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LITIGATING *SUITUM V. TAHOE REGIONAL PLANNING AGENCY* IN THE UNITED STATES SUPREME COURT

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At least one thing is clear about the regulatory takings issue: legal academics and law students like to write about it. The sheer number of articles generated by the issue is somewhat mind

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* Professor of Law, Georgetown University Law Center. I served as counsel of record for Tahoe Regional Planning Agency before the Supreme Court in *Suitum v. Tahoe Regional Planning Agency*, No. 96-243, which is the subject of this essay. The essay is based on a talk that I gave at Florida State University College of Law on March 19, 1997, when *Suitum* was still pending before the United States Supreme Court. The Court decided the case on May 27, 1997, after this essay was written. Because the purpose of this essay is to discuss the litigation strategies behind *Suitum*, I have deliberately not updated the essay in light of the Court's actual decision, except for this preliminary footnote discussion and a brief addendum at the end. The result is that the speculation in the final portion of the essay regarding the likely outcome of the Court is obviously now moot. I have nonetheless retained that portion of the essay because it reveals litigation strategies. Although I served as counsel of record for the Tahoe Regional Planning Agency in *Suitum*, the essay strives to describe the strategies of the opposing parties in an evenhanded fashion, which is an objective that I no doubt fail to achieve. The views expressed in the essay are mine alone and do not represent the views of my client in *Suitum*. I would like to thank Peter Byrne, my colleague and co-counsel in *Suitum*, for commenting on an earlier draft.

boggling.[1] The issue has become a virtual rite of passage for environmental, land use, and property law scholars, as each, in

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1. A listing of recent articles on the regulatory taking issue published just in 1996 and early 1997 (not years immediately following a Supreme Court takings decision) is illustrative. *See* Shawn M. Willson, Comment, *Exacting Public Beach Access: The Viability of Permit Conditions and Florida's State Beach Access Laws after* Dolan v. City of Tigard, 12 J. LAND USE & ENVTL. LAW 303 (1997); Brenna Durden, et. al., *Waiting for the Go: Concurrency, Takings, and the Property Rights Act*, 20 NOVA L. REV. 661 (1996); Christine Venezia, Comment, *Looking Back: The Full-Time Baseline in Regulatory Takings Analysis*, 24 B. C. ENVTL. AFF. L. REV. 199 (1996); Anna R. C. Caspersen, *The Public Trust Doctrine and the Impossibility of "Takings" by Wildlife*, 23 B. C. ENVTL. AFF. L. REV. 357 (1996); Jesse A. Lynn, *Caveat Lessor? The Takings Clause and the Doctrine of Mission Inviolability:* 767 Third Avenue Associates v. Permanent Mission of the Republic of Zaire to the United Nations, 76 B. U. L. REV. 399 (1996); Molly S. McUsic, *The Ghost of Lochner: Modern Takings Doctrine and Its Impact on Economic Legislation*, 76 B. U. L. REV. 605 (1996); James H. Freis, Jr. & Stefan V. Reyniak, *Putting Takings Back Into the Fifth Amendment: Land Use Planning After* Dolan v. City of Tigard, 21 COLUM. J. ENVTL. L. 103 (1996); David J. Bederman, *The Curious Resurrection of Custom: Beach Access and Judicial Takings*, 96 COLUM. L. REV. 1375 (1996); Alan E. Brownstein, *Constitutional Wish Granting and the Property Rights Genie*, 13 CONST. COMMENT. 7 (1996); Leslie M. MacRae, *The Regulatory Takings Bill: A Cure With Unintended Side Effects*, 5 DICK. J. ENVTL. L. POL'Y 57 (1996); William L. Inden, Comment, *Compensation Legislation: Private Property Rights vs. Public Benefits*, 5 DICK. J. ENVTL. L. & POL'Y 119 (1996); Michael Graf, *Application of Takings Law to the Regulation of Unpatented Mining Claims*, 24 ECOLOGY L. Q. 57 (1997); Gerald Torres, *Taking and Giving: Police Power, Public Value, and Private Right*, 26 ENVTL. L. 1 (1996); Susan A. Austin, Comment, *Tradable Emissions Programs: Implications Under the Takings Clause*, 26 ENVTL. L. 323 (1996); Ronald J. Krotoszynski, Jr., *Fundamental Property Rights*, 85 GEO. L. J. 555 (1997); Thomas G. Douglass, Jr., *Have They Gone "Too Far"? An Evaluation and Comparison of 1995 State Takings Legislation*, 30 GA. L. REV. 1061 (1996); John F. Hart, *Colonial Land Use Law and Its Significance for Modern Takings Doctrine*, 109 HARV. L. REV. 1252 (1996); Royal C. Gardner, *Banking on Entrepreneurs: Wetlands, Mitigation Banking, and Takings*, 81 IOWA L. REV. 527 (1996); Steven H. Magee, *Protecting Land Around Airports; Avoiding Regulatory Taking Claims by Comprehensive Planning and Zoning*, 62 J. AIR L. & COM. 243 (1996); Noreen A. Murphy, *The Viability of Impact Fees After* Nollan *and* Dolan, 31 NEW ENG. L. REV. 203 (1996); Gregory J. Sidak, & Daniel F. Spulber, *Deregulatory Takings and Breach of the Regulatory Contract*, 71 N. Y. U. L. REV. 851 (1996); Jonathan M. Block, *Limiting the Use of Heightened Scrutiny to Land-Use Exactions*, 71 N. Y. U. L. REV. 1021 (1996); David E. Steinglass, Note, *Extending Pruneyard: Citizens' Right to Demand Public Access Cable Channels*, 71 N. Y. U. L. REV. 1113 (1996); Marshall S. Sprung, *Taking Sides: The Burden of Proof Switch in* Dolan v. City of Tigard, 71 N. Y. U. L. REV. 1301 (1996); George Wyeth, *Regulatory Competition and the Takings Clause*, 91 NW. U. L. REV. 87 (1996); Eric Grant, *A Revolutionary View of the Seventh Amendment and the Just Compensation Clause*, 91 Nw. U. L. REV. 144 (1996); J. Peter Byrne, *What We Talk About When We Talk About Property Rights—A Response to Carol Rose's Property as the Keystone Right?*, 71 NOTRE DAME L. REV. 1049 (1996); Kelly J. Strader, *Taking the Wind Out of the Government's Sails?: Forfeitures and Just Compensation*, 23 PEPP. L.

REV. 449 (1996); Marc R. Lisker, *Regulatory Takings and the Denominator Problem*, 27 RUTGERS L. J. 663 (1996); Jason R. Biggs, Comment, Nollan *and* Dolan*: The End of Municipal Land Use Extortion—A California Perspective*, 36 SANTA CLARA L. REV. 515 (1996); Jennifer L. Bradshaw, Comment, *The Slippery Slope of Modern Takings Jurisprudence in New Jersey*, 7 SETON HALL CONST. L. J. 433 (1997); Lynn E. Blais, *Takings, Statutes, and the Common Law: Considering Inherent Limitations on Title*, 70 S. CAL. L. REV. 1 (1996); George E. Grimes, Jr., Comment, *Texas Private Real Property Rights Preservation Act: A Political Solution to the Regulatory Takings Problem*, 27 ST. MARY'S L. J. 557 (1996); Barton H. Thompson, Jr., *The Endangered Species Act: A Case Study in Takings & Incentives*, 49 STAN. L. REV. 305 (1997); James E. Holloway & Donald C. Guy, *Land Dedication Conditions and Beyond the Essential Nexus: Determining "Reasonably Related" Impacts of Real Estate Development Under the Takings Clause*, 27 TEX. TECH. L. REV. 73 (1996); Richard A. Epstein, *The Takings Jurisprudence of the Warren Court: A Constitutional Siesta*, 31 TULSA L. J. 643 (1996); Stephen P. Foley, Comment, *Does Preventing "Take" Constitute an Unconstitutional "Taking"?: An Analysis of Possible Defenses to Fifth Amendment Taking Claims Based on the Endangered Species Act*, 14 UCLA J. ENVTL. L. & POL'Y 327 (1995/1996); Daniel A. Crane, Comment, *A Poor Relation? Regulatory Takings After* Dolan v. City of Tigard, 63 U. CHI. L. REV. 199 (1996); Michael A. Wolf, Euclid *at Threescore Years and Ten: Is This the Twilight of Environmental and Land-Use Regulation?*, 30 U. RICH. L. REV. 961 (1996); Charles M. Haar, *The Twilight of Land-Use Controls: A Paradigm Shift?*, 30 U. RICH. L. REV. 1011 (1996); Danielle M. Stager, *Takings in the Court of Federal Claims: Does the Court Make Takings Policy in Hage?*, 30 U. RICH. L. REV. 1183 (1996); Carol M. Rose, *A Dozen Propositions on Private Property, Public Rights, and the New Takings Legislation*, 53 WASH. & LEE L. REV. 265 (1996); Gregory M. Mohrman, Comment, *Police Power, Gifts, and the Washington Constitution: A Framework for Determining the Validity of Property Rights Legislation*, 71 WASH. L. REV. 461 (1996); Michael, A. Wolf, *Fruits of the "Impenetrable Jungle": Navigating the Boundary Between Land-Use Planning and Environmental Law*, 50 WASH. U. J. URB. & CONTEMP. L. 5 (1996); Jerold S. Kayden, *Hunting for Quarks: Constitutional Takings, Property Rights, and Government Regulation*, 50 Wash. U. J. URB. & CONTEMP. L. 125 (1996); John J. Delaney & Emily J. Vaias, *Recognizing Vested Development Rights as Protected Property in Fifth Amendment Due Process and Takings Claims*, 49 WASH. U. J. URB. & CONTEMP. L. 27 (1996); Robert M. Washburn, "*Reasonable Investment-Backed Expectations" as a Factor in Defining Property Interest*, 49 WASH. U. J. URB. & CONTEMP. L. 63 (1996); Jeremy Walker, *Property Rights After Dolan: The Search for the Madisonian Solution to the Regulatory Takings Conundrum*, 20 WM. & MARY ENVTL. L. & POL'Y REV. 263 (1996); Stephen C. Werner, Jr., *To Compensate or Not to Compensate, That is the Question: Misconstruing the Federal Regulatory Takings Analysis in* Zealy v. City of Waukesha, 3 WIS. ENVTL. L. J. 203 (1996); Sarah E. Waldeck, Comment, *Why the Judiciary Can't Referee the Takings Game*, 1996 WIS. L. REV. 859 (1996); Louise A. Halper, *Tropes of Anxiety and Desire: Metaphor and Metonymy in the Law of Takings*, 8 YALE J. L. & HUMAN 31 (1996); Charles Tiefer, *Controlling Federal Agencies by Claims on Their Appropriations? The Takings Bill and the Power of the Purse*, 13 YALE J. ON REG. 501 (1996); Robert Brauneis, "*The Foundation of Our Regulatory 'Takings' Jurisprudence": The Myth and Meaning of Justice Holmes's Opinion in* Pennsylvania Coal Co. v. Mahon, 106 YALE L. J. 613 (1996); Carol M. Rose, Book Review, *Takings, Federalism, Norms Regulatory Takings: Law, Economics, and Politics*, 105 YALE L. J. 1121 (1996) (reviewing WILLIAM A. FISCHEL, TAKINGS, FEDERALISM, NORMS REGULATORY TAKINGS: LAW, ECONOMICS, AND POLITICS (1995)).

turn, seeks to demonstrate his or her acumen by revealing the incoherence of the Supreme Court's regulatory takings precedent.[2] Certainly, my own academic hands are not entirely clean in that regard.[3]

This essay deliberately sidesteps many of the grander issues discussed and debated in that vast array of existing scholarship. The essay instead seeks to consider the strategic choices opposing parties face in litigating regulatory takings cases before the Supreme Court and the impact of choices made on the resulting judicial precedent. To that end, the focus of this essay is decidedly discrete: one case pending at the time of this writing before the United States Supreme Court, *Suitum v. Tahoe Regional Planning Agency*.[4] This essay describes and discusses the litigation strategies of the two opposing parties in the case. The essay also speculates on the possible impact that the strategies will have on the Court's ruling.

The essay is divided into three parts. It begins with an introductory description of the background facts. This description, however, is provided from two very different perspectives: first, the perspective of the private property owner and, second, that of the regulating agency. The essay next explores in some detail the ways in which the two opposing parties chose to litigate the legal issues presented before the Supreme Court both in their respective briefs and at oral argument. Most significant in this discussion are the techniques used to maximize the possibility of a major favorable

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2. *See, e.g.*, Brauneis, *supra* note 1, at 613; Hart, *supra* note 1, at 1252; Frank I. Michelman, *Property, Utility, and Fairness: Comments on the Ethical Foundations of "Just Compensation" Law*, 80 HARV. L. REV. 1165 (1967); Andrea L. Peterson, *The Takings Clause: In Search of Underlying Principles Part I—A Critique of Current Takings Clause Doctrine*, 77 CAL. L. REV. 1299 (1989); Andrea L. Peterson, *The Taking Clause: In Search of Underlying Principles Part II—Takings as Intentional Deprivations of Property Without Moral Justification*, 78 CAL. L. REV. 53 (1990); Jeremy Paul, *The Hidden Structure of Takings Law*, 64 S. CAL. L. REV. 1393 (1991); Jed Rubenfeld, *Usings*, 102 YALE. L. J. 1077 (1993); Mark Sagoff, *Muddle Through or Muddle Through? Takings Jurisprudence Meets the Endangered Species Act*, 38 WM. & MARY L. REV. 825 (1997); Barton H. Thompson, Jr., Note, *Judicial Takings*, 76 VA. L. REV. 1449 (1990); BRUCE ACKERMAN, PRIVATE PROPERTY AND THE CONSTITUTION (1977); WILLIAM FISCHEL, REGULATORY TAKINGS (1996).

3. *See* Richard J. Lazarus, *Putting the Correct "Spin" on* Lucas, 45 STAN. L. REV. 1411 (1993).

4. 117 S.Ct. 1659 (1996) (cert. granted).

ruling or to minimize the possibility of a damaging loss. The *Suitum* litigation proved especially complex in that regard. Finally, the essay briefly describes what happened at oral argument in the case, as reflected in the questions posed by the individual Justices and their harbinger for the result.

I. THE *SUITUM* FACTS

One of the happy incidents of Supreme Court litigation is that the relevant facts tend not to be sharply disputed.[5] The Court has granted review to decide an important issue of law and not to resolve ongoing factual disputes. The Court is contemplating the impact of its ruling on all cases, whatever their factual variations, which is why oral argument is dominated by questions posing hypothetical fact patterns. Those hypotheticals allow the Court to explore the implications of possible rulings of law. The Court routinely denies review in those cases where messy factual disputes obscure the legal issue presented.

Of course, the facts before the Court quite often have a major impact on the outcome. Those facts inform the legal issue before the Court. They highlight, in one particular factual setting, the implications of the Court's resolution of the legal issue presented. For this reason, those litigants, like the United States, who are involved in substantial litigation before the Court and the lower federal courts, strive to have the Court address legal issues in cases that present the best possible factual settings. The United States will therefore decline to petition for a writ of certiorari in certain cases and will even acquiesce in certiorari requests from opposing parties seeking Supreme Court review from decisions favorable to the federal government. The government's strategic objective is to press its legal argument in a case with sympathetic facts.[6]

Litigants solely involved in one isolated case obviously are not similarly able to choose among a series of possible fact patterns presenting the same legal issue. But they, like all litigants before the

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5. How "happy" depends, of course, on how favorable the record is to one's legal arguments.

6. These comments are based on my own experience in serving as an Assistant to the Solicitor General from 1986 to 1989.

Court, will seek to pitch the facts of a particular case in the light most favorable to their legal position. In the *Suitum* case, their doing so led to very different factual emphasis, even in the absence of any significant factual dispute for the Court's resolution.

The common factual ground between the parties is fairly straightforward. *Suitum* presents a regulatory takings challenge brought by a landowner, Bernadine Suitum, against the Tahoe Regional Planning Agency (TRPA), which is a bi-state agency created by an interstate compact entered into by California and Nevada and approved by Congress.[7] Suitum contends that the TRPA has taken her land by barring her from building a home on her land.[8] The relevant TRPA Code of Ordinance prevents any development of her property that requires more than *de minimis* impermeable coverage of the land.[9] The TRPA's justification for the restriction is that the Agency has determined that Mrs. Suitum's property is a "stream environment zone" (SEZ), the disturbance of which (the Agency believes) would have a negative impact on the quality of Lake Tahoe.[10] The district court dismissed her takings claim for lack of ripeness.[11] And the Ninth Circuit affirmed.[12]

The ripeness ruling was based on the availability under the TRPA Code of transferable development rights (TDRs) to landowners, like Mrs. Suitum, within the Tahoe Basin.[13] TDRs allow a landowner, in effect, to sever development rights from her parcel and to sell them for application to other eligible parcels of property in the Basin. There are three different kinds of TDRs available to landowners in Lake Tahoe: "land coverage,"

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7. *See* Pub. L. No. 91-148, 83 Stat. 360 (1969) (amended 1980).

8. *See* Complaint at 1-6, Suitum v. Tahoe Reg'l Planning Agency (filed Jan. 28, 1991), *reprinted in* Joint Appendix, Suitum v. Tahoe Reg'l Planning Agency, No. 96-243 [hereinafter Joint Appendix].

9. *See* TAHOE REG'L PLANNING AGENCY CODE § 20.4 (1996).

10. Respondent's Brief at 12, Suitum v. Tahoe Reg'l Planning Agency, No. 96-243 (1997) [hereinafter Respondent's Brief].

11. *See* Joint Appendix, *supra* note 8, at 150-53 (reprinting the unpublished district court's ruling).

12. *See* Suitum v. Tahoe Reg'l Planning Agency, 80 F.3d 359 (9th Cir. 1996).

13. *See id.* at 362-63.

"residential allocations," and "residential development rights."[14] To build a single family home or other residential unit in the Tahoe Basin, a property owner must have all three rights. Ripeness was lacking, the lower courts held, because petitioner brought her lawsuit without first seeking to determine her entitlement to TDRs and, pursuant to TRPA procedures, to seek approval from the TRPA of their proposed transfer through sale to an identifiable, eligible parcel of property.[15]

Within these common bounds, the TRPA and Mrs. Suitum present their facts with remarkably different emphases. Described below are the facts of the *Suitum* case, as presented by the parties. The competing descriptions are followed by a brief discussion of the ways in which the *Suitum* facts, notwithstanding their unique nature, present a classic regulatory takings dispute.

A. The Facts According to Bernadine Suitum

In 1972, Bernadine Suitum and her late husband purchased a residential lot (slightly less than one half acre) in the Lake Tahoe Basin to build a home for their retirement.[16] It had always been their shared dream to have such a home.[17] The Tahoe property was zoned for residential use at the time of their purchase and homes were being constructed on lots in the area.[18]

Unfortunately, Mrs. Suitum's husband soon became seriously ill and remained ill for several years. His poor health and the related health care expenses, made them unable to build a home during that time.[19] Their neighbors, however, did construct homes and, as a result, surrounded the Suitum's vacant lot with homes on three

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14. TAHOE REG'L PLANNING AGENCY CODE § 21.6.A (1996) (residential development right), *id.* §§ 20.3.A(4), 37.11 (land coverage), *id.* §§ 33.2.A(3), 37.8.C, 37.8.E (residential allocation).

15. *Suitum*, 80 F.3d at 362-63; Suitum v. Tahoe Reg'l Planning Agency, No. CV-N-91-040-ECR (D. Nev. filed Mar. 30, 1994), *reprinted in* Joint Appendix, *supra* note 8, at 152-53.

16. *See* Petitioner's Brief at 2, Suitum v. Tahoe Reg'l Planning Agency, No. 96-243 (1996) [hereinafter Petitioner's Brief].

17. *See* Herbert A. Sample, *Supreme Court To Review Dispute Over Development*, SACRAMENTO BEE, Feb. 23, 1997, at A1.

18. *See* Petitioner's Brief, *supra* note 16, at 2.

19. *See Suitum*, 80 F.3d at 362-63.

sides.[20] Mrs. Suitum's husband ultimately died from his illness.[21] On his death bed, he reportedly restated his desire to have his wife realize their dream of building a home on their land at Lake Tahoe.[22]

By the late 1980s, Mrs. Suitum, who is now eighty-two years old and in "frail health," had garnered the resources necessary to seek a permit to build a home on her land.[23] The TRPA, however, denied her a building permit.[24] The denial was based on the TRPA's designating her land a SEZ.[25] According to the TRPA, preservation of SEZ land is necessary for the protection of the Lake, because SEZs "'provide surface water conveyance from upland areas into Lake Tahoe and its tributaries.'"[26] But, for Mrs. Suitum, "assertions that the construction of Mrs. Suitum's home would have adverse environmental impacts on Lake Tahoe are not supported by the record."[27] In fact, Mrs. Suitum alleges that TRPA made no "individualized determination that the construction of Mrs. Suitum's home, employing appropriate technology and mitigation procedures, would cause so much as a single atom of nitrogen to tumble into the ditch 60 yards to the rear of her front property line and be borne thence to the lake."[28]

The possible availability of TDRs has, according to Mrs. Suitum, no relevance to the question whether the government has taken her property.[29] Some TDRs are of limited scope. Mrs. Suitum would be entitled, for instance, to sell "land coverage" based on one percent of the size of her lot. Given a lot size of approximately

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20. *See id.*

21. *See id.*

22. *U.S. Supreme Court Scales Back Barrier That Kept 83-Year-Old from Building on Her Land; Pacific Legal Foundation Hails Ruling as "Monumental Victory" for Property Rights in America*, BUSINESS WIRE, May 27, 1997 (Pacific Legal Foundation Press Release) ("When her husband, now deceased, became ill, Mrs. Suitum said her husband told her, "'Hon, keep on going. Build the house, and I'll be with you.' And that's what I tried to do, she said.").

23. Petitioner's Brief, *supra* note 16, at 2; Petitioner's Reply Brief at 6, Suitum v. Tahoe Reg'l Planning Agency, No. 96-243 (1996) [hereinafter Petitioner's Reply Brief].

24. *See* Petitioner's Brief, *supra* note 16, at 3.

25. *See id.*

26. *Id.* (quoting Tahoe Regional Plan Goals and Policies).

27. Petitioner's Reply Brief, *supra* note 23, at 14.

28. *Id.* at 15.

29. *See* Petitioner's Brief, *supra* note 16, at 12-29.

18,300 feet, Mrs. Suitum would therefore be allowed to sell the right to cover eligible land with 183 square feet of impermeable coverage, which is less than a fourteen square foot structure.[30] To obtain a "residential allocation," she would have to enter and win a lottery.[31] Mrs. Suitum has no automatic right to such a TDR under the TRPA Code. And, while she does have a right to a "residential development right" under the Code, the market for such a "wholly arbitrary" "administrative contrivance" from SEZ property is, she argues, nonexistent.[32]

None of these "administrative credits" changes the basic fact that she cannot use her land in any meaningful way. "The administrative credits are in no sense a strand in the bundle of rights constituting Mrs. Suitum's ownership of her Mill Creek Estates lot . . . ."[33] They, therefore, bear no relevance to the question whether her property has been taken.[34] They do not allow her to "exercise . . . her personal autonomy and dominion by realizing her longtime dream of owning a retirement home on her own land . . . ."[35]

B. The Facts According to the Tahoe Regional Planning Agency

The relevant facts, according to the TRPA, begin not in 1972, but several million years earlier with the formation of the Tahoe Basin and Lake Tahoe. The basin was formed when faults caused the land to drop forming a trough or graben with the Sierra Nevada mountain range to the west and the Carson Range to the east.[36] The Lake is one of the largest inland mountain lakes in the world. Its surface is 191 square miles[37] and its average depth is 1027 feet with a maximum depth of 1645 feet.[38]

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30. *See id.* at 21.
31. *Id.* at 20.
32. *Id.* at 5 n.5, 20-21.
33. *Id.* at 19.
34. *See id.* at 34.
35. *Id.* at 18.
36. *See* DOUGLAS H. STRONG, TAHOE: AN ENVIRONMENTAL HISTORY 1 (1984).
37. *See id.* at 6.
38. *See* Respondent's Brief, *supra* note 10, at 2; *see also* STRONG, *supra* note 36, at xiii.

The Lake's waters are also of an extraordinarily high quality, especially their exceptional clarity.[39] Long ago, Mark Twain wrote of the Lake:

> So singularly clear was the water, that where it was only twenty or thirty feet deep the bottom was so perfectly distinct that the boat seemed floating in the air! Yes, where it was even *eighty* feet deep. Every little pebble was distinct, every speckled trout, every hand's-breadth of sand . . . . [T]he water was not *merely* transparent, but dazzlingly, brilliantly so.[40]

The Lake's famously clear waters are the result of its distinct physical features, which contribute to exceedingly low nitrogen and phosphorous concentrations in the Lake.[41] The waters benefit from the relatively small amount of land in the Basin surrounding the Lake—approximately 200,000 acres.[42] Less land means less opportunity for rain runoff to carry nutrients from the land into the Lake.[43] The Lake's waters also benefit from the high concentration of SEZ lands in the Tahoe Basin.[44] Approximately 10% of the Basin is SEZ.[45] These lands effectively filter out contaminants from the runoff prior to their entry into the Lake.[46] SEZ lands act like a sponge, soaking up nitrogen and phosphorous in the rainwater and retaining them in the soil.[47]

The Lake's high quality waters, however, are an extremely fragile feature.[48] The Basin includes a high proportion of steep slopes—one half of the land has a gradient over 20 percent.[49] The soil is highly susceptible to erosion.[50] The Lake is dependent on preservation of the SEZs, the destruction of which would signifi-

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39. *See* Respondent's Brief, *supra* note 10, at 2.

40. MARK TWAIN, THE INNOCENTS ABROAD: ROUGHING It 654 (Library of America ed. 1984).

41. *See* Respondent's Brief, *supra* note 10, at 2.

42. *See id.* at 2-3.

43. *See id.*

44. *See id.* at 2.

45. *See id.*

46. *See id.* at 3.

47. *See id.* at 3.

48. *Id*.

49. *See* STRONG, *supra* note 36, at 6.

50. *See* Respondent's Brief, *supra* note 10, at 3; *see also* STRONG, *supra* note 36, at 4.

cantly increase the nutrient flow in the Lake and thereby lower water quality and clarity.[51] And, perhaps most important, the Lake has a very lengthy retention time.[52] Because there is only one outlet—the Truckee River—whatever contaminants go into the Lake stay there.[53] It takes approximately 700 years for Lake Tahoe to flush itself out.[54] By comparison, Lake Erie, which is far larger, flushes itself out once every 2.3 years.[55]

The fragile ecosystem upon which the Lake depends deteriorated during the past several decades of uncoordinated development and SEZ destruction.[56] The Lake lost about one-half meter per year of clarity between the early 1970s and the 1980s, threatening both "economic and ecologic collapse" in the Tahoe Basin.[57] Consequently, Nevada and California sought congressional approval of the creation of the TRPA: to implement an enforceable program to stop and reverse the Lake's rapid decline.[58]

The 1987 TRPA Plan, which Mrs. Suitum challenges, implements the enforceable restrictions on development necessary for all those dependent on the Lake's preservation, including those who own property in the Basin.[59] The Plan assesses the suitability of development on individual parcels, like Mrs. Suitum's, based on their actual physical characteristics.[60] The focus of the inquiry is the property's potential, if developed, to create physical spillover effects that cause harm outside the property's own borders, including harm to the Lake.[61] Prevention of such harmful effects is the only reason residential development of Mrs. Suitum's land is not allowed.[62]

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51. *See* Respondent's Brief, *supra* note 10, at 3.
52. *See id* at 4.
53. *See id.* at 3-4.
54. *See id* at 4.
55. *See id.*
56. *See id.*
57. *Id.* at 5.
58. *See id.*
59. *See id.* at 7-8.
60. *See id.* at 8.
61. *See id.*
62. *See id.* at 7-11.

The TDR program is not an arbitrary "administrative contrivance."[63] It is the product of years of consensus building workshops, involving government officials, environmentalists, and property rights advocates.[64] The three kinds of TDRs correspond directly to the TRPA's objectives of limiting long term residential development, the annual pace of that development, and the amount of impervious coverage in the Basin.[65] A residential development right represents the right to have a residential unit on an eligible parcel of land, and there is a total cap on the number of such units in the Basin.[66] A residential allocation is necessary to construct a residence in a specific calendar year, and the TRPA Plan limits the number of allocations available each year.[67] Land coverage is the maximum percentage of impervious coverage of the surface allowed, which directly corresponds to the need to reduce the amount of contaminants flowing into the Lake in rain runoff.[68]

Economically, TDRs avoid the windfalls and wipeouts that otherwise occur from land use regulation that bars development on some parcels and permits it on others. TDRs promote a sharing of the benefits generated and burdens imposed by development restrictions. The restrictions make the TDRs more valuable both by reducing harmful spillover effects and by requiring those with property eligible for development to purchase development rights from other landowners, like Mrs. Suitum.[69]

Absent the kind of land use restrictions implemented by the TRPA Plan, there would be no winners in Lake Tahoe. There would only be losers as the Lake continued to decline on an accelerated basis and the value of all land in the area plummeted in tandem with the Lake's ecological collapse. Mrs. Suitum's dream

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63. Petitioner's Brief, *supra* note 16, at 11.

64. *See* Respondent's Brief, *supra* note 10, at 7.

65. *See id.* at 8-10, 42.

66. *See id.* at 8 (citing TAHOE REG'L PLANNING AGENCY CODE § 21.6.A (1996)); *see also* TAHOE REG'L PLANNING AGENCY CODE § 35.2.A (1996) ("[A] maximum of 1,600 multi-residential bonus units shall be assigned to plan areas.").

67. *See* Respondent's Brief, *supra* note 10, at 9 (citing TAHOE REG'L PLANNING AGENCY CODE § 33.2.A(3) (1996)).

68. *See id.* at 8-9 (citing TAHOE REG'L PLANNING AGENCY CODE §§ 20.3.A(4), 37.11 (1996)).

69. *See id.* at 42-43.

of a retirement home—repeated throughout the Tahoe Basin causing the destruction of SEZs—would rapidly become a nightmare for the Lake and surrounding property owners, including Mrs. Suitum and her heirs.

Petitioner's TDRs are not, contrary to her suggestions, worth less than zero.[70] The undisputed factual record in the case demonstrates that a viable market exists for her TDRs, and that they would fetch, altogether, a sum as high as $56,000 dollars.[71] In addition, the record is likewise uncontradicted in its showing that the market value of her land, even restricted, is as high as $16,750 to her neighbors interested in expanding their residential lots.[72] Therefore, the value of her entire package of property rights, including TDRs and residual land, is as high as $72,000, which is far more than the $28,000 Mrs. Suitum claims she originally paid for the property.[73] Indeed, because her property values may well have declined if development in the Basin had not been restricted, her property may even be worth more restricted than it would have been had development continued in the Basin unimpeded.

C. Comparing the Competing Factual Accounts

The differences between the two statements of facts are stark. The facts according to the petitioner, Bernadine Suitum, begin with Mrs. Suitum herself. The emphasis is, understandably, on Mrs. Suitum's status as an individual and the apparent difficulties that she faces, given her advanced age, the loss of her husband, and her frail health.[74] Petitioner's facts next emphasize her relationship to her land.[75] She can credibly posit a close, personal identification

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70. *See id*. at 13 (citing Plaintiff's Response to Defendant's TRPA Memorandum Concerning Transfer of Development Rights at 2, Suitum v. Tahoe Reg'l Planning Agency, No. 96-243 (1996) (C.A. Rec. Item #77)).

71. *See* Joint Appendix, *supra* note 8, 131-32, 142.

72. *See id.* at 131-32.

73. *See* Deposition of Bernadine Suitum at 18, Suitum v. Tahoe Reg'l Planning Agency, No. CV-N-91-040-ECR (D. Nev. taken on June 23, 1993).

74. *See* Petitioner's Brief, *supra* note 16, at 2; *see also* Petitioner's Reply Brief, *supra* note 23, at 1, 6.

75. *See* Petitioner's Brief, *supra* note 16, at 2; *see also* Petitioner's Reply Brief, *supra* note 23, at 18-20.

with the land in light of her proposed use and the land's relatively small size.

Her counsel's obvious objective in describing the facts in this fashion is to engender the Court's sympathy. Mrs. Suitum certainly presents the characteristics of the classic sympathetic plaintiff, and the facts emphasized are neither contrived nor improper. To be sure, the legal issues would remain virtually the same if Mrs. Suitum were a younger, robust, extraordinarily wealthy individual. Mrs. Suitum's own personal circumstances nonetheless legitimately emphasize how, for some, real property may be closely tied to personal identity and restrictions on use may cause personal hardship.

Petitioner's factual description also logically stresses certain features regarding the timing and nature of the restrictions imposed on the development of her property. The suggestion, both implicit and explicit, is two-fold: (1) the restriction is inequitable because so many others were allowed to build prior to its imposition; and (2) the impact of any development of her property, whatever its nature, must be fairly minimal in light of preexisting development.[76]

Mrs. Suitum also naturally seeks to describe the purpose of the restrictions on development in a way that bolsters her claim that a regulatory taking has occurred. Hence, she emphasizes her view that the TRPA is not preventing a harmful use of her property.[77] Instead, the government is, in effect, using the natural condition of her property—as a filter—to enhance the value of property owned by the public and by other private landowners who were and are allowed to develop their properties. Such use amounts to the very kind of "public use" of private property that the Fifth Amendment proscribes in the absence of just compensation.[78] Mrs. Suitum, in effect, implies a view of democratic government as essentially rent-seeking on behalf of the majority and government officials.

Finally, Mrs. Suitum's presentation of the relevant facts downplays the value of the TDRs to which she is entitled based on her

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76. *See* Petitioner's Brief, *supra* note 16, at 2; *see also* Petitioner's Reply Brief, *supra* note 23, at 14, 15.

77. *See* Petitioner's Reply Brief, *supra* note 23, at 13-15.

78. *Id.* at 14-15; *see also* U.S. CONST. amend. V.

ownership of these parcels. Instead, she emphasizes the broader functions property may serve in promoting individual liberty. Presenting the facts in this manner furthers Mrs. Suitum's legal argument that TDRs are no substitute for her own personal use of her property and "the right to use property is an inherent attribute of ownership."[79] TDRs do not allow her to exercise autonomy and dominion over her property or to realize her and her late husband's dream to build a home there.[80] At most, TDRs allow someone else—the purchaser of her TDRs—to use *their* property for developmental purposes.[81] Her land remains "taken," and therefore, the Fifth Amendment mandates that the government pay her "just compensation."

Contrast Mrs. Suitum's approach with that of the respondent TRPA. Petitioner's status as an individual disappears. She is no longer "Mrs. Suitum," as in petitioner's brief. She is now simply "petitioner."[82] The party that receives detailed description is not the landowner. Instead it is the natural resource at stake, which includes both its enormous beauty and fragility. The first five pages of the TRPA's brief is devoted to a description of the Lake and its pressing environmental problems.[83] The description is complete with historical references to John Fremont's sighting of the Lake in 1844, Mark Twain's subsequent literary description,[84] together with congressional findings regarding the seriousness of the ecological threats to the Lake.[85]

Mrs. Suitum's home becomes "impermeable coverage." The development restriction is not using the land as a filter, it is preventing contaminated rain runoff from spilling over outside the boundaries of petitioner's property. Petitioner's property is the source of the threat.[86]

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79. Petitioner's Brief, *supra* note 16, at 21 (citing Robert Nozick, ANARCHY, STATE, AND UTOPIA 171 (1974)); United States v. Causby, 328 U.S. 256, 261 (1946).

80. *See* Petitioner's Brief, *supra* note 16, at 17-20.

81. *See id.* at 19-23.

82. *See generally* Respondent's Brief, *supra* note 10.

83. *See id.* at 1-5.

84. *See id.* at 1-2.

85. *See id.* at 4-5.

86. *See id.* at 3, 12, 45.

Finally, the TRPA's description of the facts emphasizes the substantial economic advantages to property owners, including Mrs. Suitum, of TDRs. It demonstrates that TDRs are the kind of innovative land use planning device that warrant commendation, not condemnation. TDRs seek to reduce inequities and achieve environmental protection by relying on property rights and market forces. They restore substantial economic value to petitioner's bundle of property rights and avoid collapse of an ecosystem upon which petitioner's pre-restriction, higher market value, depended.[87]

Respondent's description differs from petitioner's but is no less legitimate. The rule of law petitioner seeks from the Court in *Suitum* would apply equally to a large corporate developer contemplating a major residential development on hundreds of acres of sensitive wetlands. It is essential for the TRPA to explain to the Court how the impacts of development of certain types of land, especially those aquatic in character, are not discrete. They have major spillover effects on adjacent lands and on common pool resources, such as Lake Tahoe. Likewise, it is legitimate for the TRPA to ensure that the Court appreciates the unique and tremendous beauty of Lake Tahoe, the resource at stake in *Suitum*.

Finally, the TRPA needs to reverse the equities by demonstrating that the economic impact on petitioner is less harsh than that suggested by her brief. The TRPA accomplishes this in two ways. First, it emphasizes the economic value of the TDRs and how they promote property rights by creating a new, marketable right. Second, the Agency places petitioner's alleged loss in perspective by showing that a fair comparison of values requires an accounting of the decline in land use values that would have occurred absent the very restrictions on development imposed by the TRPA Plan that petitioner attacks.

Whichever perspective one embraces, the *Suitum* facts plainly offer a classic regulatory takings case. The conflict in *Suitum* between environmental protection and private property rights occurs, as is typically the case, where land meets water. That is no coincidence. Where land and water physically meet and interact is also

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87. *See id.* at 40-49.

where two fundamentally different conceptions of property rights collide.

Private expectations in land ownership tend toward fixed, stable, absolutist notions of private rights in property.[88] Water rights are far different.[89] The fluid and mobile physical nature of the resource imposes obvious limits on the scope of any private rights assigned to that resource.[90] These physical characteristics make clear the need to limit those private rights, as well as the need for accommodation and compromise when competing rights in a common resource conflict, as they inevitably do.[91]

The collision between private expectations and environmental protection is further exacerbated at the border between land and water because land values there are high. People like to live in those border areas, such as coastal zones, because of their close proximity to water bodies. Additionally, those areas are attractive for manufacturing and commercial activities because of the many potential uses of water for transportation and in industrial processes. Because real estate speculators have often yielded high profits by developing these border areas, any restrictions on development are likely to disappoint significant, investment-backed expectations.

It is therefore no coincidence that virtually every regulatory takings case to reach the Supreme Court in recent years has arisen in those land/water border areas. In *Agins v. City of Tiburon*,[92] the dispute was over large lot zoning in the City of Tiburon overlooking the San Francisco Bay. In *First English Evangelical Church v. County of Los Angeles*,[93] it was the construction of a camp for handicapped children in a flood plain. In *Nollan v. California Coastal Commission*[94] and *Lucas v. South Carolina Coastal Council*,[95]

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88. *See* Eric T. Freyfogle, *Context and Accommodation in Modern Property Law*, 41 STAN. L. REV. 1529, 1530-31 (1989).

89. *See id.*

90. *See id.* at 1530.

91. *See id.* at 1539-45, 1552-53.

92. 447 U.S. 255 (1980).

93. 482 U.S. 304 (1987).

94. 483 U.S. 825 (1987).

95. 505 U.S. 1003 (1992).

the properties bordered the Pacific and Atlantic Oceans along the California and South Carolina coasts, respectively. In *Dolan v. City of Tigard*,[96] the principal basis for the challenged land use regulation was the plumbing and hardware store's physical proximity to a waterway prone to flooding. *Suitum*, of course, involves a parcel of land two thousand feet from Lake Tahoe, saturated with groundwater, and bordering a creek that flows directly into the Lake.

Finally, the *Suitum* case raises the fundamental question presented by the regulatory takings issue: whether the government takes private property when it prevents a landowner from eliminating the essential ecological functions the land serves in the broader ecosystem. In *Lucas*, the Court indicated that a restriction amounts to a taking when it results in a deprivation of all economic value, unless background principles of law otherwise support the restriction.[97] *Lucas*, which may or may not be weighty precedent today,[98] does not address the far more important question of how to analyze a takings claim in the absence of a total economic wipeout. The court simply punts back to its previously-announced multi-factor test of *Penn Central Transportation Co. v. City of New York*.[99] Moreover, because such total wipeouts almost never occur, the question that is left unanswered is by far the more important issue.

The *Suitum* facts present that unanswered legal issue. The record makes clear that this is not a case of total economic wipeout, like *Lucas*, because even with the restriction significant residual value to the land remains.[100] In *Suitum*, unlike *Lucas*, the governmental agency obtained the critical trial court finding that the land may retain "significant residual value" as a possible privacy buffer to the neighbors.[101] In addition, because of the TDRs available to

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96. 512 U.S. 374 (1994).

97. *See Lucas*, 505 U.S. at 1019 n.8, 1027-31.

98. *See* Richard J. Lazarus, *Counting Votes and Discounting Holdings in the Supreme Court's Regulatory Takings Cases*, 38 WM. & MARY L. REV. 1099, 1103-06 (1997).

99. 438 U.S. 104, 124-25 (1978).

100. *See* Joint Appendix, *supra* note 8, at 123-32, 139-43.

101. Suitum v. Tahoe Reg'l Planning Agency, No. CV-N-91-040-ECR (D. Nev. filed Mar. 30, 1994), *reprinted in* Joint Appendix, *supra* note 8, at 150, 152.

the landowner in *Suitum*, it creates the possibility that *Lucas*'s factual premise need not ever occur. So long as governmental agencies utilize TDRs and those TDRs possess some significant market value, a restriction on development should never amount to a total economic loss for a property owner. For this reason, the issue posed by *Suitum*—whether the value of TDRs is relevant to the threshold "taking" question rather than merely the subsequent "just compensation" question—is of enormous practical significance.

II. CASTING AND RECASTING THE LEGAL ISSUE IN *SUITUM*

Suitum is nonetheless an odd case for the resolution of any fundamental issue of regulatory takings law. Because the lower courts dismissed Suitum's complaint on ripeness grounds, the threshold question of ripeness is the only legal issue before the Court. The merits of the underlying takings claim are not before the Court. The Court almost never addresses the ultimate merits of a case without allowing the lower courts the opportunity to do so in the first instance. As a practical matter, where the lower courts dismiss a complaint on threshold jurisdictional grounds, the factual record before the Court is invariably insufficient for a decision on the merits.

Why then did the Court grant review in *Suitum*? The answer lies in the way that Bernadine Suitum's lawyer effectively recast the ripeness argument in the Supreme Court to present the broader legal issues within ripeness. In the Supreme Court, petitioner's counsel jettisoned factbound arguments of little interest to the Court in favor of more sweeping legal contentions of broader interest, at least to those individual Justices looking for opportunities to establish precedent protecting property rights from governmental regulation. Of course, because the TRPA's interest in the case is to avoid just that result, petitioner's legal strategy required the TRPA to modify its own arguments in significant respects.

This part of the essay explores the various ways that Suitum and the TRPA tried to influence the judicial outcome by "pitching" the legal issue presented to the Court differently. Discussed first is how Suitum's counsel sought to present the legal issue in a way

that maximized the possibility of the Court's handing down sweeping precedent favorable to them. Next, the essay addresses how the TRPA strived to recast the issue presented to minimize the scope of any unfavorable ruling by the Court.

A. The Legal Issue Presented According to Suitum

In the lower courts, the plaintiff landowner was represented by local counsel who presented a very narrow and quite extreme response to the TRPA's contention that plaintiff's complaint lacked ripeness. The TRPA claimed that the complaint lacked ripeness because the landowner had failed to pursue and obtain TRPA approval of the transfer of her TDRs prior to filing her complaint.[102] The landowner's almost exclusive response was that the TDRs did not affect the ripeness of her complaint because they were a sham and lacked any market value.[103] The lower courts refused even to admit into evidence a supporting expert affidavit proffered by the landowner because it lacked any credibility.[104] By contrast, the lower courts accepted the TRPA's expert affidavits, which supported a finding that the TDRs possessed substantial market value.[105]

As a practical matter, the ripeness dispute in the lower courts devolved into a factbound inquiry over whether the landowner's TDRs possessed significant market value. Once the lower courts concluded that they did, the courts accepted the TRPA's contention that until a landowner determined the full extent and value of those TDRs, a takings claim was not ripe because a court could not determine the economic impact of the challenged regulation on the

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102. *See* Defendant's Motion for Summary Judgment, Suitum v. Tahoe Reg'l Planning Agency, No.CV-N-91-040-ECR (D. Nev. filed Sept. 15, 1993) (C.A. Rec. Item #66); Defendant TRPA's Memorandum Concerning Its Transfer of Development Program, Suitum v. Tahoe Reg'l Planning Agency, No. CV-N-91-040-ECR (D. Nev. filed Dec. 8, 1993) (C.A. Rec. Item #74).

103. *See* Plaintiff's Response to Defendant TRPA's Memorandum Concerning Its Transfer of Development Program at 2, Suitum v. Tahoe Reg'l Planning Agency, No. CV-N-91-040-ECR (D. Nev. filed Jan. 7, 1994) (C.A. Rec. Item #77).

104. *See* Suitum v. Tahoe Reg'l Planning Agency, No. CV-N-91-040-ECR (D. Nev. filed Mar. 30, 1994), *reprinted in* Joint Appendix, *supra* note 8, at 151 n.2; *see also* Suitum v. Tahoe Reg'l Planning Agency, 80 F.3d at 359, 363 (9th Cir. 1996).

105. *See Suitum*, 80 F.3d at 363-64.

property that had allegedly been taken. Relying on the Supreme Court's decision in *Williamson County Regional Planning Commission v. Hamilton Bank*,[106] the courts reasoned that until a court knows how "far" a regulation has gone, the court cannot decide whether a regulation has gone "too far" and, therefore, amounts to a taking requiring the payment of just compensation.[107] The rationale is, at least on the surface, entirely in keeping with the rationale of the Court's precedent that a regulatory takings claim is not ripe until a property owner has taken the steps (permit application, variance application, amendment application) to determine precisely how the challenged law applies to the land in question.[108]

In seeking Supreme Court review, Suitum's counsel needed to pursue a very different tact. A factbound argument will almost never result in Supreme Court review. The individual Justices disagree about many things. But they all share the sentiment that their job is not to correct lower court decisions. Their job is instead to review and decide only the most important legal issues facing the nation or those slightly less important legal issues that both divide the lower courts and require a uniform answer.

The Pacific Legal Foundation (PLF) took over as Suitum's lead counsel before the High Court. PLF is a conservative public interest litigation organization and is no novice in Supreme Court regulatory takings litigation. PLF has represented the interests of property owners as amicus curiae or as parties in virtually every land use takings case before the Court during the past two decades.[109] Their programmatic interest in the *Suitum* litigation no

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106. 473 U.S. 172 (1985).

107. Suitum v. Tahoe Reg'l Planning Agency, No. CV-N-91-040-ECR (D. Nev. filed Mar. 30, 1994), *reprinted in* Joint Appendix, *supra* note 8, at 153; *Suitum*, 80 F.3d at 362-63.

108. *See* MacDonald, Sommers & Frates v. Yolo County, 477 U.S. 340, 348 (1986) ("A court cannot determine whether a regulation has gone 'too far' unless it knows how far the regulation goes.").

109. *See, e.g.*, Agins v. City of Tiburon, 447 U.S. 255, 256 (1980); Hodel v. Virginia Surface Mining & Reclamation Ass'n, 452 U.S. 264, 268 (1981); Williamson County Reg'l Planning Comm'n v. Hamilton Bank, 473 U.S. 172, 174 (1985); United States v. Riverside Bayview Homes, Inc., 474 U.S. 121, 123 (1985); Keystone Bituminous Coal Ass'n v. DeBenedictis, 480 U.S. 470, 472 n.* (1987); First English Evangelical Lutheran Church v. County of Los Angeles, 482 U.S. 304, 306 (1987); Nollan v. California Coastal Comm'n, 483 U.S. 825, 826 (1987) (counsel of record for petitioner); Yee v. City of Escondido, 503

doubt extends further than Bernadine Suitum's more narrow interests in this case. One can anticipate that PLF lawyers saw in the sympathetic facts of Mrs. Suitum's personal circumstances an opportunity for favorable Supreme Court precedent that furthers PLF's broad property rights agenda.

PLF's challenge was nonetheless considerable given the procedural posture of the case and the narrow, extreme nature of the landowner's arguments on the ripeness issue in the lower courts. Each made this case an unlikely candidate for Supreme Court review. Also weighing heavily against the Court's review was the unique nature of the TRPA's TDR program, which divides TDRs into at least three types and utilizes a fairly intricate program for their establishment and utilization. There are few obvious analogues in federal law or other state laws, which renders any judicial decision regarding the TRPA program potentially less significant.

PLF successfully obtained Supreme Court review by distancing itself from the factbound ripeness arguments made on behalf of its client in the lower courts in favor of broader legal theories of potentially greater interest to the Justices.[110] PLF's argument was no longer that the TDRs lacked any market value (although disdain for TDRs remained palpable in the petition). The argument was that the Court's precedent did not make their valuation a prerequisite for ripeness.[111] This allowed PLF to present the case as an opportunity for the Court to sort out existing confusion in the lower courts regarding the meaning of the Court's ripeness ruling in *Williamson County*.[112] According to PLF, the Ninth Circuit's

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U.S. 519, 521 (1992); Lucas v. South Carolina Coastal Council, 505 U.S. 1003, 1005 (1992); Dolan v. City of Tigard, 512 U.S. 374, 376 (1994).

110. *See* Tanya Branson, *Property Rights Attorney Goes to the Supreme Court*, TAHOE WORLD, Apr. 17, 1997, at 9A ("The Pacific Legal Foundation and [Larry] Hoffman had the perfect client, an 82-year-old widow in a wheelchair, [Hoffman] joked to the bar association members."); Petition for Writ of Certiorari, Suitum v. Tahoe Reg'l Planning Agency, No. 96-243 (filed Aug. 12, 1996).

111. Petition for Writ of Certiorari at 13-16, Suitum v. Tahoe Reg'l Planning Agency, No. 96-243 (filed Aug. 12, 1996).

112. *See id.* at 11-12.

ruling in *Suitum* exemplified the ways in which the lower courts were misapplying *Williamson County*.[113]

In seeking Supreme Court review, PLF also described the case as implicating the viability of a recent Supreme Court case, *Lucas v. South Carolina Coastal Council*, in which the Court had endorsed an analytic framework for takings analysis potentially more favorable to landowners.[114] As described by petitioner, "[w]hen all 'economically productive use' of land is forbidden, under *Lucas* the Takings Clause is violated unless the forbidden use could have been prohibited under common law nuisance doctrine."[115] PLF contended that the Ninth Circuit ruling "could eviscerate the *Lucas* categorical taking doctrine. If the transfer of a development right is a 'use' of land, then *all* use of land is not denied whenever the regulator body fabricates a TDR program."[116] PLF, in effect, collapsed the argument regarding the merits of a takings claim into its ripeness argument, which made the case potentially far more attractive to those Justices concerned about preventing erosion of their decision in *Lucas*.

Once the Supreme Court granted review in *Suitum*, PLF raised the stakes considerably by recasting yet again the nature of its legal claims on behalf of the landowner. Indeed, PLF's counsel of record changed to a more senior, policy-oriented attorney, which is likely why the tone of the briefing shifted dramatically.[117] Gone was the more dispassionate discussion, evident in the petition for a writ of certiorari, explaining the need for clarification of the Court's ripeness precedent. Substantially deemphasized was the landowner's narrow contention that her case is ripe because the value of her TDRs—and thus the "economic impact" of the challenged regulation—can be readily determined based on

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113. *See id.* at 12.

114. *See id.* at 16-18.

115. *Id.* at 17 (quoting Lucas v. South Carolina Coastal Council, 505 U.S. 1003, 1029 (1992)).

116. *Id.* at 18.

117. *Compare id.* at 25 (listing Victor J. Wolski, Counsel of Record) *with* Petitioner's Brief, *supra* note 16, at 34 (listing R.S. Radford, Counsel of Record).

appraisals without the need for any formal efforts to obtain approval of the transfer of her TDRs.[118]

In their place was the heavy artillery of the property rights movement. PLF's brief on the merits for the landowner, unlike its petition for review, reflected a concerted effort to use *Suitum*'s sympathetic facts to expand dramatically Fifth Amendment protection of private property rights in land.[119] To be sure, PLF's merits brief maintained the essential focus on ripeness. But, as only hinted at in the petition, the brief now collapsed aggressive, libertarian theories of the Fifth Amendment Takings Clause into its ripeness arguments.[120]

Petitioner's takings claim is ripe, the merits brief argued, because TDRs, and their value, are totally irrelevant to the question of whether property has been taken.[121] The brief asserted that *Lucas* stands for the proposition that a landowner has a right to "use" property for essential uses such as the building of a home, and the "ruse" of TDRs "would render this Court's categorical takings doctrine" in *Lucas* "a nullity."[122] Citing to Friedrich A. Hayek's *The Road to Serfdom*, the brief argued that "[p]roperty ownership without the right of use would be an empty formalism, incapable of performing its crucial social function of providing a bulwark of personal autonomy against the encroachment of an aggressive, overreaching state."[123] The "full exercise" of "development rights" the brief maintained, is "inherent in the ownership" of undeveloped land.[124] Because TDRs do not provide a landowner with the right to use his land—they "represent *variances* from restrictions on development of the purchaser's land"—their value has no bearing on the ripeness of a landowner's takings claim.[125]

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118. *See* Petitioner's Brief, *supra* note 16, at 25-27.
119. *See id.* at 16-22.
120. *See id.*
121. *See id.* at 12-23.
122. *Id.* at 30-34.
123. *Id.* at 21.
124. *Id.* at 23.
125. *Id.* at 22-23.

In short, PLF's brief sought to take the *Suitum* case far beyond ripeness and the implications of TDR programs for *Williamson County*. PLF's brief for the landowner sought, through ripeness, to have the Court endorse a theory of the Takings Clause that would make landowners far more likely to succeed on the merits in regulatory takings claims brought against land use regulators. Under that theory, landowners would have a fundamental "right to use" property for developmental purposes. And, programs like TDRs, which reduce the economic impact of a regulation, would not defeat the applicability of the *Lucas per se* rule for regulations that deprive a landowner of all economically viable use of her property.

Indeed, PLF's briefing became so focused on the merits of its takings claim that it finally abandoned any pretense of even linking the merits to the ripeness issue in its reply brief. The reply brief explicitly asked the Court to rule in favor of the landowner on the merits of her takings claim.[126] It did so notwithstanding that the petition for a writ of certiorari had presented only the ripeness issue to the Court.[127] The validity of the underlying regulatory takings claim was, therefore, not even before the Court.[128] Yet PLF's property rights zeal finally overcame those basic jurisdictional concerns in the reply brief.

B. The Legal Issue Presented According to the TRPA

The TRPA's outlook on the case is necessarily different. PLF seeks to make this a major takings case. The TRPA, having won below, has no interest at all in *Suitum* even being a Supreme Court case. The TRPA would, of course, prefer to have the Court affirm the lower court's judgment. But the Agency would likely not be displeased if *Suitum* were to become a minor, relatively unimportant case.

The TRPA certainly cannot afford to ignore the downside risks presented in *Suitum*. The landowner's personal circumstances make her legal position appear more sympathetic. There is also

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126. *See* Respondent's Brief, *supra* note 10, at 2, 15-17.

127. *See* Petition for Writ of Certiorari, Suitum v. Tahoe Reg'l Planning Agency, No. 96-243 (filed Aug. 12, 1996).

128. *See* SUP. CT. R. 14.1.

reason to anticipate that a majority of the Court may be initially hostile to the TRPA in this case. At least five Justices on the current Court have previously voted in favor of property owners' raising takings claims against land use regulators.[129] And it is doubtful that the minimum of four Justices who voted in favor of review in *Suitum* did so with the expectation of affirming the Ninth Circuit ruling. They are far more likely to have granted review with the opposite expectation.

The TRPA must, therefore, begin with the assumption that a majority of the Justices likely expect to rule against the Agency and reverse the lower court's judgment. The TRPA must, to be sure, resist that unfavorable result, but in so doing, it cannot afford to blind itself to the notion that not all losses would be equal. There are bases upon which the TRPA could lose the Ninth Circuit's favorable judgment that would amount to a devastating loss for the TRPA and for government regulators nationwide. Yet, at the same time, there are doubtless ways that the judgment could be reversed that would be far less troubling. Indeed, loss of a judgment on certain narrow grounds could even offer substantial benefits in both the current and future litigation.

The worst possible losses for the TRPA would be on one of two possible grounds. The first would be that the landowner's takings claim is ripe because all landowners have the inherent right to develop their property. The abrogation of that right, moreover, triggers application of the *Lucas per se* takings test. The physical suitability of the property for development would be irrelevant under that approach. So too would be the land's environmental fragility. Such a ruling would realize some of the worst implications of the Court's reasoning in *Lucas* and expand its possible application far beyond the narrow factual predicates of that case. Wetlands protection programs, restrictions on mining, and land use restrictions for the protection of endangered species would all be imperiled.

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129. *See* Dolan v. City of Tigard, 512 U.S. 374 (1994) (majority opinion in favor of landowner authored by Chief Justice Rehnquist and joined by Justices O'Connor, Scalia, Kennedy, and Thomas); *see also* Lazarus, *supra* note 98, at 1131-40.

A second damaging basis for an adverse ruling would be that TDRs are irrelevant to the question of whether property has been taken. The Court would rule that although the positive economic value of TDRs mitigates the "economic impact" of a restriction on land use, such value is relevant only to the question of whether a landowner has received "just compensation" for "taken" property. It does not mean that there has been no taking in the first instance.

Whether TDR value is relevant to the threshold "taking" issue or only to the subsequent "just compensation" issue is of enormous practical significance. If relevant to the threshold taking issue, then positive TDR value would avoid the *Lucas per se* takings test whenever land use restrictions were coupled with TDR programs. There would likely never be the total economic wipeout necessary to trigger the *Lucas per se* test.

The positive economic value of TDRs would also substantially affect the result in cases where *Lucas* did not otherwise apply. In those cases, courts apply the three-factored takings analysis established by the Court in *Penn Central Transportation Co. v. City of New York*.[130] One of the three factors is the "economic impact" of the challenged regulation.[131] By reducing the net economic impact of a land use restriction, TDR value would make courts less likely to conclude that a restriction on land use amounts to a taking under that analysis. That, in fact, was how the *Penn Central* Court weighed TDRs, as mitigating the economic impact on the landowner, and that ruling has fostered the use of TDRs in a variety of land use regulatory programs.[132]

If, however, the Court were to accept PLF's contention that TDR value is relevant only to the just compensation issue, the opposite scenario would result, and courts would be more likely to find a taking requiring just compensation. They would do so applying the *Lucas per se* rule in more cases and would be more likely to do so applying the *Penn Central* framework. To the extent

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130. 438 U.S. 104, 124 (1978) (identifying as factors "of particular significance" in resolving a regulatory takings claim: (1) the "character of the governmental action;" (2) the extent of any "interfere[nce] with distinct, investment-backed expectations;" and (3) the "economic impact" of the regulation).

131. *Id.*

132. *See id.* at 137.

that courts measure "just compensation" based on the fair market value of the highest and best use of the property absent restrictions, TDR value would most likely fall short of that constitutional requirement. Federal, state, and local governments, therefore, would have to make up the difference between TDR value and just compensation where courts concluded that a taking had occurred. The upshot is that the constitutionality of land use programs that rely on TDRs would be jeopardized.

A far narrower basis for reversal would be that Suitum's takings claim is now ripe simply because the landowner need not seek approval of the transfer of her TDRs to ripen her claim. A trial court can rely on appraisals offered by the parties to the litigation to determine TDR value. TDR value would, under this approach, be relevant in deciding the merits of Suitum's takings claim. But failure to seek formal TRPA approval of a transfer of TDRs to specifically identified property would not render the takings claim unripe.

This final approach would, of course, be adverse to the interests of the TRPA because it would require a reversal of the Ninth Circuit's favorable judgment. But the Court's rationale would be far less troubling to the TRPA than either of the two broader legal bases previously described. Indeed, there would be a significant silver lining to reversal on that narrow basis. In many circumstances, appraisal evidence of the value of TDRs is likely to be favorable to the government, perhaps even more so than relying on the marketing efforts of an individual landowner at any one discrete moment of time.

The *Suitum* facts are illustrative. Should the Court remand the case for TDR valuation based on the existing record, the TRPA will likely fare quite well. The lower courts rejected the landowner's proffered evidence that her TDRs lacked economic value.[133] As a result, the uncontroverted evidence before the trial court is that those TDRs possess substantial market value—as high as

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133. *See* Suitum v. Tahoe Reg'l Planning Agency, No. CV-N-91-040-ECR (D. Nev. filed Mar. 30, 1994), *reprinted in* Joint Appendix, *supra* note 8, at 153; Suitum v. Tahoe Reg'l Planning Agency, 80 F.3d 359, 363-64 (9th Cir. 1996).

$56,000.[134] There is also uncontradicted evidence at trial that the land itself retained a market value of approximately $16,000 because neighbors would be interested in expanding the size of their lots surrounding their existing homes.[135] The substantiality of these sums render *Lucas* wholly inapplicable, and a successful takings challenge under the *Penn Central* framework highly problematic.

For this reason, the TRPA, like Bernadine Suitum, faced a considerable challenge in developing its litigation strategies before the Supreme Court. The Agency's preference was, of course, the Court's affirming the Ninth Circuit's judgment. Yet, at the same time, the TRPA needed to minimize the possibility of a loss on broadly damaging grounds and to maximize the possibility that any loss be based on narrow grounds that could inure to the Agency's benefit on remand.

The TRPA's brief on the merits reflects these competing concerns. The brief stresses the very different implications of Suitum's various legal theories. The brief expressly labels them "narrow" and "extreme" and adopts a quite different emphasis and tone in their respective discussions.[136]

Because the narrow ripeness ground is the least troubling, TRPA's brief discussed it first.[137] Doing so makes plain that should the Court agree with Suitum on this isolable ground, the Court need not address any of Suitum's broader property rights theories. TRPA's brief also explicitly acknowledged that Suitum's narrow claim presents a "close question."[138]

To be sure, the brief contested Suitum's narrow argument and defended the judgment of the court of appeals. But it did so on a ground that is itself narrower than that of the court of appeals. The Ninth Circuit's opinion appeared to create a rigid rule of finality, suggesting that a takings claim would never be ripe until after a landowner formally sought Agency approval of the transfer

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134. *See* Suitum v. Tahoe Reg'l Planning Agency, No. CV-N-91-040-ECR (D. Nev. filed Mar. 30, 1994), *reprinted in* Joint Appendix, *supra* note 8, at 153.

135. *See id*.

136. Respondent's Brief, *supra* note 10, at 16.

137. *See id.* at 30-31.

138. *Id.* at 16.

of TDRs.[139] The TRPA's ripeness argument before the Supreme Court did not advance that same argument. It was based instead on more flexible notions of prudential ripeness and the need for the reviewing court to have the evidence of "economic impact" before it for an adjudication of a takings claim.[140] The tone of this portion of the brief was matter-of-fact and even-handed.

The tone of the remainder of the TRPA's brief was, however, decidedly different.[141] The brief aggressively challenged PLF's broad property rights theories, which were not similarly characterized as presenting a close question. The brief sought to ensure that if the Court is inclined to rule against the TRPA, that the majority will decide not to do so on broader grounds than necessary. The focus of the presentation was aimed at those Justices on the Court, such as Justice Kennedy and perhaps Justice O'Connor, who are more likely to be at the center of a sharply-divided Court on regulatory takings issues.[142]

The brief, therefore, directly challenged the landowner's reliance on *Lucas*.[143] The TRPA explained that *Lucas* has no bearing on this case at all because of the presence of economically viable use (relying on the record evidence of the significant residual value of the land).[144] And the Agency took broader issue with the PLF's claim that the Court in *Lucas* endorsed a constitutional right to develop property.[145] According to the TRPA, the Court's focus in *Lucas* was on property "value" and not on "use" *per se*.[146]

The TRPA brief also singled out Justice Kennedy's separate concurrence in *Lucas* for special emphasis.[147] The brief argued that Kennedy's reasoning in that concurrence is at odds with PLF's extreme views regarding a constitutional right to develop

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139. Suitum v. Tahoe Reg'l Planning Agency, 80 F.3d 359, 362-63 (9th Cir. 1996).
140. Respondent's Brief, *supra* note 10, at 18-30.
141. *See id.* at 32-49.
142. *See* Lazarus, *supra* note 98, at 1116-18, 1131-40.
143. *See* Respondent's Brief, *supra* note 10, at 34-36.
144. *See id.* at 35 n.23.
145. *See id.* at 34.
146. *Id.* at 34-35.
147. *See id.* at 36.

property.[148] The concurrence's description of Fifth Amendment takings law focuses on the economic value of the regulated property. It does not endorse the notion that the Fifth Amendment supports a landowner's inherent right to "use" property in certain essential ways, such as the building of a home.[149]

Justice Kennedy's views on *Lucas* are especially significant. There are only four Justices currently on the Court who joined the *Lucas* five-Justice majority—Chief Justice Rehnquist and Justices Scalia (the author), O'Connor, and Thomas. Justices Stevens, Souter, Ginsburg, and Breyer are unlikely adherents. Justice Kennedy's separate concurrence in *Lucas*, in which he declined to join Justice Scalia's majority opinion, is the likely harbinger of the Court's future treatment of *Lucas*.[150]

The TRPA brief adopted a similarly aggressive approach to PLF's broad argument that TDRs are relevant only to the just compensation issue. The TRPA's theme here was stare decisis and federalism, again in an effort to persuade the more centrist Justices of the problematic nature of the TRPA's broad argument.[151] The brief, therefore, stressed that the Court in *Penn Central* had specifically rejected the same argument being advanced by PLF in *Suitum*.[152] The *Penn Central* Court held that the value of TDRs is relevant to a regulation's economic impact and therefore to the threshold question whether a taking had occurred.[153] And, the brief further stressed that state and local governments have long relied on that settled precedent in establishing TDR programs across the country.[154] The intended effect was to ensure that the Justices were aware of the costly ramifications for state and local governments of the Court's reaching out to decide the *Suitum* case on the broader grounds advanced by PLF on Suitum's behalf.

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148. *See id.*

149. *Id.*

150. *See* Lazarus, *supra* note 98, at 1107-09, 1131-40.

151. *See* Respondent's Brief, *supra* note 10, at 32-33.

152. *See id.*

153. *See id.* at 33 (citing Penn Cent. Transp. Co. v. City of New York, 438 U.S. 104, 137 (1978)).

154. *See id.* at 16-17, 33.

Finally, in a further appeal to those on the Court (likely a majority) concerned about erosion of private property rights, the TRPA brief stressed the property rights advantages of TDRs. TDRs, the brief explained, reflect a move away from rigid command and control regulatory approaches.[155] They express a revitalization of private property rights and market forces to achieve environmental protection in a fairer and more efficient manner.[156] TDRs, in effect, enhance property rights by creating a market in developmental rights.[157]

The TRPA brief elaborated on the advantages of TDRs by focusing more particularly on the functioning of TDRs in the Tahoe Basin.[158] Under the TRPA Code, TDRs do not apply only to those whose property is restricted. They enhance the property rights of *all* landowners.[159] TDRs permit each landowner to sever development rights for transfer and application to other eligible property.[160] According to the TRPA brief, the upshot is two-fold: (1) development is steered to those parcels that are most environmentally suitable and economically profitable; and (2) the economic benefits and burdens of environmental restrictions are shared more equitably by all landowners in the Basin.[161]

C. Emphasis and Deemphasis at Oral Argument

The primary purpose of oral argument is, of course, to answer the Justices' questions. The current Court is quite lively during argument and their questions mostly reflect genuine, persistent probing of the legal issues presented.[162] The Justices explore the soft spots in the positions of the parties, which are easy to write around in briefing, but difficult to avoid orally when confronted with able, pointed questioning.

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155. *See id.* at 40-43.

156. *See id.* at 41.

157. *See id.* at 40-43.

158. *See id.* at 41-45.

159. *See id.* at 38.

160. *See id.*

161. *See id.* at 41-45.

162. See Joan Biskupic, *Justices Growing Impatient With Imprecision*, WASH. POST, May 5, 1997, at A17.

Although the oral advocate must ultimately speak to the issues of concern to the Justices, the oral argument does provide counsel with the opportunity to signal the party's priorities in the litigation and to establish a theme for the party's legal position. In *Suitum*, both PLF and the TRPA were faced with difficult choices in that regard.

PLF had to decide whether to focus on the possibility of a big win, by stressing its broad private property rights theories or to downplay the implications of its position, by emphasizing the more factbound equities presented by Mrs. Suitum's individual circumstances. Normally, if an oral advocate can win on any one of several possible grounds, the advocate should spend her limited time on her strongest ground. In this case, that rationale would suggest that PLF should spend its time on the narrow ripeness argument—its strongest on the merits. By doing so, however, PLF would miss its opportunity to press the broad property rights theories of greatest programmatic interest to PLF and the property rights movement. The TRPA was faced with a similar dilemma. Unlike Suitum, the TRPA could preserve its judgment only if it defeated each of Suitum's various grounds for reversal because any one of the three would be sufficient to vacate the judgment. Normally, in those circumstances, the oral advocate must spend her time on the *other side's* strongest position and her own weaker arguments. This may seem counterintuitive, but it remains prudent. There is little point in spending limited oral argument time making strong arguments against a legal theory that the Court need not even address to deal your client a loss. Based on this reasoning, the TRPA should allocate its oral argument time disproportionately to Suitum's narrow ripeness argument because that is the petitioner's strongest argument.

What complicates the decision for the TRPA in *Suitum* is that not all losses are equal. As previously described,[163] affirmance is, of course, the best possible result, but a loss on narrow ripeness grounds is far more palatable than a loss based on PLF's broader theories. Indeed, as also discussed above,[164] such a narrowly-based

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163. *See* discussion *supra* Part II.B.

164. *See* discussion *supra* Part II.B.

loss may even have distinct, long term advantages for the TRPA in *Suitum* and for government regulators in future cases.

But it is less clear which way this factor cuts in terms of presenting TRPA's oral argument. It might seem, in the first instance, to support the TRPA's emphasizing in its oral presentation the flaws in Suitum's broad legal theories. The TRPA cares most about those issues and therefore should allocate its oral argument time accordingly. On the other hand, by doing so, the TRPA might unwittingly make it more likely that the Court will choose to address the broad theories. To the extent, therefore, that the TRPA is less confident of how the Court would rule in addressing those issues, the TRPA might decide in favor of their deemphasis rather than their emphasis.

So, what did the parties actually do at oral argument? The PLF attorney, arguing on behalf of the landowner, adopted an understated, moderate style.[165] (Rumor has it that he tried a more aggressive, sweeping approach in his moot court a few days beforehand, but that it bombed in front of a panel of more seasoned Supreme Court advocates). He focused on the narrow, ripeness argument in the first instance and moved only tentatively toward the broader legal theories.[166] He readily acknowledged, the reply brief notwithstanding, that the merits of the takings claim were not before the court and did not press the broader legal theories when initially rebuffed by several Justices.[167] The argument's emphasis

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165. *See* Official Transcript of the Oral Argument in the United States Supreme Court at 3-24, Suitum v. Tahoe Reg'l Planning Agency, No. 96-243 (1997) [hereinafter Oral Argument Transcript] (argument of R.S. Radford, Counsel for Petitioner).

166. *See id.*

167. *See id.* The oral argument transcript reveals several exchanges where the PLF lawyer declined opportunities to press broader arguments and, in one instance, even had to be cajoled by Justice Scalia to do so:

> Question: The Ninth Circuit didn't reach any takings question, did they?
> Mr. Radford: No.
> Question: They said that under *Hamilton County* this was simply—you had to pursue further remedies before they would even confront the question.
> Mr. Radford: That's correct, Mr. Chief Justice.
> Question: I thought it was your position that it doesn't go to the taking either.
> . . . .

was on Bernadine Suitum and her desire for a day in court. His opening statement was, "[t]his case is about an ordinary property owner who's been denied all beneficial use of her land and then, in addition, has been denied access to the courts to seek relief for that categorical taking of her property."[168] The result was an effective, informative presentation that lacked the more extreme and fiery rhetoric that dominated much of Suitum's opening and reply briefs.

The TRPA likewise chose to emphasize the narrow ripeness issues before the Court. Its decision not to emphasize the broader legal theories before the Court was made easier by the TRPA's decision to agree to permit the United States, as amicus curiae, to use ten minutes of the TRPA's oral argument time in support of the TRPA.[169] Because the federal interest in the case was exclusively concerned with the implications of PLF's broader legal arguments, the TRPA could be confident that the United States would, if necessary, focus on those issues in its presentation.

The TRPA also sought to establish a theme in its oral presentation that underscored why the Justices (particularly Kennedy and O'Connor) should find the TRPA's legal position more attractive than they might have originally assumed. The theme was the advantages *to property owners* of a ruling in favor of the TRPA.[170] To that end, the TRPA sought to emphasize how: (1) affirmance of the court of appeals' judgment could be to property owner's advantage because the existing record favored the TRPA and dismissal provided the landowner with the opportunity to establish a more

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> Mr. Radford: That is indeed our position, Justice Scalia . . . . [I]f this Court decides that there's residual value in the property and decides that that has some relevance to the takings question—
>
> Question: Or decides that there may be. We don't need to make the factual determination.
>
> Mr. Radford: That's correct[,] . . . Justice O'Connor . . . . I think this is a *Lucas* case.
>
> Question: Do we have to say whether it's a *Lucas* case or a *Penn Central* case in order for you to prevail on the ripeness claim?
>
> Mr. Radford: No. That's not necessary, Justice Kennedy.

Id. at 9-11.

168. *Id.* at 3.

169. *See id.* at 42-49.

170. *See id.* at 24-42 (argument of Richard J. Lazarus, Counsel of Record for Respondent).

favorable record; (2) TDRs promote private property rights and reliance on market forces; and (3) the land use restrictions challenged in this case protect all property owners in the Tahoe Basin from the adverse economic effects of the destruction of a common resource upon which they depend. The TRPA's opening statement at oral argument was, accordingly, that "Petitioner's position is decidedly at odds with the interests of property owners concerned about governmental regulation."[171]

III. CONCLUSION: SPECULATING ABOUT THE OUTCOME

Speculating about pending Supreme Court cases is no more than that: speculating. The Justices are notoriously hard to read. What seems to be a Justice's obvious inclinations at oral argument can be quite deceptive when the opinions are released and votes made known. Even more "scientific" bases of speculations, such as predicting the author of an opinion based on which Justices have authored previously-announced opinions in cases argued during the same two-week arguments sessions are of limited value and can easily go awry.[172] The technique works only if the case of interest is one of the last to be decided, the opinions assignments are given out somewhat evenly among the Justices during the relevant two-week session, and there are no changes in opinion writing after the original assignment.

Supreme speculation is nonetheless an entertaining enterprise. So, notwithstanding the risk of future embarrassment, I will venture forth to speculate about the possible implications for the outcome of the Justices' questions and comments at oral argument.

The Court was, as always, fairly lively. And, the Justices seemed more skeptical of the TRPA's legal position at argument then they did of the landowner's position. It was not surprising that Chief Justice Rehnquist and Justice Scalia were openly critical of the TRPA's ripeness argument,[173] given their past writings. Nor

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171. *Id.* at 24.

172. *See* Linda Greenhouse, *Telling the Court's Story: Justice and Journalism at the Supreme Court*, 105 YALE L.J. 1537, 1547-48 (1996).

173. *See, e.g.*, Oral Argument Transcript, *supra* note 165, at 24-25 (questions posed by Chief Justice Rehnquist); *id.* at 32 ("you know the answer to that is, of course, the suit is

was it surprising that Justice Thomas was silent. But Justice Stevens' complete silence—normally a strong advocate for the government in takings cases—and the aggressive questioning of the TRPA by Justices O'Connor,[174] Kennedy,[175] Souter,[176] Ginsburg,[177] and Breyer[178] suggested that the TRPA faces a considerable hurdle in obtaining an outright affirmance. Justice O'Connor, in particular, seemed especially concerned with the perceived inequities of depriving the "elderly woman the right to go to court."[179] And, Justice Souter expressed his concern that because the TRPA had created the valuation problem with TDRs and not Mrs. Suitum, the resulting factual uncertainty should not be a bar to her bringing her takings claim.[180]

There was nonetheless possible good news for the TRPA at the oral argument. A majority of the Justices did not seem interested in ruling in favor of the landowner on any of the broader property rights theories that PLF was advancing. Most significant in that regard were comments made by Justices O'Connor and Kennedy, which are two votes that PLF would have to obtain in order to garner a five-Justice majority. Justice O'Connor appeared to express

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ripe" (question posed by Justice Scalia)). The official transcript does not identify the Justices by name. The identifications referred in this footnote and elsewhere in this essay are based on my recollection of the argument and on contemporaneous notes compiled by others during the argument.

174. *See, e.g., id.* at 26 ("Well, and that [petitioner's narrow ripeness argument] sounds eminently reasonable in light of the evidence that we do have in front of us. Experts have given their opinion of the value.").

175. *See, e.g., id.* at 36 ("But it seems to me quite manipulative for you to say we want to use the courts to create our market. You want the ruling to create a market?").

176. *See, e.g., id.* at 35 ("Why should we characterize her as creating the uncertainty when it was your agency that created the rights?").

177. *See, e.g., id.* at 34-35 ("Why should it be Suitum rather than the agency that does the fleshing out?").

178. *See, e.g., id.* at 33 ("I can't think of any ripeness case I've ever read, and maybe you can cite one, but I can't think of any ripeness case I've ever read in which a factor like this made a difference.").

179. *Id.* at 46 ("I mean, why not give this poor, elderly woman the right to go to court and have her takings claim heard?").

180. *Id.* at 32 ("No, but you are creating the uniqueness. I mean, you are supplying the ingredient which Justice Scalia referred to as being up in the mountains without any comparable sales, and the only thing that is unique is that, in creating the TDR scheme, you have created the problem. Why should the landowner have to wait because you created something which is difficult to value?").

the view that the Court had previously rejected PLF's view of TDRs in *Penn Central*,[181] and also discussed the evidence of the land having significant residual value,[182] which would take the *Suitum* case the *Lucas* framework. Finally, Justice Kennedy suggested that the Court need not even reach any of these broader issues if the Court were to instead decide the case based on narrow ripeness grounds.[183]

In all events, what is most important about the result in *Suitum* will clearly not be whether the Court affirms or reverses the Ninth Circuit's judgment. The importance of the Court's ruling in *Suitum* will turn on the Court's reasoning. It will depend on whether the Court decides the case on broad or narrow grounds. Based on the oral argument, a likely outcome would be a ruling in favor of Suitum but on the narrow ripeness grounds favored by the TRPA.

Moreover, even if the Court decides the case on narrow grounds, the opinion's significance will turn on the extent to which its author seeks through dictum to address issues outside the four corners of the Court's formal ruling. An opinion for the Court written by Justice Scalia would no doubt be far different than an opinion for the Court authored by Justice Breyer, even if their bottomline judgments were the same. For this reason, the identity of the Justice assigned to write the opinion for the Court is critical.

Yet, there is very little that the advocates for the opposing parties can do to influence the identity of the author. That decision is one for the senior Justice in the majority to make. And it is made based on a host of factors; some relate to the case at issue, such as the strength of a particular Justice's interest and expertise in the subject matter of the case and, when applicable, the need to maintain a fragile majority coalition; but others have nothing to do with the case at hand, including, for example, whether there are

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181. *See id.* at 5 ("[The value of TDRs] might have relevance as to whether there's a taking, conceivably . . . . Well, but it was true in *Penn Central*, I guess.").

182. *See id.* at 7-8 ("Now, there is some residual value to the extent the property might want to be acquired by a neighbor or someone else to have a larger yard or additional property, I assume.").

183. *See id.* at 11 ("Do we have to say whether it's a *Lucas* case or a *Penn Central* case in order for you to prevail on the ripeness issue?").

other cases in the same two-week argument session that a particular Justice cares more about.

Whoever writes the Court's opinion in *Suitum* and regardless of what the opinion says, one thing, however, is for certain. No matter how narrow the Court's ultimate reasoning; no matter how factbound its rationale; law professors and law students will write a lot about the case. But, here again, I am not in a good position to complain, having launched in this essay what is a thinly-disguised opening salvo.

ADDENDUM

After the preparation of the essay and the talk on which it was based, the Court decided the *Suitum* case.[184] The Court unanimously concluded that the Ninth Circuit erred in ruling that petitioner's takings challenge was not ripe.

Justice Souter authored the opinion for the Court, which addressed only the narrow ripeness issue. The Court noted that the TRPA no longer seemed to be defending the rationale of the Ninth Circuit[185]—that TRPA approval of a proposed transfer of TDRs was necessary for there to be a "final agency decision" within the meaning of *Williamson County*—which the Court then rejected.[186] The Court also rejected the TRPA's contention that any uncertainty regarding the precise value of petitioner's TDRs created a prudential ripeness concern sufficient to justify dismissal of petitioner's complaint.[187]

The Court noted that courts routinely value property rights based on appraisal evidence and that the TRPA had itself introduced appraisal evidence in this case of the substantial value possessed by petitioner's TDRs.[188] And, echoing Justice Souter's questions at oral argument,[189] the Court explained that "While it is true that market value may be hard to calculate without a regular trade in TDRs, . . . this is simply one of the risks of regulatory pioneering, and the pioneer here is the agency, not Suitum."[190]

The Court expressly declined to reach any broader issues regarding either the applicability of *Williamson* County[191] or to address directly "the significance of the TDRs both to the claim that a taking has occurred and to the constitutional requirement of just

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184. *See* Suitum v. Tahoe Reg'l Planning Agency, No. 96-243, slip op. (May 27, 1997).

185. *See id*. at 8.

186. *See id.* at 8-14.

187. *See id.* at 14-18.

188. *See id.* at 15-16.

189. *See supra* note 176 and accompanying text.

190. Suitum v. Tahoe Reg'l Planning Agency, No. 96-243, slip op. at 16 (May 27, 1997).

191. *See id.* at 12 ("Amici . . . urge us to establish a rule that a taking plaintiff need only make a single proposal and a single request for a variance to ensure the ripeness of his claim . . . . That issue is not presented in this case.").

compensation."[192] According to the Court, "[t]he sole question here is whether the claim is ripe for adjudication, even though Suitum has not attempted to sell the development rights she has or is eligible to receive. We hold that it is."[193]

However, Justice Scalia, joined by Justices O'Connor and Thomas, filed a separate opinion concurring in the judgment, declining to join parts of the Court's opinion.[194] Justice Scalia would have reached the broader issue and would have decided the ripeness issue on the ground that TDRs are wholly irrelevant to the threshold question of whether a regulation amounts to a "taking" of property.[195] He characterized "[p]utting TDRs on the taking rather than the just-compensation side of the equation (as the Ninth Circuit did below) as a clever, albeit transparent, device that seeks to take advantage of a peculiarity of our takings-clause jurisprudence."[196] Scalia faulted the majority opinion for presuming in its rationale that TDRs may be relevant to the taking issue.[197]

Finally, Justice Scalia sought to distinguish the Court's prior opinion in *Penn Central*, but went on to posit that "[i]f *Penn Central*'s one-paragraph expedition into the realm of TDRs were not distinguishable in this fashion, it would deserve to be overruled."[198] Of course, because Justice Scalia's separate opinion attracted only three votes (including his own),[199] it does not

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192. *Id.* at 1 ("[W]e have no occasion to decide, and we do not decide, whether or not these TDRs may be considered in deciding the issue of whether there has been a taking in this case, as opposed to the issue of whether just compensation has been afforded for such a taking.").

193. *Id.*

194. *See id.* at 3-7 (concurring opinion of Justice Scalia, with whom Justices O'Connor and Thomas join).

195. *Id.*

196. *Id.* at 4.

197. *See id.* at 1 ("That discussion presumes that the answers to these questions may be relevant to the issue presented at this preliminary stage of the present case: whether Suitum's takings claim is ripe for judicial review under the 'final decision' requirement. In my view they are not relevant to that issue, and the Court's discussion is beside the point.").

198. *Id.* at 6.

199. One of those votes was Justice O'Connor, which is somewhat surprising, not in light of her past voting, *see* Lazarus, *supra* note 98, at 1116-18, but only in light of her

constitute an opinion for the Court and is of no precedential effect. The separate opinion is nonetheless a reminder of PLF's primary objective and of the TRPA's primary concern in this case, which were not realized.

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comments and questions at oral argument. *See* Oral Argument Transcript, *supra* note 165; *see also* discussion *supra* Part II.C.

THE POLITICS OF MUNICIPAL INCORPORATION IN SOUTH FLORIDA*

RUSSEL M. LAZEGA** AND CHARLES R. FLETCHER***

Table of Contents

I. INTRODUCTION

"In such experience as I have had with taxation—and it has been considerable—there is only one tax that is popular, and that is the tax on the other fellow."[1]

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* The *Journal of Land Use and Environmental Law* thanks Florida League of Cities and David Ramba for their help and resources used in connection with this article. Additionally, the *Journal* expresses its appreciation to Barbara Falsey for providing information about the most recent incorporation efforts of communities in South Florida.

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Who could refuse the promise of decreased taxes and increased services? Many unincorporated areas of Florida are realizing that by incorporating they can reduce their taxes, localize, and increase the responsiveness and services of their local governments.[2] Incorporation conjures images of Mayberry—local folks taking care of local problems.[3] It is government on a first-name basis—close, personal, and responsive. However, like all good things, incorporation comes at a price. Counties presently depend upon the tax revenues garnered from more affluent areas to subsidize services to poor communities.[4] Incorporation spurs a dramatic redistribution of local revenues which often leaves the remaining county scrambling to fill the revenue void left by seceding municipalities. Compounding the problem, most of the incorporating municipalities are wealthier areas that have long subsidized poorer regions of their respective counties. Logically, with affluent unincorporated communities increasingly exercising the tempting option of self-governance, counties will be forced to find new sources of funding to maintain services at existing levels for the poorer unincorporated regions. The question remains: Who will ultimately pay this subsidy?

This article analyzes the causes and effects of Florida's recent wave of municipal incorporation and discusses proposed legislative reforms aimed at alleviating some of the funding disparities that often result. Part II presents a brief overview of the structure of Florida's system of local government. Part III discusses why many of Florida's unincorporated communities have recently sought incorporation and explains the current legislative and constitutional provisions governing the creation of new municipalities.[5] Part IV analyzes these provisions and argues that

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1. A DICTIONARY OF LEGAL QUOTATIONS 166 (Simon James & Chantal Stebbings eds., 1987) (comment of Sir Thomas White during 1917 debate in the Canadian Parliament).

2. *See* Monica Davey, *An Island of their Own*, ST. PETE TIMES, Dec. 11, 1995, at 1B, 4B.

3. *See* Keith Goldschmidt, *Lawmakers Take Services Unincorporated Areas in Brevard, Indian River See Rising Growth Rate*, FLA. TODAY, Feb. 9, 1997, at 01B ("And incorporation can benefit people in taking care of their own community, rather than being swallowed by either a county or nearby municipal government.").

4. *See* discussion *infra* Part III (discussing funding).

5. Some Southeast Florida communities discussed in the coming sections which were seeking incorporation at the time this article was originally drafted have now become incor-

the absence of stringent requirements for municipal incorporation has created a revenue distribution crisis requiring legislative attention. Part V presents the legislative and constitutional solutions proposed by both sides of the incorporation debate and assesses their feasibility. Part VI concludes that no perfect solution exists to increase local autonomy and reduce taxes, thus incorporation is likely to remain a tempting option.

II. LAYING THE FOUNDATION: STRUCTURE OF FLORIDA'S LOCAL GOVERNMENTS

In Florida, local government[6] generally operates as one of two types of governmental units: county government or municipal government.[7] The scope of a local government's power is determined by whether it is a municipality or a county and by the charter or non-charter status of the county in which the local government resides.[8] Florida's constitution requires that the state be subdivided into counties.[9] The Supreme Court of Florida interprets this provision to mean that the *entire* state must be divided into counties.[10] The scope of each county's power depends upon whether the county is a charter or a non-charter county.

A. Counties

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porated. These municipalities include: Wellington, Aventura, Pinecrest, Deltona, and Weston. *See* Jay Weaver, *Cityhood Will Cost Weston, Some Say No-New-Tax Vow Called a Mistake*, FT. LAUD. SUN SENT., Aug. 28, 1996, at 1B; Michael E. Young, *Residents Make Weston Broward's 29th Municipality*, FT. LAUD. SUN SENT., Sept. 4, 1996, at 5B; Davey, *supra* note 2, at 1B, 4B. Destiny incorporation was recently defeated in a referendum, and Sunny Isles is nearing the final steps of incorporation. *See* Telephone Interview with Barbara Falsey, Principal Planner, Metro Dade Department of Planning, Development, and Regulation (Mar. 31, 1997) [hereinafter Falsey Interview] (discussing incorporation plans of Dade County communities).

6. A brief description of the structure and funding of Florida's local governments is provided to help in understanding the problems that can be created by municipal incorporation; however, a comprehensive analysis of Florida's local governmental structure and funding sources is beyond the scope of this article.

7. *See* FLA. CONST. art. VIII, §§ 1, 2.

8. *See generally* Illene S. Lieberman & Harry Morrison, Jr., *WARNING: Municipal Home Rule is in Danger of Being Expressly Preempted By . . .*, 18 NOVA L. REV. 1437, 1442-44 (1994) (describing various sources of and limitations on home rule authority).

9. *See* FLA. CONST. art. VIII, § 1(a).

10. *See* Lipscomb v. Gialourkis, 133 So. 104 (Fla. 1931).

A charter county has "all powers of local self-government not inconsistent with general law, or with special law approved by a vote of the electors."[11] In the event of a conflict between a municipal ordinance and a charter county ordinance, the charter county ordinance will prevail unless the county charter specifies otherwise.[12]

A non-charter county "shall have such power of self-government as is provided by general or special law."[13] The non-charter county government is empowered to enact all ordinances not inconsistent with general or special law, but unlike a charter county ordinance, a non-charter county ordinance is not effective when in conflict with a municipal ordinance.[14] Regardless of whether a county is a charter or non-charter county, it has implicit authority to perform governmental functions unless this power is expressly preempted by another governmental unit.[15] Counties are responsible for providing state and municipal multi-jurisdictional services to county residents.[16] Multi-jurisdictional services may include public health, major roads, sophisticated police labs, and the medical examiner's office.[17] The county levies a county-wide ad valorem tax to fund these services.[18] Over half of county-wide ad valorem taxes go to fund the county school system, which communities cannot avoid paying by incorporating.[19] In addition

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11. FLA. CONST. art. VIII, § 1(g). A special law is "a law passed by both houses of the Legislature that applies to a limited geographic area." FLA. H.R. COMM. ON COMM'Y AFF., 1995 FLORIDA LOCAL GOVERNMENT FORMATION MANUAL (4th ed. 1995).

12. *See* FLA. CONST. art. VIII, § 1(g); *see also* Lieberman, *supra* note 8, at 1443.

13. FLA. CONST. art. VIII, § 1(f).

14. *See id*.

15. *See id.*

16. *See generally* John P. Thomas, *Why County Public Financing is Inadequate to Meet the Infrastructure Crisis,* 20 STETSON L. REV. 799, 804-05 (1991) (describing the various functions of county government).

17. *See* Fred Tasker, *The Aventura Rebellion,* MIAMI HERALD, Mar. 12, 1995, at J1, J4. Multi-jurisdictional services tend to be services that are administered more efficiently by a larger governmental body. *See id.*

18. *See id.*

19. *See, e.g.,* Letter from Ken Venturi, Chairman, City of Marco Island, P.A.C., to Registered Voters of Marco Island (Mar. 15, 1997) (on file with author) (providing statistics that show that over 50% of Marco Island's ad valorem taxes go to the county school system). Opponents of incorporation of the Marco Island community in Southwest Florida claim that if Marco Island were to incorporate, the city would continue to pay the county

to multi-jurisdictional services, counties provide traditional municipal services, such as police and fire protection, to unincorporated areas.[20] Residents in the county's unincorporated area pay an additional ad valorem tax to fund these services.[21]

Dade County represents a relatively novel experiment in local government called metropolitan (or metro) county government. Article VIII, section 6(f) of the Florida Constitution provides that Dade County may, to the extent not inconsistent with general law or the powers of existing municipalities, exercise all powers conferred by general law upon municipalities.[22]

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more than 90% of what is currently paid to the county to support county services. Thus, incorporation does not exempt the incorporated community from paying county taxes. *See* Kathleen McNamara, *PAC Submits Incorporation Feasibility Study*, MARCO IS. EAGLE, Feb. 19, 1997, at A6, A15.

20. *See* Thomas, *supra* note 16, at 805.

21. *See* Tasker, *supra* note 17, at J5. "[Aventura residents are] angry that they and other affluent neighborhoods in Dade's unincorporated area are taxed to subsidize local services to the poor . . . ." *Id.* at J1.

22. *See* FLA. CONST. art. VIII, § 6(f).

B. Municipalities

A municipality is a municipal corporation.[23] Like other corporations, a municipality must be established through incorporation procedures.[24] Florida's constitution allows for the creation of municipalities empowered to "conduct municipal government, perform municipal functions and render municipal services."[25] Municipalities, absent an express prohibition by the state, have authority to provide services and pass ordinances under what is known as "home rule."[26] This power stems from article VIII, section 2 of the Florida Constitution and from the Municipal Home Rule Powers Act.[27]

Florida's municipalities are creatures of statute.[28] The power to create and dissolve a municipality rests almost exclusively within the discretion of the Florida Legislature (Legislature),[29] which is generally said to have inherent and plenary power in the creation and establishment of municipal corporations.[30] The Legislature's authority to create and dissolve municipalities has been somewhat limited by the Formation of Municipalities Act (Act).[31] The Act provides that a charter for incorporation of a municipality, except in cases of merger, may only be adopted by special law upon a legislative determination that the incorporating community satisfies the requirements of the Act.[32] Additionally, the Legislature may

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23. *See* 12 FLA. JUR. 2D *Counties, Etc.* § 4 (1989).

24. *See* FLA. STAT. § 165.041 (1995) (providing that a charter "for incorporation of a municipality . . . shall be adopted only by a special act of the Legislature").

25. FLA. CONST. art. VIII, § 2(a), (b).

26. *See* FLA. STAT. §§ 166.011-.141 (1995); *see also* Lieberman, *supra* note 8, at 1439-42.

27. *See* FLA. CONST. art. VIII, § 2.

28. *See* 12 FLA. JUR. 2D *Counties, Etc.* § 6 (1989).

29. *See* FLA. STAT. §§ 166.011-.161 (1995). "Municipalities may be established or abolished and their charters amended pursuant to general or special law." FLA. CONST. art. VIII, § 2(a); *see also* discussion *infra* Part IV.

30. *See* Coen v. Lee, 156 So. 747, 749 (Fla. 1934) ("The creation of municipal corporations with governmental powers . . . are inherent legislative powers and such powers are plenary in the absence of organic restrictions.").

31. Act effective July 1, 1974, ch. 74-192, 1974 Fla. Laws 513 (codified at FLA. STAT. ch. 165 (1995)); *see* discussion *infra* Part IV (providing a more detailed discussion of the Act).

32. *See* FLA. STAT. § 165.041(1) (1995). In contrast, a charter for merger "of two or more municipalities and associated unincorporated areas may . . . be adopted by passage

change a municipality's boundaries[33] or cause it to be annexed by a neighboring community[34] by general or special law.

Dade County is an exception to the general rule that municipal incorporation is an exclusively legislative function. As a metro form of government, Dade County is empowered to merge, consolidate, or abolish all municipal corporations "whose jurisdiction lies wholly within Dade County."[35] Dade County may also provide a method for establishing municipal boundaries incorporating new municipalities within the county.[36]

III. FUNDING OF FLORIDA'S LOCAL GOVERNMENTS

Taxation is one of the few areas that local governments do not have broad authority to legislate.[37] Florida's constitution dramati-

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of a concurrent ordinance by the governing bodies of each municipality affected, approved by a vote of the qualified voters in each area affected." *Id.* § 165.041(2)(a).

33. *See* 12 FLA. JUR. 2D *Counties, Etc.* § 38 (1989). The Legislature's power to change and fix municipal boundaries is "limited by the requirement that the elements which necessitate or make desirable the creation of a municipal corporation must be present." *Id.*

34. *See* FLA. CONST. art. VIII, § 2(c).

35. *Id.* at art. VIII, § 11(1)(c)m.3.

36. *See id.* Article VIII, section 11(1)(e) states that the Dade County charter "[m]ay provide a method for establishing new municipal corporations, special taxing districts, and other governmental units in Dade County from time to time and provide for their government and prescribe their jurisdiction and powers." *Id.* The county charter currently provides:

> The Board of County Commissioners and only the Board may authorize the creation of new municipalities in the unincorporated areas of the county after hearing the recommendations of the Planning Advisory Board, after a public hearing, and after an affirmative vote of a majority of the electors voting and residing within the proposed boundaries. The Board of County Commissioners shall appoint a Charter Commission, consisting of five (5) electors residing within the proposed boundaries, who shall propose a charter to be submitted to the electors in the manner provided in Section 5.03. The new municipality shall have all the powers and rights granted to or not withheld from municipalities by this Charter and the Constitution and general laws of the State of Florida.

DADE COUNTY CODE, CHARTER OF DADE COUNTY, § 5.05 (1992). Section 5.03 provides the method by which a municipality may adopt, revoke, or amend its charter. Section 5.03 requires that the governing body of the municipality draft a proposed charter, amendment, revocation or abolition, which must be submitted to a vote of the electors of the municipality within 120 days after adopting a resolution or after certification of a petition signed by 10% of the electors of the municipality. *See id.* § 5.03.

37. *See* FLA. CONST. art. VII, § 1(a) (providing that "[n]o tax shall be levied except in pursuance of law. No state ad valorem taxes shall be levied upon real estate or tangible

cally limits the ability of local governments to generate tax revenues by expressly preempting virtually all forms of taxation to the State of Florida.[38] The only substantial tax which municipalities are authorized to levy is the ad valorem tax, commonly known as the property tax.[39] As a result of this constitutional limitation, local governments depend primarily upon three major sources of revenue: ad valorem taxes, state-shared revenue, and service charges.[40]

The latter two of these three sources are currently in jeopardy. The State has substantially decreased state-shared revenues while increasing the burden on local governments by imposing more unfunded mandates.[41] Unfunded mandates are directives by the Legislature to create or improve any given program or to reach a particular standard, without financial contribution from the state.[42] By definition, local governments do not have the ability to opt out of these mandates.[43] Essentially, local governments are told to bear the full burden of funding state programs and directives.[44] Furthermore, recent United States Supreme Court decisions that mandate tighter connections between impacts and exactions may limit the ability of local governments to satisfy their public's needs by requiring private citizens to dedicate lands or contribute to public infrastructure (such as building public roads or sidewalks) in exchange for permits.[45] Accordingly, with the decreasing ability to

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personal property. All other forms of taxation shall be preempted to the state except as provided by general law.").

38. *See id.* at art. VII, § 1.

39. *See id.* at art. VII, § 9(b).

40. *See* Kristin C. Rubin, *Unfunded Mandates: A Continuing Source of Intergovernmental Discord*, 17 FLA. ST. U. L. REV. 591, 594 (1990) (discussing the authority of local governments to generate revenue).

41. *See id*.

42. *See id*.

43. *See generally id.* at 595-605. Local governments' hands are tied when dealing with the Legislature and the use of unfunded mandates. Generally, the most effective deterrent to unfunded mandates is for local governments to lobby the Legislature not to pronounce unfunded mandates as a matter of public policy. *See id.*

44. *See* Thomas, *supra* note 16, at 802.

45. *See, e.g.*, Dolan v. City of Tigard, 512 U.S. 374 (1994); Nollan v. California Coastal Comm'n, 483 U.S. 825 (1987). This connection is more commonly described as the nexus between exactions and impacts. *See* Nicholas V. Morosoff, Note, *"Take my Beach, Please!": Nollan v. California Coastal Commission and a Rational-Nexus Constitutional Analysis of Development Exactions*, 69 B.U. L. REV. 823, 824 (1989).

use exactions as a tool, local governments must depend even more upon ad valorem taxes as a key source of revenue to satisfy public needs. Additionally, total service charge collections appear to be faltering, also resulting in increased reliance on ad valorem taxes.[46]

When an unincorporated area incorporates to form a municipality, the new municipality essentially withdraws from certain elements of the county taxing unit[47] and, with some exceptions, becomes responsible for providing its own municipal government and many of its own municipal services,[48] including code enforcement, garbage collection, street cleaning, landscaping, and fire and police protection.[49] Decisionmaking authority likewise shifts to the municipality, authorizing the governing municipal body to exercise those powers delegated by and implied from its municipal charter.[50] Incorporation localizes control of a community, making the municipal government directly and exclusively accountable to local residents.[51] It can also lower taxes of "donor communities"[52]

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46. In fiscal year 1993-94 service charge collections totaled $351,029,942. *See* 1995 FLORIDA TAX HANDBOOK 119 (1995). Fiscal year 1994-95 estimates project a 4.99% decrease in total service charge collections. *See id.* Total service charge collections for fiscal year 1995-96 were expected to increase only .69%. *See id.* Each year between 1989-1994 total service charge collections increased at rates ranging from 4.46% to 84.35%. *See id.*

47. Some counties may levy two kinds of ad-valorem tax. *See* Tasker, *supra* note 17, at J4. For example, Metropolitan-Dade County levies a service tax on the entire county and a second service tax on the county's unincorporated communities. *See id.* The county-wide tax funds services that are provided to the entire county include: schools, public health, major roads, sophisticated police labs, and the medical examiner's office. *See id.* This tax is not affected by the incorporation of a community within the county. *See id.* On the other hand, the second tax, levied by the county to provide unincorporated areas with municipal services like: zoning, police, and garbage collection, is impacted by municipal incorporation. *See id.* The newly incorporated municipality, not the county, would be empowered to collect this tax. *See id; see also* FLA. CONST. art. VIII, § 6(f) (stating that Metro-Dade County may exercise municipal powers to the extent that such power is not inconsistent with the powers of existing municipalities or general law).

48. *See* Tasker, *supra* note 17, at J4.

49. *See id.*

50. *See* Stanley L. Seligman & Robert L. Beal, *The Sovereignty of Municipalities: Out Again, When Again*, FLA. B. J., June 1976, at 338.

51. *See* Lieberman, *supra* note 8, at 1438-44.

52. A donor community is one that pays taxes for services which are predominately used by other populations who use those services in disproportion to their payment in taxes. *See generally* Marjorie Lambert, *7 Unhappy Dade Groups Mount Drive to Form Cities*, FT. LAUD. SUN SENT., Mar. 26, 1995, at B1.

that under the county taxing system contribute more in taxes than they receive in services.[53]

Sparked largely by a desire to retain a greater percentage of scarce tax revenues, many communities are pursuing the prospect of municipal incorporation. In 1995, seven communities in Dade County alone announced their desire to incorporate.[54] Additionally, the communities of Wellington[55] in Palm Beach County and Weston[56] in Broward County instituted campaigns for their own local governments and incorporated in 1995 and 1996, respectively.[57] Current incorporation efforts represent a $41 million dollar revenue flight problem for South Florida's three largest counties.[58] Consequently, in 1996 Dade County instituted a freeze out on incorporation efforts for at least a year, recognizing the rapid erosion of its tax base due to wealthy neighborhoods incorporating.[59] To combat revenue problems caused by

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53. *See id*. Lambert points out that many supporters of incorporation in Dade County are inspired by the example of Key Biscayne, which was able to lower its taxes and increase services after incorporating. *See id.*

54. *See* Dexter Filkins, *City Fever Sweeping the County*, MIAMI HERALD, June 4, 1995, at B1, B5; *see also* Lambert, *supra* note 52, at B1.

55. *See* Diane Hirth, *Wellington Moves Closer to City Status: State Senate Clears Way for Community to Vote on Incorporation*, FT. LAUD. SUN SENT., May 12, 1995, at B1.

56. *See* Glenn B. Sterling, *In Some Ways Weston Already Looks Like, Functions as a City*, FT. LAUD. SUN SENT., Feb. 7, 1995, at A17; *see also* Battinto Batts, Jr., *Weston Study to Determine Cost of Becoming a Broward City*, FT. LAUD. SUN SENT., Oct. 4, 1994, at B1.

57. *See* Act effective June 17, 1995, ch. 95-496, 1995 Fla. Laws 129 (Wellington incorporation); Act effective June 2, 1996, ch. 96-472, 1996 Fla. Laws 43 (Weston incorporation).

58. The seven Dade County communities considering incorporation in 1995 had a 1995 tax base of $107,948,500 and represented a potential $32,691,646 revenue flight problem for Dade. *See* Lambert, *supra* note 52, at B1. In 1995, it was estimated that the incorporation of Weston would cause a $1.8 million revenue flight problem for Broward County. *See* Evelyn Larrubia, *Report Says Weston Can Run Itself*, FT. LAUD. SUN SENT., Apr. 4, 1995, at B1. 1995 estimates of the cost of Wellington's incorporation calculated that Palm Beach County would lose over $7.4 million. *See* Diane Hirth, *Wellington Needs Rural Areas*, FT. LAUD. SUN SENT., Mar. 15, 1995, at B5. In total, estimates in 1995 found that Dade, Broward, and Palm Beach Counties stood to lose almost $41.9 million from the incorporation wave. *See id.*

59. *See* Jacqueline Bueno, *Dade Ponders a Future as Miami's Caretaker*, WALL ST. J., Dec. 11, 1996, at F1 (reporting on Dade County's response to numerous rich neighborhoods' recent incorporation); *see also* Martin Wisckol, *Decision to Abolish Miami Up to Voters*, FT. LAUD. SUN SENT., Jan. 8, 1997, at 1A. In fall of 1996, several Dade communities officially announced their intentions to begin incorporation efforts to the Dade Board of County

incorporation, Miami residents are considering dissolving the city of Miami, thereby allowing Dade County to take over the municipal services of the former city.[60] With this move, Dade County would absorb Miami's financial debts and help keep Miami afloat by offering a higher per-capita tax roll value to pay for current Miami residents' services.[61] However, some Miami officials fear that the unincorporation of Miami would add fuel to the incorporation wave by prompting the remaining affluent neighborhoods within Miami to incorporate, leaving only poor neighborhoods.[62]

A. Dumping the Tea in the Harbor: The Call for Representative Government

"Taxation without representation is tyranny."[63]

Incorporation supporters have likened the incorporation wave to the Boston Tea Party—a stand against taxation without representation.[64] They are angered by what they view as bloated and unresponsive county government and want greater control over how their taxes are spent.[65] Proponents argue that the best way to make government responsive to community interests is to make it a community government.[66] The theory seems facially

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Commissioners. Incorporation proceedings were deferred for these communities, which include Miami Lakes, Doral, Palmetto Bay, and Country Club Lakes. *See* Falsey Interview, *supra* note 5.

60. *See* Bueno, *supra* note 59, at F1.

61. *See id.* Dade County would be responsible for providing services to the poorer areas of Miami. Miami's annual per-capita tax roll value is about $31,000, while Dade County's value totals about $38,655. *See id*. Thus, Dade County would absorb Miami's lower tax base, which might cause a potential financial struggle for the County, as less money would be available per capita but additional services would have to be provided. *See id.*

62. *See id.*

63. A DICTIONARY OF LEGAL QUOTATIONS 166 (Simon James & Chantal Stebbings eds., 1987) (comment of James Otis).

64. *See* Lambert, *supra* note 52, at B1 ("[P]roponents compare their uprising with the Boston Tea Party, a revolt against taxation without representation.").

65. *See id*.

66. *See generally* Ankur J. Goel, et al., Comment, *Black Neighborhoods Becoming Black Cities: Group Empowerment, Local Control, and the Implications of Being Darker than Brown*, 23

sound: A decentralized government operating at a neighborhood level will better serve that neighborhood because its constituents' interests should be more homogeneous.

1. Control of Local Government

Many communities are embracing incorporation because of a general dissatisfaction with large and impersonal county government.[67] Residents of Florida's unincorporated communities often complain that distant county governments are accountable to many widely scattered and dissimilar communities and do not respond adequately to their particular concerns.[68] Voters complain of disfranchisement and argue that county commissioners ignore the problems of voters outside their particular county districts.[69]

Disfranchisement has become particularly problematic now that some counties have switched from a county-wide, or at-large, election system to a district election system.[70] Under the county-wide election system, each voter in the county could vote on the entire county ballot.[71] Now, under a district election system, each district within the greater county elects only its district representatives.[72] A voter no longer has a voice in selecting each member of the county commission.[73] Consequently, the power of many communities that historically had produced a large voter turnout has been diluted.[74] As one Aventura[75] resident described

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HARV. C.R.-C.L. L. REV. 415, 418 (1988) (describing the incorporation of predominately-minority communities and the need for self-empowerment).

67. *See* Lambert, *supra* note 52, at B1.

68. *See id.*

69. *See id.*

70. This change was sparked largely by *Meek v. Metro Dade County*, 805 F. Supp. 967 (S.D. Fla. 1992), which held that Dade County's county-wide election system unlawfully diluted African American and Hispanic voting power and excluded minorities from holding office. However, recent decisions of the United States Supreme Court may call into question the constitutionality of such race-conscious districting. *See* Miller v. Johnson, 115 S. Ct. 2475 (1995) (holding that Georgia's congressional redistricting plan violates the equal protection clause).

71. *See* Tasker, *supra* note 17, at J4.

72. *See id*.

73. *See id*.

74. *See id*.

prior to Aventura's incorporation: "[E]very one of the candidates was up here campaigning, because they knew we were the ones turning out the votes. Now we only have one commissioner, and none of the other commissioners could care less about us because we don't vote for them."[76]

2. Visions of Marbury: The Appeal of Localizing Government

The idea that localization of government begets more responsive and effective government is deeply ingrained in the American ethos.[77] This idea stems from a Jeffersonian notion that local government is an effective way to ensure citizen participation in government.[78] Incorporation evidences a belief that citizens are more apt to participate in smaller, more localized government because they are more likely to believe that their participation counts.[79] This sense of "civic effectiveness" encourages more participation, which, in turn, restores decisionmaking power to the community.[80] Additionally, the theory suggests that a more localized government should face fewer competing and conflicting demands from citizens than a larger county government. The rationale is the unified concerns of one local community become diluted at the county level. Each separate community has its own

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75. Aventura, located in Dade County, incorporated in 1995. *See* Wisckol, *supra* note 59, at 1A.

76. Lambert, *supra* note 52, at B1.

77. For an insightful analysis of the various defenses of localization and fragmentation of government, see Richard Briffault, *Voting Rights, Home Rule, and Metropolitan Governance: The Secession of Staten Island as a Case Study in the Dilemmas of Local Self-Determination*, 92 COLUM. L. REV. 775, 825-30 (1992).

78. Jefferson described the town meeting system of government as "the wisest invention ever devised by wit of man for the perfect exercise of self-government . . . ." George W. Liebmann, *Devolution of Power to Community and Block Associations*, 25 URB. LAW. 335, 336 (1995), *citing* Letter from Thomas Jefferson to Samuel Rercheval, July 12, 1816, *in* 12 AUTOBIOGRAPHICAL WRITINGS 8 (1905).

79. *See* Briffault, *supra* note 77, at 827-28; *see also* Liebmann, *supra* note 78, at 337 (stating that decreased voter and political participation have inspired drives for more liberal incorporation laws).

80. *See* Briffault, *supra* note 77, at 827-28; *see also* Liebmann, *supra* note 78, at 337 (stating that local government helps to preserve a necessary element of free government, citizen participation).

separate demands.[81] For example, an unincorporated Aventura's unified request for more landscaping on Country Club Boulevard was one of many requests for street beautification on the county commission's calendar. However, after Aventura's incorporation, the new municipal government is only accountable to the demands of Aventura residents.[82]

Localization of government also provides more basic benefits. Citizens are closer to their local officials. For example, Aventura residents no longer must drive eighteen miles to communicate with their government officials.[83] Residents can walk to their local town hall to voice concerns over landscaping, potholes, and barking dogs.[84]

Incorporation supporters argue that localization restores control of government to people who are both familiar to and familiar with the community.[85] The difference is perceived as a choice between a government of "folks you know" and a government that is accountable to someone else.[86] One Sunny Isles resident accurately described the sentiment stating: "I don't want to destroy this county, but a lot of those commissioners don't even know where Sunny Isles is."[87]

B. Will Localization of Government Improve Local Government?

Jefferson's theory suggests that residents of incorporated municipalities should be more satisfied with their municipal government and services than are residents of the larger

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81. Thomas Jefferson advised, "[D]ivide the counties into wards . . . . Begin them only for a single purpose; they will soon show for what others they are the best instruments." Liebmann, *supra* note 66, at 335 (cited in Letter from Thomas Jefferson to Joseph C. Cabell, Feb. 2, 1816, *in* 14 AUTOBIOGRAPHICAL WRITINGS 419 (1905)).

82. Only "electors" can vote in municipal elections. *See* FLA. STAT. § 98.091(3) (1995). An elector of a municipality must be a resident of that municipality. *See id.* § 166.032.

83. *See* Tasker, *supra* note 17, at J4.

84. *See id.* at J1, J4 (providing a vivid, Mayberriesque description of an incorporated Aventura).

85. *See id.* (providing an image of life in a locally-governed community).

86. Prior to incorporation, one Aventura resident envisioned an incorporated Aventura as having residents chatting with local neighbor-officials on the street during morning walks. *See id.* at J4.

87. Filkins, *supra* note 54, at B5.

unincorporated county. However, recent studies indicate that satisfaction with public services bears little relation to whether a community is incorporated.[88] In fact, a majority of residents in many of the Dade County communities considering incorporation have favorably reviewed county police, fire, garbage, and library services.[89] In all but three of these communities, a majority of the unincorporated Dade County residents responding to the survey also expressed a favorable opinion of the county parks and recreation services.[90] Only county code enforcement and county planning and zoning received unanimous disapproval from Dade County's unincorporated communities.[91] Surprisingly, these figures are well in line with the satisfaction levels of many of Dade's incorporated communities.[92] In fact, the only strong correlation evidenced by the study was the positive correlation

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88. *See generally* Todd Hartman, *City or County, Residents Have Similar Complaints*, MIAMI HERALD, July 16, 1995, at MB Neighbors 3, 6-7 (comparing satisfaction levels among residents of unincorporated Dade County with satisfaction levels among residents of Dade's incorporated municipalities).

89. *See id.* In many respects satisfaction levels among residents of unincorporated Dade County rivaled many of the surveyed municipalities. For example, in the unincorporated community of West Kendall, 66.8% of the residents surveyed responded that their police protection was excellent or good. *See id.* In the unincorporated community of Westchester, this figure was 64.8%. *See id.* Before incorporation, the area of Sunny Isles returned police approval ratings of 63.4%, and the non-seceding remainder of Dade County returned ratings of 61.8%. *See id*. These figures are in line with or superior to a number of the surveyed municipalities including: Hialiah (65.4%), Miami (58.9%), North Miami (68.1%), Miami Beach (66.8%), and Opa Locka (35.5%). *See id.* Similarly, residents of unincorporated Dade County showed a general satisfaction with their library services that rivaled, and in some cases surpassed, many of the surveyed municipalities. *See id*. A comparison of the percentage of residents of the unincorporated county who rate their library service as excellent or good with the responses of a number of Dade municipalities proves illustrative. *See* Appendix, Table 1. Since this survey was taken, three Dade County communities have actually incorporated.

90. *See* Hartman, *supra* note 88, at MB Neighbors 3, 6-7.

91. *See id.* Not surprisingly, a majority of residents in many of the incorporated communities and unincorporated communities responded disfavorably. More interesting perhaps are the communities that responded favorably. The unincorporated communities of West Kendall and Westchester and the incorporated communities of Key Biscayne, Miami Beach, and Coral Gables expressed general satisfaction with their code enforcement services. *See id.* Only Key Biscayne and Coral Gables gave favorable reviews to their planning and zoning officials. *See id.* The only connection between these two communities is their notable affluence in comparison to other communities surveyed. *See id.*

92. *See id.*

between a community's affluence and its satisfaction with local services.[93] By contrast, incorporation may improve resident satisfaction in some predominately minority communities, where the variables involved with incorporation create a very different equation.[94] Destiny, a predominately African American community in Dade County, is a current example.[95]

1. Race and the "Destiny" of a Little Community Seeking Self-Determination

A strange twist on the traditional incorporation scenario comes from a number of predominantly African American communities seeking self-empowerment.[96] A recent example is the community of Destiny in Dade County.[97] In sharp contrast to the integrationist philosophy of the 1960s civil rights movement, these incorporationists argue that minorities can best empower themselves by establishing separate, self-reliant municipalities.[98] Advocates of minority neighborhood incorporation maintain that by incorporating, they can employ a pro-active approach to discrimination in the provision of municipal services.[99] For example, residents of an incorporated minority municipality could address problems of police brutality *ex ante* by hiring a police chief whom they feel is attentive to their needs and by creating citizen review boards.[100] Incorporation also could allow minority communities to govern themselves, rather than relying upon county governments that many residents view as being predominantly white and unresponsive to the needs of minorities.[101] To many minorities, the pro-active option of self-empower-

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93. *See id.*

94. *See* Goel, *supra* note 66, at 473-81.

95. *See* Marjorie Lambert, *New City Might be Dade's Destiny*, MIAMI HERALD, June 1, 1995, at B2.

96. *See generally* Goel, *supra* note 66 at 440-60 (analyzing the incorporation of minority communities).

97. *See* Filkins, *supra* note 54, at B1, B5 (discussing the particular issues facing Destiny's incorporation drive).

98. *See* Goel, *supra* note 66, at 477.

99. *See id.* at 439.

100. *See id.* at 438.

101. *See id*. at 447-48.

ment is more appealing than the reactive and uncertain approach of seeking vindication post-injury in the courts.[102] However, the economic feasibility of many such communities, including Destiny, is questionable.[103] Unlike donor municipalities, these communities often receive more in services than they pay in taxes.[104] In many cases, incorporation requires an increase in taxes to maintain existing service levels.[105] The question is one of self-determination and fair representation. It is, in essence, more tea in the harbor.

2. "An Offer You Can't Refuse:" Decreased Taxes and Improved Services

Minority empowerment movements generally are the exception to the incorporation norm.[106] As a matter of course, donor communities tend to incorporate to reduce taxes.[107] Donor communities are affluent communities whose tax revenues subsidize certain services to the county's poorer regions.[108] If the economic disparity between the donor community and the rest of the county is substantial, the donor community's tax burden will probably be substantial because some of the donor's tax revenues

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102. *See id.* at 438.

103. *See id.* at 480-81; *see also* Filkins, *supra* note 54, at B1, B5 (citing to the Destiny feasibility study, which concludes that Destiny would have to raise taxes to maintain its current level of services); Lambert, *supra* note 52, at B1.

104. *See generally* Lambert, *supra* note 52, at B1 (noting that the community of Destiny receives more in services than it pays in taxes).

105. *See* Filkins, *supra* note 54, at B1, B5.

106. *See id.* at B1, B5; *see also* Lambert, *supra* note 52, at B1.

107. *See* Lambert, *supra* note 52, at B1. *See generally* Tasker, *supra* note 17, at J1, J4.

108. *See* Tasker, *supra* note 17, at J1, J4. Metropolitan-Dade County, like many other counties, levies two kinds of property taxes: a service tax on the entire county, including incorporated areas, and second service taxes on the county's unincorporated communities. *See id.* The county-wide tax funds services that are provided to the entire county, including schools, public health, major roads, sophisticated police labs, and the medical examiner's office. *See id.* This tax is not affected by the incorporation of a community within the county. *See id.* On the other hand, the second tax, levied by the county to provide unincorporated areas with municipal services, such as zoning, police, and garbage collection, is impacted by municipal incorporation. *See id.* The newly incorporated municipality, not the county, would be empowered to collect this tax. *See id*; *see also* FLA. CONST. art. VIII, § 6(f) (stating that Metro-Dade County may exercise municipal powers to the extent that such power is not inconsistent with the powers of existing municipalities or general law).

will be used to subsidize neighboring communities.[109] By incorporating, the donor community can eliminate this subsidy and thereby reduce its taxes.[110] The tax ramifications of incorporation have in many cases been so dramatic that the incorporating community has been able to decrease its tax burden while simultaneously increasing municipal services.[111] In fact, six of the seven Dade County communities that engaged in the incorporation process in 1995 paid more in taxes than they received in services.[112] In West Kendall, this gap totaled over $13,793,200.[113] In East Kendall, the figure was $7,922,300.[114] The total gap among the six communities was $32,691,646.[115] Coupled with the benefits of locally controlled government, incorporation presented these donor communities with a $32,691,646 "offer they can't refuse."

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109. *See* Tasker, *supra* note 17, at J1, J4.

110. For a detailed breakdown of the financial impact of incorporation, see DELTONA INCORPORATION STUDY STEERING COMM. & VOLUSIA COUNTY DEV. AND CODE ADMINISTRATION DEP'T, COUNTY COUNCIL OF VOLUSIA COUNTY, FLORIDA, AN ANALYSIS OF THE FEASIBILITY OF INCORPORATION OF DELTONA, FLORIDA 76 (Jan. 22, 1987) (on file with the *Journal of Land Use and Environmental Law*) [hereinafter DELTONA FEASIBILITY REPORT] (indicating that incorporation, on the average, would reduce the property taxes of Deltona residents). For commercial property, the average projected tax decrease was over 47.8%. *See id.* at 70. This computation was derived by dividing Deltona's current average commercial property tax ($396.68) by the projected average commercial property tax after incorporation ($189.90) plus a required utility franchise fee ($60.22). *See id.* Since this report, the Legislature approved the incorporation of Deltona in 1995, and Deltona's incorporation was finalized by referendum in 1996. *See* Act effective June 17, 1995, ch. 95-498, 1995 Fla. Laws 148; Act effective May 25, 1996, ch. 96-441, 1996 Fla. Laws 1.

111. By incorporating in 1992, Key Biscayne was able to augment its level of services while lowering its tax rate to the lowest rate of any Dade County municipality. *See* Dexter Filkins, *The Moses of Metro Secessionists*, MIAMI HERALD, July 13, 1995, at A1, A8; *see also Incorporate Metro's City*, MIAMI HERALD, July 12, 1995, at A10; Lambert, *supra* note 52, at B1.

112. *See* Lambert, *supra* note 52, at B1.

113. *See id*.

114. *See id*.

115. *See id*.

IV. ANALYSIS OF FLORIDA'S FORMATION OF MUNICIPALITIES ACT AND THE PROBLEMS WITH MUNICIPAL INCORPORATION

A. Breakdown of the Act

The Act[116] was first enacted in 1974[117] and currently states that its purpose is to "provide standards, direction, and procedures for the formation of municipalities in this state and the provision of municipal services so as to: (1) allow orderly patterns of urban growth and land use. (2) assure adequate quality and quantity of local public services. (3) ensure financial integrity of municipalities. (4) eliminate or reduce avoidable and undesirable differentials in fiscal capacity among neighboring local governmental jurisdictions. (5) promote equity in the financing of municipal services."[118] The Act provides the exclusive procedure pursuant to general law for forming or dissolving a municipality, except where a county operates by a home rule charter that provides for an exclusive method as specifically authorized by the Florida Constitution.[119] Despite its lofty aims, the Act lacks the teeth necessary to address the revenue flight problem facing South Florida.[120] A closer review of the statute illustrates that assumption.

The Formation of Municipalities Act provides in pertinent part:

> (1) The incorporation of a new municipality, other than through merger of existing municipalities, must meet the following conditions in the area proposed for incorporation:

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116. The Formation of Municipalities Act was formerly known as the Formation of Local Governments Act. *See* Act effective Oct. 1, 1989, ch. 89-169, 1989 Fla. Laws 603 (amending chapter 165, *Florida Statutes* and effecting the name change).

117. Act effective July 1, 1974, ch. 74-192, 1974 Fla. Laws 513 (codified at FLA. STAT. ch. 165 (1995)).

118. FLA. STAT. § 165.021 (1995).

119. *See id.* § 165.022. The exception will be important in considering the particular issue facing Dade County.

120. In comparison, Kentucky's law governing incorporation requires: (1) a petition signed by two-thirds of the proposed territory's registered voters or a number of real property owners equal to the owners of at least two-thirds of the assessed value of the real property in the proposed territory; (2) a determination by the reviewing court that incorporation constitutes a reasonable way of providing the public services sought by voters; and (3) a determination by the reviewing court that the interest of other areas and adjacent local governments will not be unreasonably prejudiced by the incorporation. *See* KY. REV. STAT. ANN. §§ 81.050-.060 (1995).

> (a) It must be compact and contiguous and amenable to separate municipal government.
>
> (b) It must have a total population . . . in the area proposed to be incorporated of at least 1,500 persons in counties with a population of less than 50,000, and of at least 5,000 population in counties with a population of more than 50,000.
>
> (c) It must have an average population density of at least 1.5 persons per acre or have extraordinary conditions requiring the establishment of a municipal corporation with less existing density.
>
> (d) It must have a minimum distance . . . from the boundaries of an existing municipality within the county of at least 2 miles or have an extraordinary natural boundary which requires separate municipal government.[121]

1. Compact, Contiguous, and Amenable to Separate Municipal Government Requirement

The Act requires that an incorporating municipality be compact and contiguous.[122] Compactness, unity, and continuity are considered necessary and implied elements of a city.[123] An attempt to incorporate two distinct, detached tracts of land as one corporate territory is void.[124]

The compact and contiguous requirement ensures that an incorporated municipality is a geographically unified community,[125] which as a whole will benefit from incorporation.[126] Additionally, the prerequisite prevents a prospective municipality from incorporating large tracts of rural land solely to increase its tax base.[127] The rationale of the requirement is consistent with the general principle that an area should only be incorporated if the

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121. FLA. STAT. § 165.061(1) (1995).

122. *See id.* § 165.061(1)(a).

123. *See* 62 C.J.S. *Municipal Corporations* § 9 (1987).

124. *See* Enterprise v. State *ex rel.* Attorney General, 29 Fla. 128, 138 (Fla. 1892).

125. *See generally* OSBORNE M. REYNOLDS, JR., HANDBOOK OF LOCAL GOVERNMENT LAW § 67 (1982) (describing and noting the overlap of the requirements of compactness, contiguity, and community).

126. *See, e.g.*, State *ex rel.* Davis v. Lake Placid, 147 So. 468, 471-72 (Fla. 1933) (noting that Legislature may not incorporate within a municipality rural lands removed from the benefits of incorporation).

127. *See id.*

conditions making incorporation desirable, namely, the facilitation of municipal services, are present.[128]

However, requirements of compactness and contiguity do not appear to be substantial obstacles to most of the communities currently considering incorporation. In fact, none of the communities currently seeking to incorporate have been challenged on either ground.[129] More importantly, the requirement fails to address the key issue in the current incorporation debate—the secession of compact and contiguous affluent communities to the detriment of the remaining county.[130] Any resolution of the current incorporation debate should address the needs of the remaining county, an element that is lacking in the Formation of Municipalities Act.[131]

"Amenable to separate government" has not been interpreted by Florida's courts. However, most of the communities currently incorporating are donor communities that can afford to pay for their own municipal services.[132] The provision could preclude incorporation of communities that receive more in services than they pay in taxes; however, these communities are the exception to the incorporation norm.[133] Again, the statute is an inadequate attempt at addressing the current incorporation dispute.

2. Population

In comparison to many other southeastern states, Florida's minimum incorporation population threshold of 1,500 in counties with less than 50,000 persons and 5,000 in counties with more than 50,000 inhabitants is relatively lofty.[134] However, Florida's recent

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128. *See id.*

129. The reason why communities seeking incorporation do not encounter compact and contiguous obstacles is likely because the current incorporation wave has come from developed communities within South Florida's more densely populated counties. *See* Milan J. Dluhy, *Dade County's Incorporation Fever*, MIAMI HERALD, Apr. 9, 1995, at 1M, 5M.

130. *See* FLA STAT. § 165.061 (1995).

131. *See id.* ch. 165.

132. *See* Filkins, *supra* note 54, at B1, B5.

133. In 1995, Destiny was the only incorporating community that was subsidized. *See* Lambert, *supra* note 52, at B1.

134. *See, e.g.*, GA. CODE ANN. § 36-31-3 (1993) (requiring that a proposed municipality have a minimum population of 200 persons); ALA. CODE § 11-41-1 (1989) (requiring that a proposed municipality have at least 300 persons to incorporate); KY. REV. STAT. ANN. §

incorporation wave has come almost entirely from large and mid-sized communities[135] within Florida's more developed counties.[136] Even with the heightened population requirement for larger counties, secessionists in densely populated counties have no difficulty meeting the population threshold.[137] While the threshold arguably may deter smaller communities from incorporating, it fails to address the current concern of many South Florida counties—the secession of larger, affluent communities from the greater county.

3. Density

Florida, like many other states,[138] has a minimum density threshold for incorporating municipalities.[139] A community seeking incorporation must have a minimum density of 1.5 persons per acre unless the Legislature determines that extraordinary circumstances merit waiving the density requirement.[140] The density requirement helps to assure that incorporating communities would genuinely benefit from incorporation and that the incorporating community needs additional municipal services.[141] The density requirement also inhibits incorporating municipalities from including contiguous, but unrelated, rural areas to increase

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81.060 (1993) (setting the minimum population threshold for incorporation at 300 persons).

135. *See* Dluhy, *supra* note 129, at 1M, 5M. (noting the populations and density of the Dade County communities proposing incorporation).

136. *See id.*

137. Of the communities that launched campaigns for incorporation in 1995, all had populations well in excess of the minimum population requirement. In Dade County, the populations of the various communities in 1995 were: Aventura (19,400); Sunny Isles (11,772); Pinecrest (15,800); Destiny (69,785); East Kendall (81,940); and West Kendall (154,797). *See id.* at 5M. Likewise, the Palm Beach County community of Wellington, with a population of 25,000, well exceeded the threshold. *See* Hirth, *supra* note 58, at B1. Weston, in Broward County, has a population of 17,000. *See* Larrubia, *supra* note 58, at B1.

138. *See, e.g.*, GA. CODE ANN. § 36-31-3 (1995) (requiring an average resident population of at least 200 persons per square mile). *See generally* REYNOLDS, *supra* note 125, at § 67 (describing the requirements for municipal incorporation in various jurisdictions).

139. *See* FLA. STAT. § 165.061 (1)(c) (1995).

140. *See id.*

141. "There must be a basis for additional governmental facilities; otherwise those provided by the state and county are ample." 12 FLA. JUR. 2D *Counties, Etc.* § 38 (1989).

tax revenues.[142] For example, a community with a population density only slightly above the 1.5-person-per-acre threshold would not be able to incorporate sparsely populated rural areas and maintain a density above the minimum requirement.

The density requirement may present an obstacle to the incorporation of some communities.[143] However, only one of the seven communities in Southeast Florida seeking incorporation has run afoul of the density requirement.[144] It remains unclear whether the current density threshold will prevent affluent communities from continuing to secede, particularly considering that the incorporation wave has largely been a phenomenon of Southeast Florida's more densely populated counties.[145]

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142. *See id.* § 39 (commenting that an abuse of power could arise if a municipality attempts to incorporate an area with no resident population or an area that is small and disproportionate to an excessive area).

143. The Act's density requirement initially was a problem to be overcome by Wellington. *See Wellington Clears Hurdles*, FT. LAUD. SUN SENT., May 4, 1995, at B3 [hereinafter *Wellington Clears*]. However, Wellington succeeded in its incorporation attempts in 1995. *See* Act effective June 17, 1995, ch. 95-496, 1995 Fla. Laws 129.

144. *See id.*; *see also* Dluhy, *supra* note 129, at 5M (indicating that the density of each of the Dade County communities proposing incorporation clearly exceeds the statutory requirement).

145. The incorporation drive has come from communities in Dade, Broward, and Palm Beach Counties. *See* Filkins, *supra* note 111, at A1, A8.

4. Proximity

A community seeking to incorporate must be at least two miles away from another municipality.[146] However, the Act provides an exception for communities with extraordinary natural boundaries that require the community to establish separate municipal government.[147] The proximity requirement helps to ensure the presence of a genuine need for additional governmental facilities.[148] If the community can be adequately served by a neighboring municipality or by the county, then, theoretically, incorporation is not necessary.[149]

The proximity requirement has been an obstacle to the incorporation of some communities.[150] However, the provision does not prevent communities that meet the condition from seceding from the county,[151] even when secession will detrimentally impact the county.[152] Therefore, a community that meets the technical requirements of the Act can be incorporated, even if incorporation would severely prejudice neighboring communities.

5. The Advisory Nature of the Formation of Municipalities Act

"For all intents and purposes the [Formation of Municipalities]Act is advisory."[153]

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146. *See* FLA. STAT. § 165.061 (1)(d) (1995).

147. *See id*.

148. *See* 12 FLA. JUR. 2D *Counties, Etc.* § 38 (1989).

149. *See id*.

150. In 1995, Wellington did not satisfy the Act's proximity requirement as initially proposed. *See Wellington Clears*, *supra* note 143, at B3. Sunny Isles also ran afoul of the proximity requirement. It is less than two miles away from the municipalities of Bal Harbor and North Miami Beach. *See generally* 1992 COMMERCIAL ATLAS & MARKETING GUIDE (Rand McNally ed., 123d ed. 1992). Wellington was incorporated in 1995. *See* Act effective June 17, 1995, ch. 95-496, 1995 Fla. Laws 129; Wisckol, *supra* note 59, at 1A. Sunny Isles is moving toward incorporation. *See* Falsey Interview, *supra* note 5.

151. In fact, the provision has not prevented the current Dade County incorporation drives from going forward. *See* Tasker, *supra* note 17, at J1, J4.

152. The Act requires only that the area meet the listed conditions. *See* FLA. STAT. § 165.061 (1995). The Act contains no condition prohibiting incorporation when incorporation would prejudice neighboring communities or the greater county. *See id.*

153. Telephone Interview with David Ramba, Assistant General Counsel to the Florida League of Cities (Jan. 29, 1996).

Perhaps the most significant shortfall of the Act is that the Legislature is not bound by it. While politically the Legislature may feel pressure to comply with its own standards, under the Act it is not legally obligated to do so. As a matter of statutory interpretation, special law supersedes general law.[154] Municipalities must be incorporated by special act of the Legislature.[155] Therefore, despite providing well-defined standards, the Legislature is free to incorporate a municipality in contravention of some or all of those standards.[156]

B. The Incorporation Problem in Perspective

Currently, over one million people live in unincorporated Dade County.[157] This figure is expected to swell by 35%, or 700,000 people by the year 2010.[158] Seventy-six percent of this growth is expected to be in unincorporated areas of the county.[159] By 2010, Metro-Dade County could be responsible for providing municipal services to over 1.7 million people.[160] Dissatisfaction with the large and impersonal county government can be expected to increase with the population.[161]

Currently, unincorporated communities have an option that allows them to escape the specter of bloated county government and, in many cases, lower taxes.[162] More importantly, under existing Florida law, the impact of such action on the remaining areas of the county is irrelevant.[163] Absent legislative attention, the

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154. *See* Rowe v. Pinellas Sports Auth., 461 So. 2d 72 (Fla. 1984) (holding that a special act prevails over a general law unless the general law amounts to an overall revision or general restatement of law on the same subject).

155. *See* FLA. STAT. § 165.041(1) (1995).

156. *See, e.g.*, DELTONA FEASIBILITY REPORT, *supra* note 110, at 16-17 (addressing Deltona's deficiencies in meeting the statutory requirements for incorporation and stating that incorporation is still possible if extraordinary conditions exist).

157. *See* Dluhy, *supra* note 129, at 5M.

158. *See id.*

159. *See id*.

160. *See id*.

161. *See id.*

162. *See* discussion *supra* Part II and accompanying footnotes.

163. *See supra* notes 151-152.

problem will become self-perpetuating.[164] Residents will continue to flock to South Florida's unincorporated communities.[165] As these areas grow, new communities will face the tempting incorporation option.

C. Impact of the Growth Management Act on Incorporation

One aspect of municipal incorporation which is often overlooked by residents of a proposed municipality is the impact of Florida's growth management laws.[166] These laws impose many requirements on new municipalities which county government previously addressed. While the municipal comprehensive planning process may allow the residents to have more control over the future of their community than in the county planning process, certain responsibilities will fall on the residents to provide for needs of residents which may have been provided for in other areas of the county. These requirements include parks and recreation areas,[167] conservation and protection of natural resources,[168] and affordable housing plans.[169]

Many members of a community may prefer that local control of such services as parks and zoning are provided and that the environment is protected and not ignored by the larger county government. However, providing for affordable housing,[170] special housing and group homes,[171] and historic preservation[172] may not be so popular. The required housing element of the municipal com-

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164. *See* Dluhy, *supra* note 129, at 5M.

165. *See id*.

166. *See* The Florida State Comprehensive Planning Act, FLA. STAT. §§ 186.001-.901 (1995 & Supp. 1996) (establishing the state comprehensive planning process); County and Municipal Planning and Land Development Regulation Act, FLA. STAT. §§ 163.3161-.3244 (1995 & Supp. 1996) (requiring local government comprehensive planning requirements including mandatory comprehensive plan requirements such as housing and recreation elements); The Florida Environmental Land and Water Management Act, FLA. STAT. §§ 380.012-.12 (1995 & Supp. 1996); *see also* FLA. ADMIN. CODE ch. 9J-5 (1997).

167. *See* FLA. STAT. § 163.3177(6)(e) (1995 & Supp. 1996).

168. *See id.* § 163.3177(6)(d).

169. *See id.* § 163.3177(6)(f).

170. *See id.* § 163.3177(6)(f)1d.

171. *See id*.

172. *See id*.

prehensive plan must specify how the municipality will provide for existing housing needs and projected future housing needs.[173]

The affordable housing requirement is particularly relevant to Florida municipal incorporation because it suggests that a community cannot disregard the disadvantaged elements of the community. In fact, section 163.3177, *Florida Statutes* requires municipalities to provide "adequate sites for future housing, including low-income, very-low income, and moderate income families."[174] The communities that are incorporating in Southeast Florida are generally affluent communities that are incorporating, in part, to avoid subsidizing public services to poor areas. Often these affluent areas fear that low income housing near affluent neighborhoods will lower their property values. In practice, the planning statutes do not require the municipality to provide affordable housing within the municipal boundaries.[175] While any existing affordable housing cannot be forced out of the municipality, future affordable housing needs do not need to be provided within the municipal boundaries. The municipality can enter into an inter-local agreement with the county to provide for the future affordable housing needs in another part of the county.[176] Thus, the municipality can prevent the construction of new affordable housing within the municipality while still complying with the statutory obligation to provide affordable housing.

If there is no existing or future affordable housing need in the municipal boundaries, the city will not be required to provide affordable housing.[177] Consequently, if the proposed municipality were to draw the city limits so as only to include affluent areas, the

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173. *See* FLA. ADMIN. CODE r. 9J-5.010 (1997).

174. FLA. STAT. § 163.3177(6)(f)1d (1995 & Supp. 1996). The Growth Management Act requires all Florida jurisdictions to put together a comprehensive plan. *See id.* §§ 163.3161-.3215. Among the elements required in the plan is a housing element, ensuring that jurisdictions anticipate the housing needs of current and future residents, including low income residents. *See id.* § 163.3184. *See generally* Charles E. Connerly & Marc Smith, *Developing a Fair Share Housing Policy for Florida*, 12 J. LAND USE & ENVTL. L. 63, 69-73 (1996) (discussing Florida's current requirement for jurisdictions to provide housing).

175. *See* FLA. STAT. §§ 163.3161-.3215 (1995 & Supp. 1996).

176. *See* FLA. ADMIN. CODE r. 9J-5.010(3)(c)10 (1997).

177. *See* Telephone interview with Paul Noll, Florida Department of Community Affairs (Aug. 26, 1996).

city may not be required to provide affordable housing at all. In this respect, the comprehensive planning process reinforces existing housing patterns. Communities with little or no affordable housing can attempt to structure their boundaries so as to legally exclude lower income areas.[178]

V. OPTIONS FOR REFORM

Four primary options have been considered as possible responses to the incorporation crisis:[179] municipal revenue sharing, requirement of economic balance, quasi-city councils or quasi-city halls, and judicial or administrative review of incorporation proposals.[180] An examination of each proposal and its advantages and disadvantages must be undertaken to correctly assess the best alternative to solve the current incorporation problems in South Florida.

A. Municipal Revenue Sharing

Municipal revenue sharing contemplates that all cities in a county contribute to a pool to provide subsidies to the county's poor communities.[181] Affluent municipal residents would contribute a portion of their property taxes to fund this subsidy program.[182] A Minnesota legislative proposal provides an example of a possible Florida model. The proposed Minnesota municipal revenue sharing plan would collect a portion of the total municipal property tax revenue (the portion paid on the value above $200,000) and deposit it into a revenue pool to be shared by all

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178. The only exception to this statement is group homes, foster homes, and other special housing. The comprehensive planning laws require that these needs be met. *See* FLA. STAT. § 163.3177(6)(f)1d. (1995 & Supp. 1996). The inter-local agreement authority for affordable housing discussed above does not extend to other housing needs. *See id.*

179. *See* Goel, *supra* note 66, at 443-46; *see also* Filkins, *supra* note 54, at B5.

180. *See* Filkins, *supra* note 54, at B5.

181. *See id.* The revenue sharing plan proposed by Metro-Dade Planning Director Guillermo Olmedillo should not be confused with the revenue sharing plan set out in the Florida Revenue Sharing Act of 1972. *See* FLA. STAT. §§ 218.20-.26 (1995).

182. For an illustration, see Dane Smith, *House Backs Tax-Sharing Proposal*, MINNEAPOLIS / ST. PAUL STAR TRIB., May 5, 1995, at B1.

municipalities according to need.[183] While many Florida incorporationists have expressed qualified support for a revenue sharing plan,[184] such a plan may face constitutional challenges. Municipal revenue sharing redistributes taxes levied upon municipal residents to subsidize services to the county's unincorporated areas.[185] Under the revenue sharing plan, the taxes of municipal residents would be used to fund services provided exclusively to residents of the unincorporated county.[186]

Even in the absence of constitutional defects, the future of municipal revenue sharing is questionable because revenue sharing fails to eliminate subsidies.[187] Incorporating communities would still gain the benefit of increased autonomy, but they would pay higher taxes than they would by incorporating under the current system.[188] Arguably, the subsidy under the revenue sharing plan may be more palatable than remaining unincorporated if the contribution requirement is less than the current subsidy. However, in either case, someone must still pay a subsidy.

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183. *See id.* The plan's sponsor, Minnesota state representative Myron Orfield, estimates that "the proposed extension of an existing fiscal disparity formula" would redistribute an additional $100 million a year in property taxes from a few of Minneapolis and St. Paul's most affluent suburbs to the county's average and low income suburbs. *See id.*

184. *See* Filkins, *supra* note 54, at B5.

185. *See id.*

186. *But see* FLA. CONST. art. VIII, § 1(h) (prohibiting municipal property taxes from being used for "services rendered by the county exclusively for the benefit of the property or residents in unincorporated areas").

187. Under a revenue sharing plan an incorporating municipality would continue to pay subsidies to the county. *See* Filkins, *supra* note 54, at B5.

188. The incorporating community under the revenue sharing plan would still pay a subsidy in addition to the cost of providing its own municipal services. However, under the present system, an incorporating community would not pay a subsidy to provide services to residents of the unincorporated county. *See id.*

B. Requirement of Economic Balance

The economic balance option requires the area seeking to incorporate to show that the property values in the area are within a certain dollar cap.[189] Accordingly, more affluent communities seeking to incorporate must draw in poorer communities to lower their average property values to the requisite level.[190] The system would also work the opposite way, requiring a poor community seeking to incorporate to draw in more affluent communities to raise the average municipal property value to the minimum requirement.[191]

The problems with the economic balance proposal are two-fold. First, under the economic balance plan, affluent communities continue to pay a *de-facto* subsidy.[192] For example, assume the required property value range for a municipality is $40,000 to $50,000. A community with an average property value of $60,000 would have to include areas with average property values below $40,000 to lower the total average property value to within the $40,000 to $50,000 range because only the recipient of the subsidy changes. This occurs because affluent communities generally contribute more in taxes than they receive in services.[193] The surplus subsidizes services to poorer areas of the county.[194] Under the economic balance system, wealthy areas of a newly-incorporated municipality would continue to subsidize the poor communities within their municipal boundaries.[195] Thus, the subsidy remains, but the recipient changes. The ultimate result remains the same: Affluent communities would continue to pay more for services than they receive, and poor communities would continue to pay for less than they receive.[196]

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189. *See id.*

190. *See id.*

191. *See id*.

192. *See* discussion *supra* Part IV.B.

193. *See* Tasker, *supra* note 17, at J1, J4.

194. *See id.* at J4.

195. *See* Filkins, *supra* note 54, at B5.

196. While in some cases it may be possible to include areas with low to average property values that are not subsidized (i.e., a fairly densely populated condominium development might not require subsidies), such action defeats the intent of the economic

The economic balance plan is deficient in a second respect. It presumes that divergent areas will cooperate to form and maintain a unified municipality. The current incorporation wave is largely attributable to the inability of Florida communities to agree on how municipal funding and services should be distributed.[197] A viable plan must address the incorporationists' desire for self-governance.[198]

C. Neighborhood City Halls and Quasi-city Councils

In an effort to return local control to outlying communities, some counties have proposed implementing a system of neighborhood government within the greater county government structure.[199] The primary examples of such systems are neighborhood city halls and quasi-city councils.[200]

1. Neighborhood City Halls

The plan to create neighborhood city halls proposes that branch offices of county government be established in unincorporated communities.[201] Neighborhood city halls would theoretically facilitate outlying communities' access to local government and municipal services.[202] Citizens could voice complaints at a local branch office rather than traveling downtown to the county's central office.[203] Additionally, neighborhood city halls would provide county officials with "a forum through which they could maintain close contact with community leaders."[204]

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balance proposal. The plan is designed to require an incorporating municipality to bear some of the county's burden of subsidizing poorer communities.

197. *See, e.g.*, Tasker, *supra* note 17, at J1, J4 (describing Aventura's various reasons for seeking incorporation).

198. *See* discussion *supra* Part III.

199. *See, e.g.*, Filkins, *supra* note 54, at B5.

200. *See* Goel, *supra* note 66, at 444-45.

201. *See id.*

202. *See id.* at 445.

203. *See id.*

204. *Id.*

However, the neighborhood city hall has not been widely embraced by local government or community residents.[205] Nor does it appear that the plan would be adequate to meet the needs of South Florida's unincorporated communities. Residents of South Florida's unincorporated communities are demanding more than a clearinghouse for complaints.[206] They are seeking control over local expenditures, a power the neighborhood city hall lacks.[207]

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205. *See id.* (noting two major criticisms of neighborhood city halls: (1) spending funds to increase public image and to buy uneasy inner city peace; and (2) becoming tools for increased central control and circumventing city councils and administrative departments).

206. *See generally* Tasker, *supra* note 17, at J4 (describing Aventura's various reasons for seeking incorporation).

207. *See, e.g., id.* (describing Aventura's fight to control how its taxes are spent).

2. Quasi-city Councils

Proposed quasi-city councils would enable residents of the unincorporated county to have some input in local financial matters.[208] Quasi-city councils or community-based administrative centers, are community councils that participate in decisionmaking regarding the preparation of local budgets and the provision of local services.[209] Some councils are also empowered with limited authority over zoning matters, police patrols, and minor local matters.[210]

Quasi-city councils are a relatively palatable response to complaints of disfranchisement among residents of South Florida's unincorporated communities. In fact, Dade County residents overwhelmingly support the establishment of quasi-city councils.[211] However, these councils lack budgetary power and generally have minimal administrative authority.[212] Additionally, the establishment of quasi-city councils does not eliminate the tax incentive to incorporate. Despite strong community support for quasi-city councils, incorporation still presents a better option for many neighborhoods.[213] Incorporation would offer a viable solution[214] to address the tax incentive to secede.[215]

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208. *See* Goel, *supra* note 66, at 444-45.

209. *See id.*

210. *See, e.g.*, Filkins, *supra* note 54, at B5.

211. *See* Dexter Filkins, *Dade Poll May Slow Rush to Secession*, MIAMI HERALD, July 12, 1995, at A1. Fifty-two percent (52.4%) of Dade County residents surveyed responded that community based administrative centers were a very good idea. *See id.* at A8. Thirty-one percent (31.3%) responded that community-based administrative centers are mostly a good idea. *See id.* Compare the response to community-based administrative centers with the 18.7% support for incorporation. *See id.* Fifty-two percent (52.7%) of the residents surveyed either did not know whether they favored incorporation or wanted to wait for further study. *See id.*

212. *See* Goel, *supra* note 66, at 444-45.

213. The survey asked residents of unincorporated Dade County whether "establishing community-based administrative centers to handle citizen problems is" (1) a very good idea; (2) a mostly good idea; (3) mostly bad; (4) very bad; or (5) don't know. *See* Filkins, *supra* note 211, at A8. The strong support for community-based administrative centers evidenced by the survey and a desire to incorporate are not mutually exclusive. A resident who wants to localize governmental control may favor community-based administrative centers as one possible response. The same resident could likely believe incorporation is also a good option. Another possibility is a resident may support the establishment of community-based administrative centers but may be uncertain of, or desire more

D. Judicial or Administrative Determination that Incorporation Will Not Unreasonably Prejudice Adjacent Areas

In Florida, the argument that a community is withdrawing from a county taxing unit to avoid paying county taxes and subsidies to the poor is not an acceptable defense against incorporation.[216] In fact, reduction of taxes is a perfectly valid reason to incorporate even if the incorporation of the donor community would severely prejudice the greater county.[217] After the recent incorporation of Pinecrest, Pinecrest vice-mayor, Bob Hingston stated that "'[w]e feel we can provide services to the community for less than what [Dade County] cost us. Whatever additional funds we have will be used for start-up costs,'" and Aventura mayor Arthur Snyder agreed that incorporation will lower tax increases for at least two years in newly incorporated Aventura.[218]

Some states have limited the ability of communities to incorporate when incorporation would be injurious or prejudicial to neighboring areas by requiring a judicial determination that the incorporation is "right" or "reasonable."[219] For example, Mississippi requires that the reviewing court enter an order denying incorporation if it finds that "the proposed incorporation is not reasonable and is not required by the public necessity and convenience."[220]

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information about, the prospect of incorporation. For example, Aventura residents voted almost seven to one in favor of incorporation after a feasibility study indicating incorporation would decrease taxes was released in the community. *See* Marjorie Lambert, *Aventura Residents Reject Dade, Vote Resoundingly for Own City*, FT. LAUD. SUN SENT., Apr. 12, 1995, at B3.

214. *See* Tasker, *supra* note 17, at J4.

215. *See* discussion *supra* Part III.

216. *See* discussion *supra* Part IV (discussing Florida's statutory provisions for incorporation and the absence of provisions regarding detriment to the remaining unincorporated area).

217. No incorporation effort in Florida has ever been invalidated simply because the incorporating community was incorporating to reduce taxes. Naturally, the conditions making incorporation necessary or desirable must still exist. *See* State *ex. rel.* Landis v. Boyton Beach 177 So. 327 (1937). More efficient municipal services would seem to be a condition making incorporation desirable to the incorporating community.

218. Weaver, *supra* note 5, at 1B.

219. *See, e.g.*, MISS. CODE ANN. § 21-1-17 (1996).

220. *Id.*

Kentucky requires that a reviewing court determine as a matter of law that incorporation would not severely prejudice the interests of other areas and adjacent local governments.[221] Such a requirement would provide courts with an avenue to prevent incorporation in cases where the incorporation would severely prejudice the remaining county.[222] The court would be empowered to review the impact of each incorporation effort on the greater community to determine whether incorporation is right or reasonable.[223]

Any delegation of reviewing power would require clear legislative standards to avoid constitutional challenges. Under article II, section 3 of the Florida Constitution, the respective branches of government are prohibited from exercising any powers pertaining to the other branches.[224] However, the Legislature may vest courts with the authority to determine whether statutory criteria have been satisfied.[225] As long as the Legislature establishes clear criteria for the court to consider in determining the rightness or reasonableness of the incorporation, the statute should survive constitutional challenge.[226]

However, the vague language of such a requirement would also empower courts with some latitude to establish new judicial standards for the legislative function of incorporation.[227] Moreover, the requirement that incorporation be right or reasonable does not eliminate the subsidy shell game. Someone will still have to pay the subsidy;[228] however, the court, not the incorporating area, would be the instrumental party in this decision.

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221. *See* KY. REV. STAT. § 81.060 (1)(e) (1995).

222. *See id.* (allowing a court to enter an order denying incorporation if the incorporation would substantially prejudice the interest of other areas).

223. *See, e.g.*, REYNOLDS, *supra* note 125, at § 67 (noting that some jurisdictions require that a court determine incorporation is "right" or "reasonable").

224. *See* FLA. CONST. art. II, § 3.

225. The separation of powers doctrine is not violated if the executive or judicial body is merely left to execute the expressed will of the Legislature. *See, e.g.*, Albrecht v. Department of Envtl. Regulation, 353 So. 2d 883 (Fla. 1st DCA 1977).

226. *See* REYNOLDS, *supra* note 125, at § 67.

227. *See id.*

228. A court would merely accept or reject a petition for incorporation. *See* KY. REV. STAT. § 81.060 (1995). If the court approves the incorporation, the remaining county would pay the entire subsidy. If the court denies the petition, the community seeking incorporation would continue to pay the subsidy along with the county. *See id.*

VI. CONCLUSION

None of the proposals offered by this article present a comprehensive solution to the incorporation problem. A viable solution must increase local autonomy and reduce taxes. Otherwise, incorporation remains a more tempting option. The ideal solution should also provide a mechanism for achieving these objectives while still providing adequate public services and protect public safety in the poorer communities.

No proposal has promised to eliminate subsidy and increase local autonomy to the level of an incorporated municipality. Instead, proposals merely redistribute the current tax burden and provide limited increases in local government control.[229] Local councils increase community autonomy, but they present a less tempting option than incorporation, which offers more autonomy and decreased taxes. Revenue sharing, economic balance, and the requirement that incorporation be "reasonable" minimally augment local authority and merely redistribute the burden to support the county's poor.[230] Ultimately, someone must pay this tax. As is often the case with taxation, the most popular tax will invariably remain "the tax on the other fellow."[231]

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229. *See* discussion *supra* Part V.

230. *See* discussion *supra* Part V.

231. A DICTIONARY OF LEGAL QUOTATIONS 166 (Simon James & Chantal Stebbings eds., 1987) (comment of Sir Thomas White during 1917 debate in the Canadian Parliament).

VII. APPENDIX

Table 1

Percentage of Residents of Dade County Who Rated Their Library Services Excellent or Good[232]

Unincorporated Communities	Incorporated Municipalities
West Kendall (70.2%)	Hialiah (53.1%)
East Kendall (62.0%)	Miami (51.4%)
Pinecrest (52.5%)	North Miami (54.9%)
Westchester (73.9%)	Miami Beach (52.1%)
Destiny (64.4%)	Opa Locka (42.7%)
Aventura (72.4%)	
Sunny Isles (51.4%)	

232. Hartman, *supra* note 88, at MB Neighbors 3, 67. Since this poll was taken, Pinecrest and Aventura have incorporated. Sunny Isles is moving toward incorporation, but Destiny voted down incorporation. *See* Falsey Interview, *supra* note 5.

PRIVATE PROPERTY RIGHTS IN FLORIDA: IS LEGISLATION THE BEST ALTERNATIVE?

ROBERT P. BUTTS*

Table of Contents

I. INTRODUCTION

Suppose Joe, a property owner, is developing a tract of land. One day an eagle makes its home on Joe's property. Society has expressed concern over the dwindling eagle population, and the political community has responded by enacting regulations for the protection of eagles. One such regulation bans all development within twenty-four acres of the eagle's nest.[1] Although Joe understands the eagle's predicament and does not challenge the regulation, he feels that he is bearing the full financial burden of protecting this particular eagle. Joe meets with the agency that promulgated the eagle regulation and asks if they would mind buying his twenty-four acres that surround the eagle's nest. The government declines the offer and explains that Joe's loss does not rise to the level of a taking because the loss of developing his

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* Associate, Peter A. Robertson & Associates, P.A. J.D., University of Florida (1996); B.S., Webber College (1993).

1. The bald eagle enjoys federal protection as an endangered species under the Endangered Species Act of 1973, 16 U.S.C. §§ 1531-1543 (1982 & Supp. 1984) and the Bald Eagle Protection Act, 16 U.S.C. §§ 668(a)-(d) (1982). Section 372.0725, *Florida Statutes* also protects eagles as a threatened species. *See* FLA. STAT. § 372.0725 (1995).

twenty-four acres did not cause a complete diminution in the value of Joe's property. Joe leaves feeling that society is asking him to do more than his part to protect this eagle.[2]

This hypothetical illustrates the tension between private property rights and government regulatory power. The issue was foreshadowed in *Pennsylvania Coal v. Mahon*[3] which noted that when a "regulation goes too far it [is] recognized as a taking."[4] Since *Pennsylvania Coal,* courts have struggled with balancing the liberty interest of the private property owner and the government's need to protect the public's best interest. Over time, courts have developed a regulatory takings analysis, finding that a regulatory taking occurs when: (1) the property owner is denied the economically viable use of property due to the regulatory imposition; (2) the property owner has an investment-backed expectation; (3) and the property owner's interest is not subject to the state's regulation under the common law nuisance doctrine.[5] Florida has adopted these concepts in forming its takings analysis.[6]

Prior to the 1970s, the use of private property was largely unregulated except for zoning laws and prohibitions against nuisance activities.[7] In the 1970s, the public became aware of the undesirable consequences of unregulated land use, such as disorganized development and the destruction of natural habitats.[8] Political actions ensued, authorizing the application of greater governmental regulatory power.[9] This government action was generally approved by the courts.[10] Following the direction set in the 1970s, federal and state laws were enacted and have

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2. *See generally* Florida Game and Fresh Water Fish Comm'n v. Flotilla, Inc., 636 So. 2d 761 (Fla. 2d DCA 1994) (discussing a factually similar situation).

3. 260 U.S. 393 (1922).

4. *Id.* at 415; *see* U.S. CONST. amend. X ("[N]or shall private property be taken for public use, without just compensation.").

5. *See* Penn Cent. Transp. Co. v. City of New York, 438 U.S. 104, 124 (1978); Loveladies Harbor, Inc. v. United States, 28 F.3d 1171, 1179 (Fed. Cir. 1994).

6. *See* discussion *infra* Part III.A (examining the *Graham* case which incorporates many aspects of the federal takings analysis).

7. *See* Michael L. Rosen & Richard E. Davis, *A Question of Balance* 1 (1996) (unpublished manuscript) (on file with author).

8. *See id.*

9. *See id.*

10. *See id.*

accomplished many positive results for the environment.[11] However, these laws have resulted in unanticipated costs and consequences that are increasingly viewed as excessive where they arguably inhibit economic growth and infringe on private property rights.[12]

Florida recently responded to this issue by passing legislation aimed at enhancing private property rights.[13] Part II examines this property rights legislation. Since no case law exists at the time of this writing that interprets Florida's private property rights legislation, Part III analyzes the operative aspects of the legislation in the context of existing federal and state takings case law and compares the results of the cases with the anticipated results under the new legislation. Part IV examines the anticipated effect of the legislation from the perspective of property rights proponents as well as opponents. Part V discusses how the legislation might affect Florida takings law. Finally, Part VI concludes that since the private property rights issue continues to evolve, legislation is the most viable vehicle during this evolutionary process with which to address the subject. Consequently, more permanent alternatives, such as a constitutional amendment, are premature at this time.

II. EXAMINING FLORIDA'S NEW PROPERTY RIGHTS LEGISLATION

On October 1, 1995, the Florida Legislature enacted the Bert J. Harris, Jr. Private Property Rights Protection Act (Act)[14]. The Act creates a cause of action that provides judicial relief for landowners who are restricted by government laws and regulations from using their land.[15] Essentially, the new legislation was enacted to provide real property owners with protection from laws and regulations in situations that do not rise to the level of a taking under the traditional takings analysis.[16] The mechanism for this

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11. *See id.*

12. *See id.*

13. *See* FLA. STAT. § 70.001 (1995); *see also* David L. Powell, et al., *Florida's New Law to Protect Private Property Rights*, 69 FLA. B. J., Oct. 1995, at 12, 12-15 (interpreting the Act).

14. Act effective Oct. 1, 1995, ch. 95-181, 1995 Fla. Laws 181 (codified at FLA. STAT. § 70.001 (1995)).

15. *See* FLA. STAT. § 70.001(1) (1995).

16. *See id.*

protection is the Act's requirement that governmental entities compensate landowners when a government regulation causes an "inordinate burden" on an owner's property.[17]

The Act is intended to protect either a landowner's existing use of land or a vested right to a specific use of land from an action by a state, regional, or local government that amounts to an inordinate burden.[18] An existing use is defined as an actual present use.[19] However, the definition also includes reasonably foreseeable land uses that have created an existing fair market value in the property that exceeds the value of the actual present use.[20] For example, if commercially zoned property were currently used as the location of a single family residence, the existing use may be deemed commercial if it results in a higher fair market value for the property. Thus, compensation would be based on the commercial value of the property rather than its value as a residence.

A vested right is established by applying common law principles of equitable estoppel.[21] Equitable estoppel is applied to land use regulations if a landowner, in good faith, relies on some act or omission of the government and suffers a substantial change in position or incurs extensive obligations and expenses.[22] Typically, this situation arises when an owner relies on the statement of a governmental official or on a law or regulation that is subsequently changed.

III. THE OPERATIVE ASPECTS OF THE LEGISLATION

A. Inordinate Burden

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17. *Id.* § 70.001(2).

18. *See id.* The Act does not apply to actions by the federal government, to governmental actions that involve operating, maintaining, or expanding transportation facilities, or to specific actions of a government entity which occurred prior to May 11, 1995. *See id*. § 70.001(3)(c)(10); *see also* Fla. H.R. Comm. on Judiciary, CS for HB 863 (1995) Staff Analysis 6 (May 23, 1995) (on file will comm.).

19. *See* FLA. STAT. § 70.001(3)(b) (1995).

20. *See id.* ("The term 'existing use' means an actual, present use . . . which [is] normally associated with . . . such reasonably foreseeable, nonspeculative land uses which are suitable for the subject . . . property and compatible with adjacent land uses . . . .").

21. *See id* § 70.001(3)(a).

22. *See id*.

The concept of an inordinate burden is perhaps the element of the Act that has created the most speculation among local governments, planners, landowners, and the legal community. According to the Act, an inordinately burdened landowner is one whose use of real property has been restricted or limited to a certain extent by a government action.[23] Two independent conditions are evaluated to determine what constitutes an inordinate burden.[24] To satisfy the first condition, the effect of the action must permanently restrict the use of real property to the extent that the landowner is unable to realize reasonable, investment-backed expectations.[25] To satisfy the second condition, a regulation must leave the owner with an unreasonable use of property such that the "owner bears permanently a disproportionate share of a burden imposed for the good of the public."[26]

Although the Act clearly identifies situations where the Act is inapplicable,[27] its provisions are less specific in describing conditions in which the Act is applicable.[28] Consequently, depending on how a reasonable, investment-backed expectation is defined and the determination of when a landowner permanently bears a disproportionate share of the burden imposed for the good of the public, a court may interpret an inordinate burden to be easier for a property owner to meet than satisfying the elements required to obtain compensation for a regulatory taking.

1. Analyzing Traditional Takings Concepts: Graham v. Estuary Properties

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23. *See id.* § 70.001(3)(e).

24. *See id.*

25. *See id.*

26. *Id.* However, a property owner is not inordinately burdened by government action that precludes the noxious use of real property or a use that constitutes a public nuisance. *See id.* Finally, temporary impacts to land do not rise to the level of an inordinate burden. *See id.* For example, a valid, time-limited moratorium is not actionable under the Act.

27. *See id*. § 70.001(10),(13). For example, the Act does not apply to actions commenced more than one year after a law or regulation is first applied to the property at issue. *See id.* § 70.001(11).

28. For example, the Act only applies to regulations, laws, and ordinances of the state or a political entity of the state. *See id*. § 70.001(1).

A substantial body of case law exists that addresses the concepts within the Act in the context of the traditional takings analysis.[29] Florida courts will perhaps look to the reasoning of these cases in determining whether a landowner's property is restricted or limited to a degree compensable under the Act. In fact, the Florida Supreme Court utilized traditional takings case law in its decision in *Graham v. Estuary Properties*.[30] In *Graham*, the plaintiff, Estuary, owned 6,500 acres of land on the southwest coast of Florida.[31] The topography of the land included extensive wetlands and mangroves that separated the portion of the land suitable for development from various bays and inlets along the coast.[32]

Estuary sought a permit to clear the mangroves and build an "interceptor waterway" in their place.[33] Estuary planned to increase the amount of land suitable for development by using the fill coming out of the waterway to elevate areas of the property that were otherwise too low for development.[34] On the recommendation of the Southwest Florida Regional Planning Council, the Board of County Commissioners denied the permit.[35] As a result, Estuary appealed on the basis that the permit denial constituted a taking without just compensation.[36] The court recognized the following factors in its decision: (1) whether there was a physical invasion of the property; (2) whether the regulation precluded all economically reasonable use of the property; (3) whether the government action conferred a public benefit or prevented a public harm; (4) whether the government action promoted the health, safety, welfare, or morals of the public; (5) whether the regulation was arbitrarily or capriciously applied to

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29. *See e.g.*, First English Evangelical Lutheran Church v. Los Angeles County, 482 U.S. 304 (1987); Penn Cent. Transp. Co. v. City of New York, 438 U.S. 104 (1978); Lucas v. South Carolina Coastal Council, 505 U.S. 1003 (1992).

30. 399 So. 2d 1374 (Fla. 1981).

31. *See id.* at 1376.

32. *See id*.

33. *See id.*

34. *See id.* Estuary contended that the waterway would replace the ecological function of the mangroves. *See id*.

35. *See id.* at 1376-77.

36. *See id*. at 1380.

the property; and (6) the extent to which the regulation curtailed Estuary's investment-backed expectations.[37]

The fourth factor, which addresses whether the government action promotes the health, safety, welfare or morals of the public, is like a threshold factor because it questions the viability of the government action. This factor examines whether the state constitutionally used its police power. States enjoy the power to regulate under their police power.[38] Florida delegated this power to local governments through its constitution.[39] If a regulation does not promote the health, safety, or welfare of the public, it is not a valid exercise of police power.[40] Thus, if the permit denial in *Graham* had not advanced these goals, then the government's denial would have been declared invalid. Estuary's permit request would have been approved without Fifth Amendment takings having been at issue.[41] However, the *Graham* court held that the permit denial was a valid exercise of the police power.

Under the fifth factor, even if the government action was a valid exercise of police power, the action may have still been applied improperly to the property at issue.[42] For example, had the governmental entity in *Graham* denied Estuary's permit but granted permits to other property owners similarly situated to Estuary, then Estuary would have had a strong argument against the arbitrary application of the regulation at issue. However, Estuary did not

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37. *See id*. at 1380-81. This article discusses the *Graham* factors in the order in which they were addressed in the *Graham* case itself.

38. *See* U.S. CONST. amend. X ("The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively or to the people.").

39. *See* FLA. CONST. art. VIII, § 2(b) ("Municipalities shall have . . . [the] powers to . . . conduct municipal government . . . and may exercise any power for municipal purposes except as otherwise provided by law.").

40. *See Graham*, 399 So. 2d at 1380. *Contra* Newman v. Carson, 280 So. 2d 426, 428 (Fla. 1973).

41. *See* U.S. CONST. amend. V ("[N]or shall private property be taken for public use, without just compensation.").

42. *See* Varholy v. Sweat, 15 So. 2d 267 (Fla. 1943). If the regulation is arbitrarily or capriciously applied, it is an invalid exercise of the police power. *See id.* at 269-70.

base its argument on either of the above-discussed factors of the *Graham* test.[43]

Instead, the case turned on a Fifth Amendment claim for just compensation.[44] Under the Fifth Amendment, governmental entities may appropriate private property for a government purpose as long as the government justifiably compensates the property owner.[45] Courts recognize two types of government appropriations under the Fifth Amendment. First, an appropriation or "taking" of private property occurs when government action results in the government's physical occupation of the property.[46] This situation typically arises when the government uses its power of eminent domain to take private property for a public purpose but fails to compensate the landowner.[47] Second, courts recognize that a government regulation may result in such a deprivation of value that the property at issue is deemed taken for the purpose of awarding compensation.[48]

The first factor of the *Graham* test considered whether the government physically invaded Estuary's property.[49] Since no physical invasion of Estuary's property occurred, Estuary had no Fifth Amendment takings claim under this theory. Nevertheless, in an attempt to characterize the government's action as a physical invasion, Estuary argued that if the denial of the dredge and fill permit conferred a benefit to the public, it was like an exercise of eminent domain which required compensation.[50] Estuary contended that retaining the mangroves created a public benefit by providing a source of recreational fishing, so the permit denial was

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43. Although the *Graham* decision did not turn on these two elements, they help illustrate these particular aspects of the takings issue.

44. *See Graham*, 399 So. 2d at 1380-83.

45. *See* U.S. CONST. amend V; *see also* FLA. CONST. art. X, § 6(a) ("No private property shall be taken except for a public purpose and with full compensation . . . .").

46. *See, e.g.*, Loretto v. Teleprompter Manhattan CATV, 458 U.S. 419, 438-40 (1982) (determining that even television cables permanently attached to the outside of an apartment building constitute a permanent physical invasion).

47. *See generally* Joint Ventures, Inc. v. Department of Transp., 563 So. 2d 622, 624 (Fla. 1990) (discussing the distinction between a physical occupation taking and a regulatory taking).

48. *See infra* notes 59-61 and accompanying text.

49. *See Graham*, 399 So. 2d at 1380.

50. *See id*. at 1381.

essentially a physical occupation of the mangroves by the government.[51]

The third *Graham* factor addressed this public benefits argument by asking whether the government action conferred a public benefit or prevented a public harm.[52] The court agreed that the act of regulating property to confer a public benefit is a taking.[53] Further, the court acknowledged the hazy line between the prevention of a public harm and the creation of a public benefit, as the public arguably benefits whenever a harm is prevented.[54]

The *Graham* court noted that preventing the destruction of the mangroves conferred a benefit on the public because the public waterways, protected by the mangrove's natural filtration system, would remain clean.[55] In other words, the status quo was merely maintained by refusing to allow the destruction of the mangroves, which the court distinguished from the creation of a public benefit.[56] Unlike creating a benefit not previously enjoyed by the public, maintaining the status quo did not enhance the public's position.[57] Therefore, the court concluded that the permit denial prevented a public harm and was consequently deemed an exercise of the police power as opposed to a physical invasion.[58]

The *Graham* court then turned its attention to the alternate theory of regulatory takings under the Fifth Amendment. The court's test for a regulatory taking as articulated under the second *Graham* factor inquires whether the governmental action precluded *all* economically reasonable use of the property.[59] Thus, when

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51. *See id.*

52. *See id.*

53. *See id.*

54. *See id*. at 1382.

55. *See id*. at 1379.

56. *See id*. at 1382.

57. However, for example, had the owner been required to change its development plans to improve the public waterways, such a requirement would have been beyond the scope of the police power. *See id.*

58. *See id*. at 1382-83.

59. *See id.* at 1380. *But see Joint Ventures*, 563 So. 2d at 625 ("[C]ompensation must be paid ... when [governmental] interference deprives . . . [private property] owner[s] of *substantial* economic use of . . . [the] property." (emphasis added)).

government action renders property useless, this factor mandates that the result to the owner remain the same as if the property were taken by eminent domain.[60] Florida courts agree that such an action is compensable as a regulatory taking.[61] On this point, Estuary argued that denial of the dredge and fill permit made development impracticable, and thus, no economically feasible use of the property remained.[62] In response, the court noted that at least 526 of the total 6,500 acres remained suitable for development.[63] Therefore, the result of the permit denial did not render all of Estuary's property useless.[64]

The court noted that a landowner has no absolute right to change the natural character of the land when the purpose for the proposed change is not suited to the natural state of the land, and the proposed change is injurious to others.[65] As a result, a private property owner is not necessarily entitled to the highest and best use of the property if that use creates a public harm.[66] Since Estuary's total parcel was not rendered virtually useless by the permit denial and the portion of the property that was adversely affected had no independent development potential, the court held that no regulatory taking had occurred.[67]

Finally, the court considered the sixth *Graham* factor which addressed the effect of the government action on a landowner's expected return on investment.[68] Essentially, this factor required the court to analyze whether Estuary had a vested right to dredge and fill the property.[69] Such a right must exist at the time the land is

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60. *See Graham*, 399 So. 2d at 1380-82.

61. *See, e.g.*, City of Pompano Beach v. Yardarm Restaurant, 641 So. 2d 1377, 1384 (Fla. 4th DCA 1994); Tampa-Hillsborough Co. Expressway Auth. v. A.G.W.S., 640 So. 2d 54 (Fla. 1994); Askew v. Gables-By-The-Sea, 333 So. 2d 56, 61 (Fla. 1st DCA 1976).

62. *See Graham*, 399 So. 2d at 1382.

63. *See id.* at 1376.

64. *See id.* at 1381-82 (noting that Estuary's property was not "entirely submerged" and that Estuary purchased the property "with full knowledge that part of it was totally unsuitable for development.").

65. *See id.*

66. *See id*.

67. *See id*.

68. *See id*. at 1383.

69. *See id*.

purchased and be supported by some type of government acknowledgment, such as a statute.[70] The court noted that no such support was present in Estuary's case, and deemed Estuary's investment-backed expectation as mere speculation.[71] Consequently, the court ruled in favor of the Board in its denial of Estuary's dredge and fill permit.[72]

2. Applying the Graham *Facts to the Act*

The *Graham* court's treatment of Estuary's traditional takings claim is instructive because it illustrates that a landowner must show virtually a complete diminution in value of the property at issue to prevail on the regulatory takings claim.[73] In contrast to the complete diminution in value requirement of regulatory takings, the Act substitutes the concept of an inordinate burden.[74] How would Estuary have fared under the Act? The Act utilizes essentially two tests[75] and that under either test, Estuary would first have to survive the Act's "existing use" requirement.[76] Since development was not underway, Estuary would fail the primary existing use analysis.

However, the Act's alternative definition of an existing use may apply to Estuary if the type of development sought was reasonably foreseeable.[77] In other words, the relevant query is whether the land was suitable for such development even though it was not currently under development. The *Graham* court addressed this question and determined that the type of development Estuary sought was not suitable for the property at issue.[78] Consequently, even the Act's alternative definition of existing use may not have changed the result in *Graham*.

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70. *See id*.
71. *See id*.
72. *See id*.
73. *See supra* note 59 and accompanying text.
74. *See* discussion *supra* Part II.
75. *See supra* note 24-26 and accompanying text.
76. FLA. STAT. § 70.001; *see* discussion *supra* Part II.
77. *See* FLA. STAT. § 70.001; *see also* discussion *supra* Part II.
78. *See* Graham v. Estuary Properties, Inc., 399 So. 2d 1374, 1383 (Fla. 1981).

Since the *Graham* court determined that the land was not suitable for development in its present condition and that Estuary had no justifiable reason to expect a dredge and fill permit to be granted, Estuary's investment-backed expectation to develop may have been deemed unreasonable. The Act's first test for an inordinate burden requires frustration of the property owner's reasonable investment-backed expectation.[79] If the owner's expectation is not reasonable, the Act does not provide for compensation. Thus, even if Estuary survived the Act's existing use requirement, Estuary would have likely failed the Act's requirement of an inordinate burden.

The Act's second inordinate burden test is broader. If Estuary's investment-backed expectation was unjustified, Estuary would still have a claim under this test if Estuary bore a disproportionate share of a burden that was required for the good of the public.[80] The perceived burden born by Estuary was the denial of the dredge and fill permit and ultimately the inability to develop the property to its fullest potential. The public benefit was the prevention of public harm to the adjacent waterway that would potentially result from Estuary's development plans.[81] However, the *Graham* court noted that preventing a public harm merely maintains the status quo.[82] Thus, using the *Graham* analysis, requiring a property owner to maintain the status quo may not be a compensable burden under the Act. As a result, in addition to not finding relief under the Act's first test, Estuary may have fallen short under the second test as well.

3. Other Traditional Takings Cases: Further Potential Interpretations of the Inordinate Burden Concept

In contrast to the "all or nothing" takings analysis utilized by the Florida Supreme Court in *Graham*, the Federal Circuit has held that a taking may occur even when a regulation prohibits the

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79. *See supra* note 25 and accompanying text.
80. *See supra* note 26 and accompanying text.
81. *See Graham*, 399 So. 2d at 1382.
82. *See supra* note 57 and accompanying text.

landowner from less than all economically beneficial use.[83] In *Florida Rock Industries*, Florida Rock purchased a 1,560 acre parcel of wetlands to be used for limestone mining, which would have effectively destroyed the surface wetlands.[84]

Subsequent to the purchase and prior to the commencement of mining, the Army Corps of Engineers (Corps) enacted regulations requiring owners of wetlands to obtain permits under section 404 of the Clean Water Act before engaging in dredging or filling.[85] Florida Rock sought such a permit for ninety-eight of the 1,560 acres but was denied the permit on the basis of anticipated damage to the wetlands.[86] The validity of the Corps' actions was conceded, and Florida Rock filed suit alleging that the permit denial was an uncompensated regulatory taking.[87]

The court noted that the regulatory taking analysis is a subject of continuing debate.[88] One test utilized by the Supreme Court involves balancing several considerations, including the economic impact of the regulation on the claimant, the extent to which the regulation interferes with the claimant's investment-backed expectations, and the character of the government's action.[89] However, the *Florida Rock* court ruled that economic impact alone may be determinative when a regulation categorically prohibits all economically beneficial use of land.[90] The court found that such a regulation has an effect equivalent to a permanent physical occupation and amounts to a compensable taking.[91]

When a regulation prohibits less than all economically beneficial use of land and causes only a partial deprivation of value, the Supreme Court's categorical taking test is not necessarily satisfied.[92] As a result, the Federal Circuit focused on when, if

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83. *See* Florida Rock Indus., Inc. v. United States, 18 F.3d 1560, 1570 (Fed. Cir. 1994).
84. *See id.*
85. *See id*.
86. *See id*. at 1563.
87. *See id*.
88. *See id*. at 1564.
89. *See* Penn Cent. Transp. Co. v. City of New York, 438 U.S. 104, 124 (1978).
90. *See Florida Rock*, 18 F.3d at 1564-65.
91. *See id*. at 1565.
92. *See id*.

ever, a partial reduction in value results in a compensable taking under the Fifth Amendment.[93] In addressing this question, the court examined what percentage of a property's economic use must be destroyed by a regulation before a compensable taking occurs and how to determine that percentage.[94]

The focal point of the court's primary inquiry concentrated on whether the government acted in a responsible way by "limiting the constraints on property ownership to those necessary to achieve the public purpose, and not allocating to some number of individuals, less than all, a burden that should be borne by all."[95] An *ad hoc* test emerged from this inquiry that focused on the owner's loss of economic use of the property resulting from the regulation and if the owner received compensating benefits from the regulation.[96] The court also considered whether other economically realistic uses for the property remained available to the owner.[97]

The court approached the issue from the perspective that simply because a regulation serves a legitimate public purpose, government liability is not necessarily precluded.[98] Under the Fifth Amendment, the government may take any interest in property in an eminent domain proceeding and is not limited to fee interests.[99] Consequently, the court reasoned that the same was true in cases of inverse condemnation resulting from a regulated action.[100]

The Federal Circuit noted that the record did not clearly establish that Florida Rock was deprived of all economic use of its

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93. *See id.* at 1568-71. As a result of this inquiry, the court acknowledged the concept of a partial taking. *See id.*

94. *See id*. at 1569.

95. *Id*. at 1571. The *Florida Rock* court's inquiry is similar to the Act's second test. *See supra* note 26 and accompanying text.

96. *See id*.

97. *See id.*

98. *See id*.

99. *See id*. at 1572.

100. *See id.* A claim for inverse condemnation is actually the type of claim that arises from a regulatory taking. *See* Joint Ventures, Inc. v. Department of Transp., 563 So. 2d 622, 627 (Fla. 1990). Typically the issue involved is whether the government action has risen to the level of a taking.

land.[101] However, the court remanded the case to find the value of the land after imposition of the regulation to determine the extent of the owner's deprivation of value to decide whether the deprivation was enough to constitute a taking.[102] The *Florida Rock* court's decision signifies that even though the Corp's action did not completely diminish the value of Florida Rock's property, a partial taking may have occurred and compensation may be required.[103]

The Act echoes the reasoning of *Florida Rock* in that compensation may be required even when government action does not amount to a full diminution in value.[104] However, the Act remains subject to judicial interpretation. The court's interpretation of what constitutes an inordinate burden will ultimately determine the extent to which the Act will affect property rights in Florida.

Although the Act creates a new cause of action and remedy for landowners separate from takings law, the remedy resembles existing takings law remedies in several ways.[105] Each case involves an *ad hoc* fact intensive inquiry to determine whether a particular government action encroaches too far on private property rights.[106] The Act defines "too far" as when the property owner is inordinately burdened by governmental action.[107] Although the Act defines inordinate burden, quantifying the burden remains unclear.[108] The burden must be quantified to set damages for lost value and thresholds of loss, above which causes of action accrue.[109] Otherwise, differentiating between reasonable and inordinate burdens will be difficult.[110]

Property rights advocates interpret the Act to provide relief beginning with the loss of the first dollar of fair market value.[111]

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101. *See Florida Rock*, 18 F.3d at 1572-73.
102. *See id*. at 1573.
103. *See id*. at 1572-73.
104. *See* FLA. STAT. § 70.001(1)(1995).
105. *See id.*
106. *See id*.
107. *Id*. § 70.001(2).
108. *See id*. § 70.001(3)(e).
109. *See* Robert C. Downie, II, *Property Rights: Will Exceptions Become the Rule?*, 69 FLA. B. J., Nov. 1995, at 69, 70.
110. *See id*.
111. *See id*. at 71.

This position is diametrically opposed to the traditional state court evaluation of whether government action has resulted in a regulatory taking.[112] The Federal Circuit came closest to accommodating the property rights advocates' argument in *Florida Rock.* However, *Florida Rock* only acknowledged that something less than a complete diminution of value caused by government action could result in a compensable taking of private property but did not determine exactly how much diminution is necessary.[113] While the Act incorporates the concept of partial takings, the judicial interpretation of Florida courts of how much diminution constitutes a compensable part remains to be seen. If diminution starts with the first dollar, the Act is obviously a victory for private property rights.

Conversely, courts may establish a threshold that does not award compensation unless there is a substantial diminution in value. In some Florida state courts, such as *Graham*, a substantial diminution effectively means a complete diminution.[114] Critics of this all or nothing approach argue that such an approach allows compensation for an owner whose property value is diminished 100% but offers no relief for the owner whose diminution in value is only 95%.[115]

Property rights advocates hope the Act will change the all or nothing test applied in *Graham*.[116] Advocates assert that just compensation should be "proportional to the value of the interest taken as compared to the total value of the property."[117] However, if partial regulatory takings are recognized, the question becomes,

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112. *See id*.

113. *See Florida Rock*, 18 F.3d at 1570.

114. *See supra* note 59 and accompanying text.

115. *See Florida Rock*, 18 F.3d at 1569. This problem does not exist when a taking is by physical occupation. *See id*. For instance, if the government takes 50 acres of an owner's 100 acre tract, the owner is undoubtedly entitled to just compensation for the 50 acres. The issue only arises when a regulation deprives the owner of property value, even though the land is not physically invaded. In the first instance, the owner gave up actual land. In the second instance, the owner gave up value. Under *Graham*, land is compensable, but value is not. *See* Graham v. Estuary Properties, Inc., 399 So. 2d 1374, 1382 (Fla. 1981).

116. *See* discussion *supra* Part III.A.1 (*Graham* analysis).

117. Toby P. Brigham, *The Property Rights/Regulation Struggle* 16 (unpublished manuscript) (on file with author).

"[H]ow much must be taken before compensation is required?" Where is the line between a mere diminution in value and a compensable taking? If the line is too close to the first dollar of diminution, can government still operate effectively? In light of these concerns, some propose a percentage in diminution as the threshold at which a landowner has a cause of action under the Act.[118]

Property rights have received substantial commentary in recent years, and the Act represents another step in the search for a resolution of the inherent tension between property owners and governmental regulations. Various theories of property and social responsibilities have received consideration. Some contend that state and federal governments maintain complete control over usage of property.[119] Opponents of this view contend that owners have a right to use their property in any manner they choose, and damages must be paid for any governmental interference.[120] The Act presents an opportunity for courts to consider these forces in a context outside of traditional takings law. Although uncertainties remain regarding what constitutes an inordinate burden, at a minimum the Act provides courts with the forum to establish an inordinate burden at less than a complete diminution in value.

B. Property Rights at Issue

In addition to the concept of an inordinate burden, the Act addresses the particular property rights at issue. The Act describes

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118. *See generally* Downie, *supra* note 109, at 70-71. However, this approach has its own drawbacks. For example, if the threshold of an inordinate burden is drawn at a 30% diminution in value, the owner would receive no compensation if the government passed two different laws at different times that each caused a 20% diminution in value. *See id.* at 71. Furthermore, suppose one owner has 50 acres of property and another has 100 acres. *See generally id.* (providing a similar illustration). Each of their properties include 25 acres of habitat for a newly named endangered species. *See generally id.* If the regulation protecting the endangered species diminishes the value of that acreage to zero, the owner of the 50 acres would be compensated but the owner of the 100 acres would not be because the 100 acre value is diminished less than the required 30%. *See id.*

119. *See Florida Rock*, 18 F.3d at 1580 (Nies, C.J. dissenting).

120. *See id.* at 1573.

these rights as (1) the right to the continued existing use of the property; and (2) vested rights.[121]

Limiting or restricting either of these rights creates an inordinate burden on the landowner. The term "existing use"[122] is well defined in the Act, but the concept of vested rights is not. However, the vested rights concept is no stranger to the property rights issue in Florida as the concept is often analyzed by applying the doctrine of equitable estoppel.[123]

Equitable estoppel applies when a property owner, in good faith, makes such a substantial change in position or incurs such extensive obligations and expenses that it would be highly inequitable to destroy the right acquired.[124] For example, suppose a developer seeks a zoning change to develop property for multi-family use.[125] If the proposed zoning is approved and the developer spends money for development costs in reliance on this approval, the Board may be estopped from subsequently changing its position.[126] Put simply, a governmental entity may not invite a property owner onto a welcome mat and then snatch the mat away to the detriment of the property owner.[127]

However, in order to enjoy the protection of equitable estoppel, the property owner must carefully comply with any conditions attached to the development permit.[128] For example, a Board may approve construction of a landfill with conditions requiring the owner to submit certain engineering plans and state permits prior

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121. *See* FLA. STAT. § 70.001(2) (1995).

122. *See supra* notes 18-22 and accompanying text.

123. *See, e.g.*, Orange County v. Seay, 649 So. 2d 343 (Fla. 5th DCA 1995); Equity Resources, Inc. v. County of Leon, 643 So. 2d 1112 (Fla. 1st DCA 1994); City of Key West v. R.L.J.S. Corp., 537 So. 2d 641 (Fla. 3d DCA 1989). The Act states "[t]he existence of a 'vested right' is to be determined by applying the principles of equitable estoppel or substantive due process under the common law or by applying the statutory law of this state." FLA. STAT. § 70.001(3)(a) (1995).

124. *See* Sakolsky v. City of Coral Gables, 151 So. 2d 433, 436 (Fla. 1963). Later courts have commented that the concepts of vested rights and equitable estoppel have been employed interchangeably by Florida courts. *See R.L.J.S. Corp*., 537 So. 2d at 644 n.4.

125. *See, e.g.*, Hollywood Beach Hotel v. City of Hollywood, 329 So. 2d 10 (Fla. 1976).

126. *See id*. at 15.

127. *See* Town of Largo v. Imperial Homes, 309 So. 2d 571, 573 (Fla. 2d DCA 1975).

128. *See, e.g.*, Hernando County Bd. of County Comm'rs v. S.A. Williams Corp., 630 So. 2d 1155 (Fla. 5th DCA 1993).

to operation.[129] If the owner does not comply, the Board is in a position to withdraw its approval of the permit. Such non-compliance compromises an owner's position of relying in *good faith* on the board's decision.[130]

Likewise, a municipality is not estopped from assessing impact fees on the developer of a condominium even after the building permit is issued and some of the units are sold.[131] Courts view such an imposition of a new tax or an increase in the rate of an existing tax as simply one of the usual hazards of business.[132] As a result, an owner is not likely to have a vested right in the current tax policy of a governmental entity.

Consequently, owners may have vested rights in situations where governmental entities are estopped from denying those rights. Notably, the Act does not modify the test[133] required to determine whether a right is vested. It merely says that if an owner has a vested right, the Act offers a remedy not previously available. The same is true for existing rights. Consequently, while the Act offers hope for property owners, owners only gain access to the Act's pro-property rights provisions through either the door that says "inordinately burdened existing use" or the door that says "inordinately burdened vested right."[134] As a result, while the Act is intended to enhance property rights, the thresholds determining access remain subject to existing takings analysis.

C. Ripeness

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129. *See id*.

130. *See id*.

131. *See, e.g.*, City of Key West v. R.L.J.S. Corp., 537 So. 2d 641, 647 (Fla. 3d DCA 1989).

132. *See id*. (citing John McShain, Inc. v. District of Columbia, 205 F.2d 882, 883 (D.C. Cir. 1953)).

133. The doctrine of vested rights limits local governments in the exercise of their powers when a "property owner (1) in good faith (2) upon some act or omission of the government (3) has made such a substantial change in position or has incurred such extensive obligations and expenses that it would be highly inequitable and unjust to destroy the right he acquired." Hollywood Beach Hotel v. Hollywood, 329 So. 2d 10, 15-16 (Fla. 1976); *see R.L.J.S. Corp*., 537 So. 2d at 644.

134. FLA. STAT. § 70.001(2) (1995).

A regulatory takings claim is not ripe for judicial consideration until the government entity authorized to implement the regulation makes a final decision applying the regulation to the property.[135] Therefore, the ripeness doctrine requires that an owner exhaust all available administrative remedies before judicial consideration. Consequently, the issue of ripeness stands at the threshold of regulatory takings claims.[136]

The ripeness doctrine serves two functions.[137] First, the doctrine recognizes that land use decisions are subject to change and compromise based on input from opposing interests involved.[138] Thus, given time, the parties will reach a political or administrative resolution. Second, by requiring a final administrative decision, "the doctrine enables a court to determine whether a taking has occurred and if so, its extent."[139] Without such a final decision, courts cannot judge whether the land retains any reasonable beneficial use or if the owner's expectation interests have been eradicated.[140]

Recently, *Tinnerman v. Palm Beach County*[141] illustrated the operation of the ripeness doctrine. In *Tinnerman*, the landowner petitioned Palm Beach County to rezone property from agricultural to commercial, consistent with the county's comprehensive plan.[142] The county commission approved the rezoning with one caveat: The owner could not build until construction commenced to widen the access road to the property.[143] The commission imposed this condition in response to concerns that the increased traffic flow

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135. *See* Hodel v. Virginia Surface Mining & Reclamation Ass'n, 452 U.S. 264, 297 (1981).

136. *See* Williamson County Reg'l Planning Comm'n v. Hamilton Bank, 473 U.S. 172, 189-91 n.11 (1985) (finding takings claim not ripe where landowner had not requested variances from regulations forming the basis of objections raised by land use authority).

137. *See* Tinnerman v. Palm Beach County, 641 So. 2d 523, 525 (Fla. 4th DCA 1994).

138. *See id*.

139. *Id*.

140. *See id*.

141. 641 So. 2d 523 (Fla. 4th DCA 1994).

142. *See id*. at 524.

143. *See id*. at 525.

caused by the proposed development would diminish the level of road service below an acceptable level.[144]

The owner chose not to ask the commission to reconsider its decision, modify the restrictive condition, or pursue other possible uses for the property potentially consistent with the code.[145] Instead, the owner filed a claim for inverse condemnation in circuit court.[146] The court heard whether the commissioner's conditional approval of the owner's requested rezoning was a final action for ripeness purposes.[147] Although the zoning regulations stated that the commission's decision was a final action, the court noted that "the ripeness requirement of a final decision requires more than procedural finality . . . ."[148]

Procedural finality merely sets the stage for further negotiations. To obtain ripeness, the owner must pursue other less intense uses of the subject property before establishing that all administrative remedies are exhausted.[149] For example, suppose property is zoned for twenty units per acre, and the owner proposes to build a twenty unit per acre project. However, because of wetlands on the property, the land use authority board denies the permit. Using the *Tinnerman* standard, before the owner can file a claim in circuit court, the land use authority must make a final determination of the number of units per acre it will allow. If the land use authority would approve a project of fifteen units per acre, the actual extent of any diminution in value is established by comparing the value of the project at twenty units per acre with fifteen units per acre.

To have a viable claim under the Act, a claim must be presented to the government entity within one year after the application of the regulation to the owner's property.[150] The claim must be

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144. *See id*. at 524.

145. *See id*. at 525.

146. *See id*.

147. *See id*.

148. *Id.*

149. *See id*. at 526. The court in *Tinnerman* noted that the owner also had temporary uses for the land, such as a nursery or newsstand, and failed to demonstrate that such uses were not economically viable. *See id.*

150. *See* FLA. STAT. § 70.001(11) (1995).

accompanied by a bona fide appraisal that demonstrates the loss in property value.[151] The circuit court may hear the claim 180 days after it is filed.[152] Within the 180 days of the filing period, the government entity must make a written settlement offer to resolve the claim.[153]

The settlement offer procedure provides the government an opportunity to offer a compromise or alternative use for the property at issue. However, the Act does not require that the government offer a compromise but allows a statement asserting no change in the original government action giving rise to the claim.[154] In any event, unless the owner accepts the settlement offer, the government must also provide a written ripeness decision identifying the allowable uses of the property.[155] The required ripeness decision effectively eliminates the necessity for the landowner to exhaust all administrative remedies before being heard in circuit court.[156]

In *Tinnerman*, the appellate court ruled the claim not ripe even after a full year had passed because the plaintiff's permit request was denied.[157] The Act would have effectively reduced this time to no more than 180 days. Additionally, the owner's only expense would probably have been the cost of the required appraisal.[158]

Thus, the Act lowers or at least defines the ripeness hurdle by establishing a definite time period within which a case is heard. The Act will have the biggest impact on property rights in the ripeness area. Many property rights cases have gone unheard because they were not ripe in the traditional sense of the doctrine.[159] Before the Act, the standard for ripeness was an

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151. *See id*. § 70.001(4)(a).

152. *See id*. § 70.001(5)(a).

153. *See id.* § 70.001(4)(c) ("During the 180-day-notice period . . . the governmental entity shall make a written settlement offer . . . .").

154. *See id*.

155. *See id.* § 70.001(5)(a).

156. *See id*. ("The failure of the governmental entity to issue a written ripeness decision . . . shall be deemed to ripen the prior action . . . .").

157. *See* Tinnerman v. Palm Beach County, 641 So. 2d 523, 524 (Fla. 4th DCA 1994).

158. *See* FLA. STAT. § 70.001(4)(a) (1995).

159. *See, e.g.*, Glisson v. Alachua County, 558 So. 2d 1030, 1038 (Fla. 1st DCA 1990) (owners failed to apply for approval of development proposal under newly enacted

uncertain moving target as demonstrated by the "at least one meaningful attempt" standard set forth in *Tinnerman.*[160] The Act clarifies and gives certainty to the ripeness standard that a property owner must meet to establish ripeness by eliminating the need to define vague terms, such as a "meaningful attempt."

D. The Act's Settlement Offer and Attorney's Fees and Costs

Another important aspect of the Act, related to its ripeness provisions, is its inducement to settle cases.[161] The Act's ripeness provision also provides attorney's fees and costs to the prevailing party in an action, creating a powerful incentive for careful consideration of the government's settlement offer.[162] The landowner is entitled to fees and costs if the court determines that the settlement offer was not substantial enough to settle the claim.[163] Similarly, the government is entitled to fees and costs if the court determines that the owner rejected a viable settlement offer.[164]

With the prospect of paying an opponent's fees and costs, governments will undoubtedly make realistic offers, and owners will carefully consider those offers.[165] Governmental fiscal restraints will also make settlement an attractive option, and such settlements may constitute exceptions to the challenged regulation.[166] After a settlement is reached with one landowner, other similarly situated owners may expect the same treatment, resulting in exceptions essentially replacing the new regulation.[167] Consequently, land use

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comprehensive plan); City of Deland v. Lowe, 544 So. 2d 1165, 1168 (Fla. 5th DCA 1989) (owner failed to exhaust administrative remedy of appeal prior to filing claim); Department of Envtl. Regulation v. MacKay, 544 So. 2d 1065, 1066 (Fla. 3d DCA 1989) (owner failed to apply for building permit and never sought building permit or zoning variance).

160. *Tinnerman*, 641 So. 2d at 526.

161. *See* FLA. STAT. § 70.001(4)(c) (1995).

162. *See id.* § 70.001(6)(c). The settlement offer at issue is the last best offer made by the government entity, and it is on this offer that the jury makes its determination of whether the landowner is inordinately burdened. *See id.* § 70.001(4)(c).

163. *See id.* § 70.001(4)(c).

164. *See id.*

165. *See* Downie, *supra* note 109, at 71, 72.

166. *See id.* at 72.

167 *See id.*

regulation may be reduced to the first step in a process in which the real lawmaking occurs during the settlement process.[168]

Due to this scenario involving similarly-situated property owners demanding settlements, governments may feel compelled to raise taxes to retain the option of compensation. Increased taxes are a consequence society must consider when embracing enhanced property rights. Since a relatively small percentage of property owners are adversely affected by government regulations,[169] the majority may not see the need for protection from an event that is perceived as unlikely. The reality is that the decision is ultimately political, and politicians heed the concerns of voters.

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168. *See id*.

169. *See* Sylvia R. L. Vargas, *Florida's Property Rights Act: A Political Quick Fix Results in a Mixed Bag of Tricks*, 23 FLA. ST. U. L. REV. 315, 400 (1995) (viewing the Act as a windfall to owners of large undeveloped parcels and stating that timber companies, agribusiness, and developers will be the chief beneficiaries of the Act's provisions).

IV. DETERMINING THE BEST ANSWER TO FLORIDA PROPERTY RIGHTS

A. The Act Does Not Go Far Enough

Advocates of property rights see the Act as a first step in the right direction. However, the Act's limitations and ambiguities preclude the declaration of a complete victory. Property rights advocates prefer a standard that establishes a threshold that triggers compensation at a point more definable than an inordinate burden.[170] Consequently, the Act is perceived as giving courts too much discretionary power.[171] Ideally, advocates would prefer a percentage similar to the one contained in the federal Private Property Rights Restoration Act (PPRRA) proposed by Senator Phil Graham of Texas.[172] The PPRRA provides a cause of action against the federal government if government action causes a temporary or permanent diminution in value of the affected portion of real property of at least 25% or $10,000.[173] The Act does not specifically address whether an inordinate burden is measured by the investment-backed expectations for an entire parcel or just for an affected portion.[174] A plain language interpretation of the Act arguably favors the former.

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170. Such property rights bills have been introduced in the Florida Legislature since the 1970s. *See, e.g.*, Fla. HB 571 (1977); Fla. CS for SB 1055 (1977); Fla. HB 1165 (1977); Fla. SB 261 (1978); Fla. HB 438 (1978); Fla. HB 889 (1978). However, these bills all died in committee. *See generally* Kent Wetherell, *Private Property Rights Legislation in Florida: The "Midnight Version" and Beyond*, 22 FLA. ST. U. L. REV. 525, 537-47 (1994). During the 1994 Legislature Session, a property rights bill was introduced that proposed that any government regulation causing a diminution of value of 25% be deemed a taking. *See* Fla. CS for HB 485 & 1967 (1994).

171. *See* Editorial, *The Property Appraisers Series*, ST. PETE. TIMES, July 9, 1995, at 2D.

172. *See* S. 2410, 104th Cong. (1994). Senator Graham reintroduced this bill in 1995. *See* S. 343, 104th Cong. (1995); *see also* 141 CONG. REC. S10011-12, S10037 (daily ed. July 14, 1995).

173. *See* S. 343, 104th Cong. § 2 (1995). Under the PPRRA, the 25% threshold applies to the "affected portion" of a landowner's property. This essentially lowers the compensation threshold for the overall property because it is easier to establish a 25% diminution in value of a fraction as opposed to the whole. For example, if an entire parcel has a fair market value of $100,000, but the affected portion's value is only $40,000, the landowner would be compensated as long as the diminution in value exceeds $10,000. *See id.* § 2(A)-(B).

174. See FLA. STAT. § 70.001(2)(1995).

Perhaps the most important area of concern for those in favor of enhanced property rights in Florida is that legislation is subject to change with time. An amendment to the state constitution would provide a more permanent vehicle for increased property rights in Florida. In 1994, over 45, 996[175] signatures were gathered in favor of an amendment by initiative to article I, section 2 of the Florida Constitution.[176] The initiative sought to expand these rights by adding the following language:

> Any exercise of the police power, excepting the administration and enforcement of criminal laws, which damages the value of a vested private property right, or any interest therein, shall entitle the owner to full compensation determined by jury trial with a jury of not fewer than six persons and without prior resort to administrative remedies.[177]

The initiative was challenged and the Florida Supreme Court reviewed it in *League of Women Voters of Florida v. Smith*.[178] Opponents argued, and the court agreed, that the proposal violated the single subject rule.[179] The single subject rule acts as a constraint on the initiative process whereby a proposed amendment or revision may "embrace but one subject and matter directly connected therewith."[180] The drafters of the constitution imposed this rule to prevent logrolling.[181]

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175. *See* FLA. DEP'T OF STATE, DIV. OF ELECTIONS, SUMMARY OF SIGNATURES NEEDED AND CERTIFIED FOR REVIEW PURSUANT TO SECTION 15.21, FLORIDA STATUTES 8 (1994) (listing the number of signatures obtained per district for a property rights amendment).

176. *See* FLA. CONST. art I, § 2. The power to propose a revision or amendment to Florida's constitution may be invoked by filing a copy of the amendment, signed by 8% of the voters in each district and in the state as a whole, with the secretary of state. *See* FLA. CONST. art. XI, § 3.

177. Petitioner's Initial Brief at 1, League of Women Voters, Inc. v. Smith, No. 83967 (Fla. 1994).

178. 644 So. 2d 486 (Fla. 1994).

179. *See id*. at 490-91.

180. FLA. CONST. art. XI, § 3; *see also Smith*, 644 So. 2d at 490-95 (discussing the factors considered in determining whether the single subject rule is violated).

181. Logrolling occurs when an unpopular measure is combined with one or more popular measures in an amendment, in hopes that voters will conclude that they must take the bad with the good and approve all the measures as a result. *See Smith*, 644 So. 2d at 490.

In *Smith*, the court's inquiry focused on whether the proposed amendment affected multiple branches of government.[182] Since an initiative more than likely will affect several branches of government to a small degree, "no single proposal can substantially alter or perform the functions of those branches . . . ."[183] Here, the court noted "that the initiative transfers all administrative remedies for police power actions that damage private property interests from the executive branch to the judicial branch."[184] The initiative was also viewed as affecting the ability of local governments to pass zoning laws and to plan in general.[185]

Consequently, the court noted that the initiative affected the legislative branch by discouraging the enactment of laws necessary to protect the public interest.[186] Since the initiative potentially altered the ability of multiple governmental entities to perform their functions, it violated the single subject rule.[187] As a result of this violation, the initiative was stricken from the November 1994 ballot.[188]

Apparently, drafting a broadly-worded property rights initiative that does not violate the single subject rule by affecting multiple governmental entities is difficult. Advancing property rights by initiative may be futile unless the initiative addresses a very narrow issue that would not be seen by the court as hindering a local government's ability to plan. However, such a narrow initiative may only satisfy a small part of the agenda of property rights proponents.

The constitution can also be amended through a revision commission that meets every twenty years.[189] The next meeting is in 1998, and property rights are a likely area of consideration.[190] Amendments proposed by the revision commission are not subject

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182. *See id*. at 494-95.
183. *Id*. at 494.
184. *Id*. at 495.
185. *See id*.
186. *See id*.
187. *See id.*
188. *See id.* at 497.
189. *See* FLA. CONST. art. XI, § 2.
190. *See* Julie Hauserman, *Hazard on the Horizon*, ST. PETE. TIMES, Feb. 23, 1997, at 1D.

to single subject scrutiny.[191] Thus, the revision commission is an alternative vehicle for proposing an amendment that broadly affects property rights. The revision commission is composed of thirty-seven members appointed by the Attorney General, the Governor, the Speaker of the House, the President of the Senate, and the Chief Justice of the Florida Supreme Court.[192] However, since appointees may be chosen because they share similar views as their appointers, amending the constitution may be a viable political option but difficult to achieve in reality.

B. The Act Goes Too Far

Opponents of the Act and expanded property rights have several concerns. Primarily, opponents fear an explosion of litigation.[193] Before the Act, owners essentially had no cause of action unless a regulation deprived them of all economically reasonable use of their property.[194] Even when owners could prove a compensable taking had occurred, they were not heard until they had exhausted all administrative remedies, making their case ripe.[195] Consequently, despite whether these doctrines were justified, they operated like a fine screen to filter a substantial portion of cases from the circuit court.[196] The Act essentially circumvents this by creating a new cause of action that recognizes what arguably amounts to partial takings.[197] Thus, depending on how courts define an inordinate burden, the potential for increased litigation exists.

Planners and local governments are particularly concerned that the Act may inhibit their ability to effectively plan the growth of

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191. The Florida Constitution contains no provision requiring changes or additions made by the revision commission to be subject to the single subject rule. *See* FLA. CONST. art. XI, § 2. *But see* FLA. CONST. art. XI, § 3.

192. *See* FLA. CONST. art. XI, § 2(a).

193. *See* David Spohr, *Florida's Takings Law: A Bark Worse Than Its Bite*, 16 VA. ENVTL. L. J. 313, 322-23, 333-35 (1997) (describing the anticipated litigation explosion resulting from the Act).

194. *See supra* note 59 and accompanying text.

195. *See supra* note 135 and accompanying text.

196. *See* discussion *supra* Part III.C (describing how the ripeness doctrine prevents some cases from ever reaching the circuit court).

197. *See* discussion *supra* Part III.A-C.

their communities.[198] Their concerns are brought to light in the context of the concurrency requirement mandated by Florida's Local Government Comprehensive Planning and Land Development Regulation Act (Planning Act).[199] The Planning Act requires that development be concurrent with infrastructure necessary to sustain the development.[200] For example, suppose land is zoned ten units per acre but the local government will only allow four units because of concerns that traffic would exceed the level for which the access roads were designed. Thus, the owner's development request is denied for not being concurrent with the infrastructure. Depending on the adopted definition of inordinate burden, the owner may have a claim under the Act for the difference in the fair market value of the land after the unit restriction is applied. If the local government and the landowner do not reach a compromise, the government is left to choose between granting the owner's request for ten units per acre or compensating the owner under the Act. Thus, the concerns of local governments may be warranted.

The Planning Act also requires local governments to address concerns regarding sanitary sewers and septic tanks.[201] Septic tanks are only suitable in soils that have a high rate of percolation.[202] Environmental concerns have restricted the use of septic tanks in recent years.[203] If this trend continues, it may constrain the development of private property. Arguably, the owners of such property could have a cause of action under the Act if development would have been permitted but for the increased restrictions on the use of septic tanks. Local governments are caught between the Planning Act and the Act. They are

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198. *See* Robert Perez, *Land-Rights Law Worries Planners*, ORLANDO SENT., Mar. 3, 1996, at K1.

199. *See* FLA. STAT §§ 163.3161-.3243 (1995).

200. *See* FLA. STAT. § 163.3180 (1995). *See generally* David L. Powell, *Managing Florida's Growth: The Next Generation*, 21 FLA. ST. U. L. REV. 223, 293 (1993).

201. *See* FLA. STAT. § 163.3180(1)(a) (1995).

202. *See* FLA. ADMIN. CODE ANN. r. 9J-5.011(1)(f)4 (1994).

203. *See, e.g.*, Ferguson v. Department of Envtl. Protection, 1994 WL 286382 at *3 (Fla. Dep't Envtl. Reg. June 8, 1994).

compelled by state law to comply with their adopted plans.[204] However, if compliance requires additional regulation that is enacted after the Act, local governments are exposed to the Act's potential liability.[205] This potential for liability is directly dependent on how courts ultimately interpret the threshold of an inordinate burden beyond which governmental regulatory action is compensable.[206] The lower the threshold, the greater the potential is for local government liability.[207]

V. WHAT ARE FLORIDA LANDOWNERS' PROPERTY RIGHTS TODAY?

Prior to the Act, many landowners simply ran out of time or money before they were ever heard by a court. The Act creates an inducement for settlement.[208] While this is not a pure victory for property rights proponents, the Act creates a vehicle for meaningful dialogue between governmental entities and landowners affected by government action due to the obligation to pay the prevailing party's attorney's fees and costs,[209] forcing both sides to critically evaluate their respective positions before proceeding.

The Act also compels the parties to pursue settlements quickly because of the Act's ripeness provision.[210] Now, property owners have some degree of control over how quickly their claim is processed. The Act replaces an open-ended common law ripeness doctrine that offered no incentive for the government to address a landowner's claims on the merits with a legislative set of instructions designed to expedite the proceedings. No longer are

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204. *See* FLA. STAT. § 163.3231 (1995). Local plans must be consistent with the regional plan, which must be consistent with the state comprehensive plan. *See id.*

205. *See* FLA. STAT. § 70.001 (1995).

206. *See* discussion *supra* Part III.A.

207. *See* discussion *supra* Part III.A.

208. *See* FLA. STAT. § 70.001(4)(c) (1995) ("[T]he governmental entity shall make a written settlement offer [to the property owner]. . . ."); *see also* Downie, *supra* note 109, at 70, 71 (commenting that if the government does not make a bona fide settlement offer, the property owner is entitled to attorney's fees and costs, and if a property owner rejects a bona fide offer, the government is entitled to attorney's fees and costs).

209. *See* FLA. STAT. § 70.001(6)(c) (1995).

210. *See supra* notes 150-153 and accompanying text.

landowners forced to litigate whether all administrative measures have been exhausted.[211]

While the Act appears to have streamlined the procedural aspects of property rights confrontations, the extent to which property rights have been substantially enhanced remains unclear. Even if courts establish the compensable threshold at something less than a complete diminution in value, landowners must still meet the existing use requirement. Existing uses must be compatible with adjacent property and suitable for the property at issue.[212] This uncertain standard allows courts to avoid examination of how much of a diminution in value is necessary before compensation is required.

Even when the existing use requirement of the Act is met, landowners are still faced with such nebulous concepts as reasonable investment-backed expectations and whether the property owner bears a disproportionate burden imposed for the good of the public.[213] These concepts have been debated in the context of takings in the same courts that will hear claims under the Act.[214] Consequently, these same courts may continue applying traditional takings jurisprudence and reach the same conclusions for claims under the Act.

VI. CONCLUSION

The questions under the Act that remain unanswered are the same ones that would have been subject to judicial interpretation under the proposed constitutional amendment that failed in 1994.[215] Property rights advocates may prefer a constitutional remedy because the Act is subject to change through subsequent litigation. However, the flexibility of legislation may prove to be the greatest ally to property rights.

A constitutional amendment is a very permanent option without much room for error. On the other hand, legislation

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211. *See supra* notes 141-149 and accompanying text.

212. *See* FLA. STAT. § 70.001(3)(b) (1995).

213. *See supra* notes 24-26 and accompanying text.

214. *See supra* notes 29-30 and accompanying text.

215. *See supra* note 176 and accompanying text.

provides a laboratory in which property rights issues may continue to be distilled. A constitutional amendment may go too far in one direction or the other. Consequently, legislation is the best vehicle with which to address the property rights issue at this time.

The Act provides an alternative to traditional takings analysis. However, its actual effect on private property rights depends on the courts' interpretation of an inordinate burden. At the extremes lie the all or nothing approach taken by Florida state courts and the position advocating compensation for the first dollar of diminution in value supported by some property rights proponents. Clearly, the answer lies somewhere in between.

Politicians as well as the general public are concerned about the erosion of property rights over the past thirty years. Consequently, the courts will likely interpret the Act's compensable threshold at a point closer to the first dollar than to complete diminution. However, society will have to ask itself what it is willing to pay for the protection received from land use regulations enacted in the public interest. When faced with the increased taxes that may result from compensating individual landowners, society may take a critical look at the benefits it receives in return for its payments.

In any event, the judiciary continues to be faced with reaching a workable balance on property rights. Currently, the Act merely answers some questions while raising others. The Act is part of an evolving process that will continue to find property rights proponents and opponents looking to the courts for the answers.

Just as the Supreme Court was left to decide how far is too far when deciding *Pennsylvania Coal* in 1922,[216] Florida courts are still left with the same question under the Act due to the unclear compensable threshold of an inordinate burden. However, now Florida courts have a clean slate. No longer are they constrained by the all or nothing takings analysis that developed in the wake of *Pennsyl-*

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216. *See* Loveladies Harbor, Inc. v. United States, 28 F.3d 1171, 1179 (Fed. Cir. 1994) (describing division of a larger property into parcels); *see also supra* notes 3-5 and accompanying text.

vania Coal.[217] The Act clearly sets itself apart from traditional takings analysis by declaring a separate and distinct cause of action.[218]

Courts must heed this opportunity to discard *Pennsylvania Coal*'s all or nothing approach that is arguably responsible for the excessive regulatory climate that fanned the fires of the contemporary property rights movement. However, courts also should not award compensation for the first dollar of diminution. Instead, courts should seek a point far enough above the first dollar of diminution to establish that the property has unquestionably been harmed. The first dollar of diminution in value as well as the second and third, for that matter, do not suffice to make this determination. At the same time, the 45,995 Florida citizens who signed the petition for the proposed 1994 property rights amendment to the constitution certainly will not tolerate a compensable threshold far above the first dollar of diminution.

Courts will likely respond to these public concerns and set the diminution threshold in the area of 10% to 25% before a landowner may be compensated under the Act.[219] However, the answer is not this simple since the use of a percentage will cause collateral issues such as whether the diminution in value is measured by individual regulations or an aggregate of multiple regulations.[220] Other issues may arise concerning the actual property against which the percentage is applied: either the entire parcel or only a portion.[221]

These issues are not necessarily new nor insurmountable. The difference is that today the Act allows courts to forge new doctrines to address them in a way that is responsive to current societal concerns. Instead of being constrained by precedent, courts must take this opportunity to address these issues in a new light outside the shadow of traditional takings law.

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217. *See supra* note 59 and accompanying text.

218. *See supra* note 15 and accompanying text.

219. These percentages are approximations based on the concepts utilized in the PPRRA. *See supra* notes 172-173 and accompanying text.

220. *See supra* note 118 and accompanying text.

221. *See supra* note 118 and accompanying text.

AMENDING THE NATIONAL ENVIRONMENTAL POLICY ACT: FEDERAL ENVIRONMENTAL PROTECTION IN THE TWENTY-FIRST CENTURY

PAUL S. WEILAND*

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I. INTRODUCTION

The environment as a concept in law and policy began to take shape thirty-five years ago.[1] Following World War II, individuals began to recognize the adverse impact of humanity on the environment. Works such as Rachel Carson's *Silent Spring*,[2] Aldo Leopold's *A Sand County Almanac*,[3] and Stewart Udall's *The Quiet Crisis* embodied this recognition.[4] The resulting rise in consciousness catapulted the issue of environment into the national arena, and by the mid-1970s, the United States Congress had

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1. *See* Lynton K. Caldwell, *Environment: A New Focus for Public Policy?*, 23 PUB. ADMIN. REV. 132, 132 (1963).

2. RACHEL CARSON, SILENT SPRING (1962).

3. ALDO LEOPOLD, A SAND COUNTY ALMANAC (1949).

4. STEWART L. UDALL, THE QUIET CRISIS (1963).

enacted an unprecedented volume of federal legislation to protect the environment.[5] The cornerstone of this national effort to protect the environment is the National Environmental Policy Act (NEPA).[6]

The passage of NEPA signaled a movement from dependence on common law to public law to promote environmental protection.[7] The development of public law to protect the environment has evolved significantly since NEPA's emergence in 1970. However, according to a number of leading scholars in the field, the foundation on which the current federal statutory scheme for environmental protection rests is weak. A. Dan Tarlock writes, "To use a rainforest analogy, environmental law is a dense canopy with shallow roots. The past twenty-five years have produced a lush but weak legal regime of environmental protection."[8] Identifying the positive and negative aspects of environmental law and policy, Rosemary O'Leary writes, "The primary source of the problem is our nation's incremental approach to environmental law making."[9] Lynton K. Caldwell suggests, "Implementation of the environmental protection features of the Federal Land Policy and Management Act, the Forest Management Act, and other policy directive acts is handicapped by the absence of an unambiguous referent in fundamental law."[10] Finally, in a

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5. *See* Robert R. Kuehn, *The Limits of Devolving Enforcement of Federal Environmental Laws*, 70 TUL. L. REV. 2373, 2373-74 (1996).

6. National Environmental Policy Act of 1969, Pub. L. No. 91-190, § 102, 83 Stat. 852 (1970) (codified at 42 U.S.C. §§ 4321-4345 (1994)). For the complete text of NEPA, see *infra* Appendix.

7. *See* Lettie McSpadden Wenner, *The Courts and Environmental Policy*, *in* ENVIRONMENTAL POLITICS AND POLICY: THEORIES AND EVIDENCE 238, 242 (James P. Lester ed., 2d ed. 1995) [hereinafter Wenner, *The Courts and Environmental Policy*]; *see also* Lettie M. Wenner, *Environmental Policy in the Courts*, *in* ENVIRONMENTAL POLICY IN THE 1990S 145 (Norman J. Vig & Michael E. Kraft eds., 2d ed. 1994) (discussing the shift to federal environmental controls in terms of efficiency using a cost-benefit analysis).

8. A. Dan Tarlock, *Environmental Law, But Not Environmental Protection*, *in* NATURAL RESOURCES POLICY AND LAW: TRENDS AND DIRECTIONS 162, 164 (Lawrence MacDonnell & Sarah Bates eds., 1993).

9. Rosemary O'Leary, *The Progressive Ratcheting of Environmental Laws: Impact on Public Management*, 12 POL'Y STUD. REV., Autumn/Winter 1993, at 118, 133.

10. Lynton K. Caldwell, *A Constitutional Law for the Environment: 20 Years with NEPA Indicates the Need*, 31 ENV'T, Dec. 1989, at 6, 11.

symposium on the twentieth anniversary of NEPA, participants identify the need for efforts to improve upon the current system of federal environmental law.[11] All of these commentators call for the amendment of NEPA or the Constitution to strengthen the public law basis of federal environmental protection efforts.[12]

This article analyzes the evolution of NEPA and the need for reform as we enter the twenty-first century. Part II traces the evolution of the environmental movement and the creation of NEPA from the beginning of the twentieth century until NEPA's final passage by Congress in 1969.[13] In Part III, the focus is on the framers' intent in passing NEPA. Part IV examines the interpretation of NEPA by both the courts and the executive branch. Part V includes an assessment of NEPA in its present state and examination of possible paths to reform the Act, while Part VI provides conclusions about the need for a strong commitment to NEPA in the future.

II. CREATION OF THE NATIONAL ENVIRONMENTAL POLICY ACT

NEPA and subsequent national legislation to protect the environment were the products of an incremental process of issue formation and development. Despite assertions to the contrary, environmentalism emerged gradually.[14] Generally, state law preceded federal law, and both were preceded by scientific advancements concerning human/environment relations. In fact, the roots of the environmental movement may be traced back to the

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11. *See Symposium on NEPA at Twenty: The Past, Present and Future of the National Environmental Policy Act*, 20 ENVTL. L. 447 (1990).

12. James Krier has argued that the Constitution can be interpreted to include a right to environmental quality. *See* James E. Krier, *The Environment, the Constitution, and the Coupling Fallacy*, 32 LAW QUADRANGLE NOTES, Spring 1988, at 35, 35. For a critique of the proposal to amend the Constitution to include a statement of environmental rights, see J.B. Ruhl, *An Environmental Rights Amendment: Good Message, Bad Idea*, 11 NAT. RESOURCES & ENV'T, Winter 1997, at 46, 46.

13. For a more detailed account of the origins of NEPA, see Terrence T. Finn, *Conflict and Compromise: Congress Makes a Law—Passage of the National Environmental Policy Act* (1972) (unpublished Ph.D. dissertation, Georgetown University).

14. *See* Henry Caulfield, *The Conservation and Environmental Movements: An Historical Analysis, in* ENVIRONMENTAL POLITICS AND POLICY: THEORIES AND EVIDENCE 13, 19 (James P. Lester ed., 1989).

conservation and preservation movements that arose at the turn of the twentieth century.[15]

The conservation movement was based upon the controlled use of resources or multiple-use resource management, while the preservationist movement was concerned primarily with the preservation of natural resources, as the name implies.[16] Underlying conservationist notions was the economistic assumption that resources exist for the benefit of society.[17] However, conservationists recognized resource limits and therefore believed that resources should be used wisely, not wastefully. Preservationists, on the other hand, believed that nature has intrinsic worth. Adherents to the preservationist movement focused on those aspects of nature having an ethical or aesthetic value that should not be destroyed by indifferent human action.[18] Many of the moral imperatives of preservationists stemmed from the works of transcendentalists such as Ralph Waldo Emerson and Henry David Thoreau.[19]

Under the administration of President Theodore Roosevelt, the conservation movement dominated, popularizing the ideas of multiple-use and sustained yield.[20] The movement was led by Gifford Pinchot who was chief of the United States Forest Service under Roosevelt.[21] John Muir, the founder of Sierra Club in 1892, led the preservationists in their battles against the conservation movement but was unable to stand up to the politically powerful resource development interests in most cases.[22]

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15. *See generally* SAMUEL HAYS, CONSERVATION AND THE GOSPEL OF EFFICIENCY: THE PROGRESSIVE CONSERVATION MOVEMENT, 1890-1920 (1959) (tracing the early history of the movement with respect to water, forestry, and public land conservation).

16. *See* JOSEPH PETULLA, AMERICAN ENVIRONMENTAL HISTORY: THE EXPLOITATION AND CONSERVATION OF NATURAL RESOURCES 217-35 (1977).

17. *See* GIFFORD PINCHOT, THE FIGHT FOR CONSERVATION 42-50 (1910); *see also* HAYS, *supra* note 15, at 2-4.

18. For an explanation of the views of preservationists and conservationists, see PETULLA, *supra* note 16, at 228-30.

19. *See* RALPH WALDO EMERSON, NATURE (1836); HENRY DAVID THOREAU, MAINE WOODS (1878); HENRY DAVID THOREAU, WALDEN (1880).

20. *See* HAYS, *supra* note 15, at 271.

21. *See id.* at 271-73; *see also* PINCHOT, *supra* note 17, at 40.

22. *See* PETULLA, *supra* note 16, at 232-34.

The conservation movement of the early 1900s and the environmental movement of the 1960s both stressed a common goal—the achievement and maintenance of a sustainable long-term relationship between humankind and the environment.[23] Two critical distinctions however may be drawn between the two movements. First, the environmental movement may be viewed as a grass roots or "bottom-up" movement, while the conservation movement was a "top-down" effort.[24] As such, the environmental movement may be characterized as a popular or mass-based movement, whereas the conservation movement was driven by a small number of high level government officials and their counterparts in schools of agriculture, forestry, and mining, and by some farsighted industrialists.[25]

Secondly, one aspect of the environmental movement that separated it from the conservation movement was its concern with a larger set of issues. Unlike the conservation movement, the concerns of which were essentially the wise and prudent use of natural resources, the emphasis of the environmental movement was on ecological relationships between humans and nature and on the protection and preservation of the environment.[26] Environment, as understood today, had very limited meaning prior to the 1960s. Americans generally viewed the natural world as a storehouse of raw materials intended for human economic purposes.[27]

Between the 1930s and the 1960s, scientific advances began to lay a foundation for political action to protect the environment. In 1956, a lengthy report of an international symposium on *Man's Role in Changing the Face of the Earth*[28] was published, and in 1965, Harvard University Press reprinted a book written a century earlier

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23. *See* Caulfield, *supra* note 14, at 19.

24. W. Douglas Costain & James P. Lester, *The Evolution of Environmentalism, in* ENVIRONMENTAL POLITICS AND POLICY: THEORIES AND EVIDENCE 15, 26 (James P. Lester ed., 2d ed. 1995).

25. *See id.* at 26-27.

26. Roderick Nash states that while the conservation movement believed in a "gospel of efficiency," the environmental movement subscribes to a "gospel of ecology." RODERICK FRAZIER NASH, THE RIGHTS OF NATURE: A HISTORY OF ENVIRONMENTAL ETHICS 9 (1989).

27. *See id.*

28. INTERNATIONAL SYMPOSIUM ON MAN'S ROLE IN CHANGING THE FACE OF THE EARTH, MAN'S ROLE IN CHANGING THE FACE OF THE EARTH (1956).

by George Perkins Marsh titled *Man and Nature*.[29] Also, in 1965, the Conservation Foundation convened a conference on Future Environments of North America and published the proceedings in 1966.[30] A number of high profile books further contributed to increased public awareness of an endangered environment.[31] Although aesthetic and ethical values tended to dominate the popular literature of environmental protest, science was more frequently invoked, as scientific instrumentation and methods permitted increasingly refined analyses of human-induced environmental degradation.[32]

Congress began to react to scientific and popular concern for the environment in the late 1950s and early 1960s. In 1959, Senator James Murray of Montana introduced a predecessor of NEPA titled the Resources and Conservation Act.[33] This bill included a number of provisions that eventually found their way into NEPA, including a declaration of policy, the creation of an environmental organization in the Executive Office of the President, and an annual report.[34]

Environmental science was integrated into proposals for legislation beginning in 1965 with the introduction of Senator Gaylord Nelson's Ecological Research and Surveys Act.[35] This bill did not come to a vote, but some of its principles were incorporated into title II, sections 201-05 of NEPA. In 1966, both Senator Henry Jackson and Representative John Dingell introduced legislation to establish an environmental advisory council similar to that proposed by Senator Murray in 1959.[36] The Task Force on Environmental Health and Related Problems recommended to the Secretary of Health, Education, and Welfare that a council of

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29. GEORGE PERKINS MARSH, MAN AND NATURE (Harvard University Press 1965) (1864); *see* PETULLA, *supra* note 16, at 220-21.

30. FUTURE ENVIRONMENTS OF NORTH AMERICA: BEING THE RECORD OF A CONFERENCE CONVENED BY THE CONSERVATION FOUNDATION IN APRIL, 1965, AT AIRLIE HOUSE, WARRENTON, VIRGINIA (F. Fraser Darling & John P. Milton eds., 1966).

31. *See supra* notes 2-4.

32. *See* PETULLA, *supra* note 16, at 359.

33. S. 2549, 86th Cong. (1959).

34. *See id.*

35. S. 2282, 89th Cong. (1965).

36. *See supra* note 33 and accompanying text.

ecological advisors be created.[37] The Task Force, chaired by Ron Linton, urged the President to submit a proposal to Congress for an Environmental Protection Act.[38]

By the late 1960s, the environment had become a major legislative issue. Of the 695 bills signed into law during the 91st Congress (1969-70), 121 were listed by the Congressional Research Service as "environment oriented."[39] Meanwhile, several congressional committees issued a number of reports on environmental policy.[40]

In 1969 Senator Jackson reintroduced a bill addressing national environmental protection.[41] The only Senate hearing on this bill occurred on April 16.[42] It was at this point that the concept of an Environmental Impact Statement (EIS) was integrated into the

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37. *See* TASK FORCE ON ENVIRONMENTAL HEALTH AND RELATED PROBLEMS, A STRATEGY FOR A LIVABLE ENVIRONMENT 6, 48 (1967).

38. *See* S. 1075, 91st Cong. (1969).

39. ENVIRONMENTAL POL'Y DIV., CONG. RES. SERVICE, LIBRARY OF CONG., 92D CONG., CONGRESS AND THE NATION'S ENVIRONMENT: ENVIRONMENTAL AFFAIRS OF THE 91ST CONGRESS 245 (Comm. Print 1971) (prepared at the request of Henry M. Jackson, Committee on Interior and Insular Affairs, United States Senate).

40. The Subcommittee on Science, Research, and Development, chaired by Emilio Q. Daddario, issued a report on June 17, 1968 that did not propose specific legislation but summarized previous hearings, comments of staff and advisors, and listed the principle relevant legislative proposals before Congress. *See* SUBCOMM. ON SCIENCE, RES. & DEV., HOUSE COMM. ON SCIENCE & ASTRONAUTICS, 90TH CONG., MANAGING THE ENVIRONMENT (Comm. Print 1968).

On July 11, 1968, a report written by Lynton K. Caldwell was issued to the Senate Committee on Interior and Insular Affairs making the case for a national environmental policy. *See* SENATE COMM. ON INTERIOR & INSULAR AFFAIRS, 90TH CONG., A NATIONAL POLICY FOR THE ENVIRONMENT: A SPECIAL REPORT (Comm. Print 1968).

A Joint House-Senate colloquium was subsequently held on the topic of a "National Policy for the Environment" on July 17, 1968. It was designed to avoid conventional committee jurisdiction limitations and to bring together members of Congress with executive branch heads and leaders of industrial, commercial, academic, and scientific organizations. The colloquium helped to raise congressional awareness of the environmental policy issue and to legitimize it as a congressional concern rather than just an exclusive jurisdictional interest of specific committees. A congressional "white paper" published in October 1968, reported the proceedings of the colloquium and documented the broadening of legislative concern. *See* SENATE COMM. ON INTERIOR & INSULAR AFFAIRS & HOUSE COMM. ON SCIENCE & ASTRONAUTICS, 90TH CONG., CONGRESSIONAL WHITE PAPER ON A NATIONAL POLICY FOR THE ENVIRONMENT (Comm. Print 1968).

41. *See* S. 1075, 91st Cong. (1969) (introduced Feb. 18 1969).

42. *National Environmental Policy: Hearing before the Senate Comm. on Interior and Insular Affairs*, 91st Cong., 1st Sess. 116 (1969).

bill.[43] The need for an action-forcing provision to obtain compliance from the federal agencies had been recognized by commentators on environmental protection legislation.[44] During the hearing, in response to a question by Senator Jackson, Lynton K. Caldwell testified that a declaration of environmental policy must be operational to be effective—written so that its principles could not be ignored.[45] Caldwell declared that "a statement of policy by the Congress should at least consider measures to require federal agencies, in submitting proposals, to contain within those proposals an evaluation of their effect upon the state of the environment."[46] William Van Ness and Daniel A. Dreyfus, both of whom were staff members of the Committee on Interior and Insular Affairs, drafted detailed language for the impact statement requirement.[47]

III. THE INTENTION OF THE FRAMERS

The legislative history of NEPA provides a clear indication of the framers' intent when they drafted the Act. From a macro perspective, the framers intended NEPA to be the most important piece of environmental legislation in the history of the United States. According to the Senate sponsor of the law, Senator Jackson, NEPA "is the most important and far-reaching environmental and conservation measure ever enacted by the Congress."[48] Dr. Lynton K. Caldwell, a consultant to the Senate Committee on Interior and Insular Affairs and one of the architects of NEPA, asserts that "the purpose of NEPA, as the Act declares, was to adopt a national policy for the environment within the

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43. *See* S. 1075, 91st Cong. (1969) (reported on July 9, 1969 with amendments concerning the EIS).

44. *See National Environmental Policy: Hearing before the Senate Comm. on Interior and Insular Affairs*, 91st Cong., 1st Sess. 116-17 (1969).

45. *See id*.

46. *Id*. at 116.

47. *See* RICHARD A. LIROFF, A NATIONAL POLICY FOR THE ENVIRONMENT: NEPA AND ITS AFTERMATH 17 (1976).

48. 115 CONG. REC. S40,416 (Dec. 20, 1969) (statement of Sen. Jackson).

context of the planetary biosphere. The intent of the legislation is general, but hardly vague . . . ."[49]

NEPA provisions were designed to accomplish four goals. First, the Act includes a statement of national environmental policy.[50] According to Senator Jackson:

> A statement of environmental policy is more than a statement of what we believe as a people and as a nation. It establishes priorities and gives expression to our national goals and aspirations. It provides a statutory foundation to which administrators may refer to it [sic] for guidance in making decisions which find environmental values in conflict with other values.[51]

The Act's statement of policy is designed to provide federal decisionmakers with a statutory referent when they are confronted with a situation in which they must balance competing economic, environmental, political, and social concerns.

Second, the Act includes an action-forcing provision designed to ensure that the policies and goals of the Act are carried out by the federal government.[52] This action-forcing provision, the Environmental Impact Statement (EIS) was designed to improve decisionmaking by forcing the federal agencies to consider the environmental implications of their activities.[53] Section 102(2)(C)of NEPA applies to "proposals for legislation and other major Federal actions significantly affecting the quality of the human environment."[54]

According to Caldwell, who is credited with the creation of the EIS concept,[55] section 102(2)(C) is designed to promote better planning and decisionmaking.[56] The authors of NEPA decided to include an action-forcing provision in order to ensure that the

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49. Lynton K. Caldwell, *NEPA Revisited: A Call for a Constitutional Amendment*, 6 THE ENVTL. FORUM, Nov.-Dec. 1989, at 17, 19.

50. *See* 42 U.S.C. § 4331 (1994).

51. 115 CONG. REC. S40,416 (Dec. 19, 1969) (statement of Sen. Jackson).

52. *See* 42 U.S.C. § 4332 (1994).

53. 115 CONG. REC. S40,416 (Dec. 19, 1969) (statement of Sen. Jackson).

54. 42 U.S.C. § 4332(2)(C).

55. *See* Caldwell, *supra* note 49, at 17.

56. *See id.* at 20.

statement of national environmental policy could be implemented and would not be ignored.[57]

Third, the Act establishes a Council on Environmental Quality (CEQ).[58] The CEQ, according to Senator Jackson, was established to provide: (1) a locus at the highest level for the concerns of environmental management; (2) objective advice to the President and a comprehensive, integrated overview of Federal actions as they related to the environment; and (3) a system for monitoring the state of the environment.[59]

The CEQ was purposely placed in the Executive Office of the President (EOP) and not the White House to lessen the President's control over the Council.[60] The design of the CEQ is based on the design of the Council of Economic Advisers (CEA).[61] In order to understand the logic behind the creation of the CEA and the CEQ, the historical context in which the CEA was proposed must be examined. The Brownlow Report to the President, which preceded the creation of the CEA, provides significant insights into important changes in the Executive Branch that were considered and made under President Franklin D. Roosevelt.[62] The drafters of the Brownlow Report envisioned an executive characterized by a distinction between politics and administration.[63] The purpose of

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57. *See* LIROFF, *supra* note 47, at 16.

58. *See* 42 U.S.C. § 4342 (1994).

59. *See* 115 CONG. REC. S40,416 (Dec. 19, 1969) (statement of Sen. Jackson).

60. *See* Dinah Bear, *The National Environmental Policy Act: Its Origins and Evolutions*, 10 NAT. RESOURCES & ENV'T, Fall 1995, at 3, 4.

61. *See id.* at 71; 115 CONG. REC. S40,416 (Dec. 19, 1969) (statement of Sen. Jackson); *see also* LIROFF, *supra* note 47, at 52-54. The CEA was established under the Employment Act of 1946, 15 U.S.C. §§ 1021-1025 (1994).

62. The Brownlow Report is named for its author, Louis Brownlow, who headed the President's Committee on Administrative Management. *See* PRESIDENT'S COMM. ON ADMIN. MGMT., REPORT OF THE ADMINISTRATIVE MANAGEMENT IN THE FEDERAL GOVERNMENT (1937) [hereinafter Brownlow Report].

63. *See id.* The Brownlow Report states:

> Our Presidency unites at least three important functions. From one point of view the President is a political leader . . . . From another point of view he is head of the Nation in the ceremonial sense of the term . . . . From still another point of view the President is the Chief Executive and the administrator within the Federal system and service.

Id. at 1-2.

creating a White House staff separate from the Executive Office of the President was to institutionalize the politics/administration distinction.

Fourth, the Act requires that the President submit to Congress an annual environmental quality report.[64] This report provides Congress and the people with an assessment of the state of the environment.

IV. INTERPRETATION OF THE NATIONAL ENVIRONMENTAL POLICY ACT

On January 1, 1970, President Nixon signed NEPA into law.[65] This moment signaled the beginning of a new chapter in the history of NEPA as the focus shifted from formulation to implementation. Two questions arose regarding: (1) the role that the CEQ would play in national environmental protection efforts (and specifically, the President's interactive role with the CEQ); and (2) the interpretation and implementation of NEPA by federal agencies and courts.

A. The Council on Environmental Quality

Section 202 of NEPA establishes that the CEQ is not a regulatory agency but instead, a multi-member council set up to provide the presidential administration with timely information about human/ environment relations.[66] In addition, the CEQ has

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The recommendations called for by the President's Committee on Administrative Management include expansion of the White House staff and a strengthening of the management arms of the Chief Executive. *See id*. at 46. For a further discussion on politics and administration, see Donald Kettl, *Public Administration: The State of the Field*, *in* POLITICAL SCIENCE: THE STATE OF THE DISCIPLINE 407 (Ada Finifter ed., 1993); Herbert Kaufman, *The End of an Alliance: Public Administration in the Eighties*, *in* PUBLIC ADMINISTRATION: THE STATE OF THE DISCIPLINE 483 (Naomi Lynn & Aaron Wildavsky eds., 1990); Terry M. Moe, *Politics and Theory of Organization*, 7 J. L. ECON. & ORG. 106 (1991); Francis Rourke, *Responsiveness and Neutral Competence in American Bureaucracy*, 52 PUB. ADMIN. REV. 539 (1992). For a discussion on the politics/ administration distinction, see Woodrow Wilson, *The Study of Administration*, 2 POL. SCI. Q. 197 (1887).

64. *See* 42 U.S.C. § 4341 (1994).

65. National Environmental Policy Act of 1969, Pub. L. No. 91-190, § 102, 83 Stat. 852 (1970) (codified at 42 U.S.C. §§ 4321-4345 (1994)). For the complete text of NEPA, see *infra* Appendix.

66. *See* 42 U.S.C. § 4342.

the task of developing guidelines for formulating EISs.[67] The three members of the Council, including a chairman, are appointed by the President for indefinite terms with the advice and consent of the Senate.[68] The first chairman of the CEQ, Russell Train, helped to shape national environmental policy.[69] Initially, the CEQ played a critical role in the implementation of NEPA through the process of promulgating detailed regulations to guide agency decisions regarding the need to file an EIS and the steps necessary to adequately prepare the document.[70]

Under President Nixon, and initially under President Carter, the CEQ had an important policymaking role. In 1977, President Carter's staff contemplated eliminating the CEQ but was unable to do so because it is statutorily created.[71] Since the election of Reagan, presidential support for the CEQ further declined. In 1981, Reagan unsuccessfully attempted to abolish the CEQ.[72] While he failed to abolish the CEQ, Reagan was able to shrink and marginalize it. The CEQ's resources declined from an annual budget of $3.1 million under Carter in 1980[73] to a $700,000 budget

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67. Executive Order No. 11514, required the CEQ to issue guidelines to federal agencies for the preparation of EISs. *See* Exec. Order No. 11514, 35 Fed. Reg. 4247 (1970). Subsequently, Executive Order No. 11991 was issued amending Executive Order No. 11514. The order gave the CEQ the power to issue regulations to federal agencies for implementation of the procedural provisions of NEPA. *See* Exec. Order No. 11991, 42 Fed. Reg. 26,967 (1977); *see also* Council on Environmental Quality Regulations, 40 C.F.R. §§ 1500-1508 (1996) (reprinted in 42 U.S.C. §§ 4321-4345 (1994)).

68. *See* 42 U.S.C. § 4342.

69. *See* Bear, *supra* note 60, at 6.

70. *See* Charles F. Weiss, *Federal Agency Treatment of Uncertainty in Environmental Impact Statements under the CEQs Amended NEPA Regulations § 1502.22: Worst Case Analysis or Risk Threshold?* 86 MICH. L. REV. 777, 794-95 (1988); *see also* 40 C.F.R. §§ 1500-08. *See generally* Mark S. Tawater, *Section 9.03, in* LAW OF ENVIRONMENTAL PROTECTION 9-105 (Sheldon M. Novak ed., 1987).

71. *See* Edward Walsh, *Staff Cut of 145 Said Proposed for White House*, WASH. POST, July 7, 1977, at A1; Edward Walsh, *Backers of Environmental Unit Ask Carter to Keep it Intact*, WASH. POST, July 8, 1977, at A3; Philip Shabecoff, *Environment Council Is Defended*, N.Y. TIMES, July 7, 1977, at B16; Gladwin Hill, *Environment: Fresh Worries*, N.Y. TIMES, July 8, 1977, at A7.

72. *See* David Hoffman, *Reagan Considers End to 3 Agencies*, WASH. POST, Dec. 11, 1984, at A1.

73. EXECUTIVE OFFICE OF THE PRESIDENT, OFFICE OF MGMT. & BUDGET, BUDGET OF THE UNITED STATES GOVERNMENT, FISCAL YEAR 1982 382-83 (1982).

in 1985.[74] Reagan reduced the CEQ's personnel from fifty staff members to eleven.[75] In addition, the annual reports written and published by the CEQ under Reagan's first administration came to be viewed by environmentalists as politically motivated and skewed.[76]

From 1980 onward, presidents have not treated the CEQ as a council, appointing only a chairman.[77] In 1993, President Clinton was the third president to propose the elimination of the CEQ.[78] Because the CEQ was created by an act of Congress, it would have required an act of Congress to abolish it. Following a number of objections, Clinton removed the proposal to eliminate the CEQ.[79] In 1995, the agency had fourteen employees and a budget of $2 million.[80] It was not until December 30, 1994, over two years after his election, that President Clinton made an appointment to the CEQ.[81]

The ability of the CEQ to play a prominent role in national policymaking has been hampered by the existence of an often hostile political environment within the EOP.[82] As a result, one

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74. *See* EXECUTIVE OFFICE OF THE PRESIDENT, OFFICE OF MGMT. & BUDGET, BUDGET OF THE UNITED STATES GOVERNMENT, FISCAL YEAR 1987 6d-23 (1987); *see also* ENVIRONMENTAL POLICY IN THE 1990S 404-05 (Norman J. Vig & Michael E. Kraft eds., 1994).

75. *See* UNITED STATES OFFICE OF PERSONNEL MGMT., FEDERAL CIVILIAN WORKFORCE STATISTICS, MONTHLY RELEASE: EMPLOYMENT AND TRENDS AS OF APRIL 1982 (1982); *see also* Cass Peterson, *Reagan Cites "Solid Progress" Toward Clean Air, Water*, Wash. Post, July 12, 1984, at A13.

76. *See* Peterson, *supra* note 75, at A13.

77. *See* Caldwell, *supra* note 49, at 22.

78. *See* Ann Devroy, *Clinton Announces Plan to Replace Environmental Council*, WASH. POST, Feb. 9, 1993, at A6; Tom Kenworthy, *Clinton Plan on CEQ Sparks Tiff With Environmentalists*, WASH. POST, Mar. 25, 1993, at A22; John H. Cushman, Jr., *A Clinton Cutback Upsets Environmentalists*, N.Y. TIMES, Sept. 26, 1993, at A1; *see also* 139 CONG. REC. S4809-03, 4816 (Apr. 22, 1993) (statement of Sen. Roth).

79. *See* Robert Cahn & Patricia Cahn, *Policing the Policy. (the National Park Service Compliance with the National Environmental Policy Act)*, NAT'L PARKS, Sept. 19, 1995, at 36 (describing how Clinton rescinded his proposal to abolish the CEQ, and instead, created a dozen new positions within the CEQ and gave the CEQ additional funding).

80. *See* U.S. OFFICE OF MANAGEMENT AND BUDGET, BUDGET OF THE UNITED STATES 86 (1995) (reporting fiscal year 1995).

81. *See* 141 CONG. REC. S18229-02 (Dec. 7, 1995) (statement of Sen. Dole) (nominating Kathleen A. McGinty).

82. *See supra* notes 71-81 and accompanying text.

scholar described the CEQ as "reactive rather than proactive."[83] However, the shortcomings of the CEQ are not inherent in the organization. In fact, following a study of the CEQ, the General Accounting Office concluded that the CEQ has been "influential in shaping the Nation's approach to protecting and preserving our environment."[84]

B. NEPA, Federal Agencies and the Courts

Once Congress passed NEPA, the onus of implementation fell on the federal agencies. Given the breadth and complexity of federal administrative tasks, it is not surprising that agencies reacted in different ways. Most agencies adopted a wait-and-see attitude toward NEPA that accompanied a perception of the Act as noncommittal at best and contrary to their mission at worst.[85] In an early analysis of NEPA, Liroff summed up administrative response to the Act:

> Several general patterns of agency response to NEPA are observable. First, there were those agencies like the AEC [such as the Atomic Energy Commission] prior to Calvert Cliffs and the FPC [such as the Federal Power Commission] who felt that compliance might interfere with their achievement of their traditional missions. Second, there was a lack of procedural response on the part of environmental agencies like EPA [i.e., the Environmental Protection Agency] that regarded NEPA as superfluous because their decisions were already infused with environmental considerations.
>
> Third, there were a few agencies, like the AEC after Calvert Cliffs and the [Army] Corps [of Engineers], in which some concerted efforts to implement NEPA was [sic] made . . . .
>
> Fourth some agencies showed a lack of interest in NEPA because ecological considerations did not seem germane to their principal missions, and there was little reward to be gained by allocating scarce agency resources to environmental concerns.[86]

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83. *Nomination of Kathleen A. McGinty: Hearing before the Senate Comm. on Environment and Public Works*, 104th Cong., 1st Sess. (1995).

84. U.S. GENERAL ACCOUNTING OFFICE, THE COUNCIL ON ENVIRONMENTAL QUALITY: A TOOL IN SHAPING NATIONAL POLICY i (1981).

85. *See* LIROFF, *supra* note 47, at 138.

86. *Id.* at 140.

As a result, it became obvious that successful implementation of NEPA would require intervention by the executive, judiciary, or legislature.

Although NEPA includes no explicit provision for judicial review, courts play an important role in the implementation and interpretation of the Act. From a practical point of view, courts have defined the requirements that are placed on the federal agencies by NEPA. One of the first federal appellate decisions to address NEPA was *Calvert Cliffs' Coordinating Committee v. Atomic Energy Commission*.[87] In this case, the court considered whether rules adopted by the Atomic Energy Commission (AEC) with respect to environmental matters are adequate under NEPA.[88] The court held that the AEC's procedural rules that address environmental matters were not in compliance with NEPA.[89] In the process, the court linked the procedural and substantive aspects of NEPA and made it clear that the Act requires the federal agencies to internalize the values set forth in NEPA.[90] The court stated:

> NEPA, first of all, makes environmental protection a part of the mandate of every federal agency and department . . . . [AEC] is not only permitted, but compelled, to take environmental values into account. Perhaps the greatest importance of NEPA is to require [AEC] and other agencies to consider environmental issues just as they consider other matters within their mandates.[91]

The court did differentiate between the substantive and procedural components of the NEPA. It held that the substantive aspects of NEPA are flexible,[92] and found that "Congress did not establish environmental protection as an exclusive goal; rather, it desired a reordering of priorities, so that environmental costs and benefits will assume their proper place along with other considerations."[93] However, the court found the procedural aspects of the Act to be

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87. 449 F.2d 1109 (D.C. Cir. 1971).
88. *See id.* at 1111-12.
89. *See id.* at 1117.
90. *See id.* at 1118.
91. *Id*. at 1112.
92. *See id*.
93. *Id*.

much more rigid. Referring to section 102, which contains the procedural aspects of NEPA, the court stated, "They must be complied with to the fullest extent, unless there is a clear conflict of statutory authority. Considerations of administrative difficulty, delay or economic cost will not suffice to strip the section of its fundamental importance."[94]

Calvert Cliffs legitimized judicial review of agency compliance with both the procedural and substantive components of NEPA.[95] However, since that case, the Supreme Court has taken a more limited approach to judicial review of agency action, refusing to enforce the substantive provisions of the Act.

One of the first opinions that curtailed implementation of NEPA was *Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council*.[96] The Court held that the Nuclear Regulatory Commission met the statutory requirements set forth in the Administrative Procedure Act (APA)[97] and in NEPA in order to issue permits to Consumers Power Corporation and Vermont Yankee Nuclear Power Corporation to construct nuclear power plants.[98] In *Vermont Yankee*, Justice Rehnquist articulated the Supreme Court's view concerning judicial review under NEPA.

> NEPA does set forth significant substantive goals for the Nation, but its mandate to the agencies is essentially procedural. It is to ensure a fully informed and well-considered decision, not necessarily a decision the judges of the Court of Appeals or of this Court would have reached had they been members of the decisionmaking unit of the agency. Administrative decisions should be set aside in this context, as in every other, only for substantial procedural or substantive reasons as mandated by statute, not simply because the court is unhappy with the result reached.[99]

Although the Court placed emphasis on the judiciary's role in ensuring agency compliance with NEPA's procedural requirements, it

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94. *Id*. at 1115.

95. *See* Wenner, *The Courts and Environmental Policy*, *supra* note 7, at 242.

96. 435 U.S. 519 (1978).

97. 5 U.S.C. § 706 (1994).

98. *See Vermont Yankee*, 435 U.S. at 557-58.

99. *Id.* at 558 (citations omitted).

left open the opportunity for judicial review to ensure some level of compliance with NEPA's substantive goals.

In *Strycker's Bay Neighborhood Council, Inc. v. Karlen*,[100] the Court precluded the possibility of judicial review as a mechanism for implementation of NEPA's substantive goals.[101] In *Strycker's Bay*, the Department of Housing and Urban Development (HUD) was involved in the designation of a proposed site in New York City for low income housing.[102] The Court held that HUD met NEPA's procedural requirements and that the agency therefore had complied fully with NEPA.[103]

> *Vermont Yankee* cuts sharply against the Court of Appeals' conclusion [in *Strycker's Bay*] that an agency, in selecting a course of action, must elevate environmental concerns over other appropriate considerations. On the contrary, once an agency has made a decision subject to NEPA's procedural requirements, the only role for a court is to insure that the agency has considered the environmental consequences; it cannot "interject itself within the area of discretion of the executive as to the choice of the action to be taken."[104]

Following the decision in *Strycker's Bay*, the courts were to interpret NEPA as requiring nothing more than an adequate assessment of the environmental consequences of significant actions by federal agencies.[105] In his dissent, Justice Marshall argued that the majority went too far:

> *Vermont Yankee* does not stand for the proposition that a court reviewing agency action under NEPA is limited solely to the factual issue of whether the agency "considered" environmental consequences. The agency's decision must still be set aside if it is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law,"[106] and the reviewing court must still insure

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100. 444 U.S. 223 (1980).
101. *See id.* at 228.
102. *See id.* at 223.
103. *See id.* at 228.
104. *Id*. at 227-28 (quoting Kleppe v. Sierra Club, 427 U.S. 390, 410 n.21 (1976)).
105. *See* Wenner, *The Courts and Environmental Policy*, *supra* note 7, at 243.
106. *Id.* at 229 (quoting 5 U.S.C. § 706(2)(A)) (citations omitted).

> that the agency "has taken a 'hard look' at environmental consequences . . . ."[107]

Justice Marshall interpreted the holding of the majority to imply that the courts need not even apply the minimal test set forth in the APA when reviewing agency decisions.[108] As he understood the majority's holding, the courts would have to limit their focus to whether the agency has merely considered the environmental consequences of its action.[109]

Robertson v. Methow Valley Citizens Council[110] and *Marsh v. Oregon Natural Resources Council*[111] are the most recent in a line of Supreme Court cases that have effectively decimated the substantive provisions of NEPA.[112] *Robertson* involved an EIS prepared by the United States Forest Service while Marsh involved an EIS prepared by the Army Corps of Engineers. Both agencies were challenged on the basis of the argument that they failed to include a complete mitigation plan and a worst case analysis in their EISs.[113] In *Marsh*, the Court held that "NEPA does not work by mandating that agencies achieve particular substantive environmental results."[114] Similarly, the Court held in *Robertson* that "NEPA itself does not mandate particular results, but simply prescribes the necessary process."[115]

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107. *Id*. (quoting Kleppe v. Sierra Club, 427 U.S. 390, 410 n21 (1976)) (citations omitted).

108. *See id.* at 231.

109. *See id.*

110. 490 U.S. 332 (1989).

111. 490 U.S. 360 (1989).

112. Although NEPA does not include an explicit provision for judicial review of agency actions that affect the environment, the judiciary has provided the impetus for NEPA substantive implementation. "Judicial review has given NEPA its significance. The Act itself places obligations on agencies, but without apparent means of oversight . . . . While NEPA supplied the most pervasive means of environmentally responsive decisionmaking throughout government, the absence of institutional enforcement invited administrative inattention." Nicholas C. Yost, LAW OF ENVIRONMENTAL PROTECTION § 9.01 (Sheldon M. Novick ed., 1987).

113. *See Robertson*, 490 U.S. at 345-46; *Marsh*, 490 U.S. at 368.

114. *Marsh*, 490 U.S. at 371.

115. *Robertson*, 490 U.S. at 350. The Court went on to state that "NEPA merely prohibits uninformed—rather than unwise—agency action." *Id*. at 351. With regard to whether NEPA requires the Corps of Engineers to develop a full mitigation plan, the Court held, "NEPA does not require a fully developed plan detailing what steps will be taken to

In these two unanimous decisions, the Court held for the Forest Service and Corps of Engineers respectively. These decisions display the unwillingness of the Court to enforce the substantive provisions of NEPA, and the tendency of the Court to impose additional limitations on the procedural components of the Act (particularly the EIS) over time.[116] In the process, "the United States Supreme Court has undone much of the promise of NEPA."[117]

V. ASSESSMENT OF THE CURRENT STATE OF THE NATIONAL ENVIRONMENTAL POLICY ACT AND PATHS TO REFORM

Given the unwillingness of the courts, particularly the Supreme Court, to enforce the provisions of NEPA,[118] action by either Congress or the President would be required to implement the Act. Neither has displayed a serious interest in the Act. All three branches, as well as the Federal administrative agencies, are responsible for the failure of the nation to realize the goals set forth in NEPA.[119] The present situation was not brought about by deficiencies inherent in the NEPA or the CEQ. However, an amendment to NEPA might be possible, thereby forcing Congress, the judiciary, the President, and the federal agencies to comply more fully with the spirit of NEPA.

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mitigate adverse environmental impacts and does not require a 'worst case analysis.'" *Id.* at 359.

116. The number of EISs filed has decreased over time from 1,949 in 1971 to 513 in 1992, and a corresponding decrease in the number of NEPA lawsuits has occurred, from 189 in 1974 to 81 in 1992. *See* Bear, *supra* note 60, at 71. These trends may be partially attributed to the narrow reading of NEPA adopted by the Supreme Court. Thus, the Court may have created a situation in which NEPA does not even fulfill the modest goal of requiring informed agency decisionmaking because federal agencies do not feel compelled to develop EISs as often as in the past, and challenges to EISs are drafted less frequently than in the past.

117. *See* Nicholas C. Yost, *NEPA's Promise—Partially Fulfilled*, 20 ENVTL L. 533, 549 (1990); *see also* David B. Lawrenz, *Judicial Review Under the National Environmental Policy Act: What Remains After* Robertson v. Methow Valley Citizens Council*?*, 62 U. COLO. L. REV. 899 (1991); Marion D. Miller, *The National Environmental Policy Act and Judicial Review After* Robertson v. Methow Valley Citizens Council *and* Marsh v. Oregon Natural Resources Council, 18 ECOLOGY L. Q. 223 (1991) (analyzing the Court's decisions on NEPA).

118. *See* discussion *supra* Part IV.B (describing the inaction of the judiciary with regard to NEPA).

119. *See* discussion *supra* Parts III-IV.

First, NEPA's statement of national environmental policy must be set out in a manner that would clarify the intention of Congress to make environmental protection a *substantive* goal to be incorporated into federal decisionmaking. To accomplish this task, NEPA could be amended to declare that each person has a fundamental and inalienable right to a healthful environment. In 1969, Senator Jackson's Bill 1075 included such language; however, the language was struck in conference.[120] Another alternative would be to amend NEPA to include a provision that "establishes a governmental obligation to administer the laws and policies in ways that avoid unnecessary damage to the environment, its species and ecosystems."[121] If NEPA were amended to include a strengthened substantive statement of environmental protection (either a rights-based statement or a responsibilities-based statement), it would provide a reaffirmation of NEPA's substantive goals to all parties including the courts and federal agencies.

Closely related to this first point is a second point that both judicial review and a citizen suit provision should be incorporated into the language of NEPA. Citizens and the courts have played critical roles in the evolution of NEPA up to this point.[122] Further, citizen suit provisions have been integrated into other environmental laws, such as the Clean Air Act,[123] Clean Water Act,[124] and Resource Conservation and Recovery Act.[125] It would be logical to institutionalize the role of these two important groups of actors, the

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120. *See* 115 CONG. REC. 39702 (Dec. 17, 1969). For a discussion of the concept of an environmental bill of rights, see Eva H. Hanks & John L. Hanks, *An Environmental Bill of Rights: The Citizen Suit and the National Environmental Policy Act of 1969*, 24 RUTGERS L. REV. 230 (1970). Such language has attracted criticism. *See, e.g.*, Ruhl, *supra* note 12, at 47-49.

121. Lynton K. Caldwell, *The Case for an Amendment to the Constitution of the United States for Protection of the Environment*, 1 DUKE ENVTL. L. & POL'Y FORUM 1, 3 (1991).

122. *See* William Andreen, *In Pursuit of NEPA's Promise: The Role of Executive Oversight in the Implementation of Environmental Policy*, 64 IND. L.J. 205, 208 (1989); Michael Blumm, *The National Environmental Policy Act at Twenty: A Preface*, 20 ENVTL. L. 447, 478 (1990).

123. 42 U.S.C. § 7604 (1994).

124. 33 U.S.C. § 1365 (1994).

125. 42 U.S.C. § 6972 (1994).

judiciary and private citizens, in the process of implementing NEPA through amendment.[126]

Third, in light of judicial interpretation of NEPA, it is critical to link substance to procedure explicitly. In its present form, section 102(2)(C) of NEPA requires federal agencies to consider the environmental impacts of a variety of alternative projects.[127] Caldwell has suggested that the law as written has contributed to better decisionmaking, but change is necessary to realize the substantive goals set forth in section 101.[128] "The EIS alone cannot compel adherence to the principles of NEPA. The EIS is necessary but insufficient as an action-forcing procedure . . . ."[129] To further NEPA's substantive goals, the EIS requirement could be supplemented with a mandate that agencies adopt the project from among alternatives that "maximizes environmental protection and enhances environmental values" while maintaining the economic viability of the project.[130]

Fourth, section 102(2)(C) mandates that "every recommendation or report on proposals for legislation" include an EIS.[131] Generally, this mandate has been ignored by Congress.[132] Grad notes that "[t]here is little evidence that NEPA has had any significant effect on the legislative process . . . . Few impact statements have been filed in the context of legislation that may have substantially adverse effects on the environment . . . ."[133]

Subjecting legislation to the procedural requirements that have been enforced by the judiciary up to this point would result in more fully informed, and perhaps better, decisionmaking. If substantive

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126. In a classic work on environmental law, one scholar argues for an expanded role for the judiciary and citizens to protect the environment and supplement other democratic processes. *See* JOSEPH SAX, DEFENDING THE ENVIRONMENT (1971).

127. *See* 42 U.S.C. § 4332(2)(c) (1994).

128. 42 U.S.C. § 4331 (1994).

129. Caldwell, *supra* note 49, at 22.

130. Thomas France, *NEPA—The Next Twenty Years*, 25 LAND & WATER REV. 113, 140 (1990); *see* Blumm, *supra* note 120, at 477; Philip Michael Ferester, *Revitalizing the National Environmental Policy Act: Substantive Law Adaptation's From NEPA's Progeny*, 16 HARV. ENVTL. L. REV. 207, 257 (1992).

131. 42 U.S.C. § 4332(2)(C) (1994).

132. *See* 4 FRANK P. GRAD, TREATISE ON ENVIRONMENTAL LAW § 9.02 (1996).

133. *Id.*

and procedural requirements are jointly implemented, notoriously inefficient and environmentally unsound laws, such as those governing grazing and mining on federal lands, would possibly be reformed.[134] In addition, appropriation bills, in which many decisions that lead to the destruction of the environment are successfully hidden, would be subject to review.[135]

Fifth, to the fullest extent possible, legislation should include provisions that force the President to fulfill his responsibility to appoint a *council* on environmental quality and to make that council a high priority. Up to this point, numerous presidents have failed to appoint a council, thus violating the Constitution which states in part that the President "shall take care that the laws be faithfully executed."[136] Though this duty has been repeatedly ignored in the past, it need not be the case in the future.[137] Additionally, a clarification of congressional commitment to the CEQ may increase the likelihood that the President will fulfill the responsibility of chief executive.

VI. CONCLUSION

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134. *See generally* UNITED STATES GENERAL ACCOUNTING OFFICE, GRAZING LEASE ARRANGEMENTS OF BUREAU OF LAND MANAGEMENT PERMITTEES (1986) (discussing current grazing practices and regulations); *see also* John D. Leshy, THE MINING LAW: A STUDY IN PERPETUAL MOTION 20-23 (1987); George Cameron Coggins, *Commentary: Overcoming the Unfortunate Legacies of Western Public Land Law*, 29 LAND & WATER L. REV. 381, 382 (1994) (addressing the issue of mining); John C. Lacy, *The Historic Origins of the U.S. Mining Laws and Proposals for Change*, 10 NAT. RESOURCES & ENV'T, Summer 1995, at 13, 18-20; George Cameron Coggins & Robert L. Glicksman, *Power, Procedure, and Policy in Public Lands and Resources Law*, 10 NAT. RESOURCES & ENV'T, Summer 1995, at 3, 3. For an exploration of recent doctrinal changes in these areas, see NATURAL RESOURCES POLICY AND LAW: TRENDS AND DIRECTIONS (Lawrence MacDonnell & Sarah Bates eds., 1993).

135. On the issue of appropriation bills and environmental degradation, see Sandra Beth Zellmer, *Sacrificing Legislative Integrity at the Altar of Appropriations Riders: A Constitutional Crisis*, 21 HARV. ENVTL. L. REV. 457 (1997). Under current CEQ regulations, appropriations do not fall under the definition of legislation. *See* 40 C.F.R. § 1508.17 (1996). The Supreme Court upheld this definition stating that "appropriation requests constitute neither "proposals for legislation" nor "proposals for . . . major Federal actions . . . ." Andrus v. Sierra Club, 442 U.S. 347, 364-65 (1979).

136. U.S. CONST. art. II, § 3.

137. *See* discussion *supra* Part IV.A (recounting presidents' repeated misunderstanding of the statutorily-imposed CEQ).

The amendment of NEPA is not likely to be an easy task. However, a reinvigorated NEPA may establish environmental protection among the nation's priorities when entering the twenty-first century. The need for an explicit referent in statutory or constitutional law is essential to ensure strong and efficacious environmental law within the United States.

Over twenty-five years ago the federal government, led by Congress and the President, recognized the damage that humankind has inflicted on the environment and declared a national commitment to environmental protection.[138] This type of bold step forward occurs infrequently in a political system characterized by incrementalism.[139] However, as we near the end of the twentieth century and the beginning of the twenty-first century, the time may be ripe to reconsider the relationship between humankind and the environment from a more enlightened perspective informed by a more complete (although still incomplete) knowledge of the natural world and our impact upon it.

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138. *See* discussion *supra* Part III (describing the intent of Congress on the inception of NEPA).

139. For an explanation of incrementalism, see Charles E. Lindblom, *The Science of "Muddling Through,"* 19 PUB. ADMIN. REV. 79 (1959); Charles E. Lindblom, *Still Muddling, Not Yet Through*, 39 PUB. ADMIN. REV. 517 (1979); *see also* Moe, *supra* note 63, at 111-12. For a widely-recognized analysis of incrementalism in the public sector, see AARON WILDAVSKY, THE POLITICS OF THE BUDGETARY PROCESS (3d ed. 1979).

VII. APPENDIX

National Environmental Policy Act

42 U.S.C. §§ 4321-4345

§ 4321. Congressional declaration of purpose

The purposes of this chapter are: To declare a national policy which will encourage productive and enjoyable harmony between man and his environment; to promote efforts which will prevent or eliminate damage to the environment and biosphere and stimulate the health and welfare of man; to enrich the understanding of the ecological systems and natural resources important to the Nation; and to establish a Council on Environmental Quality.

§ 4331. Congressional declaration of national environmental policy

(a) Creation and maintenance of conditions under which man and nature can exist in productive harmony

The Congress, recognizing the profound impact of man's activity on the interrelations of all components of the natural environment, particularly the profound influences of population growth, high-density urbanization, industrial expansion, resource exploitation, and new and expanding technological advances and recognizing further the critical importance of restoring and maintaining environmental quality to the overall welfare and development of man, declares that it is the continuing policy of the Federal Government, in cooperation with State and local governments, and other concerned public and private organizations, to use all practicable means and measures, including financial and technical assistance, in a manner calculated to foster and promote the general welfare, to create and maintain conditions under which man and nature can exist in productive harmony, and fulfill the social, economic, and other requirements of present and future generations of Americans.

(b) Continuing responsibility of Federal Government to use all practicable means to improve and coordinate Federal plans, functions, programs, and resources

In order to carry out the policy set forth in this chapter, it is the continuing responsibility of the Federal Government to use all practicable means, consistent with other essential considerations of national policy, to improve and coordinate Federal plans, functions, programs, and resources to the end that the Nation may—

(1) fulfill the responsibilities of each generation as trustee of the environment for succeeding generations;

(2) assure for all Americans safe, healthful, productive, and esthetically and culturally pleasing surroundings;

(3) attain the widest range of beneficial uses of the environment without degradation, risk to health or safety, or other undesirable and unintended consequences;

(4) preserve important historic, cultural, and natural aspects of our national heritage, and maintain, wherever possible, an environment which supports diversity and variety of individual choice;

(5) achieve a balance between population and resource use which will permit high standards of living and a wide sharing of life's amenities; and

(6) enhance the quality of renewable resources and approach the maximum attainable recycling of depletable resources.

(c) Responsibility of each person to contribute to preservation and enhancement of environment

The Congress recognizes that each person should enjoy a healthful environment and that each person has a responsibility to contribute to the preservation and enhancement of the environment.

§ 4332. Cooperation of agencies; reports; availability of information; recommendations; international and national coordination of efforts

The Congress authorizes and directs that, to the fullest extent possible: (1) the policies, regulations, and public laws of the United States shall be interpreted and administered in accordance with the policies set forth in this chapter, and (2) all agencies of the Federal Government shall—

(A) utilize a systematic, interdisciplinary approach which will insure the integrated use of the natural and social sciences and the

environmental design arts in planning and in decisionmaking which may have an impact on man's environment;

(B) identify and develop methods and procedures, in consultation with the Council on Environmental Quality established by subchapter II of this chapter, which will insure that presently unquantified environmental amenities and values may be given appropriate consideration in decisionmaking along with economic and technical considerations;

(C) include in every recommendation or report on proposals for legislation and other major Federal actions significantly affecting the quality of the human environment, a detailed statement by the responsible official on—

(i) the environmental impact of the proposed action,

(ii) any adverse environmental effects which cannot be avoided should the proposal be implemented,

(iii) alternatives to the proposed action,

(iv) the relationship between local short-term uses of man's environment and the maintenance and enhancement of long-term productivity, and

(v) any irreversible and irretrievable commitments of resources which would be involved in the proposed action should it be implemented.

Prior to making any detailed statement, the responsible Federal official shall consult with and obtain the comments of any Federal agency which has jurisdiction by law or special expertise with respect to any environmental impact involved. Copies of such statement and the comments and views of the appropriate Federal, State, and local agencies, which are authorized to develop and enforce environmental standards, shall be made available to the President, the Council on Environmental Quality and to the public as provided by section 552 of Title 5, and shall accompany the proposal through the existing agency review processes;

(D) Any detailed statement required under subparagraph (C) after January 1, 1970, for any major Federal action funded under a program of grants to States shall not be deemed to be legally insufficient solely by reason of having been prepared by a State agency or official, if:

(i) the State agency or official has statewide jurisdiction and has the responsibility for such action,

(ii) the responsible Federal official furnishes guidance and participates in such preparation,

(iii) the responsible Federal official independently evaluates such statement prior to its approval and adoption, and

(iv) after January 1, 1976, the responsible Federal official provides early notification to, and solicits the views of, any other State or any Federal land management entity of any action or any alternative thereto which may have significant impacts upon such State or affected Federal land management entity and, if there is any disagreement on such impacts, prepares a written assessment of such impacts and views for incorporation into such detailed statement.

The procedures in this subparagraph shall not relieve the Federal official of his responsibilities for the scope, objectivity, and content of the entire statement or of any other responsibility under this chapter; and further, this subparagraph does not affect the legal sufficiency of statements prepared by State agencies with less than statewide jurisdiction.

(E) study, develop, and describe appropriate alternatives to recommended courses of action in any proposal which involves unresolved conflicts concerning alternative uses of available resources;

(F) recognize the worldwide and long-range character of environmental problems and, where consistent with the foreign policy of the United States, lend appropriate support to initiatives, resolutions, and programs designed to maximize international cooperation in anticipating and preventing a decline in the quality of mankind's world environment;

(G) make available to States, counties, municipalities, institutions, and individuals, advice and information useful in restoring, maintaining, and enhancing the quality of the environment;

(H) initiate and utilize ecological information in the planning and development of resource-oriented projects; and

(I) assist the Council on Environmental Quality established by subchapter II of this chapter.

§ 4333. Conformity of administrative procedures to national environmental policy

All agencies of the Federal Government shall review their present statutory authority, administrative regulations, and current

policies and procedures for the purpose of determining whether there are any deficiencies or inconsistencies therein which prohibit full compliance with the purposes and provisions of this chapter and shall propose to the President not later than July 1, 1971, such measures as may be necessary to bring their authority and policies into conformity with the intent, purposes, and procedures set forth in this chapter.

§ 4334. Other statutory obligations of agencies

Nothing in section 4332 or 4333 of this title shall in any way affect the specific statutory obligations of any Federal agency (1) to comply with criteria or standards of environmental quality, (2) to coordinate or consult with any other Federal or State agency, or (3) to act, or refrain from acting contingent upon the recommendations or certification of any other Federal or State agency.

§ 4335. Efforts supplemental to existing authorizations

The policies and goals set forth in this chapter are supplementary to those set forth in existing authorizations of Federal agencies.

§ 4341. Reports to Congress; recommendations for legislation

The President shall transmit to the Congress annually beginning July 1, 1970, an Environmental Quality Report (hereinafter referred to as the "report") which shall set forth (1) the status and condition of the major natural, manmade, or altered environmental classes of the Nation, including, but not limited to, the air, the aquatic, including marine, estuarine, and fresh water, and the terrestrial environment, including, but not limited to, the forest, dryland, wetland, range, urban, suburban, and rural environment; (2) current and foreseeable trends in the quality, management and utilization of such environments and the effects of those trends on the social, economic, and other requirements of the Nation; (3) the adequacy of available natural resources for fulfilling human and economic requirements of the Nation in the light of expected population pressures; (4) a review of the programs and activities (including regulatory activities) of the Federal Government, the State and local governments, and nongovernmental entities or

individuals, with particular reference to their effect on the environment and on the conservation, development and utilization of natural resources; and (5) a program for remedying the deficiencies of existing programs and activities, together with recommendations for legislation.

§ 4342. Establishment; membership; Chairman; appointments

There is created in the Executive Office of the President a Council on Environmental Quality (hereinafter referred to as the "Council"). The Council shall be composed of three members who shall be appointed by the President to serve at his pleasure, by and with the advice and consent of the Senate. The President shall designate one of the members of the Council to serve as Chairman. Each member shall be a person who, as a result of his training, experience, and attainments, is exceptionally well qualified to analyze and interpret environmental trends and information of all kinds; to appraise programs and activities of the Federal Government in the light of the policy set forth in subchapter I of this chapter; to be conscious of and responsive to the scientific, economic, social, esthetic, and cultural needs and interests of the Nation; and to formulate and recommend national policies to promote the improvement of the quality of the environment.

§ 4343. Employment of personnel, experts and consultants

(a) The Council may employ such officers and employees as may be necessary to carry out its functions under this chapter. In addition, the Council may employ and fix the compensation of such experts and consultants as may be necessary for the carrying out of its functions under this chapter, in accordance with section 3109 of Title 5 (but without regard to the last sentence thereof).

(b) Notwithstanding section 1342 of Title 31, the Council may accept and employ voluntary and uncompensated services in furtherance of the purposes of the Council.

§ 4344. Duties and functions

It shall be the duty and function of the Council—

(1) to assist and advise the President in the preparation of the Environmental Quality Report required by section 4341 of this title;

(2) to gather timely and authoritative information concerning the conditions and trends in the quality of the environment both current and prospective, to analyze and interpret such information for the purpose of determining whether such conditions and trends are interfering, or are likely to interfere, with the achievement of the policy set forth in subchapter I of this chapter, and to compile and submit to the President studies relating to such conditions and trends;

(3) to review and appraise the various programs and activities of the Federal Government in the light of the policy set forth in subchapter I of this chapter for the purpose of determining the extent to which such programs and activities are contributing to the achievement of such policy, and to make recommendations to the President with respect thereto;

(4) to develop and recommend to the President national policies to foster and promote the improvement of environmental quality to meet the conservation, social, economic, health, and other requirements and goals of the Nation;

(5) to conduct investigations, studies, surveys, research, and analyses relating to ecological systems and environmental quality;

(6) to document and define changes in the natural environment, including the plant and animal systems, and to accumulate necessary data and other information for a continuing analysis of these changes or trends and an interpretation of their underlying causes;

(7) to report at least once each year to the President on the state and condition of the environment; and

(8) to make and furnish such studies, reports thereon, and recommendations with respect to matters of policy and legislation as the President may request.

§ 4345. Consultation with Citizens' Advisory Committee on Environmental Quality and other representatives

In exercising its powers, functions, and duties under this chapter, the Council shall—

(1) consult with the Citizens' Advisory Committee on Environmental Quality established by Executive Order numbered 11472, dated May 29, 1969, and with such representatives of science, industry, agriculture, labor, conservation organizations, State and local governments and other groups, as it deems advisable; and

(2) utilize, to the fullest extent possible, the services, facilities, and information (including statistical information) of public and private agencies and organizations, and individuals, in order that duplication of effort and expense may be avoided, thus assuring that the Council's activities will not unnecessarily overlap or conflict with similar activities authorized by law and performed by established agencies.

EXACTING PUBLIC BEACH ACCESS: THE VIABILITY OF PERMIT CONDITIONS AND FLORIDA'S STATE BEACH ACCESS LAWS AFTER *DOLAN V. CITY OF TIGARD*

SHAWN M. WILLSON*

Table of Contents

I. INTRODUCTION

Many coastal states have laws specifically designed to protect or enhance public access to beaches. Some states, including Florida,[1] South Carolina,[2] North Carolina,[3] Texas,[4] and

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1. *See* FLA. STAT. § 161.55(6) (1995) (providing that a developer cannot interfere with existing beach access unless the developer provides a comparable alternate accessway); FLA. STAT. § 161.053(5)(e) (1995) (allowing the Department of Environmental Protection (DEP) to require an alternate accessway where the granting of a permit will cause unavoidable interference with public beach access).

2. *See* S.C. CODE ANN. § 48-39-150(A)(5), (B) (Law. Co-op. 1987 & Supp. 1996) (allowing DEP to consider the extent to which a proposed development will affect public beach access in granting or denying a development permit and providing that DEP may condition the permit on whatever measures it deems necessary for protection of the public interest).

California,[5] allow a local government, a department created of environmental protection, or a coastal management authority to grant development permits for construction in coastal areas based on compliance with certain conditions. The imposed conditions are designed to make the development consistent with a local comprehensive plan or the beach preservation policies of the state. Often, these conditions require landowners to dedicate land on their property for a public easement to or across the beach if the development interferes with public access.[6]

Following the United States Supreme Court's decisions in *Nollan v. California Coastal Commission*[7] and *Dolan v. City of Tigard*,[8] local governments may not find permit conditions as valuable a tool in preserving beach access. If the permit condition exacted by the city does not have an essential nexus to the legitimate state interest of preserving public access and is not roughly proportional to the projected impact on the development, then the government must compensate the landowner for a regulatory taking under the Fifth Amendment.[9] While the preservation of beach access is an important goal for coastal cities, a municipality may find compensation for access expensive and discouraging.

This Comment analyzes the viability of Florida's beach access laws in light of *Nollan* and *Dolan* and explores the effect these cases might have on permitting for coastal construction at a local level. Part II looks at Florida's current beach access laws, focusing on statutes governing beach and shore preservation and local comprehensive planning. Part III discusses the two recent exactions cases

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3. *See* N.C. GEN. STAT. § 113A-120(a), (b) (1996) (providing that a development permit may be conditioned upon the applicant's amending of a proposal to protect the public interest with respect to various factors, including beach access).

4. *See* TEX. NAT. RES. CODE ANN. § 61.015(g) (West 1978 & Supp. 1997) (providing that a local government may impose any reasonable conditions it finds necessary to ensure adequate public beach access).

5. *See* CAL. PUB. RES. CODE § 30212(a) (West 1996) (requiring new development projects to provide public access to and along the shoreline unless adequate access exists nearby).

6. *See supra* notes 1-5 and accompanying text.

7. 483 U.S. 825 (1987).

8. 512 U.S. 374 (1994).

9. *See id.* at 391.

and explores what might constitute a regulatory taking under the Supreme Court's current test. Because the Supreme Court did not clearly define one element of the test, the "rough proportionality" standard, Part III also discusses subsequent cases and opinions of scholars interpreting that element. Part IV anticipates the effect *Dolan* may have on future permit conditions for beach access and comments on problems that *Dolan* may create in relation to present state beach access laws. Finally, Part V suggests measures Florida can take to ensure the effectiveness of such laws and to aid municipalities in imposing proper permit conditions.

II. STATE BEACH ACCESS LAWS

Coastal states preserve perpendicular access to beaches using both common law and statutory remedies.[10] Most coastal state legislatures created beach access laws in compliance with the federal Coastal Zone Management Act of 1972 (CZMA).[11] The CZMA seeks "to preserve, protect, develop, and where possible, to restore or enhance, the resources of the Nation's coastal zone for this and succeeding generations" by providing federal funds and guidelines to state coastal management programs that comply with the requirements of the Act.[12] Specifically, the CZMA requires state programs to provide for various objectives, including public access to the coast for recreation purposes.[13] Even states that do not have programs approved by the CZMA recognize the importance of public beach access and have developed laws to deal with the problems created by the need for beach access.[14]

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10. *See* Daniel Summerlin, *Improving Public Access to Coastal Beaches: The Effect of Statutory Management and the Public Trust Doctrine*, 20 WM. & MARY ENVTL. L. POL'Y REV. 425, 426 (1996).

11. 16 U.S.C. § 1452 (1985 & Supp. 1997). Only six of the 35 eligible states do not have federally-approved coastal management plans under the CZMA. *See* COASTAL AND OCEAN LAW 156 (Joseph J. Kalo et al. eds., 2d ed. 1994); *see also* Summerlin, *supra* note 10, at 438-43 (discussing the coastal management programs developed by North Carolina and California).

12. 16 U.S.C. § 1452(1); *see also* Summerlin, *supra* note 10, at 430.

13. *See* 16 U.S.C. § 1452(2)(E); *see also* Summerlin, *supra* note 10, at 431.

14. The Texas Open Beaches Act dedicates an entire subchapter to the subject of public access. *See* TEX. NAT. RES. CODE ANN. § 61.011(a) (1995) (stating that "[i]t is declared and affirmed to be the public policy of this state that the public, individually and

A. Florida's Beach Access Laws

Provisions addressing protection of beach access are located in chapter 161, *Florida Statutes*, entitled "Beach and Shore Preservation."[15] The statute makes perpendicular public access a requirement for construction within a coastal building zone "[w]here the public has established an accessway through private lands to lands sea-ward [sic] of the mean high tide or water line by prescription, prescriptive easement, or any other legal means. . . ."[16] The developer cannot interfere with the public's access right unless the developer provides a comparable alternative accessway.[17] The developer's ability to relocate, improve, or consolidate existing accessways hinges upon whether the new accessway is of substantially similar quality and convenience to the public, is approved by the local government, is approved by DEP (when the involved improvements are seaward of the coastal construction line), and is consistent with the coastal management element of the local comprehensive plan.[18]

The coastal management element, discussed in section 163.3177(6)(g), *Florida Statutes*, sets forth the policies that will guide the local government in its decisions and implementation of ten objectives listed therein.[19] While none specifically include beach access, access could fall under the broad language of several of these objectives. For example, the objectives include the: "[m]aintenance, restoration, and enhancement of the overall quality of the coastal zone environment, including, but not limited to, its amenities and aesthetic values;"[20] "orderly and balanced utilization and preservation, consistent with sound conservation

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collectively, shall have the free and unrestricted right of ingress and egress to and from the state-owned beaches bordering on the seaward shore of the Gulf of Mexico . . . ."); *see also* Summerlin, *supra* note 10, at 442.

15. FLA. STAT. ch. 161 (1995).

16. *Id.* § 161.55(6).

17. *See id*.

18. *See id.* § 161.55(6)(a)-(d).

19. *See id.* § 163.3177(6)(g). Another Florida statute provides a description of what the coastal management element is to be based upon, and what it should contain. *See id.* § 163.3178(2).

20. *Id.* § 163.3177(6)(g)(1).

principles, of all living and nonliving coastal resources;"[21] and "[a]voidance of irreversible and irretrievable loss of coastal zone resources."[22]

Each element mandated by section 163.3177(6)(g) must be based on studies, surveys, and data and must be consistent with other coastal resource plans prepared and adopted under general or special law.[23] The coastal management element must also contain a map of "existing coastal uses, wildlife habitat, wetland and other vegetative communities, undeveloped areas, areas subject to coastal flooding, *public access routes to beach and shore resources*, historic preservation areas, and other areas of special concern to local government."[24] In addition, the coastal management element must have a component for shoreline use that identifies public access to beach and shoreline areas and addresses the need for water-dependent and water-related facilities in those areas.[25]

Section 161.053, *Florida Statutes* also deals with beach and shore preservation, regulating construction control setback lines, and contains language that promotes the protection of beach access.[26] For purposes of that section, "access" or "public access" is defined as "the public's right to laterally traverse the sandy beaches of this state where such access exists on or after July 1, 1987."[27] Section 161.053(1)(a) sets forth the public policy behind the establishment of the control lines, stating:

> [T]he beaches in this state and the coastal barrier dunes adjacent to such beaches . . . represent one of the most valuable resources of

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21. *Id*. § 163.3177(6)(g)(3).

22. *Id.* § 163.3177(6)(g)(4).

23. *See id.* § 163.3178(2).

24. *Id.* § 163.3178(2)(a) (emphasis added). The element must also contain ten other requirements including an analysis of the environmental, socioeconomic, and fiscal impacts created by the future land use plan, an analysis of the effects of drainage systems and the impacts of potential pollution, an outline of the principles for hazard mitigation and for the protection of human life against the threat of natural disasters, and an outline of the principles for protecting or restoring existing beach and dune systems. *See id.* § 163.3178(2)(b)-(e).

25. *See id.* § 163.3178(2)(g).

26. *See id.* § 161.053.

27. *Id.* § 161.021(1).

> Florida and . . . it is in the public interest to preserve and protect them from imprudent construction which can jeopardize the stability of the beach-dunes system, accelerate erosion, provide inadequate protection to upland structures, endanger adjacent properties, or *interfere with public beach access*.[28]

Where a developer wishes to build a structure seaward of a coastal construction line, DEP may grant a permit for the structure after DEP considers certain facts and circumstances, including potential impacts of the location of the structure.[29] DEP must limit construction that interferes with lateral beach access but can require an alternate accessway as a condition to granting a permit if interference with public access is unavoidable.[30] Individual counties may also establish their own coastal construction zoning and building codes in lieu of the provisions of section 161.053, as long as the zones and codes are approved by DEP.[31] The requirement for these codes mimics the general policy set forth at the beginning of the section, as the zoning codes must be "adequate to preserve and protect the beaches and coastal barrier dunes . . . from imprudent construction that will jeopardize the stability of the beach-dune system, accelerate erosion, provide inadequate protection to upland structures, endanger adjacent properties, or *interfere with beach access*."[32] Florida law, however, provides little guidance to help DEP or a local government in its decision to impose a permit condition. Section 161.053(5)(e) merely provides that "[t]he width of such alternate access may not be required to exceed the width of the access that will be obstructed as a result of the permit being granted."[33]

III. PERMIT CONDITIONS AND REGULATORY TAKINGS AFTER *NOLLAN* AND *DOLAN*

In exacting a permit condition, a municipality could go beyond the traditional authority conferred upon it by the legitimate police

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28. *Id.* § 161.053(1)(a) (emphasis added).
29. *See id*. § 161.053(5)(a)(3).
30. *See id*. § 161.053(5)(e).
31. *See id*. § 163.053(4).
32. *Id.* (emphasis added).
33. *Id.* § 161.053(5)(e).

powers of protecting the public health, morals, and safety.[34] Thus, a permit condition might constitute a Fifth Amendment taking if it contains a condition on development that impedes the property rights of an individual and is not justified by those police powers.[35] For instance, any permit condition that requires a landowner to dedicate an easement to the public impairs individual property rights by taking away the landowner's right to exclude others from his or her land and by allowing a permanent physical invasion.[36]

Although not a permit condition case, the United States Supreme Court recognized this right to exclude in *Kaiser-Aetna v. United States*.[37] There, developers sought to deny access to the public after dredging an existing channel known as Kuapa Pond.[38] The United States argued that the channel became part of the navigational servitude following the developers' improvements and required that the public have a right of access to the improved pond.[39] However, the Supreme Court held that the United States could not require Kaiser-Aetna to allow the public free access without invoking the government's powers of eminent domain.[40] The Court held that "the 'right to exclude,' so universally held to be a fundamental element of the property right, falls within the category of interests that the Government cannot take without compensation."[41] The Court further noted that the imposition of

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34. *See* John P. Seibels, Jr., Nollan *and* Dolan: *Exaction Packed Adventures in Takings Jurisprudence*, 4 S.C. ENVTL. L. J. 1, 2 (1995).

35. *See id.*

36. *See* Nollan v. California Coastal Comm'n, 483 U.S. 825, 832 (1987); Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419, 427-33 (1982); Kaiser-Aetna v. United States, 444 U.S. 164, 179-80 (1979). In *Nollan*, the Court stated:

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

Nollan, 483 U.S. at 832.

37. 444 U.S. 164 (1979).

38. *See id.* at 168-69.

39. *See id.* at 170.

40. *See id.* at 180.

41. *Id.* at 179-80.

the navigational servitude would result in an actual physical invasion of the developers' land.[42]

The Army Corps of Engineers could have required Kaiser-Aetna to obtain a permit before dredging the channel but instead told them that the permit was unnecessary.[43] Interestingly, the Court stated in dicta that the government could either have denied the dredging permit altogether if the dredging would have impaired navigation on the bay or have conditioned the granting of the permit on the developers' agreement to take measures to promote navigation.[44]

A. Nollan v. California Coastal Commission

Eight years after *Kaiser-Aetna*, the Supreme Court directly addressed the constitutionality of a permit condition requiring beach access in *Nollan v. California Coastal Commission*.[45] The Nollans owned beachfront property and wished to replace an existing bungalow on the property with a three-bedroom house.[46] The California Coastal Commission granted their permit application for the structure subject to the condition that the Nollans record a deed restriction granting an easement to the public to pass laterally on the Nollans' beach.[47] The Nollans brought suit, claiming the condition was an unconstitutional taking of their property under the Fifth Amendment.[48]

In order to determine the validity of the exaction, the Court looked to whether the exaction had an essential nexus to the governmental purpose the exaction was designed to serve.[49] According to the Commission, the easement was needed to protect the ability of the public to see the beach, to overcome the "psychological barrier" that development along the shore created,

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42. *Id.* at 180.
43. *See id.* at 167.
44. *See id.* at 179.
45. 483 U.S. 825 (1987).
46. *See id.* at 828.
47. *See id*.
48. *See id.* at 829.
49. *See id.* at 836-37.

and to prevent congestion on the public beaches.[50] The Court did not believe that the easement for lateral access was reasonably related to these ends.[51] The Court found it "impossible" to understand how allowing people using the public beaches to walk across the Nollans' property reduced obstacles to viewing the beach; nor could it understand how the lateral access condition reduced the psychological barrier or additional congestion caused by the development.[52] The Court therefore concluded that the Commission either had to remove the impermissible condition or compensate the Nollans for the easement.[53]

1. What is a Valid Exaction Under Nollan*?*

Despite its holding, the *Nollan* Court noted that permit conditions are constitutionally valid in several instances. For instance, a permit condition that serves the same legitimate police power as a refusal to issue the permit is not a taking if the refusal to issue the permit itself does not constitute a taking.[54] The Court stated:

> [I]f the Commission attached to the permit some condition that would have protected the public's ability to see the beach notwithstanding construction of the new house—for example, a height limitation, a width restriction, or a ban on fences—so long as the Commission could have exercised its police power . . . to forbid construction of the house altogether, imposition of the condition would also be constitutional.[55]

Furthermore, a permit condition is valid if it has an essential nexus to the legitimate state interest offered to justify the exaction.[56] Thus, the condition would be valid if it required the Nollans to provide a viewing spot on their property.[57] A viewing spot would have an essential nexus to the public purpose of protecting the

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50. *Id.* at 835.
51. *See id.* at 837.
52. *Id.* at 838-39.
53. *See id.* at 841-42.
54. *See id.* at 836.
55. *Id*.
56. *See id.* at 837.
57. *See id.* at 836.

public's view of the ocean with which the development would interfere.[58] The Court concluded:

> Although such a requirement, constituting a permanent grant of continuous access to the property, would have to be considered a taking if it were not attached to a development permit, the Commission's assumed power to forbid construction of the house in order to protect the public's view of the beach must surely include the power to condition construction upon some concession by the owner, even a concession of property rights, that serves the same end.[59]

Unless a condition serves the same governmental purpose as the development ban, the building restriction becomes nothing more than an "out-and-out plan of extortion," allowing the government to obtain an easement without compensating the landowner.[60]

In 1994, the Court added an additional prong to the regulatory takings analysis.[61] In *Dolan v. City of Tigard*,[62] the owner of a plumbing and electrical supply store applied for a permit to redevelop her site by expanding the size of her store and paving a parking lot.[63] The City Planning Commission conditioned the granting of Dolan's permit application on her agreement to dedicate portions of her property for a public greenway system and for a pedestrian and bicycle pathway.[64] Dolan disputed those conditions, arguing that the dedication requirements were not related to the proposed development and were thereby an uncompensated taking under the Fifth Amendment.[65]

The *Dolan* Court sought to resolve the question left open in *Nollan*'s essential nexus concept by clarifying how much of a connection must exist between permit exactions and the projected impacts of the development.[66] The *Dolan* Court concluded that a permit condition is not deemed a taking if the condition imposed

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58. *See id.*

59. *Id.*

60. *Id.* at 837 (quoting J.E.D. Assoc., Inc. v. Atkinson, 432 A.2d 12, 14-15 (1981)).

61. *See* Seibels, *supra* note 34, at 18-21 (discussing the prongs of the regulatory takings analysis).

62. 512 U.S. 374 (1994).

63. *See id.* at 379.

64. *See id.* at 379-80.

65. *See id.* at 382.

66. *See id.* at 386.

bears a "rough proportionality" to the nature and extent of the impact of the proposed development.[67] While a precise mathematical calculation is not be necessary to prove the connection, a municipality must "make some sort of individualized determination."[68]

In *Dolan*, the Court found that the permit conditions met the first prong of the test.[69] An essential nexus existed between the greenway exaction limiting development in a 100-year floodplain and the city's interest in preventing flooding along an adjacent creek.[70] A nexus also existed between the bicycle path exaction and the legitimate public purpose of reducing traffic congestion.[71]

The Court did not find, however, that the conditions bore the required relationship to the projected impact of Dolan's proposed development.[72] While the permit conditions were designed to promote legitimate state interests, the city's findings on the impact of the development did not justify the need for the exactions.[73] Although limiting development in the floodplain would alleviate some threat of flooding, the city did not explain why that portion of the property had to be owned by the public in order to further the legitimate interest of flood control.[74] At the same time, the dedication of the floodplain easement would significantly and adversely affect Dolan's property rights by compromising her right to exclude others in the greenway.[75] The Court did recognize that "[i]f petitioner's proposed development had somehow encroached on existing greenway space in the city, it would have been reasonable to require petitioner to provide some alternative greenway space for the public either on her property or elsewhere."[76]

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67. *Id.* at 391.
68. *Id.*
69. *See id.* at 387.
70. *See id*.
71. *See id.* at 387-88.
72. *See id.* at 394-95.
73. *See id.* at 393.
74. *See id.* at 391.
75. *See id.* at 393.
76. *Id.*

With respect to the dedication of the bicycle path, the city estimated that the proposed development would generate approximately 435 additional vehicle trips per day and that the creation of the pathway "could offset some of the traffic demand . . . and lessen the increase in traffic congestion."[77] The Court did not consider these findings sufficient, stating: "The findings of fact that the bicycle pathway system 'could offset some of the traffic demand' is a far cry from a finding that the bicycle pathway system will, or is likely to, offset some of the traffic demand."[78] The Court stressed that the city had to make some effort to quantify its finding.[79] As a result, the Court held that neither the dedication of public greenway space nor the pedestrian/bicycle path were roughly proportional to the impacts of the expansion of the store and the paving of the parking lot.[80]

B. The Meaning of "Rough Proportionality"

Although the Court sought to clarify its stance on regulatory takings, the *Dolan* decision left open another question for interpretation by the lower courts. The Supreme Court did not provide a well-defined analytical framework to guide lower courts in the application of the rough proportionality standard.[81]

Scholars analyzing the rough proportionality standard disagree on its requirements and the difficulty local governments may have

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77. *Id.* at 395.

78. *Id.* (quoting Dolan v. City of Tigard, 854 P.2d 437, 447 (Or. 1993)).

79. *See id*.

80. *See id.* at 396.

81. *See* James E. Holloway & Donald C. Guy, *Land Dedication Conditions and Beyond the Essential Nexus: Determining "Reasonably Related" Impacts of Real Estate Development under the Takings Clause*, 27 TEX. TECH L. REV. 73, 130, 132 (1996) (discussing the "broad framework" of the rough proportionality test and the implications of *Dolan* on land dedication conditions); *see also* Seibels, *supra* note 34, at 22 (stating that the "essential nexus" and "rough proportionality" tests are "in the eye of the beholder"); William Funk, *Reading* Dolan v. City of Tigard, 25 ENVTL. L. 127, 139 (1995) (conceding that the rough proportionality test is "somewhat open-ended" and stating that the lower courts will make the "real value decisions"); Nancy E. Stroud & Susan L. Trevarthen, *Defensible Exactions after* Nollan v. California Coastal Commission *and* Dolan v. City of Tigard, 25 STETSON L. REV. 719, 806-12 (1996) (discussing the potential impacts of *Dolan* on the way exactions are calculated and reviewing the current cases that interpret the standard).

in meeting it.[82] Further, current cases facing the issue have failed to set forth definitive boundaries.[83] According to William Funk, a law professor at Northwestern School of Law at Lewis and Clark College, the test "is not particularly demanding" by its terms or in light of the Court's analysis of the conditions imposed by the city.[84] He compares the test to other standards created by the Supreme Court, analogizing rough proportionality to the mid-level scrutiny applied in gender classifications.[85] While strict scrutiny bears a presumption of unconstitutionality and rational basis bears one of constitutionality, the substantial relationship requirement has no presumption at all.[86] Rough proportionality, which also appears to offer no clear presumption, suffers from the same open-ended quality as the substantial relationship standard and does not provide much guidance in predicting future outcomes.[87]

Like gender classifications, Funk believes the rough proportionality test will develop a "shorthand" to lessen some of its subjective quality.[88] His distinction centers around the existence of preconceived conditions in a city's master plan.[89] In *Dolan*, city ordinances mandated that the city planning commission require the dedication of space for the greenway and bike path in order for the commission to approve site development in the 100-year floodplain.[90] Professor Funk asserts that such preconceived conditions weigh against rough proportionality because no particular relation could exist between the conditions and the

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82. *See* Holloway & Guy, *supra* note 81, at 132; Stroud & Trevarthen, *supra* note 81, at 805-22; Funk, *supra* note 81, at 137-42; Jill I. B. Inbar, *"A One Way Ticket to Palookaville": Supreme Court Takings Jurisprudence after* Dolan *and its Implications for New York City's Waterfront Zoning Resolution*, 17 CARDOZO L. REV. 331, 371 (1995).

83. *See* Stroud & Trevarthen, *supra* note 81, at 821-22 (stating that Florida courts have not yet had the opportunity to apply *Dolan*).

84. Funk, *supra* note 81, at 141.

85. *See id.* at 137-38.

86. *See id.* at 137.

87. *See id.* at 137-38.

88. *Id.* at 138.

89. *See id.* at 137-38.

90. *See* Dolan v. City of Tigard, 512 U.S. 374, 379-80 (1994) (citing CITY OF TIGARD COMMUNITY DEV. CODE § 18.120.180.A.8).

impacts of a specific development.[91] In contrast, a finding of rough proportionality would be more likely where the city imposed conditions after contemplation of, and in response to, a specific development.[92]

Under either alternative, Funk concludes that "the rough proportionality test does not seem to impose insuperable obstacles to local government" and that the Court's analysis of the failures of the conditions in *Dolan* "suggests relatively easy hurdles."[93] He further comments that "had Tigard done some study (or relied upon some general national planning study) to estimate bikepath usage that would reduce automobile usage, and that study had shown some relationship to the estimated increase in traffic, that would have been enough" to satisfy the standard.[94]

Others believe that state courts will apply the rough proportionality standard in a manner not unlike the reasonable relationship test, which requires a municipality to show a reasonable relationship between the required dedication and the impact of the proposed development.[95] Prior to the decision in *Dolan*, many state courts addressing the same issue had already adopted the reasonable relationship test.[96] Although the *Dolan* Court stated that the reasonable relationship test was closest to the federal constitutional norm, the Court refused to specifically adopt the test as such because the name could create confusion with its similarity to the term "rational basis."[97] Instead, the Court termed its requirement "rough proportionality."[98] Thus, some scholars feel

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91. *See* Funk, *supra* note 81, at 138.

92. *See id*.

93. *Id.* at 139.

94. *Id.*

95. *See* Stroud & Trevarthen, *supra* note 81, at 806-07.

96. *See, e.g.*, City of College Station v. Turtle Rock Corp., 680 S.W. 2d 802 (Tex. 1984); Simpson v. City of North Platte, 292 N.W.2d 297 (Neb. 1980); Call v. City of West Jordan, 606 P.2d 217 (Utah 1979); Collis v. City of Bloomington, 246 N.W.2d 19 (Minn. 1976); Jordan v. Village of Menomonee Falls, 137 N.W.2d 442 (Wis. 1965).

97. Dolan v. City of Tigard, 512 U.S. 374, 391 (1994); *see* Stroud & Trevarthen, *supra* note 81, at 806-07.

98. *Dolan*, 512 U.S. at 396.

that lower courts will look to current state decisions analyzing the reasonable relationship standard for guidance.[99]

Finally, other scholars view the rough proportionality test as a rigorous standard for local governments to meet in light of the *Dolan* Court's willingness to strengthen individual private property rights.[100] They maintain that *Nollan* and *Dolan* represent a backlash against a traditionally deferential standard favoring land use regulation and indicate a trend toward heightened protection of individual property rights.[101] Further, they argue that *Dolan* creates an obstacle to the promulgation of land use regulations and the imposition of permit conditions by shifting the burden to the government to demonstrate that its actions are constitutional.[102] The test favors the landowner by forcing the government to justify a general land use regulation on a case-by-case basis, evaluating the effect on one landowner at a time.[103] According to this view, rough proportionality is a "virtually insurmountable" standard in

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99. *See* Stroud & Trevarthen, *supra* note 81, at 806-07.

100. *See* Inbar, *supra* note 82, at 333. One scholar asserts that city land use planners must now undertake a cost-benefit analysis before enacting land use regulations in order to weigh the potential costs of litigation by private landowners seeking redress under *Dolan*, the potential costs of just compensation and the public benefits which could be attained under such regulations. *See* Allison B. Waters, *City Planners Must Bear the Burden of Rough Proportionality in Exactions and Land Use Regulation*, Dolan v. City of Tigard, 114 S. Ct. 2309, 37 S. TEX. L. REV. 267, 297-98 (1996) (recommending that planners always engage in such an analysis to avoid *Dolan*'s "wild card threat" that compensation may be required and to protect against bankrupting public offers).

101. *See* Inbar, *supra* note 82, at 332-33; *see also* Mark V. Hanrahan, Dolan v. City of Tigard: *Rough Proportionality as the Supreme Court's Next Step in Takings Jurisprudence*, 12 GA. ST. U. L. REV. 553, 574-75 (1996) ("The property-protective bent of the Court is reflected in the rough proportionality test because more than a simple essential nexus or logical relationship is required if the exaction in question is to pass constitutional muster. Rough proportionality presents a higher threshold for government to surmount to effect development exactions.").

102. *See* Inbar, *supra* note 82, at 333; Waters, *supra* note 100, at 298.

103. *See* Inbar, *supra* note 82, at 368. The test also increases costs for the local government by requiring an individualized determination in each case. *See* Brian B. Williams, Note, Dolan v. City of Tigard: *A New Era of Takings Clause Analysis*, 74 OR. L. REV. 1105, 1124 (1995). Prior to *Dolan*, the type of showing necessary to show a reasonable relationship was relatively inexpensive for municipalities. *See id.* The environmental and engineering studies that may now be required to illustrate rough proportionality are both expensive and time consuming. *See id.*

situations where data is not readily quantifiable.[104] Even extensive empirical studies cannot quantitatively demonstrate the impact of a proposed development or the burden of a permit condition in certain situations.[105]

1. Land Dedication Cases Addressing Dolan *and Rough Proportionality*

Florida courts have yet to decide a case which specifically utilizes the *Dolan* analysis and its rough proportionality standard.[106] Although cases have acknowledged *Dolan*'s holding, any discussion of the rough proportionality standard has been merely dicta.[107] In *Sarasota County v. Taylor Woodrow Homes, Ltd.*,[108] a land developer and the county reached a resolution that authorized the rezoning of property and the approval of a development of regional impact.[109] The resolution contained certain requirements, including an agreement by the developer to build a private waste water treatment system at its own expense for the benefit of its development.[110] The developer agreed to dedicate the system to the county free of charge if the development was not completed by the time the county decided to proceed with a waste water treatment facility of its own in the area.[111] When the county exercised its right to request the dedication almost twenty years later, the developer refused to dedicate the property, claiming that the request was an unconstitutional taking of private property.[112]

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104. Inbar, *supra* note 82, at 368.

105. *See id.* at 366.

106. *See* Stroud & Trevarthen, *supra* note 81, at 821-22.

107. *See, e.g.*, Sarasota County v. Taylor Woodrow Homes, Ltd., 652 So. 2d 1247 (Fla. 2d DCA 1995); Department of Transp. v. Heckman, 644 So. 2d 527, 530 (Fla. 4th DCA 1994) (citing *Dolan* for the proposition that landowners cannot be forced to relinquish their rights to just compensation when their land is taken for a public purpose in exchange for a benefit granted by the government, where the property sought has little or no relationship to that benefit); *see also* Stroud & Trevarthen, *supra* note 81, at 821-22.

108. 652 So. 2d 1247 (Fla. 2d DCA 1995).

109. *See id.* at 1249.

110. *See id.*

111. *See id.*

112. *See id.* at 1250.

The court recognized *Dolan* for the proposition that "the government cannot compel a person to give up a constitutional right to property in exchange for a discretionary benefit where the property sought has little relationship to the benefit."[113] However, the court refused to decide the constitutional issue and remanded the case for further factual findings on the contract dispute.[114] Nevertheless, the court suggested that an essential nexus existed between the development and a permit condition by the county requiring a sewer system in that location.[115]

With respect to rough proportionality, the court indicated that an evaluation of the impacts of the dedication on the costs borne by residents would be an element in quantifying the data:

> If that nexus existed in 1974, then the next question that needed to be addressed at that time was whether "rough proportionality" existed between the impact of the proposed project and a dedication by which the developer would provide the sewer system free of charge to the County. Given that nothing in life is free, such a dedication would appear to require the developer to pass the costs of the system on to the new residents either through the sales price of the real property or through county authorized utility rates.[116]

However, the court did not suggest how such a determination could be made. It simply noted that rough proportionality could not be decided as a matter of law on the existing pleadings.[117]

Several cases in other jurisdictions have applied *Dolan* directly, providing more insight into the rough proportionality standard. An Oregon case, *J.C. Reeves Corp. v. Clackamas County*,[118] could be particularly useful in determining the constitutionality of permit conditions requiring public access. In that case, the applicant sought a permit to develop a 4.9-acre parcel into a residential subdivision.[119] A city street ran along the parcel's eastern border, and another tract of undeveloped land lay along its southern

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113. *Id.* at 1251.
114. *See id.* at 1252.
115. *See id.*
116. *Id.*
117. *See id.*
118. 887 P.2d 360 (Or. Ct. App. 1994).
119. *See id.* at 361.

border.[120] To provide access to the adjacent tract, the applicant sought to extend this existing street, which ran up to the parcel's northern border,[121] to a new street to be built along the parcel's southern property line.[122] In his proposal, the applicant placed a "spite strip," a one-foot strip of land that would not be dedicated, for the purpose of creating the right-of-way between that new street, the proposed right-of-way, and the southern property line.[123] The hearing officer conditioned the approval of the application on construction of improvements to the street running along the land's eastern border and on the elimination of the spite strip.[124]

The court first noted that the Supreme Court in *Dolan* did not view the rough proportionality test "to be a radical departure" from the reasonable relationship standard[125] and found that the hearing officer's findings on the street improvement condition were not sufficient to fulfill the *Dolan* requirement.[126] The hearing officer's order contained conclusory statements about the benefits of the street improvements[127] but did not make any comparison between the effects of traffic and the need for the improvements required by the county.[128]

Unlike the street improvement condition, the court upheld the condition that eliminated the spite strip.[129] The hearing officer found:

> DTD [County Transportation Department] has determined that it is necessary to dedicate the road to the property line to provide access to the property to the south. DTD's reasoning is that the property to the south is too narrow to develop lots and provide for an additional

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120. *See id.*
121. *See id.*
122. *See id.* at 361-62.
123. *Id.* at 362.
124. *See id.*
125. *See id.* at 363.
126. *See id.* at 365.
127. *See id.* at 364.
128. *See id.* at 365.
129. *See id.* at 366.

> east-west roadway, and the property will require access to this road when development occurs.[130]

The court concluded that these findings satisfied the *Dolan* requirement and stated that "[l]ittle could seem clearer than that the location of a 21-lot subdivision with an internal roadway can have profound impacts on access and traffic."[131] The court held that the elimination of the spite strip was an appropriate condition for providing access to the neighboring property since the proposed development would interfere with or eliminate that access, and the adjacent property was not large enough to provide adequate access on its own.[132] With the presence of the spite strip, the amount of land available for the right-of-way was insufficient.[133] The court stated, "[I]t is the fact of the strip's presence that threatens access, and no questions of level or intensity remain to be resolved."[134] Thus, further findings as to the proportionality were unnecessary.[135] Since the strip interfered with access, a condition creating or enhancing access directly countered the impact and did not require quantifiable data.[136]

Another Oregon case, *Schultz v. City of Grants Pass*,[137] is also helpful in understanding the rough proportionality standard. Petitioners in *Schultz* sought a development permit to partition their 3.85-acre parcel into two lots.[138] The city conditioned permit approval on the dedication of two city and county rights-of-way.[139] In justifying the conditions, the city, imagining a worst-case scenario, based its findings on the impact of any future potential development of the lots as opposed to the impact of the mere

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130. *Id.*
131. *Id.*
132. *See id.*
133. *See id.*
134. *Id.*
135. *See id.*
136. *See id.*
137. 884 P.2d 569 (Or. Ct. App. 1994).
138. *See id.* at 570.
139. *See id.*

partitioning of one lot into two.[140] The court held that the city could justify the conditions based on the present application and not on speculation as to any future uses.[141] The court also found that the city's data did not comport with the meaning of rough proportionality.[142] An increase of eight vehicle trips a day generated by the development did not require the dedication of 20,000 square feet of the petitioners' property without compensation.[143]

a. Rough Proportionality as a Mixed Question of Law and Fact

Interestingly, one court recently held that the issue of rough proportionality is a mixed question of law and fact that may be submitted to a jury.[144] Quoting the Supreme Court's language on "individualized determinations," the court stated that the description indicated an essentially factual inquiry.[145] The court cited several cases that submitted to the jury a reasonableness issue that was fact-bound in nature or was based largely "on the application of the fact-finding tribunal's experience with the mainsprings of human conduct."[146]

2. Impact Fee Exactions and Dolan's Rough Proportionality Standard

In lieu of the land dedications required in the cases discussed above, some municipalities exact impact fees as a precondition to

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140. *See id.* at 573. This aspect of *Schultz* differs from *J.C. Reeves Corp.*, which allowed the city to require a condition based upon future development of the adjacent property. *See* notes 118-136 and accompanying text.

141. *See Schultz*, 884 P.2d at 573.

142. *See id.*

143. *See id.* Following *Schultz*, an Illinois court similarly held that an exaction requiring over twenty percent of the plaintiff's property did "not correspond with the slightest notions of rough proportionality" where the increase in traffic was only four-tenths of one percent. Amoco Oil Co. v. Village of Schaumberg, 661 N.E.2d 380, 391 (Ill. App. Ct. 1995), *cert. denied*, 667 N.E.2d 1055 (Ill. 1996), *cert. denied*, 117 S. Ct. 413 (1996).

144. *See* Del Monte Dunes at Monterey, Ltd. v. City of Monterey, 95 F.3d 1422, 1430 (9th Cir. 1996).

145. *Id.*

146. *Id.* (quoting Commissioner v. Duberstein, 363 U.S. 278, 289 (1960)).

development.[147] In Florida, neither section 161.053 nor section 161.55, *Florida Statutes*, authorizes the imposition of impact fees as a condition to coastal construction;[148] however, a municipality, pursuant to its local zoning code, could require the landowner to pay a fee to a specified fund for the preservation of local beach access.[149] Presently, the constitutionality of this type of exaction is also questionable under *Dolan*.[150]

While both *Nollan* and *Dolan* were land dedication cases, some courts have held that the *Dolan* test applies in impact fee situations.[151] Three days after the Supreme Court announced its decision in *Dolan*, the Court vacated a judgment of the California Court of Appeal in a case involving impact fees and ordered that court to reconsider its decision in light of *Dolan*.[152] In *Ehrlich v. Culver City*, the plaintiff challenged permit conditions requiring the payment of an art fee and a recreation fee.[153] Over the course of two years, the plaintiff acquired 2.4 acres of vacant land and received approval for the development of a tennis club and recreational facility.[154] Thereafter, the city amended its zoning plan, redesignating the parcel as a commercial zone.[155] The facility

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147. *See generally* Mark W. Cordes, *Legal Limits on Development Exactions*: *Responding to* Nollan *and* Dolan, 15 N. ILL. U. L. REV. 513, 513-14 (1995) (explaining that impact fees are one means of requiring developers to contribute money before they can proceed with development). Impact fees are "typically one-time fees imposed on a developer to offset a variety of potential impacts, on the theory that the cost of providing services for new developments can be determined in advance." *Id*. at 517.

148. *See generally* FLA. Stat. § 161.053 (1995); FLA. STAT. § 161.55 (1995).

149. *See, e.g.*, Fla. Stat. § 163.3202(1)(e) (1995) (providing for land development regulations to "ensure the protection of environmentally sensitive lands designated in the comprehensive plan"). Requiring payment of a fee for the preservation of local beach access may be one way to ensure such protection of environmentally sensitive lands.

150. *See* Cordes, *supra* note 147, at 515 (questioning *Dolan*'s reach beyond physical dedications of land to other exactions, such as impact fees).

151. *See, e.g.*, Ehrlich v. Culver City, 512 U.S. 1231 (1994); Trimen Dev. Co. v. King County, 877 P.2d 187 (Wash. 1994).

152. *See Ehrlich*, 512 U.S. at 1231 (remanding Ehrlich v. Culver City, 19 Cal. Rptr. 2d 468 (Cal. Ct. App. 1993)); *see also* Cordes, *supra* note 147, at 541-42.

153. *See* Ehrlich v. Culver City, 911 P.2d 429, 435 (Cal. 1996), *rev'g* Ehrlich v. Culver City, 19 Cal. Rptr. 2d 468 (Cal. Ct. App. 1993) (on appeal after remand in Ehrlich v. Culver City, 512 U.S. 1231 (1994)), *cert. denied*, 117 S. Ct. 299 (1996).

154. *See id*. at 433.

155. *See* id. at 433-34.

operated until 1988, at which time the plaintiff closed the facility and applied for a zoning change and plan amendment for the construction of a condominium complex.[156]

Initially, the city sought to buy the property to maintain the public recreational facilities but later was unable to make the purchase.[157] At the same time, the city denied the plaintiff's application for the condominium development because the city was concerned about the loss of recreational land uses.[158] Ultimately, the city approved the development plan but conditioned its approval upon plaintiff paying $280,000 toward additional recreational facilities (the recreational fee) located elsewhere in the city and $33,200 toward the city's "Art in Public Places" program (the art fee).[159] The recreational fee was imposed in lieu of a condition requiring the placement of four tennis courts on the condominium property.[160]

The court of appeal upheld the recreation fee but found the art fee unconstitutional.[161] The United States Supreme Court vacated the decision and remanded back to the court of appeal, which subsequently reached the same conclusion.[162] Upon review of the latter decision, the California Supreme Court held that the art fee was a valid exercise of the police power as a "traditional" land use regulation and was not subject to the *Dolan* analysis.[163] However, the court found that the recreation fee was subject to *Dolan*'s heightened standard and remanded the case back to the trial court for further factual findings upon which to base the rough proportionality test.[164]

The California Supreme Court had little difficulty finding an essential nexus between the recreation fee and the state's legitimate state purpose of preserving and promoting the city's recreational

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156. *See id.* at 434.
157. *See id.*
158. *See id.*
159. *See id*. at 434-35.
160. *See id.*
161. *See id.* at 435-36.
162. *See id.* at 436.
163. *See id.* at 450.
164. *See id.* at 447.

resources.[165] As to the rough proportionality test, the court concluded that it did not have enough factual information to make a determination but commented extensively on what might constitute a roughly proportional fee and how the city should proceed with its individualized determination.[166] The city claimed that the loss of approximately $800,000 of recreational facilities located on the plaintiff's property justified a $280,000 recreational fee, but the court disagreed that the city should measure lost recreational benefits by the lost value of the plaintiff's health club.[167]

The court also held that the city could not justify the fee merely because four tennis courts would have been built on the property had the city insisted that a private recreational facility be constructed on the site.[168] The fee was not compensation for the loss of private facilities resulting from the zoning change since the costs of private courts would be funded through private means such as club membership dues.[169] Using the city's method, the court determined that:

> Plaintiff is being asked to pay for something that should be paid for either by the public as a whole, or by a private entrepreneur in business for a profit. The city may not constitutionally measure the . . . recreational exaction, by the value of facilities it had no right to appropriate without payment.[170]

Nevertheless, the court stated that a recreational fee could be a valid exaction as long as the amount of the fee was more closely tied to the actual impact of the zoning change.[171] Further, the court offered suggestions on what type of expense the city could measure in its fee calculation. These alternatives included the administrative expenses incurred in the redesignation of other property in the city for recreational use or the greater expenses necessary to attract and induce entrepreneurs to develop private

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165. *See id.* at 447-48.
166. *See id.* at 448-50.
167. *See id.* at 448.
168. *See id.* at 448-49.
169. *See id.* at 449.
170. *Id.*
171. *See id.*

recreational facilities.[172] The court also stated that the city could require the plaintiff to transfer the restricted land use designation, which mandated a recreational land use, to a comparable parcel of property owned by the plaintiff in the city.[173] This transfer would return the city "to the status quo as it existed prior to approval of the condominium project, that is, with a similar parcel of vacant land reserved for recreational use as an inducement to the development of private recreational facilities."[174] If such a transfer would be impracticable:

> [The city] may surely levy an in-lieu exaction to accomplish the same objective. Such a fee would serve the same purpose as all development fees: providing the city with a means of escaping the narrow choice between denying plaintiff his project permit altogether or subordinating legitimate public interests to plaintiff's development plans.[175]

The Washington Supreme Court also used the *Dolan* analysis to evaluate the validity of an impact fee for recreational land.[176] In *Trimen Development Co. v. King County*, the county required the developer to pay fees in lieu of dedication as a condition to the granting of two permit applications.[177] The fees were to be used for the acquisition and development of open space, park sites, and recreational facilities within a "park service area."[178] Under a county ordinance, the county calculated the fee based upon the assessed value of an equivalent amount of land that the developer would have reserved or dedicated.[179]

Based on the ordinance's formula for land dedication, the county proposed that Trimen dedicate 1.08 acres of the twenty-one acres of its first development, Winchester I.[180] Trimen instead opted for the fee and successfully proposed a reduction of the

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172. *See id.*
173. *See id.*
174. *Id.*
175. *Id.*
176. *See* Trimen Dev. Co. v. King County, 877 P.2d 187, 187 (Wash. 1994) (en banc).
177. *See id.* at 189.
178. *Id.*
179. *See id.*
180. *See id.* at 190.

figure suggested by the county.[181] Trimen ultimately paid $52,349.37 for the fee and obtained final approval for the development.[182] Shortly thereafter, the county proposed a 1.016 acre dedication of the developer's 22-acre development, Winchester II.[183] Once again, Trimen paid an in-lieu fee, this one totaling $34,979.38.[184]

The plaintiff in *Trimen Development Co.* did not attack the constitutionality of the permit condition but rather argued that the fee violated a state statute providing that no county could impose an impact fee unless it could establish that the fee was reasonably necessary because of the development.[185] The court examined the fee directly and analyzed the lawfulness of the city ordinance that was used to calculate the fee.[186]

In 1985, the county had conducted a comprehensive assessment of park needs and created the ordinance's formula based on its findings.[187] According to the county, it needed over 300 acres of additional park land by the year 2000 in light of projected population growth.[188] The county found that Trimen's proposed development would increase the population by approximately 336 people and would therefore create a need for an additional 2.52 acres of park land.[189] Under the ordinance, this impact would require the developer to dedicate 2.096 acres.[190] The county calculated the in-lieu fees based upon current zoning, projected population, and the assessed value of land that the developer would have been required to dedicate.[191] Without further explanation, the court concluded that the fees were reasonably necessary as a direct result of the proposed development, citing

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181. *See id.* at 189.
182. *See id.*
183. *See id.*
184. *See id.*
185. *See id.* at 193-94.
186. *See id.* at 194.
187. *See id.*
188. *See id.*
189. *See id.*
190. *See id.*
191. *See id.*

Dolan's rough proportionality test.[192] The court noted that the county did not conduct a site-specific study as to the actual individual impact of Trimen's development but asserted that the county's comprehensive impact assessment of 1985 was sufficient grounds upon which to base the fee calculation.[193]

Florida courts have not had the opportunity to address the application of *Dolan* with respect to impact fee exactions.[194] Although some courts have held that *Nollan* and *Dolan* pertain solely to land dedication cases,[195] Florida will likely follow the lead of the California and Washington supreme courts. Prior to *Dolan*, Florida courts evaluated impact fees using the reasonableness standard set forth by the Florida Supreme Court in *Contractors and Builders Ass'n of Pinellas County v. City of Dunedin*.[196] Thus, precedent indicates that courts will not likely have difficulty adopting the heightened scrutiny of *Dolan* in such situations.

In *Contractors and Builders Ass'n*, city ordinances required the payment of connection fees as a condition to the granting of a permit for water and sewer service.[197] The court found that the imposition of the fees was acceptable and did not constitute a tax but determined that the amount of the fees did not have a reasonable relationship to their intended purpose.[198]

According to the court, a municipality could raise money for capital improvements to its water and sewer system by charging connection rates that did not exceed a pro rata share of the costs of the improvements themselves and that were limited to meeting those improvement costs.[199] However, placing the entire burden of the costs of capital expenditures on individuals seeking to connect to the system after an arbitrarily chosen time was not just and equitable.[200] The court held that:

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192. *See id.*
193. *See id.*
194. *See* Stroud & Trevarthen, *supra* note 81, at 821-22.
195. *See* Cordes, *supra* note 147, at 541.
196. 329 So. 2d 314 (Fla. 1976).
197. *See id.* at 317.
198. *See id.* at 321-22.
199. *See id.* at 320.
200. *See id.*

> The cost of new facilities should be borne by new users to the extent new use requires new facilities, but only to that extent. When new facilities must be built in any event, looking only to new users for necessary capital gives old users a windfall at the expense of new users.[201]

Thus, by requiring new users to contribute toward the cost of replacing original facilities through the payment of connection fees, the city was arbitrarily and irrationally distinguishing between existing and new developments.[202]

The court did not find that the amount of fees was unreasonable but instead found that the failure of the ordinance to restrict use of the fees unduly burdened an arbitrary class of individuals.[203] Hence, the court struck down the ordinance that required the exactions.[204] At the same time, the court quoted an ordinance that properly restricted the use of connection fees.[205] That ordinance deposited money from the sewer connection charges into a sanitary sewer capital reserve fund to be expended only for the purpose of making major emergency repairs or constructing new additions to the treatment plant or sewer system.[206]

Contractors and Builders Ass'n would appear to meet *Dolan* standards because it implicitly requires an individualized determination as to the impact of a proposed development and the nature and extent of the exaction. Using a *Dolan* analysis, the court upheld the impact fees as having an essential nexus, finding that the city could legitimately raise expansion capital by setting connection charges where expansion was reasonably required.[207] However, the court struck down the ordinance under which the city could assess those fees because the fees were not, in effect, roughly proportional to the

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201. *Id.* at 321.

202. *See id.*

203. *See id.*

204. *See id.* (striking FLA. ADMIN. CODE ANN. r. 25-71(c)).

205. *See id.* (quoting Hayes v. City of Albany, 490 P.2d 1018, 1020 (Or. Ct. App. 1971)).

206. *See id.* at 321.

207. *See id.* at 320.

impact of a particular development.[208] As noted above, the court found that the "cost of new facilities should be borne by new users to the extent new use requires new facilities, but only to that extent."[209] Fees that burdened new developments with costs that should be shared by original developments and fees that required new developments to subsidize the costs of original facilities were not roughly proportional to the impact of the development.[210] Those fees required new users to pay for expenses that had little or nothing to do with the increased use or wear that their particular development would have on the city's water and sewer system.[211] One might say that the court was requiring the city to make a more individualized determination as to the extent of the exaction by limiting the use of fee money so that fees for new developments were more directly related to the specific impact of those new developments. Under this interpretation, a court specifically using the *Dolan* test would likely come to the same conclusion. This similarity suggests that Florida courts might be more inclined to analyze the validity of impact fees, as well as land dedication conditions, using the *Dolan* standard.

IV. THE EFFECT OF *DOLAN* ON PERMIT CONDITIONS FOR BEACH ACCESS AND ON STATE BEACH ACCESS LAWS

A. Land Dedication Permit Conditions

1. Individualized Determinations and Quantifiable Data

According to Professor Funk's view, *Dolan* should not discourage local governments from preserving public beach access through permit exactions.[212] He believes *Dolan* creates "relatively easy hurdles" that may be overcome by "some study" showing "some relationship" to the impact.[213] Thus, a municipality would simply

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208. *See id.* at 320-21.

209. *Id.* at 321.

210. *See id.*

211. *See id.*

212. *See* Funk, *supra* note 81, at 139 (commenting generally that "*Dolan*'s rough proportionality test should not cause major problems for local government . . . .").

213. *Id.*

have to show that the development interfered with beach access and that the dedication of alternate beach access provided some proportionate remedy to this interference.

Current cases illustrate potential problems with Funk's reading of *Dolan*.[214] First, any study quantifying the relationship would not be sufficient to satisfy the requirement as Funk suggests. The permit conditions in both *Schultz* and *Amoco Oil Co.* were based on individualized determinations by the city.[215] The studies demonstrated that the increases in traffic were de minimis compared to the extent of the burdens imposed by the permit conditions.[216] Despite quantifiable findings by the cities, these courts found rough proportionality to be lacking.[217] Therefore, a finding of "some" relationship might not be enough; the relationship would have to be significant to justify a burden on individual property rights.

Furthermore, *Dolan* indicates that a mere attempt to quantify findings is not adequate to constitute an individualized determination. In *Dolan*, the City of Tigard engaged in some study with respect to the proposed development, finding that it would increase traffic by roughly 435 vehicle trips per day.[218] The City failed to quantify the need for the permit condition by studying whether the pathway would likely offset this traffic.[219] In trying to comply with *Dolan*, a city may now ask how it can empirically study whether and to what extent a proposed permit condition can offset the impact of a future development. In other words, finding that the condition *could* offset the impact is not the same as finding that it *will*. No courts have answered the question of how a city can procure such a speculative finding, even where a precise mathematical calculation is unnecessary.

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214. *See, e.g.*, Schultz v. City of Grants Pass, 884 P.2d 569 (Or. Ct. App. 1994); Amoco Oil Co. v. Village of Schaumberg, 661 N.E.2d 380 (Ill. App. Ct. 1995), *cert. denied*, 667 N.E.2d 1055 (Ill. 1996), *cert. denied*, 117 S. Ct. 413 (1996).

215. *See Amoco Oil Co.*, 661 N.E.2d at 391; *Schultz*, 884 P.2d at 573.

216. *See Amoco Oil Co.*, 661 N.E.2d at 391; *Schultz*, 884 P.2d at 573.

217. *See Amoco Oil Co.*, 661 N.E.2d at 391; *Schultz*, 884 P.2d at 573.

218. *See* Dolan v. City of Tigard, 512 U.S. 374, 395 (1994).

219. *See id.*

This speculation creates the "insurmountable" obstacle discussed above.[220] One scholar, analyzing New York City's 1993 Waterfront Zoning Ordinance (Waterfront Ordinance), believes the Waterfront Ordinance to be unconstitutional due to the impossibility of quantifying a study on public access under the plan.[221] The Waterfront Ordinance creates special regulations for construction in waterfront areas of the city.[222] It is "designed to guide development along the City's waterfront and in so doing to promote and protect public health, safety and general welfare."[223] As a result, it requires developments on waterfront-zoned lots to provide waterfront public access.[224] This access includes public walkways, upland connections, supplemental public access areas, and visual corridors.[225] The public access dedication may occupy from fifteen to twenty percent of the total zoning lot area and must meet specific requirements.[226] For example, it must assure handicap accessibility, create pedestrian circulation, buffer, and transition zones, and provide unobstructed views.[227] The Waterfront Ordinance also sets forth specific design standards for width, seating, handicap access, lighting, signs, guardrails, and landscaping and requires the walkways to be open to the public from sunrise to sunset.[228]

While a court could plausibly find an essential nexus between the requirements of the Waterfront Ordinance and the public purpose of providing physical and visual access to the waterfront, Inbar suggests that the Ordinance may fail to meet the test for rough proportionality.[229] She states:

> According to the Court in *Dolan*, New York City has the burden to prove that it formulated an individualized assessment regarding

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220. *See supra* notes 100-105 and accompanying text.
221. *See* Inbar, *supra* note 82, at 365-68.
222. *See id.* at 355.
223. *Id.* (quoting NEW YORK CITY ZONING RESOLUTION art. VI, ch. 2, § 62-00).
224. *See id.*
225. *See id.* at 355-56.
226. *See id.*
227. *See id.*
228. *See id*.
229. *See id.* at 363-64.

> whether the development would diminish physical and visual public access to the waterfront thereby justifying a demand for the upland and shoreline walkways to offset the detriment to public interests. This final test appears most problematic for New York City, since the regulations create a public benefit that the City, by its own admission, could not otherwise afford.[230]

Inbar further notes that the failure of the City of Tigard's statistical evidence demonstrates that New York City must prove with "extreme certainty" that "the development on the waterfront *would* actually *impede* the public's access to the waterfront," and that "the pathways *would alleviate* this harm."[231] Consequently, she believes that a court would probably find the Waterfront Ordinance unconstitutional under *Dolan* since the case is one in which the purpose of the ordinance seeks to ensure "quality of life interests that are difficult to quantify, such as those implicated by the public trust doctrine."[232]

Although New York City could undertake extensive empirical studies to determine how a proposed development would impact public access and could attempt to collect data on how walkways would offset the impact of each particular development, the evidence would probably not satisfy the strict standard of rough proportionality.[233] The failure would result from the difficulty of quantifying the type of public interest benefits produced by the Waterfront Ordinance.[234]

The same difficulty arises with permit conditions for beach access dedications under relevant Florida statutes. How could a municipality quantify how much an alternate accessway would offset interference with existing access? Following the suggestions of the Court in *Dolan*,[235] the municipality could study the present uses of an accessway, totaling the amount of pedestrian traffic on the accessway over a certain period of time. Then, the municipality

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230. *Id.*

231. *Id.* at 364 (emphasis in original).

232. *Id.* at 365.

233. *See id.* at 366-67.

234. *See id.* at 367.

235. *See* Dolan v. City of Tigard, 512 U.S. 374, 395 (1994); *see also supra* notes 77-80 and accompanying text.

could make an assumption that an alternate accessway that is "comparable" under the requirements of the statute would bear the same amount of pedestrian traffic. Certainly, this assumption plays on the semantic games of the Supreme Court in *Dolan*, for no concrete difference exists between finding that such a pathway may, or will, alleviate the impact of the development. At the same time, such an assumption does not provide the quantification that might be required under a *Dolan* analysis. Unfortunately, no method seems to exist through which a municipality could avoid speculation.

Certain cases suggest that future courts can avoid this dilemma in their considerations.[236] The *Dolan* Court recognized that "it would have been reasonable to require petitioner to provide some alternative greenway space for the public either on her property or elsewhere" had the proposed development "somehow encroached on existing greenway space in the city."[237] Thus, a permit condition that counters a development's impact by creating an exaction essentially equivalent to that interfered with or eliminated, makes further quantification unnecessary. Such was the case in *J.C. Reeves Corp.* where the dedication, which required the elimination of a spite strip that interfered with public access, was directly proportional to the impact on the development.[238] There the court determined that the condition was "an appropriate device for providing the adjacent property with the access that the proposed development would otherwise eliminate or impair."[239] The court found that the mere fact of the strip's presence threatened access and that no questions of level or intensity remained to be resolved.[240]

Furthermore, the courts in *Schultz* and *Amoco Oil Co.* did not consider whether the exactions in question would alleviate future

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236. *See, e.g.*, Schultz v. City of Grants Pass, 884 P.2d 569 (Or. Ct. App. 1994); Amoco Oil Co. v. Village of Schaumberg, 661 N.E.2d 380 (Ill. App. Ct. 1995), *cert. denied*, 667 N.E.2d 1055 (Ill. 1996), *cert. denied*, 117 S. Ct. 413 (1996).

237. *Dolan*, 512 U.S. at 394.

238. *See* J.C. Reeves Corp. v. Clackamas County, 887 P.2d 360, 365-66; *see also supra* notes 118-136 and accompanying text.

239. *J.C. Reeves Corp.*, 887 P.2d at 365.

240. *See id.* at 365-66.

impacts. Instead of basing their analyses on a comparison of the impact of the proposed development with the need for the exaction, the courts weighed the impact of the development against the *extent* of the exaction.[241] Both courts found the permit conditions invalid because the conditions required such an extensive amount of land to alleviate such a small impact.[242] Such an analysis relies on readily quantifiable data regardless of the situation and does not require any speculation as to an unknowable future. A determination in this manner appears to be contemplated by *Dolan* where the Court stated that a required dedication had to be related "both in nature and extent" to the impact of a proposed development.[243] Thus, a condition requiring the dedication of an alternate beach accessway would not be a regulatory taking if the new accessway was comparable to the accessway with which the proposed development interfered.

Under this comparative analysis, courts would find it far easier to uphold conditions for beach access that simply shift the accessway from the center of a small tract to the lot line. The condition would provide a "one-to-one correspondence between the means used and the harm sought to be prevented."[244] The analysis might also be useful to municipalities in cases where a developer seeks to create alternate access at either end of a large tract covering several miles. Arguably, the elimination of perpendicular beach access at the center of a large tract could not be adequately remedied by a shift to the lot line. Relocating an accessway to the lot line would effectively preclude the public from using the beach located near the center of the tract since few members of the public would venture a mile or more by lateral access to reach the area. Accordingly, a municipality might deny a permit application unless the developer agreed to a condition creating access at various points along the length of the development. As long as those accessways were comparable in nature and did not burden an unreasonable amount of the developer's land in comparison to the

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241. *See Amoco Oil Co.*, 661 N.E.2d at 391; *see also Schultz*, 884 P.2d at 573.

242. *See Amoco Oil Co.*, 661 N.E.2d at 391; *see also Schultz*, 884 P.2d at 573.

243. Dolan v. City of Tigard, 512 U.S. 374, 391 (1994).

244. John Martinez, *A Framework for Addressing Takings Problems*, 9 UTAH B.J. 13, 15 (1996).

amount of existing access interfered with by the proposed development, the permit conditions would most likely meet the rough proportionality test as suggested in *Schultz* and *Amoco Oil Co.*

2. The Effectiveness of Florida's Statutes

Section 161.55(6) does much to ensure that an alternate accessway will be roughly equivalent to an existing accessway that has been established by prescription, prescriptive easement, or any other legal means.[245] It mandates that the new accessway be of "substantially similar quality and convenience to the public."[246] The accessway must also be approved by the local government and approved by DEP if the improvements are seaward of the coastal construction control line.[247] Finally, the new accessway must be consistent with the coastal management element of the local comprehensive plan.[248] Based on these standards, an alternate accessway is likely to have a significant relationship to the impact of the proposed development on an existing accessway.

Section 161.053, on the other hand, does less to guarantee that a new accessway will be roughly proportional to the accessway with which a proposed development interferes.[249] DEP, in its judgment, may impose the condition, and the alternate accessway cannot be wider than the accessway that will be obstructed by the proposed development.[250] While this requirement ensures that a greater area of an individual's property will not be burdened by the alternate accessway, it does not guarantee that the new accessway will be roughly equivalent and of substantially similar quality and convenience to the public. Section 161.053 focuses more on protecting the property rights of the individual landowner while section 161.55(6) places greater emphasis on the preservation of the public's right to beach access.[251]

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245. *See* FLA. STAT. § 161.55(6) (1995).
246. *Id.* § 161.55(6)(a).
247. *See id.* § 161.55(6)(b)-(c).
248. *See id.* § 161.55(6)(d).
249. *See id.* § 161.053.
250. *See id.* § 161.053(5)(e).
251. *See id.* § 161.053, 161.55(6).

Interestingly, both sections assume that an existing public accessway is obvious and its presence on the property is recognized by all, including the property owner and the municipality. However, universal recognition is unlikely. Thus, another difficulty arises in demonstrating rough proportionality: A municipality must prove that the beach access existed in the first place. As a result, a municipality would have to make an individualized determination as to each property to establish that the public had acquired an easement through prescription, custom or otherwise. The burden and cost of conducting this study for each permit condition the municipality sought to impose would be extensive and would perhaps be equivalent to the compensation that it would have to pay for land it had taken.[252]

B. Impact Fee Exactions as an Alternative to Permit Conditions

Ehrlich and *Trimen Development Co.* suggest that finding quantifiable data and making an individualized determination may not be as difficult with respect to impact fees.[253] If a fee is imposed that requires the landowner to pay an amount equivalent to the amount necessary to obtain comparable beach access in another location, the condition would appear to have a practical one-on-one correspondence between the exaction and the development's impact. Furthermore, the fee would not be based on a nebulous, unquantifiable public benefit.[254] By basing the fee on the actual cost of obtaining comparable access, the fee could be specifically tailored to the impacts of a proposed development.[255] "[B]y their very nature impact fees lend themselves to the quantification and individualized assessment required by *Dolan* and as a general method would not appear to be at risk under *Dolan.*"[256] Thus,

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252. *See generally supra* notes 102-103 and accompanying text.

253. *See* Erhlich v. Culver, 911 P.2d 429, 442-44 (Cal. 1996); Trimen Dev. Co. v. King County, 877 P.2d 187, 193-94 (Wash. 1994) (en banc); *see also* Cordes, *supra* note 147, at 553 (stating that impact fees would fare better under the *Dolan* analysis than physical dedications).

254. *See* Inbar, *supra* note 82, at 367; *see also supra* notes 100-105 and accompanying text.

255. *See* Cordes, *supra* note 147, at 553.

256. *Id.*

local governments might wish to shift from land dedications to impact fees in order to meet the requirements of *Dolan* because impact fees may provide greater flexibility when establishing rough proportionality.[257]

This type of exaction would fall within the alternatives suggested by the California Supreme Court in *Ehrlich*.[258] Instead of dedicating a parcel which could be rezoned, the developer could pay a fee that would accomplish the same end.[259] *Ehrlich* also suggested that the impact fee could include the administrative costs of purchasing and designating the accessway.[260] Further, as stated by the court in *Trimen Development Co.*, an impact fee used for land purchase and development is valid if it is equivalent to the value of land that would have been dedicated.[261] Finally, an impact fee exaction would likely meet the requirements of *Contractors and Builders Ass'n* as long as a municipality used the funds acquired from the fee to directly mitigate the impact of the proposed development.[262]

V. MEASURES TO PRESERVE BEACH ACCESS

In its efforts to preserve public access to beaches, Florida could pursue several options. These options include adopting certain revisions to the statutes governing public access, initiating a formal program for the identification of current accessways, and providing citizens with the ability to protect public access in court through a citizen suit provision.

A. Changing Chapter 161

No matter what effect *Dolan* ultimately has on Florida law, several changes can be made to chapter 161, *Florida Statutes*, to further protect and enhance beach access and to help ensure that per-

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257. *See id.*

258. *See Ehrlich*, 911 P.2d at 449.

259. *See id.*

260. *See id.*

261. *See* Trimen Dev. Co. v. King County, 877 P.2d 187, 193-94 (Wash. 1994) (en banc).

262. *See* Contractors and Builders Ass'n v. City of Dunedin, 329 So. 2d 314, 321 (Fla. 1976).

mit conditions for beach access pass the heightened scrutiny of the Supreme Court's decision. First, the language of section 161.053 should mimic that of section 161.055.[263] Specifically, section 161.053 should not only contain language limiting the width of new access to that of the old but also should require the accessway to be of substantially similar quality. Like section 161.55(6), this requirement would be monitored by approval of the local government or DEP.[264] Such a change in the statutory language would help guarantee that future dedications requiring either lateral or perpendicular access are roughly proportional to the impact of coastal developments.[265] As modified, the statute would ensure that alternate accessways are equivalent by requiring them to be comparable in nature and convenience to existing accessways.[266] Further, both sections should contain some language alluding to the need for, or specifically requiring, some kind of individualized determination before the permit condition is imposed. Finally, both sections should authorize impact fees in lieu of dedication or grant authority to municipalities to make this choice. Because impact fees may be more flexible in meeting *Dolan* standards, the statutes should promote their use.[267]

B. Platting Public Beach Access Points

If public accessways are identified and platted prior to the imposition of a permit condition, one difficulty in meeting the rough proportionality standard of *Dolan* is diminished. As discussed above, an existing accessway must be identified before a municipality can find that a proposed development will interfere with or eliminate that access.[268] The applicable Florida statutes

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263. *See* FLA. STAT. § 161.053(5)(e) (1995) (stating that the width of alternate access cannot exceed the width of existing access with which a proposed development will interfere); *see also* FLA. STAT. § 161.55(6) (1995) (requiring that alternate accessways be of substantially similar quality and convenience to the public, be approved by the local government, be approved by DEP in certain situations, and be consistent with the coastal management element of the local comprehensive plan).

264. *See* FLA. STAT. § 161.55(6) (1995).

265. *See supra* notes 241-244 and accompanying text.

266. *See* FLA. STAT. § 161.55(6) (1995).

267. *See supra* notes 257-261 and accompanying text.

268. *See supra* notes 241-244 and accompanying text.

governing local government comprehensive planning require that some municipalities include coastal management elements in their respective local comprehensive plan.[269] According to section 380.24,[270] these municipalities are those "[u]nits of local government abutting the Gulf of Mexico or the Atlantic Ocean, or which include or are contiguous to waters of the state where marine species of vegetation listed by rule as ratified in [section] 373.4211 constitute the dominant plant community."[271] Essentially, all coastal municipalities must include a coastal management element.

As stated previously, the coastal management element must be based upon "studies, surveys, and data" and must contain a map of public access routes to beach and shore resources and a shoreline component which identifies public access to beach and shoreline areas.[272] Under these statutes, it appears that a municipality should consistently identify and map existing beach access, eliminating one part of the individualized determination that the municipality must make when imposing a permit condition.

Rhode Island goes one step further in promoting beach access. Florida may wish to follow Rhode Island's lead in order to ensure that its permit exactions meet the constitutional standard. Rhode Island has developed a program for the discovery, maintenance, and management of public beach access.[273] In 1958, Rhode Island created an administrative agency known as the Commission on the Discovery and Utilization of Public Rights of Way, which had the authority to identify existing public easements.[274] Later, the Legislature created a Coastal Resources Management Council (CRMC) to replace that Commission.[275] The CRMC retains the sole authority to discover and designate all existing public accessways

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269. *See* FLA. STAT. § 163.3177(g) (1995).

270. *Id.* § 380.24.

271. *Id.*

272. *See id.* § 163.3178(2).

273. *See* Michelle A. Ruberto & Kathleen A. Ryan, *The Public Trust Doctrine and Legislative Regulation in Rhode Island: A Legal Framework Providing Greater Access to Coastal Resources in the Ocean State*, 24 SUFFOLK U. L. REV. 353, 358 (1990).

274. *See id.*

275. *See id.*

to the ocean.[276] By 1989, CRMC's Right-of-Way Subcommittee had identified 164 sites as public accessways, and at the time of its 1989 review, the Subcommittee had several hundred potential sites that remained to be evaluated.[277]

CRMC has several powers and duties with respect to public rights-of-way:

> (1) The council shall be responsible for the designation of all public rights-of-way to the tidal water areas of the state, and shall carry on a continuing discovery of appropriate public rights-of-way to the tidal water areas of the state.
>
> (2) The council shall maintain a complete file of all official documents relating to the legal status of all public rights-of-way to the tidal water areas of the state.
>
> (3) The council shall have the power to designate for acquisition and development, and posting, and all other functions of any other department for tidal rights-of-way and land for tidal rights-of-way, parking facilities, and other council related purposes.
>
> Further, the council shall have the power to develop and prescribe a standard sign to be used by the cities and towns to mark designated rights-of-way.[278]

When CRMC designates public rights-of-way, it must give consideration to land evidence records, the exercise of domain over the parcel, the payment of taxes, the creation of a dedication, the public's use, and other public records or historical evidence, including maps and street indexes.[279] CRMC's determination that a right-of-way exists must be justified by substantial evidence.[280] Lastly, a municipality must notify CRMC when a public right-of-way is no longer useful to the public and should be abandoned.[281]

By creating a state agency to oversee the designation of beach access, Rhode Island has created a comprehensive program that may aid the state and its municipalities in overcoming regulatory

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276. *See id.*
277. *See id.*
278. R.I. GEN. LAWS § 46-23-6(E)(1)-(3) (1995).
279. *See id.* § 46-23-6(E)(6)(a)-(g).
280. *See id.* § 46-23-6(E)(7).
281. *See id.* § 46-23-6(E)(8).

takings challenges in the future.[282] Unfortunately, such a program also has its drawbacks. For instance, implementation of a similar program in Florida would require additional funding from the state government. Further, the state would have to be prepared for litigation brought by property owners seeking to contest the state's determination of a right-of-way on their land.

C. Creating Citizen Standing

Since implementing a state program to determine beach access may be just as expensive as compensating property owners for their beach access dedications,[283] the Legislature could also adopt a statute providing for citizen standing to enforce the public's right to beach access. In this way, individuals could bring suit to establish by declaratory relief or to protect through injunctive relief their rights to existing accessways. Citizen suits would remove part of the financial burden from the government for the designation of public access points.

The issue of citizen suit standing was recently addressed by the United States Supreme Court in *Lujan v. Defenders of Wildlife*,[284] where the Court held that Congress could not create federal court standing for private citizens that have not suffered any concrete injury.[285] Under Article III of the United States Constitution, federal court jurisdiction is limited to an actual case or controversy.[286] In *Lujan*, members of a wildlife association brought suit against the United States Secretary of the Interior for failing to follow correct procedure when promulgating a regulation under the Endangered Species Act.[287] The Act provided that "any person may commence a civil suit on his own behalf (A) to enjoin any person, including the United States and any other governmental instrumentality or agency . . . who is alleged to be in violation of any provision of this chapter."[288] The Supreme Court rejected the

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282. *See supra* notes 241-247, 263 and accompanying text.
283. *See supra* notes 100-105, 247 and accompanying text.
284. 504 U.S. 555 (1992).
285. *See id.* at 577-78.
286. *See id.* at 559-60; *see also* U.S. CONST. art. III, § 1.
287. *See Lujan*, 504 U.S. at 558-59.
288. *Id.* at 571-72 (quoting 16 U.S.C. § 1540(g) (1988)).

view that the plaintiffs satisfied the injury-in-fact rule by Congress' conferral to all persons of an "abstract, self-contained, noninstrumental" right requiring the executive branch to observe procedures mandated by law.[289]

According to the Court, a generalized, undifferentiated grievance was an inadequate basis upon which to grant standing, and Congress could not legislatively remedy the situation by awarding standing to any member of the public regardless of whether that person had suffered a concrete injury.[290] Nevertheless, Congress could enact statutes that created legal rights, the invasion of which would create standing.[291]

The result is similar with respect to Florida state courts. In *Florida Wildlife Federation v. Department of Environmental Protection*,[292] the Florida Supreme Court upheld the citizen suit provision of Florida's Environmental Protection Act (EPA) which allowed a Florida citizen to maintain an action for injunctive relief against "[a]ny governmental agency or authority charged by law with the duty of enforcing laws, rules, and regulations for the protection of the air, water, and other natural resources of the state to compel such governmental authority to enforce such laws, rules, and regulations" or against "[a]ny person natural or corporate, governmental agency or authority to enjoin such persons, agencies, or authorities from violating any laws, rules or regulations for the protection of the air, water, and other natural resources of the state."[293] The court determined that the provision was not an impermissible incursion by the Legislature into the judiciary's power to adopt rules of practice and procedure under the Florida Constitution since it created substantive rights that were not previously possessed by individuals.[294] The statute did not seek to define proper parties to a suit but instead sought to create an entirely new cause of action.[295] It afforded citizens the ability to

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289. *Id.* at 573.
290. *See id.* at 575-78.
291. *See id.* at 578 (quoting Warth v. Seldin, 422 U.S. 490, 500 (1975)).
292. 390 So. 2d 64 (Fla. 1980).
293. FLA. STAT. § 403.412(2)(a) (1977).
294. *See Florida Wildlife Fed'n*, 390 So. 2d at 66.
295. *See id.*

protect their rights to a clean environment, a right which was not available to Florida citizens prior to the statute's enactment.[296]

The citizen suit provision at issue in *Florida Wildlife Federation* differed from that struck down by the Florida Supreme Court in *Avila South Condominium Ass'n, Inc. v. Kappa Corp.*[297] The statutory provision in dispute in *Avila South* gave condominium associations the ability to contract, bring suit, and be sued with respect to the exercise of an association's powers.[298] The provision also gave associations the capability to maintain a class action suit on behalf of its unit owners with respect to matters of common interest.[299] According to the court:

> Practice and procedure encompass the course, form, manner, means, method, mode, order, process or steps by which a party enforces substantive rights or obtains redress for their invasion. "Practice and procedure" may be described as the machinery of the judicial process as opposed to the product thereof . . . . [S]ubstantive law includes those rules and principles which fix and declare the primary rights of individuals as respects their persons and their property.[300]

Therefore, the court found that the statute in question constituted an impermissible incursion into the court's ability to adopt rules of practice and procedure since the statute sought to define proper parties in suits litigating substantive rights.[301]

Like federal standing, standing in Florida state courts generally requires a showing of a special injury.[302] The Florida Supreme Court originally adopted this rule to prevent a multiplicity of suits, but the court, as well as the Legislature, has created exceptions to the rule since its adoption.[303] Thus, in *Florida Wildlife Federation*, the court held that the Legislature did not have to require a showing of special injury when it created a new cause of action

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296. *See id.* at 67.

297. 347 So. 2d 599 (Fla. 1977).

298. *See* FLA. STAT. § 711.12(2) (1975).

299. *See id.*

300. *Avila So. Condominium Ass'n*, 347 So. 2d at 608 (quoting *In re* Florida Rules of Criminal Procedure, 272 So. 2d 65, 66 (Fla. 1972)).

301. *See id.*

302. *See* Florida Wildlife Fed'n v. Department of Envtl. Protection, 390 So. 2d 64, 67 (Fla. 1980).

303. *See id.*

under the Florida EPA.[304] Instead, "the legislature chose to allow citizens to bring an action where an action already existed for those who had special injury."[305]

In *United States Steel Corp. v. Save Sand Key, Inc.*,[306] the Florida Supreme Court specifically addressed standing to sue for injunctive or declaratory relief to preserve or protect existing beach access. Save Sand Key, Inc., a nonprofit organization created for the purpose of procuring as much of Sand Key as possible for public use, filed a complaint against United States Steel (U.S. Steel), seeking to enjoin U.S. Steel from interfering with the public's right to use lands acquired through prescription, implied dedication, or general or local custom.[307] Save Sand Key alleged that U.S. Steel began construction of high-rise condominiums and fenced portions around its construction sites that substantially interfered with the public's rights to full use and enjoyment of Sand Key.[308] As a result, Save Sand Key requested an injunction against any future acts that would interfere with, impair, or impede the public's exercise of their rights.[309] It also sought injunctive relief from the alleged public nuisance of a purpresture blocking of the enjoyment of those rights and declaratory relief impressing a public easement in the area for boating, bathing, navigation, fishing, and other public uses.[310] U.S. Steel moved to dismiss the complaint, claiming that Save Sand Key lacked standing since it did not allege a special injury different from an injury to the general public.[311]

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304. *See id.* Although the court held that plaintiffs did not have to show a special injury under the Florida EPA, it noted certain requirements that would have to be met in order to state the cause of action. *See id.* at 67-68. An alleged irreparable injury that was not sustained by the facts as alleged would not ordinarily warrant a grant of injunctive relief; the question raised would have to be real, not theoretical, and the plaintiff would have to show a direct and bona fide interest in the outcome. *See id.*

305. *Id.* at 67.

306. 303 So. 2d 9 (Fla. 1974).

307. *See id.* at 9-10.

308. *See id.* at 10.

309. *See id.* at 9-10.

310. *See id.*

311. *See id.*

The court looked to an earlier case with similar facts, *Sarasota County Anglers Club, Inc. v. Burns*,[312] and held that no statutory authority existed for a cause of action where Save Sand Key could assert property rights in the real estate owned by U.S. Steel and where no special injury was alleged.[313] The court further noted that the reliance of the lower court on several cases in which courts allowed an exception to the special injury rule was misguided.[314] The court viewed these exceptions as extremely narrow and not applicable to the case before it.[315]

Although the court was unwilling to allow citizen standing in *Save Sand Key, Inc.*, the case should not bar the Florida Legislature from statutorily creating a right of action for the general public. As discussed above, the Legislature could create a cause of action affording Florida citizens the ability to protect their rights to existing public easements absent a special injury based upon the reasoning of *Florida Wildlife Federation.* Because this cause of action does not currently exist, the Legislature would not be simply defining proper parties.

Opponents of this legislation might argue that such a cause of action is in actuality an existing action for public nuisance, and therefore, the situation is not analogous to that of *Florida Wildlife Federation.* In the lower court decision in *Save Sand Key, Inc.*,[316] the Second District Court of Appeal gave a convincing justification for upholding Save Sand Key's cause of action, finding that the plaintiffs alleged a justiciable cause of action within the rationale of *City of Daytona Beach v. Tona-Rama, Inc.*[317] The Second District stated,

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312. 193 So. 2d 691 (Fla. 1st DCA 1967), *aff'd sub nom*, Sarasota County Anglers Club, Inc. v. Kirk, 200 So. 2d 178 (Fla. 1967).

313. *See Save Sand Key, Inc.*, 303 So. 2d at 12.

314. *See id.* at 12-13.

315. *See id.*

316. Save Sand Key, Inc. v. United States Steel Corp., 281 So. 2d 572 (Fla. 2d DCA 1973).

317. 271 So. 2d 765 (Fla. 1st DCA 1973), *quashed by* 294 So. 2d 73 (Fla. 1974). The Second District Court of Appeal in *Save Sand Key, Inc.* relied on the lower court decision in *Tona-Rama, Inc.*, which was later quashed by the Florida Supreme Court. While the Florida Supreme Court in *Tona-Rama, Inc.* disagreed with the finding of the lower court that the public had gained a prescriptive easement, it recognized that the public had certain rights

"In [*Tona-Rama*] the court expressly recognized vested prescriptive rights in the public to a portion of the soft sand area of Daytona Beach. Under certain facts and circumstances, yet to be proven here of course, such rights may become absolute and enforceable."[318] However, when the Florida Supreme Court reversed the Second District's decision as to standing, it also overturned the decision as to the existence of a stated cause of action based on public nuisance.[319] The court agreed with *Sarasota County Anglers Club* that the statutes allowing citizens to sue for the abatement of public nuisances[320] did not apply to these cases.

Regardless of whether parties could use a public nuisance theory to protect their beach access rights, that cause of action in any context would require a showing of special injury.[321] Thus, a member of the public with a generalized grievance could not bring a valid suit for the enforcement of public beach access rights based on public nuisance. A legislatively-created cause of action affording citizens the ability to protect their rights to beach access might therefore be equivalent to the right afforded by the Florida EPA, where an individual's ability to enforce such rights *without special injury* had never existed before. As the court stated in *Florida Wildlife Federation*, "That the legislature chose to allow citizens to bring an action *where an action already existed for those who had special injury* persuades us that the legislature did not intend that the special injury rule carry over to suits brought under the EPA."[322] This statement suggests that a cause of action that requires no showing of special injury may constitute the creation of a *new* cause of action regardless of whether parties who suffered a special injury could previously maintain such an action.

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that could be obtained through prescription and custom in other cases. *See Tona-Rama, Inc.*, 294 So. 2d at 77-78.

318. *Save Sand Key, Inc.*, 281 So. 2d at 577.

319. *See* United States Steel Corp. v. Save Sand Key, Inc., 303 So. 2d 9, 12 (Fla. 1974) ("[T]here is no statutory authority for this cause of action.").

320. *See id.* (discussing FLA. STAT. § 64.11 (current version at FLA. STAT. § 60.05 (1995)) and FLA. STAT. § 823.05).

321. *See* Florida Wildlife Fed'n v. Department of Envtl. Protection, 390 So. 2d 64, 67 (Fla. 1980).

322. *Id.* (emphasis added).

VI. CONCLUSION

One of the policies of the State of Florida is to preserve, protect, and enhance public access to the beaches, shorelines, and waters around the state.[323] In the past, permit conditions requiring the dedication of beach accessways have been one effective solution to furthering this policy. In demonstrating its commitment to upholding individual property rights, the United States Supreme Court may have undermined Florida's ability to provide access to a resource that belongs to all of us under the public trust doctrine. Because *Dolan*'s rough proportionality standard has yet to be clearly defined, the possibility exists that some beach access conditions will no longer be constitutionally sound. Hopefully, courts will follow language in both *Nollan* and *Dolan* indicating that the creation of alternate access where existing access is impaired is not a regulatory taking. Those courts also should look to post-*Dolan* decisions, such as *Schultz, Amoco Oil Co.,* and *J.C. Reeves Corp.* which construes the rough proportionality standard with respect to permit conditions in such a way that local governments can meet the standard without unreasonable difficulty.

Moreover, the Florida Legislature should take additional measures to ensure that its policies can be legitimately effected. These measures include minor changes to chapter 161, *Florida Statutes,* as well as the implementation of a state program to identify existing beach access and the possible creation of a citizen standing provision to enforce current public rights.

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323. *See* FLA. STAT. § 161.053 (1995).

COASTAL PETROLEUM'S FIGHT TO DRILL OFF FLORIDA'S GULF COAST

LEIGH DERENNE BRASLOW*

Table of Contents

I. INTRODUCTION

> Robert Joffee, director of the Mason-Dixon Florida Poll, said Floridians are clearly overwhelmingly against offshore drilling. "Just go to a busy shopping center and ask about offshore drilling . . . . If you get anyone in favor of it, call me . . . Most people who reside in the state attach a great deal of importance to recreational use of the shoreline."[1]

In 1944, Florida Governor Spessard L. Holland and members of his cabinet signed a renewable oil lease agreement which covered 3.6 million acres of state submerged lands,[2] an area covering

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1. Chris Poynter, *Drilling for Dollars*, TALL. DEM., Oct. 13, 1996, at 8A.

2. *See* Drilling Lease between Arnold Oil Explorations, Inc. and the Trustees of the Internal Improvement Fund of the State of Florida 13 (Dec. 27, 1944) (on file with the Office of the Att'y General Office, Tallahassee, Fla.) [hereinafter 1944 Drilling Lease]; *see*

sovereign lands under water from Appalachicola to Naples and extending 10.36 miles into the Gulf of Mexico.[3] Coastal Petroleum Oil Company (Coastal) bought out the company that originally held the leases, Arnold Explorations, Inc. (Arnold)[4] and drilled for oil on its leases for many years without ever producing any commercial quantity of oil.[5] In 1990, the Florida Legislature banned all oil drilling off the coasts of Florida.[6] Although Coastal had been inactive in its drilling for twenty-eight years by that time, this legislative action galvanized the company to pursue a long battle in the courtrooms of Florida, seeking recompense from Florida taxpayers for its alleged monetary loss caused by the ban.[7]

Coastal's fight to drill off Florida's Gulf Coast raises issues that are becoming more common as the government takes an increasingly active role in protecting this country's natural resources. Coastal's fight illustrates the tension between preserving the government's ability to change its policies to adapt to the changing needs of the environment and values of community versus protecting the property rights of individuals. Coastal's case is complicated by the reality that no one knows how much oil, if any, exists underneath the state waters of Florida's Gulf Coast. In a sense, the State is playing a game of russian roulette with Coastal. Fifty years of dry wells would suggest that no oil exists on Coastal's lease, so why not let the company continue to sink dry wells? Why continue a costly and lengthy legal battle to keep oil drilling off Florida's beaches if the drilling is almost certain to produce no oil? Why restrict Coastal's right to drill and risk a court order requiring the State of Florida to pay for the value of the leases? Floridians' strong attachment to their pristine beaches, the dependence of Florida's

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also Florida is Sued Over Confiscation of Oil Leases, PLATT'S OILGRAM NEWS, July 24, 1990, at 4 [hereinafter *Florida is Sued*].

3. *See* 1944 Drilling Lease, *supra* note 2, at 2.

4. *See* Poynter, *supra* note 1, at 8A.

5. *See id.*

6. *See* Act effective Aug. 1, 1990, ch. 90-72, 1990 Fla. Laws 187 (codified at FLA. STAT. § 377.242(1)(a) (1995)).

7. *See* Poynter, *supra* note 1, at 8A ("'It only sprang to life because they saw the potential for money,' said David Guest, an attorney for the Sierra Club Legal Defense Fund in Tallahassee, which is suing to keep Coastal from drilling. 'As soon as the state said no drilling, Coastal jumps and sues for a bajillion dollars.'").

lucrative tourism economy on an unmarred scenic view and clean water and beaches, the damage to the marine ecosystem caused by oil drilling, and the remote possibility oil would be found make the gamble that Coastal will continue to come up dry a risk Florida's government may be unwilling to take.

This Comment examines the legal issues surrounding oil drilling off Florida's Gulf Coast. Part II considers whether oil exists at all in the Gulf, and if so, what damages could occur in the event of a spill. Part III discusses the actions that the State of Florida has taken regarding offshore oil drilling and the dynamics of Coastal as a company. With this background, Part IV studies the litigation between Coastal and the State of Florida that has occurred in the last six years. The litigation has taken two distinct paths: a suit by Coastal alleging that Florida's 1990 ban on offshore oil drilling unlawfully took Coastal's property rights without due process of law and a suit by Coastal attempting to force the Florida Department of Environmental Protection (DEP) and Florida's Board of Trustees of the Internal Improvement Trust Fund (Trustees) to issue a permit to drill off of St. George Island without requiring large sums of money for an accident security deposit.[8] Part V shifts the focus to five potential legal theories that may be pursued by Coastal in its attempt to protect its alleged drilling rights: (1) the Submerged Lands Act argument; (2) the public trust doctrine; (3) the vested rights argument; (4) the Fifth Amendment takings argument; and (5) the substantive due process argument. Part V explores these arguments and evaluates the potential success and failure both sides may have.

II. THE POTENTIAL FOR OIL AND THE EFFECT OF A SPILL

No one has ever found oil beneath Florida's territorial waters in the Gulf of Mexico.[9] Coastal has drilled for twenty-five years.[10] It has sunk twenty-two wells.[11] All have come up dry.[12] However,

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8. *See* Poynter, *supra* note 1, at 8A; David Abramson, *Coastal Petroleum to Appeal Court Decision on Development of Offshore Florida Leases*, OIL DAILY, Aug. 8, 1996, at 2.

9. *See* Poynter, *supra* note 1, at 8A.

10. *See id*.

11. *See id.*

the potential for oil may exist. In 1975, the State hired two experts to estimate how much oil might lie beneath Florida's Gulf Coast.[13] According to those experts, the land which Coastal leased from the State could contain more than sixty million barrels of oil.[14] Denis Dean, the Assistant Attorney General handling the Coastal litigation, de-emphasized the significance of this estimate, stating that it was based on the oil activity in federal, not state, waters in the vicinity and was simply a guess.[15] He also reported that both experts indicate they would not stand by those figures today.[16] Further, Dean stated that no company approached the State of Florida between 1976 and 1990 to request a lease to drill in those waters. This lack of interest led Dean to ask, "If there was this big demand, where was everybody?"[17] Nevertheless, a spokesperson for Coastal has argued that since vast oil resources have been found off the coasts of Texas, Alabama, and Louisiana for years, logically oil could also be found off Florida's Gulf Coast, as "oil doesn't recognize a state line."[18]

Recent technological innovations could have an impact on the possibility of finding oil.[19] New construction for the platforms on oil rigs may enable drilling at significantly lower depths.[20] Computers may be able to find oil resources that were not otherwise detectable.[21] One journalist reports that these innovations have created an offshore rush by Florida energy companies to "aggressively purs[ue] oil and gas exploration in the Gulf."[22] Despite these innovations, a truism in the oil drilling

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12. *See id*.

13. *See* Telephone Interview with Denis Dean, Ass't Att'y General, Tallahassee, Fla. (Oct. 24, 1996) [hereinafter Dean Interview].

14. *See* Eric Schmuckler, *If You Can't Drill, Sue*, FORBES, Sept. 17, 1990, at 14.

15. *See* Dean Interview, *supra* note 13.

16. *See id.*

17. *Id.*; Gady Epstein, *Oil Company Returns to Court*, TAMPA TRIB., May 7, 1996, at Metro 6.

18. Poynter, *supra* note 1, at 8A.

19. *See Deep in Gulf is High-Tech Oil Rush*, ST. PETE. TIMES, May 2, 1996, at 1A.

20. *See id*.

21. *See id*.

22. *Id*.

business holds that no one can ever know for sure if oil exists on a site before drilling has begun.[23]

In addition to the uncertainty about the presence of oil is the question of how much potential damage a spill could cause. The amount of damage caused by a potential spill depends upon two unknowns: (1) the quantity of oil that might be discovered; and (2) the water temperature and weather conditions at the time of a spill.[24] According to DEP biologist Ernest Barnett, an oil spill at the Coastal site off St. George Island could result in the spillage of as much as a million barrels, or 42 million gallons of oil. He projected:

> Uncontained and with certain wind conditions, the oil would travel 29 miles within 24 hours . . . . It would seep onto the beaches of St. George Island, Cape St. George Island, Dog Island and St. Vincent Island . . . . At least 50 percent of beach within 29 miles of the drill site would be damaged . . . . [Five] percent of the oyster reefs—23.21-million square feet—would be damaged, as well as 46.86-million square feet of marshes and 6.4 million square feet of sea grasses . . . . Those were conservative estimates . . . .[25]

Moreover, Florida's warm waters might actually facilitate damage caused by an oil spill. Scientists report that cold-water oil spills, like that of the Exxon Valdez, are not nearly as damaging as those which take place in warmer waters, thus making Florida, with its marshlands and sandy beaches, many times more vulnerable than Prince William Sound in Alaska.[26] In the Exxon Valdez oil spill, 10 million gallons of oil were dumped in Prince William Sound.[27] Exxon had to spend $3 billion to clean up the oil and settle lawsuits, and two years ago it paid another $5 billion in a jury award to harmed fisherman and property owners.[28]

In November 1992, Coastal commissioned a study by Continental Shelf Associates of Jupiter, Florida to assess potential damage

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23. *See* Dean Interview, *supra* note 13.

24. *See Reckless Assault on Florida's Coast*, TAMPA TRIB., May 26, 1995, at Nation 14 [hereinafter *Reckless Assault*].

25. Diane Rado, *State Takes New Tact Against Oil Driller*, ST. PETE. TIMES, May 24, 1995, at 1B.

26. *See Reckless Assault*, *supra* note 24, at Nation 14.

27. *See id*.

28. *See id.*

that could result from a spill off the Florida Gulf Coast.[29] Ten pages of the study detail the parade of horribles that would attend an oil spill from the proposed drilling site off St. George Island.[30] Despite this finding of Coastal's own study, Coastal attorney Robert Angerer took issue with DEP's prediction, arguing, "The largest oil spill in United States history was 77,000 barrels off the coast of Santa Barbara, California. There's no way Florida would ever see anything close to that, let alone a million barrels."[31]

III. ACTIONS THE STATE OF FLORIDA HAS TAKEN REGARDING OFFSHORE OIL DRILLING PRE-1990

In the early 1940s, when the country was at war, the State of Florida was anxious for investors to fund exploration for domestic oil, pay taxes, make lease payments, and bring industry to this state.[32] Lawmakers passed the Florida Oil Discovery Award Bill in June 1941, guaranteeing $50,000 to the first company to strike oil.[33] Subsequently, the State entered into an option contract with Arnold, allowing the company, as lessee, full rights to conduct geological and geophysical surveys and investigations of an area of submerged lands.[34] In 1944, Arnold entered into two perpetual leases with the State for oil, gas, and mineral rights to 3.6 million acres of state submerged lands in the Gulf, an area about the size of Massachusetts.[35] The leases covered an area 425 miles long, beginning at Appalachicola and ending south of Naples, and beginning at the beach and reaching 10.36 miles into the Gulf.[36]

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29. *See* CONTINENTAL SHELF ASSOC., INC., ENVIRONMENTAL CONDITIONS AND ASSESSMENT OF POTENTIAL IMPACTS BOB SIKES CUT SITE A (1992) [hereinafter ENVIRONMENTAL CONDITIONS Report]; Telephone Interview with Denis Dean, Ass't Att'y General, Tallahassee, Fla. (Sept. 13, 1996) [hereinafter Dean Interview].

30. *See* ENVIRONMENTAL CONDITIONS report, *supra* note 29.

31. Phil Willon, *Oil Spill Bonding Demanded*, TAMPA TRIB., June 28, 1995, at Metro 1.

32. Act effective June 4, 1941, ch. 20667, 1941 Fla. Laws 1677 (reflecting the attitude of Florida legislators in the 1940s).

33. *See* FLA. STAT. § 253.49 (1941) (repealed 1947); *see also* Poynter, *supra* note 1, at 8A.

34. *See* Gas and Minerals and Option to Lease Exploration Contract for Oil between the Trustees and Arnold Oil Explorations, Inc. 1 (Oct. 4, 1941) (on file with the Office of the Att'y General) [hereinafter 1941 Drilling Lease].

35. *See* 1944 Drilling Lease, *supra* note 2.

36. *See id.*; *see also* Poynter, *supra* note 1, at 8A.

The leases also included the submerged lands under Tampa Bay, Lake Okeechobee, Charlotte Harbor, the Suwannee River, nine central Florida lakes and part of the St. Johns River.[37] Under the terms of the leases, Arnold paid $500 per drilling block for the purpose of drilling for oil, gas, and sulphur.[38] Arnold also agreed to drill at least one test well on each drilling block every five years until a sufficient number of wells had been drilled according to a formula in the lease.[39] If Arnold did not comply with the well drilling requirement, the right to renew the lease was to become unenforceable.[40] If Arnold struck oil, the State would receive one-eighth in royalties.[41] The drilling leases were to be periodically renewed. The 1944 agreement provided that Arnold would pay a total annual rental of approximately $22,566.40 for all the leases.[42] In 1946, that rent was raised to $27,048.00.[43] In the mid-1940s, Coastal purchased the leases and took over all rights and responsibilities from Arnold.[44] By 1976, the annual lease rent was fixed around $60,000, and this rent remained in effect until 1992, when Coastal and the State agreed the payments should stop pending resolution of their litigation.[45]

In 1968, the Trustees and the United States Army Corps of Engineers became embroiled with Coastal over rights to Lake Okee-

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37. *See* Phil Willon, *Oil Drilling Restrictions Spark Battle*, TAMPA TRIB., Aug. 13, 1995, at Metro 1. Dean admits that the state "gave away the farm" in granting those leases in the 1940s. Poynter, *supra* note 1, at 9A.

38. *See* 1944 Drilling Lease, *supra* note 2, at 2.

39. *See id.* at 4.

40. *See id.*

41. *See id.* at 5.

42. *See id.* at 7.

43. *See* Drilling Lease between Arnold Oil Explorations, Inc. and the Trustees of the Internal Improvement Fund of the State of Florida 1 (Mar. 27, 1946) (on file with the Office of the Att'y General Office, Tallahassee, Fla.).

44. *See* Drilling Lease between Arnold Oil Explorations, Inc. and the Trustees of the Internal Improvement Fund of the State of Florida 2-3 (Feb. 27, 1947) (on file with the Office of the Att'y General Office, Tallahassee, Fla.).

45. *See* Memorandum of Settlement, *Coastal Petroleum Co. v. Secretary of the Army*, No. 68-951-Civ.-CA & 69-699-Civ.-CA (consolidated) 6 (S.D. Fla. Jan. 6, 1976) (on file with the Office of the Att'y General, Tallahassee, Fla.) [hereinafter Settlement Agreement]; Poynter, *supra* note 1, at 8A; Dean Interview, *supra* note 13.

chobee.[46] The lawsuits were resolved in a Settlement Agreement in 1976 in which Coastal agreed not to explore or drill on Lake Okeechobee due to its environmental value.[47] In addition, Coastal's 10.36 miles of submerged land along the 435 mile stretch of coastline was divided into three parallel zones.[48] The near shore zone extends from the water's edge to 4.36 miles into the Gulf.[49] Here, Coastal retains only a royalty interest.[50] If the State drilled in the zone or allowed someone else to drill, Coastal would be entitled to a 6.25% royalty on any oil discovered.[51] From mile 4.36 to mile 7.36, Coastal returned all rights to the state.[52] Coastal possesses no lease, no royalty rights or any other kind of right to this area.[53] In the outer three miles, from mile 7.36 to mile 10.36, Coastal retains full exploitation rights.[54]

Coastal agreed that its rights to explore for oil, gas, and minerals would terminate completely in 2016, forty years from the signing of the Agreement. Coastal divested itself of any right to intervene in any land use decisions except in the outer three-mile strip and agreed to secure permits from all appropriate state environmental protection agencies.[55] In recognition of Coastal's reduced rights, Coastal's annual rental on leases 224-A and 224-B was decreased from $49,614.40 to $39, 261.00.[56] Coastal returned

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46. *See* Letter from Lawton Chiles, Gov. of Fla., to Bob Graham, U.S. Sen.-Fla. 2 (Aug. 27, 1996) (on file with author) (providing a time line and history of Coastal).

47. *See* Settlement Agreement, *supra* note 45.

48. *See id.* at 6.

49. *See id.*

50. *See id.*

51. *See id.*

52. *See id*. at 5; *see also* Dean Interview, *supra* note 29.

53. *See* Dean Interview, *supra* note 29.

54. *See id.*

55. *See* Settlement Agreement, *supra* note 45, at 4.

56. *See id.* at 6. Lease 224-A covers the full 10.36 mile span from St. George Island to Pasco County, north of Tampa. Lease 224-B picks up from that point and extends to the end of 425 mile span, to a point south of Naples in Collier county. Lease 248 covers only Lake Okeechobee. *See* Letter from Carliane D. Johnson, Governmental Analyst, OPB Environmental Policy Unit, to Leigh Braslow (Nov. 6, 1996) (on file with author) (displaying Lease Nos. 224-A, 224-B, and 248 on a State of Florida map). The lease payment on lease 248 remained at $19,985.92. *See* Settlement Agreement, *supra* note 45, at 6.

to the State 1.2 million acres of offshore land and retained 2.4 million acres with either a royalty interest or with full rights.[57]

In 1988, the Florida Legislature passed a law that requires an entity drilling for oil to provide a deposit, bond, or surety which satisfies statutory safety and environmental performance provisions.[58] In the alternative, the applicant may chose to pay an annual fee to the Minerals Trust Fund, at a rate of $4,000 per year per well for the first year and $1,500 per well for each subsequent year.[59] In addition, regardless of the number of permits a lessee possesses or has applied for, the lessee will be required to contribute no more than $30,000 per year to the fund.[60]

Apparently dissatisfied with the coverage afforded by that statute, in 1997, the Florida Legislature passed a new law that empowers the government to require greater assurances from an applicant seeking to drill.[61] The amount of surety will now be based on the projected clean-up amount and natural resources damages resulting from a potential spill, and the Administrative Commission (essentially the Governor and cabinet) are the permitting authority to set the bond.[62] This recent development is a victory for opponents of offshore oil drilling, but no one can be sure to what degree until the Commission acts and a court reviews this new legislation.[63]

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57. *See Florida is Sued*, *supra* note 2, at 4.

58. *See* FLA. STAT. § 377.2425(1)(a) (1995).

59. *See id*. § 377.2425(1)(b). These rates have been adjusted to reflect inflation. *See id.* § 377.2425(1)(b)(4) (allowing for a cost of inflation adjustment). They now stand at approximately $4,802 and $1,801. *See* Telephone Interview with Bruce M. Deterding, DEP Analyst, Tallahassee, Fla. (Oct. 24, 1996) [hereinafter Deterding Interview].

60. *See* FLA. STAT. § 377.2425(1)(b)(3) (1995).

61. Act effective May 7, 1997, ch. 97-49, 1997 Fla. Laws 286 (to be codified at FLA. STAT. § 377.242(1)(a) (1995)). Deterding opines that the new law will give DEP greater leverage in requiring a surety that is commensurate with the potential damage a driller could cause. *See* Deterding Interview, *supra* note 59.

62. *See* Act effective May 7, 1997, ch. 97-49, 1997 Fla. Laws 286 (to be codified at FLA. STAT. § 377.242(1)(a) (1995)).

63. *See* Telephone Interview with Denis Dean, Ass't Att'y General, Tallahassee, Fla. (June 16, 1997) [hereinafter Dean Interview].

In 1990, Florida passed a sweeping ban on offshore oil drilling.[64] The ban prohibited any structures designed to drill oil in Florida's state waters in the Gulf of Mexico.[65] The legislation provided an exception for Coastal, the only company grandfathered in under this statute.[66]

IV. COASTAL PETROLEUM THE COMPANY

While Coastal calls itself an oil drilling company, its only assets are the drilling leases.[67] Coastal owns no boats or drilling equipment.[68] From 1941 to 1990, Coastal paid $2.3 million in lease rentals.[69] During the fifty-five years of the company's existence and after $10 million dollars in legal fees,[70] all of Coastal's exploratory wells have come up dry.[71] Coastal has operated at a loss since 1953 and had a deficit of around $22.8 million in 1996.[72] In 1994, Coastal reported to the United States Securities and Exchange Commission (SEC) that "its primary source of income for decades, issuing new stock, was no longer a good option. Few investors would be interested in a company on such shaky ground."[73] In March of 1995, Coastal filed a statement with the SEC stating that if no sales were made or if the litigation in Florida was not resolved soon in Coastal's favor, the company would likely

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64. *See* Act effective Aug. 1, 1990, ch. 90-72, 1990 Fla. Laws 187 (codified at FLA. STAT. § 377.242(1)(a) (1995)).

65. *See* FLA. STAT. § 377.242(1)(a)(1)-(4) (1995).

66. *See id.* § 377.242(1)(b) (stating that the ban does not apply to permitting or construction of structures intended for the drilling or for the production of oil pursuant to an oil lease); *see also* Letter from Carliane D. Johnson, Governmental Analyst, OPB Environmental Policy Unit, to Leigh Braslow (Nov. 6, 1996) (on file with author).

67. *See* David Olinger, *State Says Company is Drilling for Dollars*, ST. PETE. TIMES, Aug. 20, 1996, at 1B.

68. *See id.*

69. *See* Tom Stewart-Gordon, *Company Set to Abandon its Efforts to Drill Offshore Florida*, OIL DAILY, Aug. 6, 1990, at 7.

70. *See* Gady Epstein, *Investors Gamble on Fla. Oil*, TAMPA TRIB., Aug. 25, 1996, at Nation 1.

71. *See* Phil Willon, *Lykes Keeps Oil Company in Business*, TAMPA TRIB., Dec. 7, 1995, at Metro 1.

72. *See* Poynter, *supra* note 1, at 8A.

73. Phil Willon, *Lykes Fuels Coastal Bid to Drill Offshore Oil Rig*, TAMPA TRIB., July 24, 1995, at Metro 1.

"have insufficient funds to continue operations after 1995."[74] However, recently Coastal has begun to win its battles in Florida courtrooms.

In 1992, the Lykes Company of Florida invested a large amount of money in Coastal.[75] Commenting on the investment, Florida Attorney General, Bob Butterworth stated, "Lykes sees dollars . . . . Coastal is not a drilling company. Coastal is a lottery,"[76] implying that Lykes involved itself with Coastal because it foresees a potentially large settlement from the State for the return of Coastal's leases. However, Lykes may have a bona fide interest in oil drilling because Lykes required at least half of the invested money to be used for aggressive oil and gas exploration.[77]

Coastal Caribbean Oils & Minerals owns 67.5% of Coastal.[78] The Lykes family owns 7.8 million shares, about 23% of Coastal.[79] Philadelphia investor Leon Gross owns 3.2 million shares, about 10% of the company.[80] According to SEC records, the company has about $6 million in cash, which was raised earlier this year when the company released 6.7 million shares of stock for sale at $1 each.[81] Because the company makes no money from oil, Coastal's financial health depends upon its 14,000 investors who have purchased 33 million shares.[82]

V. LITIGATION BETWEEN COASTAL PETROLEUM AND THE STATE OF FLORIDA IN THE 1990S

A. The Near Shore Royalty Rights and the 1990 Drilling Ban

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74. Willon, *supra* note 37, at Metro 1.

75. *See id*.

76. Willon, *supra* note 71, at Metro 1.

77. *See Lykes Bros. Co. Pushes Oil-Well Drilling*, LAKELAND LEDGER PUBLISHING CORP., July 25, 1995, at 3B.

78. *See* Barry Meier, *A Florida Company Does Little But Sue, But It has Prospects*, WALL ST. J., Aug. 26, 1986.

79. *See* Poynter, *supra* note 1, at 8A.

80. *See* Epstein, *supra* note 70, at Nation 1.

81. *See* Poynter, *supra* note 1, at 8A.

82. *See id.* One enthusiastic investor who owns 4% of the company remarked that maintaining the existence of the company was "almost like a religion with me." Meier, *supra* note 78; *see also* Epstein, *supra* note 70, at Nation 1.

After the signing of a Settlement Agreement in 1976, fourteen years passed in which no company, including Coastal, drilled for oil.[83] In 1990, when Florida banned offshore oil drilling, with the exception for Coastal's lease in the seven to ten mile strip, Coastal commenced litigation claiming that the ban constituted a taking of Coastal's royalty interest of 6.25% in profits in the near shore area of the leases.[84] The State agreed to suspend Coastal's yearly rental of approximately $60,000 for all three leases until the lawsuits were resolved.[85]

Estus Whitfield, director of the governor's environmental office in 1990, stated, "'It has never been my understanding that an oil and gas lease guarantees the right to drill,'" thereby implying that no taking could exist where profits were so uncertain.[86] Coastal has rejected that contention as "hard to accept" because Coastal's leases require the company to regularly drill a specified number of holes.[87]

In a circuit court decision, Judge Padovano held that the Settlement Agreement, which established the amount of the royalty decision, "was silent as to whether the Trustees have a duty to cooperate with prospective lessees or whether the State may simply prohibit leasing, permitting, and drilling in the royalty areas."[88] Although Coastal claimed the royalty area had oil prospects at the time of the Settlement Agreement, Judge Padovano ruled to the contrary, noting that twenty-one of twenty-two wells drilled had come up dry;[89] Coastal spent $16 million on the leases before 1968

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83. *See* Poynter, *supra* note 1, at 8A.

84. *See id.* As explained above, the ban had an exception for entities who had a valid oil lease in effect before the 1990 act. *See* FLA. STAT. § 377.242(1)(b)(1995). Coastal was the only company with such a lease. However, in the Settlement Agreement, Coastal surrendered its lease rights to the near shore area and maintained only a royalty interest. Because the exception in the ban was for the leases in the near shore area, not royalty interests, where Coastal possessed the right to royalties if the oil was discovered, Coastal's interest went from a potential 6% to zero. *See* Settlement Agreement, *supra* note 45, at 6.

85. *See* Willon, *supra* note 73, at Metro 1.

86. Stewart-Gordon, *supra* note 69.

87. *Id.*

88. Coastal Petroleum Co. v. Chiles, No. 90-3195 (Fla. 4th Cir. Ct. 1996) (on file with the Office of the Att'y General, Tallahassee, Fla.).

89. *See id.* Coastal struck oil on one occasion in 1954. The oil was found inland at 40 Mile Bend in South Florida. *See* Willon, *supra* note 73, at Metro 1.

with no oil ever produced; and from 1976 to the filing of the suit at bar no third party had requested a grant of any leases from the State in Coastal's royalty area.[90]

The court found that the lease did not contain an implied condition that the State lease the near shore area because Coastal had not bargained for this right.[91] The court also determined that the State was not bound to act as a "reasonably prudent landowner" because it also had environmental policies to further.[92] Additionally, the court held that Coastal had given away land-use decisionmaking authority in the Settlement Agreement when it agreed that "Coastal shall have no right to intervene in any land use decisions within the areas leased other than as to the outermost three miles."[93] Judge Padovano held that the ban was passed to prevent ecological harm pursuant to the public trust doctrine,[94] in light of the Legislature's assertion that "future oil and gas drilling on sovereign lands in the near shore waters of the State would be detrimental and contrary to the public interest."[95] Significantly, Florida's constitutional codification of the public trust doctrine, which had long existed in state case law, occurred in 1970, six years before the Settlement Agreement.[96] Coastal has an appeal currently pending before the First District Court of Appeal,[97] where oral arguments were held on February 25, 1997.[98]

B. The Battle Over a Permit to Drill Off of St. George Island

1. The Department of Environmental Protection

Aside from the dispute involving Coastal's rights in the near shore zone, Coastal is also involved in another dispute. This second

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90. *See* Coastal Petroleum Co. v. Chiles, No. 90-3195 (Fla. 4th Cir. Ct. 1996) (on file with the Office of the Att'y General, Tallahassee, Fla.).

91. *See id*. at 6.

92. *Id.* at 9.

93. *Id*.

94. *See id*.

95. *Id.* at 15.

96. *See* discussion *infra* Part VI.B.

97. *See* Poynter, *supra* note 1, at 9A.

98. The author attended these oral arguments. At the time of this writing, a decision has not been rendered.

dispute takes place in the outer three-mile zone off St. George Island. Coastal has chosen this site to commence new exploratory drilling operations.[99] Florida has made two attempts to require Coastal to post a bond that would cover clean-up costs in case of an oil spill.[100] The first attempt sought a $515 million insurance bond to cover clean-up costs as well as potential harm to Florida's $31 billion tourism industry.[101]

DEP may require certain conditions precedent before issuing a drilling permit to Coastal. Section 377.2425, *Florida Statutes*, states that prior "to granting a permit . . . the department shall require the applicant or operator to provide surety that these operations will be conducted in a safe and environmentally compatible manner."[102] An applicant can choose to provide a bond that satisfies environmental provisions of the statute or pay into the Minerals Trust Fund at a rate of $4,000 per well for the first year and $1,500 per well for each subsequent year.[103] A surety guarantees that a company has the money to clean up a spill if it occurs, so Florida taxpayers will not have to pay the bill.

In 1995, DEP told Coastal it would not be granted a permit to drill off St. George Island unless Coastal posted a $515 million security, an amount based upon estimated clean-up costs in the event of a spill.[104] Coastal was unsuccessful in its endeavor to raise that amount, and DEP denied the permit.[105] The First District Court of Appeal held that DEP had exceeded its statutory authority when it required the $515 million security, stating, "Nothing in section 377.2425 suggests that the department can require additional security when an applicant has paid into the fund."[106] Coastal had already elected to join the Minerals Trust Fund with the annual payment of $4,000 specified in that

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99. *See* Jim Ash, *Bill Will Require Oil Drillers to Post Bond*, FLA. TODAY, May 29, 1997, at 5B.

100. *See Reckless Assault*, *supra* note 24, at Nation 14.

101. *See id*.

102. FLA. STAT. § 377.2425 (1995).

103. *See id.* § 377.2425(1) (b).

104. *See* Coastal Petroleum Co. v. Department of Envtl. Protection, 649 So. 2d 930 (Fla. 1st DCA 1995).

105. *See id.*

106. *Id*.

section.[107] The Florida Supreme Court denied certiorari on the matter.[108]

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107. *See id.* at 931.

108. *See* Department of Envtl. Protection v. Coastal Petroleum Co., 660 So. 2d 712 (Fla. 1995).

2. Governor Chiles and the Cabinet and the Trustees

When the First District Court of Appeal rejected DEP's attempt to require the $515 million bond, Governor Chiles and the Trustees tried to require a $1.9 billion bond under the authority of section 253.571, *Florida Statutes,* which empowers the Trustees to require proof of financial responsibility of a developer prior to mining on public trust land.[109] Coastal claimed that the bond was an unconstitutional retroactive application of a statute to a preexisting lease.[110] Because the lease was executed in the 1940s and the Florida Legislature did not enact the statute until 1969, the First District Court of Appeal agreed.[111]

The court said that in the 1976 Settlement Agreement, Coastal agreed to satisfy the requirements of all environmental permitting agencies. Because the Trustees are not a "permitting agency," they could not impose a bond under this banner.[112] The Settlement Agreement also had a clause that waived the State's right to assert drilling requirements not specified in chapter 20680, 1941 Laws of Florida.[113] That clause would exclude the authority conferred by section 253.571.[114] In addition, the court stated that since the State had other remedies at its disposal, intrusion upon this contract was not warranted.[115] The State's remedies were that Coastal could and did contribute to the Minerals Trust Fund and that Coastal's contract requires Coastal to assume responsibility for all damage it causes.[116] The court did not address the adequacy of a $4,000 (or $1,500 for subsequent years) contribution per well nor the fact that Coastal may well be judgment-proof, since a judgment against Coastal may prove worthless if Coastal has no assets with which to pay. The Florida Supreme Court again refused certiorari.[117]

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109. *See* FLA. STAT. § 253.571 (1995); Coastal Petroleum Co. v. Chiles, 672 So. 2d 571, 572 (Fla. 1st DCA 1996).

110. *See Coastal Petroleum*, 672 So. 2d at 572.

111. *See id.* at 573

112. *Id.* at 573-72 (citing Settlement Agreement, *supra* note 45, at 6).

113. *See id.* at 573 (citing Settlement Agreement, *supra* note 45, at 5).

114. *See id.* at 573-74.

115. *See id.* at 573.

116. *See id.*

117. *See* Chiles v. Coastal Petroleum Co., 678 So. 2d 1287 (Fla. 1996).

3. Must DEP Now Issue the Permit?

After losing its bid to require Coastal to post the $515 million bond, DEP had no other alternative but to issue the permit for the site off the coast of St. George Island. Before DEP issues a permit, the *Florida Administrative Code* requires that Coastal publish for the public's benefit DEP's "notice of intent" to issue the permit.[118] This notice gives interested parties and environmental groups an opportunity to initiate an administrative hearing before the Division of Administrative Hearings (DOAH).[119]

Coastal asked the First District Court of Appeal to order DEP to issue the final permit immediately because the public was noticed and had already had an opportunity to intervene concerning the issuance of this permit.[120] The State argued that not all people having an interest in the *denial* of the permit were in the group of people having an interest in the *granting* of the permit.[121] The State further contended that without a second hearing, certain interested members of the public would be denied their opportunity to speak about the permit, through no fault of their own.[122] Coastal objected, arguing this was a stalling tactic, as these hearings could take two years to conclude.[123] In February of 1997, the First District Court of Appeal granted environmental groups the opportunity to protest Coastal's oil drilling plans at DOAH.[124]

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118. FLA. ADMIN. CODE ANN. r. 62-103.150 (1996); *see also Court Orders Florida to Explain its* Policy, OIL DAILY, Sept. 16, 1996; Dean Interview, *supra* note 13.

119. *See* FLA. ADMIN. CODE ANN. r. 62-103.150 (1996).

120. *See* Coastal Petroleum Co. v. Department of Envtl. Regulation, No. 96-3226 (Fla. 1st DCA Feb. 10, 1997) (petition review of non-final order from August 1996); *see also* Dean Interview, *supra* note 63.

121. *See* Coastal Petroleum Co. v. Department of Envtl. Regulation, No. 96-3226 (Fla. 1st DCA Feb. 10, 1997) (petition review of non-final order from August 1996); *see also* Dean Interview, *supra* note 63.

122. *See* Coastal Petroleum Co. v. Department of Envtl. Regulation, No. 96-3226 (Fla. 1st DCA Feb. 10, 1997) (petition review of non-final order from August 1996); *see also* Dean Interview, *supra* note 63.

123. *See Across the Nation Florida: Enviros Challenge Coastal's Oil Drilling Plans*, AM. POL. NETWORK GREENWIRE, Sept. 6, 1996, at 16.

124. *See* Coastal Petroleum Co. v. Department of Envtl. Regulation, No. 96-3226 (Fla. 1st DCA Feb. 10, 1997) (petition review of non-final order from August 1996); *see also* Chris Poynter, *Court Rules that Public Can Fight Coastal Drilling Plan*, TALL. DEM., Feb. 12, 1997, at B1.

In the administrative hearing, DEP must defend its decision before an administrative officer. The administrative officer will make a recommendation and will forward it to DEP, which may accept or reject it. Coastal may then appeal the DEP order to the First District Court of Appeal.[125] With the passage of the new law giving the Administrative Commission authority to impose a bond on Coastal's activity,[126] DEP has asked DOAH to relinquish jurisdiction of the citizen hearing, which is scheduled for September 1997.[127] DOAH is considering that motion currently.[128]

4. Administrative Challenges by Interested Environmental Groups

Sierra Club and the Florida Audubon Society filed a petition with DOAH on August 20, 1996, requesting a formal administrative hearing on the permit.[129] Their petition contends that section 377.241, *Florida Statutes*, requires that the permit be denied because:

> the ocean environment is extremely sensitive to potential adverse effects of oil drilling; Coastal has had the lease for almost fifty years without producing any oil gas or minerals; Coastal ceased bona fide exploratory activities over 20 years ago; and there is only an extremely remote possibility of finding oil or gas in commercially recoverable quantities.[130]

The permitting agency is required to take into account the nature of the area surrounding the site of the proposed drilling; the character of the mineral ownership interest of the applicant, including the length of time the applicant has held such rights without performing any exploratory operations; and the likelihood of the

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125. *See DEP Still Obligated to Issue Oil-Drilling Permit But Coastal Petroleum Must Give Public Notice*, FRANKLIN CHRON., Feb. 21, 1997, at A1. "There are three additional permits [Coastal] must have before any drilling can take place, and these permit applications are also subject to notice provisions, and possible challenge." *Id.*

126. *See* notes 61-63 and accompanying text.

127. *See* Dean Interview, *supra* note 63.

128. *See id.*

129. *See* Christine Younger, *Florida Environmentalists Challenge Coastal Petroleum Oil Drilling Permit*, WEST'S LEGAL NEWS, Sept. 5, 1996, at 9237.

130. *Id.* (citing a petition filed with DEP on August 30, 1996 by the Florida Wildlife Federation, Florida Chapter of the Sierra Club, and the Florida Audubon Society asserting the sensitive nature of the St. George Island beach).

presence of oil, gas or minerals in large enough quantities to be commercially recoverable before issuing a permit.[131] This statutory requirement may present a formidable obstacle for Coastal, considering that it possessed its drilling rights for over fifty years, has sunk approximately twenty wells, has produced no oil, and wants to drill off a pristine coastline.[132]

At the time of this writing, Coastal and the Attorney General are awaiting an opinion from the First District Court of Appeal as to whether Judge Padovano[133] correctly ruled that the ban on offshore oil drilling was not a taking of Coastal's royalty interest in the near shore area. The court heard oral argument on this question on February 25, 1997.[134] That same day, Coastal filed an application for twenty-two new drilling permits in the outer three-mile zone.[135] Now that the First District Court of Appeal has rejected Coastal's attempt to force DEP's issuance of the drilling permit without first publishing notice to the public and allowing an opportunity for an administrative hearing,[136] the Sierra Club and Florida Wildlife Federation's administrative petition to commence a hearing will go forward, unless DOAH accedes to DEP's motion to relinquish jurisdiction.[137]

If the environmental groups' administrative challenges fail, Coastal can begin drilling barring two events. DEP could refuse to issue a permit. A question exists as to whether DEP could still refuse to issue the permit once Coastal has satisfied all statutory and administrative requirements. In other words, does Coastal have a legally protected right to a drilling permit?[138] Additionally,

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131. *See* FLA. STAT. § 377.241 (1995).

132. *See* discussion *supra* Part III.

133. Since deciding this case at the trial level, Judge Padovano was appointed to the First District Court of Appeal of Florida, the same court in which the appeal is being heard.

134. The author personally attended these oral arguments.

135. *See* Telephone Interview with Denis Dean, Ass't Att'y General, Tallahassee, Fla. (Feb. 28, 1997) [hereinafter Dean Interview].

136. *See* Coastal Petroleum Co. v. Department of Envtl. Regulation, No. 96-3226 (Fla. 1st DCA Feb. 10, 1997) (petition review of non-final order from August 1996); Poynter, *supra* note 1, at 8A.

137. *See* discussion *supra* Part V.B.3.

138. However, Dean has stated that DEP affirmatively intends to issue the permit once Coastal satisfies the requirements for the administrative hearing. *See* Interview with

the Governor and the Trustees could revoke the leases under the State's public trust doctrine in Article X of Florida's Constitution.[139] If this happens, Coastal would likely file suit seeking payment from Florida taxpayers for the value, albeit speculative, of the leases. Thus, the question becomes: Does the public trust doctrine exempt the State from paying for the value of the property interest it has taken?[140]

VI. LEGAL ANALYSIS

With the background of the Coastal litigation laid, this Comment turns its focus to evaluating the potential legal arguments of Coastal and the State of Florida. The coming section will analyze the likelihood of Coastal and the State's success based on a variety of legal theories, including the Submerged Lands Act of 1953, public trust doctrine, vested rights, takings, and substantive due process. The Submerged Lands Act and public trust doctrine arguments pertain to both of Coastal's fights: protection of all its near shore royalty rights and obtaining a permit to drill off St. George Island. The vested rights, takings, and substantive due process arguments are targeted specifically at the St. George permitting controversy.

A. Submerged Lands Act of 1953

In 1845, the Supreme Court stated that title to submerged lands in navigable waters belongs to the states.[141] It was generally presumed that these lands included offshore submerged lands. In 1897, California became the first state to successfully drill for oil

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Denis Dean, Ass't Att'y General, Tallahassee, Fla. (Jan. 27, 1997) [hereinafter Dean Interview].

139. *See* FLA. CONST. art. X; Dean Interview, *supra* note 138; *see also* discussion *infra* Part VI.B (providing a comprehensive analysis of the public trust doctrine).

140. The third outcome could be that the Administrative Commission could set a bond so high that Coastal would not be able to raise adequate funds to pay. In that case, Coastal would not be entitled to a permit due to its failure to post the requisite bond. However, since section 377.242, *Florida Statutes* was just passed, its impact on Coastal remains speculative. *See* discussion *supra* Part III (describing the new law).

141. *See* Pollard v. Hagan, 44 U.S. 212, 230 (1845).

offshore.[142] It was not until 1937 that the United States Department of the Interior "suddenly changed its position concerning the states' title to the territorial sea."[143] In 1947, the Supreme Court affirmed the Department's change in policy in a California case when it held California had no ownership rights in the three-mile territorial sea.[144] Although the case applied only to California, the language in the opinion was sufficiently broad to upset presumed rights of all coastal states in the three-mile territorial sea.[145]

In 1953, Congress resolved the dispute by passing the Submerged Lands Act which confirmed title to land beneath navigable waters, including ocean waters, to the states within their respective boundaries.[146] The United States tried to challenge the effect of the Act in 1960[147] and 1975.[148] The United States Supreme Court confirmed that the Act granted Florida three marine leagues seaward from its coastline into the Gulf of Mexico.[149] In 1976, the Supreme Court issued a consent decree again confirming that Florida is entitled to all lands, minerals, and other natural resources extending from the coastline to three marine leagues into the Gulf of Mexico and three miles into the Atlantic.[150]

Coastal's entire lease could be void if, due to the Supreme Court's decision in 1947, California had no ownership rights in the three mile territorial sea. Florida similarly was without authority to lease the submerged lands in 1941.[151] What is significant is that, arguably, Florida did not receive congressional authorization to make the 1941 agreement until 1953. Thus, arguably, Coastal

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142. *See* Donna R. Christie, *Making Waves: Florida's Experience with Extended Territorial Sea Jurisdiction*, 1 TERRITORIAL SEA J. 81, 87 (1990).

143. *Id.*

144. *See* United States v. California, 332 U.S. 19, 22 (1947).

145. *See* Christie, *supra* note 142, at 87-88.

146. *See* 43 U.S.C. §§ 1301-1315 (1986 & Supp. 1997).

147. *See* United States v. Louisiana, 363 U.S. 1 (1960).

148. *See* United States v. Louisiana, 420 U.S. 515 (1975).

149. *See* United States v. Florida, 363 U.S. 121, 127 (1960). A marine league is three nautical or geographical miles. A nautical or geographical mile is 6,080 feet. A land mile is 5,280 feet. *See* BLACK'S LAW DICTIONARY 667, 685 (6th ed. 1991).

150. *See* United States v. Florida, 425 U.S. 791, 791-92 (1976).

151. *See* United States v. California, 332 U.S. 19, 22 (1947).

would have received nothing because the state as grantor did not in fact own the property at the time of the conveyance. If Coastal did not receive any rights in the 1940s, it has no case today.

Coastal may have an estoppel-by-deed argument to defeat this contention. In the *Coastal Petroleum Co. v. American Cyanamid Co.*,[152] the Florida Supreme Court found that the Trustees were not estopped from claiming legal title to sovereignty lands encompassed within previously conveyed deeds.[153] The Florida Supreme Court allowed the State to repudiate the deed because the deed "does not show that the Trustees *intended* to convey *sovereignty* lands" along with the *swamp and overflowed* lands that the State did clearly intend to convey.[154] The State survived the estoppel-by-deed argument in *Cyanamid* because its intent to convey sovereignty lands along with the swamp and overflowed lands was unclear. The State would have patent difficulty making the same argument in a case against Coastal because Coastal's leases clearly demonstrate the Trustees' intent to convey rights in the subject sovereignty lands.[155] Thus, Coastal would have an excellent estoppel-by-deed argument because Coastal can show reliance and the State's clear intent to lease the interest at issue.

B. Public Trust Doctrine

An analysis of the State of Florida's conveyance to Coastal of these leases under the public trust doctrine must begin with consideration of the leading case on the public trust doctrine, *Illinois Central Railroad Co. v. Illinois*.[156] Illinois granted a railroad title to virtually all of the submerged land in Chicago harbor.[157] The grant was a fee in perpetuity, just as Coastal's leases were in perpetuity prior to the Settlement Agreement.[158] In *Illinois Central*, the United States Supreme Court said that the conveyance of a mere 1,000 acres of submerged land was a "gross perversion of the trust over

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152. 492 So. 2d 339 (Fla. 1986).
153. *See id.* at 343.
154. *Id.* (emphasis added).
155. *See* 1941 Drilling Lease, *supra* note 34.
156. 146 U.S. 387 (1892).
157. *See id.* at 450-51.
158. *See id.* at 448.

the property."[159] By contrast, Coastal's leases embraced 3.6 million acres of submerged lands.[160] The court stated that while the State may grant parcels of land, "the abdication of the general control of the State over lands under the navigable waters of an entire harbor or bay, or of a sea or lake" is not permitted.[161] Likewise if a state purports to make a grant that is offensive to the public trust doctrine, the grant is always revocable, if not void, at any time in the future.[162] This is because the state "can no more abdicate its trust over property . . . like navigable waters . . . than it can abdicate its police powers in the administration of government and the preservation of peace."[163] The Supreme Court said that the people's interest in public trust lands could not be dependent upon the choices of past legislatures:

> The legislation which may be needed one day for the harbor may be different from the legislation that may be required at another day. Every legislature must, at the time of its existence, exercise the power of the state in the execution of the trust devolved upon it. We hold, therefore, that any attempted cession of the ownership and control of the state in and over the submerged lands . . . was inoperative.[164]

The Florida Supreme Court considers it an "uncontroverted legal proposition" that "Florida received title to all lands beneath navigable waters, up to the ordinary high water mark, as an incident of sovereignty, when it became a state in 1845."[165] All navigable waters and submerged lands under navigable waters are held by the sovereign for the benefit of the people.[166] This principle was codified in Florida's Constitution: "The title to lands under navigable waters . . . is held by the state, by virtue of its sovereignty, in trust for all the people . . . Private use of portions of

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159. *Id.* at 455.
160. *See* note 2 and accompanying text.
161. *Illinois Central*, 146 U.S. at 452-53.
162. *See id.* at 455.
163. *Id.* at 453.
164. *Id.* at 460.
165. Coastal Petroleum v. American Cyanamid Co., 492 So. 2d 339, 342 (Fla. 1986).
166. *See* Merrill-Stevens Co. v. Durkee, 57 So. 428, 431 (Fla. 1912).

such lands may be authorized by law, but only when not contrary to the public interest."[167]

While further analysis would be required to establish the legal navigability of the inland waterways conveyed in Coastal's leases, the 425-mile strip reaching 10.36 miles out into the Gulf of Mexico is unquestionably sovereign submerged land held in the public trust.[168] From time immemorial, the Gulf has been used for all traditional public trust uses: commerce, navigation, and fishing.[169] An analysis of Coastal's leases under *Illinois Central* suggests that Florida's conveyance of drilling rights violated the public trust doctrine at its inception. A challenge could be mounted against the 1944 lease on the grounds that 3.6 million acres is not a parcel of land under any reasonable definition. A grant that is offensive to the public trust doctrine is always revocable, if not void.[170] However, revocation is not barred simply because the lease has been in existence for fifty years since "[a]ny grant of the kind is necessarily revocable, and the exercise of the trust by which the property was held by the State can be resumed at any time."[171] When the Florida Legislature passed the ban against offshore drilling in 1990, it was giving expression to the tenet that "[e]very legislature must, at the time of its existence, exercise the power of the State in the execution of the trust devolved upon it."[172] In *Coastal Petroleum Co. v. Secretary of the Army*,[173] Judge Atkins specifically held that application of the public trust doctrine limited Coastal's leases.[174]

The Supreme Court seemingly retreated from *Illinois Central* in 1926 when it decided *Appleby v. City of New York*,[175] holding that New York effectively conveyed the *jus publicum* as well as the *jus*

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167. FLA. CONST. art. X, § 11.
168. *See Illinois Central*, 146 U.S. at 455.
169. *See* White v. Hughes, 190 So. 446, 448 (Fla. 1939).
170. *See Illinois Central*, 146 U.S. at 455.
171. *Id.*
172. *Id.* at 460.
173. No. 68-951-Civ.-CA & 69-699-Civ.-CA (consolidated) (S.D. Fla. Jan. 6, 1976).
174. *See id.*
175. 271 U.S. 364 (1926).

privatum[176] in several blocks of land under navigable water.[177] *Appleby* did not overrule *Illinois Central* but merely distinguished it.[178] The difference between these two cases lies in the courts' differing perceptions of what the state legislature has determined to be in the public interest and by the fact that *Appleby*, unlike *Illinois Central*, concerned a small conveyance of property.[179]

Illinois Central seems to establish that Florida's Legislature would have the authority to revoke Coastal's leases under the state's public trust doctrine.[180] The question remains whether compensation would nevertheless be due to Coastal. One court has ruled that in Florida the revocation of a permit does not constitute a taking of property requiring compensation because a permit to perform activities on public land is always subject to the public trust doctrine.[181] A permit does not create a vested right until the permit holder detrimentally relies on the permit.[182] By contrast, the holder of a lease acquires rights that vest at the time of conveyance.[183] It is not known whether this distinction between a permit and a lease would cause a court to reach a different conclusion as to whether no compensation is due when a taking occurs pursuant to the public trust doctrine.

The public trust argument thus far has relied on the notion that Coastal's leases were void at their inception because the doctrine

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176. Originally, in English law, *jus privatum* meant that the sovereign held title over lands, while *jus publicum* vested dominion over the lands in the crown as a trust for the benefit of the public. *See* DONNA R. CHRISTIE, COASTAL AND OCEAN MANAGEMENT LAW 19 (1994).

177. *See Appleby*, 271 U.S. at 399.

178. *See id*. at 395.

179. *See id.* at 393-94.

180. *See* notes 170-172 and accompanying text.

181. *See* Marine One, Inc. v. Manatee County, 898 F.2d 1490, 1492 (11th Cir. 1990) ("Although no Florida cases have been cited where a permit to perform activities on public land was revoked, it is clear from other Florida cases that revocation of such a permit would not constitute a taking of property. In *Graham v. Edwards*, the court stated that a permit to erect structures on sovereign submerged lands does not exempt the permit-holder from exercise of the state's proprietary powers over those lands. Those proprietary powers are founded on the 'public trust doctrine,' long a part of Florida jurisprudence . . . ." (citations omitted)).

182. *See* Franklin County v. Leisure Properties, Ltd., 430 So. 2d 475, 479 (Fla. 1st DCA 1993); *see also* discussion *infra* Part VI.C.1.

183. *See* discussion *infra* Part VI.C.1.

prohibits a state from leasing such a large amount of sovereign land. Another argument is that the proposed use, offshore oil drilling, may violate of the public trust doctrine. In 1941, the Florida Legislature believed that attracting drillers and discovering oil would benefit the public.[184] However, the United States Supreme Court said in *Illinois Central* that each legislature has the authority to reexamine what uses of public lands are in the public's best interest and may repeal acts by previous legislatures if deemed necessary.[185] This proposition raises the question of which uses of the submerged lands off Florida's Gulf Coast fall within Florida's public trust doctrine.

As a part of the common law, the public trust doctrine has historically evolved to meet changing needs. In its original form in England, the doctrine only applied to navigable waters that were affected by the tides.[186] This application made sense with respect to an island country. American courts modified the doctrine to include its many navigable waterways that are not tidally influenced.[187] Similarly, in its traditional form, the public trust uses were primarily commerce, navigation, and fishing.[188] Courts in recent decades, however, are beginning to recognize preservation of the shrinking natural environment for recreation and ecological preservation as a legitimate expression of the public trust doctrine.[189] The California Supreme Court, for instance, has said:

> There is growing public recognition that one of the most important public uses of the tidelands—a use encompassed within the tidelands trust—is the preservation of those lands in their natural state, so that they may serve as ecological units for scientific study, as open space, and as environments which provide food and habitat for birds

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184. *See* FLA. STAT. § 253.49 (1941) (repealed 1947).

185. *See* Illinois Cent. R.R. v. Illinois, 146 U.S. 387, 460-62 (1892).

186. The public trust doctrine provides that the State, as trustee for the people, bears the responsibility of preserving and protecting submerged lands for the public to use for fishing, commerce, navigation, and more recently, recreational and ecological purposes. *See* BLACK'S LAW DICTIONARY 859 (6th ed. 1991).

187. *See* CHRISTIE, *supra* note 176, at 19-20.

188. *See id.*

189. *See id.*

> and marine life, and which favorably affect the scenery and climate of the area.[190]

Thus, two viable arguments could be made that Coastal's leases violate the public trust doctrine. The first is that the 3.6 million acre lease violated *Illinois Central*'s prohibition on massive grants of public trust land; the second is that preservation of the Gulf by a ban on offshore oil drilling is an integral part of public trust doctrine that has evolved in Florida. If these arguments were to succeed, then Coastal's leases could possibly be void. Consequently, Coastal might not be entitled to any right to drill off Florida's coast or receive damages for not being able to drill.

C. Vested Rights

1. Florida Law

To successfully pursue a takings claim, Coastal must possess a development expectation recognized by state law that is reasonable enough to find a vested right interest.[191] By virtue of the leases, does Coastal also have a vested right to a drilling permit? As stated in *Town of Largo v. Imperial Homes Corporation*,[192] "[O]ne party will not be permitted to invite another onto a welcome mat and then be permitted to snatch the mat away to the detriment of the party induced or permitted to stand thereon . . . ."[193] Coastal may make the equitable estoppel argument necessary to establish a vested right to a permit if: "(1) relying in good faith (2) upon some act or omission of the government (3) it has made such a substantial change in position or incurred such extensive obligations and expense that it would be highly inequitable and unjust to destroy the rights it has acquired."[194]

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190. Marks v. Whitney, 491 P.2d 374, 380 (Cal. 1971) (stating that the public trust doctrine encompasses preserving land in its natural state); *see also* Kootenai Envtl. Alliance, Inc. v. Panhandle Yacht Club, Inc., 671 P.2d 1085, 1087 (Idaho 1983) (stating that the public trust doctrine includes "varied public recreational uses in navigable waters").

191. *See* John J. Delaney & Emily J. Vaias, *Recognizing Vested Development Rights as Protected Property in Fifth Amendment Due Process and Takings Claims*, 49 WASH. U. J. URB. & CONTEMP. L. 28, 29 (1996).

192. 309 So. 2d 571 (Fla. 2d DCA 1975).

193. *Id.* at 573.

194. *Id.* at 572-73.

A court would first have to determine whether Coastal acquired a vested interest. The vast majority of cases involve a developer asserting vested rights in a development permit for private property.[195] In this case, Coastal would argue that it has a vested right in a permit to develop on public, submerged land. *Marine One, Inc. v. Manatee County*[196] held that a landowner or developer has no property right in possession of a building permit on public land.[197] Furthermore, the *Marine One* court found that a county's revocation of a construction permit for a marina built on sovereign submerged lands was not a taking because the permittee did not have a property right in that permit.[198] Activities performed on public land are "mere *licenses* whose revocation cannot rise to the level of a Fifth Amendment taking."[199] *Marine One* has been cited with approval on several occasions.[200] In the event that a court did not find *Marine One* controlling, Coastal would have to prove that it had a vested right to a permit under the elements of equitable estoppel outlined above.

Several indications suggest that Coastal should have reasonably expected a change in the regulations on oil drilling in Florida. DEP and Governor Chiles tried to condition drilling on the obtaining of clean-up bonds ranging from $515 million to $1.9 billion, respectively.[201] DEP introduced legislation in the 1997 legislative session that would give the Trustees greater leverage in requiring sureties commensurate with the potential damage an oil driller could cause.[202] The Sierra Club and the Florida Audubon Society filed a petition requesting a formal administrative hearing on the permit,

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195. *See, e.g.*, Equity Resources, Inc. v. County of Leon, 643 So. 2d 1112 (Fla. 1st DCA 1994); Franklin County v. Leisure Properties, Ltd., 430 So. 2d 475, 479 (Fla. 1st DCA 1993).

196. 898 F.2d 1490 (11th Cir. 1990).

197. *See id.* at 1492-93.

198. *See id.*

199. *Id.* (emphasis added).

200. *See* Corn v. City of Lauderdale Lakes, 771 F. Supp. 1557, 1568 (S.D. Fla. 1991); Villas of Lake Jackson, Ltd. v. Leon County, 796 F. Supp. 1477, 1486-87 (N.D. Fla. 1992); Decarion v. Monroe County, 853 F. Supp. 1415, 1418 (S.D. Fla. 1994).

201. *See* note 109 and accompanying text.

202. This legislation ultimately passed and went into effect in May of 1997. *See* notes 61-63 and accompanying text.

the granting of which, they contend, could lead to the ruin of Florida's sensitive ecosystem.[203] The red flags of political resistance to Coastal's venture are evident, as Coastal's president, Phil Ware, himself acknowledged in a 1996 interview with the *Tallahassee Democrat*.[204] Yet, according to *A.H. Sakolsky v. City of Coral Gable*s,[205] these signs of resistance will not necessarily result in a finding of bad faith reliance by Coastal. The Florida Supreme Court rejected the "red flags doctrine" and stated that even where a petitioner has good reason to believe that the "official mind might change because 'strenuous objection was present and made known, [and because a] suit was threatened and the political issue made apparent,'" a petitioner can still rely in good faith that its intended action will be permitted.[206] The court did not believe that developers should be subject to the instabilities of a municipal body merely because its membership is subject to change.[207]

In making a vested rights determination, a court will next consider whether the government made any representations that would authorize Coastal's particular course of activity or development. As an initial matter, the law in this area is concerned with protecting private property owners from overstepping by governmental entities: "A citizen is entitled to rely on the assurances and commitments of a zoning authority and if he does, the zoning authority is bound by its representations, whether they be in the form of words or deeds."[208] For example, while the mere purchase of land may not create a right to rely on existing zoning, a developer may legitimately rely on a rezoning when the municipality knew that the developer's purchase of the land was contingent solely upon obtaining that rezoning.[209] Coastal will benefit from the language in the *Imperial Homes* decision which

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203. *See* notes 129-132 and accompanying text.

204. Ware conceded, "Not everyone is real in favor of Coastal drilling." Poynter, *supra* note 1, at 9A.

205. 151 So. 2d 433, 435 (Fla. 1963).

206. *Id.* at 435.

207. *See id.*

208. Town of Largo v. Imperial Homes Corp., 309 So. 2d 571, 573 (Fla. 2d DCA 1975).

209. *See id.*

stated that there is no requirement that the private property owner have obtained a building permit in reliance on existing zoning to evoke equitable estoppel.[210]

Coastal will likely argue that the "official act" on which it relied was the signing of the leases. Coastal would assert that this act implied that as long as Coastal followed the permitting procedures, drilling for oil could commence. Behind this argument are two competing policy considerations: (1) preserving the autonomy of governmental entities to regulate land use for the benefit of the general public; and (2) protecting a private property owner's equitable interests. The *Imperial Homes* court discussed the tension between these two important goals:

> [N]othing in this opinion should be construed as any impediment to the efforts of municipalities and other local governmental entities which exercise zoning authority from reducing the density provisions in their zoning regulations in an orderly and comprehensive manner, provided this is accomplished *in the interest of the public health, safety and welfare* and *in a way as not to mislead innocent parties who in good faith rely to their detriment upon the acts of their governing bodies*.[211]

Coastal has a strong equity argument in that the State, as grantor of the lease, not only had notice of Coastal's intent to drill but was the key enabler of drilling activity. In *Sakolsky*, the mayor of Coral Gables suggested a site for the developer to construct a luxury apartment building.[212] The developer obtained a permit, but the city commission later rescinded it in response to public opposition.[213] In that case, the developer had a permit in hand at the time of suit,[214] unlike Coastal, which does not have a permit for the St. George site. However, language in *Imperial Homes* indicates that a private property owner need not have obtained a building permit before equitable estoppel can apply.[215] Thus, the *Sakolsky* court's decision to preclude the city commission from rescinding

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210. *See id.*

211. *Id.* at 574 (emphasis added).

212. *See* Sakolsky v. City of Coral Gables, 151 So. 2d 433, 433-34 (Fla. 1963).

213. *See id.* at 434.

214. *See id.*

215. *See Imperial Homes*, 309 So. 2d at 573.

the permit on equitable estoppel grounds and its emphasis on the mayor's role in enabling construction suggest that Coastal might successfully wield this estoppel argument.

Ultimately, a court will have to decide whether the State's environmental interests can be safeguarded by a less unilateral method than denial of a permit to drill.[216] If Coastal can show that it will conduct its drilling activity in a sufficiently careful manner, a court may find that such a resolution appropriately balances the strong equitable interests of Coastal and the responsibilities of the State as guardian of Florida's natural resources.

One Florida case implies that a permit can lapse due to a developer's inaction. In *Hollywood Beach Hotel*, the Fourth District found that after receiving permission but electing not to proceed or initiate construction, the developer relinquished and forfeited its vested right in the building permit.[217] The Florida Supreme Court rejected this holding but only because "it fails to take into account the unique facts which dominate the instant case."[218] The unique facts created an adverse political climate and delays attributable to the city commissioners.[219] In Coastal's case, "from 1976 to 1990, the company was dormant except for lawsuits. But when the state moved in 1990 to ban offshore oil drilling altogether, Coastal came alive."[220] In that time frame, Coastal chose not to drill, not because of political opposition, but because it could not find an oil company interested in investing in the venture so unlikely to be profitable.[221] If Coastal had a right to a permit, it arguably may have lapsed under *Hollywood Beach Hotel* because Coastal's business reality, not political opposition, caused the leases to lay idle.

The final factor in a court's vested rights determination involves whether Coastal, in reliance on the leases, made substantial investments or incurred extensive obligations in preparation for oil drilling. Every year since it obtained its leases, Coastal made payments

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216. *See id.*

217. *See* City of Hollywood v. Hollywood Beach Hotel, 283 So. 2d 867, 870 (Fla. 4th DCA 1973), *aff'd in part, rev'd in part*, 329 So. 2d 10 (Fla. 1976).

218. *See* City of Hollywood v. Hollywood Beach Hotel, 329 So. 2d 10, 16 (Fla. 1976).

219. *See id.*

220. Poynter, *supra* note 1, at 8A.

221. *See id.*

to the State which began around $20,000 in 1941 and reached approximately $60,000 in the 1990s.[222] The State can argue that Coastal's right to drill vests on a yearly basis after it makes its annual payment. Coastal paid every year and enjoyed anew the freedom to exercise its rights under the leases.[223] As a result, the State may argue that the money should not be viewed as a cumulative expenditure but as an annual expenditure for which Coastal reaped a contemporaneous benefit—a right to drill which no one else possessed.

Other than the lease payments and its legal bills, Coastal has spent no appreciable amount of money in exploration or preparation for drilling in reliance upon its right to drill; Coastal owns no drilling equipment or boats.[224] Further, Coastal agreed in the 1976 Settlement Agreement that it would secure permits from all appropriate State environmental protection agencies prior to commencing any drilling or mining.[225] Thus, long before Coastal sought to drill at the St. George site, Coastal knew that a permit must be obtained.

In *Equity Resources v. County of Leon*,[226] the First District Court of Appeal held that where "a substantial and not de minimis portion of the overall expenditures benefited future phases of the planned project," the developer could not be denied a permit when the local government was fully aware of the scope of the development and consistently granted permits to continue the development.[227] Under *Equity Resources*, Coastal could argue that the yearly expenditures were benefiting future phases of its oil drilling project. Furthermore, the court in *Equity Resources* specifically rejected a requirement for "large scale developments that would naturally contemplate and require a number of years to

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222. *See* Settlement Agreement, *supra* note 45, at 6; Poynter, *supra* note 1, at 8A; Dean Interview, *supra* note 13.

223. When Coastal's freedom to exercise its rights became encumbered by litigation in 1992, the State permitted Coastal to halt payments. *See* Dean Interview, *supra* note 13.

224. *See* Olinger, *supra* note 67, at 1B.

225. Settlement Agreement, *supra* note 45, at 6.

226. 643 So. 2d 1112 (Fla. 1st DCA 1994).

227. *Id.* at 1119.

complete" be developed within a "reasonable time."[228] Thus, the fact that Coastal may have taken fifty years to exercise its drilling rights at St. George may not be problematic. On the other hand, *Equity Resources* also noted that no evidence indicated that the project was ever abated or abandoned by the developer.[229] In contrast, Coastal chose not to drill for twenty-eight years before the 1990 drilling ban and only became active when the ban was passed affecting the first three miles off Florida's Gulf Coast.[230]

The existence of a "public peril" may be a special exception to the principle of vested rights that could allow the revocation of a vested right under certain circumstances. The Florida Supreme Court stated in dicta that a change in zoning may effectively revoke a building permit "if a municipality can show that some new peril to the health, safety, morals or general welfare of the municipality has arisen between the granting of the building permit and the subsequent change of zoning."[231] However, the court stated that it had "never had the occasion to decide if the exception . . . should be established."[232] A subsequent Third District Court of Appeal opinion relied on this exception, enunciated in *Hollywood Beach Hotel*.[233] Therefore, an argument could be made that a peril has arisen since 1941 when Coastal's leases were granted. That peril is a progressive attrition of Florida's coastal environment caused by industry and Florida's burgeoning human population.[234] As noted by the Florida Supreme Court, "environmental degradation threatens not merely aesthetic concerns vital to the state's economy but also to the health, welfare, and safety of substantial numbers of Floridians."[235] Allowing offshore oil drilling in Florida's Gulf Coast could have the potential to push the State's coastal environmental well-being into a state of peril.

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228. *Id.*
229. *See id.*
230. *See* Poynter, *supra* note 1, at 8A.
231. City of Hollywood v. Hollywood Beach Hotel Co., 329 So. 2d 10, 16 (Fla. 1976).
232. *Id.*
233. *See* Dade County v. Rosell Constr. Corp., 297 So. 2d 46, 48 (Fla. 3d DCA 1974).
234. *See* Department of Community Affairs v. Moorman, 664 So. 2d 930 (Fla. 1995).
235. *Id.* at 932.

The elements of equitable estoppel necessary to show a vested right in Florida require Coastal to demonstrate its good faith reliance upon some act or omission of the government that leads Coastal to incur extensive expense such that it would be highly inequitable to destroy the rights Coastal has acquired. Due to the *Sakolsky* decision, Coastal should easily satisfy the good faith reliance prong. Even though Coastal may not have expended exorbitant sums of money, the yearly lease payments and legal bills would probably satisfy a court as to the "substantial change in position" factor. The real fight would center around whether it would be highly inequitable to destroy these rights: Should the State be held hostage to a overwhelmingly unpopular lease agreement that was signed over fifty years ago that could have a catastrophic effect on Florida's environment and tourist economy? Or should Coastal's rights and change of position be protected? The success of the vested rights argument as applied to Coastal rests upon a court's stance concerning these seminal questions.

2. Federal Law

Though having only persuasive value, a line of federal cases dealing with oil drilling in the outer continental shelf deserves mention in the discussion of Coastal's rights. Federal case law establishes that, like Florida law, vested rights are based upon notions of equitable estoppel.[236] Under federal law, oil and gas leases issued by the Department of Interior traditionally have not been considered to vest a right to a permit.[237] However, the Secretary of Interior does not have the discretion to refuse to issue a permit once a company holding a drilling lease fulfills all applicable statutory conditions and when the statute contains language requiring issuance of a permit upon satisfaction of statutory conditions.[238]

In *Union Oil Company of California v. Morton*,[239] an oil company sued the Secretary of the Interior for denial of permission to construct a drilling platform in federal waters under a federal oil and gas lease.[240] The Secretary had approved the application to install a drilling platform in 1968. In January 1969, before the platform was installed, a very serious oil blowout occurred off the coast of Santa Barbara.[241] As a result, approval of the platform was withdrawn and Union Oil sued.[242]

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236. *See* Southwestern Petroleum Corp. v. Udall, 361 F. 2d 650, 654 (10th Cir. 1966) (finding that rights vested under "existing legislation may [not] be superseded or modified by later legislation"); Wyoming v. United States, 255 U.S. 489, 501 (1921) ("When all statutory requirements have been met to obtain a mineral patent from the federal government, but the patent has not yet been issued, the complying party then has a vested right referred to as 'equitable title.' Such a vested right removes from the United States the power to deprive the holder of the right to the fee title . . . .").

237. *See* Jan G. Laitos & Richard A. Westfall, *Government Interference with Private Interests in Public Resources*, 11 HARV. ENVTL. L. REV. 1, 13 (1987).

238. *See id.*

239. 512 F.2d 743 (9th Cir. 1975).

240. *See id.* at 746.

241. With regard to the severity of the spill, one court reported:

> On January 28, 1969, a Union Oil well on outer continental shelf lands in the Santa Barbara Channel blew out, creating an oil slick of about fifty square miles which caused severe property and environmental damage . . . [and caused] the collapse of the insurance market covering damages caused by offshore oil spills.

Pauley Petroleum Inc. v. United States, 591 F.2d 1308, 1311 (Cl. Ct. 1979).

242. *See Union Oil*, 512 F.2d at 746.

In a written statement, the Secretary detailed his reasons for withdrawing the permit. The Secretary explained that possible oil pollution would have adverse environmental consequences, and the proposed platform would increase interference with recreational and commercial fishing and would be aesthetically undesirable.[243] The Ninth Circuit rejected these considerations as interests that should have been considered before the lease was granted.[244] Nevertheless, the court stated that Union Oil was subject to reasonable restraints on its lease rights when such restraints are based upon sound environmental and/or conservation grounds.[245]

Three years later, another oil company sued the United States for denial of a permit to install an oil platform.[246] The Court of Claims agreed that the United States had breached its lease agreement.[247] The court said the Secretary of the Interior "cannot breach vested contractual rights under the guise of protecting the Channel environment."[248] The court considered it critical that the environmental concerns proffered by the Secretary were "known and undoubtedly considered" when the lease was signed.[249]

This line of cases is instructive in considering Coastal Petroleum's legal position. In *Union Oil*, an oil and gas lease had been signed, and the oil company was protesting the denial of permission to construct a drilling platform,[250] just as Coastal has been fighting the State's resistance to issue a permit to drill. According to the Ninth Circuit, as long as no newly-discovered risk associated with offshore oil drilling has developed, Coastal's lease created a right to drill that cannot be canceled simply because oil drilling has become unpopular.[251] Perhaps this approach by

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243. *See id.* at 748-49.
244. *See id.* at 751.
245. *See id.* at 750-52.
246. *See* Sun Oil Co. v. United States, 572 F.2d 786 (Ct. Cl. 1978).
247. *See id.* at 813.
248. *Id.* at 814.
249. *Id.* at 816.
250. *See id.* at 746.
251. *See Union Oil*, 512 F.2d at 751.

federal courts will sway Florida courts to be more sympathetic toward Coastal's position.

D. Fifth Amendment Takings

The government may regulate the use of property, but if a regulation goes "too far," the government must compensate the landowner for the taking[252] or must rescind the regulation.[253] A regulation that has a *de minimis* effect on the value of property is not compensable.[254] In deciding how far is too far in a regulatory taking, courts use an ad-hoc, fact-specific approach, looking at: (1) the economic impact of the regulation; (2) the character of the government action; and (3) the extent to which the action interferes with reasonable investment-backed expectations.[255]

The first prong examines the economic impact of the regulation and contains two subparts. The United States Supreme Court decision in *Lucas v. South Carolina Coastal Council*[256] held that a legitimate exercise of the police power, whether or not it is required to prevent a nuisance, will not be deemed a taking absent a complete diminution in fair market value.[257] Accordingly, the first subpart of the first prong requires a court to examine whether a denial of a Coastal's permit to drill is a legitimate exercise of police power. In *Graham v. Estuary Properties, Inc.*,[258] the Florida Supreme Court stated that "protection of environmentally sensitive areas and pollution prevention are legitimate concerns within police powers."[259] However, the Second District Court of Appeal

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252. Pennsylvania Coal v. Mahon, 260 U.S. 393, 415 (1922).

253. *See id.*

254. *See* Agins v. City of Tiburon, 447 U.S. 255, 260 (1980); Joint Ventures, Inc. v. Department of Transp., 563 So. 2d 622, 625 (Fla. 1990).

255. *See* Penn Cent. Transp. Co. v. City of New York, 438 U.S. 104, 124 (1978).

256. 505 U.S. 1003 (1992).

257. *See id.* at 1031; *see also* Richard J. Grosso & David J. Russ, *Takings Law in Florida: Ramifications of* Lucas *and* Reahard, 8 J. LAND USE & ENVTL. L. 431, 477-78 (1993).

258. 399 So. 2d 1374 (Fla. 1981).

259. *Id.* at 1381. *Estuary Properties* may be distinguishable, however, from Coastal's facts because in *Estuary Properties* the regulation at issue did not render the developer's property worthless. *See id.* at 1381-82. In Coastal's case, this factual conclusion would rest upon whether Coastal's property is deemed to encompass only the St. George site or all 3.6 million acres. *See infra* notes 263-265 and accompanying text.

of Florida noted that as statutory and regulatory limitations affecting private property owners increase in frequency over this century, the need to compensate for socially reasonable restrictions that substantially impact private rights has also increased.[260] One commentator has stated that the range of police power actions that would prevent a just compensation claim for a total diminution of value has narrowed, declaring that a "valid general concern will not necessarily justify a specific confiscatory action and specific factual and scientific evidence will be required."[261] Thus, although *Estuary Properties* suggests that the State's purpose in denying a permit would be a legitimate exercise of its police powers, the State would still have to demonstrate sufficient scientific evidence to justify its denial.

Assuming that the State succeeded in proving that its denial of Coastal's drilling permit is a valid exercise of the police power, a court would turn to the portion of the takings analysis in which lies the crux of the entire takings question in Coastal's case. The second subpart of the first prong requires a court to analyze whether denial of a permit would result in a complete diminution in fair market value of Coastal's property rights.[262] In examining this issue, a court must decide if Coastal's threatened property interest encompasses only the St. George site or all of the submerged land on which Coastal has lease rights.[263]

The Supreme Court said in *Penn Central*:

> "Takings" jurisprudence does not divide a single parcel into discrete segments and attempt to determine whether rights in a particular segment have been entirely abrogated. In deciding whether a particular governmental action has effected a taking, this Court focuses rather both on the character of the action and on the nature and extent of the interference with rights in the parcel as a whole.[264]

Using this language from *Penn Central*, the State can argue that Coastal has not been deprived of all economic use of its property

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260. *See* Conner v. Reed Bros., 567 So. 2d 515, 519 n.7 (Fla. 2d DCA 1990).

261. Grosso, *supra* note 257, at 482.

262. *See* Lucas v. South Carolina Coastal Council, 505 U.S. 1003, 1019 (1992).

263. *See* Penn Cent. Transp. Co. v. City of New York, 438 U.S. 104, 130-31 (1978).

264. *Id.*

because Coastal's property interest includes its entire leasehold, totaling 2.4 million acres of submerged land.[265] Given this property interest, the State may assert that a permit denial at the St. George site affects a minuscule portion of Coastal's property interest. Coastal will likely counter that its property interest is much narrower, including only its leasehold interest at the St. George site. Thus, Coastal would assert that a denial of a permit to drill at St. George denies all economic use of its rights at St. George.

The heart of the takings analysis as applied to Coastal turns on a court's interpretation of the extent of Coastal's property interest. From Coastal's vantage point, a permit denial would be a total deprivation of economic use under *Lucas* and require compensation. Instead, a court might follow the interpretation of a recent Florida appellate decision that shows that "courts will take a practical, realistic view of the property as a whole for takings analysis."[266] Such an approach would lead to a broader

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265. *See* Settlement Agreement, *supra* note 45. The 2.4 million acres of submerged land constitute Coastal's net leased holdings off Florida's coast after the Settlement Agreement in 1976. *See id.*

266. Grosso, *supra* note 257, at 484. In *Department of Environmental Regulation v. Schlinder*, 604 So. 2d 565 (Fla. 2d DCA 1992), the court did not find a prohibition on filling 1.85 acres of wetlands a taking when the landowner also owned 1.65 acres of uplands which were immediately adjacent. *See id.* at 567-68.

Additionally, in *Reahard v. Lee County*, 968 F.2d 1311 (11th Cir. 1992), the court held if a substantial state interest is advanced, such as protection of wetlands, an owner is not entitled to compensation unless the landowner is deprived of all or virtually all economically viable use of the property; a showing of "substantial reduction in value" is not be sufficient to warrant compensation. In that case, a county land use plan allowed only one residence to be built on thirty-eight acre of wetlands. *Id.* at 1136. Both of these cases illustrate courts looking at the whole of the property interest affected rather than focusing on the fraction of land directly restricted.

A federal circuit court's consideration of whether a regulation constituted a taking illustrates the same approach:

> [A]re there direct compensating benefits accruing to the property, and others similarly situated, flowing from the regulatory environment? Or are benefits, if any, general and widely shared through the community and the society, while the costs are focused on a few? Are alternative permitted activities economically realistic in light of the setting and circumstances, and are they realistically available? In short, has the government acted in a responsible way, limiting the constraints on property ownership to those necessary to achieve the public purpose, and not allocating to some number of individuals, less than all, a burden that should be borne by all?

Florida Rock Indus., Inc. v. United States, 18 F.3d 1560, 1571 (Fed. Cir. 1994).

interpretation of Coastal's property interest and support the State's argument that Coastal's interest encompasses its entire leasehold.

The second prong of the takings analysis requires a court to analyze the character of the government action.[267] Generally, the "more compelling the purpose of the governmental regulation, the further the regulation can go before it will be a taking."[268] Specific factors considered by the Florida Supreme Court include: (1) whether the regulation confers a public benefit or prevents a public harm; (2) whether the regulation promotes the health, safety, welfare, or morals of the public; and (3) whether the regulation is arbitrarily and capriciously applied.[269]

In *Estuary Properties*, the Florida Supreme Court elaborated on whether the *Estuary* regulation conferred a public benefit or prevented a public harm. The court found that the regulation prevented a public harm because it prohibited the destruction of a mangrove forest necessary to avoid unreasonable pollution of the waters.[270] In Coastal's case, the State could argue that denial of a drilling permit was necessary to avoid unreasonable pollution of the waters, thereby causing unreasonable harm to the public,[271] although a requisite evidentiary showing would be necessary to support this point. Second, the court in *Estuary Properties* also found that the regulation promoted the health, safety, welfare, or morals of the public because it protected the community from pollution which would adversely affect the local economy.[272] The State in the Coastal controversy could also argue that a clean natural environment is conducive to the health and safety of the public and critical to preserving Florida's tourism industry. Additionally, the Florida Supreme Court held that because the

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267. *See* Penn Cent. Transp. Co. v. City of New York, 438 U.S. 104, 124 (1978).

268. *See* Keystone Bituminous Coal Ass'n v. DeBenidictis, 480 U.S. 470, 488 (1987); *see also* Grosso, *supra* note 257, at 479;

269. *See* Graham v. Estuary Properties, Inc., 399 So. 2d 1374, 1381 (Fla. 1981); *see also* Grosso, *supra* note 257, at 479.

270. *See Estuary Properties*, 399 So. 2d at 1381.

271. The court in *Estuary Properties* discussed the conceptual difficulty in drawing a line between prevention of a public harm and creation of a public benefit. Yet the court maintained that "it does not necessarily follow that the public is safe from harm when a benefit is created." *Id.* at 1382.

272. *See id.* at 1381.

proposed development would cause pollution affecting the county's economy, the regulation preventing that public harm was not arbitrary.[273] Again, the State can make a similar pollution argument to satisfy the arbitrariness inquiry.

The third prong of the takings analysis requires a court to determine whether the regulation interferes with Coastal's distinct investment-backed expectations in its leasehold.[274] To accomplish this task, a court must consider Coastal's expenditures of money in reliance on its leases.[275] Then, a court must determine whether Coastal's expectation was reasonable and not subjective given the circumstances[276] and whether the expectation was reasonable at the time Coastal formed its expectation.[277]

As to the first subpart, Coastal has spent no appreciable amount of money in exploration or preparation for drilling in reliance upon its right to drill other than the lease payments and its legal bills.[278] As discussed earlier, Coastal owns no drilling equipment or boats.[279] Next, a court must consider the subjectiveness of Coastal's drilling expectations.[280] Unlike the landowner in *Estuary Properties* who had "only its own subjective expectation that the land could be developed in the manner it now proposes,"[281] Coastal did not enter into these leases with knowledge of a drilling restraint. The State and Coastal intended the leases to facilitate oil drilling in the Gulf.[282] Lastly, a court must determine the reasonability of Coastal's expectation at the time of the formation of that expectation.[283] All parties to Coastal's perpetual lease appear to have had the expectation that the lease would lead to offshore oil drilling.[284] Coastal paid annual rent to

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273. *See id.*
274. *See* Penn Cent. Transp. Co. v. City of New York, 438 U.S. 104, 124 (1978).
275. *See id.* at 124; *Estuary Properties*, 399 So. 2d at 1381.
276. *See Estuary Properties*, 399 So. 2d at 1383.
277. *See* Ruckelshaus v. Monsanto Co., 467 U.S. 986, 1005-06 (1984).
278. *See* Olinger, *supra* note 67, at 1B.
279. *See id.*
280. *See Estuary Properties*, 399 So. 2d at 1383.
281. *See id.* at 1382.
282. *See* discussion *supra* Part III (describing the history of Coastal's leasehold).
283. *See* Penn Cent. Transp. Co. v. City of New York, 438 U.S. 104, 124 (1978).
284. *See* discussion *supra* Part III.

preserve its right to drill oil.[285] Further, Coastal entered into the perpetual lease decades before the oil drilling ban.[286]

If DEP refuses to issue the drilling permit, Coastal could argue that denying the permit renders its lease rights worthless. Coastal's investment-backed expectation is further supported by the existence of a statutory right under section 377.242 (1) (b), *Florida Statutes*, which exempts Coastal's lease from the general ban on offshore oil drilling.[287] Thus, the viability of Coastal's argument would center upon whether Coastal's property is deemed to encompass just the St. George site or all 2.4 million acres of its leasehold.[288]

While a court will find a *per se* taking and will require the state to compensate when a landowner has been denied all economically viable use,[289] there is an exception to this rule when the use sought to be prohibited was forbidden at the time the owner took title.[290] For example, under the nuisance exception, the State could argue that any oil drilling by Coastal would be a public nuisance. The Supreme Court said in *Lucas*, "We assuredly would permit the government to assert a permanent easement that was a preexisting limitation upon the landowner's title."[291] Thus, if a use constitutes a common law nuisance or offends some other background principle of law, a regulation can prohibit it without compensation being due.[292]

The Florida Supreme Court stated that a "public nuisance violates public rights, subverts public order, decency or morals, or causes inconvenience or damage to the public generally."[293] However, the Court cautioned that it "is not possible to define comprehensively 'nuisance' as each case must turn upon its facts and be

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285. *See* note 87 and accompanying text.
286. *See* discussion *supra* Part III.
287. *See* FLA. STAT. § 377.242(1)(b) (1995); *Estuary Properties*, 399 So. 2d at 1383.
288. *See* note 263 and accompanying text.
289. *See* Lucas v. South Carolina Coastal Council, 505 U.S. 1003, 1019 (1992).
290. *See id*. at 1027.
291. *Id.* at 1028-29.
292. *See id*.
293. Orlando Sports Stadium v. State, 262 So. 2d 881, 884 (Fla. 1972).

judicially determined."[294] Given the definition above, the State could argue that vast environmental damage potentially caused by oil drilling off Florida's sensitive coast constitutes a nuisance. However, Coastal's plan to drill for oil probably would not go so far as to violate public rights, subvert public order, decency, or morals. Arguably though, oil drilling could cause inconvenience or damage to the public generally so that a particularly environmentally-conscience court might consider an application of the nuisance doctrine to Coastal's case.

The idea behind nuisance is that a property owner was never authorized to use his property in a manner which was proscribed at common law. Thus, because the owner took title with this inherent limitation, denial of the proposed use fails to deprive the landowner of a right previously obtained. Additionally, if a particular use has long been engaged in by similarly-situated owners, a presumption exists that the use was not prohibited at common law.[295] Coastal's use of its leases for oil drilling has long been enabled and authorized by Florida. Second, nuisance has its roots in equitable principles.[296] Coastal could argue the inequity of allowing the State, through the permitting process, to now prevent drilling denies Coastal the sole right for which the State executed the leases. Further, Coastal could contend that nothing in the State's conduct prior to the 1990 oil ban reflected the conviction that oil drilling violated the State's understanding of its nuisance power. For these reasons, the State would probably be unsuccessful in asserting the nuisance exception enunciated in *Lucas.*

E. Substantive Due Process

If Coastal succeeds in convincing a court that it has a vested right to a drilling permit, Coastal could allege that denial of such a permit violates its substantive due process rights, which protect an individual's right to be free from an abuse of governmental

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294. *Id.*

295. *See* Lucas v. South Carolina Coastal Council, 505 U.S. 1003, 1029-30 (1992).

296. *See* Loveladies Harbor, Inc. v. United States, 28 F.3d 1171, 1182 (Fed. Cir. 1994).

power,[297] including arbitrary or irrational zoning standards.[298] To satisfy this standard, Coastal must show that the State "abused its power by acting arbitrarily and capriciously, which means that the action does not bear a substantial relation to the public health, safety, morals, or general welfare."[299]

The State can show that denial of a permit bears a substantial relation to the public's general welfare. In *Estuary Properties,* the Florida Supreme Court said that pollution prevention and the protection of environmentally-sensitive areas are legitimate concerns within a state's police powers.[300] Thus, the State could maintain that denial of a permit to drill is consistent with their legitimate concerns.[301]

The State would also have to show that the denial of the permit was not arbitrary, capricious, oppressive or discriminatory.[302] The Florida Supreme Court has explained that "a law is not necessarily discriminatory—hence invalid—because its lacks universality of operation over the state. The test to be applied is whether the exclusion of certain territories, people or property is predicated upon a fair, property and reasonable classification premise."[303] It is true that no company but Coastal would suffer from a policy of drilling permit denials; but no other company is similarly situated to Coastal in enjoying an oil lease off Florida's Gulf Coast. Second, a denial of a permit to drill at St. George might not be considered oppressive since Coastal has millions of other acres for which it may seek a permit to drill.[304] Third, Coastal would not be oppressed as a result of a permit denial if, as many contend, no

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297. *See* Greenbriar, Ltd. v. City of Alabaster, 881 F.2d 1570, 1577 n.13 (11th Cir. 1989).

298. *See* Wheeler v. City of Pleasant Grove, 664 F.2d 99, 100 (5th Cir. 1981).

299. Corn v. City of Lauderdale Lakes, 997 F.2d 1369, 1374 (11th Cir. 1993).

300. *See* Graham v. Estuary Properties, Inc., 399 So. 2d 1374, 1381 (Fla. 1981).

301. In *Department of Community Affairs v. Moorman*, 644 So.2d 930 (Fla. 1990), the Florida Supreme Court said that a regulation which regulated the height of fences in order to protect a threatened population of deer had a rational relationship with state environmental policy. *See id.* at 933.

302. *See* Village of North Palm Beach v. Mason, 167 So. 2d 721, 727 (Fla. 1964).

303. *Id.*

304. *See* 1944 Drilling Lease, *supra* note 2, at 13; *see also* discussion *supra* Part I (describing the size of Coastal's leasehold).

commercially useful quantities of oil lie beneath Florida's Gulf Coast.[305] However, the State will have to convince a court that denial of the permit is necessary to achieve its environmental protection goals. If there are alternative means to reasonably ensure the ecological well-being of the Gulf Coast, then denial of the permit may be a case of regulatory overkill and a violation of Coastal's substantive due process rights.[306]

VII. CONCLUSION

As the public trust doctrine evolves, it has come to include the responsibility of the State to manage public trust lands in a way that guarantees preservation of and the public's recreational access to diminishing natural resources. Under *Illinois Central*, Coastal's leases appear to violate the public trust doctrine due to the leases' indiscriminate size. Thus, *Illinois Central* seems to authorize the Florida Legislature's revocation of those leases today for a violation over fifty years ago.[307] While takings are compensable under the Fifth Amendment, courts have yet to fully address whether the same principles would apply when the revocation is effected under the public trust doctrine. As a matter of basic fairness, it is difficult to explain why Coastal should not be entitled to some compensation if its contract is revoked pursuant to this doctrine.

The *Marine One* decision suggests that in Florida a property owner does not have a vested right to a building permit on public land.[308] However, under Florida's equitable estoppel test, it would appear that Coastal has in good faith detrimentally relied upon the government's issuance of the leases and thus has a vested right to a drilling permit. The troubling part of this equity argument, which is based upon notions of fairness is that Coastal may end up the party who unfairly benefits. The State did not wait until Coastal had the drilling bit poised over a gold mine to intervene. Coastal

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305. *See* discussion *supra* Part II.

306. *See* Wheeler v. City of Pleasant Grove, 664 F.2d 99, 100 (5th Cir. 1981) (stating that individuals have a right to be free from arbitrary or irrational zoning standards if other options are available).

307. *See* discussion *supra* Part VI.B.

308. *See* discussion *supra* Part VI.C.1.

was a dormant oil company.[309] No company had petitioned the State or Coastal to drill in Florida's Gulf Coast for decades because of the prevalent belief that there is no oil in Florida's Gulf Coast. In a sense, Coastal is holding the State hostage to a moribund contract in which Coastal had no evident interest for twenty-eight years. Coastal's leases are not prospective for oil; they are prospective for a legal settlement. To allow Coastal to prevail in this matter by utilizing notions of equity would be a cruel irony on Florida's citizens.

The State may succeed using the takings argument depending upon the denominator a court employs when measuring how much of Coastal's property has been taken compared to the whole of its rights.[310] Otherwise, prohibiting Coastal from drilling off St. George Island, or anywhere in the outer three mile zone, will completely deprive Coastal of its investment backed expectations. Even in a takings suit, however, the State might ultimately prevail on the damages question because the value of the leases is highly speculative, and most Florida juries would not be sympathetic to Coastal's business venture.

The substantive due process argument will also be a difficult challenge for the State to defend against.[311] A court may be persuaded that denial of a permit is not arbitrary and discriminatory, even though it only affects Coastal because there are no similarly-situated property owners. A court may be persuaded that denial of a permit is not oppressive depending again upon the denominator a court employs when measuring how much of Coastal's property has been taken. If only a small part of Coastal rights are deemed frustrated by denial of a permit, such a denial may not rise to the level of oppression. Finally, denial of a permit would not be oppressive if a court was persuaded no oil existed at the drill site.

As a native of Florida's gulf coast beaches, this author considers protection of the coastal environment to be of paramount importance. For better or for worse, a court of law often becomes a venue far removed from the people and places whose interests are

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309. *See* discussion *supra* Part VI.C.1.

310. *See* discussion *supra* Part VI.D.

311. *See* discussion *supra* Part VI.E.

there litigated, and the reality of what is at stake becomes a mere abstract.

On balance, Coastal probably has the stronger case. The State of Florida signed a contract it never should have signed. Now, the State should probably pay whatever a jury determines is the contract's worth. In a law review article such as this, there is little room in which to moralize. So, perhaps, it will be enough to say generally that, notwithstanding superior legal arguments, entrepreneurs such as this company who are content to put their financial gain ahead of the long term well being of Florida's rare and exquisite natural resources should be considered *personas non grata* in this state.

PREVENTING THE SECONDARY EFFECTS OF ADULT ENTERTAINMENT ESTABLISHMENTS: IS ZONING THE SOLUTION?

DANA M. TUCKER*

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> Along with the increase of "special cabarets"[1] came the increase in crime which was directly associated with these businesses. In fact there were a total of 463 crimes reported involving robbery, assault, narcotics, prostitution, lewd and lascivious acts, nude dancing, fight disturbances and exhibiting obscene material. With the increase of these businesses and the crime associated with them came the outcry

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1. This term refers to adult entertainment businesses which offer the public topless to totally nude go-go dancers. *See* Tampa City Council Workshop Transcript 17 (July 1, 1982) [hereinafter Tampa Transcript].

> of the families and residents . . . for an end to these "sex oriented" businesses in their neighborhoods.[2]

The adult entertainment industry has grown rapidly over the past twenty years, especially with the emergence of 1-900 phone lines, pay-per-view adult movies, and pornographic internet websites. Within that time, United States Supreme Court decisions have recognized that First Amendment protection may extend to some types of nonobscene nude dancing and pornography as nonverbal expressive speech.[3] With this potential for protection has come an increase in businesses that offer adult entertainment.[4]

Some communities view the proliferation of X-rated movie houses, adult bookstores, and topless bars as a hazard to the morals of their community and a threat to property values.[5] Where a direct approach to the problem by way of adoption and enforcement of obscenity laws is regarded as impractical, local officials have instead chosen zoning as a method to control the uses and availability of these facilities. Zoning the location of adult businesses has ignited a hotly charged debate. Adult business proprietors and many First Amendment advocates are pitted against those citizens who want adult establishments and their negative secondary effects out of their neighborhoods.[6]

The question remains whether zoning is effectively ridding residential and school areas in close proximity to adult entertainment facilities of resulting adverse effects. This Comment explores this question and proposes possible solutions. Part I outlines the history of zoning and discusses a municipality's authority to zone out

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2. *Id.* at 17-18.

3. *See* Barnes v. Glen Theatre, Inc., 501 U.S. 560, 565 (1991) (stating that some nude dancing is expressive conduct within "the outer perimeters" of the First Amendment); Doran v. Salem Inn, Inc., 422 U.S. 922, 932 (1975) (citing *California v. LaRue*, 409 U.S. 109, 118 (1972) for the proposition that customary barroom types of nude dancing might be entitled to First Amendment protection in some circumstances). "Entertainment, as well as political and ideological speech, is protected; motion pictures, programs broadcast by radio and television, and live entertainment, such as musical and dramatic works fall within the First Amendment guarantee." Schad v. Borough of Mount Ephraim, 452 U.S. 61, 65 (1981).

4. *See infra* notes 82-89 and accompanying text.

5. *See, e.g.*, Tampa Transcript, *supra* note 1, at 15-19.

6. *See Barnes*, 501 U.S. at 560; Tampa Transcript, *supra* note 1, at 15-19.

entertainment businesses. Part II explores the growth of adult use businesses and their First Amendment protection. Part III defines the secondary effects associated with these establishments, evaluates the growth of the effects, and analyzes the relationship between the adult use businesses and the negative effects seen in residential neighborhoods. Finally, Part IV assesses possible zoning solutions and alternative methods to decrease negative secondary effects.

I. THE POWER TO ZONE

Zoning may generally be defined as the division of a municipality or other local community into districts, the regulation of buildings and structures according to their construction and the nature and extent of their use, or the regulation of land according to its nature and uses.[7] To be valid, zoning laws must balance individual property rights with the government's substantial interests in promoting the public welfare.[8]

A. The Evolution of Zoning in the United States

Zoning essentially developed as an outgrowth of nuisance law.[9] By the early twentieth century, the United States Supreme Court upheld at least three municipal land use regulations, basing these decisions on traditional nuisance principles.[10] In 1916, New York City became the first municipality to enact a comprehensive zoning scheme.[11] Within ten years, approximately 425 municipalities,

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7. *See* 82 AM. JUR. 2D *Zoning and Planning* § 2 (1992).

8. *See* Davis v. Sails, 318 So. 2d 214, 217-18 (Fla. 1st DCA 1975) (citing 101 C.J.S. *Zoning* § 16).

9. *See* DANIEL R. MANDELKER, LAND USE LAW § 1.3 (1982).

10. *See* Hadacheck v. Sebastian, 239 U.S. 394, 410-13 (1915) (upholding an ordinance that excluded brickyards within certain areas of the city); Reinman v. Little Rock, 237 U.S. 171, 176-77 (1915) (upholding an ordinance that excluded livery stables from certain areas of the town); Welch v. Swasey, 214 U.S. 91, 107-08 (1909) (upholding an ordinance that divided Boston into two building districts with different height limitations applicable to each).

11. *See* ROBERT H. NELSON, ZONING AND PROPERTY RIGHTS: AN ANALYSIS OF THE AMERICAN SYSTEM OF LAND-USE REGULATION 8 (1977).

representing more than half of the country's urban population, had passed similar measures.[12]

The Supreme Court reached a landmark decision in *Village of Euclid v. Ambler Realty Co.*,[13] holding that so long as freedom of speech is not threatened, a zoning plan is a valid exercise of local police power if the plan serves a rational interest of the municipality.[14] In *Euclid*, the Court reasoned that the zoning ordinance represented a valid exercise of the police power and rejected the landowner's argument that the ordinance deprived him of his liberty and property in contravention of the dictates of the Fourteenth Amendment.[15] The Court held that so long as the classifications made under a zoning ordinance are "fairly debatable,"[16] and the provisions are not "clearly arbitrary and unreasonable, having no substantial relation to the public health, safety, morals, or general welfare," the ordinance will be upheld as constitutional.[17]

Nearly fifty years later, the Court heard *Village of Belle Terre v. Boraas*.[18] In *Belle Terre*, a landowner challenged a zoning ordinance that restricted the use of his property to single-family dwellings.[19] Only family members or no more than two unrelated persons could reside in a house on his property.[20] By alleging that the ordinance infringed his fundamental constitutional rights of privacy, the landowner attempted to have the ordinance reviewed under more exacting constitutional scrutiny than the mere rationality standard adopted in *Euclid*.[21] The Court did not agree that any fundamental constitutional rights were implicated by the

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12. *See id.* at 9.

13. 272 U.S. 365 (1926).

14. *See id.* at 389-90.

15. *See id.* at 397. The landowner relied on the provision of the Fourteenth Amendment which states that no State shall "deprive any person of life, liberty, or property, without due process of law." U.S. CONST. amend. XIV, § 1, cl. 3.

16. *Euclid*, 272 U.S. at 388.

17. *Id.* at 395.

18. 416 U.S. 1 (1974).

19. *See id.* at 2.

20. *See id.*

21. *See id.* at 7.

zoning ordinance and applied the mere rationality test, ultimately upholding the ordinance.[22]

Three years later, in *Moore v. City of East Cleveland*,[23] the Court was faced with an ordinance similar to the one upheld in *Belle Terre*, but the *Moore* ordinance did not allow related persons to live together under certain circumstances.[24] The Court struck down the ordinance as an abridgment of the fundamental right of freedom of choice relating to family matters. The Court applied strict scrutiny, thus requiring the ordinance to be the least restrictive means of achieving a compelling state interest.[25] Through these decisions, the Court has reinforced the notion that local governments have wide latitude in protecting society morals and the general quality of life concerns of their communities.[26]

However, when a zoning regulation threatens freedom of speech, the courts cannot apply the deferential *Euclid* standard.[27] Therefore, the initial determination for any court reviewing a zoning ordinance that impacts First Amendment expression affects the applicable standard of review. The Supreme Court has consistently held that government regulation of speech on the basis of its content is subject to strict judicial scrutiny.[28]

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22. *See id*.

23. 431 U.S. 494 (1977).

24. *See id.* at 498-99.

25. *See id.* at 499-500. The Court concluded that although the governmental interests sought to be achieved were "legitimate," the ordinance only has a "tenuous relation" to the achievement of those ends. *Id.* at 500.

26. *See, e.g.*, Berman v. Parker, 348 U.S. 26, 32 (1954) (holding that zoning is permissible for the promotion of safety, health, morals, and the general quality of life in the community); Zahn v. Board of Public Works, 274 U.S. 325, 328 (1927) (deferring to the legislature where the validity of a zoning ordinance is fairly debatable).

27. *See* Metromedia, Inc. v. City of San Diego, 453 U.S. 490, 521 (1981) (holding that a zoning ordinance aimed at curbing pollution and eliminating distractions for pedestrians and motorists by prohibiting noncommercial billboards advertising was an unconstitutional violation of the First Amendment).

28. *See* Carey v. Brown, 447 U.S. 455, 458-59 (1980) (holding an Illinois statute unconstitutional because it made the impermissible distinction between labor picketing and peaceful picketing); *see also* Police Dep't of Chicago v. Mosley, 408 U.S. 92, 95 (1972) (concluding government regulations cannot be based on the content of First Amendment expression); Street v. New York, 394 U.S. 576, 594 (1969) (finding it unconstitutional to convict a person for speaking in defamatory terms about the American flag).

B. The Development of Zoning in Florida

The power to zone at the county and municipal level may be granted by the state legislature to local authorities by local or special act.[29] Zoning is an exercise of legislative power residing in the state and delegated to a municipal corporation.[30] The enactment of a zoning ordinance constitutes the exercise of a legislative and governmental function.[31] In Florida, the zoning power of municipalities is derived from article VIII, section 2(b) of the Florida Constitution[32] through the Municipal Home Rule Powers Act.[33] The Florida Legislature grants the governing body of a county the power to establish, coordinate, and enforce zoning and business regulations necessary for the protection of the public.[34] However, the doctrine of separation of powers[35] prohibits delegation of zoning powers to administrative bodies[36] and limits judicial review.[37] Since zoning is primarily legislative in nature, zoning decisions should be made by zoning authorities responsible to their constituents.[38]

Zoning laws and regulations are enacted through the exercise of police power. To justify the exercise of police power, the zoning restriction imposed must bear a real and substantial relation to, or be reasonably necessary for the public health, safety, morals, or

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29. *See* State *ex rel.* Taylor v. City of Jacksonville, 133 So. 114, 115 (Fla. 1931).

30. *See* 7 FLA. JUR. 2D *Building, Zoning, and Land Controls* § 55 (1997).

31. *See id.*

32. FLA. CONST. art. VIII. § 2(b)

33. FLA. STAT. § 166.021(4) (1995).

34. *See id.* § 125.01(1)(h).

35. *See* FLA. CONST. art. II, § 3. "The powers of the state government shall be divided into legislative, executive and judicial branches. No person belonging to one branch shall exercise any powers appertaining to either of the other branches unless expressly provided herein." *Id*.

36. *See* Askew v. Cross Key Waterways, 372 So. 2d 913, 924 (Fla. 1978) (holding that the legislature is not free to redelegate to an administrative body so much of its lawmaking power as it may deem expedient).

37. *See* Town of Indialantic v. McNulty, 400 So. 2d 1227, 1230 (Fla. 5th DCA 1981) (holding that zoning decisions are primarily legislative in nature and should be made by a zoning authority and not by the courts as super zoning review boards).

38. *See id.*

general welfare.[39] A city and the courts must consider the public welfare of the whole community when construing a zoning ordinance; a mere or anticipated benefit to a special group within the city is not enough.[40]

Aesthetics may also be considered in connection with the general welfare of a community.[41] The peculiar characteristics and qualities of a city may justify zoning to perpetuate its aesthetic appeal, and this type of zoning is an exercise of the police power in the protection of public welfare.[42] However, a zoning ordinance does not become invalid merely because it is based solely or predominately on aesthetic considerations.[43] In *Mayflower Property, Inc. v. Watson*,[44] the Florida Supreme Court recognized the preservation of the general nature of a neighborhood to be a proper purpose on which to base a zoning classification.[45] Zoning regulations that promote the integrity of a neighborhood and preserve its residential character are related to the general welfare of the community and are valid exercises of legislative power.[46]

Florida courts have considered other purposes and objectives for zoning regulations. Zoning regulations may be employed to protect the economic value of existing uses.[47] The decrease or

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39. *See* Burritt v. Harris, 172 So. 2d 820, 822 (Fla. 1965); *see also* City of Miami Beach v. 8701 Collins Ave., 775 So. 2d 428, 430 (Fla. 1953).

40. *See* Fogg v. City of South Miami, 183 So. 2d 219, 221 (Fla. 3d DCA 1966) (holding a zoning ordinance prohibiting drive-in operations at a dairy products retail store invalid where the city made exceptions for a gas station, a bank, and a savings and loan business).

41. *See* City of Miami Beach v. Ocean & Inland Co., 3 So. 2d 364, 367 (Fla. 1941); *see also* Rotenberg v. City of Ft. Pierce, 202 So. 2d 782, 785-86 (Fla. 4th DCA 1967) (holding that aesthetics are a valid basis for zoning).

42. *See* City of Miami Beach v. First Trust Co., 45 So. 2d 681, 684 (1949).

43. *See* City of Coral Gables v. Wood, 305 So. 2d 261, 263 (Fla. 3d DCA 1974) (upholding the validity of a zoning ordinance aimed at maintaining aesthetic characteristics by preventing unsightly appearances and diminution in property values from camper-type vehicles parked in a residential area).

44. 233 So. 2d 390 (Fla. 1970).

45. *See id.* at 392; *see also* Blank v. Town of Lake Clarke Shores, 161 So. 2d 683, 686 (Fla. 2d DCA 1964) (holding that it is not arbitrary and unreasonable for a residential village to pass an ordinance preserving its residential character as long as the inhabitants' business and industrial needs are met by other accessible areas in the community at large).

46. *See* City of Miami v. Zorovich, 195 So. 2d 31, 37 (Fla. 3d DCA 1967).

47. *See* Trachsel v. City of Tamarac, 311 So. 2d 137, 140 (Fla. 4th DCA 1975).

prevention of traffic congestion[48] and the prevention of the overcrowding of lands[49] are proper purposes on which to base zoning classifications. However, the restriction or the control of business competition is not a valid objective or purpose of zoning regulations.[50]

When exercising its zoning powers, a municipality must deal with well-defined classes of uses. Zoning ordinances generally contain comprehensive regulations addressing the construction of buildings and the use of premises in each of the classes of districts which a municipality has been divided.[51] Therefore, zoning regulations must relate to either the nature of the structure or the nature of the use.[52] Zoning involves more than mere classification; it also involves consideration of the future growth and development, adequacy of drainage and storm sewers, public streets, pedestrian walkways, and density of population.[53]

II. ZONING AND THE ADULT ENTERTAINMENT INDUSTRY

The regulation of nonobscene nude dancing and adult book and video stores has been addressed in several federal courts.[54] Since zoning regulations must relate to the nature of the structure or the nature of its use, many municipalities utilize this power to regulate the use of adult entertainment structures to control the activities of these businesses.[55] Thus, inevitable conflicts arise

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48. *See id.*; *see also* Mayflower Prop., Inc. v. Watson, 233 So. 2d 390, 392 (Fla. 1970).

49. *See Watson*, 223 So. 2d at 374.

50. *See* Wyatt v. City of Pensacola, 196 So. 2d 777, 779 (Fla. 1st DCA 1967).

51. *See* 7 FLA. JUR. 2D *Building, Zoning, and Land Controls* § 58 (1997).

52. *See id.*

53. *See id.*

54. *See, e.g.*, ILQ Investments, Inc. v. City of Rochester, 25 F.3d 1413 (8th Cir. 1994); U.S. Partners Fin. Corp. v. Kansas City, Missouri, 707 F. Supp. 1090 (W.D. Mo. 1989); 11126 Baltimore Boulevard, Inc. v. Prince George's County, 828 F. Supp. 370 (D. Md. 1993); Janra Enter., Inc. v. City of Reno, 818 F. Supp. 1361 (D. Nev. 1993).

55. *See* Barnes v. Glen Theatre, Inc., 501 U.S. 560, 563 (1991) (upholding a zoning ordinance requiring performers to wear pasties and G-strings); FW/PBS, Inc. v. City of Dallas, 493 U.S. 215, 220 (1990) (upholding a zoning ordinance requiring owners and operators of motels that rent rooms for less than 10 hours at a time to comply with licensing requirements of sexually oriented businesses); City of Renton v. Playtime Theatres, Inc., 475 U.S. 41 (1986) (upholding a zoning ordinance prohibiting adult movie theaters from locating within 1,000 feet of a residential zone, church, park, or school); Hang

between local governments attempting to regulate sexually oriented businesses and owners, operators, and patrons of such businesses seeking protection under the First Amendment.[56] The resulting case law has wrestled with the problem of defining the lawful scope of local zoning power over businesses that arguably deal with these forms of expression.[57]

A. First Amendment Protection of Expressive Speech

First Amendment litigation generally revolves around two issues: (1) whether the material in question rests under the purview of First Amendment protection; and (2) if so, what is the scope of that protection.[58] First Amendment analysis and litigation has been the subject of cases involving hate speech,[59] flag burning,[60] commercial advertising,[61] defamation,[62] invasion of privacy[63] and matters of national security.[64]

On, Inc. v. City of Arlington, 65 F.2d 1248, 1254 (5th Cir. 1996) (upholding a zoning ordinance placing a "no touch" requirement on activities between dancers and customers); Matney v. County of Kenosha, 86 F.3d 692 (7th Cir. 1996) (upholding a zoning ordinance requiring that one side of viewing booths in adult establishments remain open or unenclosed).

56. *See* Elise M. Whitaker, *Pornographer Liability for Physical Harms Caused by Obscenity and Child Pornography: A Tort Analysis*, 27 GA. L. REV. 849, 855 (1993) (discussing the background of judicial regulation of obscenity on First Amendment grounds).

57. *See* discussion *infra* Part II.A.

58. *See* Spence v. Washington, 418 U.S. 405, 409-11 (1974).

59. *See* Garrison v. Louisiana, 379 U.S. 64 (1964).

60. *See* Texas v. Johnson, 491 U.S. 397 (1989).

61. *See* Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n, 447 U.S. 557, 566-73 (1980) (finding that commercial speech or advertising is protected from unwarranted governmental regulations).

62. *See* New York Times Co. v. Sullivan, 376 U.S. 254 (1964). Neither factual error nor defamatory content sufficed to remove the constitutional shield from protecting criticism of official conduct. *See id.* at 279-83. However, *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974) and *Curtis Publishing Co. v. Butts*, 388 U.S. 130 (1967) set up an elaborate system of limited protection for publishers of defamatory statements concerning public figures and public matters. *See Gertz*, 418 U.S. at 339-41; *Butts*, 388 U.S. at 148-50.

63. *See* Cox Broadcasting Corp. v. Cohn, 420 U.S. 469, 491 (1975) (finding that a state may not punish for publication of accurate information derived from official court records open for public inspection).

64. *See* Snepp v. United States, 444 U.S. 507, 510 n.3 (1980) (finding that the government had a compelling interest in reviewing a former CIA agent's publication pursuant to a voluntary employment agreement).

The Supreme Court extended the First Amendment's protection of free speech to cover many types of expressive conduct that are not technically speech. In *Brown v. Louisiana*,[65] the Court ruled that the First Amendment protected individuals engaged in an orderly demonstration at a segregated public library and stated that First Amendment rights "are not confined to verbal expression."[66] In *West Virginia State Board of Education v. Barnette*,[67] the Court held that a student could not be forced to salute the flag, stating that "symbolism is a primitive but effective way of communicating ideas."[68] To determine whether the conduct is expressive or symbolic speech, courts must determine whether it constitutes expressive conduct.[69] In *Spence v. Washington*,[70] the Court held that the conduct is expressive if the actor had an "intent to convey a particularized message," and a great likelihood existed that the audience understood the message.[71]

Arguably, limitless types of conduct, including appearances in the nude in public, are expressive. People who participate in public nudity may be expressing something about themselves.[72] The Court, however, expressly rejected this broad definition of expressive speech saying, "We cannot accept the view that an apparently limitless variety of conduct can be labeled 'speech' whenever the person engaging in the conduct intends thereby to express an idea."[73] The Court went further in *City of Dallas v. Stanglin*,[74] observing that "it is possible to find some kernel of expression in almost every activity a person undertakes, for example, walking down the street or meeting one's friends at a shopping mall, but such a kernel is not sufficient to bring the activity within the

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65. 383 U.S. 131 (1966).
66. *Id.* at 142.
67. 319 U.S. 624 (1943).
68. *Id.* at 632.
69. *See* United States v. O'Brien, 391 U.S. 367, 376 (1968).
70. 418 U.S. 405 (1974).
71. *Id.* at 410-11.
72. *See* Barnes v. Glen Theatre, Inc., 501 U.S. 560, 569 (1991).
73. *O'Brien*, 391 U.S. at 376.
74. 490 U.S. 19 (1989).

protection of the First Amendment."[75] The *Stanglin* Court found that the mere activity of the adult entertainment patrons, coming together to engage in recreational activity, is not protected by the First Amendment.[76]

If conduct is found to be nonexpressive, then it does not receive First Amendment protection.[77] For example, in *South Florida Free Beaches, Inc. v. City of Miami*, the Eleventh Circuit refused to give First Amendment protection to nude sunbathers who challenged a public indecency law on the basis that it infringed on their right to communicate their belief that nudity was not indecent.[78] In upholding minimum dress requirements at public beaches, the Supreme Court has held that "[t]he appearance of people of all shapes, sizes and ages in the nude at a beach . . . would convey little if any erotic message . . . ."[79] The Court further found that whether or not nudity is combined with expressive activity, a state which has indecency or minimum public dress requirements statutes, is attempting to remedy "the evil" of public nudity.[80]

First Amendment rights cases involving adult entertainment businesses have established many of the core principles and standards of the parameters of allowable governmental restrictions on freedom of expression. A long history of governmental attempts to curtail such entertainment ultimately resulted in numerous cases in which the parties sought freedom of speech protection.[81] However, regardless of how one feels about nudity as expressive conduct, the First Amendment standards that have emerged from these battles have undeniably gone to the very core of the right to freedom of expression.

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75. *Id.* at 25.

76. *See id.* (holding that a social dance group does not involve the sort of expressive association that the First Amendment has been held to protect).

77. *See* South Florida Free Beaches, Inc. v. City of Miami, 734 F.2d 608, 609 (11th Cir. 1984).

78. *See id.*

79. Barnes v. Glen Theatre, Inc., 501 U.S. 560, 571 (1991).

80. *Id.*

81. *See Barnes*, 501 U.S. at 567-71; *see also* Schad v. Borough of Mount Ephraim, 452 U.S. 61, 65 (1987) (citing various cases that extend freedom of speech protection to forms of entertainment which contain nudity).

In the last decade those businesses that fall within the definition of "adult entertainment business" have increased tremendously.[82] The creation of an appropriate definition for adult entertainment has produced significant litigation. No definition exists that will engender a perfect fit for the entire adult entertainment industry. Perhaps all attempts to formulate a definition for adult entertainment will ultimately end with the conclusion reached by United States Supreme Court Justice Potter Stewart. Stewart noted the difficulty of creating an intelligible definition but stated, "I know it when I see it."[83] However, for the purposes of this Comment, adult entertainment will be broadly defined as that which focuses on sexuality, where it contains a certain degree of sexual explicitness and/or erotic use of full or partial nudity. Thus, the adult entertainment industry includes: peep shows, adult video stores, pornographic bookstores, special cabarets,[84] rap parlors,[85] liquor lounges, internet web sites,[86] X-rated pay-per-view channels,[87] massage parlors,[88] and 1-900 sex phone lines.[89]

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82. *See infra* notes 83-89 and accompanying text.

83. Jacobellis v. Ohio, 378 U.S. 184 (1964) (Stewart, J., concurring).

84. A cabaret features topless dancers, go-go dancers, exotic dancers, strippers, male or female impersonators, or similar entertainers. *See* DETROIT, MICH., OFFICIAL ZONING ORDINANCE § 66.000 (1972).

85. Rap parlors are "establishments at which men may converse with women who are not fully clothed." Alexander v. City of Minneapolis, 698 F.2d. 936, 936-37 n.2 (8th Cir. 1983).

86. Web sites on the internet that offer material, such as nude pictures and sexually explicit "chat-lines," have been at the center of censorship in recent years. *See generally* ACLU v. Reno, 929 F. Supp. 824, 849 (E.D. Pa. 1996) (finding that the Communications Decency Act violated the First Amendment by prohibiting certain transmissions on the internet).

87. Some cable companies throughout the United States offer services like the Spice network, where the subscriber may pay for each viewing of a pornographic movie, rather than subscribe to any one particular premium channel. *See* Playboy Entertainment Group v. United States, 945 F. Supp. 772, 776 (D. Del. 1996).

88. An establishment is a massage parlor when it is engaged primarily in providing sexually oriented massages notwithstanding that it calls itself a health club and provides exercise equipment. *See* Babin v. City of Lancaster, 493 A.2d 141, 144 n.3 (1985).

89. Long distance carriers offer services where a caller may dial a phone number with the prefix 1-900 with the agreement to pay per minute to speak with a person, usually a woman, about sexually explicit topics. The caller often requests the woman to use sexually arousing language. *See* Sable Communications, Inc. v. FCC, 492 U.S. 115, 117-18 (1993).

B. Nude Dancing as Expressive Conduct: Eroticism or Obscenity?

Expressive conduct is not limited to communicative speech; it may include symbolic speech that conveys an idea.[90] Thus, owners of adult entertainment businesses have argued that the dancers are expressing a message and that their conduct is therefore protected as symbolic speech.[91] The respondents in *Barnes v. Glen Theatre, Inc.*,[92] argued that their go-go dancers were performing nonobscene nude dancing intended to send a message of eroticism and sexuality.[93] In addressing the constitutional protection of nude dancing, Chief Justice Rehnquist stated that nude dancing is expression only "marginally" within the "outer perimeters" of the First Amendment.[94] The *Barnes* Court recognized that public indecency laws have long been justified as part of the state's police powers, reflecting a substantial governmental interest in protecting order and morality.[95] The Court also found the government interest unrelated to any message expressed by nude dancing, and in doing so, the Court separated eroticism and the message of nude dancing from nude dancing itself.[96] By requiring dancers to wear pasties and a G-string, Indiana had only made the message slightly less graphic. It did not prohibit the message of eroticism, rather it prohibited the message's transmission through nude dancing.[97]

The argument has been made that nude dancing constitutes obscenity and is without First Amendment protection.[98] The *Miller*

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90. *See* Texas v. Johnson, 491 U.S. 397, 403 (1989) (holding that the burning of the American flag is protected symbolic speech).

91. *See* Miller v. City of South Bend, 904 F.2d 1081, 1086-87 (7th Cir. 1990), *rev'd,* Barnes v. Glen Theatre, Inc., 501 U.S. 560 (1991); *see also* Walker v. City of Kansas City, 911 F.2d 82, 85 (W.D. Mo. 1988).

92. 501 U.S. 560 (1991).

93. *See id.* at 569.

94. *Id.* at 566.

95. *See id.* at 569. The plurality cited its decisions in *Paris Adult Theatre I v. Slanton*, 413 U.S. 49 (1973) (upholding a prohibition on the showing of obscene films) and *Bowers v. Hardwick*, 478 U.S. 186 (1986) (upholding a prohibition of sodomy) for the notion that public morality may serve as a basis for law. *See Barnes*, 501 U.S. at 569.

96. *See id.* ("While the dancing to which [the indecency statute] was applied had a communicative element, it was not the dancing that was prohibited, but simply its being done in the nude.").

97. *See id.* at 573 (Scalia, J., concurring).

98. *See* Miller v. California, 413 U.S. 15, 18-19 (1973).

Court announced and applied the standard that American courts continue to use when determining what constitutes obscenity. According to the *Miller* three-part test, material is obscene: (1) if the typical person applying community standards would find the work as a whole appealing to prurient interests; (2) if the work describes or depicts in an obviously offensive manner sexual conduct specifically outlined by the relevant statute; and (3) if the work considered as a whole is devoid of serious artistic, political, literary or scientific value.[99] Applying the *Miller* test, the Eighth Circuit found, "to the extent that nude barroom dancing contains a message and therefore qualifies as First Amendment 'speech,' it may contain a message that nonetheless is categorically unprotected by the First Amendment--that is, an appeal to the prurient interest."[100]

Nevertheless, the Supreme Court's willingness to engage in First Amendment analysis in nude dancing cases indicates that the Court does not view all nude dancing as obscene. Numerous Supreme Court decisions indicate that nude dancing constitutes expressive conduct intended to convey a particularized message, and thus, meets the *Spence* standard.[101] In *Doran v. Salem Inn, Inc.*,[102] the Court upheld a preliminary injunction that enjoined enforcement of a city regulation that prohibited topless dancing.[103] In *Doran*, the Court noted that nude dancing may be protected expression "although the customary 'barroom' type of nude dancing may involve only the barest minimum of protected expression, . . . this form of entertainment might be entitled to First and Fourteenth Amendment protection under some circumstances."[104] Finding the ordinance overbroad as applied to

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99. *See id.* at 24; *see also* Roth v. United States, 354 U.S. 476 (1957) (confronting the issue of constitutional protection for obscene material). The defendant, Roth, ran a business that published and sold pornographic magazines, books, and photographs. The Court affirmed Roth's conviction finding that the ideas expressed by lewd and obscene materials are of little "social value" and therefore receive no First Amendment protection. *Id.* at 485.

100. *See* Walker v. City of Kansas City, 911 F.2d 80, 87 (8th Cir. 1990).

101. *See supra* notes 70-71 and accompanying text.

102. 422 U.S. 922 (1975).

103. *See id.* at 932.

104. *Id.*

the nude dancing in question, the Court granted the request for injunctive relief without addressing the exact level of protection the First Amendment provides to nude dancing.[105]

C. The Four-Prong Test of Regulating Expressive Speech

In *United States v. O'Brien*,[106] the Supreme Court formulated a four-prong test for determining whether government regulation aimed at nonexpressive conduct violates the First Amendment.[107] In *O'Brien*, the defendant was convicted under federal law[108] for burning his draft card to protest American involvement in the Vietnam War.[109] The Court stated, "We cannot accept the view that an apparently limitless variety of conduct can be labeled 'speech' whenever the person engaging in the conduct intends thereby to express an idea."[110] The *O'Brien* Court enunciated a four-prong test, finding that government regulation of conduct is constitutional if: (1) the regulation is a constitutional exercise of the government's power; (2) it furthers an important or substantial government interest; (3) it is unrelated to the suppression of free expression; and (4) any incidental burden upon First Amendment rights is no greater than necessary to promote the compelling state interest.[111]

By applying the four-prong test to the facts in *O'Brien*, the Court found that O'Brien's course of conduct was expressive.[112] However, the Court found that the government's interest in safeguarding efficient procedures for administering the Selective Service system was a substantial governmental interest that was unrelated to the suppression of speech.[113] The Court also found that the governmental interest could not be advanced by any alternative method and that the regulation did not prevent O'Brien

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105. *See id.* at 933-34.

106. 391 U.S. 367 (1968).

107. *See id.* at 376-83.

108. *See* 50 U.S.C. § 462(b) (1965) (stating that any person "who forges, alters, knowingly destroys, knowingly mutilates, or in any manner changes any such certificate . . . may be fined and imprisoned.").

109. *See O'Brien*, 391 U.S. at 376.

110. *Id.*

111. *See id.* at 376-83.

112. *See id.* at 376.

113. *See id.* at 382.

from expressing his view in other ways.[114] Therefore, the conviction was upheld because the Court found the statute to be content-neutral.[115]

However, in *Texas v. Johnson*,[116] the Court found that the *O'Brien* test could not be applied to public burning of the American flag.[117] In considering the constitutionality of the statute in *Johnson*, the Supreme Court noted that Johnson's act of burning the flag was expressive, thus meriting analysis under the First Amendment.[118] Finding the Texas statute content-based, the Court applied a higher level of scrutiny.[119] The Court balanced the governmental interest of preserving the flag as a symbol of national unity against Johnson's right to unburdened freedom of speech.[120] In making this determination, the Court relied on statements made by Johnson at his trial. According to Johnson, "The American flag was burned as Ronald Reagan was being re-nominated as President. And a more powerful statement of symbolic speech, whether you agree with it or not, couldn't have been made at that time."[121] Ultimately, the Court held that, under this balancing of interests, Johnson's right to express himself was more important than Texas's asserted state interest.[122]

1. Issue One: Is the Zoning Ordinance Content-Neutral?

The Supreme Court has applied the *O'Brien* test to cases involving the regulation of adult entertainment businesses when the zoning ordinance is content-neutral, and thus, does not restrict conduct because of its message.[123] *Barnes* first applied the *O'Brien*

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114. *See id.* at 378-86.

115. *See id.* at 381-82. Content-neutral regulations are constitutional and do not involve the regulation of speech. Content-based regulations are generally unconstitutional and are enacted to control the expression of speech. *See infra* notes 126-130 and accompanying text.

116. 491 U.S. 397 (1989).

117. *See id.* at 410.

118. *See id.* at 405-06.

119. *See id.* at 412.

120. *See id.* at 414-17.

121. *Id.* at 406.

122. *See id.* at 420.

123. *See* Barnes v. Glen Theatre, Inc., 501 U.S. 560, 563 (1991).

test to adult entertainment. In *Barnes*, owners and dancers in the adult entertainment industry brought suit to enjoin enforcement of Indiana's public indecency statute that required the dancers to wear pasties and G-strings.[124] After *Barnes*, the Supreme Court approached government regulation of adult entertainment by evoking various legal theories related to First Amendment protection, including the time, place, and manner test, the overbreadth doctrine, the vagueness doctrine, the prior restraint doctrine, and Twenty-first Amendment principles.[125]

The Supreme Court has consistently held that governmental regulation of speech on the basis of its content is subject to strict judicial scrutiny.[126] Therefore, only content-neutral ordinances regulating protected expression are constitutional.[127] The Court's analysis of an ordinance challenge begins with a determination of whether the ordinance focuses merely on the time, place, and manner in which adult uses can be operated (content-neutral regulations) or whether the ordinance is aimed at restricting the content of the expression (content-based regulations).[128] An ordinance is content-neutral if it meets the following three criteria: (1) the government has a substantial interest in the regulation that is unrelated to the suppression of ideas; (2) the means of regulating the protected expression are narrowly tailored; and (3) reasonable alternative avenues of communication are left open for dissemination of the regulated speech.[129] For these reasons, local

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124. *See id.* at 563; *see also supra* notes 92-97 and accompanying text.

125. *See* Young v. American Mini Theatre, 427 U.S. 50, 58-62 (1976).

126. *See, e.g.*, Carey v. Brown, 447 U.S. 455, 458-59 (1980) (striking down a state statute as unconstitutional because it made the impermissible distinction between labor picketing and peaceful picketing); Police Dep't of Chicago v. Mosley, 408 U.S. 92, 95 (1972) (holding that government regulations cannot be based on the content of First Amendment expression); Cohen v. California, 403 U.S. 15, 24 (1971) (reversing a conviction for wearing jacket bearing the phrase "Fuck the Draft" as a violation of protected expression); Street v. New York, 394 U.S. 576, 584-85 (1969) (finding it unconstitutional to convict a person for speaking in defamatory terms about the American flag).

127. *See* City of Renton v. Playtime Theatres, Inc., 475 U.S. 41, 49 (1989).

128. *See Mosley*, 408 U.S. at 95-96.

129. *See* Heffron v. International Soc'y for Krishna Consciousness, Inc., 452 U.S. 640, 647-48 (1981); *Mosley*, 408 U.S. at 98; Kingsley Books, Inc. v. Brown, 354 U.S. 436, 442 (1957).

governments attempting to pass zoning ordinances for adult entertainment businesses must ensure that the ordinance provides: (1) sufficient factual basis to support a finding of substantial governmental interest; (2) narrowly tailored definitions of adult uses affecting only those businesses which the ordinance intends to regulate; and (3) reasonable alternative channels of communication for the affected expression.[130]

2. Issue Two: Whether Time, Place, and Manner Regulations are Proper?

The time, place, and manner test was originally formulated to apply only to speech or expressive conduct that takes place in public forums.[131] However, some courts and scholars have viewed the time, place, and manner test and the *O'Brien* test as essentially the same.[132] The Supreme Court has used the time, place, and manner test to evaluate state regulation of nude dancing.[133] This application often arises when owners of adult entertainment establishments claim a zoning regulation is a violation of their First Amendment rights.[134] Government restriction of expressive activities has been permitted in situations where restrictions fall short of a complete ban and constitute time, place, and manner restrictions.[135] Essentially, courts have found that although expression covered by the First Amendment cannot be banned, it can be restricted in terms of where, when, and how that expression is presented.[136] For example, nonobscene sexually explicit material on broadcast television and radio can be restricted to times when

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130. *See City of Renton*, 475 U.S. at 50.

131. *See* Ward v. Rock Against Racism, 491 U.S. 781, 791 (1989).

132. *See* Clark v. Community for Creative Non-Violence, 468 U.S. 288, 298 (1984) (finding that the time, place, and manner test embodies the same standards as those set forth in *O'Brien*).

133. *See infra* notes 141-143 and accompanying text.

134. *See* Barnes v. Glen Theatre, Inc., 501 U.S. 560, 562-63 (1991); *see also* Walker v. City of Kansas City, 911 F.2d 80, 82, 85 (W.D. Mo. 1988).

135. *See* Erznoznik v. City of Jacksonville, 422 U.S. 205, 211-12 (1975) (invalidating a zoning ordinance that failed to distinguish movies containing nudity from all other movies which were being restricted, thereby constituting a complete ban on speech).

136. *See* Ward v. Rock Against Racism, 491 U.S. 781, 791 (1989).

children are less likely to be in the audience.[137] The Court has given state and local governments leeway in their attempts to control purported adverse effects of adult entertainment, particularly when related to protecting children or others who do not wish to be exposed to adult material.[138] This leeway has also extended to controlling alleged adverse secondary effects.[139] Yet, even with time, place, and manner restrictions, courts have set limits concerning how far a government can go when attempting to ban unpopular expression.[140]

The Supreme Court first addressed the time, place, and manner restrictions of adult entertainment regulations in 1976 in *Young v. American Mini Theatres, Inc.*,[141] and later in *Schad v. Borough of Mount Ephraim*,[142] and *City of Renton v. Playtime Theatres, Inc.*[143] Each of these cases supplied an important element for an examination of time, place, and manner regulations. *Young* stressed that the regulation must not suppress protected expression and that access to that expression must remain available.[144] *Schad* emphasized that the regulation cannot be so broad as to completely prohibit protected expression and that the regulation must further a substantial governmental interest.[145] *Renton* established a deferential standard of review for cases involving time, place, and manner regulations.[146]

a. Young v. American Mini Theatres, Inc.

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137. *See* FCC v. Pacifica Foundation, 438 U.S. 726, 748 (1978) (finding that because of the use of the public airwaves, broadcasting is subject to somewhat stricter regulation than print media or cable TV).

138. *See id.* at 730 n.1; *see also Erznoznik*, 422 U.S. at 210-12.

139. *See* Redner v. Dean, 29 F.3d 1495, 1505 (11th Cir. 1994); 11126 Baltimore Boulevard, Inc. v. Prince George's County, 886 F.2d 1415, 1420, 1426 (4th Cir. 1989).

140. *See* City of Renton v. Playtime Theatres, Inc., 475 U.S. 41, 50-55 (1989).

141. 427 U.S. 50 (1976).

142. 452 U.S. 61 (1981).

143. 475 U.S. 41 (1986).

144. *See, e.g., Young*, 427 U.S. at 70-71.

145. *See Schad*, 452 U.S. at 68-69.

146. *See City of Renton*, 475 U.S. at 46-48 (deferring to the government's purpose or substantial interest in enacting time, place, and manner regulations).

According to Justice Powell, *Young* was the first case decided by the Supreme Court "in which the interests of freedom of expression protected by the First and Fourteenth Amendments ha[d] been implicated by a municipality's commercial zoning ordinances."[147] At issue in *Young* was the constitutionality of certain portions of Detroit's Anti-Skid Row ordinance that singled out adult bookstores and theaters for special treatment.[148] The original Anti-Skid Row ordinance, passed in 1962, was based on findings by the Detroit Common Council that certain types of businesses, when concentrated, can have a blighting effect on the surrounding neighborhood.[149]

The ordinance forbade adult motion picture theaters, topless cabarets, and other similar establishments from locating within 1,000 feet of each other or within 500 feet of a residential dwelling without first obtaining approval.[150] Although the ordinance was not technically content-neutral because it applied only to adult entertainment, the Court found the ordinance to be a reasonable time, place, and manner restriction of protected speech because the regulation of the places where sexually explicit films may be exhibited is unaffected by whatever social, political, or philosophical message a film may be intended to communicate.[151] The Court held that the ordinance constituted a permissible content-neutral time, place, and manner restriction because the purpose of the ordinance was not to eliminate, censor, or suppress the protected speech but rather to preserve the quality of urban life by avoiding the secondary effects of these businesses on the community through regulation of the placement and concentration

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147. *Young*, 427 U.S. at 76 (Powell, J., concurring).

148. *See id.* at 54-55.

149. *See id.* at 56 (citing DETROIT, MICH., OFFICIAL ZONING ORDINANCE § 66.000 (1972), which states "[i]n the development and execution of this Ordinance, it is recognized that there are some uses which, because of their very nature, are recognized as having serious objectionable operational characteristics, particularly when several of them are concentrated under certain circumstances, thereby having a deleterious effect upon the adjacent areas. Special regulation of these uses is necessary to insure that these adverse effects will not contribute to the blighting or downgrading of the surrounding neighborhood.").

150. *See id*. at 52.

151. *See id.* at 70.

of such businesses.[152] Justice Stevens' plurality opinion pointed out that the city's goal of avoiding or mitigating these secondary effects is one which must be accorded high respect and is a sufficient governmental interest to justify the resulting incidental restriction on First Amendment speech.[153]

b. Schad v. Borough of Mount Ephraim

In contrast to *Young*, the Court in *Schad* struck down a local time, place, and manner zoning ordinance that banned all adult theaters, including live entertainment and nude dancing, from every commercial district in the city.[154] Although the Court recognized the local government's broad zoning power for the purpose of maintaining a satisfactory quality of life, the Court held that this power "must be exercised within constitutional limits."[155] In finding the ordinance unconstitutional, the Court reasoned that the municipality provided no conclusive evidence of a substantial interest in prohibiting all forms of live entertainment, and the municipality failed to prove that there were adequate alternative channels of communication open to businesses subject to the regulation.[156] The Court stated that its decision in *Young* was not controlling because in that case "[t]he restriction did not affect the number of adult movie theaters that could operate in the city; it merely dispersed them."[157]

c. City of Renton v. Playtime Theatres, Inc.

In *Renton*, a suit was brought challenging the constitutionality of a zoning ordinance which prohibited adult motion picture theaters from locating within 1,000 feet of any residential zone, single or multiple family dwelling, church, park, or school.[158] The district court granted summary judgment in the city's favor,

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152. *See id.* at 71.

153. *See id.* at 71-73 (Steven, J., concurring).

154. *See* Schad v. Borough of Mount Ephraim, 452 U.S. 61, 76-77 (1981).

155. *Id.* at 68 (citing Moore v. East Cleveland, 431 U.S. 494, 514 (1977) (Stevens, J., concurring)).

156. *See id.* at 73-74.

157. *Id.* at 71.

158. *See* City of Renton v. Playtime Theatres, Inc., 475 U.S. 41, 43 (1986).

holding that the ordinance did not violate the First Amendment.[159] The court of appeals reversed, holding that the ordinance constituted a substantial restriction on First Amendment interests and remanded the case for reconsideration of whether the city had substantial governmental interests to support the ordinance.[160] The Supreme Court held that the ordinance was a valid governmental response to the serious problems created by adult theaters and therefore satisfied the dictates of the First Amendment.[161] The Court reasoned that the ordinance did not ban adult theaters altogether and was a proper form of time, place, and manner regulation.[162] The Court reaffirmed that content-neutral time, place, and manner regulations are not unconstitutional as long as they are formulated to serve a substantial state interest and not to unreasonably limit alternative avenues of communication.[163]

The district court found that Renton City Council's predominate concerns were with the secondary effects of adult theaters on the surrounding community, not with the content of adult films themselves.[164] This finding was adequate to establish that the city's pursuit of its zoning interests was unrelated to the suppression of free expression, and thus, the ordinance was a content-neutral speech regulation.[165] The Supreme Court concluded that the Renton ordinance was designed to serve a substantial governmental interest while allowing for reasonable alternative avenues of communication.[166] The Court further held that although the ordinance was enacted without the benefit of studies specifically relating to Renton's particular problems, Renton was entitled to rely on the experiences of and studies produced by

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159. *See id.*

160. *See id.* at 44 (citing Playtime Theatres, Inc. v. City of Renton, 748 F.2d 527 (9th Cir. 1984)).

161. *See id.* at 49 (citing Young v. American Mini Theatres, Inc., 427 U.S. 50 (1976)).

162. *See id.* at 52-54.

163. *See id.* at 46.

164. *See id.* at 48.

165. *See id.*

166. *See id.* at 53.

other cities.[167] The Court found that no constitutional defect invalidated the method chosen by Renton to further its substantial interests[168] and that cities may regulate adult theaters by dispersing them or by effectively concentrating them as in Renton.[169]

Moreover, since no evidence showed that at the time the ordinance was enacted, any other adult business was located in or was contemplating a move into Renton, the Court found that the ordinance was not "underinclusive" for failing to regulate other kinds of adult businesses.[170] The Court determined that although Renton first chose to address the potential problems created by one particular kind of adult business, this choice in no way suggested that the city had "singled out" adult theaters for discriminatory treatment.[171] Finally, the Court held that the ordinance allowed for reasonable alternative avenues of communication, as required by the First Amendment.[172] Although the theater owner argued that in general no "commercially viable" adult theater sites were located within the limited area of land left open for such theaters by the ordinance, the Court found that this limitation did not give rise to a violation of the First Amendment since potential adult business owners must fend for themselves in the real estate market on equal footing with other prospective purchasers and lessees. Thus, the Court did not believe that the First Amendment compelled the government to ensure that adult theaters or any other kinds of speech-related businesses would be able to obtain sites at bargain prices.[173] The Court deferred to the city's desire to preserve "the quality of urban life."[174] In fact, the Court stated that as long as the evidence relied upon by the city is reasonably believed to be relevant to the problem that the city addresses, the

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167. *See id.*
168. *See id*. at 52.
169. *See id.* at 51.
170. *Id*. at 52.
171. *Id.*
172. *See id.* at 53.
173. *See id.*
174. *Id.* at 50 (citing Young v. American Mini Theatres, Inc., 427 U.S. 50, 71 (1976).

evidence will be sufficient to support a finding of substantial governmental interest.[175]

In light of *Renton*, municipalities should provide three essential elements in their legislation and accompanying record: (1) a legislative record sufficient to show a nexus between adult uses and particular secondary effects and a legislative finding that the legislation addresses those secondary effects; (2) a definition section which is neither vague nor overbroad; and (3) sufficient available land for the location or relocation of adult businesses.[176]

3. Issue Three: Whether Twenty-first Amendment Principles are Applicable?

Another approach that has been taken by the Supreme Court to review a governmental regulation of nude dancing utilizes the Twenty-first Amendment of the United States Constitution.[177] In *Ziffrin, Inc. v. Reeves*,[178] the Court recognized that a state has absolute power under the Twenty-first Amendment to prohibit the sale of liquor within its boundaries.[179] The Court recognized that pursuant to the Twenty-first Amendment, states have wide latitude to enact laws that prevent establishments which offer nude dancing from acquiring liquor licenses.[180]

In *LaRue*, bar owners challenged a regulation prohibiting nude dancing where alcohol was served.[181] The state offered evidence of

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175. *See id.* at 51-52.

176. *See, e.g.*, Phillips v. Borough of Keyport, 107 F.3d 164, 173-74 (3d Cir. 1997); *see also* Mitchell v. Commission on Adult Entertainment Establishments, 10 F.3d 123, 133-34 (3d Cir. 1993).

177. U.S. CONST. amend. XXI, § 2 ("The transportation or importation into any State, Territory, or possession of the United States for delivery or use therein of intoxicating liquors, in violation of the law thereof, is hereby prohibited."). The Supreme Court has interpreted this language to give the states broad powers to regulate the sale and distribution of alcohol. *See* California v. LaRue, 409 U.S. 109 (1972).

178. 308 U.S. 132 (1939).

179. *See id.* at 138.

180. *See LaRue*, 409 U.S. at 117.

181. *See id.* at 110. The California regulations prohibited certain conduct on licensed premises, such as performance of acts or simulated acts of sexual intercourse, masturbation, sodomy, bestiality, oral copulation, flagellation, or any sexual acts that are prohibited by law; the actual or simulated displaying of pubic hair, anus, vulva or genitals;

sordid and illegal acts occurring in and around the establishments.[182] The Court upheld the regulation recognizing the broad powers states have in regulating the use and distribution of alcohol under the Twenty-first Amendment.[183] The *LaRue* Court held that the regulations were within California's power to control the sale and distribution of alcohol within its borders and that the regulations were a rational response to problems created by mixing alcohol with nude entertainment.[184] The Court stressed the "critical fact" that the state did not prohibit nude performances across the board but only in places serving alcohol.[185]

The Supreme Court has further held that a state legislature, pursuant to its power to regulate the sale of liquor within its boundaries, can ban topless dancing in establishments that have a license to serve liquor.[186] A "[s]tate's power to ban the sale of alcoholic beverages entirely include[d] the lesser power to ban the sale of liquor on premises where topless dancing occurs."[187] The Court also held that nudity is the kind of conduct that is a proper subject for legislative action as well as regulation by the State Liquor Authority as a phase of liquor licensing.[188] In addition, "[c]ommon sense indicates that any form of nudity coupled with alcohol in a public place begets undesirable behavior. This legislation prohibiting nudity in public will once and for all, outlaw conduct which is now quite out of hand."[189]

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and the actual or simulated touching, caressing or fondling on the breast, buttocks, anus, or genitals. *See id.* at 111-12.

182. *See id*. Customers engaged in oral copulation with women entertainers; customers engaged in public masturbation; and customers placed rolled currency either directly into the vagina of a female entertainer or on the bar so that she might pick it up herself. Numerous other forms of contact between the mouths of male customers and the vaginal areas of female performers reportedly occurred. *See id.* at 110.

183. *See id.* at 114 (noting that "the broad sweep of the Twenty-first Amendment has been recognized as conferring something more than the normal state authority over public health, welfare, and morals").

184. *See id.* at 115-19.

185. *Id.* at 117.

186. *See* New York Liquor Auth. v. Bellanca, 452 U.S. 714, 717 (1981) (per curiam).

187. *Id.*

188. *See id.* at 717-18.

189. *Id.* (citing NEW YORK STATE LEGISLATIVE ANNUAL 150 (1977)).

4. Issue Four: Is the Licensing Requirement a Prior Restraint?

Governments sometimes adopt licensing or permit systems to regulate certain kinds of activity, such as permits to engage in door-to-door soliciting, permits to parade, and permits to operate sound amplifiers.[190] These licensing or permit systems are constitutional when the regulation is fashioned to benefit public health, safety, welfare, or convenience.[191] For example, a parade licensing requirement requiring notification of police for public regulation purposes and ensuring noninterference with other normal uses of the streets is constitutional.[192] However, licensing systems aimed at forbidding speech or regulating the content of speech are unconstitutional.[193] Since licensing and permit systems can be misused to restrain speech, they are constitutional only if they provide clearly defined relevant standards for issuance and do not accord officials discretion to deny issuance of a license or permit because of the content or viewpoint of the expression or the identity of the speaker.[194] When licensing officials have such broad discretion that they could effectively suppress legitimate speech, the permit scheme is void on its face and speakers need not comply with it.[195] However, when licensing schemes provide clear standards for issuance, speakers must seek a permit, and if refused, must seek judicial or administrative relief rather than speak without permission.[196] Therefore, the doctrine of prior restraint is applicable only to impermissible means of restricting speech.

Some local governments have employed a licensing requirement to prevent a concentration of adult businesses from opening establishments in their community.[197] Adult businesses can be

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190. *See* Kovacs v. Cooper, 336 U.S. 77, 86 (1949).

191. *See* Ginsberg v. New York, 390 U.S. 629, 636 (1968).

192. *See* Shuttlesworth v. City of Birmingham, 394 U.S. 147, 151-52 (1969).

193. *See* Lovell v. City of Griffin, Ga, 303 U.S. 444, 450-52 (1938).

194. *See* Cox v. New Hampshire, 312 U.S. 569, 575-76 (1941); *see also* Kunz v. New York, 340 U.S. 290, 294 (1951).

195. *See* Staub v. City of Baxley, 355 U.S. 313, 318 (1958) (citing Smith v. Cahoon, 283 U.S. 553, 562 (1931)).

196. *See* Poulos v. New Hampshire, 345 U.S. 395, 409-14 (1953).

197. *See* FW/PBS, Inc. v. City of Dallas, 493 U.S. 215, 220 (1990) (invalidating a license requirement for adult businesses).

required to obtain an operating license, but no license may be denied merely because the businesses will offer sexually explicit shows or other similar material.[198] The Supreme Court addressed licensing schemes as prior restraints in *FW/PBS*, where the local ordinance required all "sexually oriented businesses" to be licensed in order to operate.[199] The Court found that in order for a licensing system to be constitutional as applied to protected speech, the following three conditions must be satisfied: (1) any restraint prior to judicial review can be imposed only for a specified brief period during which the status quo must be maintained; (2) expeditious judicial review of that decision must be available; and (3) the censor must bear the burden of going to court to suppress the speech and must bear the burden of proof once in court.[200]

Since *FW/PBS*, several decisions have reviewed and addressed various adult business licensing schemes. For instance, a county's adult bookstore ordinance was found to be an unconstitutional prior restraint on protected speech where the ordinance failed to assure prompt judicial review of an administrative denial of a special exception.[201] Similarly, an ordinance was found to provide inadequate procedural safeguards where an adult bookstore seeking a special exception would face a delay of at least eight months from the date of application.[202] The Fifth Circuit reviewed two cases from Texas where the licensing procedures for adult businesses were challenged as prior restraints on protected expression but were upheld under *FW/PBS*.[203] The court was satisfied that the two licensing decisions were required to be made

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198. *See id.* at 220.

199. *Id*. at 236. The Court recognized that it was reasonable to believe that shorter rental time periods indicate that the motels foster prostitution. *See id.*

200. *See id.* at 227 (citing *Freedman v. Maryland*, 380 U.S. 51 (1965) and finding that a censorship board could not prohibit a movie production and release by way of a prepublication review requirement to determine obscenity prior to publication).

201. *See* 11126 Baltimore Boulevard, Inc. v. Prince George's County, 32 F.3d 109, 114 (4th Cir. 1994).

202. *See id.* at 115 (finding that a 150 day period for the completion of judicial review of a decision on an application for an adult bookstore was not an excessive period).

203. *See* TK's Video, Inc. v. Denton County, 24 F.3d 705 (5th Cir. 1994); Grand Brittain, Inc. v. City of Amarillo, 27 F.3d 1068 (5th Cir. 1994).

within a specified brief period, as mandated by *FW/PBS*.[204] Because the two adult entertainment businesses at issue in those cases were already in business, the court further held the government could not constitutionally shut them down while their application for a license was pending.[205] Another court has held that the requirement for a conditional use permit was presumptively unconstitutional as a prior restraint on protected expression because no sites were available in the county for adult businesses to operate.[206] The court also found that the code did not contain safeguards against the possibility that officials would deny a permit on the basis of the content of an applicant's speech.[207] These cases indicate the frequency with which local governments use licensing schemes to restrict the operation of adult businesses.

D. Restrictive Zoning Regulations in Florida

Florida, like other states, has attempted to use zoning laws to address concerns regarding the adverse secondary effects attributed to adult businesses.[208] Time, place, and manner regulations have been used by several cities in Florida to disperse or concentrate these establishments with the intention of combating the adverse secondary effects. Those Florida cities that have enacted time, place, and manner regulations affecting the

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204. *See TK's Video*, 24 F.3d at 708 (60 day period); *Grand Brittain*, 27 F.3d at 1070 (11 day period).

205. *See TK's Video*, 24 F.3d at 708; *Grand Brittain*, 27 F.3d at 1071.

206. *See* Mga Susa, Inc. v. County of Benton, 853 F. Supp. 1147, 1150 (D. Minn. 1994) (invalidating a permit requirement for a "recreational facility," the definition of which included various kinds of adult and nonadult businesses).

207. *See id.* at 1151.

208. *See* T-Marc, Inc. v. Pinellas County, 804 F. Supp. 1500, 1503 (M.D. Fla. 1992) (upholding a zoning ordinance requiring a three foot distance between dancers and patrons to control secondary effects of adult use establishments); 3299 N. Federal Highway, Inc. v. Board of County Comm'rs of Broward County, 646 So. 2d 215, 221 (Fla. 4th DCA 1994) (upholding a zoning ordinance providing for a three foot distance between the dancers and the patrons to prevent lapdancing and the adverse effects cause by this activity); International Eateries of America, Inc. v. Broward County, 941 F.2d 1157, 1162 (11th Cir. 1991) (upholding a zoning ordinance that furthered a substantial governmental interest in protecting the quality of urban life from the secondary effects of adult businesses).

location[209] and distance patrons must keep from nude dancers,[210] have also had to satisfy the requirements of *Renton.*[211]

Some local governments have attempted to use zoning laws to "zone out" adult entertainment businesses. For example, in *International Food and Beverage Systems,* the court noted that the evidence revealed only twenty-five locations around the city that were available for adult entertainment businesses.[212] The proposed sites were near the city's well-fields on the outskirts of town or located near the airport where much of the land was condemned or undergoing drastic change due to construction of a new expressway.[213] The court found that these sites were so patently unsuitable for businesses that the regulations effectively zoned the subject adult entertainment businesses out of the city.[214] Thus, the regulations were unconstitutional because they were not the least restrictive means to achieve the city's legitimate interests.[215]

Prior to the Florida Supreme Court decision in *City of Daytona Beach v. Del Percio*,[216] the Florida courts had not answered the critical question of whether Florida had delegated its powers under the Twenty-first Amendment to counties and municipalities. Resolution of this question was crucial because local ordinances regulating the sale or consumption of alcohol would be entitled to a presumption of validity conferred by the Twenty-first Amendment if the state had delegated the authority.[217] However, if the state had not delegated the authority, the ordinances would be subject to the stricter review applicable to exercises of the general police power.[218] In 1985, the Florida Supreme Court answered this

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209. *See, e.g., International Eateries,* 941 F.2d at 1157.

210. *See, e.g., T-Marc,* 804 F. Supp. at 1503; *3299 N. Federal Highway,* 646 So. 2d at 221.

211. *See International Eateries,* 941 F.2d at 1161; *T-Marc,* 804 F. Supp. at 1502; *see also* discussion *supra* Part II.C.2.c.

212. *See* International Food and Beverage Systems v. City of Fort Lauderdale, 614 F. Supp. 1517, 1521 (S.D. Fla. 1985).

213. *See id.*

214. *See id.*

215. *See id.* at 1522.

216. 476 So. 2d 197 (Fla. 1985).

217. *See* New York State Liquor Auth. v. Bellanca, 452 U.S. 714, 718 (1981).

218. *See* Krueger v. City of Pensacola, 759 F.2d 851, 852 (11th Cir. 1985).

question by finding that the powers had been delegated.[219] Since this time, local governments have used these delegated powers to restrict or forbid the sale of liquor at adult businesses.[220]

III. THE SECONDARY EFFECTS OF ADULT ENTERTAINMENT ESTABLISHMENTS ON RESIDENTIAL NEIGHBORHOODS

"With the increase of Adult Entertainment Establishments came a public awareness that these type of businesses could have a direct effect on the quality of life in . . . neighborhoods due to the criminal activities associated with these adult businesses and the type of patrons that [they] attracted."[221] Residents of communities located near some of these businesses have many reasons for disliking these establishments. One concern is with drivers who rush out of the parking lots of the businesses while children are nearby.[222] Public hearings have overflowed with similar concerns about traffic, property devaluation, prostitution and other crimes. However, at the core of this concern is the fear of the kind of people a nude dance club attracts; usually undesirables, transient crowds, and unsavory elements.[223]

A. Adverse Effects and Their Causes

Adult entertainment establishments foster criminal activities such as racketeering, arson, murder, narcotics, bookmaking, porno-

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219. *See Del Percio*, 476 So. 2d at 201-04.

220. *See* Fillingim v. Boone, 835 F.2d 1389, 1399-1401 (11th Cir. 1988) (affirming the conviction of adult night club owner for violating an ordinance prohibiting nude or semi-nude entertainment in an establishment where alcoholic beverages were sold for consumption).

221. Tampa Transcript, *supra* note 1, at 15.

222. This effect is likely due to the customer's effort to avoid being seen patronizing the business, usually because of the negative image associated with those who frequent adult entertainment establishments. *See It's Showtime*, SEATTLE TIMES / SEATTLE POST-INTELLIGENCER, June 2, 1991, at 22 [hereinafter *It's Showtime*].

223. These terms are generally used to negatively depict patrons and supporters of adult businesses. However, those who patronize adult establishments are often businessmen, married men, or others who would be considered upstanding members of the community. *See It's Showtime*, *supra* note 222, at 22; *see also Report of the Florida Supreme Court Gender Bias Study Commission*, 42 FLA. L. REV. 803, 899 (1990).

graphy, profit skimming, and loan sharking.[224] Along with these activities, opponents of these establishments argue that the spread of HIV, increased prostitution, increased rape, and neighborhood deterioration are also adverse secondary effects attributed to adult businesses.[225] Not only does a community have to deal with the increased crime brought by these businesses but also the impact on moral values. Signs erected on public streets and highway billboards intended to solicit patrons ultimately indicate to the community's youth that the moral standard of the community is to depict women as tools for sexual gratification and fantasy fulfillment, rather than as friends, lovers, mothers, and equals.[226]

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224. These activities are directly associated with organized crime, which has been argued to be the "money and muscle" behind adult entertainment establishments. Tampa Transcript, *supra* note 1, at 15.

225. *See id.* at 21-22.

226. "What this particular form of entertainment takes away from men, slowly, incrementally over time, probably unconsciously, is their capacity to appreciate the women in their ordinary lives. And perhaps it blunts even their ability to view women as equals." *See It's Showtime*, *supra* note 222, at 23.

1. The Spread of HIV

One of the adverse secondary effects attributed to the use and location of adult use businesses is the increased spread of HIV. Many local officials consider the rapid spread of HIV and AIDS in many cities throughout the country, its incurable and fatal nature, and its mode of transmission.[227] During the 1980s, HIV infection emerged as a leading cause of death in the United States among young adults aged 25 to 44 years.[228] By 1989, HIV infection had become the second leading cause of death in men and the sixth leading cause of death in women in this age group, accounting for 14% and 4% of deaths respectively.[229] "[M]ost AIDS cases in men result from HIV transmission by homosexual contact, and high incidence rates of AIDS related to homosexual contact are widespread in many states across the country."[230] Thus, preventing the spread of HIV has been cited as a reason for enacting ordinances to restrict or prohibit closed viewing booths in adult establishments that provide peep shows of nude dancers or coin-operated X-rated video viewing.[231]

Many local governments have found that viewing booths in adult establishments have been or are being used by patrons as places to engage in sexual acts, particularly between males, including but not limited to intercourse, sodomy, oral copulation and masturbation, resulting in unsafe and unsanitary conditions.[232]

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227. *See* Francisco G. Torres, *Lights, Camera, Actionable Negligence: Transmission of AIDS Virus During Adult Motion Picture Production*, 13 HASTINGS COMM. & ENT. L. J. 89, 92 (1990). HIV causes AIDS by debilitating one's immune system and ultimately causing death. AIDS is a fast-growing public concern due to its rapid spread in recent years. *See id.* at 92-93.

228. *See* Richard M. Selik et al., *Infection as Leading Cause of Death Among Young Adults in U.S. Cities and States*, 269 JAMA 2991 (1993).

229. *See id.*

230. *Id.*

231. *See* Suburban Video, Inc. v. City of Delafield, 694 F.Supp. 585, 588 (E.D. Wis. 1988).

232. *See id.* at 588 n.1 (citing DELAFIELD, WIS., CODE OF ORDINANCES § 11.14, which lists Milwaukee and Kenosha Counties, Wisconsin; Chattanooga, Tennessee; Newport News, Virginia; and Marion County, Indiana as localities that have found that adult establishments have been used by patrons for sexual acts); The Dayton city commission found that similar activity occurred at local adult establishments in Dayton, Ohio. *See* Bamon Corp. v. City of Dayton, 923 F.2d 470, 473 (6th Cir. 1990). Minneapolis, Minnesota

The viewing booths at these adult establishments are small closet-sized rooms that are divided from adjoining booths by plywood petitions. The plywood petitions have holes cut in them which permit the occupant of one booth to engage in sexual contact with the occupant of the adjoining booth, and consequently, the potential to spread HIV.[233]

Local ordinances that govern the physical layout of these types of adult establishments require that each booth, room, or cubicle be totally accessible to and from aisles and public areas of the establishment and shall be unobstructed by any door, lock, or other control-type devices.[234] These time, place, and manner regulations seek to diminish the spread of contagious diseases caused by high risk sexual conduct by regulating certain commercial facilities where high risk sexual conduct has been found to have taken place.[235] Evidence has shown that high risk sexual activities include multiple, anonymous sexual encounters and casual sexual activity occur in adult establishments that offer such viewing booths.[236] Testimony by patrons of these adult establishments evidence that fellatio, anal intercourse and mutual masturbation take place in the viewing booths.[237] The employees of these establishments have also testified that semen was found on the walls or floors of the viewing booths.[238] Thus, courts have found restrictive ordinances for the viewing booths to be valid based on

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has also passed a similar ordinance based on such findings. *See* Doe v. City of Minneapolis, 693 F.Supp. 774, 777 (Minn. 1988); Broward County, Florida has conducted an extensive sting operation to uncover these activities. *See* METROPOLITAN BUREAU OF INVESTIGATION, NINTH JUDICIAL CIRCUIT, AFFIDAVIT / PROSECUTIVE SUMMARY (Sept. 1, 1987) [hereinafter PROSECUTIVE SUMMARY] (stating that agents reported witnessing sexual intercourse, oral copulation, sodomy and fellatio) (on file with author).

233. *See* Memorandum from the Broward County Dep't of Strategic Planning and Growth Management to the Bd. of County Comm'rs (June 4, 1993) [hereinafter Broward County Memorandum] (on file with author).

234. *See* Suburban Video, Inc. v. City of Delafield, 694 F. Supp. 585, 588 (E.D. Wis. 1988); Bamon Corp. v. City of Dayton, 923 F.2d 470, 471 (6th Cir. 1991); Doe v. City of Minneapolis, 693 F. Supp. 774, 777 (D. Minn. 1988).

235. *See Doe*, 693 F. Supp. at 776.

236. *See supra* note 234 and accompanying text.

237. *See Doe*, 693 F. Supp. at 777; *Bamon Corp*., 923 F.2d at 472; Pennsylvania v. Danny's New Adam & Eve Bookstore, 625 A.2d 119, 122 (Pa. Commw. Ct. 1993).

238. *See* PROSECUTIVE SUMMARY, *supra* note 232.

the local government's substantial interest in ensuring sanitary public places to retard the spread of sexually transmitted diseases, like AIDS.[239]

Danny's New Adam & Eve Bookstore discussed the potential spread of HIV and AIDS in adult entertainment establishments that offer closed viewing booths.[240] A Pennsylvania state appeals court upheld a lower court decision closing down certain areas of two adult bookstores and video establishments that were found to be public nuisances because they threatened the spread of HIV.[241] The decision arose on a consolidated appeal by Danny's New Adam & Eve Bookstore and Book Bin East, which both sold sexually oriented video tapes, books, and magazines, as well as offered coin-operated video viewing booths.[242] Agents for the state testified that a number of the booths had holes between them that allowed patrons to have oral sex with persons in the adjacent booth.[243] A state agent also testified that in the "Couch Dancing" area of the Book Bin East, dancers offered to have sex with him for money.[244] In addition to this testimony, a patron of these establishments testified that he was infected with HIV and that he had engaged in intercourse in the establishments on several occasions.[245]

The court found that "[c]ompetent evidence exists in the record to support the trial court's conclusion that sexual conduct, occurring on the premises, could lead to the spread of HIV which may result in AIDS."[246] The court further held that the "citizens of the Commonwealth of Pennsylvania will suffer irreparable harm if defendants continue to maintain video viewing booths and areas utilized [as] 'California Couch Dancing' where sexual activity has taken place which could lead to the spread of HIV."[247] Thus, the

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239. *See Suburban Video*, 694 F. Supp. at 589.
240. *See Danny's New Adam & Eve Bookstore*, 625 A.2d at 121.
241. *See id.*at 122.
242. *See id.*
243. *See id.* at 120-21.
244. *Id.* at 121.
245. *See id.* at 122.
246. *Id.*
247. *Id.* at 121.

court considered the spread of HIV a legitimate state concern to justify regulation.

2. Increased Crime, Prostitution, Rape, and Neighborhood Deterioration

In *LaRue*, the Court relied upon testimony by law enforcement agents and state investigators that prostitution occurring in and around strip clubs involved some of the female dancers employed at the clubs.[248] The city also presented testimony that indecent exposure to young girls, attempted rape, rape, and assaults on police officers took place on or immediately adjacent to such premises.[249] Numerous studies have been conducted in cities throughout the United States to determine the relationship between increased crime rates and decreasing property values, including Austin, Texas; Orange County, Florida; Dallas, Texas; Los Angeles, California; Tampa, Florida; and Palm Beach County, Florida.[250] The reports describe the methodology and results of studies done between 1984 and 1985 in Los Angeles, California and Austin, Texas and are reasonably detailed.[251] The Austin study compared rates of sex-related crimes and other crimes in four study areas, all of which contained one or two adult businesses, to the corresponding crime rates in control areas, which were said to be near the study areas and similar in land use characteristics, but without adult entertainment establishments.[252] Generally the crime rates were found to be higher in areas containing adult establishments than in their corresponding control areas.[253] Crime rates were higher for both sex-related and non-sex-related crimes.[254]

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248. *See* California v. LaRue, 409 U.S. 109, 110 (1972).

249. *See id.* at 111.

250. *See* Broward County Memorandum, *supra* note 233; *see also* T-Marc, Inc. v. Pinellas County, 804 F. Supp. 1500, 1503 (M.D. Fla. 1992) (listing cities that have conducted studies of secondary effects of adult entertainment).

251. *See* Randy D. Fisher, Evidence for the Harms of Adult Entertainment: A Critical Evaluation 11 (1993) (unpublished report) (on file with author).

252. *See id.*

253. *See id.*

254. *See id.*; *see also* Borrago v. City of Louisville, 456 F. Supp. 30, 31 (W.D. Ky. 1978) (upholding an ordinance based on studies on increased crime and undesirable clientele

An independent report found that the number of adult businesses in the Hollywood area of Los Angeles increased from eleven in 1969 to eighty-eight in 1975, a 700% increase.[255] During the same time period, reports homicide, rape, and burglary[256] increased 7.6% in Hollywood and 4.2% citywide, indicating a low rate in the increase of serious crime in both areas.[257] The report notes that arrests for prostitution, drug offenses, gambling violations, and various misdemeanors[258] increased dramatically to 45.4% in the Hollywood area compared to a modest increase citywide of 3.2%. Additionally, a New York City study shows that the most severe crime, prostitution, and urban blight occur when adult businesses concentrate in one particular area of a city.[259] Although most of these studies show a correlation between the location of adult businesses and an increase in crime, the studies' reliability and accuracy have been questioned.[260] However, surveys of police officers and comments of citizens at public hearings have consistently expressed the view that the presence of adult businesses have had a negative effect.[261]

Two types of studies have been conducted to determine whether the presence of adult entertainment affects property values.[262] The most common study approach has been to solicit the opinions of real estate appraisers, lenders, or property owners about the effect of adult businesses on nearby residential or commercial properties.[263] Results of these surveys show that the majority of people surveyed would not buy a house or open a

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around adult establishments). *But see* California v. LaRue, 409 U.S. 109, 131-33 (1972) (Douglas, J., dissenting) (rejecting the causal connection between sex-related entertainment and criminal activity).

255. *See* Fisher, *supra* note 251, at 10.

256. *See id.* at 11.

257. *See id.*

258. *See id.*

259. *See* Rachael Simon, Note, *New York City's Restrictive Zoning of Adult Businesses: A Constitutional Analysis*, 23 FORDHAM L. REV. 187, 205 (1995) (referring to this occurrence as the "combat zone effect").

260. *See* Fisher, *supra* note 251, at 11.

261. *See id.*; *see also* Simon, *supra* note 259, at 187, 190.

262. *See* Fisher, *supra* note 251, at 15; *see also* Simon, *supra* note 259, at 206.

263. *See* Fisher, *supra* note 251, at 15.

business near an adult business.[264] Additionally, real estate professionals and residents generally agree that adult entertainment lowers property values "from moderate to substantial amounts."[265]

Los Angeles and Indianapolis used a different study approach.[266] These studies examined property values through Multiple Listing data or property value assessments and compared data for areas containing adult entertainment with control areas that contained no such establishments.[267] Many appraisers and real estate agents surveyed responded that the effects on property values depend upon the type of adult business, how it was run, and how it was marketed.[268]

B. The Relationship Between Adverse Effects and Location of Adult Businesses

The findings of these studies indicate that when compared to other commercial uses, increased crime rates and lower property values are more likely to be found near adult entertainment businesses.[269] Some studies found that illegal and lewd activities often occurred in adult bookstores and theaters.[270] Other studies document neighborhood deterioration associated with adult entertainment establishments.[271]

Although local governments have relied on these studies to support the passage of restrictive zoning ordinances, researchers disagree over whether a relationship exists between adult entertainment businesses and adverse secondary effects. The National Coalition Against Pornography, Inc. has distributed leaflets and fact sheets that indicate a link between sexually explicit material

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264. *See id.*

265. *Id.*

266. *See id.* at 16.

267. *See id.*

268. *See id.* at 15.

269. *See* Broward County Memorandum, *supra* note 233.

270. *See* PROSECUTIVE SUMMARY, *supra* note 232 (reporting that agents witnessed sexual intercourse, oral copulation, sodomy and fellatio).

271. *See* Tampa Transcript, *supra* note 1, at 9, 21-22.

and crime, child molestation rates, and rape.[272] However, following the Final Report of the Attorney General's Commission on Pornography (Meese Commission Report),[273] numerous researchers independently published contrary findings that no statistical data existed to support a relationship between violent or nonviolent sexually explicit material and rape, molestation, prostitution, and other crimes.[274]

Nevertheless, whether secondary effects are attributable to adult entertainment businesses continues to concern residents of communities located near these businesses.[275] These concerns, instead of the abstract statistical data found by researchers, are the focus of zoning boards and local governments.[276] Although the passage of restrictive zoning ordinances must be supported by sufficient factual findings, the Supreme Court has held that this evidence may be borrowed from other cities where the secondary effects exist.[277] Also, "[a] city need not wait for urban deterioration to occur before acting to remedy it" by way of a zoning ordinance that restricts location of adult entertainment businesses, and a city may rely upon experiences of other cities in enacting such restrictions as long as reliance is reasonable.[278]

Adult entertainment produces negative secondary effects, as is evidenced by numerous studies. Potential effects include: the spread of HIV, higher crime, higher rates of prostitution and rape, and neighborhood deterioration, including decreased property values. In the next section, this Comment explores methods of reducing these harmful effects.

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272. *See* NATIONAL COALITION AGAINST PORNOGRAPHY, FACT SHEET (1990).

273. ATTORNEY GENERAL'S COMM'N ON PORNOGRAPHY, U.S. DEP'T OF JUSTICE, FINAL REPORT 215 (1986) [hereinafter MEESE COMM'N REPORT].

274. *See* MARCIA PALLY, SENSE AND CENSORSHIP: THE VANITY OF BONFIRES 18-23 (Americans for Constitutional Freedom & Freedom to Read Foundation 1991).

275. *See* Minutes of the Bd. of County Comm'rs, Broward County, Fla. 2-7 (July 13, 1993) (identifying 20 citizens who voiced opinions concerning adult entertainment establishments in their neighborhoods); *see also It's Showtime*, *supra* note 222, at 22.

276. *See It's Showtime*, *supra* note 222, at 22. S*ee generally* Tampa Transcript, *supra* note 1.

277. *See* City of Renton v. Playtime Theatres, Inc., 475 U.S. 41, 51 (1986).

278. 15192 Thirteen Mile Rd., Inc. v. City of Warren, 626 F. Supp 803, 825 (E.D. Mich. 1985); *see also* Genusa v. City of Peoria, 619 F.2d 1203, 1211 (7th Cir. 1980) (finding that "a city need not await deterioration in order to act").

IV. POSSIBLE SOLUTIONS TO COMBAT SECONDARY EFFECTS

Communities have used different strategies to reduce the harmful effects resulting from the presence of adult entertainment. Many communities use zoning as a tool to rid their residential area of these harmful secondary effects.[279] When zoning out the adult entertainment establishment is not a viable avenue, other alternatives may be considered, such as expanding the scope of prostitution statutes[280] or narrowing the scope of materials protected by the First Amendment.[281]

A. Is Zoning the Solution?

In 1986, President Reagan created the Meese Commission specifically to study the impact of pornography on society.[282] In reviewing the use of zoning schemes to restrict adult entertainment, the commission expressed concern that "zoning may be a way for those with political power to shunt the establishments they do not want in their own neighborhoods into the neighborhoods of those with less wealth and less political power."[283] Striking a balance between zoning and freedom of speech has proven to be a difficult and imprecise judicial exercise.[284] While the courts have not provided definitive guidance on all the legal questions, municipalities desiring to combat the secondary effects of adult uses have received sufficient judicial direction to enable passage of zoning legislation safe from judicial veto.[285] Some municipalities have attempted to disperse adult uses by implementing minimum distance requirements between adult establishments and other land uses such as residences, churches, schools, and parks.[286] These

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279. *See* discussion *infra* Part IV.A.

280. *See* discussion *infra* Part IV.B.1.

281. *See* discussion *infra* Part IV.B.2.

282. *See* MEESE COMM'N REPORT, *supra* note 273, at 390.

283. *Id.*

284. *See* David J. Christiansen, *Zoning and the First Amendment Rights of Adult Entertainment*, 22 VAL. U. L. REV. 695, 709 (1988) (discussing the judicial treatment of the practice of zoning out adult businesses).

285. *See* City of Renton v. Playtime Theatres, Inc., 475 U.S. 41, 48-50 1986).

286. *See* Young v. American Mini Theatres, Inc., 427 U.S. 50, 52 (1976) (upholding a zoning ordinance that restricted the location of adult use businesses to prohibit the

municipalities concentrate adult establishments in industrial, light industrial, or commercial zones using zoning ordinances.[287]

The first major area of concern in promulgating adult use zoning ordinances involves development of the factual record.[288] The factual record must be built by a municipality prior to the passage of any restrictive zoning legislation.[289] The record should include two components: (1) studies indicating that a link exists between adult uses and the problems associated with those adult uses; and (2) studies indicating that the method chosen, whether dispersal or concentration, addresses those undesirable secondary effects.[290] Municipalities have two alternatives for building a factual record that will support an adult use ordinance, both of which must withstand judicial scrutiny. First, a municipality can hire experts in demography, crime, traffic, housing, real estate valuation, and commercial development to supplement the record.[291] Unfortunately, this option is very costly. Alternatively, a city can borrow from factual records of other cities that have enacted similar legislation.[292]

If a municipality chooses to borrow from other cities' experiences in building its factual record, the statement of purpose for the ordinance should clearly identify that a nexus exists between adult uses and certain secondary effects, the particular

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location of adult businesses within 1,000 feet of each other and 500 feet of residential zone); *see also* Northend Cinema, Inc. v. City of Seattle, 585 P.2d 1153, 1156 (Wash. 1978) (upholding a zoning ordinance that restricted the location of adult use businesses to a specified area of the city); *see also City of Renton*, 475 U.S. at 43, 52 (upholding a zoning ordinance that prohibited the location of adult use businesses from within 1,000 feet of a residential zone, church, park, or school); Gianni P. Servodidio, *The Devaluation of Nonobscene Eroticism as a Form of Expression Protected By the First Amendment*, 67 TUL. L. REV. 1231, 1235-37 (1993). Many jurisdictions have found alternatives to get around the *Miller* standard, thus leading to inconsistent results. *See id.*

287. *See City of Renton*, 475 U.S. at 46, 52 (upholding a zoning ordinance that restricted the location of the adult use businesses to industrial and commercial zones).

288. *See, e.g.*, Northend Cinema, Inc. v. City of Seattle, 585 P. 2d 1153 (Wash. 1978).

289. *See City of Renton*, 475 U.S. at 51-52.

290. *See id.*

291. *See id.*

292. *See id.* at 50-52. A municipality does not need to conduct new studies and build an independent factual record "so long as whatever evidence the city relies upon is reasonably believed to be relevant to the problem that the city addresses." *Id.* at 51-52.

secondary effects of adult uses that the ordinance seeks to address, and a legislative finding that the ordinance in question addresses those secondary effects.[293] In addition to a statement of purpose, the factual record should also contain, when feasible, factual findings that support the nexus between the secondary effects,[294] and the method chosen to combat those secondary effects.[295] This additional information allows a court to determine that the legislative body understood the secondary effects and made an intelligent determination that the ordinance was reasonably believed to be an effective method of combating the existing secondary effects.[296]

Conclusively, restrictive zoning of adult use establishments may help curtail adverse secondary effects that adult businesses bring into communities. However, the requirements of *Renton*[297] must be considered to ensure that the constitutional rights of owners and patrons are not violated.

B. Alternative Methods of Solving the Problems of Secondary Effects

1. Expand the scope of prostitution statutes

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293. *See id.* at 50-52. The language in *Renton* and subsequent decisions indicates that a municipality's failure to address the governmental interest issue can be fatal to the constitutionality of the ordinance. For example, Fort Lauderdale passed a city ordinance that stated as its purpose the desire "to preserve public peace and good order" and maintain property values in areas around residential sections, parks, and schools. The district court held that the city failed to provide evidence of a documented history of concern about the undesirable effect of adult entertainment on the community. *International Food & Beverage Systems v. City of Fort Lauderdale*, 614 F. Supp. 1517, 1520 (S.D. Fla. 1985); *see* Krueger v. City of Pensacola, 759 F.2d 851, 852 (11th Cir. 1985).

294. These findings should include testimony or reports from urban planners, demographers, crime experts, traffic consultants, and experts in housing, real estate valuation, commercial development, and similar evidence. *See City of Renton*, 475 U.S. at 51 (stating that a city may rely on the experiences of other cities and on the evidence summarized in *Northend Cinema, Inc. v. City of Seattle*, 585 P.2d 1153 (Wash. 1978)).

295. *See City of Renton*, 475 U.S. at 52.

296. *See* Northend Cinema, Inc. v. City of Seattle, 585 P.2d 1153, 1159 (Wash. 1978).

297. The zoning ordinance must provide sufficient evidence of adverse secondary effects, the definitions must be narrowly tailored and a reasonably available alternative means of communication. *See City of Renton*, 475 U.S. at 52-54.

Prostitution is the criminal act of exchanging sex for money; an offense that is illegal in most states.[298] The institution of prostitution allows males unconditional sexual access to females, limited only by their ability to pay.[299] Various studies conducted on adult bookstores, peep shows, strip clubs, pornographic modeling studios, and lingerie modeling shops conclude that many of these establishments offer sex for money.[300] Increased prostitution and littering in nearby neighborhoods are among the secondary effects attributable to these adult businesses[301] and are the primary contributors to community complaints about these businesses.[302]

One way to assuage the secondary effects of adult businesses would be to include pornographic filmmakers and owners of adult businesses under the scope of prostitution statutes, thus penalizing any activity in which sex is exchanged for money. Any owner, filmmaker, or photographer who does not encourage or assist in the exchange of sex for money would not fall within the scope of

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298. Nevada has made an exception for legalized prostitution. "It is unlawful for any person to engage in prostitution or solicitation thereof, except in a house of prostitution." NEV. REV. STAT. § 201.354 (1995).

299. *See* Evelina Giobbe, *Prostitution: Buying the Right to Rape*, *in* RAPE AND SEXUAL ASSAULT III: A RESEARCH HANDBOOK 143 (Ann Wolbert Burgess ed., 1991). Prostitution is "[e]ngaging in or agreeing or offering to engage in sexual conduct with another person under a fee arrangement with that person or any other person." BLACK'S LAW DICTIONARY 1222 (6th ed. 1990). Although prostitutes may be either male or female, this Comment refers only to the majority of the situations in which the prostitute is female. This Comment also acknowledges that some pornographic filmmakers are female. However, an examination of these situations is beyond the scope of this Comment.

300. *See generally supra* note 235-245 and accompanying text. A typical work day for pornographic models is 12 to 14 hours long, and models can expect to engage in at least two sex scenes a day. *See* MEESE COMM'N REPORT, *supra* note 273, at 871. Further, the Meese Commission concluded that "it seems abundantly clear from the facts before us that the bulk of commercial pornographic modeling, that is all performances which include actual sexual intercourse, quite simply is a from of prostitution." *Id.* at 890; *see* PROSECUTIVE SUMMARY, *supra* note 232 (reporting that agents witnessed sexual intercourse, oral copulation, sodomy and fellatio); *see also* LINDA LOVELACE & MICHAEL MCGRADY, ORDEAL (1980) (the autobiography of a pornographic star who describes the abuse she suffered and the prostitution with which she engaged while filming these types of movies).

301. *See* Tampa Transcript, *supra* note 1, at 21-22. Undercover agents have seen condoms lying on the ground in parking lots of some adult entertainment establishments. *See* PROSECUTIVE SUMMARY, *supra* note 232, at 235.

302. *See* Tampa Transcript, *supra* note 1, at 21-22.

these proposed prostitution statutes. As seen in numerous states, many patrons engage in sexual activity or lewd acts in adult establishments.[303] These establishments would be the primary target of expanded prostitution statutes. Decreasing the number of adult establishments that promote and foster sexual activity and lewd acts appears to be the ultimate goal of most local governments which enact restrictive zoning ordinances.[304] In contrast, this alternative is not intended to dissolve all adult establishments but aims to decrease physical sexual actions.[305] Thus, these improved statutes would merely exist to eliminate the sexual activity and lewd acts that occur at some adult establishments.

If adult establishment owners and pornographic filmmakers were held criminally liable for the activities that occur in the proximity of their establishments then perhaps a heightened level of awareness and prevention of prostitution would develop in this industry and the neighborhoods in which these establishments are located. Thus, under current prostitution statutes, the owner is able ignore illegal money transactions between the patrons and dancers. Broader prostitution statutes would lessen this purposeful ignorance by imposing greater liability upon owners, which in turn would lessen some secondary effects stemming from adult entertainment establishments, most notably prostitution and the spread of HIV and AIDS.

In California, some pornographers have been successfully prosecuted under prostitution statutes.[306] However, the case of *People v. Freeman*[307] slowed such prosecution by overturning precedent which held to the contrary.[308] The court found that

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303. *See* discussion *supra* Part III.A.1.

304. *See* City of Renton v. Playtime Theatres, Inc., 475 U.S. at 41, 52-54 (1986).

305. *See id.*

306. *See* People *ex rel.* Van de Kamp v. American Art Enter., Inc., 75 Cal. App. 3d 523 (Cal. Ct. App. 1977); People v. Fixler, 56 Cal. App. 3d 321 (Cal. Ct. App. 1976); People v. Zeihm, 40 Cal. App. 3d 1085 (Cal. Ct. App. 1974).

307. 758 P.2d 1128 (Cal. 1988) (overturning conviction of an adult business owner charged with procuring another person for the purpose of prostitution).

308. *See id*. at 1133 n.6 ("To the extent that *People v. Fixler*, *People* ex rel. *Van de Kamp v. American Art Enterprises, Inc.*, and *People v. Zeihm* hold that the payment of wages to an actor or model who performs a sexual act in filming or photographing for publication

paying actors and actresses to engage in "various sexually explicit acts, including sexual intercourse, oral copulation and sodomy" did not come under the statutory definition of prostitution.[309] The court further stated that to constitute prostitution, "the money or other consideration must be paid for the purpose of sexual arousal or gratification . . . .[310] The Freeman court found "no evidence that defendant paid the acting fees for the purpose of sexual arousal or gratification . . . ."[311]

Prior to *Freeman,* the *Fixler* court concluded that the prosecution of owners, filmmakers, and photographers was based on conduct and was not aimed at prohibiting any communication of ideas.[312] The court in *State v. Kravitz*,[313] upheld the conviction of the owner of an adult entertainment theater for soliciting a male and a female to engage in sex acts before an audience.[314] Likewise, in *People v. Maita*,[315] the defendant was convicted for pimping and pandering by hiring women to have sex with "members of the audience."[316] As in these cases, prosecution of adult business owners, pornographic filmmakers, and pornographic photographers under prostitution statutes proves to be a practical approach for lessening some of the secondary effects associated with adult entertainment establishments because the difficult problem of First Amendment line-drawing is avoided.

2. Modify the application of Miller v. California

The Supreme Court has held that obscenity does not come under the umbrella of the First Amendment as protected speech or conduct.[317] Although questions of the soundness of the *Miller* test have produced considerable debate, its practical result has been to

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constitutes prostitution regardless of the obscenity of the film or publication so as to support a prosecution for pandering . . . they are disapproved.").

309. *Id.* at 1129, 1135.

310. *Id.* at 1131.

311. *Id.*

312. *See* People v. Fixler, 56 Cal. App. 3d 321, 325 (Cal. Ct. App. 1976).

313. 511 P.2d 844 (Or. Ct. App. 1973).

314. *See id*. at 845-46.

315. 157 Cal. App. 3d 309 (Cal. Ct. App. 1984).

316. *Id.* at 313-16.

317. *See supra* note 98 and accompanying text.

narrowly define the category of materials subject to prohibition as those depicting "hard-core" sexual conduct.[318]

In *Jenkins*, the Court unanimously reversed an obscenity conviction based on the motion picture *Carnal Knowledge*.[319] This opinion signaled the Court's willingness to review the content of allegedly obscene material to limit a jury's unbridled discretion in determining what is patently offensive.[320] Thus, the *Jenkins* Court reemphasized that under *Miller*, only the most explicit, thoroughly hard-core materials that lack any redeeming value whatsoever warrant constitutional regulation.[321] As a result, only a fraction of the broad range of pornographic materials available to the public could be successfully attacked under obscenity law.

Certain types of pornographic material showing acts of bestiality,[322] flagellation,[323] sadomasochism and extreme violence[324] do not pose much of a problem for courts when determining whether the material is obscene. However, other types of sexually explicit material have benefited from the protection of the First Amendment, such as dial-a-porn messages,[325] striptease acts,[326] and crudely drawn depictions of women.[327] Perhaps this gap is where the legal system fails to prevent secondary effects caused by adult businesses.

Because obscenity enforcement has never been sufficiently consistent to force pornography syndicates out of business or back underground, video dealers are misled into believing or at least acting as if they believe that hard-core adult business is legal. The

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318. Jenkins v. Georgia, 418 U.S. 153, 160 (1974).

319. *See id.* at 155.

320. *See id.* at 160.

321. *See id.* at 161.

322. *See* United States v. Guglielmi, 819 F.2d 451, 453-54 (4th Cir. 1987).

323. *See* Ward v. Illinois, 431 U.S. 767, 771-72 (1977). Flagellation is defined as "a whipping or flogging, especially . . . for sexual stimulation." WEBSTER'S NEW WORLD COLLEGE DICTIONARY 512 (3d ed. 1996).

324. *See* United States v. Schultz, 970 F.2d 960 (5th Cir. 1992).

325. *See* Sable Communications, Inc. v. FCC, 492 U.S. 115 (1989).

326. *See* Barnes v. Glen Theatre, Inc., 501 U.S. 560, 581 (Souter, J., concurring); *see also* Miller v. Civil City of South Bend, 904 F.2d 1081, 1094 (7th Cir. 1990).

327. *See* City of St. George v. Turner, 813 P.2d 1188, 1192 (Utah Ct. App. 1991), *aff'd*, 826 P.2d 651 (Utah 1991).

Meese Commission criticized both federal and local prosecutors for letting the problem get out of control and urged federal and local enforcement as the solution to the problem of hard-core pornography.[328]

If United States attorneys and state and local prosecutors bring strong cases under present laws, perhaps the entire hard-core adult industry will be shown as regularly engaging in the illegal trafficking of obscenity. In a nation-wide survey of law enforcement efforts after *Miller*, the study concluded that obscenity laws have only a minimal effect on the conduct of prosecutors and pornographers.[329] More than half of the prosecutors surveyed said *Miller* has not affected the odds of conviction, 29% said *Miller* has helped the prosecution, and 17% reported it has helped defendants.[330] The study found that the public had become more tolerant of pornographic material and concluded that this "liberalization of attitudes has in turn influenced prosecutors to handle only cases involving particularly hard core materials."[331]

The Supreme Court consistently and forcefully has recognized that the "crass commercial exploitation of sex" is a matter of grave concern and a legitimate target of state and federal criminal and civil laws and treaties.[332] Following *Miller*, several scholars and state officials have suggested that federal and state legislatures adopt a *per se* definition of obscenity which would address the problems encountered in applying *Miller*.[333] For example, one legal commentator, Bruce Taylor, suggests the proposed statute or ordinance should state: "Hard-core pornography means any material or performance that explicitly depicts ultimate sexual acts, including vaginal or anal intercourse, fellatio, cunnilingus,

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328. *See* MEESE COMM'N REPORT, *supra* note 273, at 366-75.

329. *See* Harold Leventhal, Project, *An Empirical Inquiry into the Effects of* Miller v. California *on the Control of Obscenity*, 52 N.Y.U. L. REV. 810, 928 (1977).

330. *See id.* at 900.

331. *Id.* at 898.

332. Paris Adult Theatre I v. Slaton, 413 U.S. 49, 63 (1973).

333. Bruce A. Taylor, *Pornography and the First Amendment*, *in* CRIMINAL JUSTICE REFORM 156-57 (1983); *see also* William W. Milligan, *Obscenity: Malum in Se or Only in Context? The Supreme Court's Long Ordeal*, 7 CAP. U. L. REV. 631, 643-45 (1978).

analingus, and masturbation, where penetration, manipulation, or ejaculation of the genitals is clearly visible."[334]

This definition would limit live performances, films, and photographs that depict such acts. Since *Miller* was intended to limit the production of hard-core pornography, Taylor asserts that this *per se* definition of hard-core pornography will put the adult establishment owners, performers, pornographic filmmakers, pornographic photographers, nude models, and nude actors on notice regarding what constitutes illegal obscene material.[335]

Ultimately, if these persons are aware of the potential criminal and civil sanctions for producing or participating in the production of hard-core pornography, then the amount and substance of this material should decrease.[336] A decrease in the production of hard-core pornography would lessen the supply and the associated secondary effects attributed to this type of material. For example, a live sex show at an adult establishment would fall within the definition of hard-core pornography, thus losing its First Amendment protection.[337] Without First Amendment protection, the state and federal obscenity statutes would apply to the material, its producers, and its performers. This *per se* rule would uniformly define obscene material under *Miller* and ultimately support the conviction of those adult business owners, filmmakers, and photographers that hire women (or men) to depict or perform sexual acts for the entertainment or arousal of patrons.[338] Thus, objectively defining the scope of the *Miller* test would make owners more likely to temper the borderline hard-core sexual practices that they permit in their establishments because legal vagueness in the obscenity standard would be removed, making legal results more

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334. Bruce A. Taylor, *Hard-Core Pornography: A Proposal for a Per Se Rule*, 21 U. MICH. J. L. REFORM 255, 272 (1987). For a discussion of alternative definitions of pornography, see James Lindgren, *Defining Pornography*, 141 U. PA. L. REV. 1153 (1993).

335. *See* Taylor, *supra* note 334, at 278-79.

336. *See id.* at 281.

337. *See* William A. Stanmeyer, *Obscene Evils v. Obscure Truths: Some Notes on First Principles*, 7 CAP. U. L. REV. 647, 658-61 (1978).

338. *See* Taylor, *supra* note 334, at 281.

consistent.[339] In turn, this result would lessen secondary effects associated with adult entertainment establishments[340] in a quite similar way as the alternative advocating the expansion of prostitution statutes.[341]

C. Which Solution is Best?

The above solutions offer unique approaches to combating the secondary effects of adult establishments. Local restrictive zoning ordinances target the location, concentration, and general operations of adult establishments. The expansion of prostitution statutes targets the owners, filmmakers, and photographers who arrange and encourage the exchange of sex for money at their establishments. The modification of *Miller* would target the actual and depicted sexual acts in photographs and pornographic films. To combat the secondary effects of the adult establishments, one of these solutions should not be chosen over any other. However, if these solutions are utilized together, society will be armed with the proper ammunition to combat the adverse secondary effects of adult establishments. Since each solution offers a different method of attack to combat adverse secondary effects, these solutions should be used in conjunction with one another. Therefore, this Comment advocates that: (1) local governments continue to use zoning ordinances to prevent the effects of secondary effects; (2) state legislatures and local governments enact prostitution statutes that hold all parties involved in the transaction criminally liable; and (3) judiciary entities either modify the application of *Miller* or establish a *per se* definition of obscenity.

V. CONCLUSION

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339. *See id.* at 278; *see also* P. Heath Brockwell, Note, *Grappling with* Miller v. California: *The Search for an Alternative Approach to Regulating Obscenity*, 24 CUMB. L. REV. 131, 136-37 (1993-94). The *Miller* test's vague standards are inherent flaws, as *Miller* has had little effect on prosecutions of obscenity. The *Miller* test has been inconsistently applied by law enforcement and jurors, yielding mixed results across the country. *See id.*; *see also* Servodidio, *supra* note 286, at 1235.

340. *See* Brockwell, *supra* note 339, at 141.

341. Specifically, both alternatives would aim to lessen prostitution and spread of HIV and AIDS.

The adult entertainment industry continues to expand and gain support, resulting in the continuing presence of these businesses in our society and communities. Although many legal principles have been asserted to prevent these businesses from visibly operating in cities throughout the United States, most have failed to accomplish this goal. Supreme Court decisions have extended some First Amendment protection to these businesses and have also provided other measures that create difficulty for local governments in combating the adverse secondary effects attributed to these establishments. Zoning is a valid and useful method of ridding residential communities of these businesses and the secondary effects that are associated with them, but governmental authorities, judicial bodies, and concerned citizens need to combine their efforts and resources to successfully win the war against these businesses.

RECOMMENDED LEGAL WEB SITES FOR LAND USE AND ENVIRONMENTAL LAW

MARTHA MANN*

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I. INTRODUCTION

For those who may have confined their on-line legal research to Lexis® and Westlaw® searches, the Internet (also known as the World Wide Web) has become a legal resource worth discovering. The Internet is unique in that it allows free or nearly free[1] computer access to a spectrum of legal information, some of which is not widely published.[2] An additional advantage is that a great deal of the textual information is placed on the Internet as it is created, eliminating any wait for publication and distribution. It is now possible to read and download documents as archaic as the Code of Lipit-Ishtar[3] or as recent as the latest United States Supreme Court decision.

The Internet, started in 1969 as a United States Defense Department experiment to provide reliable communication in the event of a nuclear attack, has emerged into an expansive network of computers all over the world, connected by telephone lines and

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1. Access to the Internet is free to many students and academians, and nearly free to those who pay a monthly service charge for on-line service.

2. *E.g.*, archival documents and texts documenting the evolution of the conservation movement which can currently be viewed at the Library of Congress's American Memory web site. *See* discussion *infra* Part III (providing a brief description of the Library of Congress site).

3. The Code of Lipit-Ishtar contains some of the earliest known codified laws. Lipit-Ishtar was a shepherd and farmer who became the ruler of Isin cercla 1868-1857 B.C. The Code is estimated to have been written circa 1868 B.C. *See Counsel Quest* (visited July 12, 1997) <http://home.earthlink.net/~parajuris/CounselQuest/index.html>.

modems.[4] Today, there are over 23 million on-line users, with a predicted growth to 66.6 million by the year 2000.[5] By utilizing the Internet, one can send and receive electronic mail, view electronic newsletters, participate in electronic conferences,[6] transfer files from one computer to another, and search for information on any particular topic through the World Wide Web. As it exists today, this "information superhighway" can access information on just about every topic imaginable.[7] The World Wide Web is composed of web sites (also referred to as "home pages") which are drafted in hyper text language (HTML). The information portion of the World Wide Web is contained within the home pages.

II. SEARCHING THE WEB

Essentially, there are two different ways to search the web. The first approach is to browse the web by typing key words or phrases into a search engine. Search engines allow a web search by using terms similar to those used on Lexis® or Westlaw®. There are many existing search engines which can be used to find information and resources. Some search engines may work better than others, depending upon the information sought and the sophistication of the search engine itself. A few of the more popular general search engines along with their web site addresses are set forth below:

- Alta Vista http://altavista.digital.com/
- Infoseek http://www.infoseek.com/

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4. *See* Linda S. Brehmer and Ernest A. Cox, *Making the Internet Useful*, 48 A.L.I.-A.B.A. 129 (Jan. 9, 1997). For those interested in the creation and development of the Internet, see KATIE HAFNER & MATTHEW LYON, WHERE WIZARDS STAY UP LATE: THE ORIGINS OF THE INTERNET (1996).

5. *See id*.

6. *See generally* Eugene Volokh, *Computer Media for the Legal Profession*, 94 MICH. L. REV. 2058 (1996).

7. For additional information on legal Internet resources, *see also* Brehmer and Cox, *supra* note 1; Volokh, *supra* note 3; Linda Karr O'Connor, *Best Legal Reference Books of 1994*, 87 LAW LIBR. J. 310 (1995); Robert J. Ambrogi, *Non Legal Web Sites Can Help Busy Lawyer*, 40 RES. GESTAE 24 (1997); Alan Pearlman, *How Search Engines Help Make Web Use Easier*, 14 LEGAL TECH. NEWSLETTER 4 (Dec. 1996); JAMES EVANS, LAW ON THE NET (1995).

- Lycos http://www.lycos.com/
- Hot Bot http://www.hotbot.com/
- Yahoo http://www.yahoo.com/
- Excite! http://www.excite.com/

A purely legal search engine, dubbed "Lawcrawler," can be found at: http://www.lawcrawler.com/. Lawcrawler allows the user to search federal legal sites, state legal sites, or both. Finally, there is the mother of all search engines—a compilation of all engines in one uniform resource locator (URL). This site is located at: http://www.search.com and contains over 250 of the best search engines on the web, all located in one area.

The second approach to searching the web involves typing in a known home page address and using the hyper text links to access further information and resources. Web sites generally have addresses, such as "http://abanet.org" for the American Bar Association. Within each home page, many terms and phrases (usually highlighted or set off in some way) called hyper text links are present. These links reference other home pages that contain similar or related information. By clicking on the hyper text link, the Web searcher can immediately go to a related topic and obtain additional information without conducting a separate search. Once favorite web site is found, its address may be saved as a bookmark for quick access in the future.

III. RECOMMENDED WEB SITES FOR LAND USE AND ENVIRONMENTAL RESEARCH

The following is a list of websites which currently offer a vast amount of legal information and resources. Some are general legal websites with environmental and land use topics contained within; others are dedicated specifically to environmental and/or land use topics. However, due to the number of web sites available and the constant growth in the number of web sites, this list is far from inclusive.

THE AMERICAN ASSOCIATION OF LAW LIBRARIES/WASHBURN

http://lawlib.wuacc.edu/

This site contains links to a broad spectrum of legal resources. A listing of law schools, law firms and even course outlines is avail-

able, as is access to many law library catalogs. There is also information about discussion groups for specific areas of law.

THE AMERICAN BAR ASSOCIATION

http://www.abanet.org
A web site mainly for those interested in the bar itself, this web site also contains many links to other legal websites. Thirty-three state bar organizations also have their own web sites. (The Florida Bar Association's web page is located at http://FLABAR.org.)

CENTER FOR GLOBAL AND REGIONAL ENVIRONMENTAL RESEARCH

http://www.cger.uiowa.edu/servers/servers_environment.html
Created and updated by the Center at the University of Iowa, this site contains one of the most extensive directories of environmental information and topics. Unique links included are those to research programs and projects, along with digital and graphic environmental data.

CORNELL LEGAL RESEARCH ENCYCLOPEDIA

http://www.law.cornell.edu/library/take1.html
Compiled by a group of law librarians, this site has topical and jurisdictional resources arranged by resource format, including print, microform, CD-ROM, Lexis®, Westlaw®, and Internet, and includes direct links to references.

THE COUNCIL FOR ENVIRONMENTAL QUALITY

http://www.whitehouse.gov/CEQ
This government web site contains information about the current administration's environmental record in addition to links to NEPA Net, the White House Virtual Library, and environmental impact analysis data links.

COUNSEL QUEST

http://home.earthlink.net/ parajuris/CounselQuest/index.html
An excellent general legal research tool, this web page contains links to resources that vary from archaic laws to recent courts and opinions. It also contains articles, newsletters, humor and the law, a reference desk, and information on Usernet newsgroups.

THE ENVIRONMENTAL PROTECTION AGENCY

http://www.epa.gov
You can search the Environmental Protection Agency (EPA) server by phrase or by listed topics ranging from endocrine disruptors to environmental justice. There is also an "Envirofacts" database, a federal regulation environmental subset, and a link to an Environ-

mental Indicators Home Page, which further provides links to data collected nationally or by state, county, or zip code.

THE ESSENTIAL ORGANIZATION

http://www.essential.org/cpi/studies/toxic/index.html
This site was created by a non-profit organization to "provide provocative information" to the public on topics the creators feel are neglected by the mass media. There are links to topics such as the Environmental Resources Information Network, Citizen's Clearinghouse for Environmental Waste, Center for the Study of Responsible Law, Nuclear Information and Resources Service, and Clean Water Action.

THE FINDLAW INDEX

http://www.findlaw.com
A very useful starting point for a search, this site contains its own search engine and legal subject index. Topical legal stories and case records are regularly featured, as are recent United States Supreme Court decisions. The site also contains links to United States Federal Government resources, state law resources, foreign and international resources, as well as links to a directory of law schools, law firms and lawyers, and consultants and experts.

GREEN UNIVERSITY INITIATIVE

http://www.gwu.edu/ greenu
This web page was created through a private-public partnership between the EPA and George Washington University. The site allows the searcher to access United States environmental information resources by subject, name, or via web search engines. Environmental career opportunities are also listed.

INSTITUTE FOR GLOBAL COMMUNICATIONS

http://www.econet.apc.org/econet/en.issues.html
The Institute has supported ecological sustainability and environmental justice for more than a decade. The web page highlights weekly news stories and information on environmental activism.

THE INTERNET LEGAL RESOURCE GUIDE

http://www.ilrg.com/
This site contains a categorized index of 3100 websites covering resources such as academic journals, professional associations, a form index, and federal and state research tools. The sidebar index is quite helpful in narrowing the possible links to resources.

LAWYERS' LEGAL RESEARCH INDEX

http://www.llr.com

This site is especially useful for those still learning how to negotiate the Internet. The site takes the on-line user through Internet basics and instructions on beginning an on-line research project as part of its legal research instruction. Of interest to the environmental researcher are lists and links to internet resources in administrative law. The site also enables full-text searches of recent case law. Said to have one of the better search engines, this is also the only site on the Internet where one can find all United States Supreme Court decisions since 1990, all federal court of appeals decisions since 1992, and recent state court decisions.

THE LEGAL INFORMATION INSTITUTE AT CORNELL LAW SCHOOL

http://www.law.cornell.edu
One of the more established web sites, LII was founded in 1992 to distribute legal information electronically, including disseminating it over the Internet. This site contains a wealth of well-organized primary sources and links to other sites and sources. The site includes sections on "environmental law," "pollution," and "natural resources." Accessible environmental law materials include United States Code, Code of Federal Regulations, state statutes and environmental regulations, recent environmental decisions of the United States Supreme Court, and federal agency information.

LIBRARY OF CONGRESS AMERICAN MEMORY—THE EVOLUTION OF THE CONSERVATION MOVEMENT

http://lcweb2.loc.gov/ammem/amrvhtml/conshome.html
An interesting collection of texts not widely available, this web site purports to document the "historical formation and cultural foundations of the movement to conserve and protect America's natural heritage." The site contains federal statutes and Congressional resolutions, books, pamphlets, presidential proclamations, prints, photographs, and even a two-part motion picture. It includes the full text of Acts to establish the National Park Service, early water conservation acts, and early references on the conservation of natural resources.

LISA'S GREEN PAGE

http://www.echonyc.com/kamml/enviro.html/
Although it claims to be somewhat dated, this is a useful site with an eclectic variety of environmental and legal resources on the Net.

THE NATIONAL ASSOCIATION OF STATE INFORMATION RESOURCE EXECUTIVE STATESEARCH

http://www.nasire.org/ss/index.html
The Statesearch service provides links by state to web pages aimed at energy, environment, and natural resources.

PACE VIRTUAL ENVIRONMENTAL LAW LIBRARY

http://www.law.pace.edu/env/vell6.html
This organized "library" provides links to primary legal sources and its own search engine. This site is purely geared toward environmental legal research on the Internet with links to research topics, the reliability of Internet data, standards, current issues, and secondary sources.

PARKNET: THE NATIONAL PARK SERVICE PLACE ON THE WEB

http://www.nps.gov/
This web site provides information related to the National Park Service and its preservation of America's cultural and natural heritage. The site contains its own PARKNET search engine and a library with environmental news, legislative information, and references. Included in the National Park Service. Info topic is an index of legal resources related to the National Park Service.

QUANTUMLAW

http://www.quantumlaw.com
Access this web site to obtain daily summaries of environmental legislation, regulations, and cases in areas of wastes and hazardous substances, air, water, pesticides, and toxics and Title III.

THOMAS (LEGISLATIVE INFORMATION ON THE INTERNET)

http://thomas.loc.gov
Created by the United States Congress "in the spirit of Thomas Jefferson," this site tracks the week's congressional floor activities, major legislation, the Congressional Record (back to 1993), committee reports and transcripts, and historical documents.

UNITED STATES DEPARTMENT OF TRANSPORTATION

http://www.dot.gov/
The Department of Transportation's home page includes information on the United States DOT and links to individual states' Department of Transportation and related legal Web sites.

UNITED STATES HOUSE OF REPRESENTATIVES INTERNET LAW LIBRARY

http://law.house.gov
The site provides full text offerings of the United States Code and the Code of Federal Regulations in addition to historical documents such as the Declaration of Independence, the Constitution, and international treaties. It also includes links to state and international laws and treaties.

THE VIRTUAL LIBRARY OF ECOLOGY, BIODIVERSITY, AND THE ENVIRONMENT

http://conbio.rice.edu/vl/
Scientifically based topics include global sustainability, the history of life, endangered species, pollution, national and state issues, biodiversity and conservation.

THE WWW VIRTUAL LIBRARY: THE ENVIRONMENT

http://ecosys.drdr.virginia.edu/Environment.shtml
Created at the University of Virginia, this truly amazing web site contains a page of general environmental links and pages of specific information and data on topics such as the atmosphere, biosphere, hydrosphere, and lithosphere. It also includes the notable "List o' lists of Environmental Resources."

YAHOO ENVIRONMENTAL

http://www.yahoo.com/Society_and_Culture/Environment_and_Nature/Law

This site contains a "hotlist" of environmental topics, drawn from the day's news and archived news stories. Topics range from environmental disasters to ozone depletion to recycling.

RECENT DEVELOPMENTS IN LAND USE AND ENVIRONMENTAL LAW*

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I. FEDERAL CASES

Bennett v. Spear, 117 S.Ct. 1154 (1997).

In a unanimous opinion written by Justice Scalia, handed down on March 19, 1997, the United States Supreme Court granted standing to a group of ranchers and irrigation districts to sue for economic harm caused by enforcement of the Endangered Species Act of 1973 (ESA).[1] The claimants sued to challenge a biological opinion issued by the Fish and Wildlife Service in accordance with the ESA, which recommended that the Bureau of Reclamation reduce the water supply of the Klamath Irrigation Project in order to save two species of fish.[2] Specifically, the claimants sued for violation of sections 1533 and 1536 of the ESA.[3] Noting that the claimants were seeking to vindicate economic, rather than environmental interests, the Ninth Circuit Court of Appeals held that the claimants lacked standing under the ESA's citizen suit provision since they failed to meet the "zone of interests" test.[4] The Court granted the claimants standing to seek judicial review of their section 1533 claims under section 1540(g), the ESA's citizen suit provision,[5] even though they "are seeking to prevent application of environmental restrictions rather than to implement them."[6]

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* The recent developments section was researched and written by Wes Strickland, J.D., Florida State University College of Law (expected 1999).

1. Endangered Species Act of 1973, Pub. L. No. 93-205 § 2, 87 Stat. 884 (codified as amended at 16 U.S.C. §§ 1531-1544 (1985 & Supp. 1997)).

2. *See Bennett*, 117 S.Ct. at 1158-59.

3. *See id*.

4. *Id.* at 1160.

5. 16 U.S.C.A § 1540(g) (1985 & Supp. 1997).

6. *Bennett*, 117 S.Ct. at 1163.

The language of section 1540(g) provides that "any person may commence a civil suit" to enforce the ESA.[7] The Court rejected the Ninth Circuit's application of the zone of interests test to this provision.[8] Rather, the Court read the provision at face value to allow "everyman" to enforce the ESA.[9] The Court stated that the subject matter of the legislation (the environment) and the "obvious purpose" of the citizen suit provision to allow enforcement by "private attorneys general" are sufficient reasons to grant standing in this case.[10] The Court further held that the claimants satisfied Article III standing requirements since they suffered an injury in fact that is fairly traceable to enforcement of the ESA.[11] The Court held that the claimants' section 1536 claims are not reviewable under the ESA citizen suit provision[12] but are reviewable under the Administrative Procedure Act (APA).[13] The Court also held that biological opinions issued according to the ESA constitute final agency action for purposes of review under the APA.[14]

Suitum v. Tahoe Regional Planning Agency, 117 S.Ct. 1659 (1997).

The United States Supreme Court ruled on May 27, 1997 that Mrs. Suitum, the petitioner in an action against the Tahoe Regional Planning Agency (TRPA), could seek judicial review of an alleged regulatory taking of her property.[15] Mrs. Suitum claims that the TRPA has taken her property in violation of the Fifth and Fourteenth Amendments by forbidding her to construct a home on her lot near Lake Tahoe.[16] However, the TRPA contended in the proceedings below that Mrs. Suitum's claims were not yet ripe, since she never formally sought and received a final decision concerning certain Transferable Development Rights (TDRs) which allegedly

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7. 16 U.S.C.A § 1540(g).

8. *See Bennett*, 117 S.Ct. at 1163.

9. *Id*.

10. *Id*. at 1167.

11. *See id*. at 1163.

12. *Id*. at 1166.

13. Administrative Procedure Act, Pub. L. No. 89-554, 80 Stat. 392 (codified as amended at 5 U.S.C. §§ 701-706 (1996)).

14. *Bennett*, 117 S.Ct. at 1169.

15. *See Suitum*, 117 S.Ct. at 1670.

16. *See id*. at 1662.

constitute just compensation.[17] The Ninth Circuit Court of Appeals affirmed a holding by the district court that Mrs. Suitum's claims were not yet ripe for judicial review, since the actual value of her TDRs will remain unknown until the TRPA makes a final decision.[18] In an opinion by Justice Souter, the Supreme Court reversed the Ninth Circuit's holding.

The Court held that Mrs. Suitum satisfies the prudential ripeness principle, set forth in *Williamson County Regional Planning Comm'n v. Hamilton Bank*,[19] that she receive a final decision from the Agency imposing the regulations on her property.[20] The Court held that it was enough for the TRPA to classify Mrs. Suitum's land as falling entirely within a zone restricted from development.[21] The majority discussed the relevance of the TDRs to the question of ripeness. First, the Court stated that, since the parties do not dispute whether Mrs. Suitum would receive the TDRs, no discretionary decision is left to be made by the TRPA.[22] Second, the Court stated that any dispute about the value of Mrs. Suitum's TDRs is an issue of fact about possible market prices, which the district court may decide.[23] On the other hand, Justice Scalia, joined by Justices O'Connor and Thomas in a concurring opinion, would not have mentioned TDRs in deciding the ripeness issue.[24] Basically, the concurring Justices consider TDRs to relate solely to the question of compensation and not to the question of whether a taking has occurred.[25] The Court declined to address any broader issues relating to Mrs. Suitum's property, such as whether a taking exists entitling Mrs. Suitum to compensation.

United States v. Olin Corp., 107 F.3d 1506 (11th Cir. 1997).

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17. *See id.* at 1664.
18. *See id.*
19. 473 U.S. 172 (1985).
20. *Suitum*, 117 S.Ct. at 1664-65.
21. *See id.* at 1669.
22. *See id.* at 1661
23. *See id.*
24. *See id.* at 1671-72 (Scalia, J., concurring).
25. *See id.*

On March 25, 1997, the Eleventh Circuit Court of Appeals reversed a district court's dismissal order in a clean-up liability case brought by the United States under the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA).[26] The government filed suit against Olin seeking a clean-up order and reimbursement for response costs.[27] Relying on *United States v. Lopez*,[28] the district court ruled that CERCLA liability would violate the Commerce Clause in this case, since the contamination was confined to Olin's own property.[29] The district court also ruled that CERCLA's response cost liability scheme does not apply retroactively to disposals occurring prior to CERCLA's enactment.[30] The Eleventh Circuit reversed both of the district court's rulings.[31]

First, the Eleventh Circuit held that regulating on-site disposal facilities is a valid exercise of the power delegated to Congress under the Commerce Clause.[32] After examining the legislative history of CERCLA, the court concluded that, even though Congress did not include legislative findings or a jurisdictional element within the statute, contamination clean-up is still a valid exercise of Congressional power because on-site release of hazardous waste substantially affects interstate commerce.[33]

The court went on to hold that CERCLA's response cost liability scheme applies retroactively to hazardous waste disposals occurring before CERCLA's enactment.[34] After acknowledging that courts generally disfavor retroactive application of statutes, the Eleventh Circuit determined that the legislative intent underlying CERCLA dictated that the statute should apply retroactively and

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26. Comprehensive Environmental Response, Compensation, and Liability Act of 1980, Pub. L. No. 96-510, Title III, § 302, 94 Stat. 2808 (codified as amended at 42 U.S.C. §§ 9601-9675 (1995)).

27. *See Olin*, 107 F.3d at 1508.

28. 514 U.S. 549 (1995).

29. *See Olin*, 107 F.3d at 1508.

30. *See id.* at 1508-09.

31. *See id.* at 1509.

32. *See id.* at 1510-11.

33. *See id.*

34. *See id.* at 1514.

not just to future owners and operators.[35] The court noted that its decision was in accord with decisions by every other court having occasion to decide the issue of retroactive application of CERCLA liability.[36]

Sierra Club v. Martin, 110 F.3d 1551 (11th Cir. 1997).

On April 29, 1997, the Eleventh Circuit Court of Appeals reversed a preliminary injunction granted to the Sierra Club and a number of other environmental groups that had ordered the United States Forest Service (Forest Service) and a group of timber contractors to stop all timber cutting projects in the Chattahoochee and Oconee National Forests in Georgia.[37] The district court held that Sierra Club would likely succeed on the merits since the timber cutting projects would directly kill at least 2,000 to 9,000 migratory birds in violation of the Migratory Bird Treaty Act (MBTA).[38] The district court further held that Sierra Club could obtain injunctive relief under the APA, even though the MBTA does not create a private right of action.[39] In reversing the district court's grant of a preliminary injunction, the Eleventh Circuit held that the MBTA is a criminal statute that does not apply to the federal government.[40] Thus, the Eleventh Circuit held that the Forest Service's formal actions were not in violation of the MBTA, and Sierra Club was unable to seek judicial relief under the APA.[41]

United States v. Eidson, 108 F.3d 1336 (11th Cir. 1997).

On March 31, 1997, the Eleventh Circuit Court of Appeals affirmed a conviction of officers of a wastewater disposal company for violating the Clean Water Act (CWA).[42] The defendants were charged and convicted for the illegal dumping of pollutants into

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35. *See id.* at 1515.
36. *See id.* at 1512 n.13 (noting other district courts in accord with this position).
37. *See Martin*, 110 F.3d at 1552.
38. *See id.*
39. *See id.*
40. *See id.* at 1556.
41. *See id.*
42. *See Eidson*, 108 F.3d at 1339.

navigable waters of the United States.[43] Specifically, the defendants had dumped pollutants into a man-made drainage ditch that eventually emptied into Tampa Bay.[44] The Eleventh Circuit held that "navigable waters," as defined in the CWA, included a drainage ditch, even though, under the classic understanding of the term, it was a non-natural tributary of a navigable water.[45] The Eleventh Circuit recognized that Congress "intended to regulate the discharge of pollutants into all waters that may eventually lead to waters affecting interstate commerce."[46] The fact that the drainage ditch was man-made was immaterial since the end result would be the same had it been a natural tributary of Tampa Bay.[47]

Miccosukee Tribe of Indians of Florida v. United States, 105 F.3d 599 (11th Cir. 1997).

On February 10, 1997, the Eleventh Circuit Court of Appeals reversed a district court decision that had dismissed a claim brought under the citizen suit provision of the CWA by the Miccosukee Tribe of Indians of Florida (Tribe) against the United States Environmental Protection Agency (EPA).[48] The Tribe alleged that the EPA failed to comply with its duties under the CWA by not reviewing Florida's water quality standards that had recently been adopted in the Everglades Forever Act (EFA).[49] The Tribe alleged that Florida's water quality standards under the EFA violated the anti-degradation requirements imposed by the CWA.[50] The district court dismissed the Tribe's suit for lack of subject matter jurisdiction, ruling that the Administrator had no duty to review Florida's water quality standards under the EFA because

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43. *See id.* at 1340.
44. *See id*.
45. *Id.* at 1342.
46. *Id.* at 1341.
47. *See id.* at 1342.
48. *See Miccosukee Tribe*, 105 F.3d at 600.
49. *See id.* at 601.
50. *See id.*

Florida never submitted these standards to the Administrator for review.[51]

The Eleventh Circuit reversed, holding that the "district court inappropriately relied on Florida's representations that the EFA did not change Florida's water quality standards."[52] The court further noted that, regardless of whether a state fails to submit new or revised standards, an actual change in its water quality standards could invoke the mandatory duty imposed on the Administrator of the EPA to review such new or revised standards.[53] The court concluded by stating that the CWA citizen suit jurisdiction depended on whether the EFA actually changed Florida's water quality standards. The Tribe's claim was remanded for determination of that issue.[54]

II. FLORIDA CASES

Harris v. Wilson, 693 So. 2d 945 (Fla. 1997) and *Lake County v. Water Oak Management Corp.*, 1997 WL 217408 (Fla. May 1, 1997).

On March 20, 1997, the Supreme Court of Florida decided *Harris v. Wilson*, and on May 1, 1997, the court issued an unpublished opinion[55] for *Lake County v. Water Oak Management Corp*. The issues in both cases are virtually identical. In *Harris*, the court upheld Clay County's special assessment for solid waste disposal, even though the ordinance only applied to residential properties in the unincorporated areas of the county.[56] Similarly, in *Lake County*, the court upheld Lake County's special assessment for solid waste disposal, relying on its recent decision in *Harris*.[57] Additionally, in *Lake County*, the court upheld Lake County's special assessment for fire protection services over the protest of the assessed property owners that the fire protection services were not

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51. *See id.*

52. *Id.* at 602.

53. *Id*.

54. *Id.* at 603.

55. The *Water Oak* opinion is unpublished and was subject to revision or withdrawal at the time of this writing.

56. *See Harris*, 693 So. 2d at 949.

57. *See Lake County*, 1997 WL 217408 at *1.

special services but were of general benefit to the entire community.[58] In both cases, the court relied on its two-prong test set forth in *Sarasota County v. Sarasota Church of Christ, Inc.*[59] According to that test, the court will uphold a special assessment so long as: (1) the services at issue provide a special benefit to the assessed property; and (2) the assessment for the services is properly apportioned.[60]

First, in *Harris*, the supreme court held that Clay County's special assessment for solid waste disposal provided a special benefit to the assessed property owners since "only developed residential properties in the unincorporated areas of the county . . . are the properties that contribute to the solid waste disposal problem for which the county is unable otherwise to adequately obtain payment to cover the cost of disposal."[61] The court further held that the assessment was properly apportioned since the amount imposed accurately reflected the actual cost of disposal per lot, the cost was equally distributed among the owners and bore a rational relationship to the benefits received by the owners, and the determination of which owners were to be assessed was reasonable.[62]

In *Lake County*, the supreme court primarily addressed the special benefit prong of the *Sarasota County* test. The court upheld Lake County's special assessment for fire protection services as a special benefit since "the greatest benefit of those services is to owners of real property."[63] In so holding, the court stated that "the test is not whether the services confer a 'unique' benefit or are different in type or degree from the benefit provided to the community as a whole; rather, the test is whether there is a 'logical relationship' between the services provided and the benefit to real property."[64] The court concluded by finding that fire protection services specially benefit owners of real property by, among other

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58. *See id.*
59. 667 So. 2d 180 (Fla. 1995).
60. *See Lake County*, 1997 WL 217408 at *2.
61. *Harris*, 693 So. 2d at 948.
62. *See id*. at 949.
63. *Lake County*, 1997 WL 217408 at *3.
64. *Id.*

reasons, providing for lower insurance premiums and enhancing the value of the property.[65] These benefits are sufficient to constitute a logical relationship between the services provided and the benefit conferred.[66] Thus, the court has essentially decided to allow any special assessment so long as the county imposing it can provide a logical reason for doing so.

Martin County v. Yusem, 690 So. 2d 1288 (Fla. 1997).

On March 27, 1997, the Supreme Court of Florida held that amendments to comprehensive land use plans, adopted pursuant to chapter 163, *Florida Statutes*, are legislative decisions that are subject to a fairly debatable standard of review.[67] The respondent, Yusem, was seeking declaratory and injunctive relief against the petitioner, Martin County (County), to order the County to rezone Yusem's property from agricultural to residential.[68] To do so, however, would require the County to amend its comprehensive land use plan.[69] The trial court relied on *Snyder v. Board of County Commissioners* (*Snyder I*)[70] and applied a strict scrutiny standard of review to the County's denial of Yusem's requested rezoning amendment.[71] The Fourth District Court of Appeal reversed the trial court's ruling, but the majority agreed with the strict scrutiny standard of review,[72] based upon the supreme court's opinions in *Board of County Commissioners v. Snyder* (*Snyder II*)[73] and *City of Melbourne v. Puma*.[74] In *Snyder II*, the supreme court held that "rezoning actions that have a limited impact on the public and that can be seen as policy applications, rather than policy setting, are quasi-judicial decisions."[75] The district court concluded that the County's decision was quasi-judicial "because to increase the

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65. *See id.*
66. *See id.*
67. *Yusem*, 690 So. 2d at 1288.
68. *See id.* at 1291.
69. *See id.*
70. 595 So.2d 65 (5th DCA 1991), *quashed*, 627 So.2d 469 (Fla. 1993).
71. *See Yusem*, 690 So.2d at 1290.
72. *See id.*
73. 627 So.2d 469 (Fla. 1993).
74. 630 So.2d 1097 (Fla. 1994).
75. *Yusem*, 690 So.2d at 1290.

density on Yusem's fifty-four acres would have a limited impact on the public."[76]

In the instant opinion, the supreme court recognized that its decision in *Snyder II*, read in conjunction with its decision in *Puma*, could reasonably have lead the district and trial courts in this case to conclude that plan amendments are quasi-judicial decisions.[77] The supreme court further noted, however, that several other district courts have read its decisions in *Snyder II* and *Puma* to conclude that plan amendments are legislative, rather than quasi-judicial decisions.[78] The court then made clear its position on this issue by expressly holding that all amendments to comprehensive land use plans are legislative decisions.[79] In so holding, the court cited to Judge Pariente's dissent in the district court's opinion to reject the application of a functional analysis used in rezoning cases, such as in *Snyder II*, to cases involving amendments to comprehensive land use plans.[80]

Essentially, the supreme court found that amendments to a comprehensive land use plan, like the adoption of the plan itself, result in formulation of policy, rather than application of policy.[81] Finally, the court held that, since amendments to comprehensive plans are legislative actions, the "fairly debatable" standard of review applies in these cases.[82] This standard of review is highly deferential to the decision of the legislative body.[83] So long as reasonable persons can differ as to an action's propriety, the legislative body's decision will be upheld.[84] Therefore, the supreme court has decided to allow counties broad discretion in amending their comprehensive land use plans.

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76. *Id.*
77. *See id.* at 1293.
78. *See id.*
79. *See id.*
80. *See id.* at 1294.
81. *See id*. at 1295.
82. *Id.*
83. *See id.*
84. *See id.*

III. NOTABLE BILLS FROM FLORIDA'S 1997 LEGISLATIVE SESSION**

HB 1641 Comprehensive Planning and Land Management
Chapter 97-253, *Florida Statutes*

This bill includes several major provisions. It provides that the limitation on the frequency of amendments to a local government comprehensive plan does not apply to amendments to the schedule of capital improvements of the capital improvements element. It directs the Department of Community Affairs (DCA), in consultation with a technical committee, to evaluate statutory requirements for evaluation and appraisal of comprehensive plans. The bill repeals requirements that state and regional agencies establish by rule procedures for coordinated agency review for projects in the Florida Keys Area of Critical State Concern, and instead, enacts interagency agreements with respect to such projects. In addition, it repeals the requirement that the DCA establish, by rule, procedures and criteria for a developer to petition for authorization to submit a proposed areawide development of regional impact for a defined planning area.

CS/HB 1119 & 1577 Natural Resource Management—
Land Acquisition and Management
Chapter 97-164, *Florida Statutes*

This bill stresses the importance of good stewardship of public lands and that multiple-use management strategies, where appropriate, focus on providing public access, resource protection, ecosystem maintenance, and public-private partnerships. It directs the Department of Environmental Protection (DEP) and the Water Management Districts (WMDs) to create "land management review teams" to audit whether properties are being managed according to their plans and determines the management funding needs of those lands. These teams shall include local citizens, soil

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** The following bill summaries were adopted directly from the Florida Legislature's home page, Florida Online Sunshine, which may be found on the internet at http://www.leg.state.fl.us. The home page includes complete copies of each bill passed in 1997 Legislative Session.

and water conservation districts, and environmental advocates, as well as agency staff.

This bill also initiates a process to close out the Preservation 2000 (P2000) program. By October 1, 1997, DEP and the WMDs are directed to complete studies that pinpoint which lands on their acquisition lists are necessary to acquire in order to either protect endangered species, complete a project so that it can be adequately managed, or link parcels for wildlife corridors or multi-use greenways. It provides that, beginning in fiscal year 1998-1999, agencies with more than one-third of their land-management plans overdue shall not receive their acquisition funds.

This bill specifies that all revenues generated by a land-managing agency through multiple-use management shall be retained by that agency for land management purposes. Additionally, it merges the Land Management Advisory Council and the Land Acquisition Advisory Council, which should help ease the transition after the conclusion of the P2000 program from a focus on land acquisition to an emphasis on properly managing public lands.

This bill further specifies that acquiring lands once used as cattle-dipping vats is in the public interest. The state and other political subdivisions will not be held liable under state law solely because they acquired cattle-dipping vat land.

This bill relaxes one of the eligibility requirements for payment in lieu of taxes for small counties, making eligible an additional six small counties for payment in lieu of taxes if DEP or the WMDs have acquired lands with P2000 funds within their boundaries. It establishes authority for counties over 500,000 to create, by local option, green utilities to collect revenues for exotic-plant control.

This bill also authorizes the development of ecosystem management agreements between regulated entities operating within a defined ecosystem management area and DEP or other state regulatory agencies, provided that the agreement will have a net ecosystem benefit, and the regulated entities have internal environmental management systems. Such agreements are designed to include the following: permit processing, project construction, operations monitoring, enforcement actions, proprietary approvals, and compliance with development orders

and comprehensive plans. The agreements are voluntary for both the regulated entity and DEP, and may act as final agency action.

HB 1323 Water Protection
Chapter 97-236, *Florida Statutes*

This bill addresses the requirements of the 1996 amendments to the federal Safe Drinking Water Act that Florida must meet in order to qualify for federal funds to finance improvements to outdated or inadequate public drinking water systems. The bill provides technical and other forms of assistance to eligible systems. It makes Florida eligible to receive substantial federal dollars over the next five years, possibly a five-to-one or six-to-one match. The bill sets aside at least 15% of the funds available for loans to public water systems that serve 10,000 or fewer people, and allocates up to 15% of the funds to disadvantaged communities. Additionally, this bill transfers the licensure program for water and domestic wastewater treatment plant operators from the Department of Business and Professional Regulation to DEP.

CS/SB 550 Oil and Gas Drilling
Chapter 97-49, *Florida Statutes*

This bill eliminates the option of joining the Mineral Trust Fund to satisfy surety requirements when applying for oil and gas drilling permits. It directs the Governor and Cabinet, with recommendations from DEP, to determine the amount of surety required of applicants for drilling permits.

CS/SB 1306 Brownfields Redevelopment Act
Chapter 97-277, *Florida Statutes*

This bill creates the Brownfields Redevelopment Act. The bill requires brownfields to be designated by a local government by resolution. It provides that certain notice requirements be followed during designation. It also requires persons responsible for site rehabilitation to enter into site rehabilitation agreements that detail clean-up and redevelopment plans. It details eligibility criteria, liability protections, and reopener provisions for brownfield sites. The bill establishes pilot projects at EPA designated sites and establishes a brownfield redevelopment bonus for the creation of jobs. Addi-

tionally, it details minimum clean-up criteria to be used for the rehabilitation of these sites.

The bill contains additional provisions related to: the underground petroleum storage tank program (claims filing deadline, audit authority, and competitive bidding pilot); the filing deadline for the annual operation license granted sources of air pollution; and concerns raised by the Joint Administrative Procedures Council concerning exemptions for used oil generators.

CS/HB 1775 South Florida Water Management District—Oversight and Accountability
Chapter 97-258, *Florida Statutes*

This bill provides increased oversight and accountability of the South Florida Water Management District regarding implementation of the Everglades Forever Act. The bill creates a joint legislative committee with specific oversight responsibility. Requirements are imposed on the district to periodically report on the Everglades Construction project and to disclose information regarding plans to borrow or incur debt. Additionally, statutory guidance for administration of the Everglades Trust Fund is provided.

CS/SB 788 Natural Resources
Chapter 97-25, *Florida Statutes*

This bill is the first step in the process of ratifying the Apalachicola-Chattahoochee-Flint River Basin Interstate Compact, which is under a compact between the states of Florida, Alabama, and Georgia and the federal government. The goal of the compact is to establish a long-term management plan for the Apalachicola-Chattahoochee-Flint River Basin. Congress must still approve the compact.

CS/HB 715 Water Resources—Management
Chapter 97-160, *Florida Statutes*

This bill is a comprehensive update of Florida's water law and policy. It requires the WMDs to consider changes and structural alterations to wetlands, surface waters and groundwater, and the effects such changes have had on a water resource when estab-

lishing minimum flows and levels. It states that no significant harm to Florida's water resources or the ecology, caused by withdrawals, shall be grandfathered-in due to the way the Legislature directs the WMDs to set minimum flows and levels. The bill directs the WMDs to implement a recovery or prevention strategy if a water body falls below, or is projected to fall below, its minimum flow or level. The recovery or prevention strategy must include a timetable that will allow for development of additional water supplies concurrent with any reductions in permitted withdrawals. The bill recognizes that for some surface waterbodies, recovery to historical hydrology is not practical and gives the WMDs the discretion not to set minimum flow levels in certain circumstances.

This bill provides for staggered appointments of WMD governing board members. Additionally, it provides for more extensive review of WMD financial management and budgets. It directs that attorneys employed by the WMDs represent the legal interests or position of the governing board. The bill directs the WMDs to initiate water resource development to ensure water is available for all existing and future reasonable uses and creates stronger linkages among state, WMD, and regional water planning.

The bill requires water use permits to be issued for twenty years if there is sufficient information to provide reasonable assurance that permit conditions will be met and allows the WMDs to require a five year compliance report. It extends eligibility for Water Quality Assurance Trust Fund dollars to people who want to build or improve potable wells in areas delineated by DEP as having contaminated groundwater. The bill reclassifies discharges from desalination or demineralization facilities from industrial wastewater to drinking water byproduct for certain size facilities, as long as certain water quality standards were met. It also addresses a number of issues related to commercial fishing, including the creation of a special activity license for sturgeon, establishment of a bait fish pilot program, and implementation of the constitutionally-imposed net ban.

ABSTRACTS

Volume 12

Richard D. Gragg III, et al., *The Location and Community Demographics of Targeted Environmental Hazardous Sites in Florida*, 12 J. LAND USE & ENVTL. LAW 1 (1996).

This Article focuses on the Florida Environmental Equity and Justice Commission's report concerning whether environmental hazards are disproportionately located in minority and low income communities in Florida. The Article provides a comprehensive background of the environmental justice movement in the United States and in Florida. Next, it describes the Commission's study and discusses the methodology that the Commission used for its proximity and demographic analysis. The Article finds that targeted environmental waste sites are disproportionately located near minority and low income communities and suggests the next step in examining environmental justice problems in Florida. Finally, the Article provides comprehensive graphs and tables illustrating the results of the Commission.

Martin H. Belsky, *Indian Fishing Rights: A Lost Opportunity for Ecosystem Management*, 12 J. LAND USE & ENVTL. LAW 45 (1996).

This Article targets the problem of depletion of salmon and steelhead fisheries in the Northwest United States. The Article provides a brief overview of the *Sohappy v. Smith* and *United States v. Washington* decisions, which promoted regulation and conservation of these fisheries. Next, the Article discusses the Ecosystem Management Model, which these courts declined to adopt. Additionally, a description of the legislative measures taken in response to these two cases is provided. The Article concludes that adoption of an ecosystem management approach to fisheries management is essential to the future well-being of the fisheries in the Northwest United States.

Charles E. Connerly & Marc Smith, *Developing a Fair Share Housing Policy for Florida*, 12 J. LAND USE & ENVTL. LAW 63 (1996).

This Article focuses on the prevalent problem of increasing concentrations of poverty in the inner city and social isolation of inner-city residents in major American cities caused by the mass exodus of middle class, working residents to the suburbs. The Article advocates the implementation of fair share housing programs to remedy these problems of socioeconomic isolation. Specifically, the Article argues that Florida has an optimal statutory scheme to easily introduce such a program. The Article gives a description of fair share programs, including federal efforts toward fair share housing and the state programs of California, New Jersey, Massachusetts,

Connecticut, and Oregon. Finally, the Article closes with five alternatives for a fair share program suited specifically for Florida, utilizing the elements of other federal and state approaches to fair share housing.

Colin Crawford, *Analyzing Evidence of Environmental Justice: A Suggestion for Professor Been*, 12 J. LAND USE & ENVTL. LAW 103 (1996).

This Article addresses the inherent prejudices in modern environmental policies and practices. Specifically, this Article discusses the continuing debate regarding the strength of the correlation between the location of hazardous waste facilities and an area's minority population. Professor Crawford urges his contemporaries, particularly Professor Vicki Been, to expand their evidentiary fields to include statistics of an area's standard of living in order to obtain an accurate analysis of the motives behind locating hazardous waste facilities in certain areas. The Article concludes with a case study of Noxubee County, Mississippi to demonstrate the effect of applying this expanded method of research.

Raed Mournir Fathallah, *Water Disputes in the Middle East: An International Law Analysis of the Israel-Jordan Peace Accord*, 12 J. LAND USE & ENVTL. LAW 119 (1996).

This Article discusses the role of the Jordan River basin in the peace accord (Treaty) between the state of Israel and the Hashemite Kingdom of Jordan. After reviewing past water disputes involving the Jordan River, the water allocation and management sections of the Treaty are compared with the Treaty's predecessor, the Main Plan. Even though it was never ratified, both Israel and Jordan tacitly conducted their respective water polices in accordance with the Main Plan. This discussion is followed by a comparison of the Treaty with the substantive and procedural requirements of the International Law Commission Draft Articles and other international water law theories: equitable utilization, no significant harm, and procedural duties. Based on this analysis, the author predicts that the Treaty will influence future water disputes in the area.

Dana Crosby, *Water, Water, Everywhere, But Not Enough to Drink?: A Look at Water Supply and Florida's Growth Management Plan*, 12 J. LAND USE & ENVTL. LAW 153 (1996).

This Article discusses water supply problems in Florida, specifically addressing water supply and local and regional planning laws. First, background is provided on Florida's current water situation, including Florida's state and local growth management plans. Additionally, the Article analyzes the role of the water management districts in Florida. The Article examines two factors contributing to Florida's water supply problems: pollution and population growth. Finally, the Article concludes with recommendations to alleviate these water problems, including leadership and coordination in

planning, emphasis of regional planning components, further research of the local supply first policy, promotion of conservation, and finally, encouragement of desalination efforts.

Thomas Lundmark, Book Review, INTRODUCTION TO U.S. ENVIRONMENTAL LAWS (by Edward E. Shea), 12 J. LAND USE & ENVTL. LAW 171 (1996).

Introduction to U.S. Environmental Laws by Edward Shea is a book designed to introduce foreigners to American environmental law, providing a chapter on each of the major federal environmental enactments. Being a lecturer in Europe on American environmental law, Dr. Lundmark offers his unique insight into the effectiveness of Mr. Shea's book as an introductory educational tool. The book review describes the subject matter of the book and comments on its organization. Further, Dr. Lundmark points out several of the book's substantive flaws and omissions. Finally, the author offers several remedies to the book's shortcomings.

Richard J. Lazarus, *Litigating* Suitum v. Tahoe Regional Planning Agency *in the United States Supreme Court*, 12 J. LAND USE & ENVTL. LAW 179 (1997).

On May 27, 1997, the United States Supreme Court decided *Suitum v. Tahoe Regional Planning Agency*, a case addressing ripeness issues as they pertain to regulatory takings and transferable developmental rights (TDRs). As record counsel for the Tahoe Regional Planning Agency in the *Suitum*, Professor Lazarus considers the strategic litigation choices made by both parties and their impact on the *Suitum* litigation. By way of introduction, this essay recounts the *Suitum* facts from two different perspectives, that of petitioner and respondent. Then the essay explores the ways that the parties chose to litigate their respective sides, expounding upon the issues that the parties chose to emphasize in their briefs and at oral argument. Finally, the essay reflects on what happened at oral argument and projects the *Suitum* outcome, based largely on the questions posed by the Justices at oral argument. A brief addendum provides the author's thoughts on the actual outcome of the case.

Russel M. Lazega and Charles R. Fletcher, *The Politics of Municipal Incorporation in South Florida*, 12 J. LAND USE & ENVTL. LAW 215 (1997).

In the past few years, more affluent unincorporated communities have chosen incorporation, particularly in South Florida. This Article addresses the recent incorporation phenomenon in Florida, examining the causes and effects of the movement. The first part of the Article provides background on the structure of Florida's local government system. Additionally, the Article discusses the advantages of incorporation to Florida's communities, explaining the impetus for this new trend. Next, the Article explores the revenue tax base erosion resulting from these recent incorporations and

discusses other problems caused by the incorporation wave. Lastly, the Article presents potential options to assuage the incorporation crisis, examining the advantages and disadvantages of each of these proposals.

Robert P. Butts, *Private Property Rights in Florida: Is Legislation the Best Alternative?*, 12 J. LAND USE & ENVTL. LAW 247 (1997).

This Article analyzes the Bert J. Harris, Jr. Private Property Rights Protection Act (Act) passed by the Florida Legislature in 1995. In addition to examining the legislation, the Article includes an examination of the Act in the context of existing Florida takings case law. This is done by comparing the present case results to the anticipated results under the Act. This evaluation is followed by reviewing the perspective views of both the property rights proponents and opponents. Next, the author discusses the anticipated state of takings law in Florida. The author concludes that legislation is the best way to address takings laws in Florida and a more permanent alternative, such as a constitutional amendment, is presently premature since takings law is still evolving.

Paul S. Weiland, *Amending the National Environmental Policy Act: Federal Environmental Protection in the 21st Century*, 12 J. LAND USE & ENVTL. LAW 275 (1997).

The National Environmental Policy Act (NEPA) represents the cornerstone of American environmental law and marks the beginning of the environmental law statutory movement in the United States. This Article traces the evolution of NEPA and the environmental movement and describes the framers' intent in passing NEPA. Next, the Article examines judicial and executive interpretations of NEPA. The Article concludes by assessing NEPA's present state and suggesting possible reforms to ensure a strong future commitment to NEPA.

Shawn M. Willson, *Exacting Public Beach Access: The Viability of Permit Conditions and Florida's State Beach Access Laws After* Dolan v. City of Tigard, 12 J. LAND USE & ENVTL. LAW 303 (1997).

In the aftermath of *Nollan v. California Coastal Commission* and *Dolan v. City of Tigard*, local governments may find it more difficult to utilize permit conditions as a tool for preserving beach access. This Comment explores the viability of Florida's beach access laws after these decisions, examining the potential effects on permitting for construction at the local level. As an introduction, the Comment reviews Florida's current beach access statutes and discusses the *Nollan* and *Dolan* cases. The Comment then analyzes the true meaning of the "rough proportionality" requirement of *Dolan*, entertaining views from subsequent case law and commentators. Additionally, the Comment addresses problems that *Dolan* may create in Florida's access laws. The Comment concludes by offering suggestions to preserve beach access in Florida, including proposals for amending Florida's statutory chapter on beach access, platting of public beach access points, and creating a citizen standing provision to enforce beach access.

Leigh Derenne Braslow, *Coastal Petroleum's Fight to Drill Off Florida's Gulf Coast*, 12 J. LAND USE & ENVTL. LAW 343 (1997).

This Comment examines the six year litigation between Coastal Petroleum and the State of Florida over a vast lease of oil drilling rights that the State and Coastal negotiated almost half a century ago. Coastal Petroleum argues that Florida's 1990 offshore ban on oil drilling deprives the company of its property rights. The company also argues that it should not be required to post an enormous security bond in order to obtain its drilling permit for the leased area. The Comment analyzes five different legal doctrines that might be asserted in litigation: (1) Submerged Lands Act; (2) public trust doctrine; (3) vested rights; (4) Fifth Amendment takings; and (5) substantive due process. The author concludes that to the detriment of Florida's valuable natural resources, Coastal probably has a better chance at winning the litigation.

Dana M. Tucker, *Preventing the Secondary Effects of Adult Entertainment Establishments: Is Zoning the Solution?*, 12 J. LAND USE & ENVTL. LAW 383 (1997).

This Comment examines the effects of the adult entertainment industry on America's communities and addresses whether current legal protections adequately shield communities from negative secondary effects resulting from the industry. The Comment begins by recounting the history of municipalities' abilities to zone out adult entertainment establishments, describing the growth of the industry, and outlining the growth of their First Amendment protection. Next, the Comment examines the potential secondary effects resulting from adult entertainment establishments, including the spread of AIDS, increased prostitution, rape, crime, and neighborhood deterioration. The author discusses whether zoning is a viable method for decreasing these secondary effects from America's neighborhoods. Finally, two additional alternatives are presented to combat secondary effects. The author concludes that zoning should be combined with these additional alternatives to reach the best desired result for the optimal health of America's neighborhoods.

Martha Mann, Review, *Recommended Legal Web Sites for Land Use and Environmental Law*, 12 J. LAND USE & ENVTL. LAW 425 (1997).

This review of legal web sites for environmental and land use law serves as a useful tool for practitioners looking to expand their research to the vast array of information on the internet. The author provides a brief overview of the beginnings of the internet and how do an internet search. The review focuses on describing many of the major web sites containing information about either land use or environmental law.