Denial of Permission to "Take" an Endangered Species Will Amount to a "Taking" Under the Fifth Amendment in Limited Situations

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DENIAL OF PERMISSION TO "TAKE" AN ENDANGERED SPECIES WILL AMOUNT TO A "TAKING" UNDER THE FIFTH AMENDMENT IN LIMITED SITUATIONS

I. INTRODUCTION

Despite the fact that the Endangered Species Act is over 25 years old, it has been reviewed by the Supreme Court in only a handful of cases. Thus, many questions regarding application of the Act remain. As flora and fauna are added to the list of endangered or potentially endangered species with alarming frequency, the number of private citizens impacted by the Act is also growing rapidly. With that fact in mind, one of the most pressing issues left unanswered by the Supreme Court is whether, under certain circumstances, the Act can amount to a taking of private property without due process of law and may be considered unconstitutional in those situations.

In a recent note on United States v. Lopez, one student surmised that the Endangered Species Act would be found invalid insofar as it is applied to land use by private citizens because the Act cannot withstand a Commerce Clause challenge under Lopez. The Supreme Court has not yet considered a

2. The Endangered Species Act was enacted in 1973. See id.
3. A total of 362 plants and animals were under the scrutiny of the Endangered Species Act in 1997, exclusive of those already listed as endangered or threatened. This is an alarming number of possible new listings considering that there are only 365 days in a year. See Endangered & Threatened Wildlife & Plants; Final Listing Priority Guidance for Fiscal Year 1998 & 1999, 63 Fed. Reg. 25,502, 25,505-06 (1998). As of the end of fiscal year 1997, the Fish and Wildlife Service had made "tier two" determinations on 156 species, with 145 added to the list of endangered species, only 11 withdrawn, and another 100 proposed species remaining for determination. There were also 207 "candidate species" at that time. See id.
4. The Fish and Wildlife Service uses a four tiered approach to listing species under the Endangered Species Act. See id. The first tier, emergency listings, receives the highest priority. There were no tier one listings in 1997. Tier two received the most attention from the Fish and Wildlife Service in 1997, which is in charge of issuing final decisions on proposed listings, as outlined above. Tier three is the "candidate" level for those species which the Service deems there is sufficient information indicating a listing is appropriate, as required under 16 U.S.C. § 1533(b)(3)(B). Tier four receives the lowest priority and consists of preparation of proposed or final critical habitat designations, delistings, and reclassifications from endangered to threatened status. See id. See infra Part II for a general outline of the mechanics of the Act mentioned here.
5. This question is thoughtfully raised by Professor Robert R. Wright. See ROBERT R. WRIGHT, LAND USE IN A NUT SHELL 286-87 (3d ed. 1994).
constitutional challenge of any federal statutes on a *Lopez* rationale, and in fact, it declined an opportunity to do so recently in *United States v. Schroeder*. In *Schroeder*, the federal district court held, among other things, that the federal Child Support Recovery Act could not withstand the *Lopez* test. The Commerce Clause question was the sole issue on appeal in the Ninth Circuit’s reversal in *Schroeder*. The circuit court held that Congress had the power under the Commerce Clause to enact the Child Support Recovery Act, after which certiorari was denied.

The Supreme Court was faced with an opportunity to consider a Commerce Clause challenge within the context of the Endangered Species Act in the matter of *National Association of Home Builders v. Babbit* last year but declined to do so. Given the Supreme Court’s refusal, without dissent or comment, to consider the Commerce Clause challenge to *Schroeder*, denial of certiorari on the identical issue as applied to the Endangered Species Act is not surprising. The position that the Endangered Species Act could not survive a *Lopez* challenge as to land use by private citizens was tenuous. Even if the Court had agreed to review *National Association*, success of the *Lopez*-based challenge would not have been probable in light of the favor the Act has enjoyed with the Court and the consistent findings by the lower courts.

10. *See id.*
11. *See 95 F.3d 787 (9th Cir. 1996).*
12. *See id.*
14. *See id.*
16. *See Palila v. Hawaii Dep’t of Land & Natural Resources*, 471 F. Supp. 985 (D. Haw. 1979), *aff’d*, 639 F.2d 495 (9th Cir. 1981). In *Palila*, the federal district court found that a nonmigratory bird, the Palila, residing in a few thousand foot area of Hawaii, affects interstate commerce by “preserv[ing] the possibilities of interstate commerce . . . and of interstate movement of persons [who might want to study the bird].” *Palila*, 471 F. Supp. at 995. The Commerce Clause aspect of the district court’s ruling was not appealed. In *National Ass’n of Home Builders v. Babbit*, 949 F. Supp. 1 (D.D.C. 1996), *cert. denied*, 118 S. Ct. 2340 (1998), the circuit court found that a fly which exists strictly in a radius of eight to ten miles in southern California affects interstate commerce for the following reasons: (1) five fly specimens were sold by a botany supply house in Texas for ten dollars; (2) the fly is on display in museums outside of California; and (3) as with the Palila, people have traveled to California to study the fly. *See Palila*, 471 F. Supp. at 995, *National Ass’n, 949 F. Supp.* at 7-9. *See also Snap Judgments, 7 BUS. L. TODAY, Mar./Apr. 1998, at 6.

Perhaps most important as to speculation of whether the Supreme Court will grant certiorari in *National Ass’n of Home Builders* and their ultimate ruling, is the discussion by the circuit court in that the “Committee Reports on the ESA (Endangered Species Act) reveal that one of the primary reasons that Congress sought to protect endangered species from ‘ takings’ was the importance of the continuing availability of a wide variety of species to interstate commerce.”
Given the denial of certiorari in *National Association of Home Builders*, the only likely successful challenge to the Endangered Species Act, as applied to land use by private citizens, is one based upon a takings challenge under the Fifth Amendment. As developed in this comment, it is possible that a takings claim can be successful in a very limited circumstance.

The most favorable position for such a case would be brought under one of two scenarios by an individual land owner seeking to build a residence on a relatively small tract of land upon which an endangered species of animal is determined to make its home. The first possible scenario is where the land owner has completed the process involved in applying for an incidental taking, in order to proceed with construction, and has been denied that permit. The second possibility is where the permit for an incidental taking is granted with approval of the habitat conservation plan being based upon dedication of a significant portion of the land to conservation of the species.

This comment supports the viability of a takings claim under the Endangered Species Act, in certain circumstances, by first providing a general outline of the Act in Part II. Part III is dedicated to a discussion of the case which presented the Supreme Court with an opportunity to review a takings claim under the Endangered Species Act, and the particularly insightful dissent of Justice White in that denial of certiorari. In Part IV, this comment provides a brief overview of takings claims under the Fifth Amendment. Examined in Part V are the historical foundations which will support a takings argument under the Endangered Species Act. Part VI provides an analysis of the position taken in this comment, including discussion of scholarly theories on the issue, followed by a concluding argument.

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17. U.S. CONST. amend. V. The Fifth Amendment to the United States Constitution provides "private property [shall not] be taken for public use, without just compensation." *Id.*

18. Animal, rather than plant, is the ideal scenario simply because the majority of the opinions under the Act involve animals. Additionally, disruption of the habitat of an animal is multi-faceted in terms of shelter, food, vegetation, predators, nesting, and numerous other aspects, whereas harm to plant life is more or less singular and easier to remedy with transplanting to similar water, light, and soil conditions.

19. This scenario works whether the land owner is actually able to come up with the cost involved in preparing the ideal habitat conservation plan in accordance with the lofty standard set in *Friends of Endangered Species v. Jantzen*, 760 F.2d 976 (9th Cir. 1985) (see infra Part IID), or whether his application is seriously lacking in meeting the ideal habitat conservation plan because his funds are lacking.

20. Submission of a habitat conservation plan is an integral part of applying for an incidental taking permit. See infra note 44 and accompanying text. If the individual proposes to build upon a tract of land that is less than an acre, dedication of any portion of the land would likely make construction of a residence impossible.
II. THE ENDANGERED SPECIES ACT

Helpful to an understanding of the takings argument outlined in this comment is a limited discussion of the Endangered Species Act.21 The following discussion is not a complete analysis of all aspects of the Act, but rather an outline of those high points of the Act which may be of importance in a takings argument under the Act and in understanding the case history regarding the Act.

A. Listing of Species

A plant or animal species may be listed if it is actually "endangered" or merely "threatened" throughout "all or a significant portion of its range."22 An endangered species is one which is in danger of extinction,23 while a threatened species is anticipated to move to the status of endangered in the foreseeable future.24 The process of listing a species may be initiated by any interested person, the Secretary of the Interior, or the Secretary of Commerce.25 The actual determination of whether to list a species is made after investigation and consideration by the federal Fish and Wildlife Service26

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22. 16 U.S.C. § 1532(6) and (20).
23. See id. §1532(6).
24. See id. § 1532(20). The factors to be considered by the Secretary in determining whether a species is endangered or threatened are:
   (A) the present or threatened destruction, modification, or curtailment of its habitat or range;
   (B) overutilization for commercial, recreational, scientific, or educational purposes;
   (C) disease or predation;
   (D) the inadequacy of existing regulatory mechanisms; or
   (E) other natural or manmade factors affecting its continued existence.
Id. § 1533(a)(1).
25. See id. § 1533(b)(3)(A).
on the basis of the "best scientific data available,"27 and is made in the form of regulations.28

B. Critical Habitat

Also by regulation, the "critical habitat" of an endangered or threatened species must be designated at or near the time the species is listed as threatened or endangered.29 The Act defines critical habitat as the specific geographical area occupied by the species as well as outside areas "essential to conservation of the species,"30 but the critical habitat "shall not include the entire geographical area which can be occupied."31 Critical habitat is further administratively defined by the Secretary of the Interior, as noted in Tennessee Valley Authority v. Hill,32 to mean "any air, land, or water area . . . and constituent elements thereof, the loss of which would appreciably decrease the likelihood of the survival and recovery" of a species.33 The administrative definition goes on to define constituent elements in a manner which encom-

27. 16 U.S.C. § 1533(b)(1)(B)(2). The Supreme Court has not hesitated to uphold the scientific methods utilized by the Fish and Wildlife Service. See also Building Indus. Ass'n of Superior California v. Babbitt, 979 F. Supp. 893 (D.D.C. 1997). In Building Industry, the plaintiff challenged the listing of vernal pool fairy shrimp, conservancy fairy shrimp, longhorn fairy shrimp, and vernal pool tadpole shrimp. The court found that the plaintiff had standing to bring the action under the standard announced in Bennett v. Spear, 520 U.S. 154 (1997), but failed to demonstrate that the methodology of the study relied upon by the Fish and Wildlife Service was actually flawed, and that many experts recommended the listings without relying on the study. See Building Industry, 979 F. Supp. at 900, 903.

In designating the critical habitat, the Secretary is also supposed to consider "the economic impact . . . of specifying any particular area as [the] critical habitat." See Bennett, 520 U.S. at 172. Unfortunately for land use purposes, this provision of the statute appears to be largely ignored. See, for example, the case of the snail darter, Tennessee Valley Authority v. Hill, 437 U.S. 153 (1978). Designation of the snail darter's critical habitat was made with full knowledge that it would have an economic impact in the millions. See Tennessee Valley Authority v. Hill, 549 F.2d 1064 (6th Cir. 1977).

28. See 16 U.S.C. § 1533(a)(1) (by regulation promulgated in accordance with § 1533(b), the Secretary shall determine whether any species is endangered or threatened).

29. See id. § 1533(a)(3)(A). For 1998 and 1999, critical habitat designation will receive the lowest priority by the Fish and Wildlife Service, particularly in the context of proposed newly designated areas for animals for whom a designation has already been made. See Final Listing Priority Guidance, 63 Fed. Reg. at 25,506.


31. See id. § 1532(5)(C). However, much liberty has been taken with this provision of the Act. Consider, for instance, the abundant litigation and regulations concerning the red-cockaded woodpecker and the Northern Spotted Owl. See Stephen M. Meyer, The Economic Impact of the Endangered Species Act on the Housing and Real Estate Markets, 6 N.Y.U. ENVTL. L.J. 450 (1998) for an outstanding review of the litigation and regulations over the Northern Spotted Owl and the resulting indirect costs.


33. Id. at 160 n.9 (quoting 50 C.F.R. § 402.02).
passes every conceivable connection to air, land and water, including structures thereon and human activity. Moreover, of importance to private land owners is the fact that the area designated as a critical habitat does not strictly encompass the area in which an endangered plant or animal is found, but may also include additional areas for expansion of the species.

C. Taking

Under the Endangered Species Act, it is unlawful for individuals to "take" an endangered species or threatened species. The "taking" of such a plant or animal includes harming, harassing, or killing the same. While most of the words used to define "take" in the statute are reasonably self explanatory, both regulations and case law have interpreted and clarified the meaning of "harm."

By regulation, to harm is to commit an act which kills or injures a protected species, including habitat modification or degradation which results in death to a protected species, or results in injury to the wildlife by significantly impairing essential behavioral patterns, including breeding, feeding, or sheltering. That portion of the regulation extending taking to activities which significantly modify the habitat of an endangered species, where it results in actual injury to the species, was upheld by the Supreme Court in Babbitt v. Sweet Home Chapter of Communities for a Great Oregon. More significantly in terms of violations of the Act, an action affecting a designated critical habitat violates the statute if it might reasonably be expected to reduce the number or distribution of that species to the extent that it would be in further jeopardy, or might restrict the potential and reasonable expansion or recovery of that species.

34. See id. (citing 50 C.F.R. § 402.02).
35. See Tennessee Valley Auth., 437 U.S. at 160; 50 C.F.R. § 424. Designation of the critical habitat must be made at the time a species is listed as endangered or threatened, unless it is not determinable at that time. See 16 U.S.C. § 1533(b)(6)(C).
37. See id. § 1538(a)(1)(B) - (C).
38. Specifically, the statute provides that a "taking" means to "harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct." Id. at § 1532(19).
40. 515 U.S. 687 (1995). This action was by logging companies, logging families, and small land owners to challenge the Secretary's definition of harm because they claimed it injured them economically as applied to the red cockaded woodpecker and northern spotted owl by preventing them from carrying on logging activities necessary to their livelihood. See id.
Clearly, the actual result of the prohibitions under the Act can be devastating to the private landowner whose intended use or uses of his land would jeopardize an endangered species. This is especially true given the broad interpretation of the activities which would amount to a "taking" of an endangered or threatened species under the Act.

D. Permitted Incidental Taking

Under the 1982 amendments,\textsuperscript{42} the Act provides an exception under which a taking may be permitted by the Secretary,\textsuperscript{43} "if such taking is incidental to, and not the purpose of, the carrying out of an otherwise lawful activity."\textsuperscript{44} An incidental taking occurs in the alteration of the habitat or relocation of an endangered species during construction.\textsuperscript{45} Thus, construction on land which is the habitat of an endangered or threatened species is prohibited under the Act without a permit for an incidental taking issued by the Secretary following formal application procedures. Those procedures require, among other things, submission of a habitat conservation plan and demonstration of how the impact on the species will be minimized and mitigated.\textsuperscript{46}

While the language of the statute is encouraging to private land use on its face, the realities of obtaining a permit for an incidental taking render the statutory exception essentially meaningless in the context of private land use by individuals. The requirements which must be met in applying for a permit

\textsuperscript{42} See Pub. L. No. 97-304, 96 Stat. 1411, 1422.

\textsuperscript{43} The exception was described as one which "addresses the concerns of private landowners . . . faced with having otherwise lawful actions not requiring Federal permits prevented [because of the Act's] prohibitions against taking." H.R. REP. No. 97-835, at 29 (1982), reprinted in 1982 U.S.C.C.A.N. 2860, 2870.

\textsuperscript{44} 16 U.S.C. § 1539(a)(1)(B). The statute provides that:

No permit may be issued by the Secretary authorizing any taking . . . unless the applicant therefor submits to the Secretary a conservation plan that specifies—

(i) the impact which will likely result from such taking;

(ii) what steps the applicant will take to minimize and mitigate such impacts, and the funding that will be available to implement such steps;

(iii) what alternative actions to such taking the applicant considered and the reasons why such alternatives are not being utilized; and

(iv) such other measures that the Secretary may require as being necessary or appropriate for purposes of the plan.


\textsuperscript{45} See City of Las Vegas v. Lujan, 891 F.2d 927, 929 (D.C. Cir. 1989) (preliminary injunctive action challenging emergency listing of the entire Mojave Desert as the critical habitat of the desert tortoise denied).

to make an incidental taking of a protected species are cost prohibitive to the individual land owner and grant broad discretion to the Secretary.\footnote{47} The process is well described in \textit{Friends of Endangered Species, Inc. v. Jantzen}.\footnote{48} This Ninth Circuit case concerns the permit procedures for an incidental taking by private corporations in connection with the proposed development of 2,235 residential sites, substantial office and commercial space, as well as donation of 2,000 acres of undeveloped land to the county and state for conservation purposes.\footnote{49} Before construction commenced, the Mission Blue butterfly, an endangered species, was discovered on the land, bringing use of the land under the scrutiny of the Endangered Species Act.\footnote{50}

The county, the three cities in which the land was situated, the land owner corporation, the developer, a citizens conservation group, and others formed a committee for the purpose of formulating a plan to protect the endangered species inhabiting the land and still permit some construction and development of the land under the Endangered Species Act.\footnote{51} The committee conducted a two year study of the Mission Blue and other species, during which time no construction occurred.\footnote{52} The committee then developed a habitat conservation plan, from which it developed a written agreement to implement the plan.\footnote{53} Under the agreement, eighty-one percent of the land would remain as undisturbed open space, and people who purchased lots would be required to contribute sixty thousand dollars per year to finance a

\footnote{47}{\textit{See id.} § 1539(a)(2)(A). Specific data on the exact cost of developing a habitat conservation plan and applying for an incidental taking permit is not readily available, but it may be inferred as substantial from the manpower and time involved in completing the process, as outlined in \textit{Friends of Endangered Species, Inc. v. Jantzen}, 760 F.2d 976 (9th Cir. 1985), discussed in the text accompanying \textit{infra} notes 48-61. The cost incurred in public funds by the Fish and Wildlife Service in merely reviewing habitat conservation plans and designating critical habitats is substantial. The cost of designation of the critical habitat for the northern spotted owl was approximately one million dollars, and was $126,000 for the marbled murrelet bird. \textit{See Final Listing Priority Guidance}, 63 Fed. Reg. at 25,543.}

\footnote{48}{760 F.2d 976 (9th Cir. 1985).}

\footnote{49}{\textit{See id.} at 979. The land is 3,400 acres of undeveloped land known as San Bruno Mountain in California. \textit{See id}. The original construction plan called for development of 7,655 residential units and 2,000,000 square feet of office and commercial space. \textit{See id}. The ultimate construction plan is the result of a settlement agreement in litigation between the land owner, corporation, and the county. \textit{See id}.}

\footnote{50}{\textit{See id}.}

\footnote{51}{\textit{See id}.}

\footnote{52}{\textit{See id.} at 980. At one point during the study, approximately fifty field personnel were involved in conducting the study. \textit{See id}. at 983. The San Bruno Elfin butterfly and the San Francisco Garter snake, also endangered species, were present on the Mountain as well, but were ultimately determined not to be present in significant numbers. \textit{See id}. at 979 n.3. The biological study involved capture, marking, releasing, and recapturing the animals to determine population size and distribution of the animal on the land. \textit{See id}. at 980 & n.4.}

\footnote{53}{\textit{See id}. at 980.}
The committee next prepared an environmental assessment and an application for a permit for an incidental taking as provided in the Endangered Species Act and submitted its habitat conservation plan for consideration by the Fish and Wildlife Service. Following notice and invitation for comment to the public, the United States Fish and Wildlife Service issued its opinion that the proposed construction would make no significant impact on the Mission Blue butterfly. This relieved the committee of the need to prepare an environmental impact statement, and a permit for an incidental taking of the Mission Blue was issued in 1983, eight years after the land owner first proposed to develop its land. The suit at hand was then instituted on the argument, among others, that the two year study was methodologically flawed and that an environmental impact statement should have been required.

In 1985, the circuit court affirmed the district court's determination that the issuance of the taking permit was made in compliance with the Endangered Species Act. It is significant to note that the circuit court opinion cites a House Conference Report in which the House praises the two year study and the habitat conservation plan for the Mission Blue butterfly, referring to it as the standard against which the adequacy of similar conservation plans in connection with applications for an incidental taking should be measured.

While the Friends of Endangered Species opinion fails to outline the cost involved in the exhaustive study and other efforts geared towards securing the incidental taking permit, the cost of such elaborate measures would be beyond the means of most, if not all, individual land owners seeking to develop their private property. In a commercial context, the cost of the ten year delay in construction alone is no doubt substantial.

Perhaps the best example of the difficulty, or near impossibility, in attempting to obtain a permit for an incidental taking is Tennessee Valley Authority. Like Friends of Endangered Species, the conservation efforts in Tennessee Valley Authority were backed with a corporate pocketbook.
A newly discovered species of perch, the snail darter, was added to the endangered species list just before the Tellico Dam on the Little Tennessee River was scheduled to begin operation. The critical habitat of the snail darter was designated as the exact portion of the river which would be affected by operation of the dam.

The Tennessee Valley Authority researched alternative sites to which the snail darter might be relocated in order that the dam could be opened, and made an experimental transfer of some of the fish to a new location. Determining whether the snail darter could survive in the new location would require a five to fifteen year wait. After one year, the Tennessee Valley Authority submitted its plan and findings, but the proposed relocation was rejected by the Secretary of the Interior, who found that there was not sufficient evidence to establish that a relocation would be successful. The opening of the Tellico Dam was restrained, at a loss in excess of fifty-three million dollars in public funds.

E. Civil and Criminal Penalties

The Endangered Species Act provides for civil penalties of up to twenty-five thousand dollars per violation for knowingly committing a taking under the Act. Civil penalties of up to twelve thousand dollars per violation may be imposed for knowing violations of other provisions of the Act. Violations of the Act which are not committed knowingly are subject to civil penalties of up to five hundred dollars per violation.

The Act also provides for criminal fines of up to fifty thousand dollars and imprisonment of up to one year for knowingly committing a taking or violating provisions of a permit, certificate, or regulation issued under the Act. Knowing violations of other provisions of the Act may result in a

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63. Of passing interest is the Court's note that there were 85 to 90 species of darters in 1977, with new species being discovered at the rate of about one per year; of those known and classified at the time, more than 45 were living in the Tennessee River system. See id. at 159-60 & n.7.
64. See id. at 158-59.
65. See id.
66. See id. at 162-63.
67. See id.
68. See Tennessee Valley Auth., 437 U.S. at 163.
69. See id. at 166.
71. See id.
72. See id.
73. See id. § 1540(b)(1).
criminal fine of up to twenty-five thousand dollars and up to six months in prison.\footnote{74}

**F. Public Benefit**

Congress declared that endangered and threatened "species of fish, wildlife, and plants are of esthetic, ecological, educational, historical, recreational, and scientific value to the Nation and its people."\footnote{75} The Supreme Court held this public benefit is superior to all other factors and rights, regardless of the cost to the individual or the government.\footnote{76} The Supreme Court in *Tennessee Valley Authority* noted that the intent of Congress was to prevent extinction of endangered species, "whatever the cost."\footnote{77}

Professor Robert R. Wright surmises that the taking of the property of a citizen of this country presumably "still takes precedence over the taking of a bird's habitat under the Endangered Species Act."\footnote{78} Factoring into that presumption is the Court's finding that a traditional balancing test is not appropriate. Thus, the courts may not weigh the public burden of the loss of millions of dollars against the loss of an endangered species. This is because Congress views the value of an endangered species as incalculable.\footnote{79} Given the emphatic language used by the Court, it is likely that the Court will also refuse to balance the burden on individuals created by losing the use of land against the loss of an endangered species.

**III. PREVIOUS TAKING ARGUMENT UNDER THE ENDANGERED SPECIES ACT**

The private property with which we are concerned here is land, rather than personal property. Nonetheless, it is interesting to note that the Court had an opportunity almost ten years ago in the matter of *Christy v. Lujan*\footnote{80} to resolve the very issue addressed by this comment in the context of a taking of personal property. However, the Court denied certiorari there.\footnote{81} In *Christy*, the plaintiff leased tribal land near Glacier National Park for the purpose of

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\item \footnotemark[74]\ See id.
\item \footnotemark[75]\ See id. § 1531(a)(3).
\item \footnotemark[76]\ See *Tennessee Valley Auth.*, 437 U.S. at 153.
\item \footnotemark[77]\ See id. at 184.
\item \footnotemark[78]\ WRIGHT, supra note 5, at 287.
\item \footnotemark[79]\ See *Tennessee Valley Auth.*, 437 U.S. at 187.
\item \footnotemark[80]\ Christy v. Hodel, 857 F.2d 1324 (9th Cir. 1989), cert. denied sub nom., Christy v. Lujan, 490 U.S. 1114 (1989).
\item \footnotemark[81]\ See Christy v. Lujan, 490 U.S. 114 (1989).
\end{itemize}
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The plaintiff endured the loss of eighty sheep to grizzly bears who strayed from the forest. His requests for assistance from the Park rangers were unanswered, and his efforts to scare the bears away from his sheep were unsuccessful. The plaintiff then shot and killed one of two grizzly bears as they approached his sheep. Because grizzlies are an endangered species falling under the protection of the Act, the plaintiff's action was a violation of the Act for which he was fined. The plaintiff filed an action in federal district court, alleging that his action in killing the bears to protect his livestock was protected by the Due Process Clause of the Fifth Amendment, and that the Endangered Species Act results in a taking of his property without compensation in violation of the Fifth Amendment. The lower court upheld the fine against Christy and found that damage to private property by protected wildlife does not amount to a taking. This ruling was affirmed by the circuit court because killing federally protected wildlife to protect one's personal property is not a fundamental right and is not specifically authorized by the statute, and because the Act rationally furthers a legitimate government interest. Christy appealed the Ninth Circuit holding against him to the Supreme Court, but certiorari was denied.

Justice White, in his dissent, recognized the importance of the unresolved issue of whether the Endangered Species Act can amount to a taking of private property without due process.

Christy's claim to such [substantive] protection presents an interesting and important question - the proper resolution of which is not altogether clear . . . . Even more substantial is Christy's claim that the Endangered Species Act operates as a governmental authorization of a 'taking' of his property; leaving him uncompensated for this taking violates the Fifth Amendment, Christy contends.

Justice White noted that if the plaintiff in Christy was prevented by the Act from taking steps to prevent the use of his property for feeding the bears because they are an endangered species, conversely, it would be undoubtedly unconstitutional for the Act to permit park rangers to take Christy's livestock.

82. See Christy, 857 F.2d at 1326.
83. See id.
84. See id.
85. See id.
86. See id. at 1327. Christy faced civil penalties of $2,500.
87. See id.
88. See Christy, 857 F.2d at 1328.
89. See id. at 1330-31.
91. See id. at 1115 (White, J., dissenting).
92. Id. (White, J., dissenting).
to feed the endangered bears. Thus, the dissenting Justice theorizes, a statute forbidding one from resisting the loss of one's property is the constitutional equivalent of an edict taking that property.

In Christy, the property was personal in nature, but it is undeniably analogous to those situations under the Act in which a private citizen is estopped from taking steps to prevent the use of his real property for the purpose of sustaining an endangered species of plant or animal. More particularly, the estoppel would be in the form of the denial of a habitat conservation plan and application for an incidental take. Some scholars have theorized that a taking may occur even in the instance of approval for an incidental taking where the habitat conservation plan provides for a substantial land dedication for preservation of the species. Although the Court declined to consider the takings argument in Christy, given Justice White's dissent, the passage of ten years, and further developments in Endangered Species Act litigation, the time is right for the Supreme Court's consideration of a Fifth Amendment taking of real property argument under the Endangered Species Act.

IV. Takings Under the Fifth Amendment

The Fifth Amendment to the United States Constitution provides that private property shall not be taken for public use without just compensation. Generally, in order to have a taking of private property, there must be physical occupation by the government or others. While the obvious situation of a taking involves the exercise of eminent domain in a condemnation proceeding, a taking may also occur by "inverse condemnation." This occurs where governmental regulations on land use, such as zoning laws and historic preservation laws, so severely restrict the owner's use of his property that no economically viable use for the property remains. In this context, the

93. See id. (White, J., dissenting).
94. See id. at 1115-16 (White, J., dissenting).
96. See U.S. CONST. amend. V.
97. See First English Evangelical Lutheran Church of Glendale v. County of Los Angeles, 482 U.S. 304 (1987) (holding that inverse condemnation is a taking which occurs without formal condemnation proceedings).
98. See Pennsylvania Coal Co. v. Mahon, 260 U.S. 393, 415 (1922) (regulatory action may amount to a taking requiring just compensation).
Supreme Court determined in *Pennsylvania Coal v. Mahon*\(^{100}\) that there may be a taking even without physical intrusion onto the land, which is important to a takings claim under the Endangered Species Act. A regulatory taking or taking by inverse condemnation is, however, difficult to establish.\(^{101}\)

Each regulatory taking argument is determined on a case by case basis. The Court set out the factors to be considered in *Penn Central*.\(^{102}\) The first item considered is the character of the government action. The second item addressed is the economic impact of the regulation. Last, the court must consider the extent to which the action interferes with the owner's reasonable investment-backed expectations for the property.\(^{103}\) The regulation may also amount to a taking if a legitimate governmental interest substantially advanced by the regulation is lacking, or denies the owner economically viable use of his property.\(^{104}\)

While the Court held in *Nollan v. California Coastal Commission* that development of real property, subject to legitimate permit requirements, is a right and not a benefit,\(^{105}\) even a severe diminution in the value of property will not amount to a taking if other uses for the property remain.\(^{106}\) However, if property is left without any value because of the regulation, only compensation must be paid.\(^{107}\)

An inverse condemnation claim must be ripe for review under the standards established by the Supreme Court in *MacDonald, Sommer & Frates v. Yolo County*.\(^{108}\) The land owner must first submit a plan for development to the appropriate agency.\(^{109}\) Next, he must secure a final decision on the development which will be permitted,\(^{110}\) including petitioning for any

\(^{100}\) 260 U.S. 393 (1922).

\(^{101}\) See *Penn Central Transp. Co. v. City of New York*, 438 U.S. 104 (1978). Plaintiff wanted to build an office tower on the top of its property, the Grand Central Terminal, and the city refused to permit the construction under a landmark preservation statute. The owner established that denial of the permit would result in a loss of several million dollars of income which would be generated by the office building. The Court found that no taking had occurred because an economically viable use of the property as the Grand Central Terminal remained and because the plaintiff could build an office building atop other property nearby.

\(^{102}\) See id. at 124.

\(^{103}\) See id.

\(^{104}\) See *Nollan*, 483 U.S. at 834-35.

\(^{105}\) See id. at 841 & n.2.

\(^{106}\) See *Hadacheck v. Sebastian*, 239 U.S. 394 (1915), in which the Court held that an eighty-seven and one-half percent reduction in the value of plaintiff's land as a result of an ordinance against brick manufacturing was not a taking. See also *Penn Central*, 438 U.S. at 131, in which the seventy-five percent diminution in the value of Grand Central Station was not a taking.

\(^{107}\) See *Lucas*, 505 U.S. 1003.


\(^{109}\) See id. at 349.

\(^{110}\) See id.
variances which may be available under the regulation and exhaustion of
administrative and state remedies.\textsuperscript{111}

If a taking occurs, mere invalidation of the offending regulation is not
sufficient. There must be just compensation even for a temporary taking
under \textit{First English Evangelical Lutheran Church v. County of Los Angeles}.\textsuperscript{112} The Court held that even if the government amends or withdraws the
regulation, it must pay just compensation for the time during which exercise
of the regulation effected a taking.\textsuperscript{113} Just compensation is measured under the
willing buyer/willing seller standard of the fair market value of the property.\textsuperscript{114}

\section*{V. FOUNDATIONS FOR THE TAKINGS ARGUMENT
\textsc{under the Endangered Species Act}}

Foundations for a Fifth Amendment takings claim under the Endangered
Species Act may be found by analogy to federal wetlands regulation cases and
three specific takings cases. From those it is reasonable to argue that the
Supreme Court has opened the door for the possibility of success in a takings
claim under the Endangered Species Act. This section begins with a brief
discussion of takings in the context of wetlands regulation and then moves
through each of three recent Supreme Court cases on takings.

\subsection*{A. Takings Under Wetlands Regulation}

Review of federal wetlands regulation\textsuperscript{115} cases may provide some insight
into the standards which the Court will apply and the possible holding in a
takings claim under the federal Endangered Species Act. A Section 404
permit is required under the Clean Water Act before wetlands\textsuperscript{116} may be
filled.\textsuperscript{117} A few Federal Claims Court cases have examined whether denial of

\begin{footnotesize}
\begin{enumerate}
\item See Williamson County Reg'l Planning Comm'n v. Hamilton Bank, 473 U.S. 172
(1985). "[I]t is impossible to tell whether the land retain[ed] any reasonable beneficial use or
whether the existing expectation interests have been destroyed" without a final decision on
application of the regulations to the property. \textit{MacDonald,} 477 U.S. at 349 (quoting \textit{Williamson
County,} 473 U.S. at 190).
\item 482 U.S. 304 (1987).
\item See \textit{id.} at 319-20.
\item See United States v. 564.54 Acres of Land, 441 U.S. 506, 511 (1979).
\item Wetlands are "those areas that are inundated or saturated by surface or ground water
at a frequency and duration sufficient to support, and that under normal circumstances do
support, a prevalence of vegetation typically adapted for life in saturated soil conditions." 33
C.F.R. § 328.3(b).
\item See 33 U.S.C. § 1344(a).
\end{enumerate}
\end{footnotesize}
a Section 404 permit constitutes a taking, the focus of which seems to have been placed on the economic viability of the property.

Denial of the highest and best use of the property resulting in a diminution in value does not alone establish a taking. But, if the denial of a Section 404 permit prevents "economically viable use" of the property, there may be a taking. Economically viable use, in the context of wetlands cases, does not mean that the property may simply still be utilized for such activities as bird watching, conservation, or even a marina.

In Loveladies Harbor v. United States, the government argued that a taking could not have occurred because economically viable use for the property remained after denial of a Section 404 permit because the land could be used for hunting, bird watching, conservation, agriculture, or a marina. There, the land owner had one acre of developable upland which was surrounded by wetlands, and denial of the permit prevented development of the upland as well. The Claims Court held that, in order to defeat a takings claim, the uses proposed by the government must be reasonably probable or it must be shown that a market exists for the proposed uses, and thus ruled that there had been a taking.

B. First English Evangelical Lutheran Church v. County of Los Angeles

Three recent Supreme Court cases are worthy of close examination as they lay the foundation upon which an Endangered Species Act takings claim may be successful. The first of these is First English Evangelical Lutheran Church v. County of Los Angeles. This was an action in inverse condemnation based upon a regulatory taking. The ordinance at issue prohibited any construction in an interim flood protection area, including the church's campground property. The flood hazard which led to the ordinance was

118. See Deltona Corp. v. United States, 657 F.2d 1184, 1193 (Cl. Ct. 1981) (Section 404 permit was denied, but there was no taking because not all of the land was wetlands requiring a permit and the remaining 111 acres of land could be developed). See also Jentgen v. United States, 657 F.2d 1210 (Cl. Ct. 1981), cert. denied, 455 U.S. 1017 (1982); but see Loveladies Harbor v. United States, 21 Cl. Ct. 153 (1990), aff'd 28 F.3d 1171 (Fed. Cir. 1994).
120. See Loveladies Harbor, 21 Cl. Ct. at 158-59.
121. See id.
122. See id.
123. See id. See also Formanek v. United States, 26 Cl. Ct. 332 (1992) (government failed to show a market existed for the proposed use of 12 acres of uplands existing in a 112 acre tract and that a permit to fill some portion of the wetlands would be necessary to create access to and utilize the uplands).
125. See id. at 307-08.
actually followed by a flood that destroyed the church’s campground buildings, and the county refused to permit the church to rebuild them. The church alleged it had suffered a complete loss of the use of its property as a result of the ordinance. The Court did not decide whether there was a total taking on the facts presented, but found that a total taking which is only temporary in nature is nonetheless compensable during the period of the taking.

*First English* may be important in establishing a takings claim under the Endangered Species Act in two ways. First, it is clear that a total taking must be established under *First English*. Second, compensation will be required even for a temporary taking. Thus, *First English* essentially anticipates one of the possible arguments of the government in defense of a takings claim under the Endangered Species Act. In other words, it will not be sufficient to establish that an endangered or threatened species is expected to eventually be delisted and that the prohibition against the private land use is somehow temporary, pending the delisting, because *First English* requires compensation during the interim period.

This comment contemplates a theoretical takings claim where a private land owner would seek and be denied an incidental taking permit resulting in total loss of the use of his land. Assuming that scenario and successful slating of his claim for consideration by the Supreme Court, *First English* may also provide the framework for a compensation claim during the interim period. More specifically, the Court may provide the framework for compensation during the period from denial of the land owner’s application for an incidental taking until final determination by the Supreme Court. Such a compensation claim would be viable under *First English*, even if the Fish and Wildlife Service then amended its decision and granted an incidental take permit.

### C. *Lucas v. South Carolina Coastal Council*

The second case which appears to advance the possibility of a successful takings claim under the Endangered Species Act is *Lucas v. South Carolina Coastal Council*

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126. *See id.*
127. *See id.* at 308.
129. *See First English*, 482 U.S. at 318.
130. *See supra* note 3 regarding delisting.
The individual land owner in *Lucas* paid nearly a million dollars for two parcels of beach front property with the intent of building a home. After his purchase, a state statute was enacted which prohibited him from building a home. The land owner sued, alleging a taking in violation of the Fifth and Fourteenth Amendments, and arguing that his land was robbed of all value by the statute.

The *Lucas* Court held that because the land owner had to "sacrifice all economically beneficial uses in the name of the common good, that is, to leave his property economically idle, he [had] suffered a taking." Encouraging to the individual would-be Endangered Species Act takings claimant, the Court in *Lucas* did find that there was a "total taking" in the case of this individual land owner who sought to build a single family residence on his beach front property and was denied. Also worth noting, dicta in the majority opinion of *Lucas* demonstrates the Court's uncertainty as to whether a regulation which requires a land owner to leave a portion of his property "in its natural state" would amount to a deprivation of all economically beneficial use of that portion of the land, and thus result in a taking, or whether it would fall under the "mere diminution in value" standard defeating compensation.

D. *Dolan v. City of Tigard*

The next case arguably laying the groundwork for a takings claim under the Endangered Species Act is *Dolan v. City of Tigard*. There, an individual land owner sought permission from the city to expand his store and pave his gravel parking lot, which fell into the city's 100 year floodplain. As a condition, the city requested dedication of a part of the owner's land which

132. See id. at 1006-07.
133. See id. at 1007.
134. See id. at 1009.
135. See id. at 1019. The majority opinion here is in alignment with the later comment of Justice Rehnquist in *Dolan v. City of Tigard*, 512 U.S. 374 (1994), which states: "One of the principal purposes of the Takings Clause is 'to bar government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole.'" *Dolan*, 512 U.S. at 384 (quoting *Armstrong v. United States*, 364 U.S. 40, 49 (1960)). Certainly, it serves the common good to preserve endangered species, but that preservation is a "public burden," which should be borne by the public as a whole by requiring the government to pay compensation when development of private lands is prevented or heavily restricted in the name of endangered species conservation.
136. See *Lucas*, 505 U.S. at 1030.
137. See id. at 1016 n.7. See *Loveladies Harbor*, 28 F.3d 1171 (Fed. Cir. 1994) and discussion accompanying, supra Part V.A.
139. See id. at 379.
fell within the floodplain and an adjacent strip. The floodplain land would be utilized by the city to create a public greenway, which the city said would reduce flooding and downstream impacts. The adjacent land would be utilized as a walkway and bicycle path, which the city claimed would relieve traffic congestion. The individual land owner petitioned for a variance to be relieved of the land dedication requirement, but his petition was denied. The land owner sued under the argument that the land dedication was not related to the proposed development and amounted to an uncompensated taking in violation of the Fifth Amendment. The Oregon Supreme Court ruled in favor of the city.

The Supreme Court reversed, despite finding that the "essential nexus" requirement was established. The Court found that there is an essential nexus between preventing flooding and limiting development along the floodplain and creek, and between reducing traffic congestion and providing an alternate means of transportation. However, the Court also coined a "rough proportionality" test for whether the city's findings are constitutionally sufficient to justify the condition of land dedication imposed on the permit for expansion and paving. The question of whether there is a necessary connection requires "individualized determination," rather than application of a formula, that the nature and extent of the dedication required of the individual land owner is related to the impact of the proposed development. The Supreme Court held in the instance of Dolan that the reasonable relationship was not established, and commented specifically on the city's request for a public, rather than private, greenway.

Dolan may be important in the context of a claim under the Endangered Species Act for two reasons. First, as discussed above, it is probably necessary under MacDonald for a land owner to first seek a permit for an incidental taking before proceeding with a takings claim under the Fifth Amendment. Part of the process in applying for an incidental taking permit will likely involve dedication under the habitat conservation plan of some part

140. See id. at 379-80.
141. See id. at 379, 381-82.
142. See id.
143. See id. at 380.
144. See Dolan, 512 U.S. at 382.
145. See id. at 383.
147. See Dolan, 512 U.S. at 388-89.
148. See id. at 388-91. "We think a term such as 'rough proportionality' best encapsulates what we hold to be the requirement of the Fifth Amendment." Id. at 391.
149. See id. at 391.
150. See id. at 394-95.
151. See supra note 108 and text accompanying.
of the land for preservation of the endangered species by protecting its habitat. Second, the rough proportionality test appears to require the government to bear the burden of establishing that the extent to which the regulation imposes upon the land owner is related in nature and extent to the impact of the proposed development by making an "individualized determination."

VI. ANALYSIS AND CONCLUSION

Although some scholars disagree, the Endangered Species Act can, in theory, amount to a taking of private property without due process of law under certain circumstances. A brief review of the opinions against a takings argument is in order to outline the possibility in favor of such a claim.

One of the theories against a takings claim involves the provision of the Act providing for an incidental taking permit.152 This theory provides that the incidental take provision of the Act serves as a "safety valve" against a Fifth Amendment taking.153 The theory appears to operate on the assumption that there is not a total taking involved, as there was in *Lucas*. This theory is only sound to the extent that the incidental taking permit procedure meets the rough proportionality test of *Dolan*, which cannot be satisfied without an individual determination that there is a reasonable relationship between the dedication of land for species conservation and the nature and extent of the proposed development's impact.154

Thus, the safety valve theory will fail where the exaction of property to preserve a listed species is so severe that the effect is a denial of the land owner's proposed residential or commercial development of the property. However, because the determination is individualized, the safety valve theory would likely prevent a takings claim in the context of commercial development where a substantial amount of acreage is involved so that development may still proceed after an offer to devote acreage under a habitat conservation plan.

The effect of the safety valve theory will also likely prevent a takings claim in the commercial development context because the high cost of developing a successful habitat conservation plan which meets the standards of *Friends of Endangered Species*155 will be more readily borne in a commer-

153. See id. at 622-24.
155. 760 F.2d 976, 988 (9th Cir. 1985) (noting the House Conference Report in praise of the two year study and habitat conservation plan as the standard against which habitat conservation plans should be measured). *See supra* note 61 and text accompanying at Part IID.
cial setting with an "investment-backed" pocketbook than it will by an individual. For the individual owning a small plot of land and planning to build a single family residence, the financial considerations of developing an adequate habitat conservation plan will likely render the incidental taking permit unattainable. Thus, the safety valve theory fails in that limited context, and a takings claim will prevail.

At least two articles state the opinion that the incidental taking application process satisfies the individual determination requirement and will make takings claims under the Act rare. This opinion appears to be based upon the fact that each habitat conservation plan is individually created and reviewed. The flaw here is in the language of the statute itself, which makes no provision for determining whether the burden of species conservation on the individual land owner will be too great. The sole focus of the Act, instead, is on the impact of the human land owner’s proposed activities upon the listed species. Consideration of the financial or other impact upon the land owner or his right to develop his property is not provided for in the Act. Perhaps recognizing this flaw, these commentaries acknowledge that a takings claim under the Act is a distinct possibility where an application for an incidental take is denied.

In line with the view expressed above, that the preservation of a listed species under the Act creates a public benefit, one professor opines that an individual land owner’s private property rights are transformed into a public good in the instance of a permit which has positive effects on the surrounding community. Thus, he states, the Court does not easily allow waiver of those rights which have positive externalities associated with them, thus property rights should be afforded greater protection.

One scholar said that “the great majority” of takings claims under the Act will be noncompensable under the Constitution. However, that same scholar recognizes that because the courts will continue to consider them on a “case-by-case basis, weighing equities each time, the government is continuously exposing itself to the risk of providing compensation for the

157. See id. at 10,654.
158. See supra note 44 for the statutory provisions concerning the “minimize and mitigate” burden in an incidental taking application.
159. See supra Part IID.
160. See Feldman, supra note 156, at 10,653-54.
162. Id. at 870-71.
163. See Rockwell, supra note 95.
regulation of habitat on private property.” 164 Although it is no doubt true for the majority of situations that a takings claim under the Endangered Species Act will not be successful, there are certain limited circumstances in which the Act will amount to a taking.

That fact has been acknowledged by a speaker in the field, but the proposed foundation for such a claim is not adequate to prove successful. 165 Specifically, Kimberly Rockwell posits that where the habitat conservation plan in connection with an application for an incidental taking will have the land owner leave some of the land undisturbed for species preservation, the rule of Lucas may result in compensation. 166 However, it is not likely that a takings claim will succeed under Lucas where development is not totally precluded, or so limited as to be effectively precluded.

Relief is available where either an individual land owner is denied the right to develop his land at all because of the presence of an endangered or threatened plant or animal, or his development is substantially limited by dedication of a significant portion of this land under a habitat conservation plan. The rules of Lucas, Dolan, and First Evangelical will provide the necessary framework to establish a regulatory taking in violation of the Fifth Amendment and entitle the land owner to just compensation.

Unlike Christy, certiorari in this hypothetical situation would probably be granted by the Court because the right to develop one’s real property is a constitutional right under the rule of Nollan. The application for an incidental taking and development of a habitat conservation plan will satisfy the necessity of exhausting remedies and obtaining a final determination required by MacDonald. Certainly, the government may argue that no taking has occurred under Hadacheck and Penn Central by attempting to show that uses for the land remain, such as bird watching. But, as the Court held in Loveladies, the remaining use must be economically viable and realistic. Thus, where the incidental taking permit is denied, or its granting requires so much dedication of land to conservation that construction upon and use of the land is realistically prevented, there is a compensable taking by analogy to Loveladies. In Lucas, the Court hints that it may find a total taking even in the granting of an incidental taking permit where a substantial land dedication is required, thus fulfilling the requirement of a total taking under First English. Accordingly, the Endangered Species Act, under the limited circumstance

164. See Rockwell, supra note 95, at 600.
165. See Rockwell, supra note 95, at 599. “Since some HCPs specify that discrete portions of acreage remain unchanged, a Lucas analysis could apply to such a parcel and result in compensation to the property owner.” Rockwell, supra note 95, at 599.
166. See Rockwell, supra note 95, at 599.
discussed herein, will amount to a taking of private property without due
process of law in violation of the Fifth Amendment.

Another line of reasoning against the success of a takings claim under the
Act is that the value placed on species preservation is too high. This
position, taken by Professor Oliver Houck, is that even though the Act may be
too much of a restriction on private property rights, protection of private
property rights to the extent of allowing compensation for a taking should not
be permitted in the interest of human welfare. On the one hand, Professor
Houck’s view is in line with the Court’s holding in *Tennessee Valley
Authority* in that the Court placed preservation of endangered species above
all else without regard to the financial burden.

On the other hand, *Tennessee Valley Authority* may be the very argument
against Professor Houck’s view because the Court essentially permitted the
expenditure of millions of dollars in public funds for preservation of the listed
species. In other words, it is public funds which would be paid to compensate
for a taking under the Act, and it was millions of dollars in public funds
already expended which were wasted when the Tellico Dam was prevented
from becoming operational in order to preserve the snail darter. In practice,
the Court has already approved the indirect use of public funds in connection
with land use for the preservation of an endangered species in *Tennessee
Valley*. Thus, the direct use of public funds in payment to private land owners
for the use of their property under the Act should not be a stretch, particularly
in the interest of preventing an individual from bearing a “public burden
which, in all fairness and justice, should be borne by the public as a whole.”

*Monica L. Mason*

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169. 437 U.S. 153 (1978). See also *supra* Part IIF.