states' environmental agencies and governors' offices.[156] The results indicated that more emphasis is being placed on measuring economic impacts of new regulations.[157] The survey results and the new heightened caution suggest that a new cost-benefit movement could be on its way.[158] Local governments will have to scrutinize more closely the economic impacts of their planning options. We might see a movement away from environmentally sound planning practices if such options are deemed too financially onerous.

Another survey of planners in a majority of California cities and counties revealed that a number of communities have reviewed their exaction policies, following recent major takings decisions, and have found that an essential nexus and rough proportionality actually support an increase in fees imposed on development.[159] Decisions such as *Nollan* and *Dolan* have led communities towards more systematic and comprehensive planning through studies and reports aimed at justifying the rationale for exacting land or money from developers.[160] The survey results also point to a trend towards imposing fees upon developers and a shift away from demanding exactions.[161] Although initial reactions were negative, an overwhelming number of California planners now view the decisions as establishing sound planning practices, and not as a hindrance on their discretion.[162] The ultimate conclusions from the study reveal that developing communities engaging in systematic planning can

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153. *See* Keith W. Bricklemyer & David Smolker, *Inverse Condemnation*, *in* CURRENT CONDEMNATION LAW: TAKINGS, COMPENSATION & BENEFITS 64 (Alan T. Ackerman ed., 1994).

154. *Id.*

155. *See* James R. Rinehart & Jeffrey J. Pompe, *The Lucas Case and the Conflict over Property Rights*, *in* LAND RIGHTS, *supra* note 20, at 84-85.

156. *Id.*

157. *See* Rinehart & Pompe, *supra* note 155, at 84-85.

158. *Id.* at 85.

159. *See* Carlson & Pollak, *supra* note 67, at 105. The authors' study involved sending extensive surveys to the planning director of every city and county in the State of California. The survey attempted to gauge the planners' knowledge of takings jurisprudence and its impact on land use planning and use of exactions and fees.

160. *Id.*

161. *Id.* at 107.

162. *Id.* at 105.

impose higher fees, whereas fairly developed communities may find that the takings decisions further restrict their ability to impose exactions on developers.[163]

B. Where Are We Going?

Several new policy and planning options offer some relief to the threat of stifled environmental regulations. Below are four viable options for achieving balance between property rights protection and environmental protection.

1. State Legislation

Land use regulations on private property are primarily a function of state and local governments.[164] Recently, states have expanded their power to regulate land use by developing programs to protect historic landmarks, farmland, parks, and preserves.[165] Although property rights groups have not yet successfully enacted legislation requiring the federal government to pay landowners compensation for regulations that limit property value, many states have adopted such "takings" legislation.[166] In what appears to be a growing trend, nearly half of the states have adopted legislation that allows for some form of compensation.[167]

State property rights legislation can take on two forms: planning bills and compensation bills.[168] Planning bills require states to carefully scrutinize actions, which may generate unconstitutional takings claims.[169] In 1992, Delaware became the first state to pass a "stand alone" property rights law that establishes a procedure for determining whether a proposed state rule or regulation will result in a private property taking action.[170] Shortly thereafter, Arizona followed with a planning bill similar to Delaware's.[171] Environmentalists dubbed Arizona's law as "the worst anti-environmental law ever passed in the United States" and

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163. *Id.* at 156.

164. *See* Marzulla, *supra* note 20, at 12. The federal government has developed incursion programs to regulate wetlands, but land use restrictions are typically the domain of state and local governments.

165. *Id.*

166. *See* ROBERT V. PERCIVAL ET AL., ENVIRONMENTAL REGULATION LAW, SCIENCE, AND POLICY 821 (2000).

167. *Id.*

168. Marzulla, *supra* note 33, at 106.

169. *See id.*

170. *Id.*; DEL. CODE ANN. tit. 29, § 605 (1991).

171. Marzulla, *supra* note 33, at 106.

successfully lobbied to have a referendum repeal the law.[172] Indiana has a regulation requiring the state attorney general to warn the governor of any proposed rules that might trigger takings liability.[173]

A "compensation bill" identifies a numerical percentage of diminution in value that triggers compensation.[174] Compensation bills do what the Supreme Court has refused to do. This type of bill actually defines a taking. The bill picks a percentage, for example fifty percent, to become the threshold for when a taking has occurred and compensation is required.[175] These bills provide landowners with automatic compensation if owners can establish the requisite decrease in property value.[176] This threshold approach seeks to deal with the inefficiencies associated with both full and no compensation.[177] Partial compensation can improve upon both extremes.[178] While full compensation may stifle environmental protection efforts, no compensation can lead to an excessive regulation problem.[179]

State property rights legislation is not without its criticisms from both property rights and environmental advocates. Environmentalists argue that such legislation threatens environmental protection because it imposes higher costs on state and local agencies.[180] If state governments must pay every individual who has been negatively affected because of an environmental regulation, the future of environmental protection looks dismal at the state and local level.[181] State and local governments cannot afford to compensate every landowner in every land use decision.[182] Property rights advocates also raise objections to compensation bills.[183] Their concern is that compensation bills will set the threshold for recovery so high that some landowner "victims" will be denied their right to compensation.[184] Compensation bill proponents argue that these types of bills do not preclude claims for compensation for lesser takings, they just establish a minimum, that when met, mandates the government to

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172. *Id.* (citing Marianne Lawell, The *"Property Rights" Revolt*, NAT'L L.J., May 10, 1993, at 1).

173. *See* Marzulla, *supra* note 33, at 107; IND. CODE § 4-22-2-32 (1993).

174. *See* Marzulla, *supra* note 33, at 107.

175. *Id.*

176. *Id.*

177. *See* MICELI & SEGERSON, *supra* note 4, at 213-14.

178. Marzulla, *supra* note 33, at 109-10.

179. MICELI & SEGERSON, *supra* note 4, at 213.

180. Marzulla, *supra* note 33, at 108 (citing Nancy G. Marzulla, *Who Benefits from State Private Property Regulation? You, the Taxpayer and Citizen*, LAND RTS. LETTER, June 1993, at 4).

181. *See id.* at 108-09.

182. *See id.*

183. *Id.* at 109.

184. *Id.*

compensate landowners.[185] Compensation bills take the guesswork out of policy making. Local governments will know exactly where they stand on the takings issue. They can therefore mitigate takings liability by avoiding the threshold. This can be accomplished by granting variances to landowners who may be overly burdened by a regulation.

2. Smart Growth

As indicated by the growing number of state environmental protection laws, states are now, more than ever, exercising greater control over natural resource management.[186] The smart growth movement supports a trend towards inclusive public policy to deal with the conflicting social and legal interests associated with urban development.[187] This planning strategy evaluates state and local policy making concerns, specifically the competing interests of economic development, environmental protection, growth management, and social welfare growth.[188] The public policy of smart growth calls for an equitable balance among these varying interests.[189] The smart growth planning process uses new technology and public policy, as well as old land use.[190] Because smart growth involves land use restrictions, programs designed to fit the needs of a particular community must survive constitutional scrutiny.[191] Smart growth programs have the potential for broad restrictions and controls and may adversely affect the economic interests of landowners and developers.[192] This makes such programs susceptible to takings claims.

What are the implications for smart growth programs after recent takings decisions? While *Nollan* and *Dolan* do not apply to zoning and other land use decisions, both courts were silent on whether they applied broadly to exactions.[193] These decisions may have consequences for smart growth programs that use impact exactions and other types of conditional demands.[194] Courts can use smart growth to narrow takings issues for resolution. To avoid takings liability, smart growth programs may need to establish a direct relationship between land dedications and

185. *Id.*
186. *See* Holloway & Guy, *supra* note 36, at 435.
187. *See id.*
188. *See id.* at 424-25.
189. *Id.* at 440.
190. *Id.* at 439.
191. *Id.* at 453.
192. *Id.*
193. *Id.* at 452.
194. *Id.*

their public purposes.[195] This can be achieved by making site-specific or development specific (rather than generally applying single-purpose) exactions that benefit the entire community.[196] Some challenges, however, should be expected when landowners believe that interference with their reasonable investment-backed expectations is too burdensome.[197]

Smart growth programs can also be effective by offering economic incentives to landowners such as transferable development rights, tax incentives, acquisitions, publicly assisted financing, and variances.[198] These types of incentives will decrease the likelihood of successful takings challenges.[199] Though one smart growth program will not fit every community, those that will be most effective will have the ability to create compromises between the competing interests of economic markets, natural resource management, and social welfare.[200]

3. Temporary Moratoria: *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency*[201]

A moratorium is "an authorized delay in the provision of governmental services or development approval."[202] In *First English*, the Supreme Court made clear that even though a land use restriction may be temporary, compensation is not necessarily precluded.[203] If the temporary moratorium proves so restrictive that it denies the landowner of all use of his property, then it is no "different in kind from permanent takings, for which the Constitution clearly requires compensation."[204] A recent Supreme Court decision declined to adopt a categorical rule that moratoria constitute per se taking, instead holding such interim development controls be evaluated in a *Penn Central* style balancing test.[205]

In *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency*, the Ninth Circuit held that a thirty-two month

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195. *Id.*
196. *Id.* at 452-53.
197. *Id.* at 457.
198. *Id.* at 461.
199. *Id.*
200. *Id.* at 470.
201. 2002 WL 654431 (U.S. Apr. 23, 2002).
202. ROBERT MELTZ ET AL., THE TAKINGS ISSUE: CONSTITUTIONAL LIMITS ON LAND USE CONTROL AND ENVIRONMENTAL REGULATION 266 (1999).
203. *See* First English Evangelical Lutheran Church of Glendale v. County of L.A., 482 U.S. 304, 318 (1987).
204. *Id.*
205. *See Tahoe-Sierra*, 2002 WL 654431, at *19.

development moratorium did not deprive private property owners of "all economically beneficial or productive use" of their land.[206] Lake Tahoe is a large alpine lake in the northern Sierra Nevada Mountains known for its size, depth, and remarkable clarity.[207] Rapid development in the latter part of the century caused dramatic increases in the Lake's nutrient levels.[208] This excess nutrient loading, known as eutrophication, caused increases in algal growth and consequentially destroyed the lake's visual beauty and also depleted its oxygen supply, threatening lake-dwelling animal life.[209] Formed in 1969 to address environmental problems associated with Lake Tahoe's growing population and tourism, Tahoe Regional Planning Association (TRPA) initiated a land use plan that sought to curtail the eutrophication process by severely limiting the development of "high hazard lands."[210] Since its inception, the TRPA has been battling with private property owners over a series of regulations that prevented lot owners from building private homes.[211] Both Nevada and California heavily scrutinized TRPA's initial regulatory scheme.[212] As a consequence, TRPA revised its regional plan to reflect amended environmental carrying capacities.[213] In 1983, as part of the plan's implementation, TRPA enacted a measure that temporarily suspended all permitting activities on lands with high susceptibility to environmental hazards until a regional plan could be developed.[214] A revised regional plan was not developed until some thirty-two months later.[215] As a result of the moratorium, 450 private property owners filed suit claiming the moratorium constituted a compensable taking under the Fifth Amendment.[216] While petitioners argued that *First English* and *Lucas* compelled the court to find a taking of their temporal interests, the Ninth Circuit rejected their interpretation, and the Supreme Court affirmed.[217]

Petitioners sought to have to categorical rule in *Lucas* (that compensation is required when a regulation deprives an owner of 'all

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206. *See* Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency, 216 F.3d 764, 780 (9th Cir. 2000).

207. *Id.* at 766.

208. *Id.* at 767.

209. *Id.* at 766-67.

210. *Id.* at 767.

211. *Id.* at 767-68.

212. *Id.* at 768-69.

213. *Id.*

214. *Id.* at 768.

215. *Id.*

216. *Id.* at 768-69.

217. *See* Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency, 2002 WL 654431, at *13; *Tahoe-Sierra*, 216 F.3d at 777.

economically beneficial uses' of his land) applied to the Lake Tahoe moratorium.[218] They argued that the thirty-two-month segment could be severed from each landowner's fee simple estate in order for the Court to find that the property had been taken in its entirety.[219] Declining to adopt such a rationale, the Court quelled the idea of temporal severance.[220] Such a view ignores the *Penn Central* admonition that a parcel must be examined as a whole.[221] examining the owner's interest in its entirety, the Court reasoned that "a fee simple estate cannot be rendered valueless by a temporary prohibition on economic use, because the property will recover value as soon as the prohibition is lifted."[222]

The Court clarified that the *Lucas* categorical rule was meant for an "extraordinary case" where a property is *permanently* deprived of all value.[223] Such a rule applied to any deprivation of economic use, despite its brevity, would encourage hasty policy decisions and add to the expense of routine government processes.[224] The Court warned that a categorical rule would lead to numerous changes in currently permissible police practices.[225] We would see takings challenges brought for normal delays such as building permit application processes, zoning ordinance changes, orders restricting access to crime scenes, and the like.[226] What's more is that if communities must abandon moratoria use, landowners will have incentives to hastily develop their property to avoid possible planning restrictions that may be enacted.[227] The Court therefore concluded that the interest of "fairness and justice" would best be served by adopting a *Penn Central* approach to such circumstances.[228]

The significance of the Court declining to adopt a categorical rule in *Tahoe-Sierra* is that the Court is validating moratoria as a viable development tool.[229] They are "an essential tool of successful development" and will encourage more environmentally sound planning by recognizing large-scale community planning efforts.[230] Taking the

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218. *See Tahoe-Sierra*, 2002 WL 654431, at *14.
219. *Id.*
220. *Id.*
221. *Id.*
222. *Id.* at *15.
223. *Id.*
224. *Id.* at *17.
225. *Id.*
226. *Id.*
227. *Id.* at *18.
228. *Id.* at *19.
229. *See id.*
230. *Id.*; Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency, 216 F.3d 764, 777 (9th Cir. 2000).

time to develop a regulatory scheme can lead to more prudent planning decisions because cities would be allowed time to evaluate different planning options and fully consider their environmental effects.[231]

The Supreme Court opinion should serve as a caution to state and local planning authorities.[232] The Court did *not* hold that a temporary development moratorium could *never* constitute a taking.[233] The Court explained that the answer to the question "whether a temporary moratorium effects a taking is neither 'yes, always' nor 'no, never'; the answer depends upon the particular circumstances of the case."[234] This seems to be a resurgence of Justice Holmes' "too far" rationale.[235] While a moratorium may be an effective tool in curtailing environmental degradation in the short term, planning authorities should be cautioned not to go too far. The best way to avoid this is to have a definitive time period in which the moratorium would take place. Giving landowners notice of when the moratorium will begin and end can help avoid interfering with reasonable investment-backed expectations.

4. TDR Programs and Other Economic Incentives

TDR programs are growth management tools that seek to transfer development potential from environmentally sensitive lands to nonsensitive lands by way of private market transactions.[236] Under TDR programs, the right to develop is severable and can be transferred to other persons or lots.[237] TDRs are useful growth management tools because they allow planning bodies to separate the need to protect a sensitive land parcel with the right of landowners to develop.[238] TDRs can be powerful mitigation tools for local communities seeking to avoid takings liability while simultaneously trying to protect precious natural resources.[239] Several courts recognize TDRs as valid economic incentives.[240] The Supreme Court in *Penn Central* asserted that the TDR offered to plaintiff

231. *See Tahoe-Sierra*, 216 F.3d at 777.
232. *See Tahoe-Sierra*, 2002 WL 654431, at *10.
233. *Id.* at *18.
234. *Id.* at *10.
235. *Id.* at *12.
236. *See, e.g.*, John M. Armentano, *Preserving Environmentally Sensitive Land*, 25 REAL EST. L.J. 197, 200-01 (1996).
237. *See* FRANKLIN J. JAMES & DENNIS E. GALE, ZONING FOR SALE: A CRITICAL ANALYSIS OF TRANSFERABLE DEVELOPMENT RIGHTS PROGRAMS 3 (1977).
238. *See* Armentano, *supra* note 236, at 198.
239. *See* Suitum v. Tahoe Reg'l Planning Agency, 520 U.S. 725, 747-49 (1997).
240. *See id.*

offset the economic impact of the landmark law and helped avoid takings liability.[241]

The idea behind a TDR is to separate the development interest in a land parcel from the actual land and transfer that potential to another parcel that is better suited for development.[242] This is done by defining "sending" and "receiving" sites.[243] A sending site is usually the environmentally sensitive land from which development potential is going to be exported.[244] Landowners in these sending areas receive development rights proportional to the fair market value of their land.[245] These rights can then be sold to landowners in nonrestricted land areas.[246] Once landowners in these receiving zones have obtained sufficient TDRs, they are permitted to develop their land in excess of any zoning restrictions.[247] To achieve parity in the TDR market, these receiving sites must be areas of growing demand for development.[248] However, if these areas are already "over-zoned," further increases in development will have little economic value to add to the TDR, and the market will fail.[249] If used effectively, TDR programs can successfully avoid the constitutional taking of private property.[250] It is an economically efficient way to balance the need for protection of environmentally sensitive areas and preserving individual property rights.

V. CONCLUSION

There are no easy answers to the environmental regulatory takings debate. The Supreme Court has declined to establish a bright line rule defining when a land use regulation becomes a taking. Further, because it is largely a state and local government responsibility, a federal regulatory scheme will probably not solve the land use problem.[251]

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241. Penn Cent. Transp. Co. v. New York City, 438 U.S. 104, 137 (1978).

242. *See* RICHARD J. RODDEWIG & CHERYL A. INGHRAM, TRANSFERABLE DEVELOPMENT RIGHTS PROGRAMS: TDRS AND THE REAL ESTATE MARKETPLACE 2 (1987).

243. Richard D. Himberger, *Transferable Development Rights*, ADVOCATE, Jan. 2000, at 8.

244. *Id.*

245. *Id.*

246. *Id.*

247. *Id.*

248. Joseph D. Stinson, Note and Comment, *Transferring Development Rights: Purpose, Problems, and Prospects in New York*, 17 PACE L. REV. 319, 329-30 (1996).

249. *Id.*

250. Himberger, *supra* note 243, at 8; *see also* Penn Cent. Transp. Co. v. New York City, 438 U.S. 104, 137 (1978).

251. *See* James G. Titus, *Rising Seas, Coastal Erosion, and the Takings Clause: How to Save Wetlands and Beaches Without Hurting Property Owners*, 57 MD. L. REV., 1279, 1287 (1998).

The ultimate questions for state and local governments thus become: Can private property rights and environmental protection be reconciled? Are they mutually exclusive goals? Who will pay the cost? If left to fall on the shoulders of private landowners, regulatory laws could spiral out of control and be so numerous that the concept of private land is essentially eliminated.

Alternatively, if left to state and local governments, environmental protection could be compromised. If localities are unable to determine the potential scope of their takings liability, they will cease to promulgate such protective laws and ordinances. Interested parties must reach a middle ground whereby all parties create realistic expectations. Through a system of carefully defined takings definitions and prudent planning methods, fairness can prevail in the land use war.