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FLOODING THE FIFTH AMENDMENT: THE NATIONAL FLOOD INSURANCE PROGRAM AND THE "TAKINGS" CLAUSE

Saul Jay Singer*

I. INTRODUCTION

The National Flood Insurance Program (NFIP) is a federal program designed to make subsidized flood insurance available to homeowners and businesses located on the nation's coasts and floodplains. The NFIP was promulgated as a quid pro quo arrangement: the federal government makes insurance available to community residents at subsidized rates in exchange for the adoption and enforcement of floodplain regulatory ordinances by community officials. Pursuant to this arrangement, communities have regulated floodplain land use in a number of ways, including banning construction in the floodway; requiring drainage channels; designating detention areas for flood runoffs; enacting grading, construction, and building codes; and prohibiting construction below certain flood levels. A judicial finding that these types of floodplain regulations constitute "takings," thereby invoking the fifth amendment requirement that the government tender "just compensation," would effectively kill the NFIP.

Since early 1987, the Supreme Court of the United States has decided three important cases involving the key question of precisely what constitutes a taking of interests in real property under the

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Constitution. In *Keystone Bituminous Coal Association v. DeBenedictis*,\(^2\) *First English Evangelical Lutheran Church of Glendale v. County of Los Angeles*,\(^3\) and *Nollan v. California Coastal Commission*,\(^4\) landowners argued that particular regulations were violative of the fifth amendment of the United States Constitution, which provides that "nor shall private property be taken for public use without just compensation."\(^5\) Of particular interest to the federal government with respect to the National Flood Insurance Program, *First English* and *Keystone* concern hazard-related land use regulations, while *Nollan* raises some other issues relevant to such regulations. The extensive concern generated by these three rulings require, at the very least, a reassessment of NFIP regulations vis-à-vis "takings" doctrine.

This Article assesses the potential impact of the Court's rulings on the constitutionality of the National Flood Insurance Program.\(^6\) It begins with a discussion of the nature of the flood hazard, the need for governmental underwriting of flood insurance, and the development and scope of the NFIP. The Article then outlines the decisions defining when regulations might limit the use of private property so as to constitute a taking of private property without just compensation. Particular emphasis is placed on the three 1987 landmark Supreme Court decisions on takings, or the "Trilogy." Finally, the Article analyzes the effect of recent developments in takings law on the constitutionality of land use regulations enacted pursuant to the NFIP.

II. Background

A. The Nature and Extent of the Flood Hazard in the United States

The Federal Emergency Management Agency (FEMA) has gathered, compiled, and analyzed statistical experiential data on the flood

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\(^3\) 482 U.S. 304 (1987).
\(^5\) U.S. CONST. amend. V. The fifth amendment's prohibition against takings applies to the states through the fourteenth amendment. See *Chicago, B. & Q. R.R. v. Chicago*, 166 U.S. 226, 241 (1897).
\(^6\) The courts have clearly stated that the NFIP itself is constitutional. See *Texas Landowners Rights Ass'n v. Harris*, 453 F. Supp. 1025, 1028–33 (D.D.C. 1978), aff'd, 598 F.2d 311 (D.C. Cir.), cert. denied, 444 U.S. 927 (1979). When the author refers to the constitutionality of the NFIP, the author means the constitutionality of NFIP-mandated regulatory controls which restrict use of property without just compensation.
\(^7\) The Code of Federal Regulations defines "Flood" as:
hazard for eleven years, from 1978, when FEMA assumed responsibility for administering the NFIP, through 1988, the most recently available aggregate experience year.\(^8\) Even a cursory, superficial study of the results will show that a super-catastrophic "mega-flood" has yet to occur.\(^9\) In short, the citizens of the United States have escaped relatively unscathed from the flood peril, given the combination of increasing development\(^10\) in the floodplains and the lower-than-normal flood loss experience over the last few years. The expectation that losses from floods will rise significantly in the near future is consistent with a finding by the United States Water Resources Council, which estimates that annual property losses will exceed $4.3 billion by the turn of the century.\(^11\)

The Federal Insurance Administration (FIA), the component of FEMA which administers the NFIP, has undertaken many studies which make it clear that the very worst flood damages are yet to come. Sophisticated ultramodern simulation techniques support the proposition that a serious flood risk exists in the United States, and that both the private and public interests therein have not been publicized adequately. At present, nine out of every ten natural disasters in this country are flood-related. Ninety percent of Presidential declarations of an emergency or major disaster involve flooding.\(^12\) Although only about seven percent of the nation's lands are floodplain as defined by the United States Army Corps of Engineers, the disproportionate present and expected future population located within the floodplain creates a potential flood problem. The Congress of the United States has made a specific finding that annual losses from floods are "increasing at an alarming rate," and attributes this

\[\text{(a) A general and temporary condition of partial or complete inundation of normally dry land areas from:} \]

\begin{enumerate}
  \item The overflow of inland or tidal waters.
  \item The unusual and rapid accumulation of runoff of surface waters from any source.
  \item Mudslides . . . which are proximately caused by flooding . . . and are akin to a river of liquid and flowing mud of the surfaces of normally dry land areas, as when earth is carried by a current of water and deposited along the path of the current.
\end{enumerate}


\(^9\) Even Hurricane Hugo, which struck the Carolinas in September, 1989, did not cause the long-awaited, much feared billion dollar flood. Estimates show that Hugo caused about $400 million in insured NFIP losses.

\(^10\) "'Development' means any man-made change to improved or unimproved real estate, including but not limited to buildings or other structures, mining, dredging, filling, grading, paving, excavation, or drilling operations." 44 C.F.R. § 59.1.

\(^11\) The Water Resources Council finding is cited in a National Science Foundation report. See NATIONAL SCIENCE FOUND., A REPORT IN FLOOD HAZARD MITIGATION 1–2 (1980).

\(^12\) Id. at 1.
increase primarily to acceleration of development and habitation of flood-prone areas.13

Studies conducted by such diverse organizations as the Royal Swedish Academy of Science, the United States Environmental Protection Agency (EPA), the French Ministry of Environment, and the Congressional Clearinghouse for the Future, have sought to identify and rank the major environmental trends by surveying scientists and other appropriate experts. Out of forty-seven identified issues and concerns, "floods" was ranked seventh, behind such standard threats as war, nuclear holocaust, and international terrorism.14 As with most serious threats to its physical and financial well-being, the public will attempt to protect itself against the threat of flooding. Insurance is the traditional method of protecting an owner's interest in property.

Still, there is compelling statistical evidence that even inhabitants of flood-prone communities, let alone the public at large, do not adequately consider the extent of their flood peril. The total NFIP policy-in-force base was just over 2.1 million as of April, 1989.15 Since the FIA estimates that approximately eight million properties are located in flood-prone areas, only about twenty-five percent of those most seriously exposed to loss by flood are taking advantage of the availability of federally subsidized insurance.

B. The "Flood Insurance Problem"16

The government does not directly underwrite automobile insurance, or homeowner's policies, or most other "traditional" property/casualty lines.17 Congress has found, however, that many factors make it "uneconomic for the private insurance industry alone to make flood insurance available . . . on reasonable terms and conditions" to those in need of such protection.18 At the same time, recent studies indicate that although insurance does not, and probably cannot, respond to all the needs of disaster victims, insurance is the most

16 Much of the material in this section was adapted from Singer, An Analytical Review of Issues Relating to the National Flood Insurance Program, THE FLOOD REP. (Feb. 1986).
17 Though, in some instances and to a certain extent, it may act in the capacity of a "self-insurer."
18 42 U.S.C. § 4001(b) (1982).
efficient and equitable method of providing disaster assistance. Because the entire "takeings" question only arises in the context of governmental action, explaining and understanding the government's involvement in flood insurance and floodplain management becomes pivotal. A key question, therefore, is why the government must subsidize property and business owners in the floodplains and shorelines of this country.

"Subsidized," in actuarial terminology, is defined as the state whereby expected losses arising out of a given group of risks, plus expenses relating to those risks, exceed the premium volume generated by the policies written. The word "expected" must be underscored because, at policy inception, no one can know precisely what the claims experience relative to a given policy will be. In rating an insurance policy, operating costs are generally well-known. Thus, the thrust of the "game" of actuarial ratemaking is to determine suitable rate classifications and to offer a solid prediction, employing mathematical and statistical techniques, of what classification aggregate losses will be.

Non-subsidized insurance is termed self-supporting or, alternatively, "actuarially sound." In restructuring NFIP rating and coverage provisions to establish an "actuarially sound" program, the Federal Insurance Administrator has distinguished the traditional definition of actuarial soundness from the NFIP's definition. The intent of the Flood Program is merely to generate sufficient premiums to cover expenses and losses relative to an average historical loss year encompassing only the actual data gathered and analyzed

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20 The NFIP defines a floodplain as an area susceptible to inundation from either the overflow of inland or tidal water or the accumulation of runoff or surface waters from any source. See 44 C.F.R. § 59 (1988).

21 The term "operating costs" includes:
(A) expense reimbursements covering the direct, actual, and necessary expenses incurred in connection with selling and servicing flood insurance coverage; (B) reasonable compensation payable for selling and servicing flood insurance coverage, or commissions or service fees paid to producers; (C) loss adjustment expenses; and (D) other direct, actual, and necessary expenses which the Director finds are incurred in connection with selling or servicing flood insurance coverage . . . .


22 Insurers do not attempt to predict individual expected loss level for a given policy, except in lines where group classification is impossible or illogical, such as ocean marine insurance. See generally D. BICKELHAUPT, GENERAL INSURANCE 550-51 (1974) (discussing the problems involving rates in ocean marine insurance)

23 Reilly, Leikin & Singer, supra note 8, at 2.
to date.24 Because the experience period and the data underlying the present rate level do not include consideration of a super-catastro­phic flood, it is clear that, even as presently subsidized, the rate level and the ensuing premium charges are vastly understated. Initially, the government pays all losses out of premium dollars. When losses exceed premium dollars, which is nearly always the case, they are paid out of a Flood Insurance Fund25 established by the federal government tapping the ultimate government resource: tax dollars. Even if the Flood Insurance Fund should become totally depleted, the federal government, having legally contracted with NFIP policyholders to pay policyholder losses up to purchased limits of coverage, has pledged to put the full financial resources of the government behind these policies.

Government flood insurance officials have estimated that if, some­how, all American property owners could be compelled to endorse their homeowner’s policies to cover the flood hazard, the price of this endorsement would be less than twenty dollars. Why, then, does the premium for an NFIP policy exceed $250? Whether merely as a limit on the police power or due to political infeasibility, the government has not mandated flood insurance purchase for all despite the fact that automobile liability insurance, for example, is legally re­quired nationwide.26 The critical difference is that automobile liabil­ity is so-called “third party” insurance; it is designed to protect not only the insured from his or her own negligence but, more impor­tantly, to protect a victim of the insured’s negligence from being unable to collect a negligence judgment against a defendant driver with no other means of financial recovery.27

The courts have left no doubt that the government may compel automobile liability insurance, which is unquestionably in the public’s interest in health, safety, and welfare. Flood insurance, however, like most property insurance, is a “first party” contract of non­indemnification, with the only “interested” parties the insurer and the insured. The public interest in mandating flood insurance is therefore diminished. Furthermore, a property owner subject to a mandatory flood insurance purchase requirement may argue that an individual who neither drives, owns an automobile, nor is in any

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25 Id. § 4017.
26 Subject to some exceptions in jurisdictions requiring such alternatives as posting bond or complying with extensive self-insurance requirements.
27 Note that the defendant may be bankrupt, illegally escape the court’s jurisdiction leaving no potential in rem cause of action behind, or otherwise creatively manage to escape collection.
other way susceptible to liability arising out of the use of an automobile is not compelled to purchase liability insurance. Similarly, if the property is not flood-prone and absent any apparent governmental interest, there is no rational purpose for requiring the landowner to insure against the flood peril.\textsuperscript{28}

If the government cannot compel homeowners to insure against the flood hazard, the question arises as to why the government must subsidize those homeowners who choose to purchase flood insurance. The answer must begin with a consideration of the principles of classification ratemaking.\textsuperscript{29} Ideally, an insurance system should be objective, cost-effective, and able to individually assess, review, and price each and every risk applying for insurance. In the large majority of property/casualty lines, however, this is impossible. First, the expenses underlying such a process would be unduly prohibitive and, second, virtually all insureds and insurers operate under serious time constraints which render individual risk assessments infeasible. The alternative to individually reviewing and rating each and every application for insurance coverage is to establish risk groupings, or to employ a system of classification ratemaking. In general, insurance criteria for determining what constitutes a "good" risk grouping include:

\begin{itemize}
  \item[(a)] there should be a sufficient number of insureds with similar risk characteristics to comprise a "credible" group;
  \item[(b)] each group should have a significantly different expected loss cost than average;
  \item[(c)] the determination of group risk characteristics must be objective, unbiased, and administratively simple to apply;
  \item[(d)] the system of risk groupings must be practical and cost-effective;
  \item[(e)] the system of risk groupings must be acceptable to the public.
\end{itemize}

NFIP risk classifications clearly satisfy these five criteria.\textsuperscript{30} Zone and elevation are the two most important risk characteristics for classifying risks under the NFIP.

\textsuperscript{28} This is going to be a particularly potent argument when considered in light of the nexus test developed by the Supreme Court in \textit{Nollan}. See infra notes 231-57 and accompanying text.


\textsuperscript{30} Congress has found that NFIP risk groupings provide the flexibility for flood insurance to be based on workable methods of pooling risks, minimizing costs, and distributing burdens equitably among those protected by flood insurance and the general public. See 42 U.S.C. § 4001(d) (1982).
1. Risk Zones

Floodplains are among the most difficult zoning features to delineate, because they are governed by geomorphological features rather than by the political and social decisions that usually enter into the process of zone designations.\[31\] The National Flood Insurance Act authorizes the government to identify and publish information concerning all floodplains and coastal areas in the country that are special flood hazards.\[32\] The United States Army Corps of Engineers, with input from a variety of other professional and technological sources, employs statistical analysis of river flow, storm tides, rainfall, topographic surveys, and hydrologic analysis to produce a Special Flood Hazard Map (SFHM), which defines areas within the community susceptible to flooding. These areas are then further divided into flood hazard zones, or “insurance risk rate zones,” producing a Flood Insurance Rate Map (FIRM).\[33\] At least three pro-

\[33\] The zones are classified as follows:

Zone V: SFHAs along coasts subject to inundation by the 100-year flood with the additional hazards associated with storm waves. Because detailed hydraulic analyses have not been performed, no base flood elevations or depths are shown. Mandatory flood insurance purchase requirements apply.

Zones VE and V1–30: SFHAs along coasts subject to inundation by the 100-year flood with additional hazards due to velocity (wave action). Base flood elevations derived from detailed hydraulic analyses are shown within these zones. Mandatory flood insurance purchase requirements apply. (Zone VE is used on new and some revised maps in place of Zones V1–30.)

Zone A: SFHAs subject to inundation by the 100-year flood. Because detailed hydraulic analyses have not been performed, no base flood elevations or depths are shown. Mandatory flood insurance purchase requirements apply.

Zones AE and A1–30: SFHAs subject to inundation by the 100-year flood determined in a Flood Insurance Study by detailed methods. Base flood elevations are shown within these zones. Mandatory flood insurance purchase requirements apply. (Zone AE is used on new and some revised maps in place of Zones A1–30.)

Zone AH: SFHAs subject to inundation by the 100-year shallow flooding (usually areas of ponding) where average depths are between one and three feet. Base flood elevations derived from detailed hydraulic analyses are shown in this zone. Mandatory flood insurance purchase requirements apply.

Zone AO: SFHAs subject to inundation by types of 100-year shallow flooding (usually sheet flow on sloping terrain) where average depths are between one and three feet. Average flood depths derived from detailed hydraulic analyses are shown within this zone. Mandatory flood insurance purchase requirements apply.

Zone A99: SFHAs subject to inundation by types of 100-year flood which will be protected by a federal flood protection system when construction has reached specified statutory progress toward completion. No base flood elevations or depths are shown. Mandatory flood insurance purchase requirements apply.

Zones B, C, and X: These areas have been identified in the community flood insurance study as areas of moderate or minimal hazard from the principal source of
cedures exist for a community or homeowner to contest a FIRM determination.\textsuperscript{34} Letter of Map Amendment (LOMA), Letter of Map Revision (LOMR), and a physical map revision.\textsuperscript{35}

Zone designations encompass a sufficient number of risks to comprise a credible group. These designations are periodically reviewed, and changes are effected where appropriate. For example, in 1986, FIA’s research indicated that differences between the “A-numbered” designations (Zone A1, A2, A3 . . . A30) were insufficient to warrant documenting and rating thirty different zone designations. Thus, FIA now designates and rates each A-numbered zone as an “AE” zone.\textsuperscript{36} The number of zone designations has decreased from about 212 to a mere nine as of this writing.\textsuperscript{37}

2. Elevation

It is axiomatic that the higher above Base Flood Elevation (BFE)\textsuperscript{38} a structure is located, the lower the probability that flood waters will reach and damage the structure. It is therefore consistent with the classification criteria listed above to group and rate risks within a zone based on their height above BFE or, in short, on their “elevation.” When each community’s FIRM is promulgated, FEMA flood in the area. However, buildings in these zones could be flooded by severe, concentrated rainfall coupled with inadequate local drainage systems. Local storm-water drainage systems are not normally considered in the community's Flood Insurance Study. The failure of a local drainage system created areas of high flood risk within these rate zones. Flood insurance is available in participating communities but is not required by regulation in these zones. (Zone X is used on new and some revised maps in place of Zones B and C.)

Zone D: Unstudied areas where flood hazards are undetermined but flooding is possible. No mandatory flood insurance purchase requirements apply, but coverage is available in participating communities.

\textit{Federal Emergency Management Agency, Questions and Answers on the National Flood Insurance Program 20–21 (1987) [hereinafter FEMA, Questions and Answers]; see also 44 C.F.R. § 64.3 (1988).}

A homeowner may wish to contest, for example, a determination that his or her property is post-FIRM, that is, constructed after FEMA promulgated a Flood Insurance Rate Map (FIRM). This is because structures constructed prior to establishment of a FIRM are generally charged lower rates than those constructed or substantially improved subsequent to the effective date of the FIRM, all other rating variables being the same.\textsuperscript{39}

\textit{See 44 C.F.R. § 70; FEMA, Questions and Answers, supra note 33, at 21–22.}

\textit{As a result, newly promulgated FIRMs do not show zones A1–A30, but only AE.}

\textit{See supra note 33.}

\textit{Federal regulations define a “base flood” or a “100-year flood” as a flood having a one percent chance of being equalled or exceeded in any given year. 44 C.F.R. § 59.1. Base flood elevation is therefore the height to which flood waters are expected to rise but once in 100 years. It is interesting to note that, based on this standard, a homeowner in the floodplain with a traditional 30-year mortgage has a better than one-in-four chance of sustaining a 100-year flood during the term of his or her mortgage.}
ascertains a BFE.\textsuperscript{39} Structures constructed or substantially improved after promulgation of the FIRM and elevated above BFE are generally charged lower rates than other structures, even within the same zone, located at BFE.\textsuperscript{40} Other key characteristics used to group flood risks include building type\textsuperscript{41} and occupancy type.\textsuperscript{42}

Although risks are classified according to their elevation, zone, building and occupancy type, and other characteristics, no classification is truly homogeneous. The grouping of like risks is a convenient model only approximating an ideal, as risks with loss experience or claims history deviating from the average exist within any grouping. This lack of homogeneity is one basis of the traditional underwriting objective, which revolves around the identification of potentially profitable risks and the procurement of risks for the company's book of business, and leads to the heart of the reason why flood insurance must be subsidized. Consider that the most likely purchaser of flood insurance is likely to be neither someone who lives atop the Rocky Mountains, hundreds of miles removed from a potentially flooding water source, nor a resident of the desert where it rains about once a year. Inhabitants of river valleys, coastal dwellers, and residents of frequent flood areas and floodways are the traditional NFIP policyholders.

Flood, as a hazard, is therefore subject to adverse selection—the situation where only the less desirable risks with higher expected losses choose to insure. The result can be a fearsome itch/scratch cycle: a poor selection of risks drives up rates, which pushes the marginal risks to either self-insure or not insure, which worsens the pool of insureds, which drives up rates even further, in an ever-escalating, never-ending cycle. Because insurance is primarily a risk-transfer mechanism, this situation undermines the very reason for the existence of insurance. Private insurers quickly learned that they simply could not profitably market flood insurance. As such, the federal government, yielding to pressure brought to bear by both developers and owners of property in the floodplains, stepped in to provide what the private insurance industry could not and would not supply.

A further problem, compounding the need for governmental involvement, is that the underwriting objective also must involve a

\begin{footnotes}
\item[41] Building types include one floor, or two or more floors. Furthermore, one-floor buildings are considered different building types, depending on whether they have basements. See \textit{id}.
\item[42] Occupancy types are single family, 2–4 family, other residential and non-residential. \textit{Id}.
\end{footnotes}
demographic spreading of the risk. No insurer wants to place "all his eggs in the same basket." Spreading the risk over a variety of demographic variables minimizes the probability that a single event can wipe out the insurer's profitability or the insurer itself. Homeowners live east and west, atop mountains and in valleys, in wood and in brick houses, are young and old, are rich and poor, are careful and careless and, in short, run the gamut of risk. All wish to be insured against hazards like fire and theft, creating a situation where the judicious underwriting of homeowners insurance provides a very good spread of risk. Very few of these same homeowners wish to purchase flood insurance, and they are closely packed on the coasts and in the floodplains. In fact, NFIP data shows that a mere three events usually are responsible for nearly fifty percent of NFIP loss liability in any given year. 43

There is one last important distinction to be made between insuring against the flood hazard and insuring against other traditional hazards. Flood is a low-frequency hazard; the number of events are relatively few but of high cost. 44 On the other hand, homeowners, automobile physical damage, and workers' compensation insurance, for example, generate a great number of "events." It is for this reason that the flood ratemaking methodology, called "The Hydraulic Model," 45 cannot embrace the traditional loss ratio or strict pure premium approaches, whereby historical loss experience is adjusted to current levels and adjusted for trends impacting cost-per-policy. The mathematical, hydrologic formulae create a greater risk of inaccuracy than private insurers are generally willing to assume, creating the vacuum that the federal government, in 1968, stepped in to fill.

III. BRIEF HISTORY OF THE NFIP 46

There are more than fifty years of developmental history behind the National Flood Insurance Program. Although flood experience and data prior to the twentieth century is sketchy at best, the flood

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43 Reilly, Leikin & Singer, National Flood Insurance Program—Flood Insurance Manual Revision—Rates and Rules Effective 10/1/85 (Mar. 26, 1985) ("A review of the paid losses for the three worst floods in each of the years 1978 through 1983 shows that they accounted for 42% of all losses in those six years.").

44 In insurance parlance, they are "low frequency" and "high aggregate severity" events.


46 Much of the material in this section was adapted from Singer, NFIP Retrospective, THE FLOOD REP. (May–June 1986).
peril was undoubtedly a problem in the late nineteenth century. In 1980, Congress accepted federal responsibility for flood forecasting and warning. Congressional acceptance of federal responsibility for flood control, albeit limited, began in 1927 following major flooding through the Mississippi River Valley, subsequently expanding geographically to a nationwide scope and functionally to include coastal hurricane flooding.

Recognizing the considerable risk to life and property arising out of the continued development of the floodplain, Congress enacted the Omnibus Flood Control Act of 1936. The Act primarily served to direct federal efforts toward the construction of engineered protection works to control flood waters, and assigned the United States Army Corps of Engineers responsibility for these works and for floodplain information services.

In the early 1930's, the Tennessee Valley Authority (TVA) was created as a regional resource development agency. Among its duties was flood control, primarily through the construction of dams and reservoirs. Later in the decade, Congress extended the Bureau of Reclamation's authority to include reservoir construction for purposes of implementing flood control.

In the 1940's the Department of Agriculture was authorized to construct eleven projects for flood control. In the 1950's the Department carried out a nationwide program for upstream watershed projects.

After a series of severe flooding events in the Midwest in 1951, President Truman requested that $50 million be set aside within the annual flood relief appropriation for a flood insurance program. The proposal was killed by congressional opposition and insurance industry lobbying. In 1952, President Truman, undeterred by the congressional opposition, increased his proposal and asked for $1.5 billion to be earmarked for flood insurance. The plan provided for administration by private industry, and assumption of risk by the

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48 These coastal flooding areas ultimately evolved into the present day V-zones. See supra note 33.
49 Ch. 699; §§ 1–7, 53 Stat. 1414 (codified as amended at 42 U.S.C. §§ 558b–1, 701b–1, 701b–3, 701b–4, 701c–1, 701g, 707 (1982)).
50 See FEDERAL EMERGENCY MANAGEMENT AGENCY, BACKGROUND PAPER ON THE FEDERAL EMERGENCY MANAGEMENT AGENCY'S NATIONAL FLOOD INSURANCE PROGRAM 2 (Nov. 30, 1981) [hereinafter FEMA, BACKGROUND PAPER].
federal government. The proposal was again defeated by the same forces that killed the 1951 proposition.

In the early 1950's, the TVA initiated a local floodplain management assistance program. Nonetheless, there was considerable flood activity throughout the eastern part of the country, prompting yet another proposal, this time by President Eisenhower. In 1956, the President proposed a $2.9 billion flood insurance program, with a new wrinkle: forty percent of the premiums would be subsidized by a partnership comprising the states and the federal government.

Although this program was adopted as the Flood Insurance Act of 1956, Congress never appropriated the funds for its implementation. Congress's primary objection was the seeming lack of any kind of regulatory floodplain provisions within the Act. It was generally believed that rather than curbing losses in floodplain areas, the availability of subsidized insurance combined with an absence of floodplain regulation would stimulate further development of floodplains leading to even greater damages. Again, insurance industry skepticism was a contributing factor in the Act's demise.

The 1960 Flood Control Act authorized the United States Army Corps of Engineers to provide local governments with information needed to regulate the floodplain. A series of natural disasters in the early 1960's again rekindled interest in a flood insurance program. Related bills were introduced annually and killed.

In 1965, a Presidential task force urged the legislature to adopt a policy emphasizing the modification of structures susceptible to flooding. Also in 1965, President Johnson directed federal agencies to evaluate the flood hazard before funding construction projects or acquiring federal property.

One year later, after a decade of serious flooding, Congress empowered HUD to determine the feasibility of establishing a flood insurance program. The result was Title XIII of the Housing and Urban Development Act of 1968, the National Flood Insurance Act.

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51 See id. This plan can be seen as a precursor to the “Write-Your-Own” (WYO) program. See infra note 70 and accompanying text.
52 FEMA, BACKGROUND PAPER, supra note 50, at 2.
53 Id.
54 Id.
establishing a joint private industry/government cooperative flood insurance program. This Act separated the flood insurance ratemaking process into two distinct categories—chargeable premium rates and estimate risk premium rates. The Act provided subsidized insurance only to properties already existing at the time the area within which they were located was identified as a Special Flood Hazard Area (SFHA).

To qualify for the NFIP, a community must adopt and enforce floodplain management ordinances which regulate future development in SFHAs. Furthermore, the community must meet the minimum criteria established by FEMA, including zoning, subdivision, hazard mitigation plans, building requirements, flood control projects, floodproofing of buildings, flood warning systems, and emergency preparedness plans. A community must also establish a system for the granting of building permits.

The National Flood Insurance Act thus effectively negated previous criticism by mandating the adoption and implementation of floodplain management measures. In 1969 an amendment to the 1968 Act was enacted, creating, for the first time, the Emergency Program. The amendment’s intent was to increase participation in the Flood Program by permitting community participation prior to the completion of detailed flood insurance maps. The amendment extended the scope of the Flood Program to cover damage resulting from mudslide and mudflow.

At this point, a major defect of the NFIP was its failure to equate federal assistance with the purchase of flood insurance. To remedy

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60 Id. § 4014.
62 Community participation in the flood program is voluntary. However, if a community contains Special Flood Hazard Areas (SFHAs), determined by governmental mappers, and the community opts out of the NFIP, homeowners in that community lose their rights to federal financial assistance such as Small Business Administration or Veterans Administration loans, mortgages from federally regulated banks, temporary housing, low-interest disaster loans, and outward disaster assistance grants. See id. §§ 4002(b)(4), 4012a, 4022 (1982 & Supp. V 1987). Most significantly, then, if the President declares a major flood disaster, federal disaster assistance is denied those homeowners dwelling within nonparticipating NFIP SFHAs. See id.
63 Minimum requirements for adequate floodplain management regulation are set forth at 44 C.F.R. §§ 60.2-60.7 (1988).
65 See 42 U.S.C. § 4001(f) (1982). In fact, FEMA by regulation extended the definition of the term "flood" to include mudslide and mudflow. See 44 C.F.R. § 59.1; see also supra note 7.
this failure, Congress passed the 1973 Flood Disaster Protection Act. The Act made federal financial assistance for construction in flood hazard areas contingent upon the purchase of flood insurance. This federal assistance encompassed both direct aid from agencies and federally regulated or insured lending institutions. All communities with SFHAs were identified and notified, and procedures were implemented for communities to appeal their designations. Risk studies were accelerated, and the definition of flood was again expanded to further include "flood-related erosion."

In May, 1977, President Carter responded to recommendations that the NFIP's established objective of protecting property and lives be supplemented with a new objective of protecting natural floodplain value. The President ordered that federal agencies take appropriate steps to reduce the nation's flood vulnerability by requiring the agencies to restrict public investment in the floodplain, including grants-in-aid to local governments. In 1982, Congress passed the Coastal Barriers Resource Act (CBRA), withdrawing the availability of flood insurance for undeveloped coastal barriers so designated by the Department of the Interior.

The last major development to date was the 1983 birth of the Write-Your-Own (WYO) Program, in which private sector insurers market flood insurance, with the federal government acting as guarantor and reinsurer. As of this writing, the WYO Program has over 1.7 million policies, or about eighty percent of the total policy-force base. Over 200 insurance companies have signed an arrangement with FIA to sell and service flood insurance under their own names. FEMA hopes eventually to move the federal government completely out of the flood insurance business. Unless and until that happens, however, potential constitutional challenges to NFIP regulations must be addressed.

IV. THE TAKINGS PROBLEM AND THE NFIP

No constitutional obstacle to future environmental legislation looms potentially larger than the problem of determining when compensation is required in order to sustain regulations restricting the use of private property. The problem can be summarized fairly by noting that land use restrictions imposed by proper exercise of police

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67 See 42 U.S.C. § 4001(g), 44 C.F.R. § 60.5.
70 See FEMA, QUESTIONS AND ANSWERS, supra note 33, at 2.
power, with appropriate consideration of and rational interest in the public's right not to be harmed, do not require just compensation under the fifth amendment, whereas eminent domain takings useful to the public do require compensation.\textsuperscript{71} Eminent domain is an inherent and necessary attribute of sovereignty, superior to all property rights.\textsuperscript{72} The exercise of eminent domain power is, in effect, a compulsory sale of the owner's interest in the property, whereby the individual's rights yield to considerations of the public welfare.\textsuperscript{73} Therefore, eminent domain involves the taking of property because it is useful to the public, while the police power regulates the use of, or impairs rights in, property to prevent detriment to the public interest.\textsuperscript{74}

While this principle may be relatively simple to state and comprehend, its effective implementation rests on the establishment of some clear line of demarcation above which just compensation is clearly mandated and below which it is not. Such line, though never absolute in a strict correlational context, should at least be such that the majority of reasonable analysts might draw similar conclusions a majority of the time. Obtaining a precise formula for when the fifth amendment takings clause is invoked is of particular import in the arena of environmental protection laws. It can be argued that not a single environmental statute has ever been enacted\textsuperscript{75} that has not evoked the standard, familiar arguments between those asserting the public's interest in preserving critical, scarce, natural resources and those defending the strong interest of individual private citizens to reap the maximum benefit out of their private ownership of property, which, arguably, constitutes the very theoretical underpinning of American capitalistic society.

The case history of takings law suggests a number of paths that the courts traditionally have followed in takings analysis and in characterizing the cases. No single theory has yet emerged which can serve as a comprehensive, universally applicable approach to resolving takings disputes. The Supreme Court often resolves difficult issues of constitutional law by establishing amorphous concepts and slippery tests, at least pretending that reasonable persons will

\textsuperscript{71} J. ARBUCKLE, ET AL., ENVIRONMENTAL LAW HANDBOOK § 7.2.5 (9th ed. 1987).
\textsuperscript{73} United States v. 5,324 Acres of Land, 79 F. Supp. 748, 760 (S.D. Cal. 1948).
\textsuperscript{74} Cooper v. State, 48 N.Y.S.2d 212, 215 (Ct. Cl. 1944).
\textsuperscript{75} Conversely, no bill has ever failed to muster sufficient support to attain enactment.
be able to apply the Court's test uniformly and correctly. The takings question has evoked a rare judicial confession of inability to devise an appropriate test. This inability has a serious impact on a society attempting to cope with a cloud of potential unconstitutionality hovering over many administrative regulations. No set formula exists to rigorously determine where regulation ends and takings begin. Thus, it is difficult to know where to draw the line between a non-compensatory regulation and one that is justified. Under the two-prong test outlined in *Keystone Bituminous Coal Association v. DeBenedictis,* for example, a land use regulation may constitute a taking under one of two alternative circumstances: either the statute "[d]oes not substantially advance legitimate state interests" or it "[d]enies an owner economically viable use of his land."

A number of general theoretical approaches to determine when a taking has occurred historically have been employed by the courts. For example, according to the "physical invasion" theory, when the government acts directly or through its agent to confiscate property and transfer ownership to the government itself, the government's obligation under eminent domain requires it to render just compensation. The utility of this theory is marginal at best, because while it effectively serves as a ceiling for non-takings, it systematically fails to serve as an adequate floor for takings. If the physical invasion test were to constitute the definitive line of demarcation then, for example, virtually no environmental regulation could be deemed to be a taking since only in the rarest of cases does ownership, as manifested through clear title, transfer to the government. In fact, physical invasion is only one of two alternative tests indi-

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76 A favorite example of the Court's seeming inability to establish precise tests is the futile attempt to define the obscenity exception to the freedom of speech guarantee in the first amendment. A frustrated Justice Stewart remarked that he might not be able to define obscenity, "[b]ut I know it when I see it." *Jacobellis v. Ohio,* 378 U.S. 184, 197 (1964) (Stewart, J., concurring).


80 *Id.* at 485.

81 *See* *Loretto v. Teleprompter Manhattan CATV Corp.***, 458 U.S. 419, 434–35 (1982). "[W]hen the character of the government action is a permanent physical occupation of the property ..., our cases uniformly have found a taking to the extent of the occupation, without regard to whether the action achieves an important public benefit or has only minimal economic impact on the owner." *Id.* (citations omitted).

82 This test may be characterized as one failing to properly sustain "necessary/sufficient" scrutiny; though this is "sufficient" to establish a taking, it cannot possibly be absolutely "necessary."
cating when a taking has occurred. When no physical invasion is involved, there still may be a finding of a taking under Keystone's two-prong test if the required governmental use is non-public in character. 83

Under the physical invasion test, however, the NFIP seemingly would survive the strictest scrutiny. Forbidding new construction below BFE, 84 sanctioning individual property owners or entire communities for non-participation, 85 and discouraging construction in certain areas, 86 for example, would all fail to constitute a taking under this physical invasion theory, since the government would not be taking title and its "presence," if any, would be unobtrusive. This theory, considered independent of others, will not prove fruitful in constitutional analysis of NFIP regulations.

A second theory considers physical appropriations other than mere title transfers as takings. The government's physical appropriation leaves no ambiguity that the owner has been ousted from actual possession of the land. 87 This approach seems to only insignificantly modify the placement of the threshold line. In particular, since the NFIP does not physically appropriate property, 88 NFIP regulations are no more threatened under this test than by the physical invasion theory.

A third theory, the "nuisance abatement" 89 theory, significantly lowers the threshold line to a level at which concern can be generated

83 See infra notes 191–230 and accompanying text.
84 See supra note 38.
85 See supra note 62.
86 See 42 U.S.C. § 4102(c) (1982). The statute provides that:
[T]he Director shall develop ... comprehensive criteria designed to encourage, where necessary, the adoption of adequate State and local measures which, to the maximum extent feasible, will —
(1) constrict the development of land which is exposed to flood damage where appropriate,
(2) guide the development of proposed construction away from locations which are threatened by flood hazards . . . .

Id.
88 Under FEMA's "1362" program, funds are set aside to buy out the owner of property damaged substantially beyond repair by flood. 42 U.S.C. § 4103(c) (1982). However, this cannot be construed as a physical "appropriation," because the program is completely voluntary. The owner must agree to sell the property, and the community must agree to "sound land management and use" of the property for at least 40 years. Id. § 4103(a).
89 As the Keystone Court succinctly stated, "[A]ll property in this country is held under the implied obligation that the owner's use of it shall not be injurious to the community." 480
regarding the constitutionality of various floodplain regulations. In particular, the courts have determined that regulation of private property sometimes can impinge on the owner's rights to such an extent as to be tantamount to a taking of that property.\textsuperscript{90} The government may take property without compensation when allowing the property to remain in the hands of its owner would result in significant injury to the community at large.\textsuperscript{91} However, if private property is destroyed without any immediate public necessity to do so, then the government must compensate.\textsuperscript{92} The NFIP issue thus becomes whether or not there is harm to the general public when public property owners do not comply with floodplain management regulations as established by a participating community\textsuperscript{93} in compliance with the National Flood Insurance Act.

The government has regularly relied on the nuisance abatement theory to uphold health and safety regulations.\textsuperscript{94} Prior to the Trilogy,

\begin{verbatim}
U.S. at 491–92 (quoting Mugler v. Kansas, 123 U.S. 623, 665 (1887)). The Mugler Court further explicated:

A prohibition simply upon the use of property for purposes that are declared, by valid legislation, to be injurious to the health, morals, or safety of the community, cannot, in any sense, be deemed a taking or an appropriation of property . . . . The power which the states have of prohibiting such use by individuals of their property as will be prejudicial to the health, the morals, or the safety of the public, is not— and, consistently with the existence and safety of organized society, cannot be— burdened with the condition that the state must compensate such individual owners for pecuniary losses they may sustain, by reason of their not being permitted, by a noxious use of their property, to inflict injury on the community.

123 U.S. at 668–69.

\textsuperscript{90} The characteristics distinguishing a taking from a non-taking under this theory were well articulated by Justice Harlan in Mugler, 123 U.S. at 668–69.

\textsuperscript{91} Id. at 669.

\textsuperscript{92} See, e.g., Short v. Pierce County, 194 Wash. 421, 435, 78 P.2d 610, 616 (1938); see also infra notes 160–69 and accompanying text (discussing Pennsylvania Coal Co. v. Mahon, 260 U.S. 393 (1922)).

\textsuperscript{93} The law prohibits governmental entities, even if properly motivated, from establishing building or construction codes in floodplain areas. In particular, the government would experience great difficulty in monitoring compliance. The Federal Insurance Administration (FIA) only markets flood insurance in regions where the authorized legislative body enacts appropriate loss mitigation regulations. Absent community administration of building activities in flood-prone areas, the aggregate loss potential cannot be adequately reduced to effect a reduction in disaster relief costs and warrant the existence of an NFIP. 44 C.F.R. § 60.1(a) (1988).

A community as defined for the NFIP's purposes is any state, area, or political subdivision; any Indian tribe, authorized tribal organization, or Alaska Native village or authorized native organization which has authority to adopt and enforce floodplain management ordinances for the area under its jurisdiction. 44 C.F.R. § 59.1. Floodplain regulation is therefore an amalgam of local, state, and federal laws.

\textsuperscript{94} See, e.g., Young Plumbing & Heating Co. v. Iowa Natural Resources Council, 276 N.W.2d
\end{verbatim}
statutory enactments requiring individual property owners to act, at their expense and in the interests of the general welfare, had been treated as if subject to a special presumption of constitutionality. Of particular interest in reference to the NFIP is a presumption of constitutionality that has been formally adopted by the United States Water Resources Council and applied to floodplain regulations.

The use of the nuisance abatement theory\(^\text{95}\) often is criticized on the grounds that an inherent assumption underlying it is false, that is, that the private homeowner is somehow personally responsible for the public nuisance and hence must pay for it as a “wrongdoer.” An NFIP example would have a homeowner purchase a beautiful plot in a floodway\(^\text{96}\) before the community opted to become a participating NFIP community. At the time of purchase, the owner’s contemplated construction plans would have been both lawful and inoffensive.\(^\text{97}\) It would seem unreasonable suddenly to transform the homeowner into a wrongdoer who must absorb serious financial loss merely because the community enacted floodplain regulations. Thus, setting the takings line in accordance with the nuisance abatement theory would seem arbitrarily to harm innocent parties.\(^\text{98}\)

Another takings theory requires the “balancing” of the economic loss to the landowner arising out of the government’s regulation against the ostensible benefit to the public of having the use of this

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\(^{95}\) The Supreme Court has utilized the nuisance abatement theory to sustain regulations against takings challenges. See Mugler v. Kansas, 123 U.S. 623, 669 (1887); Plymouth Coal Co. v. Pennsylvania, 232 U.S. 531, 540 (1914).

\(^{96}\) A floodway includes the channel of a river and the adjacent floodplain that must be preserved in an unobstructed condition to facilitate discharging the base flood while simultaneously retaining existing flood levels within one foot. 44 C.F.R. § 59.1 (1988). FEMA mandates community flooding designation to reduce the likelihood of raising the upstream Base Flood Elevation.

\(^{97}\) See A. Rathkopf & C. Rathkopf, supra note 31, § 707(c), at 7–65. “The hardest case legally is the one where a landowner's parcel, purchased before regulation was envisioned, is entirely included within a sensitive . . . area where development must be forbidden to preserve . . . values.” Id. But see Just v. Marinette County, 56 Wis. 2d 7, 18, 201 N.W.2d 761, 768 (1972) (“An owner of land has no absolute and unlimited right to change the essential natural character of his land so as to use it for a purpose for which it was unsuited in its natural state and which injures the rights of others.”).

land restricted. Under this theory, it generally is argued that since floodplain regulation creates so great a benefit to the public as to outweigh the economic cost to the individual, it is highly unlikely that NFIP provisions will be found to be a taking. Some commentators criticize the basis of this balancing theory. Applying their criticism to the narrower NFIP floodplain regulatory scenario, it may be argued that if, indeed, floodplain regulation so evidently serves the public interest, the public ought to be more willing to assume the cost of furthering its much-vaunted interest.

The theory most generally relied on in the majority of takings opinions is the "diminution of value" theory which, in contrast to a "balancing" of interests, focuses on the extent of destruction of the individual's economic interest in the land. This approach considers that government action amounts to a taking if its effects deprive owners of all or most of their interests in the subject matter. Diminution of value may be a taking. Government action amounts to a taking if its effects are so complete as to deprive the owners of all or most of their interests in the subject matter. Clearly elucidated as a principle in Pennsylvania Coal Co. v. Mahon, and specifically left intact by the Court in Keystone Bituminous Coal Association v. DeBenedictis, this approach eliminates consideration of the government's interests, regardless of how extensive those interests might be. This approach, however, can provide no precise mathematical model or hypothetical construct that FEMA or other regulators can rely on to determine precisely where diminution of value of sufficient magnitude has occurred to warrant finding a taking.

Other tests have been suggested regarding the entire takings question. It is always possible that a future Supreme Court deci-
sion will either definitively elevate one test over all others, or even adopt a new test that will determine precisely when the fifth amendment requirement to render just compensation is invoked. Until the Supreme Court does clarify the correct approach to takings analysis, however, we are left to our own devices to untangle the takings morass and to argue the issue on a variety of theories in the courts.

V. FIRST ENGLISH AND THE NFIP

Considering the general state of inactivity on the takings issue for the better part of the early twentieth century, it is somewhat outstanding that the Supreme Court allowed itself to become enmeshed in three pathbreaking takings cases, all in the same year. Since deciding, in effect, that zoning laws are constitutional in Village of Euclid v. Ambler Realty Co.107 and that constitutional zoning ordinances potentially could be applied unconstitutionally to specific plots of land in Nectow v. City of Cambridge,108 the entire zoning field essentially lay dormant for over half a century, with local governments enjoying broad, largely unchallenged regulatory power.

In light of this historically expansive treatment of government regulatory power, the few opinions resolving takings challenges to the NFIP and floodplain zoning have tended to apply the "Too Far" test devised by Justice Holmes in Pennsylvania Coal Co. v. Mahon.109 The government began to expand its range of land use rationales, however, to encompass such diverse concerns as environmental protection, historic preservation, and the maintaining of a proper ecological balance. In response to this perceived large expansion of governmental powers, legal analysts and plaintiffs' attorneys began to argue that regulation could interfere so seriously with an owner's property use as to invoke the fifth amendment's just compensation requirement.110 Many trends seem to emanate from California, and trends in takings cases are no exception. In particular, the National Association of Home Builders (NAHB) concentrated

four-part takings inquiry: (1) Is there a taking of private property?; (2) Is there any justification for taking that private property?; (3) Is the taking for a public use?; (4) Is there any compensation for the property so taken? See id.

108 277 U.S. 183, 188–89 (1928).
109 See infra notes 160–69 and accompanying text. As Justice Brennan noted in San Diego Gas & Electric Co. v. City of San Diego, 450 U.S. 621 (1981), "from the property owner's point of view, it may matter little whether the land is condemned or flooded." Id. at 652 (Brennan, J., dissenting) (emphasis added).
110 See supra notes 71–106 and accompanying text.
their efforts in California because they believed the courts there traditionally have been particularly generous in their grant of regulatory authority to local government.\footnote{See Fulton, A New Era for Private Property Rights, CAL. LAW., Nov. 1987, at 29. Cities and towns usually have broad enabling authority. See, e.g., NATIONAL HAZARDS RESEARCH AND APPLICATIONS INFORMATION CENTER, STRENGTHENING STATE FLOODPLAIN MANAGEMENT app. at 61 (1982) (discussing California’s statutory scheme).}

The applicability of \textit{First English Evangelical Lutheran Church of Glendale v. County of Los Angeles}\footnote{Id. at 307. It is interesting to note that the facts do not make clear whether or not the First English Evangelical Lutheran Church of Glendale held a flood insurance policy underwritten by the NFIP. The National Flood Insurance Act includes “church properties” as priority offerees of flood insurance. “In carrying out the flood insurance program the Director shall afford a priority to making flood insurance available to cover residential properties which are designed for the occupancy of from one to four families, \textit{church properties}, and business properties . . . .” 42 U.S.C. § 4012(a) (1982) (emphasis added).} to the National Flood Insurance Program’s promotion of flood mitigation regulations need not be theorized, as the case deals with floodplain regulation directly in the form of an interim ordinance adopted by Los Angeles County prohibiting the construction or reconstruction of any building in a floodplain. The plaintiff Lutheran church had operated a campground, called Lutherglen, on land located in a canyon along creek banks serving as a natural drainage channel for the area.

In July, 1977, about twenty years after the church’s purchase of the land in question, a forest fire stripped hills upstream from Lutherglen of all trees and vegetation, creating a serious flood risk which was actually realized the following February when a massive rain caused the creek to overrun its banks, flooding Lutherglen and destroying its buildings.\footnote{First English, 482 U.S. at 307.} The County of Los Angeles passed County Ordinance 11,855 imposing a moratorium on “reconstruct(ing) . . . any building . . . any portion of which is . . . located within the outer boundary lines of the interim flood protection area.”\footnote{Id.} The county’s announced intent was that the ordinance was “required for the immediate preservation of the public health and safety.”\footnote{Id. at 308.} The church asserted that the L.A. County ordinance denied it \textit{all} use of Lutherglen.\footnote{See infra note 147.} When the legislature subsequently modified the ordinance’s original characterization as “temporary” by enacting it as permanent law,\footnote{See infra note 147.} the church nonetheless proceeded on a “temporary taking” cause of action, claiming that the govern-
ment owed it compensation for depriving it of all use of its land, albeit temporarily.\textsuperscript{118}

In asking the United States Supreme Court to strike portions of the church’s complaint alleging denial of the use of Lutherglen in its entirety, Los Angeles County relied on the precedent established by \textit{Agins v. City of Tiburon},\textsuperscript{119} which determined that where a land use statute is found unduly restrictive, the landowner’s remedy lies not in monetary damages but in effectively striking the statute.\textsuperscript{120} Thus, the County argued that a cause of action alleging a regulatory taking must be stricken, because there can be no such thing as a regulatory taking when the unconstitutional regulatory provision can be declared null.\textsuperscript{121} In Justice Rehnquist’s words:

Under this decision [\textit{Agins}], then, compensation is not required until the challenged regulation or ordinance has been held excessive in an action for declaratory relief or a writ of mandamus and the government has nevertheless decided to continue the regulation in effect.\textsuperscript{122}

The California trial and appellate courts ruled that since County Ordinance 11,855 had not previously been found “excessive,” the government’s continuation of the ordinance was permitted. The courts therefore held that the church’s cause of action was properly in declaratory relief or mandamus, and agreed with defendant County to strike plaintiff’s allegation.\textsuperscript{123}

The Court accepted the church’s assertion that lack of ripeness did not constitute a bar in this case, finding that the Lutheran church had sought compensatory damages through state-established mechanisms.\textsuperscript{124} The dismissal by the lower California courts of the church’s action established the unavailability to the plaintiff of any inverse condemnation procedure.\textsuperscript{125} Given that the inverse condemnation vehicle maintains, as an underlying assumption, that a taking may very well occur without formal proceedings,\textsuperscript{126} the \textit{First English

\textsuperscript{118} First English, 482 U.S. at 310.
\textsuperscript{119} 24 Cal. 3d 266, 598 P.2d 25, 157 Cal. Rptr. 372 (1979).
\textsuperscript{120} Id. at 275–77, 598 P.2d at 29–31, 157 Cal. Rptr. at 376–78.
\textsuperscript{121} See First English, 482 U.S. at 308.
\textsuperscript{122} Id. at 308–09.
\textsuperscript{123} Id. at 309.
\textsuperscript{124} Id. at 312 n.6.
\textsuperscript{125} Id. Inverse condemnation is a “cause of action against a government agency to recover the value of property taken by the agency, though no formal exercise of the power of eminent domain has been completed.” \textsc{Black’s Law Dictionary} 740 (5th ed. 1979).
\textsuperscript{126} First English, 482 U.S. at 316.
Court ruled that its *Agins* decision disallowing damages incurred before a statute's invalidation was in error.127

The majority opinion emphasized that the lower courts never specifically ruled that County Ordinance 11,855 was not a taking but that the courts merely relied on *Agins* in deciding that monetary damages are unavailable as a remedy.128 The Court refused to consider the merits of the cause of action, because the lower courts “deemed them sufficient”:129

We accordingly have no occasion to decide whether the ordinance at issue actually denied appellant [church] all use of its property or whether the county might avoid the conclusion that a compensable taking had occurred by establishing that the denial of all use was insulated as a part of the State’s authority to enact safety regulations.130

In no way, then, should *First English* be made to stand as a decision favorable to the church regarding the substantive issues presented in the case: the validity of both the temporary moratorium on area construction and the subsequent permanent enactment of County Ordinance 11,855. The Court did, however, remand the key issue of whether the ordinance was truly a fifth amendment taking to the lower California courts for resolution.131 All that the church effectively won in this case, therefore, was its day in court.132

Although not directly ruling on the ordinance itself, the Court did go on to render a milestone decision. Tracing the history of key takings cases and the major principles the cases have come to represent, the Court concluded that though legislatures have indeed, in some cases, “backed off” a challenged land use statute, it had never before been decided whether the government has the obligation to pay compensation to the landowner for the loss of all use of property in the interim period between the time of the statutory enactment and its ultimate rescission by the government.

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127 "*[We hold that invalidation of the ordinance without payment of fair value for the use of the property during this period would be a constitutionally insufficient remedy.*] Id. at 322. "This period" refers to "the period of time during which regulations deny a landowner all use of his land." *Id.* at 318.

128 *Id.* at 311–12.

129 *Id.* at 313.

130 *Id.*

131 *Id.* at 313, 322.

132 Even Justice Stevens, writing for the dissent, emphasized this point: “[I]t is imperative to stress that the Court does *not* hold that appellant is entitled to compensation as a result of the flood protection regulation that the county enacted.” *Id.* at 325 (Stevens, J., dissenting) (emphasis added).
Prior to First English, authorities were in conflict on the question of whether a temporary use or occupation is compensable under eminent domain provisions. Some cases upheld compensability, while some denied compensability. In particular, California law prior to First English appears to have denied compensability.

In laying down the clear First English rule that where land use regulations deprive landowners of all use of their land, the compensation requirement may be invoked even if the taking turns out to be temporary, the Court held, in essence, that the church could litigate for money damages only if it could prove by a preponderance of the evidence that it had been deprived of all use of Lutherglen. Hence, a landowner in the church's position still must demonstrate that the only possible use of the land is to reconstruct the previous improvements on the land. Since this can rarely be the case because there are usually many more uses to which land may be put, it was quite predictable that the church would lose on the substantive issue on remand. Courts often have found sufficient value in non-developmental use of floodplains including, for example, recreation and agriculture, the very same uses the California Court of Appeal, on remand, held applicable to Lutherglen.

The decision in First English has resulted in a logical extension of the compensation for takings doctrine. Given that the church failed to establish County Ordinance 11,855 as a taking, this case cannot present any overall challenge to NFIP provisions, nor to any local ordinances enacted pursuant to the National Flood Insurance Act. Neither the general rule that government may restrict access to hazardous areas such as land in the path of a life-threatening flood nor the general rule that property owners are not assured

133 See 29A C.J.S. Eminent Domain § 113 (1965) and cases cited therein.
135 See, e.g., Goodman v. United States, 113 F.2d 914 (8th Cir. 1940).
137 First English was of great interest to scholars who have long debated the propriety of the California rule that a plaintiff in a taking case could not seek money damages. See Williams, Smith, Siemon, Mandelken & Babcock, The White River Junction Manifesto, 9 VT. L. REV. 195 (1984); Berger & Kanner, Thoughts on the White River Junction Manifesto: A Reply to the "Gang of Five's" Views on Just Compensation for Regulatory Taking of Property, 19 Loy. L.A.L. REV. 685 (1986).
140 See infra note 152 and accompanying text.
by right that they will be able to reap the maximum return on their land use is in question in the post-First English environment. The government indeed may have lost some of its maneuverability to escape its liability to render just compensation because “no subsequent action by the government can relieve it of its duty to provide compensation for the period during which the taking was effective.” But this is so only “where the government’s activities have already worked a taking of all use of property.”

On remand, the California Court of Appeal affirmed the constitutionality of both interim County Ordinance 11,855 and, in dicta, County Ordinance 12,413. The court ruled that no taking of church property requiring just compensation had occurred. Interestingly, and perhaps uncharacteristically, the court seemed to delight in noting that its decision was arrived at with ease.

With reference to the public interest prong, the court found that Ordinance 11,855 served the ultimate public interest—that of preserving human life. With reference to the economic impact prong, the court found that the Ordinance by no means denied the church all use of Lutherglen. First, under a “whole parcel” type argument, eight of the church’s twenty-one acres were left completely unregulated. The regulated thirteen acres could be used for agriculture and recreation. Furthermore, the Ordinance actually conferred economic benefit upon the church through a significantly reduced

143 See, e.g., United States v. Central Eureka Mining Co., 357 U.S. 155, 168 (1958) (“The mere fact that the regulation deprives the property owner of the most profitable use of his property is not necessarily enough to establish the owner’s right to compensation.”).
145 Id.
146 First English Evangelical, Lutheran Church of Glendale v. County of Los Angeles, 258 Cal. Rptr. 893 (Ct. App. 1989).
147 The permanent ordinance was never at issue in First English. See id. at 903 (“Nor has First English ever amended its complaint to allege the permanent flood control ordinance enacted in 1981 constituted a ‘taking’ of its property.”). The California Court of Appeal nonetheless examined the terms of Ordinance 12,413. See id. (“It is helpful to an understanding of the temporary measure to consider the terms of the permanent ordinance.”).
148 See id. at 898 (“It simply does not pose a close issue under any formulation the Supreme Court has suggested as the appropriate test for judging when compensation is required.”).
149 The court noted that the instant case more closely resembled Keystone than it did Mahon. See id. at 900 n.9. While the court never referred to the “Keystone two-prong test” by name, it apparently relied on the test in its reasoning.
150 Id. at 904. In fact, 10 people drowned in the 1978 flood that prompted the passage of the temporary ordinance. Many more would have drowned but for the fortuitous last-minute cancellation of a handicapped children’s outing scheduled at the plaintiff’s 21-acre campground, Lutherglen. See id. at 895.
151 Id. at 903.
152 Id. at 904.
probability of loss to the church from runoff from adjacent properties similarly subject to Ordinance 11,855.

The court completed its application of the trilogy to the instant case by noting that the Ordinance is tightly tailored to the substantial advancement of a legitimate state interest and, as such, the Nollan nexus requirement is satisfied.153

Having ruled that there was no taking in the instant case, the court went on to significantly narrow the applicability of the "Lut­therglen Rule" by limiting the circumstances where landowners would be permitted to recover for temporary takings. Unusually broad discretion is granted the state to enact restrictive temporary regulations to facilitate proper consideration of the evidence and to allow for the proper conduct of necessary studies. Though temporary regulations still must be reasonable as to purpose, duration, and scope, the court implied that there exist circumstances when a temporary enactment will be upheld, but an identical permanent statute will be struck.

Since a plaintiff would carry a serious burden in attempting to convince a court that the NFIP deprived him or her of all use, First English must be found to be irrelevant to the narrower issue of whether NFIP regulations invoke takings concern. It cannot reasonably be argued that any of the following NFIP regulations, for example, deprive the owner of all use of his or her land: requiring that buildings be designed and adequately anchored to prevent flotation, collapse, or lateral movement of the structure resulting from hydrodynamic loads; requiring that buildings be constructed with flood-resistant material; requiring that subdivision proposals, as well as new development proposals, be reviewed to determine whether such proposals will be reasonably safe from flooding; forbidding the alteration or relocation of a watercourse without notification to the Administrator; requiring that newly constructed and substantially improved buildings be elevated to or above the base flood level; or forbidding any development until it is demonstrated that the cumulative effect of the proposed development does not increase the water surface elevation of the base flood more than one foot anywhere in the community.154 In each of these cases, the government can hypothesize some reasonable use that is left to the landowner. It can be argued that even where the government seems to impose a very severe restriction on land use, as with the previously cited

153 See infra notes 237–58 and accompanying text.
154 These regulations may be found at 44 C.F.R. § 60.3 (1988).
prohibition of all development when the net result is a rise in BFE, a range of non-developmental uses is still well within the owner's province.

Apparently in response to First English, President Reagan issued Executive Order 12,630, ordering all federal agencies, including FEMA, and departments, including the FIA, to assess the potential cost of possible condemnation actions that might arise from a regulation, and to incorporate this assessment as an integral part of the legislation.155 This Order arguably may cause regulators to become somewhat "gun-shy," by increasing their fear of excessive litigation156 and the ensuing potential costs so much as to prevent them from passing truly necessary legislation.157 First English itself may give governmental bodies reason to pause if regulations sought to be enacted completely prevent development of a parcel for a period of time.158 This hesitation to enact controls would be most unfortunate with reference to the NFIP, because the rationality of its public purpose cannot be challenged successfully, and, furthermore, the effectiveness of its program should not be hindered. It is also possible after First English that, with financial compensation at stake, judges will be even more reluctant to find that a taking has occurred as the result of a zoning ordinance or floodplain regulation. Such judicial reluctance might lead to even fewer damage awards.

The lasting impact of First English is likely to lie in the realm of the psychological. Floodplain management people, local community jurisdictions, and FEMA in general should not allow this case to inhibit its regulatory activities or its Flood Program. In particular, a FEMA task force presently is working toward designing and effecting a Community Rating Program, the purpose of which is to offer policyholders in participating communities significantly reduced insurance premiums in exchange for the community's adoption of loss mitigation measures that go above and beyond the baseline flood control and floodplain management statutes mandated by the NFIP. Considering the foregoing analysis, it is not expected that the First

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156 As Justice Stevens noted in his First English dissent, "[t]he Court's decision today will generate a great deal of litigation. Most of it, I believe, will be unproductive." 482 U.S. 304, 322 (1987) (Stevens, J., dissenting).
English holding will in any way chill this task force's very important activities.

In conclusion, the land use regulations that are "most certain to survive even the most hostile judicial reading are those that have explicit health and safety goals, have variance procedures, allow at least some use of the protected property, and are administered swiftly and fairly." This list of attributes describes the National Flood Insurance Program quite well.

VI. Keystone and the NFIP

Analysis will show that it is the earliest of the Trilogy, Keystone, and not the better-known First English, that ought to be generating great media coverage and public preoccupation, particularly given Keystone's potentially devastating impact on statutes regulating natural hazards such as the flood hazard.

The narrow holding in Keystone is particularly important because it validates a Pennsylvania regulation virtually identical to earlier regulations overturned by the Supreme Court in Pennsylvania Coal Co. v. Mahon in 1922. Under Keystone's two-prong test, a land use regulation may be a taking if either: (1) the regulation does not substantially advance a legitimate public purpose; or (2) the regulation denies the owner all economically viable use of his or her land. Analysis of Keystone, however, yields a number of important indications that the Court tip-toed carefully around Mahon, seemingly gyrating this way and that to avoid directly overruling Mahon. It is also important to note that though Keystone and Mahon deal specifically with land surface subsidence, the Court's underlying approach and rationale undoubtedly apply to the flood hazard as well, because both subsidence and flood plain regulations are public interest regulations geared toward hazard mitigation and reduction.

In Mahon, the plaintiffs sought to enjoin the Pennsylvania Coal Company from continuing to mine coal from under the Mahons' property on the grounds that such act ultimately would lead to the subsidence of their dwelling, thereby subjecting them to serious financial loss. The Mahons admitted that their ownership in the land

159 Kass & Gerrard, supra note 141, at 40, col. 2.
160 260 U.S. 393 (1922).
162 Mahon had been considered the last word in defining the limit of governmental power regarding land regulation. See A.J. Casner & W.B. Leach, Cases and Text on Property 1115 (1984).
extended only to surface soil rights, and they impliedly conceded that the Pennsylvania Coal Company's proposed actions would not constitute direct interference with their rights. The Mahons' claim rested upon the Kohler Act, a recently-enacted Pennsylvania statute seemingly very much on point. The Kohler Act prohibited all mining causing subsidence under certain structures. The plaintiffs argued that the Kohler Act was a proper exercise of police power, intended to protect human life and uphold the general welfare. The defendant countered that the Act was an impermissible uncompensated taking of private property solely for the benefit of a particular class and not for the benefit of the public generally.

Writing for the Mahon Court, Justice Holmes ruled that the extent of the public interest underlying the enactment of the Kohler Act was insufficient to warrant destruction of the coal company's right to mine the land. In particular, said the Court, the Kohler Act served only the very private interests of homeowners such as the Mahons. Furthermore, the Act made it infeasible for the coal company to mine anthracite coal. Hidden away in a footnote in Keystone is a possible interpretation of Mahon: "the Kohler Act may be read to prohibit mining that causes any subsidence—not just subsidence that results in damage to surface structures. The record in this case indicates that subsidence will almost always occur eventually." It is possible to infer from this language that the Keystone Court believed that the Mahon Court overturned the Act because of the very high probability that virtually any act of mining would lead to at least a partial subsidence. The substantive result of the Kohler Act would therefore be the total taking of the Pennsylvania Coal Company's estate in land, an interest emphasized to great degree by the Mahon Court. In contrast, the Pennsylvania Bituminous Mine Subsidence and Land Conservation Act (Pennsylvania Subsidence Act, or PSA) challenged by the Keystone Bituminous

165 Pennsylvania Coal Co. v. Mahon, 260 U.S. 393, 405 (1922).
166 See id. at 396–99, 404.
167 See id. at 414–15.
168 See id. at 413.
Coal Association in *Keystone* only required that fifty percent of the coal underneath certain structures be kept in place to provide surface support.\textsuperscript{171}

Section 4 of the PSA prohibited coal mining causing subsidence damage beneath pre-existing public buildings, private dwellings, and cemeteries.\textsuperscript{172} The Pennsylvania Department of Environmental Resources' (DER's) implementing regulation required that half of the coal beneath section 4 protected structures be kept in place as support.\textsuperscript{173} In *Keystone*, the plaintiff coal companies, legal owners of underground coal reserves, sought to enjoin the DER from enforcing the PSA. The coal companies argued that section 4 wrought an unconstitutional taking, and relied in large part on *Mahon* for precedential support.\textsuperscript{174}

The *Keystone* Court attempted to distinguish the Kohler Act from the PSA, rendering a final interpretation that the PSA was an Act intended to halt "a significant threat to the common welfare."\textsuperscript{175} The

\textsuperscript{171} *Keystone*, 480 U.S. at 477.

\textsuperscript{172} Unlike *Mahon*, where the validity of the statute's protection of private homes was challenged, *Keystone* involved a facial challenge to the validity of protecting both private and public structures. Compare supra note 164 and accompanying text with *Keystone*, 480 U.S. at 485–88.

\textsuperscript{173} *Keystone*, 480 U.S. at 476–77.

\textsuperscript{174} Section 6 of the PSA, also challenged by the Association, provided that the Department of Environmental Resources (DER) may revoke a mining permit if coal removal under a section 4 protected structure causes damage and the miner has not, within six months, either repaired the damage or made financial restitution for it. The Association argued that section 6 is unnecessary because Pennsylvania insures surface owners for the cost of repairing their property. Had it been upheld by the Court, this argument might have meant the end of the NFIP. Homeowners in flood zones would have analogously argued that floodplain regulations and building permit requirements, for example, were unnecessary, because the NFIP would adequately reimburse the owner for any loss. The *Keystone* Court's strong negative response to the Keystone Association's argument is analogous to one that FEMA could employ to support the NFIP. Justice Stevens patiently explained in *Keystone* that the PSA was passed in the public interest, and not out of a desire to protect private parties. See *Keystone*, 480 U.S. at 485–93. If insurance makes the homeowner whole with no out-of-pocket liability to the miner, there is little disincentive to prevent the miner from raping, or at least subsiding, the land. Presumably, in *Mahon*, had there existed insurance to reimburse the plaintiffs, they likely would not have sought to sue the Pennsylvania Coal Company in the first place, both the plaintiff and the defendant would have been satisfied, and no ultimate challenge to the constitutionality of the Kohler Act would have been brought. This is another strong argument supporting the *Keystone* majority.

\textsuperscript{175} 480 U.S. at 485. The Court cited section 2 of the PSA, which provides in part:

This act shall be deemed to be an exercise of the police powers of the Commonwealth for the protection of the health, safety and general welfare of the people . . . to aid in the protection of the safety of the public, to enhance the value of such lands for taxation, . . . and generally to improve the use and enjoyment of such lands . . . .

Court concluded that the legislative purposes underlying the enactment of the PSA were genuine, substantial, and legitimate. The legislature’s stark assertion that “this act shall be deemed to be an exercise of the police powers,” however, does not automatically render it so. Were this the case, any legislature could easily circumvent the Fifth Amendment’s eminent domain provision by ritualistically asserting intent. The inquiry, then, focuses on why the Court upheld the PSA and struck down the Kohler Act, and how the Court reasoned that the Kohler Act was a “private benefit” statute lacking the requisite level of public interest to empower the legislature to enact it as a proper extension of its police power.

Justice Stevens cited three primary distinctions between the PSA and the Kohler Act that justified finding the former not to be a taking on its face and the latter to be a taking. First, he argued that, under the Kohler Act, if both surface rights and mining rights were vested in the same individual, owners could mine to their hearts’ content and cause their surface property estate to subside down to China if they so chose. Under the PSA, however, owners could not legally cause subsidence even to their own land without DER consent. Under this analysis, NFIP land use regulations are more similar to the PSA than to the Kohler Act, in that landowners in a particular NFIP community could not voluntarily flood their own property, if for some reason they were so inclined, since this might create an increased flood risk to adjoining properties.

The second argument raised by Justice Stevens was that, in *Mahon*, other adequate means existed for Pennsylvania to accomplish its interest in the public safety than by enactment of the Kohler Act. A mere notice requirement to landowners, for example, would have sufficed. In contrast, the PSA was found to be designed to accomplish a number of widely varying interests. This argument apparently stands only because the legislature that enacted the Kohler Act was not sufficiently clever in citing its legislative justification and intent. Had the legislature that enacted the Kohler Act em-

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176 *Keystone*, 480 U.S. at 486.
178 Many interesting hypotheticals leap to mind. What result, for example, if the Kohler drafters had incorporated language precisely analogous to section 2 of the PSA?
180 *Id.* at 486; *see also* 25 *Pa. Code* § 89.145(b) (1983).
181 *Keystone*, 480 U.S. at 486.
182 *Id.*
183 *Id.*
ployed language analogous to section 2 of the PSA rather than their weak "safety" argument, the Mahon Court could not have pointed out that Pennsylvania's interest in "safety" could have been sustained by a notice requirement. Section 2 of the PSA relied on a number of different state interests, easily meeting the legislature's burden to support the requirements of mere rationality. Furthermore, the Keystone Coal Association had failed to set forth alternative approaches by which the state could otherwise promote its cited interests. The Court itself did not suggest such alternatives, thereby at least arguably opening up the possibility that had petitioner Coal Association suggested satisfactory alternatives, the Court might have struck down the PSA.

Analogously, Congress has justified the NFIP by specifically finding that a program of flood insurance promotes the public interest by providing appropriate protection against the flood peril, encouraging sound land use, and requiring that NFIP objectives be related to a unified program of floodplain management. With this cited justification to contest, it would be most difficult for a plaintiff to demonstrate that the federal legislative interest in the public welfare relative to the flood hazard could effectively be sustained in a manner other than by enacting the NFIP.

In any case, though the question of whether or not the government's claim that a particular use is "public" is generally one for the courts, a legislative declaration that a use is public has a strong presumption in its favor. Still, as has been previously mentioned, legislative determination or declaration is neither binding nor conclusive. Because "public use" is not generally defined and rests in each case on public policy, NFIP regulations after the Trilogy, though possibly subject to greater judicial scrutiny regarding their

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184 Id. Circumstances could potentially arise whereby the Mahons, their guests, or their friendly neighborhood mailman could find themselves in the unfortunate position of having the ground open up beneath them, much as post-Biblical Korahs.
185 See id. at 486.
186 A good topic for research and discussion might be how, if at all, the Keystone Bituminous Coal Association could have structured its argument to pull the PSA close enough to Mahon's Kohler scenario to allow the Court to characterize it too as a taking.
189 See generally 29A C.J.S. Eminent Domain § 30, at 253–54 n.12 (1965), and cases cited therein.
“public use,” should satisfy the “public purpose” prong of the *Keystone* two-prong test.\(^{191}\)

As a third distinction, Justice Stevens found that, unlike in *Mahon*, where the Court upheld the Pennsylvania Coal Company’s assertion that it could not profitably mine,\(^{192}\) the *Keystone* record fails to reveal where the PSA unduly interferes with the Coal Association’s investment return expectations. In particular, the plaintiff failed to show that mining in any single specific location was affected adversely by the fifty percent rule, let alone show a decrease in aggregate operational profitability.\(^{193}\) Since the right of the Keystone Coal Association to exercise its support estate rights to mine virtually all the coal was preserved, the burden the PSA placed on the support estate did not constitute a taking.\(^{194}\)

In general, the plaintiff’s argument failed because takings jurisprudence does not divide a single parcel into discrete segments and attempt to determine whether rights in a particular segment have been abrogated entirely. The court focuses both on the character of the action and on the nature and extent of the interference with rights in the parcel as a whole.\(^{195}\) Under this so-called “whole parcel” approach, the courts have ruled that statutes limiting or entirely proscribing development of a specific piece of an owner’s land lying within a mapped floodplain are not takings, since the owner cannot demonstrate that such restrictions limited *all* reasonable beneficial use of the land.\(^{196}\)

With this whole parcel theory as historical precedential background, it is fortunate indeed for the NFIP that the *Keystone* majority refused to uphold Keystone Coal’s argument that the estimated 27 million tons of coal rendered beyond the reach of the Association’s right to mine by the PSA was a separate and distinct property segment, itself subject to takings consideration and scrup-

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\(^{191}\) The “public use” doctrine is the prong of takings analysis that requires that private property, or an interest therein, can be taken only for a public use or purpose, and the legislature cannot permit a taking for a strictly private use or purpose without the owner’s consent.

\(^{192}\) Or, possibly, mine at all, creating a “total” taking scenario.


\(^{194}\) See id. at 493–502.


\(^{196}\) See, *e.g.*, *S. Kemble Fischer Realty Trust v. Board of Appeals*, 9 Mass. App. Ct. 477, 481–82, 402 N.E.2d 100, 103 (1980). Floodplain zoning prohibiting an owner from filling the portion of his land in the floodplain was upheld as constitutional. The court found that the land was not rendered absolutely worthless, citing specific uses to which the owner might put his land other than filling (including enhancement of his land outside the floodplain!) *Id.*
The Court argued insightfully that, under this theory, a simple local “set-back” property ordinance, for example, would constitute a taking. Employing analogous logic, a homeowner in a flood-prone community could submit that one of the Flood Program’s most effective flood mitigation ordinances, that which prohibits construction of post-FIRM buildings below BFE, constitutes a taking which must be compensated.

The *Keystone* majority noted that “there is no basis for treating less than 2% of petitioner’s coal as a separate parcel of property.” Questions left unanswered, however, include: what if, for example, the local setback appropriated ninety percent of the homeowner’s property? Twenty-five percent? What if, for example, Keystone Association could prove that it was denied access to ninety-eight percent of its coal? Twenty-five percent? And, of direct concern to FEMA, what if particular parcels of property were entirely within the floodplain, making any meaningful construction thereon entirely impossible? The *Keystone* Court clearly stated that it will approach takings questions before it by somehow quantifying and comparing the respective values of what the government has “appropriated” and that which the property owner has been permitted to retain.

“[O]ne of the critical questions in takings analysis therefore is determining how to define the unit of property whose value is to furnish the denominator of the fraction.” We again run up against the Court’s inability to devise a useable formula. Because of this inability, no precise line can be drawn, and individual cases will continue to be litigated.

Given *Keystone’s* affirmation of that portion of *Mahon* which required that Court to scrutinize both the character of the action and the nature of the interference with rights to the land as a whole, however, the government, including FEMA in its NFIP role, need not unduly concern itself with how the Court might view government interference with particular sub-segments of privately owned parcels of land. For example, the NFIP requirement that the landowner

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197 *Keystone*, 480 U.S. at 498.
198 Id.
199 Id.
200 This, of course, was also the outstanding, unresolved question relating to Justice Holmes’ “Too Far” test: “The general rule at least is, that while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking.” *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 415 (1922).
201 *Keystone*, 480 U.S. at 497.
maintain adequate drainage paths around structures situated on slopes\textsuperscript{203} demonstrably interferes with the owner's contemplated use of that area and, in fact, may thereby completely deprive the owner of any use of the land surrounding the structure. Such a plaintiff landowner seeking just compensation from the government will probably not prevail given the \textit{Keystone} Court's emphasis on interference with the parcel of land in its entirety. Similarly, the government's prohibition of encroachments within the adopted regulatory floodway,\textsuperscript{204} which deprives the landowner of the right to build on that part of the floodway intersecting his or her property, does not necessarily, under \textit{Keystone}, entitle the owner to compensation for the loss of use of part of the property.  

\textit{Keystone} is a classic "facial" challenge.\textsuperscript{205} The Keystone Bituminous Coal Association asserted that the mere enactment of the PSA by the government makes for a taking.\textsuperscript{206} In this vein, the Court noted that both parties specifically requested that the challenge be facial,\textsuperscript{207} since neither side was prepared to promulgate the "complex and voluminous proofs" necessary to assess the PSA's impact on actual operations.\textsuperscript{208} Facial challenges are very difficult to argue and are rarely successful. Some commentators even go so far as to characterize facial constitutional attacks as "a waste of time and money."\textsuperscript{209} Even the most conservative courts often refuse on principle to rule that a statutory enactment is a per se taking.\textsuperscript{210} In particular, the Supreme Court has ruled that the constitutionality of statutes ought to be decided in "as applied" settings;\textsuperscript{211} "[t]his rule is particularly important in cases raising allegations of an unconstitutional taking of private property."\textsuperscript{212} Generally, if the ordinance allows for variances or an exceptions process, facial challenges will
not be upheld because the plaintiff must show that the statute prohibits any reasonable use. It can be argued, then, that FEMA need not harbor any concerns regarding facial challenges to its NFIP regulations.

The Keystone and Mahon decisions may impact facial NFIP takings challenges in other ways. Prior to Keystone, various state and federal courts in almost all jurisdictions had upheld regulations preventing all economically viable developmental uses of land located within a floodplain by characterizing such regulations as designed to prevent serious harm to health, safety, and the property interests of others. The New Jersey Superior Court, for instance, previously had upheld a statute that banned all development of plaintiff’s land located entirely within a designated floodplain. The court found that the regulation furthered the public purpose of preventing harm to offsite persons and property in the event of a flood. Similarly, the California courts also had permitted legislative enactments barring all development in the floodplain.

The issues presented in these cases potentially may be reopened as the result of the Keystone holding. Although generalizations regarding the holdings are ill-advised, a pattern seems to have emerged. When the Court is convinced that a legislative enactment is intended to protect a defendant against a destructive plaintiff, the Court will grant considerable breadth of discretion to the government, broadly interpret the rationality requirement, and generally uphold governmental regulation. In such situations, then, the Court will view the statute as a proper exercise of the state's police power, and will not find a taking requiring just compensation. So, for example, the Court interpreted the PSA as a legitimate governmental remedy for dangerous conditions brought about by the Keystone Bituminous Coal Association. In contrast, the Mahon Court perceived that the underlying purpose of the Kohler Act was to “shift”...
the benefit from the plaintiffs, at their expense, to other parties, thereby justifying the Court's finding that a taking had occurred.\textsuperscript{219}

The \textit{Keystone} Court's decision supports the proposition that, under the public purpose test, the government can ban a nuisance without having to render just compensation.\textsuperscript{220} The Court, however, never addressed the key question of whether compensation is required in nuisance situations where legitimate governmental regulation of the property leaves the property owner with \textit{no} reasonable use of the land. For example, \textit{Keystone} does not resolve whether an owner of property comprised entirely of sand dunes successfully might challenge the NFIP regulation barring the alteration of sand dunes on property located within an NFIP community.\textsuperscript{221} The possibility that such a challenge would succeed presents a very real threat to floodplain management.

Although land use statutory enactments should not directly present constitutional concerns, the NFIP should consider itself on constructive notice that its building restrictions may be found to be takings subject to compensation, which the already subsidized Program can ill afford. Recall that the NFIP is established as essentially a quid pro quo type of arrangement.\textsuperscript{222} In exchange for community officials' enactment of floodplain regulatory statutes, the federal government makes insurance available to their constituents at subsidized rates.\textsuperscript{223} Underlying the federal government's involvement with the NFIP is deep concern about federal revenues used to pay losses exceeding collected NFIP premium dollars. These funds must be made up for with loss mitigation processes, such as floodplain regulations, which reduce the government's need to come forward with disaster relief settlements. In effect, no statutory regulation would translate into no National Flood Insurance Program.

Pending further clarification of takings law by the Supreme Court, administrators, floodplain managers, and community officials should

\textsuperscript{219} Pennsylvania Coal Co. v. Mahon, 260 U.S. 393 (1922).


\textsuperscript{221} See 44 C.F.R. § 60.3(e)(7) (1988). Of course, the government can still argue that the landowner retains \textit{some} use as, for example, sunbathing.

\textsuperscript{222} In 1965, a congressional task force concluded that a flood plain occupation in which the benefits of occupation do not exceed estimated total costs (costs of development and damage to the occupant as well as damages forced on others by encroachment) of occupation was undesirable since the net result to society would be a loss! See TASK FORCE ON FEDERAL FLOOD CONTROL POLICY, A UNIFIED NATIONAL PROGRAM FOR MANAGING FLOOD LOSSES, H.R. Doc. No. 465, 89th Cong., 2d Sess. 14 (1965).

\textsuperscript{223} 44 C.F.R. § 59.2(b) (1988).
continue to regulate exposure to the flood hazard, albeit more carefully. In particular, a consensus emerges from the Trilogy that rationally based public purpose regulations, though diminishing the value of homeowners' interests in their land, will usually be deemed to be non-takings. In general, the Court will uphold carefully tailored, narrow regulations aimed at public interest reduction of hazard. Still, the *Keystone* decision indicates an increased willingness by the Court to examine the nexus between regulations and the purported regulatory goals. Note that *Keystone* was a five-to-four decision, with three "conservative" appointees, Justices Rehnquist, O'Connor, and Scalia, in the minority. The future composition of the Court, particularly if the replacement of the three aging "liberal" Justices is undertaken by a conservative President, may dictate a return to the strict *Mahon* approach advocated by Justice Rehnquist in his *Keystone* dissent. Examination of the existence, or lack of existence, of nexus is an area more ripe than most for judicial action along lines of personal predilection by the Justices. Time, of course, will tell.

In conclusion, despite decisions in *First English* and *Keystone*, building codes, elevation requirements, restrictions in the floodway, and grading codes statutes are probably immune from successful "facial" takings challenges. FEMA, however, must be particularly cautious not to encourage their participating communities to enact per se moratoria on all buildings in covered areas.

The NFIP will also be immune to "as applied" takings challenges. The NFIP does not establish an absolute ban on construction in flood zones. Even the most restrictive NFIP regulation, that which "bans" development in the floodway, permits development in the floodway if it can be demonstrated that neither flood level, frequency of flood, nor severity of flood damages would increase. Reading between the lines in *Keystone*, one could argue that had Pennsylvania enacted a statute completely eroding the Keystone Association's right to mine, such statute might have been found to be a taking. Similarly, an NFIP statute unequivocally banning *all* building might go simply too far.

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224 See 480 U.S. at 506-21.
225 FEMA should also consider the potential for personal liability under 42 U.S.C. § 1983 (1982) for community and state officials, above and beyond the threat of successful litigation regarding money damages.
226 44 C.F.R. § 60.3(d)(3) (1988).
227 Alternately, the Court might have found a taking if the Association had proved that the statute reduced their bottom line profitability to the extent that they had to cease operation.
Even so, the NFIP has provided for the granting of variances, allowing a building permit where the property owner can supply evidence that only “minimal” damage to the legislature’s public interest concern will occur.\(^{228}\) Under NFIP regulations, construction in the floodplain will be allowed if the building is elevated to above BFE and alternate compensatory storage for floodwaters is provided.\(^{229}\) The only NFIP enactments prohibiting all development are statutes regulating a river’s floodway. Even there, however, the courts have upheld these bans due to the extremely hazardous consequences involved in development.\(^{230}\) The logical conclusion to be drawn is that after *Keystone*, although the Court will scrutinize land use regulations to a higher degree, the NFIP has little to fear from this anticipated scrutiny. The Court will most likely uphold regulation under the NFIP.

VII. **Nollan** and the NFIP

The *Nollan* case, though mysteriously never even once mentioning *First English* or *Keystone*, considers if and when circumstances underlying the conditional grant of a building permit may be so adverse to the owner, and so limit the owner’s use of the land, as to attain the status of a compensatory taking.\(^{231}\) In general, the government acts under its police power when requiring that a landowner must meet certain conditions precedent before obtaining a requisite construction permit.\(^{232}\) Specifically, when communities pass flood mitigation statutes which, for example, condition the grant of a building permit to a floodplain landowner upon the owner’s agreement to elevate the structure so that it is entirely above the BFE, FEMA has impliedly assumed that imposing this contingency is a valid

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\(^{228}\) 44 C.F.R. § 60.6(a)(3). The regulation states:

Variances shall only be issued by a community upon (i) a showing of good and sufficient cause, (ii) a determination that failure to grant the variance would result in exceptional hardship to the applicant, and (iii) a determination that the granting of the variance will not result in . . . additional threats to public safety . . . .

\(^{229}\) Id. § 60.3.

\(^{230}\) See, e.g., *Maple Leaf Investors, Inc. v. Washington Dep’t of Ecology*, 88 Wash. 2d 726, 565 P.2d 1162 (1977) (court upheld denial of construction permit for building in the Cedar River floodway, validating both the regulatory statute itself and the enactments passed pursuant to it).

\(^{231}\) See *Nollan v. California Coastal Comm’n*, 483 U.S. 825, 834 (1987).

\(^{232}\) See *Iowa Natural Resources Council v. Van Zee*, 261 Iowa 1287, 158 N.W.2d 111 (1968) (court sustained Iowa floodplain regulatory law requiring a permit before any building construction in a floodplain).
exercise of its police power not requiring just compensation. This assumption and others of its ilk may require serious re-examination in the wake of *Nollan*.

The Nollans leased a beachfront property improved by a small bungalow. To exercise their option to purchase the property, they were required to demolish the bungalow and replace it. To replace the bungalow, state law required them to obtain a development permit from the California Coastal Commission (CCC). The CCC granted the Nollans' permit application to build a three bedroom house on condition that the Nollans grant a public easement along the shoreline to facilitate the public's ability to reach the public beaches located both north and south of the property. In administrative hearings and in the lower courts, the Nollans argued that absent CCC evidence showing that their "proposed development would have a direct adverse impact on public access to the beach," the governmental imposition of the easement condition was tantamount to a taking for which the Nollans had to be compensated. The CCC cited a state interest in preserving the public's view of the ocean, arguing also that the construction of homes and the development of areas along the coast constitutes a "psychological barrier" severely restricting the public's ingress to and egress from the beach.

Justice Scalia, writing for the majority, stated that had the CCC directly required the Nollans to grant a public easement across their property, rather than making the grant of such an easement a condition precedent to the granting of a construction permit, such a requirement surely would constitute a taking. The Court, equating a permanent, continuous right of public passage across property with a physical occupation, ruled that the state cannot escape compensation liability by indirect imposition of a requirement when direct imposition of the requirement would require just compensation. Under a new approach formulated by the *Nollan* court, the "substantial relationship" test, the government's power to forbid particular land uses to facilitate advancement of some legitimate police power purpose is contingent upon the government's ability to dem-

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233 *Nollan*, 483 U.S. at 828.
234 *Id.*
235 *Id.*
236 *Id.* at 828–29.
237 *Id.* at 831. Recall that a taking usually will be held where a permanent physical occupation exists. See *supra* notes 71–106 and accompanying text.
238 *See Nollan*, 483 U.S. at 831.
onstrate that the prohibited land use furthers the same purpose which the government has advanced as justification.239

Prior to Nollan, the Supreme Court of California required only that conditions underlying the granting of a permit be connected "indirectly" to the project in question, and that there be a mere "reasonable relationship" between the government's power to forbid land use and the advancement of a legitimate purpose.240 As has been noted previously, the California courts grant broad regulatory power to the California state legislature. A review of 1970's California appellate court takings decisions shows that the courts consistently required a mere "reasonable relationship" between government regulatory power and the advancement of a legitimate governmental purpose. This approach often allowed the imposition of permit conditions only distantly related to achieving the "purpose" of legislatively enacted regulatory statutes. An historical review of California legislative enactments provides further support for the "reasonable relationship" standard, under which the legislature enacted various programs setting criteria for state and local regulation of flood hazard areas.241

Nollan represents a significant new direction in the Court's takings analysis. Where the Court's historical concern has been primarily with the question of how great a "diminution in value" is required to invoke the requirement for just compensation, the Nollan Court shifted its attention to the "nexus" requirement that the statutory enactment substantially advance legitimate state interests.242 The Nollan decision, however, may have been foreshadowed in the California courts.

The courts of California have long recognized that in a situation where, for example, city government orders a landowner to convey a strip of his or her land for a public street, it is beyond dispute that a classic taking will be found.243 The status of California law prior to

239 Id. at 837.
240 See Associated Home Builders, Inc. v. Walnut Creek, 4 Cal. 3d 633, 484 P.2d 606, 94 Cal. Rptr. 630 (1971).
242 In a fascinating footnote, Justice Scalia noted that the takings nexus requirement is not the same as the nexus requirement in substantive due process and equal protection jurisprudence, where the mere finding that the state could rationally have decided that the statute might achieve the government's objective is sufficient. Nollan, 483 U.S. at 834 n.3.
243 Justice Scalia agreed:

Had California simply required the Nollans to make an easement across their beachfront available to the public on a permanent basis in order to increase public access
Nollan regarding making the granting of a permit conditional on conveyance of a strip of land to the government, however, can probably be found in Ayres v. City Council.\textsuperscript{244} Were the test in Ayres applied, the Court would have examined the extent that the Nollan's development itself generated the need for new public facilities. To the extent that new public facilities would need to be generated to support the Nollan's new home, the Nollans could be required to grant the easement. If the public was thereby benefited, that would be deemed to be merely an "incidental benefit." Therefore, under the Ayres test, the court should have refused to sustain land regulations not directly serving a purpose connected with the land being developed. A good example of a pre-Nollan California case where the Ayres test was applied is Selby Realty Co. v. City of San Buenaventura,\textsuperscript{245} where the court held that government could not force owners to give up their land as a condition for obtaining a building permit, when the condition imposed had no connection to the proposed development.\textsuperscript{246}

While it is not at all clear why the California court did not apply the Ayres test in Nollan, it can be argued that the Nollans should have prevailed under the Ayres test. In Nollan, however, the Supreme Court, though not directly addressing Ayres, ruled that transforming what is essentially a taking of property into a building permit condition in no way distinguishes it from a pure taking.\textsuperscript{247} Nollan's nexus test can therefore be seen largely as a clarification of Ayres. Both the Nollan and Ayres tests rein in the government's ability to demand that developers provide community benefits only remotely related to the development.

The Nollans tore down the bungalow and purchased the property while an appeal was pending in the California appellate courts.\textsuperscript{248} Unlike facial challenges, the "as applied" challenge characterized by Nollan raises the issue of ripeness. Under most circumstances, the Supreme Court will not find a taking claim ripe until the original governmental decisionmaker has arrived at a definite position, conclusively determining whether the property owner was denied "all

\textsuperscript{244} 34 Cal. 2d 31, 207 P.2d 1 (1949).
\textsuperscript{245} 28 Cal. App. 3d 624, 104 Cal. Rptr. 866 (1972).
\textsuperscript{246} Id.
\textsuperscript{247} Nollan, 483 U.S. at 836–37.
\textsuperscript{248} Id. at 829–30.
reasonable beneficial use of its property.\textsuperscript{249} A court can conclude, however, that the probability that a permit application will be granted for any use is so low as to render it a virtual impossibility. In this circumstance, the requirement to file for a permit is waived and the takings claim is rendered ripe for review without exhaustion of this (no longer) potential remedy. Therefore, recalling \textit{Keystone}, instead of being required to show that the regulation denied them \textit{all} economically viable use of the property,\textsuperscript{250} as would a facial challenger, the Nollans in their "as applied" challenge needed only to convince the Court of the regulation's economic impact and the extent of its interference with investment-backed expectations.\textsuperscript{251}

The status of takings analysis after \textit{Nollan} therefore can be summarized as follows: a plaintiff property owner may attempt to invalidate a land control statute by mounting either a facial or an "as applied" challenge on either of two distinct grounds. First, under a so-called "economic impact" prong, a taking will be found if no reasonable economically viable use of the property is provided.\textsuperscript{252} The scope of this first basis for challenge, however, has been narrowed significantly by the decision in \textit{Florida Rock Industries v. United States}.\textsuperscript{253} In \textit{Florida Rock}, the court held that denial of a permit is not a taking unless it has a sufficiently severe effect on the fair market value of the property, even though the permit denial prevents any immediate viable use of the land in question.\textsuperscript{254} Thus, even where no potentially profitable use is left to the landowner, there \textit{still} might not be a taking if the property can be sold to a speculative buyer. Recall, again, that denial of the land's most profitable use is not a taking nor, under \textit{Penn Central}'s "whole parcel" rule as reiterated by \textit{Keystone}, is it a taking where an owner's use on a part of the land is restricted.

Second, under the \textit{Nollan} public purpose prong, a landowner may challenge a land use restriction statute as failing to substantially further a legitimate governmental purpose, or for failing to demonstrate a direct nexus between the statute and that legislative pur-
Hence, the government must satisfy both prongs for the statute to be ruled constitutional, while a plaintiff landowner can challenge either prong to warrant a finding of unconstitutionality and to obtain a court order for the government to render just compensation.

The *Nollan* decision has sparked a good deal of speculation and commentary in the popular press. Much of the speculation concludes that *Nollan* will discourage future regulation of water-related land use. Similarly, *Nollan*’s nexus requirement raises some direct concerns in the context of the NFIP. Specifically, when communities enact regulations whose basis-in-fact is an attempt to curb expansion in the floodplain, the courts might find that the marginal growth arising out of a single development constitutes a harm of sufficient degree to warrant imposition of the restraint without requiring compensation. Alternatively, it is also possible that courts relying on *Nollan* might find that the correlation between the public interest and prohibition of a particular development is not sufficient to substantially advance the state interest. The issue of retroactivity is also of tremendous concern to the NFIP. Whether landowners and developers acting within the statute of limitations have standing to contest previously accepted “burdensome conditions” placed in them by their NFIP communities is left unresolved in the wake of *Nollan*.

One potentially devastating result of *Nollan* is its apparent shifting of the burden of proof. The state will now be required to prove that its legislation satisfies the nexus requirement, rather than the plaintiff landowner having to demonstrate insufficient nexus. In many instances, the imposition of this burden will require the government to produce voluminous amounts of statistical data to justify regulation. In this area, the NFIP is well ahead of the game. Presently, virtually all flood-prone areas in the nation have been delineated and mapped, flood studies supporting the formulation of NFIP policy have been undertaken with mathematical precision, and the Federal Insurance Administrator has not effected rate or rule revisions without full documentation and impact analysis. It is therefore

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256 Even before *Nollan*, some courts had already expressed hostility to floodplain regulations attempting to ban construction in already built-up beach areas. See, e.g., Annicelli v. Town of South Kingston, 463 A.2d 133 (R.I. 1983).
258 *Nollan*, 483 U.S. at 841.
doubtful that Nollan will affect the NFIP other than by possibly launching significant increases in litigation, at least for the foreseeable future, until the furor dies down.

General NFIP regulations significantly differ from the very specific Nollan permit requirement scenario. Requiring the establishment of drainage channels, designating detention areas for flood runoff, and requiring setback lines and construction codes are arguably directly correlated to government hazard reduction goals. In Nollan, however, the relationship between the restriction and the regulatory goal was, at the very least, tenuous. In conclusion, the dissimilarity of the greater Nollan scenario from most contemporary environmental regulatory provisions, coupled with the particular breadth of distinction between Nollan and NFIP floodplain management regulations, translates to little bottom line impact on the constitutionality of the National Flood Insurance Program.

VIII. CONCLUSION

There are few "new" practical results emerging from the Supreme Court's 1987 takings Trilogy that impact on the National Flood Insurance Program. The few items of lasting significance to land use regulations in general and to the NFIP in particular are as follows.

(1) The "Lutherglen Rule." Where land use regulations deprive the owner of all use of his or her property, the government may be required to render just compensation even if the taking is of temporary duration.

(2) A plaintiff possibly may sue for damages under a "taking" cause of action even prior to the invalidation of a regulatory statute, or recision of the statute by the government.

(3) Because the cases have not resolved the outstanding question of whether just compensation is required in nuisance prohibition situations where legitimate governmental regulation of the property leaves its owner with no reasonable use of all of his or her land, a carefully tailored regulation should ensure that some use of the land is left to the owner.259

(4) A property owner may challenge a land use statute on either of two alternative grounds:

259 Courts may construe "some use" very broadly, considerably curtailing plaintiffs' effective use of this first prong. See Florida Rock Indus. v. United States, 791 F.2d 893, 905 (Fed. Cir. 1986).
(a) under the "economic impact" prong, a taking will be found if the statute has left the landowner no minimally economic viable use of the property;

(b) under the Nollan nexus prong, the statute must substantially further a legitimate governmental purpose and have a direct nexus to that legislative purpose. To sustain its regulation, the government must withstand challenges to both prongs.

As the result of the Trilogy, it is expected that the courts will scrutinize more closely both the regulatory purpose underlying land use statutory enactments and the nexus relationship of statutes to purported regulatory goals. It has been demonstrated, however, that the NFIP is situated in much the same advantageous position it enjoyed prior to First English, Keystone, and Nollan, and has little cause for the constitutional fear engendered in some circles by the three decisions. Considering the hundreds of flood hazard-related land use regulations upheld by the court compared to the handful of those overturned, it is more than likely that the courts will continue to sustain soundly conceived and fairly administered floodplain regulations and loss mitigation statutes.