Eroding Coasts: From Bluffs to Marshes—Coastal Protection Versus Property Rights

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I. INTRODUCTION

A. *Coastal Erosion and The Takings Clause*—Felkay v. City of Santa Barbara

The year 2020 knocked the world to its knees. The novel coronavirus pandemic brought society to a screeching halt, wildfires ravaged Australia and portions of the western United States, and the Atlantic hurricane season was so active meteorologists ran out of designated names.[1] The

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1. *See, e.g.,* Damien Cave, *The End of Australia as We Know It*, N.Y. TIMES (Feb. 15, 2020), https://www.nytimes.com/2020/02/15/world/australia/fires-climate-change.html [https://perma.cc/Q4JZ-FJ3H?type=image]; Emma Farge, *In Busy Atlantic Hurricane Season, Storm Names to Be All Greek*, REUTERS (Sept. 15, 2020), https://www.reuters.com/article/us-hurricane-

impacts of climate change are apparent and accelerating, and one dire consequence is the erosion of coastlines across the globe.[2] Coastal communities are in a perilous position as crumbling shorelines caused by both human and natural influences threaten their existence.[3] In the United States, twenty-five million people live in areas that are susceptible to coastal flooding, and scientists predict an average sea-level rise between one and three feet before the end of the century.[4] Parts of Louisiana are sinking at a rapid rate, and 2,000 square miles of Louisiana wetlands have been lost due to human alterations of the environment.[5] These flooded lands are already the subject of legal battles, and lawmakers across the country are moving forward with plans to protect coastlines.[6] These legal battles are often compounded with pressures to ensure that beaches and coastal land are available for public use.[7] Judges are often left to decide

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atlantic-wmo/in-busy-atlantic-hurricane-season-storm-names-to-be-all-greek-idUSKBN26626L [https://perma.cc/52MH-H5XP?type=image]; Thomas Fuller & Jack Healy, *As Wildfires Burn Out of Control, the West Coast Faces the Unimaginable*, N.Y. TIMES (Sept. 13, 2020), https://www.nytimes.com/2020/09/13/us/Wildfires-Oregon-California-Washington.html [https://perma.cc/UEL5-3X44?type=image]; Lora Jones, Daniele Palumbo, & David Brown, *Coronavirus: A Visual Guide to the Economic Impact*, B.B.C. NEWS (June 30, 2020), https://www.bbc.com/news/business-51706225#:~:text=More%20people%20seeking%20work,major%20economies%20as%20a%20result.&text=Some%20experts%20have%20warned%2C%20however,those%20seen%20before%20the%20pandemic [https://perma.cc/F2XU-PBE8?type=image].

2. *See Climate Change: How Do We Know?*, NASA (last visited Sept. 15, 2020), https://climate.nasa.gov/evidence/; *Climate Impacts on Coastal Areas*, U.S. ENV'T PROT. AGENCY, https://19january2017snapshot.epa.gov/climate-impacts/climate-impacts-coastal-areas_.html#:~:text=Climate%20change%20threatens%20coastal%20areas,disrupt%20coastal%20and%20marine%20ecosystems [https://perma.cc/ANG4-VVD2?type=image].

3. *See, e.g.*, Somini Sengupta, *A Crisis Right Now: San Francisco and Manila Face Rising Seas*, N.Y.TIMES (Feb. 13, 2020), https://www.nytimes.com/interactive/2020/02/13/climate/manila-san-francisco-sea-level-rise.html [https://perma.cc/HDU5-6W9U?type=image].

4. *See Climate Impacts on Coastal Areas*, EPA, https://19january2017snapshot.epa.gov/climate-impacts/climate-impacts-coastal-areas_.html#:~:text=Climate%20change%20threatens%20coastal%20areas,disrupt%20coastal%20and%20marine%20ecosystems [https://perma.cc/Y24W-49TZ?type=image].

5. *Id.*

6. *See, e.g.*, Christopher Flavelle, *The Fighting Has Begun Over Who Owns Land Drowned by Climate Change*, BLOOMBERG BUSINESSWEEK (Apr. 25, 2018), https://www.bloomberg.com/news/features/2018-04-25/fight-grows-over-who-owns-real-estate-drowned-by-climate-change [https://perma.cc/8X93-TRJE?type=image]; *The Texas Shoreline Change Project*, UNIV. OF TEX. BUREAU OF ECON. GEOLOGY, https://www.beg.utexas.edu/research/programs/coastal/the-texas-shoreline-change-project [https://perma.cc/7A6Q-NUZ7?type=image].

7. *See, e.g.*, Dan Carden, *Lawmakers Push Measures Affirming Public Ownership, Access to Lake Michigan Beaches*, NWI.com (updated Mar. 24, 2020), https://www.nwitimes.com/news/local/govt-and-politics/lawmakers-push-measures-affirming-public-ownership-access-to-lake-michigan-beaches/article_dcfe9973-ccb7-5caf-8387-919daca98d77.html [https://perma.cc/E5TU-AA7Q?type=image].

whether public policy initiatives should be treated more favorably than private property rights.

In California and other coastal states, homes are commonly built on steep coastal cliffs, pounded by an ever-rising sea.[8] Despite rejections of its validity by some politicians,[9] coastal erosion is real[10]—albeit Thomas Felkay is unlikely to acknowledge this fact.[11] Felkay purchased a bluff-top property site (Property) overlooking the Pacific Ocean in Santa Barbara, California, located in a region that has experienced the highest rates of erosion in the state.[12] With the intent to build a single-family residence,[13] Felkay applied for a Coastal Development permit as required under California law.[14] The City's Planning Commission denied the permit, apparently assuming the proposed development would occupy part of the bluff edge (the Commission erroneously calculated the bluff edge at a lower elevation than it is). Under the City's Local Coastal Plan, building or development on a coastal bluff is expressly prohibited.[15] Following the Planning Commission's rejection of Felkay's permit, the City Council affirmed the Commission's decision on appeal. Felkay then filed suit against the City in the Santa Barbara Superior Court, claiming he was "entitled to compensation for the *per se* or categorical "regulatory" taking

8. In fact, coastal areas are some of the most highly developed parts of the state. SARA DENKA ET AL., BREN SCHOOL U.C. SANTA BARBARA, CITY OF SANTA BARBARA SEA LEVEL RISE VULNERABILITY ASSESSMENT (Mar. 2015).

9. President Trump made more than 120 posts on Twitter, questioning or making light of climate change by calling it "mythical," "nonexistent," or "an expensive hoax." Helier Cheung, *What Does Trump Actually Believe on Climate Change?*, B.B.C. NEWS (Jan. 23, 2020), https://www.bbc.com/news/world-us-canada-51213003 [https://perma.cc/A43L-E64R?type=image].

10. A coastal beach erosion study for California found that "the net shoreline change in the short-term (25-40 years) indicates that 66% of California's beaches are eroding." Cheryl J. Hapke et al., *National Assessment of Shoreline Change Part 3: Historical Shoreline Change and Associated Coastal Land Loss Along Sandy Shorelines of the California Coast*, USGS (2006), note 19, 46-51, https://pubs.usgs.gov/of/2006/1219/ [https://perma.cc/ZJ6N-K4TB?type=image].

11. Statement of Decision*,* Felkay v. City of Santa Barbara (Mar. 13, 2020 Cal. App. 2d) (No. 17CV0335) (*appeal docketed*).

12. *Id.* Central California, which covers the area from Point Reyes to just north of Santa Barbara, has experienced the highest percentage of erosion in the state in the last twenty-five to forty years. Hapke, *supra* note 10.

13. And fully aware that a historic 1978 landslide had previously destroyed two homes on precisely the same site.

14. California Coastal Act, Pub. Res. Code, §§ 30000-30900. More information on Local Coastal Plans can be accessed at http://www.coastal.ca.gov/lcps.html [https://perma.cc/T9RJ-VBEB?type=image].

15. *Id.* at 10. Under authority of the Coastal Act and Policy 8.2, "the bluff edge has been set at an elevation of 127 feet and there is to be no construction on the bluff face. No development shall be permitted on the bluff face except for engineered staircases or access ways to provide public beach access and pipelines for scientific research or coastal development industry."

under the City's Coastal Plan and its implementing statute, the California Coastal Act.[16] Specifically, Felkay asserted he was deprived of all economically beneficial use of his Property.[17] In response, the City claimed that although Felkay was not permitted to build a home on the Property, the vacant and undeveloped land retained some "value" and therefore the permit denial was not a *per se* taking.[18]

In a thirty-five-page ruling, the trial judge determined that the City's prohibition constituted a total "taking" because it deprived Felkay of all economically beneficial use of his property, and he was therefore entitled to compensation.[19] Relying on expert testimony from a credible local land-use consultant, the court concluded that the property was undevelopable due in large part to public parking concerns.[20] Additionally, the court determined that "the property was worth virtually nothing, but in no event more than 5% of value."[21] Felkay spent $850,000 to purchase the land and $1.5 million attempting to get the necessary city approvals.[22]

Felkay is a paradigmatic example of the tensions that arise from coastal adaptation policies implemented by local governments, which almost invariably pit private property rights against efforts to protect beaches for public use. Implicit in the city's decision to deny Felkay's permit request is the sense that finite pieces of coastland belong to the public and that private landowners should be precluded from developing such land.[23]

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16. *Id.* at 3.

17. *Id.* at 4.

18. *Id.* at 6. The City argued that since 276 square feet remained available for development, the Property therefore may have had some "value."

19. *Id.* at 30; *see* Lucas v. S.C. Coastal Council, 505 U.S. 1003 (1992) (holding that where the regulation denies all economically beneficial or productive use of land, the Fifth Amendment is violated, and compensation must be paid without any case-specific inquiry).

20. *Felkay,* No. 17CV0335 at 13-15. In addition to the bluff edge restriction, an ingress and egress easement, a sewer easement, and an exclusive-use easement limited parking on the subject property to one space, rather than two (which the City requires for residential properties), leaving only 267 square feet of developable area for parking. Because it was determined that Felkay would not be able to park a car in the 267 square-foot area, he would have to park on the public street, thereby burdening parking in the neighborhood.

21. *Id.* at 15.

22. *Id.* at 13-14.

23. In Santa Barbara, coastal erosion affects both the bluffs and the beaches. However, while beach erosion "can be reversed or replenished with sand over time," bluff erosion "is considered irreversible because the rock face is broken down and cannot be replaced." SARA DENKA ET AL., BREN SCHOOL U.C. SANTA BARBARA, CITY OF SANTA BARBARA SEA LEVEL RISE VULNERABILITY ASSESSMENT 8 (Mar. 2015).

B. Crooks v. State—*Is Regulation Prevention Effective?*

Felkay is instructive in understanding the legal issues presented on even geologically dissimilar shorelines, such as the marshes found in the coastal bayous of Louisiana.[24] Like California's coastline, Louisiana's wetlands are vulnerable to sea-level rise, subsidence, and storm-driven erosion.[25] The high rates of loss over the past eighty years are almost entirely related to human activities[26]—and unsurprisingly, to economic purposes. For example, in 1962, the United States began constructing the Catahoula Diversion Canal around the Catahoula Basin in accordance with the River and Harbor Act of 1960 to promote river navigation.[27] Louisiana, in conjunction with the project, "signed the 'Act of Assurances' which obligated the state to provide the federal government with all lands and property interests necessary to the project free of charge, and to indemnify the federal government from any damages resulting from the project."[28]

The Catahoula Basin in central Louisiana is the state's largest freshwater "lake."[29] It has been characterized by the U.S. Fish and Wildlife Service as "the most important inland wetland for water birds and shorebirds in Louisiana" and has also been enjoyed by "duck hunters, fishermen, birders, and other outdoor enthusiasts" for generations.[30] Since 1812, the Catahoula Basin has been commonly referred to as a "lake"—an important designation in Louisiana that would reserve ownership of

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24. Denise Reed, *To Preserve Its Coast, Louisiana Must Plan for the Future*, ENV'T DEF. FUND (Feb. 10, 2020), http://blogs.edf.org/growingreturns/2020/02/10/louisiana-plan-for-future-sea-level-rise/ [https://perma.cc/LBM9-VNWA?type=image].

25. USGS: LOUISIANA'S RATE OF COASTAL WETLAND LOSS CONTINUES TO SLOW (July 12, 2017), https://www.usgs.gov/news/usgs-louisiana-s-rate-coastal-wetland-loss-continues-slow [https://perma.cc/7686-JCMZ?type=image].

26. Rebecca B. Costa, *Policies of Loss: Coastal Erosion and the Struggle to Save Louisiana's Wetlands*, (2016) (Ph. D. dissertation, Louisiana State University) (on file at https://digitalcommons.lsu.edu/cgi/viewcontent.cgi?article=5306&context=gradschool_dissertations [https://perma.cc/W3MZ-TEAV?type=image]).

27. Crooks v. Dep't of Nat. Res., 2017-750 (La. App. 3 Cir. 12/28/18); 263 So.3d 540, 544.

28. *Id.* The Catahoula Lake Water Level Management Agreement was "developed and signed by the United States Army Corps of Engineers; the Bureau of Sport Fisheries and Wildlife, Fish and Wildlife Service, United States Department of Interior; and the Louisiana Wildlife and Fisheries Commission to ensure that proper water level management would protect the wildlife and public recreational opportunities in the Catahoula Basin, including an area known as Catahoula Lake." *Id.*

29. Crooks v. State, No. 224,262, 2016 WL 3197532, at *5 (La. Dist. Ct. May 17, 2016), *aff'd sub nom. id*.

30. *Support for Public Ownership and Management of Catahoula Lake*, https://lawildlifefed.org/resolution/support-for-public-ownership-and-management-of-catahoula-lake/ [https://perma.cc/T73R-G9GW].

land below the ordinary high-water mark to the state.[31] This water body designation is important because it determines ownership: if the body of water is defined as a lake, it is state property and remains open to the public; if it is defined as a river, then its banks (the area between the low and high watermarks) are deemed private property.

In *Crooks v. State*, Steve and Era Crooks (Lake Plaintiffs) filed a class-action lawsuit against the state of Louisiana in the Ninth Judicial District Court claiming ownership of the Catahoula Lake in central Louisiana.[32] The District Court concluded that Catahoula Lake was actually a "river,"[33] thereby reserving the ownership of its banks exclusively to riparian landowners.[34] According to Lake Plaintiffs' expert testimony, the Catahoula Lake was a flooded river basin and a man-made lake, and therefore not a publicly owned waterbody.[35] The river designation effectively declared the longtime public waterbody as private land, cutting off public access to duck hunters and the like. The appellate court upheld the decision.[36]

The Louisiana Supreme Court addressed the water-body designation controversy in January 2020 in *Crooks v. Louisiana Department of Natural Resources*.[37] The state's highest court upheld part of the district court decision declaring the Catahoula Lake private land, but reversed some of $38 million damages awarded to Plaintiffs.[38] The trial court awarded damages under the doctrine of inverse condemnation in the tens of millions, plus substantial attorneys' fees.[39] The Supreme Court explained that inverse condemnation:

> provides a procedural remedy to a property owner seeking compensation for land already taken or damaged against a governmental or private entity

31. *Crooks*, 2016 WL 3197532, at *1-2.
32. *Id.* at *1.
33. *Id.* at *25-27.
34. *Id.* at *18-19 (citing LA. Civ. Code., art. 456 (2016)).
35. In Louisiana, the general public may freely access these navigable water bodies, which form part of the public trust. By finding Catahoula Lake non-navigable in 1812, the court removed Catahoula Lake as a public thing under Louisiana Civil Code article 450, and, consequently, ended the public access that sportsmen and local community had long enjoyed. Thus, Catahoula Lake was susceptible to private ownership as a private thing.
36. Crooks v. State Dep't of Nat. Res., 17-750 (La. App. 3 Cir. 12/28/18); 263 So.3d 540, 549.
37. Crooks v. Dep't, 2019-0160 (La. 1/29/20); No. 2019-C-0160, 2020 WL 499233.
38. *Id.* at *5-6. The Supreme Court of Louisiana upheld the trial court's finding that the Catahoula Basin was "a permanent river that seasonally overflowed and . . . [that plaintiffs] are the owners of the riverbanks."
39. Crooks v. State, No. 224,262, 2016 WL 3197532, at *45 (La. Dist. Ct. May 17, 2016), *aff'd sub nom Crooks*, 263 So.3d at 544.

> having the powers of eminent domain where no expropriation has commenced. . . . The action for inverse condemnation is available in all cases where there has been a taking or damaging of property where just compensation has not been paid, with regard to whether the property is corporeal or incorporeal.[40]

The Court's recent decision did "protect taxpayers from a nearly $67 million judgement against the State for the construction and operation of a federally-funded lock and dam on Catahoula Lake,"[41] though it did not restore the lake to unambiguous public ownership.[42] But at what cost did this decision come?

In reclassifying the longtime lake as a river, the Louisiana Supreme Court failed to consider the greater impact of its decision on Louisiana property law as a whole. Though Louisianans benefited from open access to the lake for more than fifty years,[43] the court effectively terminated the public's continuing right to access an important resource and one in which the state has some reliance interests. By terminating a public right of access, the *Crooks* decision means that this body of water cannot be utilized to create public reservoirs for future use. From an environmental standpoint, it leaves unresolved the public's right to manage the area sustainably for the benefit of fish and wildlife. Until recently, the Catahoula Basin was publicly owned and managed. With its new designation, management principles for the protection of natural resources remain uncertain, particularly because the state of Louisiana has yet to adopt a comprehensive water management plan (and there is no such proposed legislation as of yet).[44] Further, it sets a dangerous precedent for restricting public access elsewhere in the state. The practical significance of the decision is that Louisiana will either have to pay for the water, by contract or perhaps through the exercise of its eminent domain power, if it wants to preserve public access to it.

As illustrated above, modern land-use and environmental actions frequently raise questions of unconstitutional takings and the proper

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40. *Crooks*, 2020 WL 499233, at *10 (quoting State v. Chambers Investment Co., Inc., 595 So. 2d 598, 602 (La. 1992)).

41. *In Victory for Taxpayers, Louisiana Supreme Court Reverses Catahoula Lake Judgement*, U.S. DEP'T OF INTERIOR (Jan. 30, 2020), https://www.ag.state.la.us/Article/9732 [https://perma.cc/HDU4-3TEH?type=image].

42. The Supreme Court did not reverse the lower court's reclassification of the lake as a river.

43. *Support for Public Ownership and Management of Catahoula Lake*, *supra* note 30.

44. Daryl G. Purpera, *Louisiana's Management of Water Resources*, LA. LEGIS. AUDITOR (issued Feb. 5, 2020), http://app.lla.state.la.us/PublicReports.nsf/0/7AE69DA84B7F7E898625850 40079C762/$FILE/LMWR.pdf [https://perma.cc/EE6Q-CQ6Q?type=image].

exercise of the state's police power. Today, especially in coastal states, there is a felt exigency to protect against erosion and degradation of the natural environment. And in a world in which the coasts are acutely finite, access to these limited public goods is jealously guarded. For many states and local communities, protection of the environment is at the heart of the Tenth Amendment. Accordingly, the following sections address the takings clause restrictions as well as land-use and zoning restrictions in California and Louisiana within the context of coastal management, and their impacts on states' ability to exercise their police power imperatives to protect health, safety, and morals in relation to the environment.

II. THE TAKINGS CLAUSE OF THE FIFTH AMENDMENT

The "Takings Clause" at the end of the Fifth Amendment to the U.S. Constitution (applied to the states through the Incorporation Doctrine) imposes a constitutional restriction on government power to acquire or restrict private property rights.[45] The purpose of this constitutional provision is to prevent the government from forcing some people alone to bear public burdens that, in justice and fairness, should be borne by the public as a whole.[46] Takings jurisprudence may require the payment of compensation to the property owner.[47]

Although takings were initially limited to physical occupations,[48] the U.S. Supreme Court has since recognized the doctrine of regulatory takings, acknowledging the power of the administrative state to diminish the use and value of private property. [49] As mentioned above, the doctrine of inverse condemnation may constitute a taking when the government damages, occupies, or alters private property without consent.

When the government commits a *per se* taking, compensation will be due regardless of the nature of the public interest advanced.[50] The U.S. Supreme Court set forth two categories of regulatory action that will

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45. U.S. CONST. amend. V, provides in pertinent part that private property cannot be taken "without due process of law; nor shall private property be taken for public use, without just compensation."

46. *See* Murr v. Wisconsin, 137 S. Ct. 1933, 1950 (2017) (citing Armstrong v. United States, 364 U.S. 40, 49 (1960)) (noting that the central purpose of the takings clause is to "bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole").

47. *See, e.g.*, Penn Central Trans. Co. v. New York City, 438 U.S. 104, 124 (1978).

48. *See* Lucas v. S.C. Coastal Council, 505 U.S. 1003, 1028 n.15 (1992) ("[E]arly constitutional theorists did not believe the Takings Clause embraced regulations of property at all.").

49. *Id.*

50. *Id.* at 1015.

generally be considered *per se* (or "categorical") takings for Fifth Amendment purposes.[51] First, a government regulation that eliminates *all* economically beneficial use of a landowner's property amounts to a compensable taking.[52] Second, where regulations require a property owner to suffer a permanent physical occupation of the property, however minor, a taking has occurred for which compensation is due.[53]

Despite deciding a number of land-use takings cases since the late 1970s,[54] the U.S. Supreme Court has not promulgated a standard for determining "where a regulation ends and a taking begins," but rather has evaluated takings claims on a case-by-case basis.[55] Apart from the two types of categorical takings noted above and takings within the land-use context to be addressed below, regulatory takings challenges are evaluated using the *Penn Central Transportation Co. v. City of New York (Penn Central)* factors.[56] In *Penn Central*, the Court held that the designation of Grand Central Terminal as a historic landmark, which prevented the

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51. *Id.*

52. *Id.* at 1015-16.

53. Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419 (1982). The seminal case *Lucas v. South Carolina Coastal Council* held that where the regulation denies all economically beneficial or productive use of land, the Fifth Amendment is violated, and compensation must be paid without any case-specific inquiry. 505 U.S. 1003 (1992). In *Lucas*, the South Carolina legislature passed the Beachfront Management Act (BMA), which prevented Lucas from building any "permanent habitable structures" on his two immediately adjacent parcels located on a barrier island near Charleston. *Lucas*, 505 U.S. at 1007-09. Lucas argued that this regulation deprived him of all economically viable use of his property and thus constituted a regulatory taking entitling him to damages. *Id.* at 1029. In rejecting the theory that regulations are not takings if they prevent social harm, the Supreme Court instead ruled in favor of a theory based on the extent of the economic effect, or "the diminution of value," which limits the owner's ability to profit from the property itself. *See, e.g.*, Penn. Coal Co. v. Mahon, 260 U.S. 393 (1922); Dooley v. Town Plan & Zoning Comm'n, 197 A.2d 770 (1964).

54. Penn Cent. Transp. Co. v. New York City, 438 U.S. 104 (1978); Agins v. Tiburon, 447 U.S. 255 (1980); Williamson Cnty. Reg'l Planning Comm'n v. Hamilton Bank of Johnson City, 473 U.S. 172 (1985); MacDonald, Sommer & Frates v. Cnty. of Yolo (1986); Keystone Bituminous Coal Ass'n v. DeBenedictis, 480 U.S. 470 (1987); Nollan v. Cal. Coastal Comm'n, 483 U.S. 825 (1987); First English Evangelical Lutheran Church v. Cnty. of Los Angeles, 482 U.S. 304 (1987); Lucas v. S.C. Coastal Council, 505 U.S. 1003 (1992).

55. *See* Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419 (1982), reaffirming the case-by-case approach. The "deprivation of all economically feasible use" rule established in *Lucas* left unresolved how courts should measure the "property interest" against the "loss of value." *Lucas*, 505 U.S. at 1016 n.7. Does a ninety percent restriction of development on a private landowner's property constitute a total deprivation of all beneficial use, or is it considered a mere diminution in value? The Court stated that this difficult question may be reconciled by "how the owner's reasonable expectations have been shaped by the State's law of property—i.e., whether and to what degree the State's law has accorded legal recognition and protection to the particular interest in land with respect to which the takings claimant alleges a diminution in (or elimination in) value."

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

construction of large office building above it, was not a taking.[57] When a regulation puts restrictions on land that falls short of eliminating *all* economically beneficial use, a taking nonetheless may have occurred, depending on a balancing of the *Penn Central* factors: (1) the economic impact on the landowner, (2) the extent to which the regulation has interfered with the landowner's reasonable investment-backed expectations,[58] and (3) the character of the governmental action.[59]

While the takings clause prohibits taking private property for public use without just compensation, it is well established that the government can place reasonable conditions on the use of private property, depending on the significant nexus between the exaction sought and a legitimate state interest.[60] The Supreme Court's respective holdings in *Nollan v. California Coastal Commission* and *Dolan v. City of Tigard* established a two-pronged test for determining whether a condition on the development of property constitutes a taking. First, a governmental exaction must substantially further legitimate governmental interests, and there must be an "essential nexus" between the legitimate state interest (e.g., public access to the beach) and the "exaction" (e.g., the permit condition).[61] If such a nexus exists, the court must then determine whether there is a "rough proportionality" between the exaction and the projected impact of the proposed development.[62] While a "legitimate state interest" has not been expressly defined by the court, a range of government actions have satisfied this requirement.[63]

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57. *Id.* at 138.

58. *See Keystone*, 480 U.S. at 492-93, 499 (holding that no regulatory taking occurred because the challenged provisions of the Subsidence Act did not make the coal mines unprofitable or undermine the coal companies' "investment-backed expectations").

59. For instance, whether it amounts to a physical invasion or instead merely affects property interests through some public program to promote the common good. Sansotta v. Town of Nags Head, 97 F. Supp. 3d 713 (E.D. N.C. 2014) (applying *Penn Central* factor of character of governmental action); *see also* Rancho de Calistoga v. City of Calistoga, 800 F.3d 1083 (9th Cir. 2015).

60. *See* Nollan v. Cal. Coastal Comm'n, 483 U.S. 825 (1987); Dolan v. City of Tigard, 512 U.S. 374 (1994).

61. *Nollan*, 483 U.S. at 837 ("[T]he government may not arbitrarily exact property by demanding dedication of private property to public access in exchange for a permit, unless the permit condition serves a directly related government purpose.").

62. *Dolan*, 512 U.S. at 391 ("[A] term such as 'rough proportionality' best encapsulates . . . the requirement of the Fifth Amendment . . . the city must make some sort of individualized determination that the required dedication is related both in nature and extent to the impact of the proposed development.").

63. *See, e.g.*, *Penn Cent. Transp. Co.*, 438 U.S. at 130 (landmark preservation); Euclid v. Ambler Realty Co., 272 U.S. 365 (1926) (residential zoning).

In sum, a plaintiff seeking to challenge a government regulation as an uncompensated taking of private property may proceed by alleging a "physical" taking (which is a kind of inverse condemnation), a *Lucas* total regulatory taking, a *Penn Central* taking, or a land-use exaction violating the *Nollan* and *Dolan* standards.[64]

III. EROSION AND LAND USE

U.S. coastlands are exposed to wind, waves, tides, and currents that can both erode the shore and expand it with sedimentary deposits.[65] The force of the ocean, in combination with storm systems and other natural forces, may entirely obliterate coastal property and increase erosion processes.[66] Rising sea levels due to global warming also contribute to the degradation of coastland.[67] As warming waters expand and push the sea level higher, scientific models anticipate "increased coastal flooding, erosion property damage, and resource loss, including the loss of recreational, economic, cultural, and ecological beach resources."[68]

Shoreline erosion is a particularly important concern for coastal property owners, beachgoers, and local governments managing coastal public resources. When land was plentiful, the impact of a governmental regulation was arguably less noticeable and less significant. But today, state and national regulations that impact local concerns, such as public beaches, increasingly affect beachside property owners' use of their (often expensive) land. Since equivalent alternative places to build continue to become more limited, government interference becomes that much more apparent.[69]

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64. *See* Lingle v. Chevron, 544 U.S. 528, 539-40 (2005). The narrow context in which public rights override private property rights, and for which compensation is not required, are confined to areas such as public nuisance (*see, e.g.*, Keystone Bituminous Coal Ass'n v. DeBenedictis, 480 U.S. 470, 490 (1987)), navigation servitudes (*see*, *e.g.*, United States v. Chandler Dunbar Co., 229 U.S. 53 (1913)), and public trust doctrines.

65. Michael Pawlukiewicz et al., *Ten Principles for Coastal Development*, URBAN LAND INST. 16 (2007), https://uli.org/wp-content/uploads/ULI-Documents/Ten-Principles-for-Coastal-Development.pdf [https://perma.cc/UXW8-RPQV?type=image].

66. *Id.*

67. *Id.*

68. 5.1 Coastal Hazards, CITY OF SANTA BARBARA (certified Aug. 2019), https://www.santabarbaraca.gov/civicax/filebank/blobdload.aspx?BlobID=202921 [https://perma.cc/8GBB-5PKA?type=image].

69. *See* Alison St John, *Coastal Cities Wrestling With 'Managed Retreat' Ramifications of Rising Sea Levels* (Aug. 1, 2019), https://www.kpbs.org/news/2019/aug/01/coastal-cities-managed-retreat-rising-sea-levels/ [https://perma.cc/9VZ5-GRMK?type=image]. In response to the Coastal Commission's encouragement of a "managed retreat" strategy, one California Mayor

State law establishes a framework for local planning procedures, but cities and counties adopt their own unique responses to the issues they face. Coastal states implement a wide range of methods to attain ecological preservation, including regulatory, planning, state land management, acquisition, non-regulatory, and research tools.[70] The complex nature of land-use zoning and planning requires a combined effort, including many hearings, input from interest groups and community members, and eventually city councils or other governing boards.[71] Particularly combative debates ensue when landowners' desire to protect the value of their beachside homes is limited by the public's right to use the beaches and safeguard natural resources. This commonplace conflict illustrates how new priorities and values, such as environmental protection, frequently clash with older ones, such as supporting industrial growth and development.

A. California's Crumbling Coast

Although drought and wildfires have been the predominant environmental concerns for Californians as of late, rising sea levels pose an equally menacing threat, especially for coastal property owners.[72] Sea levels in the state of California are expected to rise at accelerating rates, "put[ting] more than 20,000 coastal homes at risk" in the coming quarter century.[73] Scientists confidently predict that with limited human intervention, a sea-level rise of one to two meters could completely erode between thirty-one and sixty-seven percent of the state's beaches by

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responded: "First of all, purchasing those properties would be extremely expensive. And secondly, where would those people move in Del Mar? . . . There just isn't the space."

70. *See* DeVita v. County of Napa, 889 P.2d 1019, 1024 (Cal. 1995).

71. *Id.* Land-use planning employs a number of tools that can be viewed hierarchically. At the top is a municipality's most potent, called either a "general or comprehensive or master plan." Beneath that plan are various zoning ordinances and planning documents, but the controlling document is always the general plan.

72. *See, e.g.*, Somini Sengupta, *A Crisis Right Now, San Francisco and Manila Face Rising Seas*, N.Y. TIMES (Feb. 13, 2020), https://www.nytimes.com/interactive/2020/02/13/climate/manila-san-francisco-sea-level-rise.html [https://perma.cc/AG3N-D3C3?type=image]. In Pacifica, a suburb south of San Francisco, coastal erosion is fast-moving "coastal bluffs are so swiftly eroding that city officials have already demolished some properties before they could fall into the water." *Id.*

73. *Higher Tides Will Threaten More than 20,000 California Homes by Mid-Century*, UNION OF CONCERNED SCIENTISTS (June 18, 2018), https://www.ucsusa.org/about/news/higher-tides-will-threaten-more-20000-california-homes-mid-century [https://perma.cc/?V76S-THEV type=image].

2100.[74] Three overarching challenges have been identified as particularly important for the future of California's coastland: population pressure, demographic change, and rising atmospheric greenhouse gas levels.[75] As these challenges are only predicted to worsen, they call into question the suitability of the state's coastal management framework and current plan for management of the coast. Erosion at this scale puts more than $15-billion worth of private homes at risk.[76] Threats to residential development due to rising sea levels, and the economic investment required to implement environmental protection measures, is particularly politicizing in coastal communities.[77] Further, they pose not only "a vexing planning challenge"[78] but an economic burden as well.[79]

B. California Land Use

Management of ocean and coastal resources in California is a combined effort of state, local, and federal agencies.[80] In 1976, the state of California adopted the California Coastal Act (Coastal Act), placing statewide authority over coastal development and management with the

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74. *Disappearing Beaches: Modeling Shoreline Change in Southern California*, U.S. GEO. SURVEY (Mar. 27, 2017), https://www.usgs.gov/news/disappearing-beaches-modeling-shoreline-change-southern-california [https://perma.cc/6EZM-3GGA?type=image].

75. JORDAN DIAMOND ET AL, CTR. FOR L., ENERGY & THE ENV'T, UC BERKELEY, THE PAST, PRESENT, & FUTURE OF CALIFORNIA'S COASTAL ACT, (Aug. 2017), https://www.law.berkeley.edu/wp-content/uploads/2017/08/Coastal-Act-Issue-Brief.pdf [https://perma.cc/UU75-DXG7?type=image].

76. *Higher Tides Will Threaten More than 20,000 California Homes by Mid-Century*, *supra* note 73. The threat to coastal home jeopardizes millions of dollars in property taxes paid to the state: "The 20,000 California homes at risk in 2045 contribute nearly $187 million in annual property taxes today; that revenue source, and the services it funds, would be increasingly in jeopardy." *Id.*

77. In a workshop for cities updating Coastal Plans, a California City Councilman said that "even the words 'managed retreat' evoke fear that people will lose their homes and stops any rational discussion of preparing for sea level rise." Alison St. John, *Coastal Cities Wrestling with 'Managed Retreat' Ramifications of Rising Sea Levels* (Aug. 1, 2019), KPBS NEWS, https://www.kpbs.org/news/2019/aug/01/coastal-cities-managed-retreat-rising-sea-levels/ [https://perma.cc/43LG-CHW4?type=image].

78. Charles Lester & Mary Matella, *Managing the Coastal Squeeze: Resilience Planning for Shoreline Residential Development*, 36 STAN. ENV'T L.J. 23.

79. *Id.* For example, houses in north Del Mar can list at more than $20 million. It is unclear who would be liable for that loss if the city required property owners to retreat from the beach. In other parts of California, situations have already arisen in which a local jurisdiction had to use public money to demolish a privately owned building that crumbled due to sea-level rise after the owners went bankrupt.

80. *See* Jonathon Gurish, *Overview of California Ocean and Coastal Laws*, CAL. OCEAN PROT. COUNCIL, http://www.opc.ca.gov/webmaster/ftp/pdf/docs/Overview_Ocean_Coastal_Laws.pdf [https://perma.cc/Y8WW-YR67?type=image].

Coastal Commission.[81] The Coastal Act provides for the protection of existing development from shoreline hazards and also requires that new development (including the redevelopment of existing structures) protect public access and recreation, sensitive biological and visual resources, and other coastal resources.[82]

In 1993, the California Legislature amended the Coastal Act to recognize that "sound and timely scientific recommendations are necessary for many coastal planning, conservation, and development decisions . . . especially with regard to issues such as coastal erosion and geology, marine biodiversity, wetland restoration, the question of sea-level rise, desalination plants, and the cumulative impact of coastal zone developments."[83] Under California law, each county and city in the state is required to develop and adopt a localized "General Plan" outlining objectives, principles, and standards for long-term development.[84] A General Plan must address seven mandatory elements: land use, circulation, housing, conservation, open space, noise, and safety.[85]

Coastal Development Permits are the regulatory mechanism by which proposed developments in the coastal zone are brought into compliance with these policies. Recently, the California Coastal Commission recommended the strategy of "managed retreat," which involves acquiring structures in the path of the rising ocean and moving them inland.[86] However, such approaches are temporary and likely to exacerbate problems.[87] In fact, some scientists, including Charles Lester, the former executive director of the California Coastal Commission, claim that coastal communities will soon face an ultimatum: remove coastal property and cease future development, or say goodbye to the beaches.[88]

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81. DIAMOND ET AL., *supra* note 75.

82. Since the passage of Proposition 20, the predecessor to the California Coastal Act, the state has actively addressed management of coastal land-use hazards on the coast. *See*, *e.g.*, Cal. Coastal Zone Conservation Act of 1972 (Proposition 20), § 27403(d) (requiring that all development permits ensure that land from alteration and construction of structures minimize the danger of floods, landslides, erosion, siltation, and earthquakes).

83. DIAMOND ET AL., *supra* note 75.

84. CAL. GOV'T CODE § 65302.

85. *Id.*

86. CAL. COASTAL COMM'N, RESIDENTIAL ADAPTATION POLICY GUIDANCE 28 (Mar. 2018).

87. Lester & Matella, *supra* note 78.

88. *Id.*

C. Louisiana's Lost (Wet)Lands

"Louisiana has 5,000 miles of navigable waterways and a 19,000-mile inland waterway system."[89] Similar to California, Louisiana has plentiful coastal resources[90] compromised by rapid shoreline degradation.[91] About half of the wetlands in the United States have been lost in the past 200 years, and Louisiana has experienced the greatest losses.[92] Since the 1930s, about one-quarter (approximately 2,000 square miles) of the state's wetlands have disappeared.[93] Three major factors have been identified as contributing to the loss of wetlands and coastal erosion in Louisiana: "[1] the manipulation of the Mississippi River for flood control and navigation, [2] conversion of wetlands to dry lands for agriculture and urban sprawl, and finally, [3] the creation of infrastructure to support the extraction of oil and gas in Louisiana and the Outer Continental Shelf."[94] This loss is devastating, as Louisiana's swamps and marshes play a vital role to the state's wellbeing. The wetlands protect the shoreline from erosion, the estuaries from depletion, and the ecosystems from being driven out. Not only do the wetlands provide recreational and agricultural opportunities, but they also provide protection and infrastructure from damaging storm surges. Further, many Louisianans rely on the states' $1-billion-per-year seafood industry for their livelihood and continued existence.[95] Without the wetlands, more than two million residents would be forced to relocate, changing their cultural way of life centered around Louisiana's oyster and shrimp industries.[96]

D. Louisiana Land Use

The Louisiana Department of Natural Resources (LDNR) is the designated lead agency for the Coastal Resources Program. Under the authority of the Louisiana State and Local Coastal Resources Management

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89. *A Coastal User's Guide to the Louisiana Coastal Resources Program*, STATE OF LA. DEP'T OF NAT. RES., https://www.govinfo.gov/content/pkg/CZIC-ht393-l8-c65-19xx/html/CZIC-ht393-l8-c65-19xx.htm [https://perma.cc/KDS8-67PD?type=image].

90. The state makes up forty percent of the total coastal marsh in the country.

91. S. Jeffress Williams, *Louisiana Coastal Wetlands: A Resource at Risk*, USGS, https://pubs.usgs.gov/fs/la-wetlands/ [https://perma.cc/L97G-Y26U?type=image].

92. *USGS: Louisiana's Rate of Coastal Wetland Loss Continues to Slow*, USGS (July 12, 2017), https://www.usgs.gov/news/usgs-louisiana-s-rate-coastal-wetland-loss-continues-slow [https://perma.cc/HH4P-KYPY?type=image].

93. *Id.*

94. Costa, *supra* note 26.

95. LOUISIANA COASTAL WETLAND FUNCTIONS & VALUES, https://lacoast.gov/reports/rtc/1997/4.htm [https://perma.cc/KXQ2-FFFS?type=image].

96. *Id.*

Act of 1978, the Office of Coastal Management (OCM) of the LDNR implements the Louisiana Coastal Resources Management Program.[97] Like California's Coastal Commission, Louisiana's OCM regulates development and manages the resources of the Coastal Zone.

Permits are required for coastal developments to ensure that structures and activities that alter the coastline are within Coastal Use Guidelines.[98] Local Coastal Management Programs (LCMP) give local coastal parishes the opportunity to function as the permitting authority for coastal uses of local concern. Such uses are those "which directly and significantly affect coastal waters and are in need of coastal management but are not uses of state concern and which should be regulated primarily at the local level if the local government has an approved program."[99] A parish that wishes to become an official LCMP must complete a process to obtain federal and state approval.[100] The twelve coastal parishes with approved, active programs receive "technical assistance and guidance" from the OCM.[101]

In 2012, Louisiana adopted and implemented the Comprehensive Master Plan for a Sustainable Coast.[102] The fifty-year, $50-billion plan, however, has done little for the state, as "inefficient bureaucratic management, insufficient funding, and the failure to substantially alter land-use and water-use policies" continue to undermine the state's conservation and restoration efforts.[103] The Master Plan is periodically updated with new project concepts that are screened by the Coastal Protection and Restoration Authority (CPRA) against updated climate predictions.[104]

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97. *Office of Coastal Management: OCM at Work*, LA. DEP'T OF NAT. RES. COASTAL MGMT., http://www.dnr.louisiana.gov/index.cfm/page/85 [https://perma.cc/NB27-SJDJ?type=image].

98. *Office of Coastal Management: Applying for a Coastal Use Permit*, LA. DEP'T OF NAT. RES. COASTAL MGMT., http://www.dnr.louisiana.gov/index.cfm?md=pagebuilder&tmp=home&pid=93 [https://perma.cc/9EF6-5SSP?type=image].

99. La. R.S. 49:214.25(A)(2).

100. *Local Coastal Management Programs*, LA. DEP'T OF NAT. RES. COASTAL MGMT., http://www.dnr.louisiana.gov/index.cfm?md=pagebuilder&tmp=home&pid=111 [https://perma.cc/7QTH-TULH?type=image].

101. *Id.*

102. COASTAL PROTECTION & RESTORATION AUTHORITY, LOUISIANA'S COMPREHENSIVE MASTER PLAN FOR A SUSTAINABLE COAST (2012), https://biotech.law.lsu.edu/la/coast/2012-Coastal-Master-Plan.pdf [https://perma.cc/FWD5-WUR7?type=image].

103. Costa, *supra* note 26 at vii.

104. *2023 Coastal Master Plan*, Coastal Protection and Restoration Authority (last visited Jan. 11, 2021), https://coastal.la.gov/our-plan/2023-coastal-master-plan/.

IV. STATE TAKINGS

In addition to limitations imposed by the federal takings clause, state and local governments may also be subject to state constitutional restrictions, which are often more protective of private property rights than the Fifth Amendment.[105] While all states have some form of constitutional provision recognizing the importance of property rights,[106] some states, including California and Louisiana, have provided broader protection of private property rights than the Fifth Amendment, because they require just compensation not only when a property is "taken" but also when it is "damaged."[107]

The stark California constitutional mandate that just compensation be paid when private property is taken "or damaged" for public use is parallel to the Louisiana constitutional mandate.[108]

A. California Takings Clause

Under the California Constitution, "[p]rivate property may be taken or damaged . . . for public use only when just compensation . . . has first been paid to, or into the court for, the owner."[109] Because this provision requires compensation for damage as well as a taking, the California Constitution is broader in scope than its federal counterpart.[110] This notion was reiterated in *Monks v. City of Rancho Palos Verdes*, where the Court of Appeal, Second District, Division One upheld a landowner's taking claim under the California Constitution.[111]

In California, when there has been no *per se* regulatory taking, compensation is required only if the regulation is found to have unfairly singled out the property owner to bear a burden that should be borne by

105. American Law of Zoning § 16:2.

106. *See, e.g.*, CAL. CONST., art. I, § 19; LA. CONST. art. I, § 4(B)(1),

107. *See* Herzberg v. County of Plumas, 34 Cal. Rptr. 3d 588, 596 (Cal. Ct. App. 2005) ("The California Constitution also requires compensation when private property is damaged for public use. By virtue of including 'damage' to property as well as its 'taking,' the California clause protects a somewhat broader range of property values than does the corresponding federal provision. Apart from that difference, however, the California Supreme Court has construed that state clause congruently with the federal clause.") (internal quotation marks and citations omitted).

108. *See* LA. CONST. art. I, § 4(B) ("Property shall not be taken or damaged by the state . . . except for public purposes and with just compensation. . . . [T]he owner shall be compensated to the full extent of his loss.").

109. CAL. CONST., art. I, § 19.

110. To compare, the Fifth Amendment of the federal Constitution states: "[N]or shall private property be taken for public use, without just compensation."

111. Monks v. Cty. of Rancho Palos Verdes, 84 Cal. Rptr. 3d 75, 98 (Cal. Ct. App. 2008).

the public as a whole.[112] Other relevant considerations in the regulatory takings analysis are whether there is a sufficient nexus between the effect of the regulation and the objectives it is supposed to advance.[113] For example, in *Monks v. City of Rancho Palos Verdes*, the city adopted a moratorium on development because of a risk of landslides.[114] The Court concluded the moratorium constituted a total taking because obtaining an exclusion for the moratorium would be excessively costly and the only use to which the land could otherwise be put was for "temporary minor nonresidential" structures.[115] Like in *Felkay*, which denied the permit to protect characteristic California bluffs, and in *Lucas*, where the state's coastal zone law banned owners from any new construction because it would threaten a valuable natural resource, state and local governments were forced to compensate landowners because of the American property right entrenched in our society.[116] The deadlock in finding agreeable solutions for protecting coastland is clear: While the Coastal Act requires cities to prevent development from occurring on topography not safe or suitable for such development, the Constitution requires property owners to be compensated when development is so limited.

B. Louisiana Takings Clause

The Louisiana Takings Clause likewise prevents the state and political subdivisions from either taking or damaging property for a public purpose without paying compensation.[117] In order to establish an unlawful governmental taking, a Louisiana landowner must prove three things: (1) a valid property right at the time of the suit; (2) a state taking or damaging of property; and (3) that the taking or damaging was for a public purpose.[118]

A novel takings case from the Louisiana Supreme Court is *Avenal v. State*, which was a class-action involving more than 200 oyster leases, thousands of acres of leased state water bottoms, and more than $1 billion

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112. Yee v. City of Escondido, 503 U.S. 519, 522-23 (1992).

113. *See, e.g.*, Surfside Colony, Ltd. v. California Coastal Comm'n, 226 Cal. App. 3d 1260, 1269 (Cal. Ct. App. 1991), *reh'g denied and opinion modified*, (Feb. 14, 1991) (striking down a dedication because there was not a "solid" or "close" connection between the proposed project and the necessity of a public easement).

114. *Monks*, 84 Cal. Rptr. 3d at 85.

115. *Id.* at 105.

116. *See generally* Statement of Decision, Felkay v. City of Santa Barbara (Mar. 13, 2020 Cal. App. 2d) (No. 17CV0335) (*appeal docketed*); Lucas v. S.C. Coastal Council, 505 U.S. 1003 (1992).

117. LA. CONST. art. I, § 4(B)(1).

118. *See* State v. Chambers Investment Co., 595 So. 2d 598, 603 (La. 1992).

in damages.[119] The court was asked to consider whether a state coastal restoration project that diminished the leases' value was a "taking" of the lessees' land under Article 1, Section 4 of the Louisiana Constitution.[120] In concluding that the oyster fishermen had no takings claims as a result of the Coastal Restoration Project, the court explained that coastal restoration derives from a "background principal of Louisiana law" that avoidance of a "grave threat to the lives and property of others" trumps the property rights of private (oyster) leaseholders.[121]

The case stemmed from a flood-control project that altered the salinity of the waters, and as a result, the productivity of the oyster leases. In the early 1960s, the Breton Sound Basin in Louisiana experienced unexpected alterations in the salinity patterns of the waters, primarily due to the flood control project.[122] The salinity issues were the result of the federal government's construction of fresh-water diversion structures into the Breton Sound Basin, which were constructed under the authority of the Flood Control Act of 1965.[123] As a result, some previously impossible oyster-growth developed. However, the basin's high salinity levels also ruined previously productive oyster grounds that oyster fishermen had leased from the Louisiana Wildlife and Fisheries Commission via water-bottom lease agreements.[124]

These water-bottom lease owners filed a takings claim in the U.S. Court of Federal Claims, alleging they suffered a compensable taking under the Louisiana Constitution as a result of a coastal restoration project.[125] In reversing the lower courts' judgments awarding compensation, the Louisiana Supreme Court held that most of the oyster fishermen were not entitled to compensation, and held the state harmless for any loss or damage resulting from the coastal diversion project due to indemnity clauses within their leases.[126] The remaining oyster fishermen failed to prove a taking and instead only established *damage* to their property interests, which has a shorter prescriptive period in Louisiana, and so the court held that these remaining fishermen were also not entitled

119. Avenal v. State, 886 So.2d 1085, 1088-89 (La. 2004).

120. *Id.* at 1103.

121. *Id.* at 1107 n.28.

122. Pub. L. No. 89-298, 79 Stat. 1073, 1076 (1965) (modifying and expanding the Flood Control Act of 1928, Pub. L. No. 70-391, 45 Stat. 534 (1928)).

123. Specifically, § 204 adopted and authorized H.R. Doc. No. 308, 88th Cong., 2d Sess. (1965), giving the location and description of the freshwater diversion structures. Avenal v. United States, 33 Fed. Cl. 778, 779 (2003).

124. *Id.* at 781.

125. *Id.* at 779.

126. Avenal v. State, 886 So.2d at 1109.

to compensation because their claims had prescribed.[127] Indeed, the Louisiana Constitution Article 1, Section 4(B)'s requirement of compensation "to the full extent of [the] loss" may often exceed the Fifth Amendment's requirement of "just compensation." But in Louisiana, this difference comes into play only after resolution of *Avenal*'s threshold issue: whether or not a compensable damage occurred at all.

V. CONCLUSION

The Fifth Amendment as adopted prevented only the federal government from appropriating land and other resources from citizens for a public purpose without paying compensation. The addition of the Fourteenth Amendment to the Constitution extended protection against uncompensated takings to citizens against their own states, thereby providing a new opportunity for federal interference with state and local democracy. Questions about "police power," "power of eminent domain," and determining "just compensation" all pose a similar question: When a social decision to redirect economic resources clearly entails opportunity costs as well as public welfare benefits, how should these costs ultimately be distributed amongst the members of society? It is submitted that, in 2020, after decades of environmental protection and concern about climate change, the balance between public and private interests must change. Perhaps this rebalancing is best accomplished through legislation, which would be based on findings subject to court review. Inevitably, the Takings Clause will be used as a sword against the government, but at what point—especially as climate change continues to progress—can we say that the landowner has been deprived of legitimate expectations? For example, in *Felkay*, where the plaintiff knew that an earlier landslide had destroyed property on the same site,[128] were his expectations of building a new home really *legitimate*? Meanwhile, in *Crooks*, a decision in favor of the government action would have preserved a public good for eternity. Once developed or altered, the environment is forever changed. And, as necessary, true instances of state overreach can be addressed in federal and state courts, even if the issues are difficult.[129]

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127. *Id.* at 1109-10.

128. *See supra* note 13.

129. *See* Pearson v. City of Grand Blanc, 961 F.2d 1211, 1217 (6th Cir. 1992) (noting that "the lack of uniformity among the [federal] circuits in dealing with zoning cases . . . is remarkable"); *see also* Mark S. Dennison & Steven M. Silverberg, American Jurisprudence Proof of Facts 3d, 31 AMJUR POF 563 (1995) (explaining how courts must assess "large quantities of information regarding local politics, sociology, economics, and administrative custom").

The U.S. Supreme Court has reiterated that "[g]overnment authorities . . . may not burden property by imposition of repetitive or unfair land-use procedures."[130] But the formidable threats posed by global warming, and the unique context and regulatory needs of each coastal community, beg the question: Should land-use regulations by a state for the public good be considered takings when such takings are perfectly reasonable and necessary? Like Mr. Lester said, we face an ultimatum. Let's favor a democratic way of protecting invaluable public goods.

130. Palazzolo v. Rhode Island, 533 U.S. 606, 621 (2001) (citing Monterey v. Del Monte Dunes at Monterey, Ltd., 526 U.S. 687, 698). *See also* Mola Dev. Corp. v. City of Seal Beach, 67 Cal. Rptr. 2d 103 (Cal. Ct. App. 1997) (the city may not "engage in endless stalling tactics, raising one objection after another so that the regulatory process never comes to an end").