State v. Mid-Florida Growers, Inc., 505 So. 2d 592 (Fla. 2d DCA 1987)

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Constitutional Law—Public Peril and Private Property in the Takings Clause—State v. Mid-Florida Growers, Inc., 505 So. 2d 592 (Fla. 2d DCA 1987)

THE FIFTH amendment of the United States Constitution provides that no person shall be deprived of life, liberty or property without due process of law and that no private property may be taken for public use without just compensation. This "takings clause" applies to the states through the fourteenth amendment of the United States Constitution. The broad and deceptively simple concepts of "taking," "property," and "just compensation" are not simplistic in their application. Judicial takings clause analysis has created a morass of muddled rules, ad hoc decisions and contradictory holdings.

The courts and commentators have variously construed due process, takings, property, and just compensation as the most essential criterion for deciding whether a specific case requires compensation. Yet all of these criteria fail to provide the courts with sufficient guidance for their decisions. Perhaps the most prevalent judicial doctrine of the takings clause is that standards are simply abandoned and each case is decided on its facts.

Where a government exercises its power of eminent domain to acquire a fee simple estate, the takings clause requires the payment of just compensation. Also, where government action affects property through tortious conduct or regulation, the property owner may bring an "inverse condemnation" action against the

1. The term "takings clause" is used in this Note to describe that body of law and analysis which attempts to determine in what instances a government must compensate individuals for property deprivation in order to comport with the fifth and fourteenth amendments of the Constitution, where that government did not invoke the power of eminent domain prior to the deprivation.


6. E.g., Mugler, 123 U.S. at 665.

7. E.g., Michelman, supra note 3.


10. Causby, 328 U.S. at 267.
government. However, the valid exercise of the "police power" precludes the payment of compensation even though an individual's interest is destroyed.

Florida's Second District Court of Appeal considered a controversy set squarely in the grayest portion of this "parody of stare decisis" in State v. Mid-Florida Growers, Inc. The appellees in Mid-Florida Growers operated citrus nurseries and obtained budwood from another nursery which was later discovered to be infected with citrus canker. Although the samples tested from appellees' nursery revealed no citrus canker infection, 281,474 of the appellees' healthy but "suspect" citrus plants were destroyed.

The Second District Court of Appeal recognized the difficulty of distinguishing between the valid exercise of the police power and an "impermissible encroachment on private property rights" requiring compensation. The court held that, while the state's response to the possibility of citrus canker infection by the destruction of healthy but suspect trees was a valid exercise of the police power, the destruction still effected a taking requiring compensation. Because the issue was so significant, however, the following question was certified to the Florida Supreme Court: "Whether the State, pursuant to its police power, has the constitutional authority to destroy healthy but suspect citrus plants without compensation?"

12. Id. at 2386-87.
15. Rose, supra note 3, at 566.
16. 505 So. 2d 592 (Fla. 2d DCA 1987).
17. Id. at 593. Section 581.181, Florida Statutes, provides that the director of the Division of Plant Industry may cause the destruction of any plant or plant product infested or infected with plant pests and no damages shall be awarded. Florida law further grants to the Department of Agriculture and Consumer Services the power to destroy:

articles capable of harboring plant pests . . . if they are infested or located in an area which may be suspected of being infested or infected due to its proximity to a known infestation, or if they came from a situation where they were reasonably exposed to infestation, when necessary to prevent or control the dissemination of plant pests or noxious weeds or to eradicate same and to make rules therefor.

18. Mid-Florida Growers, 505 So. 2d at 594.
19. Id. at 596.
In this Note, the author explores takings law by examining, in detail, the United States Supreme Court’s three most recent takings clause decisions to provide a basic conceptual background for takings clause analysis. The author then considers the specific issues that confronted the Second District Court of Appeal in *Mid-Florida Growers* and evaluates the court’s disposition of those issues.

I. RECENT TAKINGS DECISIONS IN THE UNITED STATES SUPREME COURT

The United States Supreme Court recently added greatly to the volume of takings clause jurisprudence, if not to its clarity, by handing down three decisions directly related to land use regulation. The principles enunciated by these cases, and the contradictions evident within them, expose the fundamental issues of private interest and government power, and the constraints imposed on them by takings clause jurisprudence.

The first decision considered facts which were essentially analogous to those of the famous decision of *Pennsylvania Coal Co. v. Mahon*. In *Keystone Bituminous Coal Association v. DeBenedictis*, the Court considered state legislation prohibiting mining that causes subsidence damage to public buildings and noncommercial buildings generally used by the public, dwellings used for human habitation, and cemeteries. The complaint alleged that this legislation worked a constitutionally prohibited taking of the “support estate” which Pennsylvania recognizes as a separate estate in land.

The legislation considered in *Pennsylvania Coal Co. v. Mahon* also protected dwellings from subsidence caused by coal mining. The complaint was from the owner of a dwelling. Justice Holmes’ opinion maintained that the protection of a single private home could not state a sufficient public interest to justify an invocation of the police power which abolished “a very valuable estate.”

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25. *Id.* at 414.
cause the complaint demanded the protection of a single dwelling, Justice Holmes found no public nuisance.

Justice Holmes also discussed the validity of the statute on its face. The Court held that the legislation could not be sustained as an exercise of the police power without payment of just compensation. The regulation "went too far" since "a strong public desire to improve the public condition is not enough to warrant achieving the desire by a shorter cut than the constitutional way of paying for the change."\textsuperscript{26} Since the legislation diminished the value of the property "too far," an impermissible taking had occurred.\textsuperscript{27}

The Court in \textit{Keystone Bituminous Coal Association} purported to distinguish \textit{Mahon}.\textsuperscript{28} Justice Stevens maintained that the public purpose which was found lacking in \textit{Mahon} was present in the contemporary legislation and that it did not present undue interference with "investment-backed expectations."\textsuperscript{29} But the analysis and conclusion of \textit{Keystone Bituminous Coal Association} obviously diverge from the \textit{Mahon} decision.

Justice Stevens' characterization of the \textit{Mahon} test indicates a limitation of the constitutional restraints on government power. "We have held that land use regulation can effect a taking if it 'does not substantially advance legitimate state interests . . . or denies an owner economically viable use of his land.'"\textsuperscript{30} The first half of the \textit{Mahon} test is the basic due process analysis of government action.\textsuperscript{31} The due process emphasis of \textit{Keystone Bituminous Coal Association} focuses on the legitimacy of the government purpose and the effectiveness of the regulation in advancing that purpose. Thus, Justice Stevens' test shifts away from the private interest analysis of \textit{Mahon} to an analysis of the legitimacy of the government action.\textsuperscript{32}

\begin{itemize}
\item \textsuperscript{26} \textit{Id.} at 415-16.
\item \textsuperscript{27} \textit{Id.} at 414-15.
\item \textsuperscript{28} \textit{Keystone Bituminous Coal Ass'n v. DeBenedictis}, 107 S. Ct. 1232, 1240 ("The similarities are far less significant than the differences.").
\item \textsuperscript{29} \textit{Id.} at 1241.
\item \textsuperscript{30} \textit{Id.} at 1242 (quoting Agins v. City of Tiburon, 447 U.S. 255, 260 (1980)).
\item \textsuperscript{31} However, requiring the regulation to "substantially advance" state interests implies a higher level of scrutiny. \textit{See Nollan v. California Coastal Comm'n}, 107 S. Ct. 3141, 3150 (1987) ("[O]ur cases describe the condition for abridgement of property rights through the police power as a 'substantial advantaging' of a legitimate State interest." (emphasis in original)).
\item \textsuperscript{32} \textit{Keystone Bituminous Coal Ass'n}, 107 S. Ct. at 1244 ("[P]rohibition 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 just sense, be deemed a taking or
\end{itemize}
While the *Keystone* Court attempted to reconcile *Mahon*, *Keystone*'s due process analysis contrasts that of the *Mahon* holding. Relying upon *Mugler v. Kansas*, the *Keystone Bituminous Coal Association* decision appeared to grant wide deference to legislative bodies in their decisions defining property uses as noxious or harmful. The *Mahon* holding implied that such legislation could be characterized as forcing a property owner to relinquish his property interests to confer a public benefit rather than to prevent a public harm. This semantic contrast between regulation as forcing owners to bear the expense of a public benefit and preventing them from inflicting a public harm is at the center of the takings clause conflict. The first prong of the *Keystone Bituminous Coal Association* due process test leaves authority for making the “benefit-harm” distinction with the political branch while reserving the judiciary only due process oversight. This diminution of the judiciary’s role in police power takings analysis represents a conscious choice to abandon the standardless rule of “too-far.”

The second prong of *Keystone Bituminous Coal Association* also worked to limit the authority of the judiciary to force inverse condemnation. This prong addressed the extent to which a property owner’s interest might be diminished by government action before the action becomes a taking requiring compensation. In other words, the Court attempted to define the level at which an abridgement of a property interest becomes constitutionally significant.

A court can manipulate an evaluation of the extent to which property rights have been infringed based upon the court’s defini-

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34. *Stoebuck*, supra note 3, at 1069. Professor Stoebuck argues that *Mahon* and *Mugler* represent the only basic contending judicial doctrines. Scholars generally recognize that attempting to distinguish between regulation which forces a public benefit and one which prevents a public harm is the source of much of the difficulty in takings clause analysis. See *Michelman*, supra note 3, at 1201-02.
35. *Keystone Bituminous Coal Ass’n*, 107 S. Ct. at 1245 (“Under our system of government, one of the state’s primary ways of preserving the public weal is restricting the uses individuals can make of their property. While each of us is burdened somewhat by such restrictions, we, in turn, benefit greatly from the restrictions that are placed on others.”).
36. The second prong does not apply directly to the facts of *Mid-Florida Growers* since, in that case, the owner’s interest was completely destroyed. However, it illustrates the direction of the *Keystone Bituminous Coal Ass’n* decision and, along with two recent decisions, demonstrates the fracture in Supreme Court analysis under the takings clause.
tion of the individual's property interest.38 If the consideration is only of the interest affected by the regulation, then the property owner's loss is total.39 But if the owner's total property interest includes valuable interests besides those affected by the regulation, the deprivation is diminished as a proportion of the total property interest.40

The Court's analysis under this second test in *Keystone Bituminous Coal Association* utilized the total interest measurement rather than considering only the interest affected by the regulation.41 The Court rejected both the contention that the loss of the coal left in the ground and the elimination of the support estate approached constitutional significance. Instead, the Court held that in the context of the owner's entire "bundle" of property rights, the loss of "individual strands" could not amount to a taking requiring compensation.42 While the Court provided no firm guidelines for the determination of takings questions, the analysis under the second test further reduced the judicial role in evaluating police power regulations under the taking clause. Since the Court expanded the scope of "property," marginal diminution in value would seem to become judicially unreviewable.

Justice Stevens' reliance upon *Mugler v. Kansas* is particularly demonstrative of the Court's disapproval of *Mahon* in *Keystone Bituminous Coal Association*.43 Where *Mahon* allowed subjective judicial analysis guided only by undefinable notions of "too far," *Mugler* would defer to legislative decisions. Where *Mahon* suggested scrutiny of the harm inflicted upon an individual by regulation, *Mugler* focused upon the benefit accruing to society from the regulation. Thus under *Mugler v. Kansas* and *Keystone Bituminous Coal Association*, only where an individual's harm could not be justified within the due process analysis of the benefit provided...

38. See Pennsylvania Coal Co. v. Mahon, 260 U.S. 393, 414-15 (1922). Justice Holmes' opinion emphasizes that the legislation worked a deprivation of "certain coal" which the mining company was forced to leave in the ground. Justice Holmes' view implies that the loss of this interest represented a total property deprivation. The opinion also treats the "support estate" as a total and indivisible property interest. See Rose, *supra* note 3, at 566-67.

39. See, e.g., Pennsylvania Cent. Transp. Co. v. City of New York, 438 U.S. 104, 130 (1978) (takings analysis "does not divide a single parcel into discrete units and attempt to determine whether rights in a particular segment have been entirely abrogated").


41. *Id.* at 1249.

42. *Id.* at 1244-45.

43. *Id.* See *supra* notes 32-33 and accompanying text.
by regulation could the judiciary invoke takings clause protection for individual property rights.44

The law of takings and compensation appeared to be settling into a more coherent order. *Keystone Bituminous Coal Association* seemed to impose restraint upon the judiciary and to defer to legislative choices. The Court limited its role by emphasizing the importance of public purposes in regulatory property interest infringement. By expanding the concept of property, the constitutional prohibition against takings was substantially truncated.

The law of the takings clause, however, began a renewed plunge into the depths of the morass barely two months after the decision of *Keystone Bituminous Coal Association*. The first of these decisions45 assaulted the property expansion concept of *Keystone Bituminous Coal Association* and the second46 attacked the notion of deference toward public purpose justification. These cases appear to reverse *Keystone Bituminous Coal Association*; however, the distinguishing language of both cases merely preserves the parody of *stare decisis* which has become the benchmark of takings clause decisions.

The Court in *First English Evangelical Lutheran Church* held that "where the government’s activities have already worked a taking of all use of property, no subsequent action by the government can relieve it of the duty to provide compensation for the period during which the taking was effective."47 Despite the two-month-old decision of *Keystone Bituminous Coal Association*, Chief Justice Rehnquist’s majority opinion relied on *Pennsylvania Coal Co. v. Mahon*. The opinion rejects the notion of diminished prohibitions under the takings clause, asserting that the deprivation which may occur between the imposition of an infringing regulation and a subsequent judicial evaluation of the regulation and purported deprivation attains constitutional significance. The assertion that "temporary” takings “are not different in kind from permanent takings” reflects a narrowing of the "property" concept which limits the analysis to the interest affected rather than to the owner's total interest. Thus, under Chief Justice Rehnquist’s analysis, the important factor is the individual’s loss considered separately, with

44. See supra note 31 and accompanying text.
47. *First English Evangelical Lutheran Church*, 107 S. Ct. at 2389.
the necessary result that the takings clause is more stringently enforced against state regulatory action.\textsuperscript{48}

While the Court's decision in \textit{First English Evangelical Lutheran Church} represents a substantial retraction from the position of \textit{Keystone Bituminous Coal Association}, it is important to recognize what the later decision did not do. The Court expressly declined to decide whether the specific ordinance which the Court considered effected an impermissible taking or whether the ordinance was justifiable as an exercise of the state's authority to enact safety regulations.\textsuperscript{49}

The most recent Supreme Court takings clause decision is \textit{Nollan v. California Coastal Commission}.\textsuperscript{50} The Court in \textit{Nollan} withdrew from the premise implicit in \textit{Keystone Bituminous Coal Association} that public purposes declared by legislation to justify property infringements would be afforded judicial deference.\textsuperscript{51} The Court instead imposed a heightened scrutiny upon the regulation at issue because it impacted what the Court deemed to be constitutionally protected property.\textsuperscript{52}

\textsuperscript{48} \textit{Id.} at 2387-88. Perhaps tellingly, while courts and commentators commonly refer to the relevant portion of the fifth amendment as the "takings" clause, Chief Justice Rehnquist refers to it as the "just compensation clause." \textit{Id.} at 2387.

\textsuperscript{49} \textit{Id.} at 2384. Chief Justice Rehnquist's anomalous reliance on both \textit{Pennsylvania Coal Co. v. Mahon} and \textit{Mugler v. Kansas} returns the Court squarely to the contradictory and irreconcilable analysis which \textit{Keystone Bituminous Coal Ass'n} should have eliminated. Under this catchall method, a valid regulation is unassailable since the government may prevent individuals from inflicting harm on the public, yet any regulation which forces the individual to confer a public benefit goes "too far" and requires compensation. This distinction is without a difference and fails miserably as a standard. Without a workable analytical standard, the courts are reduced to an ad hoc decisional practice imbued with barely the legitimacy of the proverbial coin toss.


\textsuperscript{51} \textit{Id.} The first portion of the opinion also dealt a blow to the expanded property concept and narrowed the scope of the "property" examination from the total rights retained by the owner to the interests burdened by the property infringement. \textit{See id.} at 3144.

\textsuperscript{52} \textit{Id.} at 3149-50. The regulation created an easement along a California beach as the condition to beachfront development. The California Coastal Commission found that the easement would limit the burden placed on public beach access by reducing the barrier created by beach development. \textit{Id.} at 3141. The Court found that the easement's purpose was facilitated only by its visual impact. Since the commission also found that the development completely blocked the public view of the beach, the Court found that the easement could have no effect on the visual impact. Justice Brennan's dissent illustrates the narrowness of the Court's view of the regulation, both in its impact on visual access and its entire purpose. \textit{Id.} at 3154 (Brennan, J., dissenting). Justice Brennan found that the majority ignored the easement's visual impact upon the immediately adjacent public beach and its primary purpose of diminishing the burden of private development upon public use of tidelands. Thus, the Court's implementation of its freshly created takings clause scrutiny is both surgical and microscopic.
The Court's analysis of the regulation in *Nollan* is particularly difficult since it found that a proper implementation of the Commission's power would not result in an impermissible taking. The Court did not find that the effect of the regulation considered alone demanded compensation. The Court only found that because the regulation did not "substantially advance" the state's interest, the infringement upon the owner's interest was impermissible.

*Nollan* plunges the Court into a standardless, yet potent, posture against the exercise of the police power. While the holding of *Nollan* is clearly hostile to government police power regulation, little is offered to direct the courts toward the identification of invalid exercises of that authority. The Court's decision introduces a powerful new judicial authority against legislative regulation with little indication of how regulatory bodies may avoid its scope.

The conclusion to be drawn from the Court's recent paradoxical decisions comes from an evaluation of their underlying doctrines. The cases of *Pennsylvania Coal Co. v. Mahon* and *Mugler v. Kansas* are not reconcilable. The Court's refusal to acknowledge this conflict will inescapably lead to standardless judicial activism.

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53. Id. at 3147.
54. Id. at 3150.
55. Justice Scalia implies that the taking of an easement might always require compensation, yet the conditioning of a necessary permit upon the grant of that easement is somehow less offensive to the takings clause if a state purpose is furthered by the taking of the easement. Id. at 3145-46. See also United States v. Riverside Bayview Homes, Inc., 106 S. Ct. 455, 459 n.4 (1985). Thus, Justice Scalia adds his own chapter to the apparently endless line of contradictory holdings under the takings clause.
56. *Nollan*, 107 S. Ct. at 3146-47 ("Our cases have not elaborated on the standards for determining what constitutes a 'legitimate state interest' or what type of connection between the regulation and the state interest satisfies the requirement that the former 'substantially advance' the latter.").
57. The standardless nature of the Court's takings decisions allows the judiciary to craft an individual standard for each case. This unbridled substitution of judicial judgment for that of the political branches is reminiscent of another famous Holmes opinion. See *Lochner v. New York*, 198 U.S. 45, 75 (1905)(Holmes, J., dissenting).
58. See, e.g., Stoebuck, supra note 3, at 1068.
59. Property law is grounded in the individual's justifiable reliance upon the state's protection of expectations with respect to belongings. See Michelman, supra note 3, at 1235. Unless government acknowledges that property interests, founded on the individual's expectations, require this predictability, the motivation of individuals is depressed, thus limiting the efficacy of the economic system. Id. at 1211-12. Justice Holmes recognized this proposition: "When this seemingly absolute protection is found to be qualified by the police power, the natural tendency of human nature is to extend the qualification more and more until at last private property disappears." *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 415 (1922). But property derives from the state's protective authority. The state, enacting valid regulations, merely serves to further protect the expectations of its citizens. A law which rationally relates to a legitimate government purpose cannot infringe upon legitimate expec-
II. Takings Analysis of State v. Mid-Florida Growers

The unique factual setting of State v. Mid-Florida Growers presents important takings clause considerations. The state's deprivation of the appellees' property rights requires due process analysis of both the validity of the state's purpose and the relationship between the deprivation and that purpose. This evaluation entails special prominence since Nollan requires heightened scrutiny where an exercise of the police power infringes on substantial property rights. In addition, further analysis must be performed on the court's conclusion in Mid-Florida Growers that compensation may still be necessary even though a deprivation substantially advanced a legitimate government interest.

A. Does the State's Interest in the Eradication of Citrus Canker Justify the Destruction of "Healthy But Suspect" Citrus Plants?

The purpose of the destruction of the appellees' citrus plants was to prevent the spread of citrus canker. However, the trial court found that, despite the budwood's exposure to other infected citrus, no evidence supported the state's assertion of the menace presented by the exposed budwood. The trial court held that because the state could not prove the disease was present in the suspect budwood destroyed, the destruction was not justified and required compensation.

60. 505 So. 2d 592 (1987).
62. Analysis of the extent of the deprivation in Mid-Florida Growers is unnecessary since the deprivation is total. If the exercise of the police power was unwarranted in this case, no remedy other than compensation is adequate.
63. Mid-Florida Growers, 505 So. 2d at 594 (“A valid exercise of the police power does not preclude an inverse condemnation suit.”).
64. Id. at 596.
65. Id. at 593 (“The most that can be said for the Defendant is that the Plaintiffs' nursery stock was obtained from a single source where some form of citrus canker was detected.” (quoting the trial judge)).
66. Id. Two Florida district courts of appeal previously considered the destruction of "suspect" plants and held that their destruction was a valid exercise of the police power. Nordmann v. Florida Dep't of Agric. & Consumer Servs., 473 So. 2d 278 (Fla. 5th DCA 1985); Denney v. Conner, 462 So. 2d 534 (Fla. 1st DCA 1985). Neither court, however, de-
The protection of valuable agricultural resources is a valid state purpose which may justify the destruction of property which is harmful to those resources. That the citrus industry in Florida is a vast agricultural resource is hardly open to debate. Thus, the eradication of plant pests which represent a major threat to Florida's citrus industry could constitute a valid exercise of the police power, even at the expense of individual property interests.

The Florida Supreme Court has previously considered takings clause controversies involving the destruction of plants to prevent the spread of disease. The court in Corneal v. State Plant Board considered legislation that mandated the destruction of plants infected with "spreading decline." The implementation of the legislation required the destruction of the trees infested with the disease and also those trees immediately adjacent to the "infested zone." The court held that the compulsory destruction of the uninfested trees worked an impermissible taking of property which required compensation.

Several factors influenced the court in Corneal. Foremost, the court found that the total destruction of property was "justified only within the narrowest limits of actual necessity." The court determined that the healthy trees presented an insufficient threat to justify their uncompensated destruction. Because the disease spread slowly and did not completely destroy even the infested trees' productive value, the court found the destruction of the ad-

67. Miller v. Schoene, 276 U.S. 272, 279 (1928). The Court in Miller held that a Virginia statute which required the destruction of ornamental cedar trees was a valid exercise of the police power and did not require compensation. The cedar trees harbored "an infectious plant disease" which damaged Virginia's apple crop. The Court found that the high economic value of the apple industry warranted "a choice between the preservation of one class of property and that of the other wherever both existed in dangerous proximity." Id. at 279.

68. The value of citrus production from 1980 through 1985 was $1,044,828,000. BUREAU OF ECONOMIC & BUSINESS RESEARCH, 1986 FLORIDA STATISTICAL ABSTRACT.

69. State Plant Bd. v. Smith, 110 So. 2d 401 (Fla. 1959); Corneal v. State Plant Bd., 95 So. 2d 1 (Fla. 1957).

70. Corneal, 95 So. 2d at 2.

71. Id. at 3.

72. Id. at 6-7.

73. Id. at 4.

74. The court upheld the uncompensated destruction of the infested trees. Id. at 5.
jacent healthy trees unwarranted.\textsuperscript{75} The court further noted that there was a less intrusive method than the destruction of the healthy trees which might effectively control the disease.\textsuperscript{76} Thus, despite the legislature's declaration of "the most serious emergency . . . yet encountered because of spreading decline,"\textsuperscript{77} the court found that "no real emergency exist[ed]."\textsuperscript{78}

Considering facts essentially identical to those in \textit{Mid-Florida Growers}, the court in \textit{Denney v. Conner}\textsuperscript{79} distinguished \textit{Corneal}. The court in \textit{Denney} declared that the emergency lacking in the infestation of spreading decline was present in the threat posed by citrus canker.\textsuperscript{80} The court held that the disease posed an immediate threat to the public health, safety, or welfare sufficient to justify the destruction of citrus trees exposed to canker. "[I]n cases of obvious and immediate danger, the state, in the exercise of its police power, may summarily destroy private property in order to protect the public."\textsuperscript{81}

Similarly, the court in \textit{Mid-Florida Growers} found that the destruction of "healthy but suspect" trees was a valid exercise of the police power.\textsuperscript{82} It determined that the virulence of the disease and the value of the citrus industry warranted the destruction of all possible carriers of citrus canker. "We understand the difficulties in determining whether canker is present in healthy trees. Destruction of the healthy trees, however, assured the continued vitality of Florida's most valuable citrus industry."\textsuperscript{83}

The Florida courts thus determined that citrus canker indeed presented an emergency in its threat to the Florida citrus industry, and that the disease's particular virulence and potential for rapid

\textsuperscript{75} \textit{Id.} at 5. Spreading decline is caused by microscopic nematodes and travels at an average rate of 36 feet per year. \textit{Id.} at 2. "Even the affected trees cannot be said to be completely worthless, since they continue to bear fruit and do not die." \textit{Id.} at 5.

\textsuperscript{76} \textit{Id.} at 5 (A "barrier" of uncultivated soil was found an effective method of controlling spreading decline).

\textsuperscript{77} \textit{Id.} at 3.

\textsuperscript{78} \textit{Id.} at 5. \textit{See also} \textit{Nollan v. California Coastal Comm'n}, 107 S. Ct. 3141, 3150 (1987) ("We view the Fifth Amendment's property clause to be more than a pleading requirement, and compliance with it to be more than an exercise in cleverness and imagination.").

\textsuperscript{79} \textit{Denney} v. \textit{Conner}, 462 So. 2d 534 (Fla. 1st DCA 1985).

\textsuperscript{80} \textit{Id.} at 536. The court particularly emphasized the nature of the transmission of citrus canker. Spreading decline advances only a few feet per year, while the spread of citrus canker may be much more rapid since it is transmitted by wind, rain, and human contact.

\textsuperscript{81} \textit{Id.} In Nordmann v. Florida Dep't of Agric. & Consumer Servs., 473 So. 2d 278 (Fla. 5th DCA 1985), the court relied heavily upon \textit{Denney} and reached an identical conclusion.

\textsuperscript{82} \textit{State v. Mid-Florida Growers, Inc.}, 505 So. 2d 592, 595 (Fla. 2d DCA 1987) ("We join our sister courts in holding that the state's order was a valid exercise of its police power.").

\textsuperscript{83} \textit{Id.}
transmission warranted the destruction of both infected and "healthy but suspect" citrus plants. While this analysis appears sound, some of its basic assumptions may be subject to criticism. First, the court's characterization of the threat posed by citrus canker may be unfounded. Second, the court's attempts to distinguish *Corneal v. State Plant Board* may ignore the true reasoning of that case. Finally, the level of scrutiny applied to the regulation may be too lenient.

The Florida courts' citrus canker decisions are all founded, implicitly and explicitly, on the premise that the widespread introduction of citrus canker in Florida would have devastating consequences for Florida's citrus industry. While acceptance of this premise is certainly common, it is clearly not universal. One commentator has questioned whether citrus canker could survive in Florida's climate. Further, the countries which are infested with canker continue to profitably produce citrus and control the disease without extraordinary measures.

The court's interpretation of *Corneal v. State Plant Board* relies on the differences between the diseases involved to distinguish the cases. However, the court's main premise in *Corneal* was more deeply founded on the total deprivation of property worked by the destruction of healthy plants. "[T]he absolute destruction of property is an extreme exercise of the police power and is justified only within the narrowest limits of actual necessity." The court in *Corneal* found that the harsh results of the regulation demanded a tight limitation on the police power. Thus, the holding of *Corneal* emphasized more the constitutional protection afforded property than the evaluation of the supposed emergency. *Corneal* stands for the proposition that total property deprivations demand rigorous scrutiny of their police power justifications. It was this magnified inspection which determined that the spreading decline emergency was no emergency at all.

84. 95 So. 2d 1 (Fla. 1957).
85. *E.g.*, *Canker: Dread Disease Found in Florida Citrus Nurseries, The Citrus Industry*, Oct. 1984, at 5, 53 ("Reference has been made in the media to citrus canker as a 'killer' disease.").
87. *Id.*
89. *E.g.*, Denney v. Conner, 462 So. 2d 534, 536 (Fla. 1st DCA 1985).
90. *Corneal*, 95 So. 2d at 4.
91. *Id.* at 6.
Finally, both of the preceding criticisms become especially important in the perspective provided by *Nollan v. California Coastal Commission.* Within the mandate provided by *Nollan,* the relationship between the public purpose and the deprivation is subject to heightened due process scrutiny. Application of this more rigorous standard and the possibility of overemphasis of the virulence of citrus canker could establish more similarities between the citrus canker situation and the Florida Supreme Court's evaluation of the spreading decline "emergency."

Whatever the doctrinal significance of *Corneal,* it is clear that within that analysis "healthy but suspect" citrus plants constitute valuable property. There may also exist a less harsh method for controlling the disease than the destruction of the suspect plants. While the mode of citrus canker transmission creates the potential for a more rapid infestation, Florida's climate may prevent citrus grove infestation entirely. Additionally, countries which currently suffer under canker infestation continue to maintain valuable citrus production. Thus, within the scrutiny mandated by *Nollan,* the contribution of "healthy but suspect" citrus plants to an imminent danger or emergency sufficient to justify the destruction of an individual interest seems less appropriate.

However, it is essential to recognize what the result of this demanding scrutiny would require at the most basic level of analysis. The courts, by invalidating this regulation, would mandate that Florida's citrus industry expose itself to a detrimental plant disease. While this may be warranted by the peculiar facts of an individual case, the courts hardly seem equipped to determine the long-term effects of this potentially momentous decision. Thus, the dilemma presented by the citrus canker problem shows what danger lurks when courts substitute their judgment for that of the legislature to determine the proper method of protecting property, welfare, health, and safety.

94. See *Whiteside,* supra note 91, at 8 ("[T]t is now known that, with appropriate spray timing, canker is controllable with copper sprays."). See also *Corneal,* 95 So. 2d at 5 (barrier of uncultivated land provides protection from spreading decline).
95. *Whiteside,* supra note 91.
96. *Id.* at 10, 12. The Argentine example is most closely analogous although that climate appears more conducive to citrus canker infestation. *Id.*
97. The eradication effort in Florida has already resulted in the destruction of at least eight million young trees, many in voluntary efforts at eradication. Hardy, *Citrus Canker: An International Perspective,* THE CITRUS INDUSTRY, June 1985, at 5, 9.
Mid-Florida Growers also demonstrates the paradox of "protecting property" by invalidating police power regulations. The general expectation of the citrus industry is that the disease must be eradicated to prevent its long-term consequences. The state enforced eradication of canker is a valid protection of the core property interest in citrus production. The court's substitution of its own judgment would disrupt the most basic property protection afforded by the government's police power.

B. Can a Valid Exercise of the Police Power Result in a Taking Requiring Compensation?

The court in Mid-Florida Growers determined that a "valid exercise of the police power does not preclude an inverse condemnation suit." The court relied on a Florida Supreme Court case, Albrecht v. State, in reaching this conclusion. "It is a settled proposition that a regulation or statute may meet the standards necessary for exercise of the police power but still result in a taking." However, an analysis of Albrecht indicates that this premise may be inapplicable to Mid-Florida Growers. Furthermore, an analysis of the Florida Supreme Court's takings cases may indicate that the proposition is not supported.

The dispute in Albrecht v. State concerned an application for a permit to fill submerged land. The plaintiff in Albrecht brought suit when the permit was denied. The court did not decide the taking issue, nor did it consider whether the permit process was a valid exercise of the police power. The holding of Albrecht was that judicial review of a takings issue is separate from administrative review of the validity of the permitting process for the purpose of the doctrine of res judicata. The passage quoted in Mid-Florida Growers was merely dicta illustrating the separate issues involved in administrative and judicial review.

98. E.g., Hardy, Research into Canker Eradication and Control Continues, The Citrus Industry, Mar. 1985, at 50.
99. What result would be reached under due process analysis if the regulation were eliminated by the courts and the citrus industry was eventually wiped out by citrus canker?
100. State v. Mid-Florida Growers, Inc., 505 So. 2d 592 (Fla. 2d DCA 1987).
101. Id.
102. 444 So. 2d 8, 12 (Fla. 1984).
103. Id.
104. Id. at 10.
105. Id. at 12.
106. See supra note 107 and accompanying text.
The court in Albrecht cited Graham v. Estuary Properties, Inc.\(^{107}\) for the proposition that the valid exercise of the police power could still result in a taking.\(^{108}\) Yet that reliance seems unfounded. The court in Estuary Properties found no taking, and its reasoning supports the opposite conclusion. "We simply reaffirm the rule that exercise of the state's police power must relate to the health, safety, and welfare of the public and may not be arbitrarily and capriciously applied."\(^{109}\)

The courts in Estuary Properties and Albrecht v. State relied on Pennsylvania Coal Co. v. Mahon\(^{110}\) in holding that even a valid exercise of the police power could result in a taking. However, only the court in Estuary Properties provided an extensive discussion of the principle, and there the court distinguished Mahon.\(^{111}\) The court found that the allegations of regulation forcing the property owner to confer a benefit were unpersuasive where a substantial public harm was prevented.\(^{112}\)

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\text{[T]he line between the prevention of a public harm and the creation of a public benefit is not often clear. It is a necessary result that the public benefits whenever a harm is prevented. However, it does not necessarily follow that the public is safe from harm when a benefit is created.}^{113}\]

Thus, even in a regulatory setting and without an allegation of an immediate public danger or emergency, the Florida Supreme Court acknowledged the deference owed the government in its exercise of the police power. Thus, the court's reliance in Mid-Florida Growers on Albrecht is at most reliance upon dictum twice removed.

The parallel between the reasoning of Estuary Properties and Keystone Bituminous Coal Association is obvious. Both cases were basically decided on principles originally enunciated in Mugler v. Kansas.\(^{114}\)

\begin{itemize}
  \item \(^{107}\) 399 So. 2d 1374 (Fla. 1981), cert. denied, 454 U.S. 1083 (1981).
  \item \(^{108}\) Albrecht, 444 So. 2d at 12.
  \item \(^{109}\) Estuary Properties, 399 So. 2d at 1379.
  \item \(^{110}\) 260 U.S. 393 (1922).
  \item \(^{111}\) Estuary Properties, 399 So. 2d at 1381.
  \item \(^{112}\) Id. at 1382. The court in Estuary Properties upheld a regulation which reduced a development by half to prevent an adverse environmental impact. Id.
  \item \(^{113}\) Id.
  \item \(^{114}\) 123 U.S. 623 (1887).
\end{itemize}
[Property rights] are best secured, in our government, by the observance, upon the part of all, of such regulations as are established by competent authority to promote the common good. No one may rightfully do that which the law-making power, upon reasonable grounds, declares to be prejudicial to the general welfare.  

This analysis is valid despite the United States Supreme Court's decisions after Keystone Bituminous Coal Association. Nollan v. California Coastal Commission dealt exclusively with land use regulation unrelated to the public safety justification. The Court in First English Evangelical Lutheran Church v. County of Los Angeles expressly withheld a decision on what constitutes a taking and decided only the issue of whether a temporary taking demands compensation. Thus, the example of Keystone Bituminous Coal Association controls. The decision of the legislature to remove a serious threat to the public should not be hampered by the requirement of compensation.

III. Conclusion

Despite the contradictions which hamper the resolution of takings clause controversies, the courts may still craft sound decisions. The protection of private property requires a broad judicial vision to recognize those exercises of the state's power which, though they may work individual injury, protect justifiable expectations. The valid exercise of police power authority protects private property. The dilemma of takings decisions is created by competing judicial doctrines which simultaneously require activism and restraint. This contradiction is evident throughout the decisions on the tak-

115. Id. at 663. The review reserved for Mugler by the judiciary is similarly deferential:  
If, therefore, a statute purporting to have been enacted to protect the public health, the public morals, or the public safety, has no real or substantial relation to those objects, or is a palpable invasion of rights secured by the fundamental law, it is the duty of the courts to so adjudge, and thereby give effect to the Constitution.

116. See also text accompanying note 63.
118. Id. at 3149.
120. Id. at 2377-78.
ings clause, and it continues to work a detriment to valid expectations by introducing an unfettered judiciary into the balance struck by police power regulations.

Police power regulations which respond to an imminent public threat or emergency demand particular judicial deference. This deference is especially important where the result of the regulation's invalidation is potentially devastating and unforeseeable.

The Florida Supreme Court should weigh these factors with extreme care. The examples of Keystone Bituminous Coal Association and Mugler v. Kansas should control the outcome of Mid-Florida Growers. The Florida Supreme Court should uphold the destruction of “healthy but suspect” citrus trees without compensation.

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