For the last half-century, there have been conflicts between, on the one hand, the demands of the federal Endangered Species Act and the common-law public trust doctrine to provide water for the environment and, on the other hand, the demands of farms and cities to use water for consumptive purposes. This paper discusses a trilogy of Supreme Court cases that interpret the Fifth Amendment’s Takings Clause in the context of water rights, together with three recent controversies from California and Oregon. The paper argues that the “expropriation doctrine” articulated by the Supreme Court is the proper way to analyze whether there has been a taking of water rights and concludes that reallocating water away from farms and cities for environmental purposes generally constitutes a physical and permanent taking that requires just compensation. The paper uses recent decisions by the Court of Claims and the Federal Circuit, including the 2017 decision by the Court of Claims in Baley v. United States, to discuss the policies that motivate this conclusion and also to explain why the defenses to a physical taking, notably those grounded in the background principles discussion in Lucas v. South Carolina, actually support the award of just compensation.

In 1969, Professor Joseph Sax published one of the most influential environmental law review articles in the 20th century. In The Public Trust Doctrine in Natural Resources Law: Effective Judicial Intervention, Professor Sax revived the public trust doctrine and shattered the notion that water law only dealt with vested property rights. Instead, argued Professor Sax, the public trust doctrine could be used to within the water rights system to address emerging questions of environmental degradation and, ultimately, restoration.

Professor Sax’s article led, fairly directly, in California to the litigation over the City of Los Angeles’ diversions from Mono Lake. That litigation culminated in the landmark case of National Audubon Society v. Superior Court, in which the California Supreme Court – confronted with the competing claims of the public trust doctrine and the prior appropriation doctrine – found that California law embraces both doctrines and that the State of California, in exercising it supervisory authority over natural resources within the state, must balance the needs of the public against the needs of the environment. The Supreme Court remanded the case to the California State Water Resources Control Board for a determination of how to properly balance those competing needs in the case of Mono Lake. But the California Supreme Court never addressed the lurking question in the National Audubon litigation: whether the reallocation of water from the City of Los Angeles to the environment, which was the result of the remand,
constituted a taking of the City of Los Angeles’ vested property rights to water that would demand just compensation under the Fifth Amendment to the United States Constitution.

The question of whether or not the reallocation of water from what would have otherwise have been thought to be a vested property right constitutes a taking of property subject to the protection of the Fifth Amendment to the United States Constitution has arisen most acutely in the past twenty-five years in a series of cases that pit the requirements of the federal Endangered Species Act against settled principles of water law, most notably the prior appropriation doctrine. Indeed, even though the leading case interpreting the federal Endangered Species Act, *Tennessee Valley Authority v. Hill*, did not involve the prior appropriation doctrine, that case did involve a conflict between the operation of a federal water project and the needs of an endangered fish species, there, the snail darter. The most recent case involving this conflict – *Baley v. United States*, found that the irrigators in question had vested property rights to water, that the United States’ operation of the Klamath Project in 2001 for fishery purposes constituted a “physical taking” of those water rights but then denied compensation on the ground that, even if water was re-allocated pursuant to the Endangered Species Act, there were unadjudicated tribal rights equivalent to the instream flows that were senior to the irrigators’ rights and thus that the priority system forbade any compensation.

This paper addresses the question that is the direct result of Professor Sax’s landmark article. If societal values have changed from the days when the Bureau of Reclamation was building dams on every western river it could find, and if the federal Endangered Species Act and the revived public trust doctrine are evidence of that change in societal values, may that change be made without compensating individuals who had reasonable investment-backed expectations that they would be allowed to divert water for municipal or agricultural purposes? Or must the government, in reallocating water to new purposes, compensate the previous holders of water rights for that taking of property? In other words, is there a “free lunch” for the government “just because” it reflects current social values?

This paper examines the major authorities in Takings Clause jurisprudence as they apply to water rights and concludes that the best way to analyze whether or not there has been a taking is to use the “expropriation doctrine” of cases like *International Paper v. United States* or *Dugan v. Rank*. This doctrine allows for the government to reallocate water when it deems such a reallocation to serve the public interest but requires the government to compensate the owners of the rights in question. In that way, the expropriation doctrine provides an intrinsic limit on such takings and so implements one of the chief functions of the Takings Clause: preventing the government from forcing a few people from bearing the burdens that should properly be borne by the public at large. Or, as the Supreme Court opined in last year’s term: “Property rights are necessary to preserve freedom, for property ownership empowers persons to shape and to plan their own destiny in a world where governments are always eager to do so for them.” Put simply, there is no free lunch.

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7. *Murr v. Wisconsin*, 137 S.Ct. 1933, 1943 (2017) (the purpose of the Takings Clause “is to prevent the government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole.” (internal quotation marks and citations omitted)).
8. *Id.*
The Supreme Court's Trilogy of Takings Cases

The place to begin our understanding of the expropriation doctrine is in the case that provides perhaps the paradigmatic case of the government taking a water right for what the government believed to be a more important purpose. In *International Paper Co. v. United States*, Justice Oliver Wendell Holmes confronted a situation where the United States had directed a flow of water away from International Paper's mill in order to provide hydroelectric power during World War I. Wiping aside of the technical arguments offered by the United States that the United States had merely deprived International Paper of its power—rather than its water rights, Justice Holmes stated that: "[t]here is no room for quibbling distinctions between the taking of power and the taking of water rights. The petitioner's right was to the use of the water; and when all the water that it used was withdrawn from the petitioner's mill and turned elsewhere by government requisition for the production of power it is hard to see what more the Government could do to take the use." 

In other words, even while Justice Holmes recognized that the right in question was a right to use water to generate power, Justice Holmes saw that the deprivation of that usufructory right amounted to a taking, for it deprived International Paper of its ability "to shape and plan its own destiny" (to anticipate Justice Kennedy's language in *Murr*) in a case where the Wilson Administration "was eager to do so for it." Justice Holmes did not question the government's ability to redirect water for power purposes; instead, he simply required the government to compensate International Paper for its loss. In this way, the decision anticipated the conflicts that have arisen in recent years between the federal Endangered Species Act and/or the public trust doctrine and water rights in the western United States.

In *United States v. Gerlach Live Stock Co.*, the U.S. Supreme Court considered California's abolition of the absolute priority of riparian rights that was contained in what is now codified as article X, section 2 of the California Constitution. The Court noted that even though a landowner could no longer enforce the priority of a riparian right, "[n]o reason appears why those who get the waters should be spared from making whole those from whom they are taken." As the Court continued: the "[p]ublic interest requires appropriation; it does not require expropriation."

*Gerlach Live Stock* provides a case in point as to how the courts can appropriately manage the conflicts that arise in the administration of water rights. The Supreme Court noted that California

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9  282 U.S. 399 (1931).
10  This type of analytic inquiry, which looks past the form of the governmental action to its substance, finds its modern-day equivalent in the analysis of the court in the *Casitas* decision, which is discussed further below.
11  282 U.S. at 407.
12  *Murr*, 137 S.Ct. at 1943.
14  The key sentence of Article X, section 2 of the California Constitution reads as follows: "It is hereby declared that because of the conditions prevailing in this State the general welfare requires that the water resources of the State be put to beneficial use to the fullest extent of which they are capable, and that the waste or unreasonable use or unreasonable method of use of water be prevented, and that the conservation of such waters is to be exercised with a view to the reasonable and beneficial use thereof in the interest of the people and for the public welfare."
15  339 U.S. at 752-53.
16  *Id.* at 753.
law had evolved with the enactment of article X, section 2 of the California Constitution. But the Supreme Court did not – proverbially – throw up its hands to validate that change in state law without protecting the prior rights holders. Instead, the Court adhered to the key insights of Takings Clause jurisprudence: allowing the government to serve the public interest as it may evolve but not allowing the government to do so without regard for the burdens such evolution may impose on individuals without political power.17

Finally, in *Dugan v. Rank*,18 the Supreme Court considered the effects flowing from the construction of Friant Dam on the San Joaquin River. The landowners along the river claimed that the construction of the dam interfered with their rights and so required just compensation. The Court found that a “seizure of water rights need not necessarily be a physical invasion of land. It may occur upstream, as here.”19 The Court cited its decision in *United States v. Causby* in interpreting what the *Penn Central* court would later call the “physical takings” doctrine.20 Thus, the Court noted that: “when the Government acted here with the purpose and effect of subordinating the respondents’ water rights to the Project’s uses whenever it saw fit with the result of depriving the owner of its profitable use, there was the imposition of such a servitude as would constitute an appropriation of property for which compensation should be made.”21 Thus, in the case of water rights, there can be a sufficient invasion of rights even without a physical occupation, provided that there is a subordination of water rights that destroys the owner’s profitable use.

The analysis in *Dugan* echoes Justice Holmes’ concerns in *International Paper*. In each case, the Supreme Court looked past the details of the expropriation in question to determine what the effect of the government’s action on an individual might be. In both cases, the Supreme Court found that the practical effect of the government’s action was to deprive the individuals in question of their ability to use water that they had previously used for productive purposes. The imposition of such a servitude, whether for a limited time in the *International Paper* decision or indefinitely in the circumstances in *Dugan*, required just compensation. And, for the reasons articulated in *Gerlach Live Stock*, the change of law and the undoubted benefits of putting the water to an alternative use for the public, did not eliminate the need for the government to pay just compensation.

In these three cases that define the expropriation doctrine, the Supreme Court posed the difficult but inescapable question of Takings Clause jurisprudence: to what extent may the government – acting for the benefit of all the public – force certain individuals to change their behavior and give up their property? The Supreme Court – in all three cases – carefully weighed the policy questions that it most recently articulated in *Murr v. Wisconsin*: (i) not forcing a few to bear the burdens of the many, due to a lack of political power or otherwise; (ii) recognizing the need for the government to be able to govern and take vigorous action for the public good; and (iii) the need to allow individuals to plan and organize their lives. This intersection of political power dynamics, the need for a vigorous government that meets the needs of the public, and the need for

17 There is an interesting parallel between the Takings Clause jurisprudence’s solicitude for individual property owners, who are likely to lack political power to resist government intrusion, and the solicitude that the Supreme Court has shown over time for discrete and insular minorities under the famous analysis in footnote 4 of *United States v. Carolene Products*, 304 U.S. 144, 152 (1938). See generally John Hart Ely, *DEMOCRACY AND DISTRUST* (1981).
19 Id. at 625.
20 Id.
21 Id. at 625-26, internal quotation marks and parentheses omitted.
individual autonomy will help to define the debates over the reallocation of water rights, as discussed in the remainder of the paper.

2. The Modern Trilogy of Takings Cases – Tulare Lake, Casitas and Klamath

Over the past twenty-five years, there have been three cases, or more precisely, three series of cases, that have brought the questions associated with applying the Takings Clause to water rights limitations for environmental concerns into sharp relief. The first case, *Tulare Lake Basin Water Storage District v. United States*22 involved a challenge to limitations on water deliveries to Central Valley Project (CVP) and State Water Project (SWP) contractors from 1992-94. The context of this case – the limitation of water deliveries to water contractors during a drought period in order to ensure instream flows for the environment – presents the classic federal Endangered Species Act “fish vs. farms” fact pattern.

The decision begins – like so many other Takings Clause cases – with a reference to the principle in *Armstrong v. United States* that the purpose of the Takings Clause is to prevent the government from imposing a burden on the few that should be borne by all.23 As a threshold matter, the court found that there was a sufficient property interest on the part of the plaintiffs in their contracts with the CVP or SWP to support a takings claim.24 The court then relied on *United States v. Causby*25 to conclude that: “by limiting plaintiffs’ ability to use an amount of water to which they would otherwise be entitled, the government has essentially substituted itself as the beneficiary of the contract rights with regard to that water and totally displaced the contract holder. That complete occupation of the property – an exclusive possession of plaintiffs’ water-use rights for preservation of the fish – mirrors the invasion present in *Causby.*”26 The court then relied on the expropriation cases (International Paper, Gerlach Live Stock, and Dugan) as confirming that preventing the use of water constitutes a physical taking.27 The court concluded by rejecting the claim that the language of the CVP or SWP contracts constituted a “background principle” of law that would abrogate liability28 and by addressing the question of whether the public trust doctrine or article X, section 2 abrogated liability, concluding that as long as there was not a formal reallocation by the State Water Resources Control Board, the regulations that prevented water from being delivered to the plaintiffs constituted a taking of plaintiffs’ rights.29

The second set of modern takings cases is a series of cases brought by Casitas Municipal Water District against the United States for takings arising out of restrictions that required the District to route water through a fish ladder. In *Casitas Municipal Water District v. United States*,30 the trial court began its inquiry by determining that, under its water right license, the District had a right to put approximately 28,500 acre-feet/year to beneficial use. To prove a taking, the District was 49 Fed. Cl. 313 (2001).

Id. at 316.

Id. at 318.

328 U.S. 256, 262 (1946).

49 Fed. Cl. at 319. *United States v. Causby* involved an alleged taking due to airplane overflights that were alleged to destroy the value of the property in question because of noise, glare at night, and sleep deprivation.

Id.

Id. at 320-21, see generally *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1029 (1992) for a discussion of the background principles of law that might enable a regulation of property to not constitute a taking.


required to demonstrate an interference with that beneficial use.\textsuperscript{31} The court then, as in \textit{Tulare Lake Basin}, considered whether article X, section 2 of the California Constitution, the public trust doctrine or California Fish & Game Code section 5937 impose “background principles” of law under \textit{Lucas v. South Carolina Coastal Council}\textsuperscript{32} that would justify the biological opinion’s restrictions on diversions.\textsuperscript{33} After a thorough discussion of each claim, the court found that each of these defenses failed. In essence, the court found that the evidence at hand did not: “show that the fish protection aspect of California’s public trust doctrine is superior to other competing interests, including Casitas’ use of the water. . . . Defendant’s \textit{Lucas} defense based on the public trust and reasonable use doctrines therefore must fail.”\textsuperscript{34} The court reached a similar conclusion regarding Fish & Game Code section 5937.\textsuperscript{35} Turning to whether there had been a taking, the court concluded that there had not yet been a taking because the government had not yet interfered with Casitas’ beneficial use of water.\textsuperscript{36} On appeal, the Federal Circuit affirmed.\textsuperscript{37} The court initially found that Casitas’ property right was limited to the 28,500 acre-feet/year that it had placed to beneficial use.\textsuperscript{38} Because the court found that Casitas had not demonstrated that deliveries were affected, it had not yet suffered a taking and so the taking claim was not ripe.\textsuperscript{39}

The third set of cases in this modern trilogy of Takings Clause cases where water rights confront the needs of the environment involves the Klamath River in Oregon and California. In \textit{Klamath Irrigation District v. United States}\textsuperscript{40} and more recently the renamed \textit{Baley v. United States},\textsuperscript{41} the Court of Claims recognized the fundamental property rights at issue in these disputes. In \textit{Baley}, the Court – once again citing the Supreme Court’s trilogy of expropriation cases – found that: “the government had taken an action that had the effect of preventing plaintiffs from enjoying the right to use water provided by an irrigation project.”\textsuperscript{42} Relying on the Federal Circuit’s decision in \textit{Casitas Municipal Water District v. United States},\textsuperscript{43} the Court of Claims concluded that the government’s actions should be analyzed “under the physical takings rubric.”\textsuperscript{44} With a physical taking, the Court of Claims then noted that the: “Federal Circuit has held that the size and scope of a physical invasion is immaterial to the analysis; even if the government only appropriates a tiny slice of the person’s holdings, a taking has occurred.”\textsuperscript{45} Following the line of argument in \textit{International Paper} and \textit{Casitas}, the court found that: “the water plaintiffs were deprived of in 2001 is gone forever. As such, the government’s diversion of water away from the plaintiffs in 2001 was not temporary and should be analyzed as a permanent physical taking.”\textsuperscript{46} In other words, the interference by the government with the settled expectations of the irrigators gave rise

\textsuperscript{31} \textit{Id.} at 455.

\textsuperscript{32} 505 U.S. 1003 (1992).

\textsuperscript{33} 102 Fed. Ct. at 455-62.

\textsuperscript{34} \textit{Id.} at 461.

\textsuperscript{35} \textit{Id.} at 462.

\textsuperscript{36} \textit{Id.} at 472.

\textsuperscript{37} \textit{Casitas Municipal Water District v. United States}, 708 F.3d 1340 (2013).

\textsuperscript{38} \textit{Id.} at 1355-58.

\textsuperscript{39} \textit{Id.} at 1358.

\textsuperscript{40} 67 Fed. Cl. 504 (2005).

\textsuperscript{41} 2017 WL 4342771 (Ct. Claims, Nos. 1-591L et al.) (September 29, 2017). The case as originally filed included claims by irrigation districts on behalf of landowners. Ultimately, the Court certified a plaintiff class of landowners and the districts were no longer parties.

\textsuperscript{42} \textit{Id} at *49 (internal quotation marks omitted).

\textsuperscript{43} 543 F.3d 1276, 1296 (2008).

\textsuperscript{44} \textit{Baley} at *49.

\textsuperscript{45} \textit{Id.} at *57 (internal quotation marks omitted).

\textsuperscript{46} \textit{Id.} at *59 (internal quotation marks and citations omitted).
to a permanent deprivation of the right to use some quantity of water and, under the Supreme Court’s trilogy of expropriation cases, that deprivation entitled the irrigators to just compensation.\footnote{Baley court then invoked the prior appropriation doctrine to find that the reserved and treaty rights of the Native American tribes with historic holdings along the Klamath River would have required all of the water available in 2001 to deny any compensation for the irrigators. The discussion of the intersection of the priority system, Native American reserved rights and treaty rights, hydrology and the Takings Clause is beyond the scope of this paper, but is an anticipated focus of an appeal pending in the United States Court of Appeals for the Federal Circuit.}

3. \textit{The Defense of “Background Principles” to Takings Claims}

The passage of the federal Endangered Species Act and the resurrection of the public trust doctrine by Professor Sax created a powerful defense for the government against the Supreme Court’s trilogy of takings cases, all of which were decided before 1969 – when Professor Sax published his article – and before 1973 – when Congress enacted the Endangered Species Act. Specifically, even once a court has found a protected property interest, it is possible to argue the “background principles” analysis of \textit{Lucas v. South Carolina Coastal Commission}\footnote{505 U.S. 1003 (1992).} preclude compensation on the ground that the irrigator acquired the rights in question subject to either the Endangered Species Act and/or the public trust doctrine.\footnote{There are several cases, most notably \textit{Klamath Irrigation District v. United States}, 67 Fed.Cl. 504, 536-38 (2005) that have also considered whether the United States may be exempt from the requirement to pay just compensation based on the “sovereign acts” doctrine articulated in, among others, \textit{United States v. Winstar Corp.}, 518 U.S. 839, 891-899 (1996). Those cases tend to turn on the nature of the contractual interest at stake, see e.g. \textit{Klamath Irrig. Dist, supra} at 535; \textit{O’Neill v. United States}, 50 F.3d 677, 682-84 (9th Cir. 1995); \textit{but see Tulare Lake Basin Water Storage District v. United States}, 40 Fed.Cl. 313, 318 (2001) (discussed above and treating the contractual right to water as a property right rather than a contract right), rather than on the more general principles of Takings Clause jurisprudence. A discussion of the interplay between contractual principles, the “sovereign acts” doctrine defense, and the Takings Clause is beyond the scope of this paper.} 

A recent Comment in the BYU Journal of Public Law articulates the claim that the “background principles” set forth in \textit{Lucas} should serve to provide a defense against the claim that the government is acting to take water rights under the public trust doctrine. The Comment states that the: “decision in \textit{Lucas v. South Carolina Coastal Council} suggests that government regulation or taking of vested property rights are not always to be perceived by courts as \textit{per se} takings; rather, there is room for flexibility in takings jurisprudence in light of states’ power over those rights.”\footnote{Jacqueline Carlton, \textit{Comment: Drought by Fifth Amendment: Debunking Water Rights as “Real” Property}, 31 BYU J. Pub. L. 409, 428-29 (2017).} To similar effect, a recent Note in the Ecology Law Quarterly found that: “the SWRCB’s [the California State Water Resources Control Board’s] application of the public trust [doctrine] in response to ESA [federal Endangered Species Act] triggers, such as section 7 consultations, is likely to provide government defendants with a categorical defense to takings claims.”\footnote{Elise O’Dea, \textit{Note: Reviving California’s Public Trust Doctrine and Taking a Proactive Approach to Water Management, Just in Time for Climate Change}, 41 Ecology L. Q. 435, 455 (2014).} But the strongest advocate for the use of \textit{Lucas} “background principles” as a defense
to water right takings claims has been Professor John Echeverria of Vermont Law School. In his article entitled *The Public Trust Doctrine as a Background Principles Defense in Takings Litigation*,\(^\text{52}\) Professor Echeverria discussed the Tulare Lake Basin and Casitas cases, contending that the public trust doctrine “defeats takings claims based on regulation of water use designed to protect a public trust resource.”\(^\text{53}\) Specifically, Professor Echeverria states that: “[b]ecause no water right holder can claim an entitlement to exercise its water right in a fashion that harms public trust resources, a regulation designed to prevent such harm does not impair a protected property right and, therefore, cannot provide the basis for a successful takings claim.”\(^\text{54}\)

The crux of all of these claims is that the California public trust doctrine provides absolute protection to fish and other “public trust” resources. But as the *Casitas* decision recognizes, California’s law is not so simplistic. Quoting the National Audubon decision, the Casitas court opined:

> But that showing [of adverse impacts to a fishery] alone is not enough. As the National Audubon court recognized, “[t]he population and economy of [California] depend upon the appropriation of vast quantities of water for uses unrelated to in-stream trust values” and thus, “[a]s a matter of current and historical necessity,” the state “has the power to grant usufructuary licenses that will permit an appropriator to take water from flowing streams ... even though this taking does not promote, and may unavoidably harm, the trust uses at the source stream.” 33 Cal.3d at 446; see also *Town of Antioch v. Williams Irrigation Dist.*, 188 Cal. 451, 459, (1922) (recognizing that an appropriator may continue to put water to beneficial use even though that use results in the over salinity of down-stream flows). Defendant’s [the United States] position presumes that the needs of the fish trump all other uses. But what is in the best interest of a single public trust resource is not necessarily what is in the best interest of the public as a whole. This is especially true since California has explicitly identified domestic and irrigation as the highest uses of water. Cal. Water Code § 106 (“It is hereby declared to be the established policy of this State that the use of water for domestic purposes is the highest use of water and that the next highest use is for irrigation.”). Defendant must therefore show that the balance between Casitas’ various uses and the uses identified in the biological opinion weighs in favor of the fish.\(^\text{55}\)

Indeed, the National Audubon court went even further, finding that: “Now that the economy and population centers of this state have developed in reliance upon appropriated water, it would be disingenuous to hold that such appropriations are and have always been improper to the extent

\(^{52}\) 45 U.C. Davis L. Rev. 931 (2012).

\(^{53}\) Id. at 934.

\(^{54}\) Id. at 955. Professor Echeverria treats the federal Endangered Species Act as being protected by the “background principles” of *Lucas* because the protections under that Act serve to protect public trust resources that come within the scope of those background principles. Professor Echeverria’s assumption – that a federal statute adopted well after statehood can still be one of the “background principles” – would doubtless have shocked Justice Scalia (the author of *Lucas*) and is – on its face – inconsistent with *Lucas*. Nonetheless, for sake of discussion, this paper grants Professor Echeverria’s assumption, concluding that it cannot save regulations adopted under the federal Endangered Species Act from the government’s obligation to pay just compensation when it takes property for public use.

that they harm public trust uses, and can be justified only upon theories of reliance or estoppel.\textsuperscript{56}
In other words, California law requires that the needs of public trust resources be balanced against those of vested water rights. That is the “background principle” and it is fully consistent with the protection of private property rights through the Takings Clause. At best for Professor Echeverria, the public trust could offer a way to limit the rights for which the government must pay compensation. But in light of the United States Supreme Court’s physical takings trilogy, even that argument would face an uphill battle.

Some have also argued that the U.S. Supreme Court’s decision in \textit{Miller v. Schoene},\textsuperscript{57} offers a basis on which the government could avoid the need to pay just compensation, presumably through the “background principle” of the government’s police power. In that case, which involved an infestation of cedar rust that threatened Virginia’s apple orchards. The Supreme Court upheld Virginia’s ability to order the destruction of cedar trees with the infestation, stating that “where the public interest is involved preferment of that interest over the property interest of the individual, to the extent even of its destruction, is one of the distinguishing characteristics of every exercise of the police power which affects property.”\textsuperscript{58} This decision, however, is not at all problematic from a takings perspective. Notwithstanding the assertion by the Supreme Court in \textit{Penn Central Transp. Co. v. City of New York},\textsuperscript{59} which added a parenthetical\textsuperscript{60} to the above-quoted language in \textit{Miller} stating that the destruction of property was without compensation, \textit{Miller} simply leaves the question of compensation open-ended. That conclusion makes sense, for at issue in \textit{Miller} was the question of whether Virginia could in the first instance \textit{destroy} the infested cedar trees, not the subsequent question of whether, if the destruction were legal, Virginia might be required to \textit{pay} just compensation for that destruction. Further, the court in \textit{Penn Central} conceived of the destruction of the cedar trees as not inconsistent with the cedar trees’ owner’s reasonable investment-backed expectations, given the past history of infestations, and so viewed the \textit{Miller} decision as analogous to its decision on the zoning regulations at issue in \textit{Goldblatt v. Hempstead}.\textsuperscript{61} But this determination by the \textit{Penn Central} court cannot properly be applied to the water rights context, for the Supreme Court’s trilogy of takings cases find that the interference with water rights constitutes a physical taking and the \textit{Penn Central} court clearly distinguishes physical takings from regulatory takings.\textsuperscript{62} It is noteworthy that none of the Supreme Court’s trilogy of water rights takings cases even mentions \textit{Miller} in passing; those cases simply seem to have been guided by an entirely different rubric.

4. \textit{Conclusion: There Is No Free Lunch}

Ever since Professor Sax’s seminal article, advocates of the environment have struggled to find ways to evade the Supreme Court’s trilogy of takings cases. With the \textit{National Audubon} decision and the subsequent limitations on water deliveries in the \textit{Tulare Lake Basin} and Klamath decisions, as well as the bypass requirement in the \textit{Casitas} decision, the theoretical question of compensation has become quite real. Indeed, the question of compensation – whether, when and

\textsuperscript{56} \textit{National Audubon Society v. Superior Court}, 33 Cal.3d 419, 446 (1983).
\textsuperscript{57} 276 U.S. 272 (1928).
\textsuperscript{58} \textit{Id.} at 279-80.
\textsuperscript{59} 438 U.S. 104, 125-126 (1978)
\textsuperscript{60} The basis for the parenthetical is, at best, unclear. In the author’s view, the \textit{Penn Central} court retrojected its views on compensation into the \textit{Miller} decision because otherwise the Court’s Takings Clause jurisprudence would have been even more ad hoc than the Court acknowledged.
\textsuperscript{62} \textit{Penn Central}, 438 U.S. at 124.
under what circumstances – has become a real question that affects the operation of the major water projects that provide water to millions of people and millions of acres of farmland, not to mention much of the remaining wild areas across the Nation.

The Supreme Court’s trilogy of takings cases, as well as the more recent trilogy discussed above, based the expropriation doctrine on three basic principles, each of which Justice Scalia probably would have said constituted a “background principle” in his decision in Lucas. First, the Takings Clause is intended to ensure that, when the government acts for the public good, it does not impose the costs of those governmental actions on the few to bear the burdens of the many. This principle is based on the recognition that the political process – writ large to include actions by administrative agencies – disfavors those without political power. Today, unlike the case during the first half of the twentieth century, water right holders (primarily rural and often conservative) are relatively powerless as against urban areas where the majority favors environmental protection.63 Second, the Takings Clause is not intended to prevent governmental action; indeed, it is wholly consistent with vigorous governmental action, as Justice Holmes noted in International Paper. This principle recognizes, as noted above, that societal values have changed over the past fifty years and further recognizes the legitimacy – indeed, the necessity – that governmental policy reflect those changing values. The Takings Clause does not forbid strong governmental action but instead tempers those actions by requiring, in certain circumstances, that the government pay for the costs that it imposes on others in taking vigorous action. Third, the Takings Clause is intended to provide stability of the sort associated with the rule of law, so that individuals can plan their lives, make investments and otherwise benefit from the certainty of a structured and regular legal regime. Each of these principles: the protection of disfavored minorities, enabling the government to act vigorously, and ensuring the certainty associated with the rule of law, is a background principle that Justice Scalia would have endorsed.

The underlying principle of the California Supreme Court’s decision in National Audubon was that, when there is conflict about the appropriate use of water, the government needs to make a thoughtful and considered decision as to what may be in the public interest. Far from the Takings Clause being a hindrance to that type of decision-making, as shown above, the Takings Clause – properly understood – ensures that the government takes all affected interests into account, allows for vigorous action to serve the public, and provides that such actions empower the realm of private action that makes for a vigorous civil society. In all of these ways, therefore, there is no inherent conflict between the Takings Clause and vigorous governmental action or, for that matter, between fish and farmers. Instead, all of these are part of the mosaic of civil society, mediated by the judiciary, that allows for public policy to change while not disadvantaging any discrete and insular group. That is a goal worthy of the United States Constitution.

63 A recent public opinion poll illustrated this point well. Residents of the San Francisco Bay Area, the paradigmatic urban area, generally opposed Governor Brown’s WaterFix project (one or two tunnels under the San Francisco Bay/Sacramento-San Joaquin River Delta) as destructive of the environment until the pollster informed the respondents that much of their water would be delivered by the tunnels. At that point in time, public attitudes flipped to support the tunnels.