STATE FOREST PRACTICE LAWS AND REGULATIONS:
A REVIEW OF CONSTITUTIONAL AND LEGAL
ENVIRONMENTS

by

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INTRODUCTION

Public regulation of private forestry practices occurs in nearly all states throughout the nation. Some states, however, have chosen to establish comprehensive regulatory programs that are concerned with practices that can affect literally all the benefits that private forests are capable of producing, including timber, water, wildlife, and recreation. Legislative and resource agency administrative actions to establish such programs are responses to a variety of political and social influences, including public anxiety over the condition of natural environments generally; occurrence of misapplied forestry practices; required state responses to federal environmental laws; sentiment for greater accountability over activities affecting forests; proliferation of local ordinances needing uniformity; landscape-level concerns requiring centralized state control; and tendencies to emulate the actions of other states (Ellefson 1993).

The political and social factors that foster development of regulatory programs are nested within changing perceptions of property rights. As competition for forest resources increases, there occurs a need to better define externalities and property rights so that the full cost of producing commodity and environmental benefits can be acknowledged and appropriately allocated among various segments of society (e.g. forest products sector, recreation user-groups, forest wildlife interests) (Barzel 1989). In the broadest sense, forest practices regulations not only redistribute external costs and satisfy political constituent
groups, but they also alter the structure of existing property rights such that lines between interests seeking use and appropriate management of forest resources are more clearly drawn. By establishing regulatory programs, government is, in essence, determining who has the right to act and accrue specific benefits and who is to bear the costs of producing such benefits (Dragun 1983). As Rose (1990) declares: "In many ways, the evolution of regulatory regimes replicates, at a meta-level, the evolution of private property regimes."

**Property Concepts**

Since the founding of the United States and the drafting of the Constitution, notions of property and the rights and duties assigned to property have evolved (Barlowe 1972; Barzel 1989; Minda 1991). To this day, legislatures and courts continue to address and redress property and property rights entitlements. In such a context, enactment and implementation of modern environmental laws that restrict the activities of private property owners reflect a shift in social and political attitudes toward "property." In many circles, property is no longer viewed as a physically delineated object or parcel of land owned by an individual. Rather, property is increasingly being viewed as entitlements, held by society, to a broad range of nonexclusive environmental values (e.g. endangered species, healthy ecosystems, biodiversity, clean air and water, etc.) (Sax 1983).

Concepts of property in the case of private forestry are increasingly diverging from the view that property is simply a
landowner's physical parcel of land on which harvestable trees occur. Forest practice regulations, for example, often consider as property the water flowing through a forested parcel, the fish and wildlife inhabiting a forest, the soil underlying standing trees, and the aesthetic quality of the forest landscape. Although forest practice regulations typically focus on practices that impact such extended definitions of property, judicial systems continue to struggle with the appropriateness of regulations within some yet to be defined suitable definition of property. Should courts favor regulations as a means of protecting some extended set of resources (property) for the public welfare, or should they oppose them and thereby prevent public intrusion into a discrete set of rights (fee simple title) that private individuals purchase? The importance of this legal and constitutional struggle weighs heavily on private forestry since its outcome will determine what private persons can or cannot do with their forests.

**Externality Concepts**

Government actions which restrict or encourage certain behavior of private owners of property attempt to influence activities that adversely (or beneficially) affect the interests of the broader public. The conceptual reasoning behind such restrictions (including forest practice regulations) is embodied in the notion of "externalities." The latter are goods and services that are produced and subsequently imposed on others without their permission, or that are produced and subsequently consumed by others without their payment (Bromley 1991, Ellefson 1992).
Most environmental and forest practices regulations are established to redress (internalize) negative externalities -- individual private activities which impose unwanted costs on broader segments of society. For example, when a landowner harvests timber to the very edge of a stream, the resulting lack of ground cover may cause significant soil erosion and subsequent stream sedimentation. These conditions may result in degradation of water quality and a subsequent real cost (externality) to downstream landowners and users of the stream. When government restricts the manner in which harvesting occurs near streams, the landowner faces increased costs, namely the opportunity cost of lost revenue from unharvestable trees, or the additional cost of using certain harvesting techniques or equipment in the restricted area. If harvesting is to proceed, the landowner must internalize the cost of the modified harvest methods and the value of any forgone timber. Modern state forest practices laws are designed to compel private forest landowners and timber operators (e.g. contractors, loggers) to include in their accounting schedules those costs that, because of their actions, may be imposed more broadly on the public and the environment in general.

CONSTITUTIONAL TAKINGS

The question of what constitutes a breach of legitimate government authority in regulating private property interests remains a legal quagmire. An entire area of jurisprudence has emerged over the past 100 years to address concerns over government
actions that result in a "taking" of private property. And although there have been many calls by commentators, lawyers, and even judges for the Supreme Court to establish baseline categories of regulatory takings, judicial determination of what government actions "take" private property and require compensation have been based on an ad hoc, case-by-case inquiry (Cronin and Fieldsteel 1985; Marzulla and Marzulla 1991). Even after the 1992 Lucas case, legal commentators debate whether any light has been shed on how courts should interpret the effect of government regulation on owners of private property (Funk 1993; Paul 1992; Popeo and Kamenar 1992).

Definition and Background

The most cited reference regarding what government action affects a taking is found in the Fifth Amendment of the U.S. Constitution:

"No person shall ... be deprived of life, liberty, and property, without due process of law; nor shall private property be taken for public use, without just compensation."

Literally interpreted, whenever the public (through government action) seeks to gain benefit from the use of private property by preventing a private landowner from conducting activities granted under the provisions of a property contract, the landowner's property has been "taken." As unadorned as this rendition of the Fifth Amendment may be, the Supreme Court has made several crucial distinctions as to what constitutes an uncompensable government action.
The primary distinction made in property law is that the government has two vested powers: eminent domain and police power. Generally speaking, the power of eminent domain is invoked by governments principally for the provision of public improvement projects (e.g., dams, roads, schools) (Paul 1987). Government action characterizing eminent domain has traditionally consisted of condemnation of property, declaration of rights-of-way easements, or down-zoning an area of parcels designated for public use. Compensation is afforded to displaced property owners based on an appraisal of fair-market value of the condemned parcel.

The use of police power to advance public interest is a less distinguishable action of government. Under the use of police power, government may enact regulations and ordinances without affecting a taking and, therefore, requiring no compensation under the Constitution (Merriam 1988). Police power is invoked under two doctrines: nuisance (or noxious use) and waste. The doctrine of nuisance declares that individuals may not use their property in a manner that will injure the real property rights of others (Freeman 1975). Enacted under police power, most forest practices laws fall under the doctrine of nuisance (Ellefson 1992, Siegel 1991). The doctrine of waste attempts to balance the land use and management desires of a current property owner against the desires of future owners to receive the property in an unimpaired condition. Implied is that a current owner has rights to use and enjoy all the advantages of owning property -- to the extent that such uses do not alter the ability of future owners to use and enjoy the same
property. Many early forest practice laws were based on the doctrine of waste.

Criteria for Judgement

When adjudicating a case affecting regulatory takings, the courts has applied criteria to aid in determining whether a taking has occurred. At a constitutional level, if a governmental action violates protection of speech, due process, right to counsel, or equal protection, it will be ruled as invalid (Marzulla and Marzulla 1991). In takings cases, the due process clause under the Fifth Amendment and the due process and equal protection clauses of the Fourteenth Amendment are invoked. In short, these clauses prohibit government from taking action that will deprive an individual of life, liberty, or property -- without first providing a notice through clear decision-making procedures and granting the opportunity to contest the action (Cubbage and Siegel 1985; Liss and Epstein 1986).

Due process and equal protection clauses are fundamental in the adjudication of regulatory takings cases. However, they are rarely explicitly invoked as determinant factors because of the potential for broad interpretation. More specific criteria have been developed to surmise whether the clauses have been violated. These criteria can be placed in two categories, namely the nature of government action and the economic impact on the property owner. In a judicial determination, commentators refer to the weighing of these criteria as the "balancing test" or the "two-prong test."
**Nature of Government Action.** Legal commentators analyzing takings cases have identified two tests used by the U.S. Supreme Court in deliberating the nature of government action in the balancing test, namely the physical invasion test and the government action-public purpose test. Whenever a government regulation restricts the use of a physical segment of property, it is regarded as a physical invasion, akin to a taking by eminent domain (Bauman and Keresfer 1988; Cronin and Fieldsteel 1985; Hickman and Hickman 1990). The dilemma in finding a physical invasion is the lack of a categorical definition of what constitutes a real property interest in the physical sense. Hickman and Hickman (1990) cite the case of *Bedford v. United States*, 192 U.S. 217 [1904], in which a federal project to improve navigation on the Mississippi River caused gradual erosion of a property owners' land. Although there was a physical loss of property, the Court did not find the government action as a physical invasion. By contrast, in *Loretto v. Teleprompter Manhattan CATV Corp*, 458 U.S. 419 [1982], the requirement of a cable channel through the plaintiff's property was regarded by the Supreme Court as a physical invasion amounting to a taking (Dunlap 1992).

The more difficult test to ascertain is the connection between the government action and the public purpose that the government seeks to advance. This is in actuality the crux of the due process clause (Merriam 1988). Much of the case law concerning takings relies on the discernment of the nuisance doctrine: Is the
government action reasonably necessary to advance a substantive public purpose such as public health and welfare (Bauman and Keresfer 1988; Merriam 1988)? Some commentators suggest that if a regulation is consistent with a historically strong public policy in favor of environmental protection or land-use control, it is more likely to sustain judicial attack (Beuter 1987; Cronin and Fieldsteel 1985). Liss and Epstein (1986) suggest that a government action may be considered a noncompensable taking if it is "rationally based and reasonably constructed." They give the example of the development of Resource Conservation Areas (RCAs) pursuant to the Maryland Chesapeake Bay Critical Area regulations. The RCAs were enacted only after ample political deliberation and agency consideration of competing interests in open public debate. Furthermore, the commentators contend that the RCA establishment does not violate due process interpretations of arbitrary and capricious government actions given the rational approach.

In addition to physical invasion and government purpose tests, the literature also suggests that a taking may not be found in court if there is ample scope and distribution of benefits from environmental protection in relation to private costs. If there is evidence that the benefits of regulation are widely distributed throughout various sectors of society, and if such benefits can be proven to afford long-term protection of public health and welfare, there is greater likelihood that the government action will be ruled as a legitimate constitutional exercise of police power (Dunlap 1992; Cronin and Fieldsteel 1985).
Economic Value of Property. The notion that economic rights are viable property interests protected by the Constitution has been a critical element in case law focused on takings (Dunlap 1992). Like interpretation of the "nature of government action" test, deciding to what extent such action impacts the economic value of the property interest is ambiguous; it has been dependent on the relevant circumstances of specific cases. Most commentators agree that loss in economic value must be considered in the balancing test. However, there are sentiments which argue that economic impact can only be regarded when such is directly compared to the public purpose of the government action. In addition, there are equally strong sentiments that assert that economic rights must be first and foremost when regulatory takings are considered. Supreme Court rulings support both positions. There are two components of the economic impact argument, namely diminution in value, and impact on investment-backed expectations.

The use of diminution of value or impact on investment-backed expectations as factors in determining takings has not been categorical (Cronin and Fieldsteel 1985; Liss and Epstein 1986). State court decisions have tried to quantify the point where the loss of value amounts to a taking; the proposed losses range from 60 to 95 percent of value (Merriam 1988). In many instances, courts have found that a government regulation has reduced the economic value of a property use to almost zero, yet have held that the regulation is not a taking. Certainly, economic values are largely defined by the "highest and best use" of the property.
However, there have been cases when government actions do not preclude all practical uses of the property (e.g. *Penn Central Transportation Company v. New York City*, 438 U.S. 104 [1978]). Under an ad hoc, case-by-case inquiry, such definitions have never remained consistent.

**Balancing Standards.** The balance test provides an opportunity for courts to logically and rationally examine both sides of regulatory takings cases, namely the outcome of government actions versus economic interest of the property owner. However, the weight assigned these factors in the balancing test depends largely on the philosophical disposition of the court (Beuter 1987). Since there are no categorical, quantitative or economic thresholds of what government actions "take" private property, court decisions are most often based on individual judges' ethical notions of fairness and equity.

The entire domain of law is concerned with fairness and equity: In a dispute between competing interests, whose rights count and should be protected, and who should bear the costs of ensuring the existence of such rights (Dragun 1983)? In the case of environmental regulations, fairness and equity issues become more pronounced, yet less decisive. Because environmental harms and benefits are often so widely distributed geographically and socially (e.g. nonexclusive), the interrelationships between individuals' property rights become complex and indistinguishable; the capacity of existing market and property allocation systems diminishes as environmental harms and claims to resource protection
increase (Sax 1983). Dunlap (1992) asserts that judicial examination of fairness should explicitly consider the need to balance the public interest in protecting environmental and natural resources with the property rights held by private individuals. If it is determined that the public benefits of protection outweigh the harm to private interests, then government regulations act to resolve inequities.

Marzulla and Marzulla (1991) take the opposite position by claiming that questions of fairness lie primarily in the incidence of the costs of regulation. Even if regulations do not significantly impact property values, investment-backed expectations, or due process concerns, they nevertheless force private interests to bear costs for benefits the public accrues by virtue of their superior political power. Using this view of a fairness doctrine, it is the public that should bear the costs of regulation.

Valid ethical and moral elements support both "public benefit" and "economic fairness" positions for guiding balancing tests in taking cases. Where they differ is in their respective interpretations of the role that property rights play in protecting larger community interests: Do private interests have a moral obligation to allow property rights to be restricted based on the community's need to protect the environment, or should the community's desire to accrue environmental benefits first consider individual freedoms? As the history of takings case law proves, these dilemmas are not readily resolved, nor will they be. Certain
interpretations may gain prominence over a period of time, but will always be in jeopardy because of changing political, social, and environmental circumstances.

**Evolution of Takings Jurisprudence**


**Cases Pre-1922.** The first invocation of police power as a means to abate public nuisance activities occurred in the decision of *Mugler v. State of Kansas*, 123 U.S. 623 [1887]. The Court ruled that the state's prohibition of liquor manufacturing was not a taking because it was enacted to protect the health, morals, and safety of the community (Dunlap 1992; McNeal 1992). Similar to the *Mugler* ruling was the decision in *Hadacheck v. Sebastian*, 239 U.S. 394 [1915]. In this case, the Court ruled that the operation of a brickyard within the city limits of Los Angeles constituted a noxious use, and that the ordinance enacted to prohibit the use was not a taking of private property. In both cases, the Court indicated that regulations enacted to prohibit actions that may affect the health, safety and morals of the community were legitimate uses of police power and that landowners had no property rights in a nuisance (Dunlap 1992).

**Cases 1922-1986.** During the period from 1922 to 1986, the Supreme Court sought to put limits on government regulations. The first such attempt came in the *Pennsylvania Coal Company v. Mahon,*
260 U.S. 393 [1922]. Pennsylvania law prohibiting coal mining that damaged surface habitat was ruled an unconstitutional taking of private property. In so doing, the Court set constraints on what would be construed as a legitimate exercise of police power. In the majority opinion, Justice Oliver Wendall Holmes wrote: "If regulation goes too far, it will be recognized as a taking" (260 U.S. at 415). Justice Holmes concluded that the Pennsylvania law exceeded the bounds of the nuisance doctrine because it resulted in substantial diminution in the value of the property owner's right to gain profit from the property (Minda 1991). Writing in dissent, Justice Brandeis argued that the law was in fact premised upon the exercise of police power to protect the public welfare (Dunlap 1992; Minda 1991).

For the next sixty years, the Supreme Court could not settle on any one determinative factor or combination of factors that would categorically calculate what government action constitutes a taking. In fact this period generally deferred constitutionality to government regulations; for the most part the Supreme Court returned to a nuisance-type analysis. *Village of Euclid v. Ambler Realty Company*, 272 U.S. 365 [1926], regarded as the seminal land-use regulation case, held that municipal land-use zoning ordinances were a legitimate use of government police power. Other notable cases ruling in favor of government regulations include: *Miller v. Schoene*, 276 U.S. 272 [1928]; *Goldblatt v. Hempstead*, 369 U.S. 590 [1962]; *Pennsylvania Central Transportation Company v. New York City*, 438 U.S. 104, 97 L.Ed.2d 677 [1978]; and *Agins v. City of*
Tiburon, 447 U.S. 255 [1980]. The deviation from the nuisance-type rulings was Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419 [1982], in which the Court found that there was a physical invasion of a private property interest and, thus, a taking.

Although the majority of the rulings in this era were in favor of uncompensable, nuisance-based government actions, out of each case arose different definitions of property rights and property interests. For example, in Penn Central, the government’s interest in preserving a land parcel for historical landmark reasons was ruled as a constitutional action. Most importantly in Penn was how the Court defined the property interest at stake: not only did the government regulation restrict development of a high-rise building (e.g. Penn Central Transportation was denied the opportunity to pursue established business expectation), but the government interest included the airspace above the entire parcel owned by Penn Central. Hence the property interest was not limited to the physical parcel of land, but the amenity value above and surrounding the parcel (Sax 1983). These definitions helped build the foundation of the "balancing test": does the government action outweigh the costs to the private property owner?

Cases 1986-1987. During the 1986-1987 Supreme Court term, a subtle yet profound change in takings jurisprudence took place. The Court began to seriously consider takings charges based on land-use controls (Rose 1990). Four cases during this term dealt with regulatory takings (two were ruled as constitutional uses of government police power, two were ruled as takings of private
property). The first case addressing takings was *Keystone Bituminous Coal Association v. DeBenedictus*, 480 U.S. 470 [1986]. On first impressions the case resembles *Mahon* in that a state law restricting mining activities deprived the owner complete economical use of the property. However, instead of ruling the law as a taking, as *Mahon* did, the Court viewed the case based on ad hoc inquiry whereby testimony and evidence relevant to the specific case was reviewed. The Court found the mining regulation as not affecting a taking. The property interest at stake was not limited to economic value of the coal restricted from mining, but the parcel as a whole (e.g. subsurface soil structure) (Dunlap 1992; Minda 1991). The testimony and evidence in the *Mahon* case (e.g. the economic value of unmined coal) was not applied to the adjudication of the case (Paul 1991). In many respects *Keystone* kept in step with the previous sixty years of case law concerning takings -- deferring government regulations as a justified use of police power to abate nuisance-type activities.

The second case the Court judged as not involving a taking was *United States v. Cherokee Nation*, 480 U.S. 700 [1987]. Under the Federal Water Pollution Control Act, federal and state governments are required to initiate programs to reduce water pollution and improve the navigable waterways of the nation. The Court concluded that a federal waterway project which impacted the gravel deposits of a riverbed owned by a Cherokee tribe did not constitute a taking of property since the property interest at stake involved the entire riverway, not just gravel. The Court created a categorical
exception, like the Mugler nuisance-type exception, to the takings analysis. The government's authority to improve the nation's navigable waterways under existing statutes was judged to preclude any taking (Dunlap 1992).

After the Keystone ruling, many judicial scholars were of the opinion that the long relied-upon ad hoc takings test would continue to be used to analyze regulatory takings cases. However, two cases marked the turning point at which the Court moved towards a broader challenge of previously settled takings jurisprudence (Paul 1991). The first case, First English Evangelical Church of Glendale v. Los Angeles County, 482 U.S. 304 (1987), 96 L.Ed.2d 250 (1987), involved a challenge to municipal floodplain regulations that restricted development. The church was temporarily denied the reconstruction of its camp due to possible flooding hazards. The Court ruled against the regulations, even though they were temporary in nature (Dunlap 1992). The Court also moved one step beyond most takings rulings when stating that compensation was required based on the taking of the church's property (Marzulla and Marzulla 1991; Rose 1990). Hence, not only were the floodplain regulations regarded as an unconstitutional exercise of government power, but the remedy to the temporary damages was monetary compensation. Instead of defining the property interest broadly (e.g. the entire parcel of land within the floodplain), the Court based its decision largely upon the fragmentation of individual property rights -- "sticks" within the bundle of fee simple title rights (Minda 1991). First English indicated a stronger emphasis
on economic value as a property interest.

The Court continued to rule against prima facie nuisance-type regulations in *Nollan v. California Coastal Commission*, 483 U.S. 825, 97 L.Ed.2d 677 [1987]. *Nollan* challenged the connection between the public benefits of environmental protection and arbitrarily limiting private property interest based on nuisance exceptions. When the Nollan’s applied for a development permit for their beachfront property, the California Coastal Commission conditioned the permit on delineation of a public access easement, i.e., public access to their property was a prerequisite to its development. The Court ruled this restriction as a compensable taking because there was insufficient nexus (i.e., logical, rational connection) between the state’s permitting process and the actual delineation of an easement for public access. The *Nollan* decision was not only a facial challenge to the regulation’s impact on private property interests, but indicated an increasing willingness to challenge state legislatures’ actions to impose land-use and environmental controls (Bauman and Keresfer 1988; Rose 1990).

**Cases 1988-1992.** Although the *Lucas v. South Carolina Coastal Commission* case, [404 S.E.2d 895; granted certiori 112 S.Ct. 436 (1991); Decided June 29, 1992, Supreme Court Docket No. 91-453] was thought by many to clarify the Court’s position on matters concerning regulatory takings, there continues to be debate over whether or not the decision moved the Court into a new era of jurisprudence (McNeal 1992; Paul 1992; Popeo and Kamenar 1992).
Two elements characterize the Lucas case, namely a move toward categorically defining what constitutes an uncompensable use of police power; and defining property rights as discrete components, separable from the physical parcel those rights are assigned to.

**Categorical Definition of Police Power.** The Lucas case marked the first substantial attack on ad hoc rulings based on the nuisance clause. Whereas the majority of past taking decisions regarded the police power of the government as a given, the Lucas majority basically requires state governments to bear the burden of proof that a nuisance is being abated. In other words, new government regulations must not restrict or prohibit uses not regulated by past laws (McNeal 1992). By placing the nuisance clause in the realm of common law (e.g., relying on precedence set by past court decisions) rather than ad hoc, case-by-case ruling, the Court categorically, albeit broadly, defined the limits of nuisance-type regulations. Thus, in the majority opinion in Lucas, to avoid a taking requiring monetary compensation, South Carolina must now rely on established principles of nuisance in common law to prohibit the use proposed by Mr. Lucas (Watters 1993). In many ways, this turns the tide on regulatory initiatives in state legislatures. Nuisance principles and common law, long assigned to the judicial decisions, will play strong compelling roles in political decisions. By shifting the burden of proof to the legislatures, the propensity to regulate might be tempered. Conversely, the ultimate decision over the allocation of benefits and costs of regulation may now become a judicial one, not merely
a political decision.

**Severance of Property Rights.** In *Penn Central*, the Court ruled in favor of the City of New York's landmark preservation ordinance by considering the benefits and burdens of the regulation on the parcel as a whole (Minda 1991). The "highest and best use" of the parcel, based on the Court decision, was not the commercial development of Penn Central's parcel, but the preservation of the parcel's entire physical, aesthetic, and historic values. Penn Central's ownership and economic rights were not regarded as the property interests at stake. Conversely, the plaintiff's economic rights were the overriding property interests in *Lucas*. The notion of separating discrete rights from physical property is termed "conceptual severance" or "entitlement chopping" and is also found in the *First Evangelical* and *Nollan* decisions (Minda 1991; Radin 1988). By viewing property rights as separable, discrete bundles of rights, the Court was able to find a taking since Lucas' economic rights were deprived under the coastal management regulations. In many ways, the Court is reaching back in history (pre-dating even *Mugler*) towards common property-law prerogatives, namely right of exclusion, transferability, and profitability (Minda 1991). If government regulations deprive a property owner of any one of the bundle of discrete rights, then a taking has occurred.

The summation of takings commentators suggests that in the face of the modern regulatory state, the Supreme Court has recently been willing to defend traditional notions of property and property
rights by affording relief and protection of private property interests against government action. However, such inclinations are balanced by time and the political environment. In the 1980's, the posture of the Supreme Court took a conservative turn, reflecting the strong attitudes of the Reagan-Bush administration's favoring protection of private interests against public actions. And although the combination of the First Evangelical, Nollan, and Lucas rulings may serve as a short-term barometer of the Court's disposition towards developing categorical rules for takings, they must be balanced with Keystone and Cherokee Nation, which favored ad hoc rulings and categorical exceptions. At the present time, the standard-bearers for private property interests may still be a minority on the Court. Justice A. Scalia, writer of the majority opinion in Lucas, represents the most ardent proponent of private property interests. It is not clear, however, that others on the Court share similar views of "conceptual severance" of property rights, nor is it clear that the justices are prepared to disregard 100 years of ad hoc takings decisions in favor of categorical rules (Dunlap 1992).

In retrospect, there appears to have been a fundamental shift in how the Supreme Court regards government regulations and taking of private property. From Mugler to Keystone, the Court has sought to define limits of private property rights by upholding governmental regulations. Sax (1983) compared the development of takings jurisprudence during this time period with changes in social values. His claim is that Americans' sense of progress has
declined, and that the marginal benefits of development activities have diminished while the marginal costs to natural systems have increased. Society seems to be turning away from conquering nature for economic gain to preserving symbols of continuity, durability, and sustained yield. Property is no longer regarded as an input into individual production functions for economic benefits, but as a necessary social convention to maintain ecological stability over the long-term. Minda (1991) refers to this evolving view of property as the "community-perspective."

However, with First Evangelical Church, Nollan, and, most recently, Lucas v. South Carolina Coastal Commission, the Court has been disposed to ruling takings cases based on a "property-perspective" (Minda 1991), a perspective which views property rights as separate from other social conventions, that state power is inherently coercive, and that private property rights are freedom-enhancing and must be protected. According to Minda (1991), the Court is currently at a point where the community-perspective and the property-perspective are in open conflict.

**FOREST PRACTICE REGULATION**

**Case Law and Jurisprudence**

The constitutionality of forest practices regulations has not been seriously challenged in court since 1949. Furthermore, the precedence set by many state court rulings support the regulatory scheme of forest practices laws by broadly interpreting legislative intent of these laws as advancing substantive public interests in
forest resources, and by clarifying procedural disputes over specific regulations. *State v. Dexter*, 32 Wn.2d 551, 202 P.2d 906 [1949], is the only major case which challenges the constitutionality of forest practices regulations as taking of private property. Other cases contesting forest practice regulations involve either a disagreements over questions of procedure, or civil litigation between conflicting forest resource interests (e.g. environmental organizations versus forest industry firms). Such cases include (Cubbage and Siegel 1985; Martin 1989): *Arcata Redwood Co. v. State Board of Forestry*, No. 61910 Cal. Super. Ct., Humboldt Cty. [1977] (prohibited timber harvesting on lands near Redwood National Park to allow for future park expansion); *Department of Natural Resources of the State of Washington v. Bob and Jane Doe Marr*, 54 Wash. App. 589 [1989], 774 P.2d 1260 [1989] (clarified the statutory definition and application of "forest land"; distinguished criminal and civil penalties as applicable remedies under enforcement provisions); *Environmental Protection Information Center (EPIC) v. Johnson*, (required California Department of Forestry and Fire Protection [CDF] to take into account cumulative impacts of forest practices in procedural review); *Natural Resources Defense Council v. Arcata National Corporation*, 1 Civ. No. 37555 Cal. Ct. App. 1st Dist. [1976] (specified principles and some procedures under which the California Environmental Quality Act applies to forest practice regulation); *Nole v. Cole*, No. 9806 Wash. Super. Ct. [1977] (required defendant to prepare a detailed environmental impact
statement under provisions of the Washington Environmental Policy Act); and *West Norman Timber, Inc. v. State* 37 Wn.2d 467, 224 P.2d 635 [1950] (ruled that Washington forest practices regulations apply to state-owned land as well as private land).

The Dexter case has held its precedence-setting status for over forty years. The ruling essentially guaranteed state legislatures that forest practice laws, in principle, are legitimate exercises of uncompensable police power. Avery Dexter held title in fee simple to 320 acres of second growth timber in Pend Oreille County. Between 1945 and 1947, Dexter harvested approximately 150,000 board feet of merchantable fir, larch, white pine, and hemlock. In 1947, the state forester, pursuant to the Forest Conservation Act Laws of 1945 (ch. 193) became aware of the activities and directed Dexter to cease operations until a permit was secured. When Dexter failed to apply, the state proceeded to enjoin further operations. A demurrer was interposed by Dexter and the trial court sustained the demurrer, convinced that the statutes under the 1945 Act were unconstitutional. The state appealed to the Washington State Supreme Court. In the demurrer, Dexter made four claims:

- the provisions in the Act permit what amount to "taking" private property without just compensation;
- the Act establishes an unreasonable exercise of police power;
- the Act violates private property rights and impairs the obligation of contracts which are guaranteed by the U.S. Constitution; and
the requirements stipulated in the Act are unreasonable, unnecessary, arbitrary, and oppressive.

Dexter's claims were predicated on the assumption that there are no restrictive prohibitions on cutting timber on private property or requiring reforestation. Argued was that fee-simple title to land permitted landowners to do as they please with their land.

In citing past state and U.S. Supreme Court decisions, the Washington State supreme court categorically overturned the claims in the demurrer. The court ruled in favor of the state, asserting:

"the state is not required by the United States Constitution to stand idly by while its natural resources are depleted, as affecting validity of conservation measures ... [and that the] ... protection and conservation of natural resources constitute a reasonable exercise of police power."

With regards to the taking issue and the obligation of contracts, the court decision read:

"The statute requiring private owners to participate in a reforestation program does not impair obligation of contracts or take property without due process of law, as applied to holders of fee-simple title."

Finally, the court ruled that

"... [T]here is nothing within the terms of the act itself from which we can say that the requirements of [reforestation] as amended are unreasonable, arbitrary, or oppressive, or that they are not intended to accomplish the expressed purpose of this act."

The most compelling point made in the Dexter case is found in the opinion written by Justice Matthew W. Hill:

"Rights of property, like all other social and conventional rights, are subject to such reasonable limitations in their enjoyment, as shall prevent them from being injurious, and to such reasonable restraints and regulations established by law, as the legislature, under the governing and controlling power vested in them by the constitution, may think necessary and expedient."
The *Dexter* case set precedent regarding the constitutionality of the state's police power and right to protect the state's forest resources by requiring compliance to reforestation and permits for logging on private property. Without comment, *Dexter* was upheld by the U.S. Supreme Court, 338 U.S. 863 (1949).

**Statutes and Administrative Rules**

Since the mid-1980's, many states with comprehensive forest practices regulatory programs have been actively amending and revising their forest practice statutes and administrative rules. Whereas such programs originally focused on reforestation practices and timber harvesting activities affecting water quality, newer versions of such programs focus on a variety of forestry practices and benefits. For example, leaving after harvest a specified number of standing and fallen trees of certain size and age for wildlife; leaving trees standing in a riparian area so that a certain percentage of a stream's surface is shaded during noon time sunlight in order to maintain specific stream temperatures for anadromous fish species; leaving buffer strips of trees of a certain age, height, and diameter along designated highways to preserve aesthetic qualities; and granting county-level governments conditional authority to review and approve timber harvesting operations and to promulgate more stringent regulations pertaining to forest practices.

Private timber harvesting operations in some states can require considerable analysis and professional preparation -- bordering on the scope and depth of a federal environmental impact
statement. Such requirements reflect a wider public concern over the use and future condition of forested environments. The forest benefits and values that had been regarded as abundant and available for individual prosperity are now often prized for their contributions to ecosystem integrity and human health. The growth and development of regulatory policies regarding forestry parallels the growth and development of the overall community perspective of forest land.

Forest practice standards to be met by forest landowners and operators have become increasingly more specific, both in statute and in administrative rules. Such is especially the case in California, Oregon, and Washington. Although issues of constitutionality and uncompensable takings have not presented challenges to forest practices regulation in the past, this new generation of rules and amendments may raise significant debate as to the limits of government actions to influence private forestry activities. Examples of recently amended forest practices laws and administrative rules are illustrative of the trend (Ellefson, Cheng, Moulton 1993).

**California.** (PRC 4511-4628; CCR 895-1115.4) Private forest landowners proposing to harvest timber must complete a detailed Timber Harvesting Plan (THP). The type of information and analysis required in a THP is akin to an environmental impact statement. After a THP has been filed, it must proceed through administrative review by the California Department of Forestry and Fire Protection (CDF), the Department of Fish and Game, the State Water Resources
Control Board, regional water quality control boards, the Tahoe Regional Planning Agency (where applicable), the California Coastal Commission (where applicable), and county review boards. THPs are also subject to review by interested publics. Opportunity for variances and appeals of disapproved plans is afforded.

In 1988, 1,360 THPs were approved for forest practices on 376,584 acres; 99 were not approved for filing and 7 were denied. For the same year, 847 exemptions were approved by California Department of Forestry and Fire Protection for a total of 1,162,372 acres. A significant amount of technical expertise is required on the part of the applying landowner, namely calculation of soil erosion hazard rating; road, skid trail, and landing location and design; and measurement of stocking after harvesting. THPs must be approved and signed by a Registered Professional Forester (a trained and certified private professional). During the course of a forest practice operation, the landowner must comply with prescriptive standards (outlined in the code of rules) with respect to harvesting techniques, skidding, slash and debris disposal, chemical application, site preparation, soil erosion control practices, and operations in areas adjacent to watercourses. Division forest practices personnel are authorized to conduct on-site investigations to determine compliance with the rules.

In addition to forest practice regulations administered by the Department of Forestry and Fire Protection, private timber harvesting practices in California are also subject to regulations and ordinances imposed by the California Coastal Commission, the
California Tahoe Regional Planning Agency, and county governing bodies. Although the primary responsibilities of these bodies focus on land-use and development related issues, their authority to promulgate and enforce rules pertaining to private forest practices is legitimized through legislative action and court decisions. Regulations governing harvesting in Coastal Commission Special Treatment Areas were established in 1977 by the state legislature. Tahoe Regional Planning Agency harvesting restrictions were amended most recently in 1989 and are applied in addition to California forest practices rules. Seven counties in California were afforded the prerogative of enacting timber harvesting ordinances as a result of a series of state court rulings in the mid-1980's. Forest practice regulations established under these governing authorities appears to be consistent with California's tradition of regulating land-use and development activities.

Forest practices on private lands have become a very public activity. With the scope and degree of information and review processing, the state's forest practices law and rules address forest resources as broad property interests. The community-perspective -- considering the forests as an integrated system of trees, water, wildlife, soil, and aesthetic values -- has dominated the forestry sector in California since 1973. Since it has never been determined factually in court that forest practice regulations deprive the landowner of all economically beneficial uses of the land, and since the rules and regulations are prescriptive, not prohibitive, issues of constitutionality and uncompensable takings
remain remote for applicable forest practices regulations, except, perhaps, for extreme cases. Moreover, given the high percentage of variances and exemptions (over 75 percent) granted by the Division, it appears that there is ample opportunity for administrative recourse from the stringent application of the regulations (evidence that administration of the regulations is not arbitrary or capricious). Considering the detailed nature of administrative review of and control over THPs, litigation and court proceedings are more likely to involve disputes over procedure (e.g. was a THP approved without sufficient public review and comment; did the CDF disapprove a THP without logical reason) rather than on matters of constitutionality and takings. However, if regulations and ordinances begin to restrict or even prohibit certain forest practice activities, then the issue of whether such regulations cross the fine line between performance standards and land-use control are likely to subject certain forest practices regulation to takings scrutiny.

**Oregon.** (ORS 527.610-527.992; OAS 629-24-101 to 629-24-649) The Oregon Forest Practices Act and corresponding administrative rules are less complicated than what exists in California. All forest landowners must notify the Department of Forestry (DOF) of proposed forest practices. A 15 day waiting period is allowed for review, but not mandated. The Department is authorized to waive the waiting period if it is determined that no significant resource damage will result from the forest practice. Written plans are required if operations are within: 100 feet of Class I water; 300
feet of a significant wetland; 300 feet of nesting, roosting, or watering site of sensitive, threatened, or endangered species; and the State Forester determines that plans are necessary. In the case of Class I waters, it is the responsibility of the landowner to determine the classification of waters in the proposed forest practice area. The State Forester may subsequently waive the written plan if it is determined that no significant impacts will result from the forest practice. In the case of the sensitive, threatened, and endangered species sites, the State Forester must notify the landowner that the proposed forest practice is in the presence of such a site (burden of proof placed on agency). Written plans are subject to public hearings, but such are not mandated. Interested publics may request copies of proposed forest practices that have proceeded through the notification procedures.

Similar to the California Code of Rules governing forest practices, the Oregon forest practices rules prescribe performance standards. Much of the language is general, such as: "Operations on forest land shall be planned and conducted in a manner which will provide adequate consideration to treatment of slashing to protect residual stands of timber..." (OAS 629-24-301). If it is determined that a violation of the Forest Practices Act or rules has occurred, administrative and judicial action can be taken. A civil penalty can be levied against a violator.

Oregon's forest practice regulations have not been subject to serious judicial decisions, nor has their constitutionality been challenged. Most compelling is provision ORS 527.805, which
declares that: "A forest practice conducted on forest land in accordance with ORS chapters 477 and 527 shall not be declared or held to be a private or public nuisance." This measure ensures that any local or municipal ordinances restricting forest practices based on nuisance are automatically invalid, although it is not clear that the state vindicates itself from the nuisance clause. The lack of judicial history of the Oregon Forest Practices Act makes it difficult to hypothesize whether or not the state courts interpret the intent of act as abating a nuisance.

Recent amendments to the forest practices act and rules may have a more significant economic impact on forest landowners which, in turn, may raise questions of takings based on recent Supreme Court interpretations in Lucas, especially regards the economic nature of property interests and the nuisance exemption. Of note are four amendments concerning restrictions on clearcuts, wildlife leave-trees, scenic highway buffers, and reforestation requirements. The amendments appear to change the tone of the law from prescriptive to prohibitive. For example, the clearcut provision mandates defined restrictions on the maximum size of cuts, the distance between cuts, and the timing of cuts. Such restrictions limit the value of timber received from previously permitted practices. Leaving standing live or dead trees in clearcuts for wildlife habitat may also result in landowner loss of revenue. Moreover, leave-tree requirements imply a larger view of the property interest to include non-economic values not heretofore considered in statute.
At what point might Oregon’s regulations make forest practices on private lands uneconomical, regardless of the value of the land? In answering such a question, courts will certainly consider the right of the landowner to derive profit from standing timber. Hypothetical judicial interpretation of Oregon’s new forest practices regulations could derive from two possible cases:

- Property interest could be considered as the entire parcel of land, including wildlife, aesthetic values, water quality, and future forest productivity. The protection of these public interests could be seen as overriding any concerns over the value of unharvestable timber. Such an interpretation could be grounded in the *Keystone* ruling.

- Property interest could be considered as the economic rights associated with fee simple title: right to exclude, transfer, and derive profit from the property. Two issues affect this interpretation. First, do the regulations deprive any part of these economic rights, such as the foregone value of left timber? If so, a taking might be affected according to interpretations of *Lucas*. Second, are the regulations protecting the public from harm (nuisance), or is the public requiring easement of private property interests for public benefit (eminent domain)? Specifically, are there wildlife species and future productivity values that can be excluded by the private property owner by virtue of property title rights, or are they property interests held by the community? Under the *Nollan* decision, restricting private property interests for the public benefit could fall in the realm of easements, thus
affecting a taking.

**Washington.** The State of Washington is home to the landmark *Dexter* case in which the Washington State Supreme Court held the forest practices statutes as constitutional uses of state police power. Forest practices in Washington are divided into four classes, including Class I which includes practices that have a minor effect on resources, and Class IV which are practices that have potential for severe environmental impact. Class I forest practices do not require notification or applications, while Class II practices require submission of a notice of intent to the Department of Natural Resources (DNR). Class III and IV forest practices also require applications to the Department. If deemed necessary, Class IV forest practices may require preparation of an environmental impact statement.

Until 1992, the rules forest landowners were required to comply with were instructional in nature. Except for the reforestation requirements, the rules merely served as guidelines of conduct. In the event of a formal complaint by a landowner regarding the jurisdiction of the Forest Practices Board and the promulgated rules, opportunity for a formal appeals hearing is provided. Decisions of the appeals board is subject to judicial review by the appropriate district court. Such a review lends administrative legitimacy to final decisions; it can be used in favor of the state in the event of litigation. However, since formal complaints are generally lodged on the basis of procedure, questions of constitutionality and takings have not been addressed
since *Dexter*.

In 1992, the Forest Practices Board adopted new regulations to afford a higher level of resource and environmental protection. The regulations include: cumulative effects/watershed analysis, wetlands protection, expansion requirements for Class IV practices, limits on clearcut size and timing, separate provisions for certain forest chemicals, wildlife reserve tree requirements, and shade tree requirements for stream protection. Similar to the amended Oregon forest practices rules, some of the adopted Washington rules move away from prescriptive performance guidelines towards specific restrictions on private forestry activities. Since the Washington Forest Practices Act is firmly grounded in common law preventing nuisance-type private actions, the new regulations may withstand the "burden of proof," or common law, requirement stipulated in *Lucas*. In this respect, the Washington law is unique among all states with comprehensive forest practice laws. However, the impact on economic rights could still render the new regulations as suspect. According to a study conducted by a major wood-based firm in Washington, the new regulations could cost private forest landowners $26 million in lost value, or $441 million in net present value (seven percent discount rate over a fifty year rotation) (*Weyerhauser* 1991). In a hypothetical Supreme Court interpretation, using recent cases as a basis, this value could be measured against the state's common law traditions of forest practices regulation as well as the justice's interpretation of the affected property interest. If a community-perspective is employed,
the benefit of increased resource and environmental protection to society would override economic concerns. However, if the regulations render the economically beneficial value of the land useless, then the deprivation of economic rights would weigh heavily as the property interest affected.

**SUMMARY AND OBSERVATIONS**

Government regulation of forestry practices applied by owners of private forest land has historically been a contentious issue for the forestry community. Often at the center of the issue are concerns over the nature of externalities and the manner in which property is defined. Over the years, concepts of forest property have expanded beyond uncomplicated notions of a physical tract of land to which an owner retains full and exclusive rights to practice forestry. Concepts of property now often include the fish and wildlife associated with the land, the water which flows over and under the surface of the land, and the beauty that trees growing from the land provide for wider segments of the general public.

Courts continue to struggle with suitable definitions of property within the context of government regulation. Of concern is whether regulations should be viewed as a means of protecting property for the public welfare generally, or be discarded because they foster public intrusion on a discrete set of private property rights. The appropriate balance between these two perspectives hinges on societal views regarding the bundle of rights that are
attached to property. Some rights are retained by the landowner, others by private citizens other than the landowner, and still others by the public at large. That the private landowner will retain the totality of this bundle of rights is probably unrealistic, "it is an American fable or myth that a man can use his land any way he pleases regardless of his neighbors. The myth survives never-the-less ... indeed it thrives ... even though supported by the court decisions." (Bosselman, Callies and Banta 1973).

A major focus of contention over regulation of forestry activities occurring on private property involves concern over government taking of private property for public use without appropriate compensation. In this respect, property law distinguishes between two powers vested in government, namely eminent domain and police power. Forest practice regulations typically stem from exercise of the latter authority. Whether exercise of police power results in a compensable taking depends on the nature of the government action and its relation to legitimate public purposes, and the extent to which a private landowner's access to the economic value of the land is adversely impacted. Regarding the former, courts have argued that a taking does not occur if:

- regulations are consistent with a strong history of public policy in favor of environmental protection or land-use control;

- regulations are not arbitrarily and capriciously applied, namely they are rationally based, reasonably constructed and developed through due process;
. regulations are convincingly determined to be directly beneficial to the long-term protection of the public's health and general welfare.

. regulations result in benefits that are widely distributed throughout various segments of the public.

As for compensation based on a regulation's diminution of economic value or adverse impact on investment-backed expectation, the courts are far less clear. State courts have attempted to quantify the point where loss of value amounts to a taking (suggested thresholds have ranged from 60 to 95 percent of value). In some cases, economic value has been reduced to zero by regulations, yet a taking has not found to have occurred. Some have argued, however, that regulations force private landowners to bear the cost of producing public benefits; thus, the public should compensate landowners for the production of such benefits.

The constitutional foundation of forest practice regulations has not been seriously challenged since 1949. In State v. Dexter, the Supreme Court left unchallenged a state ruling that reforestation standards in Washington were justified in and of themselves; they were not arbitrary nor did they require compensation. The ruling essentially guaranteed that state forest practice laws of the time were legitimate exercises of uncompensable state police power. Even though forest practice regulations have proliferated in number and severity of limitations since the early 1970s, significant cases challenging the substance of forest practice laws have not been ruled on since State v. Dexter. Most cases since the latter have involved rulings on matter of procedure and process.
As for the future, the debate over the constitutional appropriateness of government action to restrict the manner in which owners of private forest land apply forestry practices is likely to continue. Those perceiving *Lucas* as an important move to remand environmental regulations under the nuisance doctrine may yet find that the Supreme Court’s ruling provides supporters of regulation with ample room to expand public regulation of forestry practices; the Court has yet to categorically define limits of government actions that are imposed on private property. As confusing and ambiguous as this may seem, *Lucas* has altered the legal environment of forest practices regulations. Legal questions previously thought resolved may be afforded the opportunity to be asked once again.

The debate between economic self interest versus broader environmental protection interest is not new to the forestry community, nor is it quiescent. In states with little or no previous experience in regulating private forest practices, the issues of constitutionality and uncompensable takings are beginning to surface. Now that the judicial system is firmly established as an actor in the policy arena, legal concerns, as well as political and economic ones, will play a major role in the debate.
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