NLWJC- Kagan

Counsel - Box 013 - Folder 003

Takings (95) [2]

Billy Tauzin
(Original signature of Member)

103rd CONGRESS
2nd SESSION

H.R. 3875

Insert title here

To enact the Private Property Owners Bill of Rights

IN THE HOUSE OF REPRESENTATIVES

February 23, 1994

Insert sponsor's names here

Mr. Tauzin, (for himself, Mr. Fields of Texas, Mr. Hayes, Mr. Taylor of North Carolina, Mr. Stenholm, Mr. Young of Alaska, Mr. Montgomery, Mr. Stupak, Mr. Stump, Mr. Pombo, Mr. Brewster, Mr. Callahan, Mr. Hutto, Mr. Ortiz, Mr. Laughlin, Mrs. Bentley, Mr. Bonilla, Mr. Cunningham, Mrs. Danner, Mr. Pickett Mr. Packard, Mr. Shaw

BT + 20 cosponsors

A BILL

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

A BILL

TO REQUIRE CERTAIN FEDERAL AGENCIES TO PROTECT THE RIGHTS OF PRIVATE PROPERTY OWNERS.

SECTION 1. SHORT TITLE.

This Act may be cited as the "Private Property Owners Bill of Rights".

SEC.2. FINDINGS AND PURPOSE.

(a) FINDINGS.-The Congress finds the following:

(1) Our Democracy was founded on principles of ownership, use, and control of private property. These principles are embodied in the Fifth Amendment to the Constitution prohibiting the taking of private property without the payment of just compensation.

(2) A number of Federal environmental programs, specifically the Endangered Species Act of 1973 (16 U.S.C. 1531 et seq.) and section 404 of the Federal Water Pollution Control Act (33 U.S.C. 1344) have been implemented by employees, agents, and representatives of the Federal government in a manner that deprives private property owners of the use and control of their property.

(3) As new Federal programs are proposed that would limit and restrict the use of private property to provide habitat for plant and animal species, the rights of private property owners must be recognized and respected.

(4) Private property owners are being forced by Federal policy to resort to extensive, lengthy, and expensive litigation to protect certain basic civil rights guaranteed by the Constitution.

(5) Since many private property owners do not have the financial resources or the extensive commitment of time to proceed in litigation against the Federal government, a clear Federal policy is needed to guide and direct Federal agencies with respect to their implementation of environmental laws that directly impact private property.

(6) While all private property owners should and must abide by current nuisance laws and should not use their property in a manner that harms their neighbors, these laws have traditionally been enacted, implemented, and enforced at the State and local levels where they are best able to protect the rights of all private property owners and local citizens.

(7) While traditional pollution control laws are intended to protect the general public's health and physical welfare, current habitat protection programs are intended to protect the welfare of plant and animal species, while allowing the recreational and aesthetic opportunities for the public.

(b) PURPOSES.-It is the purpose of this Act to provide a consistent Federal policy to encourage, support, and promote the private ownership of property and to ensure that the Constitutional and legal rights of private property owners are protected by the Federal government, its employees, agents, and representatives.

SEC.3. PROTECTION OF PRIVATE PROPERTY RIGHTS.

(a) In implementing and enforcing the Acts, each agency head shall comply with applicable State and Tribal government laws, including laws relating to private property rights and privacy; and shall administer and implement the Acts in a manner that has the least impact on private property owners' constitutional and other legal rights.

(b) Each agency head shall develop and implement rules and regulations for ensuring that the constitutional and other legal rights of private property owners are protected when the agency head makes, or participates with other agencies in the making, of any final decision that restricts the use of private property.

SEC.4. PROPERTY OWNER CONSENT FOR ENTRY.

(a) An agency head may not enter privately-owned property to collect information regarding the property, unless the private property owner has-

(1) consented in writing to that entry;

(2) after providing that consent, been provided notice of that entry; and

(3) been notified that any raw data collected from the property must be made available at no cost, if requested by the private property owner.

(b) Subsection (a) does not prohibit entry onto property for the purpose of obtaining consent or providing notice required under subsection (a).

SEC.5. RIGHT TO REVIEW AND DISPUTE DATA COLLECTED FROM PRIVATE PROPERTY.

An agency head may not use data that is collected on privately-owned property to implement or enforce any of the Acts, unless-

(1) the agency head has provided to the private property owner--

(A) access to the information;

(B) a detailed description of the manner in which the information was collected; and

(C) an opportunity to dispute the accuracy of the information; and

(2) the agency head has determined that the information is accurate, if the private property owner disputes the information pursuant to subparagraph (C).

SEC.6. RIGHT TO AN ADMINISTRATIVE APPEAL OF WETLANDS DECISIONS.

Section 404 of the Federal Water Pollution Control Act (33 U.S.C. 1344) is amended by adding at the end the following new subsection:

"(u) Administrative Appeals.-

(1) The Secretary or Administrator shall, after notice and opportunity for public comment, issue rules to establish procedures to allow private property owners or their authorized representatives an opportunity for an

administrative appeal of the following actions under this section:

"(A) A determination of regulatory jurisdiction over a particular parcel of property.

"(B) The denial of a permit.

"(C) The terms and conditions of a permit.

"(D) The imposition of an administrative penalty.

"(E) The imposition of an order requiring the private property owner to restore or otherwise alter the property.

"(2) Rules issued under paragraph (1) shall provide that any administrative appeal of an action described in paragraph (1) shall be heard and decided by an official other than the official who took the action, and shall be conducted at a location which is in the vicinity of the property involved in the action."

SEC.7. RIGHT TO ADMINISTRATIVE APPEAL UNDER THE ENDANGERED SPECIES ACT OF 1973.

Section 11 of the Endangered Species Act of 1973 (16 U.S.C. 1540) is amended by adding at the end the following new subsection:

"(i) Administrative Appeals.

(1) The Secretary shall, after notice and opportunity for public comment, issue rules to establish procedures to allow private property owners or their authorized representatives an opportunity for an administrative appeal of the following actions under this Act:

"(A) A determination that a particular parcel of property is critical habitat of a listed species.

"(B) The denial of a permit for an incidental take.

"(C) The terms and conditions of an incidental take permit.

"(D) The imposition of an administrative penalty.

"(E) The imposition of an order prohibiting or substantially limiting the use of the property.

"(2) Rules issued under paragraph (1) shall provide that any administrative appeal of an action described in paragraph (1) shall be heard and decided by an official other than the official who took the action, and shall be conducted at a location which is in the vicinity of the parcel of property involved in the action."

SEC.8. COMPENSATION FOR TAKING OF PRIVATE PROPERTY.

(a) ELIGIBILITY.-A private property owner that, as a consequence of a final qualified agency action of an agency head, is deprived of 50 percent or more of the fair market value, or the economically viable use, of the affected portion of the property, as determined by a qualified appraisal expert, is entitled to receive compensation in accordance with this section.

(b) DEADLINE.-Within 90 days after receipt of a final decision of an agency head that deprives a private property owner of fair market value or viable use of property for which compensation is required under subsection (a), the private property owner may submit in writing a request to the agency head for compensation in accordance with subsection (c).

(c) AGENCY HEAD'S OFFER.-The agency head, within 180 days after the receipt of a request for compensation, shall stay the decision and shall provide to the private property owner--

(1) an offer to purchase the affected property of the private property owner at a fair market value assuming no use restrictions under the Acts; and

(2) an offer to compensate the private property owner for the difference between the fair market value of the property without those restrictions and the fair market value of the property with those restrictions.

(d) PRIVATE PROPERTY OWNERS' RESPONSE.-A private property owner shall have 60 days after the date of receipt of the agency head's offers under subsection (c)(1) and (2) to accept one of the offers or to reject both offers. If the private property owner rejects both offers, the private property owner may submit the matter for arbitration to an arbitrator appointed by the agency head from a list of arbitrators submitted to the agency head by the American Arbitration Association. The arbitration shall be conducted in accordance with the real estate valuation arbitration rules of that association. For purposes of this section, an arbitration is binding on the agency head and a private property owner as to the amount, if any, of compensation owed to the private property owner and whether for purposes of this section the private property owner has been deprived of fair market value or viable use of property for which compensation is required under subsection (a).

(e) JUDGMENT.-A qualified agency action of an agency head that deprives a private property owner of property as described in subsection (a), is deemed, at the option of the private property owner to be a taking under the Constitution of the United States and a judgment against the United States if the private property owner-

(1) accepts the agency head's offer under subsection (c); or

(2) submits to arbitration under subsection (d).

(f) PAYMENT.-An agency head shall pay a private property owner any compensation required under the terms of an offer of the agency head that is accepted by the private property owner in accordance with subsection (d), or under a decision of an arbiter under that subsection, by not later than 60 days after the date of the acceptance or the date the issuance of the decision, respectively.

(g) FORM OF PAYMENT.-Payment under this section, as that form is agreed to by the agency head and the private property owner, may be in the form of-

(1) payment of an amount equal to the fair market value of the property on the day before the date of the final qualified agency action with respect to which the property or interest is acquired;

(2) a payment of an amount equal to the reduction in value; or

(3) conveyance of real property or an interest in real property having a fair market value equal to that amount.

(h) OTHER RIGHTS PRESERVED.-This section does not preempt, alter, or limit the availability of any remedy for the taking of property or an interest in property that is available under the Constitution or any other law.

(i) FINAL JUDGMENTS.-When a private property owner unsuccessfully seeks compensation under this section and thereafter files a claim for compensation under the Fifth Amendment to the Constitution and is successful in obtaining a final judgment ordering compensation from the Claims Court for that claim, the agency head making the final agency decision resulting in the taking shall reimburse the judgment fund for the amount of the judgment against the United States from funds appropriated to the agency for the 2 fiscal years following payment.

SEC.9. DEFINITIONS.

For the purpose of this Act the following definitions apply:

(1) "the Acts" means the Endangered Species Act of 1973 (16 U.S.C. 1531 et seq.) and the section 404 of the Federal Water Pollution Control Act (33 U.S.C. 1344).

(2) "agency head" means the Secretary or Administrator with jurisdiction or authority to take a final agency action under the Endangered Species Act of 1973 (16 U.S.C. 1531 et seq.) or section 404 of the Federal Water Pollution Control Act (33 U.S.C. 1344).

(3) "non-Federal person" means a person other than an officer, employee, agent, department, or instrumentality of-

(A) the Federal Government; or

(B) a foreign government.

(4) "private property owner" means a non-Federal person (other than an officer, employee, agent, department, or instrumentality of a State, municipality, or political subdivision of a State, or a State, municipality, or subdivision of a State) that-

(A) owns property referred to in paragraph (5)(A) or (B); or

(B) holds property referred to in paragraph (5)(C).".

(5) "property" means

(A) land;

(B) any interest in land; and

(C) any proprietary water right.

(6) "qualified agency action" means an agency action (as that term is defined in section 551(13) of title 5, United States Code) that is--

(A) under section 404 of the Federal Water Pollution Control Act (33 U.S.C. 1344); or

(B) under the Endangered Species Act of 1973 (16 U.S.C. 1531 et seq.).

SEC.10. PRIVATE PROPERTY OWNER PARTICIPATION IN COOPERATIVE AGREEMENTS.

Section 6 of the Endangered Species Act of 1973 (16 U.S.C. 1535) is amended by adding at the end the following new subsection:

"(j) Notwithstanding any other provision of this section, when the Secretary enters into a management agreement under subsection (b) with any non-Federal person that establishes

restrictions on the use of property, the Secretary shall notify all private property owners or lessees of the property that is subject to the management agreement and shall provide an opportunity for each private property owner or lessee to participate in the management agreement."

cert granted
arguments scheduled: 3/23/94

John T. DOLAN and Florence Dolan, Petitioners on Review,
v.
CITY OF TIGARD, Respondent on Review.

LUBA 91-161.
CA A73769, SC S39393.

Supreme Court of Oregon,
In Banc.

Argued and Submitted Jan. 11, 1993.
Decided July 1, 1993.

Landowners petitioned for judicial review of decision of Land Use Board of Appeals affirming conditions on development of property in question. The Court of Appeals, 113 Or.App. 162, 832 P.2d 853, affirmed, and landowners again appealed. The Supreme Court, Van Hoomissen, J., held that there was direct and reasonable relationship between conditions that city attached to its approval of intensified use and impacts and public needs to which use would give rise.

Affirmed.

Peterson, J., dissented and filed an opinion.

[1] EMINENT DOMAIN ⚷ 2(1.2)
148k2(1.2)
Land use regulation does not effect "taking" of property, within meaning of Fifth Amendment prohibition against taking private property for public use without just compensation, if it substantially advances legitimate state interest and does not deny owner economically viable use of owner's land. U.S.C.A. Const.Amend. 5.
See publication Words and Phrases for other judicial constructions and definitions.

[2] EMINENT DOMAIN ⚷ 2(1)
148k2(1)
In order for exaction to be considered reasonably related to impact, it is essential to show nexus between the two, in order for regulation to substantially advance legitimate state interest; exaction is "reasonably related" to impact if exaction serves same purpose that denial of requested permit would serve.
See publication Words and Phrases for other judicial constructions and definitions.

[3] EMINENT DOMAIN ⚷ 2(1.2)
148k2(1.2)
Reasonable relationship existed between exactions demanded by city in exchange for development permit granted landowners, and thus exactions did not constitute "taking" in violation of Fifth Amendment to United States Constitution, where, in exchange for permit to construction 17,600 square foot building and additional parking area, landowners were required to dedicate portion of their property for improvement of storm drainage system, and to dedicate strip of land adjacent to flood plain as pedestrian/bicycle pathway; increased traffic congestion resulting from development could be offset by means of pedestrian/bicycle pathway, and increasing property's impervious area could increase amount of storm water runoff and need for storm drainage system. U.S.C.A. Const.Amend. 5.

[3] ZONING AND PLANNING ⚷ 382.3
414k382.3
Reasonable relationship existed between exactions demanded by city in exchange for development permit granted landowners, and thus exactions did not constitute "taking" in violation of Fifth Amendment to United States Constitution, where, in exchange for permit to construction 17,600 square foot building and additional parking area, landowners were required to dedicate portion of their property for improvement of storm drainage system, and to dedicate strip of land adjacent to flood plain as pedestrian/bicycle pathway; increased traffic congestion resulting from development could be offset by means of pedestrian/bicycle pathway, and increasing property's impervious area could increase amount of storm water runoff and need for storm drainage system. U.S.C.A. Const.Amend. 5.

****438 *110** David B. Smith, Tigard, argued

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the cause and filed the petition for petitioners on review.

James M. Coleman, of O'Donnell, Ramis, Crew & Corrigan, Portland, argued the cause and filed the response for respondent on review.

Daniel J. Popeo and Paul D. Kamenar, Washington, DC, and Gregory S. Hathaway, of Garvey, Schubert & Barer, Portland, filed a brief amicus curiae for Washington Legal Foundation.

Timothy J. Sercombe and Edward J. Sullivan, of Preston, Thorgrimson, Shidler, Gates, & Ellis, Portland, filed a brief amicus curiae for 1000 Friends of Oregon.

Ronald A. Zumbrun and Robin L. Rivett, Sacramento, CA, and Richard M. Stephens, Bellevue, WA, filed a brief amicus curiae for Pacific Legal Foundation.

*112 VAN HOOMISSEN, Justice.

Petitioners in this land use case seek review of a Court of Appeals' decision affirming a Final Opinion and Order of the Land Use Board of Appeals (LUBA) in favor of respondent City of Tigard (city). Dolan v. City of Tigard, 113 Or.App. 162, 832 P.2d 853 (1992). The issue is whether city has demonstrated the required relationship between the conditions that it attached to its approval of petitioners' proposed land use and the expected impacts of that land use. [FN1] Petitioners argue that, because city failed to demonstrate an "essential nexus" or a "substantial relationship" between the exactions demanded by city and the impacts caused by their proposed development, city's exactions constitute a "taking" under the Fifth Amendment of the federal constitution. [FN2] City responds that it need only show a "reasonable relationship" between the imposition of the conditions and the legitimate public interest advanced. For the reasons that follow, we affirm the Court of Appeals' decision.

FN1. In land-use cases, this sometimes is called the relationship between the "exactions" and the "impacts."

FN2. The Takings Clause of the Fifth Amendment to the Constitution of the United States provides: "[N]or shall private property be taken for public use, without just compensation." That Clause is made applicable to the states by the Due Process Clause of the Fourteenth Amendment. Penn Central Trans. Co. v. New York City, 438 U.S. 104, 122, 98 S.Ct. 2646, 2658, 57 L.Ed.2d 631 (1978). See Annot, Supreme Court's View As to What Constitutes a "Taking" Within Meaning of Fifth Amendment's Prohibition Against Taking of Private Property For Public Use Without Just Compensation, 89 LEd2d 977 (1988). Petitioners also brought a challenge under Article I, section 18, of the Oregon Constitution (Takings Clause). Before this court, however, they expressly have limited themselves to a federal claim. Therefore, we do not address any Oregon constitutional issue.

Petitioners own 1.67 acres of land in downtown Tigard. The land is within city's "central business district" zone and is subject to an "action area" overlay zone (CBD-AA zone). The land's current use is as a retail electric and plumbing supply business, a general retail sales use.

Petitioners applied to city for a permit to remove an existing 9,700-square foot building and to construct a 17,600-square foot building in which to relocate the electric and *113 plumbing supply business and to expand their parking lot (phase I). Petitioners eventually intend to build an additional structure and to provide more parking on the site (phase II); however, the exact nature of that additional expansion is not specified. Petitioners' proposed intensified use (phase I) is permitted outright in the CBD zone; however, the AA overlay zone, which implements the policies of the Tigard Community Development Code, allows city to attach conditions to the development in order to provide for projected transportation and public facility needs.

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**439 City granted petitioners' application, but required as conditions that petitioners dedicate the portion of their property lying within the 100-year floodplain for improvement of a storm drainage system and, further, that they dedicate an additional 15-foot strip of land adjacent to the floodplain as a pedestrian/bicycle pathway. [FN3] Petitioners sought a variance from those conditions, which city denied. [FN4]

FN3. City's decision includes the following relevant condition: "1. The applicant shall dedicate to the City as Greenway all portions of the site that fall within the existing 100-year floodplain [of Fanno Creek] (i.e., all portions of the property below elevation 150.0) and all property 15 feet above (to the east of) the 150.0 foot floodplain boundary. The building shall be designed so as not to intrude into the greenway area." The dedication required by that condition comprises about 7,000 square feet, or approximately 10 percent of the subject real property.

FN4. The applicants requested variances to Community Development Code standards requiring among other things dedication of area of the subject parcel that is within the 100-year floodplain of Fanno Creek and dedication of additional area adjacent to the 100-year floodplain for a pedestrian/bicycle path.

In its 27-page final order, city made the following pertinent findings that petitioners do not challenge concerning the relationship between the dedication conditions and the anticipated impacts of petitioners' project:

"Analysis of Variance Request. The [City of Tigard Planning] Commission does not find that the requirements for dedication of the area adjacent to the floodplain for greenway purposes and for construction of a pedestrian/bicycle pathway constitute a taking of applicant's property. Instead, the Commission finds that the dedication and pathway construction are reasonably related to the applicant's request to intensify the development of this site with a general retail sales use, at first, and other uses to be added later. It is reasonable to assume that customers and *114 employees of the future uses of this site could utilize a pedestrian/bicycle pathway adjacent to this development for their transportation and recreational needs. In fact, the site plan has provided for bicycle parking in a rack in front of the proposed building to provide for the needs of the facility's customers and employees. It is reasonable to expect that some of the users of the bicycle parking provided for by the site plan will use the pathway adjacent to Fanno Creek if it is constructed. In addition, the proposed expanded use of this site is anticipated to generate additional vehicular traffic, thereby increasing congestion on nearby collector and arterial streets. Creation of a convenient, safe pedestrian/bicycle pathway system as an alternative means of transportation could offset some of the traffic demand on these nearby streets and lessen the increase in traffic congestion.

" * * * * * *

"At this point, the report will consider the applicant's request from the requirement to dedicate portions of the site within the 100-year floodplain of Fanno Creek for storm water management purposes. The applicant's Statement of Justification for Variance * * * does not directly address storm water draining concerns * * *.

"The Commission does not find that the requirements for dedication of the area within the floodplain of Fanno Creek for storm water management and greenway purposes constitutes a taking of the applicant's property. Instead, the Commission finds that the required dedication would be reasonably related to the applicant's request to intensify the usage of this site, thereby increasing the site's impervious area. The increased impervious surface would be expected to increase the amount of storm water runoff from the site to Fanno Creek. The Fanno Creek drainage basin has experienced rapid urbanization over the past 30 years causing a significant increase in stream flows after periods of precipitation. The anticipated increased storm water flow from the subject property

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to an already strained creek and drainage basin can only add to the public need to manage the stream channel and floodplain for **440 drainage purposes. Because the proposed development's storm drainage would add to the need for public management of the Fanno Creek floodplain, * * * the requirement of dedication of the floodplain area on the site is related to the applicant's plan to intensify development on the site." City of Tigard Planning Commission Final Order No. 91-09 PC at 13, 20-21.

*115 On petitioners' appeal, the Tigard City Council approved the Planning Commission's final order.

Petitioners appealed to LUBA. They did not challenge the adequacy of city's above quoted findings or their evidentiary support in the record. Rather, petitioners argued that city's dedication requirements are not related to their proposed development and, therefore, that those requirements constitute an uncompensated taking of their property under the Fifth Amendment.

In considering petitioners' federal taking claim, LUBA assumed that city's findings about the impacts of the proposed development were supported by substantial evidence. Dolan v. City of Tigard, 22 Or LUBA 617, 626 n 9 (1992). Accordingly, LUBA considered only whether those findings were sufficient to establish the requisite relationship between the impacts of the proposed development and the exactions imposed, i.e., do city's findings support city's action? LUBA stated:

"Petitioners do not contend that establishing a greenway in the floodplain of Fanno Creek for storm water management purposes, and providing a pedestrian/bicycle pathway system as an alternative means of transportation, are not legitimate public purposes. Further, petitioners do not challenge the sufficiency of the 'nexus' between these legitimate public purposes and the condition imposed requiring dedication of portions of petitioners' property for the greenway and pedestrian/bicycle pathway. Rather, petitioners' contention is that under both the federal and Oregon Constitutions, the relationship between the impacts of the proposed development and the exactions imposed are insufficient to justify requiring dedication of petitioners' property without compensation." Id. at 621 (emphasis in original).

LUBA concluded:

"In view of the comprehensive Master Drainage Plan adopted by respondent providing for use of the Fanno Creek greenway in management of storm water runoff, and the undisputed fact that the proposed larger building and paved parking area on the subject property will increase the amount of impervious surfaces and, therefore, runoff into Fanno Creek, we conclude there is a 'reasonable relationship' between the proposed development and the requirement to dedicate land along Fanno Creek for a greenway.

*116 "Furthermore, the city has adopted a Comprehensive Pedestrian/Bicycle Pathway Plan which provides for a continuous network of pedestrian/bicycle pathways as part of the city's plans for an adequate transportation system. The proposed pedestrian/bicycle pathway segment along the Fanno Creek greenway on the subject property is a link in that network. Petitioners propose to construct a significantly larger retail sales building and parking lot, which will accommodate larger numbers of customers and employees and their vehicles. There is a reasonable relationship between alleviating these impacts of the development and facilitating the provision of a pedestrian/bicycle pathway as an alternative means of transportation." Id. at 626-27.

LUBA held that the challenged conditions requiring dedication of portions of petitioners' property did not constitute an unconstitutional taking under the Fifth Amendment. Id. at 627.

The Court of Appeals affirmed, rejecting petitioners' contention that in Nollan v. California Coastal Comm'n, 483 U.S. 825, 107 S.Ct. 3141, 97 L.Ed.2d 677 (1987), the Supreme Court had abandoned the "reasonable relationship" test for a more

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stringent "essential nexus" test. Dolan v. City of **441 Tigard, supra, 113 Or.App. at 166-67, 832 P.2d 853. [FN5]

FN5. In Nollan, the California Coastal Commission conditioned a permit to the plaintiffs to replace a bungalow on their beachfront lot with a larger house on allowing a public easement to go across their beach, which was located between two public beaches. The California Court of Appeals had found that there was no taking, because the condition did not deprive the landowners of all reasonable use of their property. In an opinion written by Justice Scalia, the Nollan majority concluded that none of the designated purposes was substantially advanced by preserving a right to public access: "It is quite impossible to understand how a requirement that people already on the public beaches be able to walk across the Nollans' property reduces any obstacles to view the beach created by the new house. It is also impossible to understand how it lowers any 'psychological barrier' to using the public beaches, or how it helps to remedy any additional congestion on them caused by construction of the Nollans' new house." Nollan v. California Coastal Comm'n, 483 U.S. 825, 838-39, 107 S.Ct. 3141, 3149, 97 L.Ed.2d 677 (1987).

On review, [FN6] petitioners first argue that city must meet a higher standard than a "reasonable relationship," *117 that there must be an "essential nexus" or "substantial relationship" between the impacts of the development and the dedication requirements; otherwise, imposing exactions as a condition of land use approval is an unconstitutional taking. They rely on Nollan v. California Coastal Comm'n, supra. [FN7] Petitioners argue that, because city has not demonstrated an essential nexus between its exactions and the demands that petitioners' proposed use will impose on public services and facilities, the requisite substantial relationship is missing and, therefore, that the exactions imposed on them by city constitute a taking under the Fifth Amendment. As a fallback position, petitioners argue that city cannot demonstrate even a "reasonable relationship" between their development's impacts and city's exactions. [FN8]

FN6. We review pursuant to ORS 197.850(9), which provides: "The court may affirm, reverse or remand the order. The court shall reverse or remand the order only if it finds: "(a) The order to be unlawful in substance or procedure, but error in procedure shall not be cause for reversal or remand unless the court shall find that substantial rights of the petitioner were prejudiced thereby; "(b) The order to be unconstitutional; or "(c) The order is not supported by substantial evidence in the whole record as to the facts found by the board under ORS 197.830(13)."

FN7. In Nollan, the Supreme Court stated: "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. They have made clear, however, that a broad range of governmental purposes and regulations satisfies these requirements." 483 U.S. at 834-35, 107 S.Ct. at 3147 (footnote omitted). The Supreme Court generally has eschewed any "set formula" for determining when and under what circumstances a given regulation would be seen as going "too far" for purposes of the Fifth Amendment, preferring to engage in essentially ad hoc, factual inquiries. Lucas v. So. Carolina Coastal Council, 505 U.S. ----, 112 S.Ct. 2886, 120 L.Ed.2d 798 (1992); see McDougal v. County of Imperial, 942 F.2d 668, 677-78 (9th Cir 1991) (takings analysis involves essentially ad hoc, factual inquiries).

FN8. Petitioners also argue that, because city's dedication conditions would require

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permanent physical occupation of a portion of their property, they amount to a per se taking. That argument is not well taken. Such dedication conditions are not per se takings, because the occupation may occur only with the owner's permission. Petitioners may avoid physical occupation of their land by withdrawing their application for a development permit. The Supreme Court's analysis in Yee v. City of Escondido, 503 U.S. ----, 112 S.Ct. 1522, 118 L.Ed.2d 153 (1992), settles this point. In Yee, the owner of a mobile home park asserted a per se taking when the local city council adopted a rent control ordinance that, as the park owner argued, transferred a discrete interest in land from the park owner to his tenants. The Yee court held: "The government effects a physical taking only where it requires the landowner to submit to the physical occupation of his land. 'This element of required acquiescence is at the heart of the concept of occupation.' " 503 U.S. at ----, 112 S.Ct. at 1528, 118 L.Ed.2d at 165 (emphasis in original). Because the park owner in Yee could have evicted the tenants and used the property for another purpose, any physical invasion that might occur would not be the result of forced acquiescence. Ibid.

*118 City responds that the "reasonable relationship" test which was widely applied in regulatory takings cases before the Supreme **442 Court's decision in Nollan was not abandoned in Nollan. Under that test, city asserts, the dedication conditions that it imposed on petitioners do not constitute a taking under the Fifth Amendment.

[1] A land-use regulation does not effect a "taking" of property, within the meaning of the Fifth Amendment prohibition against taking private property for public use without just compensation, if it substantially advances a legitimate state interest and does not deny an owner economically viable use of the owner's land. Nollan v. California Coastal Comm'n, supra, 483 U.S. at 835-36, 107 S.Ct. at 3147-48; Keystone Bituminous Coal Assn. v. DeBenedictis, 480 U.S. 470, 495, 107 S.Ct. 1232, 1247, 94 L.Ed.2d 472 (1987): Agins v. City of Tiburon, 447 U.S. 255, 260, 100 S.Ct. 2138, 2141, 65 L.Ed.2d 106 (1980). Requiring an uncompensated conveyance of the easement outright would violate the Fourteenth Amendment. Nollan, supra, 483 U.S. at 834, 107 S.Ct. at 3147.

Before the Supreme Court's decision in Nollan, federal and state courts struggled to identify the precise connection that must exist between the conditions incorporated into a regulation and the governmental interest that the regulation purports to further if the regulation is to be deemed to "substantially advance" that interest. In the midst of a range of tests set forth by various courts, the Ninth Circuit Court of Appeals concluded in Parks v. Watson, 716 F.2d 646, 652 (9th Cir.1983), that, at the very least, a condition requiring an applicant for a governmental benefit to forego a constitutional right is unlawful if the condition is not rationally related to the benefit conferred. By way of example, the Parks court discussed "subdivision exaction" cases, where a city allows a developer to subdivide in exchange for a contribution. In such cases, the court noted, "there is agreement among the states 'that the dedication should have some reasonable relationship to the needs created by the subdivision.' " Id. at 653. Thus, under the Parks analysis, exactions and impacts must be "reasonably related." In Parks, the court held that the exactions had "no rational relationship to *119 any public purpose related to the [impacts of the development]" and, therefore, that the exactions could not be required without just compensation. Id. at 653.

In Nollan, the Court did not purport to abandon the generally recognized "reasonably related" test and, in fact, noted that its approach was "consistent with the approach taken by every other court that has considered the question, with the exception of the California state courts." 483 U.S. at 839, 107 S.Ct. at 3150 (citing a long list of exaction cases, beginning with Parks v. Watson, supra). The Nollan court stated:

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"We can accept, for purposes of discussion, the Commission's proposed test [the 'reasonably related test'] as to how close a 'fit' between the condition and the burden is required, because we find that this case does not meet even the most untailored standards." Id. at 838, 107 S.Ct. at 3149.

Thus, we are unable to agree with petitioners that the Nollan court abandoned the "reasonably related" test. [FN9] We recognize, however, that the Nollan court's application of that test does provide some **443 guidance as to how closely "related" exactions must be to impacts. For example, the Nollan court stated that the evident constitutional propriety of an exaction disappears

FN9. We are not alone in interpreting Nollan in this manner. In Commercial Builders v. Sacramento, 941 F.2d 872 (9th Cir.1991), cert. den., --- U.S. ----, 112 S.Ct. 1997, 118 L.Ed.2d 593 (1992), the Ninth Circuit also held that Nollan did not demand any different level of scrutiny than the one it used in Parks v. Watson, supra: "As a threshold matter, we are not persuaded that Nollan materially changes the level of scrutiny we must apply to this Ordinance. The Nollan Court specifically stated that it did not have to decide 'how close a "fit" between the condition and the burden is required' * * *. It also noted that its holding was 'consistent with the approach taken by every other court [sic] has considered the question,' citing Parks as the lead case in its string cite. * * * "We therefore agree that Nollan does not stand for the proposition that an exaction ordinance will be upheld only where it can be shown that the development is directly responsible for the social ill in question. Rather, Nollan holds that where there is no evidence of a nexus between the development and the problem that the exaction seeks to address, the exaction cannot be upheld." Id., 941 F.2d at 874-75.

"if the condition substituted for the prohibition utterly fails to further the end advanced as the justification for the prohibition. When that essential nexus is eliminated, the situation becomes the same as if California law forbade shouting fire in a crowded theater, but granted dispensations *120 to those willing to contribute $100 to the state treasury." Id. at 837, 107 S.Ct. at 3148. [FN10]

FN10. In Nollan, the Supreme Court said: "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. As indicated earlier, our cases describe the condition for abridgement of property rights through the police power as a 'substantial advanc[ing]' of a legitimate state interest. We are inclined to be particularly careful about the adjective where the actual conveyance of property is made a condition to the lifting of a land-use restriction, since in that context there is heightened risk that the purpose is avoidance of the compensation requirement, rather than the stated police power objective." 483 U.S. at 841, 107 S.Ct. at 3150-51. See Lucas v. So. Carolina Coastal Council, supra, 505 U.S. at ----, 112 S.Ct. at 2893-94, 120 L.Ed.2d at 813 (the Fifth Amendment is violated when land use regulation does not substantially advance legitimate state interests or denies an owner all economically viable use of land).

Petitioners read that passage as indicating that in Nollan the Supreme Court abandoned the "reasonably related" test for a more stringent "essential nexus" test. [FN11] We do not read Nollan that way.

FN11. The term "substantial relationship" is not used in Nollan, although the Court did cite Agins v. City of Tiburon, 447 U.S. 255, 260, 100 S.Ct. 2138, 2141, 65 L.Ed.2d 106 (1980), for the proposition that a regulation must "substantially advance legitimate state interests." Nollan, supra, 483 U.S. at 834, 107 S.Ct. at 3147.

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[2] The quoted passage indicates that, for an exaction to be considered "reasonably related" to an impact, it is essential to show a nexus between the two, in order for the regulation to substantially advance a legitimate state interest, as required by Agins v. City of Tiburon, supra, 447 U.S. at 260, 100 S.Ct. at 2141. In Nollan, the Court stated that, "unless the permit condition serves the same governmental purpose as the development ban, the building restriction is not a valid regulation of land use but 'an out-and-out plan of extortion.' " Nollan v. California Coastal Comm'n, supra, 483 U.S. at 837, 107 S.Ct. at 3149. (citations omitted). Nollan, then, tells us that an exaction is reasonably related to an impact if the exaction serves the same purpose that a denial of the permit would serve. See Dept. of Trans. v. Lundberg, 312 Or. 568, 578, 825 P.2d 641, cert. den., --- U.S. ----, 113 S.Ct. 467, 121 L.Ed.2d 374 (1992) (sidewalk dedication requirement serves the same legitimate governmental purposes that would justify denying permits to develop commercially zoned properties).

[3] In this case, we conclude that city's unchallenged factual findings support the dedication conditions imposed by *121 city. The pedestrian/bicycle pathway condition had an essential nexus to the anticipated development because, as the city found in part

> "the proposed expanded use of this site is anticipated to generate additional vehicular traffic, thereby increasing congestion on nearby collector and arterial streets. Creation of a convenient, safe pedestrian/bicycle pathway system as an alternative means of transportation could offset some of the traffic demand on these nearby streets and lessen the increase in traffic congestion." Dolan v. City of Tigard, supra, 22 Or LUBA at 622 (quoting City of Tigard Planning Commission Final Order at 20).

We are persuaded that the transportation needs of petitioners' employees and customers and the increased traffic congestion that will result from the development of petitioners' land do have an essential nexus to the development of the site, and that this condition, therefore, is reasonably related to the impact of the expansion of their business.

Because the development would involve covering a much larger portion of petitioners' land with buildings and parking, thus **444 increasing the site's impervious area, the condition requiring petitioners to dedicate a portion of their property for improvement of a storm drainage system also is reasonably related to the impact of the expansion of their business. The increased impervious surface would be expected to increase the amount of storm water runoff from the site to Fanno Creek. We hold that there is an essential nexus between the increased storm water runoff caused by petitioners' development and the improvement of a drainage system to accommodate that runoff.

We agree with LUBA's conclusion that the challenged condition requiring dedication of portions of petitioners' property is not an unconstitutional taking of petitioners' property in violation of the Fifth Amendment.

holding no taking

The decision of the Court of Appeals and the order of the Land Use Board of Appeals are affirmed.

PETERSON, Justice, dissenting.

Petitioners own a commercial building in the business district of Tigard. They sought permission to replace an existing building with a larger building. The City of Tigard *122 imposed two conditions to the granting of a building permit: one was that petitioners convey a 15-foot easement adjacent to the east bank of Fanno Creek for "storm water management and greenway purposes"; the other was that petitioners convey an 8-foot easement for a pedestrian/bicycle pathway. Petitioners appealed, asserting a violation of the Fifth Amendment to the Constitution of the United States.

The Fifth Amendment provides in part that "private property [shall not] be taken for public use, without just compensation." This case principally involves questions of federal law. The majority states the issue as follows:

> "The issue is whether city has demonstrated the required relationship between the conditions that it attached to its approval of

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petitioners' proposed land use and the expected impacts of that land use." 317 Or. at 112, 854 P.2d at 438.

Development exactions such as those involved in the present case are not unusual. Over the years, a body of law has developed that permits governments, acting under their police power, to accomplish some things that also could be accomplished under their eminent domain powers. Roberts, Mining with Mr. Justice Holmes, 39 Vand L Rev 287 (1986). [FN1] Local governments, in the exercise of their federal police power and without payment of compensation, have been authorized to require developers to grant easements, make payments, or give up rights as a condition to the development of their property.

FN1. A note in the Boston University Law Review contains an excellent historical overview of exactions. See Note, " 'Take' My Beach Please!": Nollan v. California Coastal Commission and a Rational-Nexus Constitutional Analysis of Development Exactions, 69 BUL Rev 823, 848-49 (1989).

The federal rule that applies to such exactions has two facets. First, the exaction must serve a legitimate state purpose. Second, the exaction must be reasonably necessary to address problems, conditions, or burdens created by the underlying change of use of the landowner's property. Nollan v. California Coastal Comm'n, 483 U.S. 825, 107 S.Ct. 3141, 97 L.Ed.2d 677 (1987). The second facet requires a showing that the development created a need for the exaction. If a recited need for an exaction is only an excuse for what actually is a taking, the exaction is invalid.

*123 As does the majority, I place the burden of proving these two elements on the government that exacts the conditions. In establishing that the need for the exactions arises from an increased intensity of use, the government must show more than a theoretical nexus. It must show that the granting of the permit probably will create specific problems, burdens, or conditions that theretofore did not exist, and that the exaction will serve to alleviate the specific problems, burdens, or conditions that probably will arise from the granting of the permit. More than general statements of concern about increased traffic or public **445 safety are required to support, as permissible regulation, what otherwise would be a taking. The Nollan opinion states:

"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. As indicated earlier, our cases describe the condition for abridgement of property rights through the police power as a 'substantial advanc[ing]' of a legitimate state interest. We are inclined to be particularly careful about the adjective where the actual conveyance of property is made a condition to the lifting of a land-use restriction, since in that context there is heightened risk that the purpose is avoidance of the compensation requirement, rather than the stated police power objective." 483 U.S. at 841, 107 S.Ct. at 3150-51.

Here, Tigard had two possible ways to obtain the easements. The first, and less desirable from the city's view, was to condemn the easements. That would require payment of compensation under either the state or federal constitution. [FN2] A second possible way to obtain the easements is by making the granting of them a condition to the granting of a permit.

FN2. Article I, section 18, of the Oregon Constitution, provides in part: "Private property shall not be taken for public use * * * without just compensation * * *." In this court, petitioners make no claim under the Oregon Constitution.

I am satisfied that the city has met the first test, that the exactions serve a legitimate state purpose. The pivotal issue is whether the second requirement--that the need for the exactions arises from increased intensity of use--has been established. For the answer to this question, the court *124 should look at

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the city's order to determine whether its findings of fact demonstrate a need for the exactions ordered by the city. [FN3]

FN3. Petitioners do not contest the sufficiency of the evidence to support the findings of fact.

The city's order makes repeated references to other city ordinances that contemplate the creation of a floodplain greenway and a pedestrian/bicycle pathway. The order suggests that such exactions were to be attached to all requests for improvements. For example:

"Code Section 18.86.040 contains interim standards which are to be addressed for new developments in the CBD-AA zone. These requirements are intended to provide for projected transportation and public facility needs of the area. The City may attach conditions to any development within an action area prior to adoption of the design plan to achieve the following objectives:

" * * * * *

"b. The development shall facilitate pedestrian/bicycle circulation if the site is located on a street with designed bike paths or adjacent to a designated greenway/open space/park. Specific items to be addressed are as follows:

"i. Provision of efficient, convenient and continuous pedestrian and bicycle transit circulation systems, linking developments by requiring dedication and construction of pedestrian and bike paths identified in the comprehensive plan. * * *

" * * * * *

"A bicycle/pedestrian path is called for in this general location in the City of Tigard's Parks Master Plans (Murase and Associates, 1988) and the Tigard Area Comprehensive Pedestrian/Bicycle Pathway Plan 1974. In addition, Community Development Code Section 18.120.180.A.8 requires that where landfill and/or development is allowed within or adjacent to the 100-year floodplain, the City shall require the dedication of sufficient open land area for greenway adjoining and within the floodplain in accordance with the adopted pedestrian/bicycle plan. The proposed development site includes land within the 100 year floodplain of Fanno Creek.

" * * * * *

*125 "It is imperative that a continuous pathway be developed in order for the **446 paths to function as an efficient, convenient, and safe system. Omitting a planned for section of the pathway system, as the variance would result in if approved, would conflict with Plan purposes and result in an incomplete system that would not be efficient, convenient, or safe. The requested variance therefore would conflict with the City's adopted policy of providing a continuous pathway system intended to serve the general public good and therefore fails to satisfy the first variance approval criterion.

" * * * * *

"As noted above, approval of the variance request would have an adverse effect on the existing partially completed pathway system because a system cannot fully function with missing pieces. If this planned for section is omitted from the pathway system, the system in this area will be much less convenient and efficient. If the pedestrian and bicycle traffic is forced onto City streets at this point in the pathway system because of this missing section, pedestrian and bicycle safety will be lessened. * * *

" * * * * *

"Code Section 18.120.180.A.8 requires that where landfill and/or development is allowed within or adjacent to the 100-year floodplain, the City shall require the dedication of sufficient open land area for greenway adjoining and within the floodplain in accordance with the adopted pedestrian/bicycle plan. * * *

" * * * * *

" * * * As already noted, the code at Section 18.120.080.A.8 and many other related sections (e.g., Section 18.84.040.A.7) require dedication of floodplain areas, not only for construction of pathways, but primarily to allow for public management of the storm water drainage system. * * *

" * * * In order to accomplish these public improvements related to increasing the flow efficiency of Fanno Creek, dedication of the area of the subject site within the 100-year

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floodplain and also the adjacent five feet is imperative. Not requiring dedication of this area as a condition of development approval, as the applicant's variance proposal requests, would clearly conflict with purposes and policies of the Comprehensive Plan, Community Development Code, and the City's Master Drainage Plan." City of Tigard Planning Commission Final Order No. 91-09PC, pp 9-22 (1991) (emphasis added).

*126 The quoted sections show the resolve of the city to get the easements and the purpose for the easements. However, the quoted sections of the order in no way establish that the easements necessarily are needed because of increased intensity of use of petitioners' (or anyone else's) property. Unquestionably, omission of the easements from any of the planned floodwater or pathway developments would "result in an incomplete system." But that is beside the point. If all that need be shown is that easements are needed for a legitimate public purpose, the constitutional protection evaporates. The critical question before us is whether the order shows an increased intensity of such magnitude that it creates the need for the exaction of the easements.

The following findings specifically relate to increased intensity of use in connection with the pedestrian/bicycle pathway easement:

"[T]he Commission finds that the dedication and pathway construction are reasonably related to the applicant's request to intensify the development of this site with a general retail sales use, at first, and other uses to be added later. It is reasonable to assume that customers and employees of the future uses of this site could utilize a pedestrian/bicycle pathway adjacent to this development for their transportation and recreational needs. In fact, the site plan has provided for bicycle parking in a rack in front of the proposed building to provide for the needs of the facility's customers and employees. It is reasonable to expect that some of the users of the bicycle parking provided for by the site plan will **447 use the pathway adjacent to Fanno Creek if it is constructed." Id. at 13.

Whether the first sentence of the quoted material is viewed as a legal conclusion or a finding of ultimate fact, it must be supported by findings of fact. Supporting findings are lacking. The sentence beginning with "It is reasonable to assume" is speculation, not a finding. Moreover, it states the obvious. If a pathway were built, of course customers and employees "could utilize [the pathway] for their transportation and recreational needs." Concerning the third sentence, the fact that the plans contain a reference to a bicycle rack does not establish increased intensity of use (particularly because other city ordinances require, as was required in this case, provision for bicycle parking in the plans).

*127 The city did make some specific findings relevant to the pedestrian/bicycle pathway:

"In addition, the proposed expanded use of this site is anticipated to generate additional vehicular traffic thereby increasing congestion on nearby collector and arterial streets. Creation of a convenient, safe pedestrian/bicycle pathway system as an alternative means of transportation could offset some of the traffic demand on these nearby streets and lessen the increase in traffic congestion." Ibid.

The real issue is whether the findings that a larger building is being constructed and the two sentences of the quoted findings are sufficient to support the pathway exaction. I maintain that if the city is going to, in effect, take a portion of one's property incident to an application for a permit to develop the property, the findings of need arising from increased intensity of use must be more direct and more substantial than those. The findings of fact that the bicycle pathway system "could offset some of the traffic demand" is a far cry from a finding that the bicycle pathway system will, or is likely to, offset some of the traffic demand. (Emphasis added.) In essence, the only factual findings that support the pedestrian/bicycle pathway exaction are these: A larger commercial building is to be constructed and, as a result, there is

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anticipated to be "additional vehicular traffic." That is not enough to support what amounts to a virtual taking of petitioners' land. I would require findings that demonstrate that the increased intensity of use requires the exaction. These findings do not establish that the pathway exaction is needed because of any higher intensity of use.

I turn to the flood control and greenway easement. The factual conclusion asserted to support this exaction reads as follows:

> "The increased impervious surface would be expected to increase the amount of storm water runoff from the site to Fanno Creek. The Fanno Creek drainage basin has experienced rapid urbanization over the past 30 years causing a significant increase in stream flows after periods of precipitation. The anticipated increased storm water flow from the subject property to an already strained creek and drainage basin can only add to the public need to manage the stream channel and floodplain for drainage purposes. Because the proposed development's storm drainage would add to the *128 need for public management of the Fanno Creek floodplain, the Commission finds that the requirement of dedication of the floodplain area on the site is related to the applicant's plan to intensify development on the site." Id. at 21.

Those findings do not establish such an increased intensity of use as to require the exaction of the flood control and greenway easement. All that these findings establish is that there will be some increase in the amount of storm water runoff from the site. A thimbleful? The constitution requires more than that.

Jurisprudence lags behind the times. It is its nature to react, rather than to act. Today, forces of change are at work that challenge traditional "takings" law, forces that jurisprudence has not yet had time to accommodate. Those forces coalesce into a single phenomenon: increasing interdependence among us. There are more of us, we live closer together, and we are increasingly interconnected. That phenomenon is not **448 going to change except, perhaps, to accelerate.

With respect to "takings" jurisprudence, two essentially opposing tendencies emerge. The first is a tendency to recognize the legitimacy of attempts by state and local governments to regulate private property in ways that once might have been unthinkable. No person has the same range of possible uses for real property that he or she once may have had, because many uses that once were possible now may be forbidden because of their palpable impact on others. In truth, by regulation, governments regularly and permissibly take private property for public use without compensation. [FN4]

> FN4. "For a long time, there has been no Just Compensation Clause in constitutional law. Three words, 'for public use,' have been cut away from it, treated as if they prescribed a distinct command of their own. Instead of the Just Compensation Clause as written, we have a Takings Clause engulfed in confusion and a Public Use Clause of nearly complete insignificance. "This strange breach is never remarked on. It is simply presupposed, most clearly, by those who complain about the toothlessness of the 'Public Use Clause' in modern doctrine. Their complaint is an old story: it has to do with the line of Supreme Court decisions in which the public-purpose requirement received its current, broad construction." Rubenfeld, Usings, 102 Yale LJ 1077, 1078-79 (1993) (footnotes omitted; emphasis in original).

*129 The second tendency--to some extent an outgrowth of the first--is that state and local governments attempt to further particular goals by placing limitations on uses of private property that only will be lifted if the property owners "dedicate" some portion of their property to the particular government program. The temptation, particularly in times of limited tax revenues, is to place the primary burden for funding projects on the shoulders of those whose private property happens to be in the neighborhood of the

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proposed projects, whether or not the projects bear any relationship to the property or to the uses to which the property is put.

The first of these tendencies seems benign and, even if it were otherwise, it would be inevitable. Some private property rights are going to have to bend, if our increasingly interdependent society is to continue to evolve and progress peacefully. The second tendency is an attempt at licensed extortion. The trouble is, what once would have been recognizable as extortion may turn, in time, into something considered benign because it is so familiar. That transmogrification is encouraged every time a court cannot distinguish whether a particular governmental regulation falls within the ambit of the second tendency, rather than the first.

In cases involving exactions attached to permits, hearings are held, evidence is taken, and findings are made, and the government must show why the development spawns the need for the exaction. The findings relating to the need for exactions arising from future increased intensity of use after the property is developed must establish more than a potential increase in intensity; they must establish more than some increase in intensity; they must establish a bona fide need for the extraction that arises from the development.

Because this case turns on federal law, the majority and I rely on the same federal precedents. Why, then, do we arrive at different results? Under current federal law, if a local government follows the procedures mandated by federal law, it can, incident to the regulation of use of land, take a large part of the owner's ownership rights, so long as there remains some economically feasible private use. Lucas v. So. Carolina Coastal Council, 505 U.S. ----, ---- n. 8, 112 S.Ct. 2886, 2895 n. 8, 120 L.Ed.2d 798, 815 n. 8 (1992). As the Lucas opinion itself states, landowners who lose 95 percent of the beneficial use of their ***130** property are entitled to no compensation, whereas landowners who lose all beneficial use fully are compensated. Ibid.

That power of the government gives it tremendous leverage against landowners who seek to improve their property. Because of the profound potential adverse effects that the substantive rule places on landowners, I read the federal precedents to require a high threshold that the government must meet in showing that the exaction ****449** is needed because of intensified land use by the landowner. It is not enough for a government to read the latest pertinent decision of the Supreme Court of the United States and insert in its order "magic words" from the decision (such as "the dedication and pathway construction are reasonably related to the applicant's request to intensify the development of this site"). If in fact the government needs to take part of a landowner's property because of intensified uses of the developed property, imposing the burden of showing precisely why the need in fact exists is a modest burden to place on the government. Such precision is lacking in this order.

From reading the order in this case, I am convinced that Tigard decided that it needed a pedestrian/bicycle pathway and a flood control greenway easement along Fanno Creek. One way of getting these, free of cost, is by requiring all owners who propose to change the use of their property to convey the easements to the city. That is what happened in this case.

The findings here do not establish any cognizable remediable purpose attributable to the change in use. The conditions relating to the pedestrian/bicycle pathway and flood control and greenway easements are impermissible on the record made in this case. I therefore dissent.

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funds, and this purpose is effectuated by the reading we have always before given § 302. Today's departure from this understanding seriously undermines the functioning of the statute. The Court's action is not only uninvited and unnecessary; it is a radical departure from the doctrine of judicial restraint.

CONCRETE PIPE AND PRODUCTS OF CALIFORNIA, INC., Petitioner

v.

CONSTRUCTION LABORERS PENSION TRUST FOR SOUTHERN CALIFORNIA.

No. 91-904.

Argued Dec. 1, 1992.

Decided June 14, 1993.

Employer filed action to set aside or modify arbitrator's decision as to employer's withdrawal liability to multiemployer pension plan under the Multiemployer Pension Plan Amendments Act (MPPAA). The United States District Court for the Central District of California granted plan's motion to confirm award, and employer appealed. The Court of Appeals for the Ninth Circuit, 936 F.2d 576, affirmed. The Supreme Court of the United States granted certiorari. The Supreme Court, Justice Souter, held that: (1) presumptions in the MPPAA favoring multiemployer plans did not violate due process rights of the employer by denying access to an impartial decision maker, and (2) MPPAA provisions did not violate the employer's Fifth Amendment rights as applied to employer's withdrawal liability.

Affirmed.

Justice O'Connor filed a concurring opinion.

Justice Scalia did not join Part III-B-1-b of the opinion of the Court.

Justice Thomas filed an opinion concurring in part and concurring in the judgment.

1. Constitutional Law ⇐251.5

Due process requires a neutral and detached judge in the first instance, and the command is no different when a legislature delegates adjudicative functions to a private party. U.S.C.A. Const.Amend. 5.

2. Constitutional Law ⇐255(1), 278(1)

Before one may be deprived of a protected interest, whether in a criminal or civil setting, one is entitled as matter of due process of law to an adjudicator who is not in situation which would offer possible temptation to the average man as judge, which might lead him not to hold balance nice, clear and true. U.S.C.A. Const. Amend. 5.

3. Constitutional Law ⇐251.5

Even appeal and trial de novo will not cure the failure to provide a neutral and detached adjudicator required as a matter of due process. U.S.C.A. Const.Amend. 5.

4. Constitutional Law ⇐251.5

Requirement that justice must satisfy the appearance of justice, even to the point of requiring trial by judges who have no actual bias and would do their best to weigh the scales of justice equally between contending parties, applies where private party is given statutory authority to adjudicate a dispute. U.S.C.A. Const.Amend. 5.

5. Constitutional Law ⇐318(1)

Where an initial determination is made by a party acting in an enforcement capacity, due process may be satisfied by providing for a neutral adjudicator to conduct de novo review of all factual and legal issues. U.S.C.A. Const.Amend. 5.

. Constitutional Law ⇐275(5)
Pensions ⇐103

Multiemployer pension plan trustees ct only in an enforcement capacity, not in n adjudicatory capacity, and thus alleged ias or appearance of bias in trustees' ini- ial determination of an employer's with- rawal liability did not alone violate due rocess right to impartial adjudicator; first djudication was proceeding that occurred efore arbitrator, not trustees' initial deter- ination of withdrawal liability. Employee etirement Income Security Act of 1974, § 4219(b)(1, 2), 4221(a)(1), as amended, 29 .S.C.A. §§ 1399(b)(1, 2), 1401(a)(1).

. Pensions ⇐86

Under the Multiemployer Pension Plan mendments Act, presumption favoring de- ermination made by plan sponsor shifts urden of proof or persuasion to employer. mployee Retirement Income Security Act f 1974, § 4221(a)(3)(A), as amended, 29 .S.C.A. § 1401(a)(3)(A).

. Evidence ⇐94

Burden of showing something by a preponderance of the evidence" simply re- uires trier of fact to believe that the exis- ence of fact is more probable than its onexistence before he may find in favor of arty who has burden to persuade judge of act's existence.

See publication Words and Phrases for other judicial constructions and definitions.

. Federal Courts ⇐853

A finding is "clearly erroneous," when lthough there is evidence to support it, eviewing body on the entire evidence is eft with the firm and definite conviction hat a mistake has been committed.

See publication Words and Phrases for other judicial constructions and definitions.

0. Federal Courts ⇐847, 848

A showing of "unreasonableness" vould require even greater certainty of rror on the part of a reviewing body than he "clearly erroneous" standard would re- uire.

11. Evidence ⇐598(1)

A "preponderance of the evidence" standard is customarily used to prescribe one possible burden or standard of proof before a trier of fact in the first instance; before such burden can be satisfied, fact finder must evaluate the raw evidence, finding it to be sufficiently reliable and sufficiently probative to demonstrate the truth of the asserted proposition with requisite degree of certainty.

12. Federal Courts ⇐847, 848, 850

The terms "clearly erroneous" and "unreasonable" are customarily used to describe, not a degree of certainty that some fact has been proven in the first instance, but a degree of certainty that a fact finder in the first instance made a mistake in concluding that a fact has been proven under the applicable standard of proof, and thus are "standards of review" normally applied by reviewing courts to determinations of fact made at trial by courts that have made those determinations in an adjudicatory capacity. Fed.Rules Civ.Proc.Rule 52(a), 28 U.S.C.A.

See publication Words and Phrases for other judicial constructions and definitions.

13. Federal Courts ⇐853

Review under the "clearly erroneous" standard is significantly deferential, requiring a "clear and firm conviction that a mistake has been committed."

14. Federal Courts ⇐847, 848

Application of a "reasonableness" standard of review is more deferential than a "clearly erroneous" standard, requiring reviewer to sustain finding of fact unless it is so unlikely that no reasonable person would find it to be true, to whatever required degree of proof.

15. Pensions ⇐103

When unresolved dispute as to employer's withdrawal liability under Multiemployer Pension Plan Amendments Act is referred to arbitration, arbitrator is reviewing body, as is clear from his obligation

absent contrary showing to deem certain determinations by plan sponsor correct, but is also a reviewing body invested with further powers of a fact finder, as is clear from his power to take evidence in course of his review and from presumption of correctness that district court is bound to give his findings of fact. Employee Retirement Income Security Act of 1974, § 4221(b)(3), (c), as amended, 29 U.S.C.A. § 1401(b)(3), (c).

16. Evidence ⇐90

Although where the burden of proof lies on a given issue is rarely without consequence, and frequently may be dispositive to the outcome of the litigation or application, the locus of the burden of persuasion is normally not an issue of federal constitutional moment outside the criminal law area.

17. Pensions ⇐103

Under the Multiemployer Pension Plan Amendments Act, it is entirely sensible to burden party which is more likely to have information relevant to the facts about its withdrawal from the plan with the obligation to demonstrate that facts treated by the plan as amounting to a withdrawal did not occur as alleged. Employee Retirement Income Security Act of 1974, §§ 2 et seq., 4001–4402, as amended, 29 U.S.C.A. §§ 1001 et seq., 1301–1461; U.S.C.A. Const.Amends. 5, 14.

18. Constitutional Law ⇐48(4.1)
Pensions ⇐103

Where statutory language was ambiguous and legislative history contained very little relevant to issue of degree of certainty on part of arbitrator required for employer to overcome sponsor's factual conclusions as to employer's withdrawal liability under Multiemployer Pension Plan Amendments Act, statute would be construed so as to avoid serious doubt as to its constitutionality. Employee Retirement Income Security Act of 1974, §§ 2 et seq., 4001–4402, as amended, 29 U.S.C.A. §§ 1001 et seq., 1301–1461; U.S.C.A. Const.Amends. 5, 14.

19. Constitutional Law ⇐275(5)
Pensions ⇐23

Under the Multiemployer Pension Plan Amendments Act, employer had burden of persuasion in a dispute over a sponsor's factual determination as to the employer's withdrawal liability; because that burden did not foreclose any factual issue from independent consideration by the arbitrator, there was no constitutional infirmity in it. Employee Retirement Income Security Act of 1974, §§ 2 et seq., 4001–4402, as amended, 29 U.S.C.A. §§ 1001 et seq., 1301–1461; U.S.C.A. Const.Amends. 5, 14.

20. Pensions ⇐103

Determining the date of an employer's "complete withdrawal" from a multiemployer pension plan is a mixed question of fact and law. Employee Retirement Income Security Act of 1974, §§ 2 et seq., 4001–4402, as amended, 29 U.S.C.A. §§ 1001 et seq., 1301–1461.

See publication Words and Phrases for other judicial constructions and definitions.

21. Constitutional Law ⇐275(5)
Pensions ⇐103

Where dispute as to employer's withdrawal liability under Multiemployer Pension Plan Amendments Act was referred to arbitration, arbitrator's determination of date of withdrawal did not involve misapplication of statutory presumption and did not deprive employer of right to procedural due process; because plan's letter to employer contained no statement of facts justifying trustees' demand and because parties entered into factual stipulation in district court prior to commencing arbitration, there were virtually no contested factual determination as to which arbitrator might have deferred. Employee Retirement Income Security Act of 1974, §§ 2 et seq., 4001–4402, as amended, 29 U.S.C.A. §§ 1001 et seq., 1301–1461; U.S.C.A. Const.Amends. 5, 14.

22. **Pensions ⇐103**

Multiemployer pension plan actuary's selection of assumptions and methods to calculate withdrawal liability under the Multiemployer Pension Plan Amendments Act were not vulnerable to suggestions of bias or its appearance; actuaries were trained professionals subject to regulatory standard, and technical nature of actuary's assumptions and methods and necessity for applying same assumptions and methods in more than one context limited any opportunity actuary might otherwise have to act unfairly toward withdrawing employer. Employee Retirement Income Security Act of 1974, §§ 302(c)(3), 3041, 3042, as amended, 29 U.S.C.A. §§ 1082(c)(3), 1241, 1242; 26 U.S.C.A. § 7701(a)(35).

23. **Pensions ⇐103**

Legislative history of ERISA provision suggested that actuarial assumptions in regard to withdrawal liability had to be independently determined by an actuary, and that it was inappropriate for employer to substitute his judgment for that of qualified actuary with respect to those assumptions. Employee Retirement Income Security Act of 1974, § 302, as amended, 29 U.S.C.A. § 1082.

24. **Pensions ⇐103**

In action in which employer challenged reasonableness of assumptions and methodology chosen by multiemployer pension plan actuary to calculate withdrawal liability, employer's burden of proof to show by preponderance of evidence that actuarial assumptions and methods were in the aggregate unreasonable was a burden to show that the combination of methods and assumptions used would not have been acceptable to a reasonable actuary. Employee Retirement Income Security Act of 1974, § 4221(a)(3)(A, B), as amended, 29 U.S.C.A. § 1401(a)(3)(A, B).

25. **Constitutional Law ⇐275(5)**
Pensions ⇐23

Under Multiemployer Pension Plan Amendments Act, requiring employer challenging methods and assumptions used by actuary in calculating employer's withdrawal liability to show that combination of methods and assumptions employed in calculation would not have been acceptable to reasonable actuary, did not violate due process. Employee Retirement Income Security Act of 1974, § 4221(a)(3)(A, B), as amended, 29 U.S.C.A. § 1401(a)(3)(A, B); U.S.C.A. Const.Amends. 5, 14.

26. **Pensions ⇐24.1**

Multiemployer pension plan has features of insurance scheme in which employers spread risk that their employees will meet plan's vesting requirements and obtain entitlement to benefits.

27. **Constitutional Law ⇐275(5)**
Pensions ⇐23

Multiemployer Pension Plan Amendments Act, as applied to an employer which withdrew from a multiemployer pension plan, did not violate employer's substantive due process rights as the imposition of withdrawal liability was rationally related to terms of the employer's participation in plan; employer had voluntarily decided to enter plan after trustee decisions affecting calculation of withdrawal liability had been made and thus could have assessed any implications for plan's future liability at that time and could have assessed implications for future liability of identity of plan trustees before it decided to enter plan whose trustees included representatives of contractors' associations of which employer was not member. Employee Retirement Income Security Act of 1974, §§ 2 et seq., 4001–4402, as amended, 29 U.S.C.A. §§ 1001 et seq., 1301–1461; U.S.C.A. Const.Amends. 5, 14.

28. **Eminent Domain ⇐2(1.1)**
Pensions ⇐23

Application of Multiemployer Pension Plan Amendments Act, a regulatory statute that was otherwise within Congress' powers, could not be defeated by private contractual provisions such as those protecting an employer from liability beyond what was specified in its collective bargain-

ing and trust agreement, and thus application was not an unconstitutional taking. Employee Retirement Income Security Act of 1974, §§ 2 et seq., 4001–4402, as amended, 29 U.S.C.A. §§ 1001 et seq., 1301–1461; U.S.C.A. Const.Amend. 5.

29. Eminent Domain ⇐2(1.1)
Pensions ⇐23

Application of Multiemployer Pension Plan Amendments Act to employer's withdrawal liability did not deprive employer of its property without just compensation; government did not physically invade or permanently appropriate employer's assets for its own use, so as to warrant application of analysis as to whether portion of property taken was taken in its entirety. Employee Retirement Income Security Act of 1974, §§ 2 et seq., 4001–4402, as amended, 29 U.S.C.A. §§ 1001 et seq., 1301–1461; U.S.C.A. Const.Amend. 5.

30. Eminent Domain ⇐2(1.1)
Pensions ⇐23

Application of Multiemployer Pension Plan Amendments Act to employer's withdrawal liability did not take employer's property without just compensation on theory that property was taken for sole purpose of protecting Pension Benefit Guarantee Corporation (PBGC), a government body, from being forced to honor its pension insurance; any benefit to PBGC deriving from solvency of pension trust fund was merely incidental to primary congressional objective of protecting covered employees and beneficiaries of pension trusts. Employee Retirement Income Security Act of 1974, §§ 2 et seq., 4001–4402, as amended, 29 U.S.C.A. §§ 1001 et seq., 1301–1461; U.S.C.A. Const.Amend. 5.

31. Constitutional Law ⇐23
Eminent Domain ⇐2(1.1)

Mere diminution in value of property, however serious, is insufficient to demonstrate a taking for purposes of the Fifth Amendment, and thus fact that employer had to pay out estimated 46% of shareholder equity to satisfy its withdrawal liability obligation to multiemployer pension plan was insufficient to show that an unconstitutional taking had occurred. Employee Retirement Income Security Act of 1974, §§ 2 et seq., 4001–4402, as amended, 29 U.S.C.A. §§ 1001 et seq., 1301–1461; U.S.C.A. Const.Amend. 5.

32. Eminent Domain ⇐2(1.1)
Pensions ⇐23

Application of Multiemployer Pension Plan Amendments Act to employer's withdrawal liability did not amount to a "taking" based on degree of interference with employer's reasonable investment backed expectations; at time employer began contributions to plan, pension plans had long been subject to federal regulation, plan was subject to ERISA, withdrawing employer faced contingent liability up to 30% of its net worth, and it had no reasonable basis to expect that legislative ceiling on contingent liability would never be lifted. Employee Retirement Income Security Act of 1974, §§ 4062(b), 4064, as amended, 29 U.S.C.A. §§ 1362(b), 1364; U.S.C.A. Const. Amend. 5.

Syllabus *

The Multiemployer Pension Plan Amendments Act of 1980 (MPPAA) amended the Employee Retirement Income Security Act of 1974 (ERISA) to provide that in certain circumstances an employer withdrawing from a multiemployer plan incurs as "withdrawal liability" a share of the plan's unfunded vested benefits, 29 U.S.C. §§ 1381, 1391. Withdrawal liability is assessed by means of a notification by the "plan sponsor" and a demand for payment. § 1399(b). An unresolved dispute is referred to arbitration, where (1) the sponsor's factual determinations are "presumed correct" unless a contesting party "shows by a preponderance of the evidence that

* The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States v. Detroit Lumber Co.*, 200 U.S. 321, 337, 26 S.Ct. 282, 287, 50 L.Ed. 499.

the determination was unreasonable or clearly erroneous," § 1401(a)(3)(A); and (2) the sponsor's actuary's calculation of a plan's unfunded vested benefits is presumed correct unless a contesting party "shows by a preponderance of the evidence" that, *inter alia*, "the actuarial assumptions and methods" used in a calculation "were, in the aggregate, unreasonable," § 1401(a)(3)(B). Petitioner Concrete Pipe is an employer charged with withdrawal liability by the trustees of respondent, a multiemployer pension plan (Plan). After losing in arbitration, Concrete Pipe filed an action to set aside or modify the arbitrator's decision and raised a constitutional challenge to the MPPAA, but the court granted the Plan's motion to confirm the award. The Court of Appeals affirmed.

Held:

1. The MPPAA does not unconstitutionally deny Concrete Pipe an impartial adjudicator by placing the determination of withdrawal liability in the plan sponsor, here the trustees, subject to § 1401's presumptions. Pp. 2276–2286.

(a) Even assuming that the possibility of trustee bias toward imposing the greatest possible withdrawal liability would suffice to bar the trustees from serving as adjudicators of Concrete Pipe's withdrawal liability because of their fiduciary obligations to beneficiaries of the Plan, the Due Process Clause is not violated here because the first adjudication in this case was the arbitration proceeding, not the trustees' initial liability determination. The trustees' statutory notification and demand obligations are taken in an enforcement capacity. Pp. 2276–2278.

(b) Nor did the arbitrator's adjudication deny Concrete Pipe its right to procedural due process. While the § 1401(a)(3)(A) presumption shifts the burden of persuasion to the employer, the statute is incoherent with respect to the degree of certainty required to overturn a plan sponsor's factual determination. In light of the assumed bias, deference to a plan sponsor's determination would raise a substantial due process question. The uncertainty raised by this incoherent statute is resolved by applying the canon requiring that an ambiguous statute be construed to avoid serious constitutional problems unless such construction is plainly contrary to Congress's intent. Thus, the presumption is construed to place the burden on the employer to disprove an alleged fact by a preponderance permitting independent review by the arbitrator of the trustees' factual determinations. The approach taken by the arbitrator and courts below in this case is not inconsistent with this Court's interpretation of the first presumption. Pp. 2278–2284.

(c) The § 1401(a)(3)(B) presumption also raises no procedural due process issue. The assumptions and methods used in calculating withdrawal liability are selected in the first instance not by the trustees, but by the plan actuary, § 1393(c), who is a trained professional subject to regulatory standards. The technical nature of the assumptions and methods, and the necessity for applying the same ones in several contexts, limit an actuary's opportunity to act unfairly toward a withdrawing employer. Moreover, since § 1401(a)(3)(B) speaks not about the reasonableness of the trustees' conclusions of historical fact, but about the aggregate reasonableness of the actuary's assumptions and methods in calculating the dollar liability figure, an employer's burden to overcome the presumption is simply to show that an apparently unbiased professional, whose obligations tend to moderate any claimed inclination to come down hard on withdrawing employers, has based a calculation on a combination of methods and assumptions that falls outside the range of reasonable actuarial practice. Pp. 2284–2286.

2. The MPPAA, as applied, does not deny substantive due process in violation of the Fifth Amendment. The imposition of withdrawal liability is clearly rational here because Concrete Pipe's liability is based on a proportion of its contributions during

its participation in the Plan. Pp. 2286–2289.

3. The MPPAA, as applied, did not take Concrete Pipe's property without just compensation. The application of a regulatory statute that is otherwise within Congress's powers may not be defeated by private contractual provisions, such as those protecting Concrete Pipe from liability beyond what was specified in its collective-bargaining and trust agreements. See *Connolly v. Pension Benefit Guaranty Corporation*, 475 U.S. 211, 223–224, 106 S.Ct. 1018, 1025, 89 L.Ed.2d 166. Examining Concrete Pipe's relationship with the Plan in light of the three factors the Court has said have particular significance for takings claims confirms this. First, the Government did not physically invade or permanently appropriate Concrete Pipe's assets for its own use. Second, Concrete Pipe has failed to show that having to pay out an estimated 46% of shareholder equity is an economic impact out of proportion to its experience with the Plan, since diminution in a property's value, however serious, is insufficient to demonstrate a taking. See, *e.g.*, *Euclid v. Ambler Realty Co.*, 272 U.S. 365, 384, 47 S.Ct. 114, 117, 71 L.Ed. 303. Third, the conditions on its contractual promises did not give Concrete Pipe a reasonable expectation that it would not be faced with liability for promised benefits. At the time it began making payments to the Plan, pension plans had long been subject to federal regulation. Indeed, withdrawing employers already faced contingent liability under ERISA, and Concrete Pipe's reliance on ERISA's original limitation of contingent withdrawal liability to 30% of net worth is misplaced, there being no reasonable basis to expect that the legislative ceiling would never be lifted, see *Usery v. Turner Elkhorn Mining Co.*, 428 U.S. 1, 16, 96 S.Ct. 2882, 2893, 49 L.Ed.2d 752. Pp. 2289–2292.

936 F.2d 576 (CA9 1991), affirmed.

SOUTER, J., delivered the opinion of the Court, which was unanimous except insofar as O'CONNOR, J., did not join the sentence to which n. 29 is attached, SCALIA, J., did not join Part III–B–1–b, and THOMAS, J., did not join Part III–B–1. O'CONNOR, J., filed a concurring opinion. THOMAS, J., filed an opinion concurring in part and concurring in the judgment.

Dennis R. Murphy, Sacramento, CA, for petitioner.

John S. Miller, Jr., Los Angeles, CA, for respondent.

Carol Connor Flowe, Washington, DC, for Pension Ben. Guar. Corp. as amicus curiae by special leave of the Court.

Justice SOUTER delivered the opinion of the Court.[1]

Respondent Construction Laborers Pension Trust for Southern California (the Plan) is a multiemployer pension trust fund established under a Trust Agreement executed in 1962. Petitioner Concrete Pipe and Products of California, Inc. (Concrete Pipe), is an employer and former contributor to the Plan that withdrew from it and was assessed "withdrawal liability" under provisions of the Employee Retirement Income Security Act of 1974 (ERISA), 29 U.S.C. §§ 1301–1461 (1988 ed. and Supp. II), added by the Multiemployer Pension Plan Amendments Act of 1980 (MPPAA), Pub.L. 96–364, 94 Stat. 1208. Concrete Pipe contends that the MPPAA's assessment and arbitration provisions worked to deny it procedural due process. And, although we have upheld the MPPAA against constitutional challenge under the substantive component of the Due Process Clause and the Takings Clause, *Pension Benefit Guaranty Corporation v. R.A. Gray & Co.*, 467 U.S. 717, 104 S.Ct. 2709, 81 L.Ed.2d 601 (1984); *Connolly v. Pension Benefit Guaranty Corporation*, 475 U.S. 211, 106 S.Ct. 1018, 89 L.Ed.2d 166 (1986), Concrete Pipe contends that, as applied to it, the MPPAA violates these provi-

1. Justice SCALIA does not join Part III–B–1–b of this opinion.

"[a]ppellants' claim of an illegal taking gains nothing from the fact that the employer in the present litigation was protected by the terms of its contract from any liability beyond the specified contributions to which it had agreed. 'Contracts, however express, cannot fetter the constitutional authority of Congress. Contracts may create rights of property, but when contracts deal with a subject matter which lies within the control of Congress, they have a congenital infirmity. Parties cannot remove their transactions from the reach of dominant constitutional power by making contracts about them.'

"If the regulatory statute is otherwise within the powers of Congress, therefore, its application may not be defeated by private contractual provisions." 475 U.S., at 223–224, 106 S.Ct., at 1025 (citations omitted).

Nothing has changed since these words were first written.[27]

Following *Connolly*, the next step in our analysis is to subject the operative facts, including the facts of the contractual relationship, to the standards derived from our prior Takings Clause cases. See *Id.*, at 224–225, 106 S.Ct., at 1026. They have identified three factors with particular significance for assessing the results of the required "ad hoc, factual inquir[y] into the circumstances of each particular case." *Connolly, Id.*, at 224, 106 S.Ct., at 1026. The first is the nature of the governmental action. Again, our analysis in *Connolly* applies with equal force to the facts before us today.

"[T]he Government does not physically invade or permanently appropriate any of the employer's assets for its own use. Instead, the Act safeguards the participants in multiemployer pension plans by requiring a withdrawing employer to fund its share of the plan obligations incurred during its association with the plan. This interference with the property rights of an employer arises from a public program that adjusts the benefits and burdens of economic life to promote the common good and, under our cases, does not constitute a taking requiring Government compensation." *Id.*, at 225, 106 S.Ct., at 1026.

[29] We reject Concrete Pipe's contention that the appropriate analytical framework is the one employed in our cases dealing with permanent physical occupation or destruction of economically beneficial use of real property. See *Lucas v. South Carolina Coastal Council*, 505 U.S. ——, ——, 112 S.Ct. 2886, 2890–2892, 120 L.Ed.2d 798 (1992). While Concrete Pipe tries to shoehorn its claim into this analysis by asserting that "[t]he property of [Concrete Pipe] which is taken, is taken in its entirety," Brief for Petitioner 37, we rejected this analysis years ago in *Penn Central Transportation Co. v. New York City*, 438 U.S. 104, 130–131, 98 S.Ct. 2646, 2662, 57 L.Ed.2d 631 (1978), where we held that a claimant's parcel of property could not first be divided into what was taken and what was left for the purpose of demonstrating the taking of the former to be complete and hence compensable. To the extent that any portion of property is taken, that portion is always taken in its entirety; the relevant question, however, is whether the property taken is all, or only a portion of the parcel in question. Accord, *Keystone Bituminous Coal Assn. v. DeBenedictis*, 480 U.S. 470, 497, 107 S.Ct. 1232, 1248, 94 L.Ed.2d 472 (1987) ("[O]ur test for regulatory taking requires us to compare the value that has been taken from the property with the value that remains in the property, [and] one of the critical questions is determining how to define the unit of property 'whose value is to furnish the denominator of the fraction' ") (citation omitted).

27. To the extent that Concrete Pipe's argument could be characterized as a challenge to the determination that, notwithstanding the contractual language, it is a "defined benefits plan" under the statute, this is a question on which Concrete Pipe did not seek review. See *supra*, at 2271.

[30] There is no more merit in Concrete Pipe's contention that its property is impermissibly taken "for the sole purpose of protecting the PBGC [a government body] from being forced to honor its pension insurance." Brief for Petitioner 38; see also Brief for Midwest Motor Express, Inc., et al. as *Amici Curiae* 12. That the solvency of a pension trust fund may ultimately redound to the benefit of the PBGC, which was set up in part to guarantee benefits in the event of plan failure, is merely incidental to the primary congressional objective of protecting covered employees and beneficiaries of pension trusts like the Plan. "[H]ere, the United States has taken nothing for its own use, and only has nullified a contractual provision limiting liability by imposing an additional obligation that is otherwise within the power of Congress to impose." *Connolly*, 475 U.S., at 224, 106 S.Ct. at 1025–1026.

Nor is Concrete Pipe's argument about the character of the governmental action strengthened by the fact that Concrete Pipe lacked control over investment and benefit decisions that may have increased the size of the unfunded vested liability. The response to the same argument raised under the substantive Due Process Clause is appropriate here: although Concrete Pipe is not itself a member of any of the management associations that are represented among the trustees of the fund, Concrete Pipe voluntarily chose to participate in the plan, notwithstanding this fact. See *supra* at 2289, and n. 26.

[31] As to the second factor bearing on the taking determination, the severity of the economic impact of the plan, Concrete Pipe has not shown its withdrawal liability here to be "out of proportion to its experience with the plan," *Id.*, at 226, 106 S.Ct., at 1026, notwithstanding the claim that it will be required to pay out 46% of shareholder equity. As a threshold matter, the Plan contests this figure, arguing that Concrete Pipe, a wholly owned subsidiary of Concrete Pipe & Products Co., Inc., was simply "formed to facilitate the purchase ... of certain assets of Cen-Vi-Ro," Brief for Respondent 2, and that the relevant issue turns on the diminution of net worth of the parent company, not Concrete Pipe. See Tr. of Oral Arg. 29. But this dispute need not be resolved, for even assuming that Concrete Pipe has used the appropriate measure in determining the portion of net worth required to be paid out, our cases have long established that mere diminution in the value of property, however serious, is insufficient to demonstrate a taking. See, *e.g.*, *Euclid v. Ambler Realty Co.*, 272 U.S. 365, 384, 47 S.Ct. 114, 117, 71 L.Ed. 303 (1926) (approximately 75% diminution in value); *Hadacheck v. Sebastian*, 239 U.S. 394, 405, 36 S.Ct. 143, 143, 60 L.Ed. 348 (1915) (92.5% diminution).

[32] The final factor is the degree of interference with Concrete Pipe's "reasonable investment-backed expectations." 475 U.S., at 226, 106 S.Ct., at 1027. Again, *Connolly* controls. At the time Concrete Pipe purchased Cen-Vi-Ro and began its contributions to the Plan, pension plans had long been subject to federal regulation, and " '[t]hose who do business in the regulated field cannot object if the legislative scheme is buttressed by subsequent amendments to achieve the legislative end.' *FHA v. The Darlington, Inc.*, 358 U.S. 84, 91, 79 S.Ct. 141, 146, 3 L.Ed.2d 132 (1958). See also *Usery v. Turner Elkhorn Mining Co.*, 428 U.S., at 15–16, 96 S.Ct., at 2892 and cases cited therein." *Connolly, supra*, 475 U.S., at 227, 106 S.Ct., at 1027. Indeed, at that time the Plan was already subject to ERISA, and a withdrawing employer faced contingent liability up to 30% of its net worth. See 29 U.S.C. § 1364 (1976 ed.); see also 29 U.S.C. § 1362(b) (1976 ed.); *Connolly, supra*, at 226–227, 106 S.Ct., at 1027; *Gray*, 467 U.S., at 721, 104 S.Ct., at 2713. Thus while Concrete Pipe argues that requiring it to pay a share of promised benefits "ignores express and bargained-for conditions on [its contractual] promises," *Connolly*, 475 U.S., at 235, 106 S.Ct., at 1031 (O'CONNOR, J., concurring), it could have had no reasonable expectation

David H. LUCAS, Petitioner,

v.

SOUTH CAROLINA COASTAL COUNCIL.

No. 91-453.

Argued March 2, 1992.

Decided June 29, 1992.

Owner of beachfront property brought action alleging that application of South Carolina Beachfront Management Act to his property constituted a taking without just compensation. The Common Pleas Court of Charleston County, Larry R. Patterson, Special Judge, awarded landowner damages and appeal was taken. The South Carolina Supreme Court, Toal, J., reversed, 304 S.C. 376, 404 S.E.2d 895. Certiorari was granted, 112 S.Ct. 436, and the Supreme Court, Justice Scalia held that: (1) property owner's claim was ripe for review, and (2) South Carolina Supreme Court erred in applying "harmful or noxious uses" principle to decide case.

Reversed and remanded.

Justice Kennedy, filed opinion concurring in the judgment.

Justices Blackmun and Stevens filed separate dissenting opinions.

Justice Souter filed separate statement.

1. Federal Courts ⇐510

That South Carolina Beachfront Management Act, which landowner claimed deprived him of all economically viable use of property, was amended, after briefing and argument before South Carolina Supreme Court but prior to issuance of that court's opinion, to authorize issuance of special permits for construction or reconstruction of habitable structures in certain circumstances did not render unripe landowner's deprivation claim; South Carolina Supreme Court rested its judgment on merits of claim, rather than on ripeness grounds, thus precluding landowner from asserting any takings claim with respect to deprivation which had occurred prior to amendment, and landowner alleged injury-in-fact as to preamendment deprivation. S.C.Code 1976, §§ 48-39-250 et seq., 48-39-290(D)(1).

2. Eminent Domain ⇐2(1)

There are two discrete categories of regulatory deprivations that are compensable under Fifth Amendment without case-specific inquiry into public interest advanced in support of restraint; the first encompasses regulations that compel property owner to suffer physical invasion of his property, and the second concerns situation in which regulation denies all economically beneficial or productive use of land. U.S.C.A. Const.Amend. 5.

3. Eminent Domain ⇐2(1)

When owner of real property has been called upon to sacrifice all economically beneficial use of property in name of common good, that is, to leave his property economically idle, he has suffered a "taking" within meaning of Fifth Amendment. U.S.C.A. Const.Amend. 5.

See publication Words and Phrases for other judicial constructions and definitions.

4. Eminent Domain ⇐2(1)

There are a number of noneconomic interests in land, such as interest in excluding strangers from one's land, the impairment of which will invite exceedingly close scrutiny under takings clause. U.S.C.A. Const.Amend. 5.

5. Federal Courts ⇐501

Where finding that was premise of petition for certiorari was not challenged in brief in opposition, court would not entertain argument in respondent's brief on the merits that such finding was erroneous.

6. Eminent Domain ⇐2(1.1)

South Carolina Supreme Court erred in applying rule that harmful or noxious uses of property may be proscribed by govern-

ment regulation without requirement of compensation to decide case in which property owner alleged that all economically viable use of his property was precluded by South Carolina Beachfront Management Act, which barred him from erecting any permanent habitable structures on his land; in order to avoid paying compensation, state had to identify background principles of nuisance and property law that prohibited use as landowner presently intended in circumstances in which property was presently found. U.S.C.A. Const.Amend. 5.

7. Eminent Domain ⇐69

Where state seeks to sustain regulation that deprives land of all economically beneficial use, it may resist compensation only if logically antecedent inquiry into nature of owner's estate shows that proscribed use interests were not part of his title to begin with. U.S.C.A. Const.Amend. 5.

8. Eminent Domain ⇐69

In order for state regulations prohibiting all economically beneficial use of land to be imposed without necessity of paying compensation to landowners, regulation must do no more than duplicate result that could have been achieved in the courts by adjacent landowners or other uniquely affected persons under state's law of private nuisance, or by state under its complimentary power to abate nuisances that affect public generally, or otherwise. U.S.C.A. Const.Amend. 5.

9. Eminent Domain ⇐114

Although state may elect to rescind regulation which prohibits all economically beneficial use of land, and thereby avoid having to pay compensation for permanent deprivation of land, where regulation has already worked a taking of all use of property, no subsequent action by government can relieve it of duty to provide compensation for period during which taking was effective. U.S.C.A. Const.Amend. 5.

Syllabus *

In 1986, petitioner Lucas bought two residential lots on a South Carolina barrier island, intending to build single-family homes such as those on the immediately adjacent parcels. At that time, Lucas's lots were not subject to the State's coastal zone building permit requirements. In 1988, however, the state legislature enacted the Beachfront Management Act, which barred Lucas from erecting any permanent habitable structures on his parcels. He filed suit against respondent state agency, contending that, even though the Act may have been a lawful exercise of the State's police power, the ban on construction deprived him of all "economically viable use" of his property and therefore effected a "taking" under the Fifth and Fourteenth Amendments that required the payment of just compensation. See, *e.g.*, *Agins v. Tiburon*, 447 U.S. 255, 261, 100 S.Ct. 2138, 2141, 65 L.Ed.2d 106. The state trial court agreed, finding that the ban rendered Lucas's parcels "valueless," and entered an award exceeding $1.2 million. In reversing, the State Supreme Court held itself bound, in light of Lucas's failure to attack the Act's validity, to accept the legislature's "uncontested ... findings" that new construction in the coastal zone threatened a valuable public resource. The court ruled that, under the *Mugler v. Kansas*, 123 U.S. 623, 8 S.Ct. 273, 31 L.Ed. 205, line of cases, when a regulation is designed to prevent "harmful or noxious uses" of property akin to public nuisances, no compensation is owing under the Takings Clause regardless of the regulation's effect on the property's value.

Held:

1. Lucas's takings claim is not rendered unripe by the fact that he may yet be able to secure a special permit to build on his property under an amendment to the Act passed after briefing and argument

* The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States v. Detroit Lumber Co.*, 200 U.S. 321, 337, 26 S.Ct. 282, 287, 50 L.Ed. 499.

before the State Supreme Court, but prior to issuance of that court's opinion. Because it declined to rest its judgment on ripeness grounds, preferring to dispose of the case on the merits, the latter court's decision precludes, both practically and legally, any takings claim with respect to Lucas's preamendment deprivation. Lucas has properly alleged injury-in-fact with respect to this preamendment deprivation, and it would not accord with sound process in these circumstances to insist that he pursue the late-created procedure before that component of his takings claim can be considered ripe. Pp. 2890–2892.

2. The State Supreme Court erred in applying the "harmful or noxious uses" principle to decide this case. Pp. 2892–2902.

(a) Regulations that deny the property owner all "economically viable use of his land" constitute one of the discrete categories of regulatory deprivations that require compensation without the usual case-specific inquiry into the public interest advanced in support of the restraint. Although the Court has never set forth the justification for this categorical rule, the practical—and economic—equivalence of physically appropriating and eliminating all beneficial use of land counsels its preservation. Pp. 2892–2895.

(b) A review of the relevant decisions demonstrates that the "harmful or noxious use" principle was merely this Court's early formulation of the police power justification necessary to sustain (without compensation) *any* regulatory diminution in value; that the distinction between regulation that "prevents harmful use" and that which "confers benefits" is difficult, if not impossible, to discern on an objective, value-free basis; and that, therefore, noxious-use logic cannot be the basis for departing from this Court's categorical rule that total regulatory takings must be compensated. Pp. 2896–2899.

(c) Rather, the question must turn, in accord with this Court's "takings" jurisprudence, on citizens' historic understandings regarding the content of, and the State's power over, the "bundle of rights" that they acquire when they take title to property. Because it is not consistent with the historical compact embodied in the Takings Clause that title to real estate is held subject to the State's subsequent decision to eliminate all economically beneficial use, a regulation having that effect cannot be newly decreed, and sustained, without compensation's being paid the owner. However, no compensation is owed—in this setting as with all takings claims—if the State's affirmative decree simply makes explicit what already inheres in the title itself, in the restrictions that background principles of the State's law of property and nuisance already place upon land ownership. Cf. *Scranton v. Wheeler*, 179 U.S. 141, 163, 21 S.Ct. 48, 57, 45 L.Ed. 126. Pp. 2899–2901.

(d) Although it seems unlikely that common-law principles would have prevented the erection of any habitable or productive improvements on Lucas's land, this state-law question must be dealt with on remand. To win its case, respondent cannot simply proffer the legislature's declaration that the uses Lucas desires are inconsistent with the public interest, or the conclusory assertion that they violate a common-law maxim such as *sic utere tuo ut alienum non laedas*, but must identify background principles of nuisance and property law that prohibit the uses Lucas now intends in the property's present circumstances. Pp. 2901–2902.

304 S.C. 376, 404 S.E.2d 895 (1991), reversed and remanded.

SCALIA, J., delivered the opinion of the Court, in which REHNQUIST, C.J., and WHITE, O'CONNOR, and THOMAS, JJ., joined. KENNEDY, J., filed an opinion concurring in the judgment. BLACKMUN, J., and STEVENS, J., filed dissenting opinions. SOUTER, J., filed a separate statement.

A. Camden Lewis, Columbia, S.C., for petitioner.

C.C. Harness, III, Charleston, S.C., for respondent.

Justice SCALIA delivered the opinion of the Court.

In 1986, petitioner David H. Lucas paid $975,000 for two residential lots on the Isle of Palms in Charleston County, South Carolina, on which he intended to build single-family homes. In 1988, however, the South Carolina Legislature enacted the Beachfront Management Act, S.C.Code § 48–39–250 *et seq.* (Supp.1990) (Act), which had the direct effect of barring petitioner from erecting any permanent habitable structures on his two parcels. See § 48–39–290(A). A state trial court found that this prohibition rendered Lucas's parcels "valueless." App. to Pet. for Cert. 37. This case requires us to decide whether the Act's dramatic effect on the economic value of Lucas's lots accomplished a taking of private property under the Fifth and Fourteenth Amendments requiring the payment of "just compensation." U.S. Const., Amdt. 5.

I

A

South Carolina's expressed interest in intensively managing development activities in the so-called "coastal zone" dates from 1977 when, in the aftermath of Congress's passage of the federal Coastal Zone Management Act of 1972, 86 Stat. 1280, as amended, 16 U.S.C. § 1451 *et seq.*, the legislature enacted a Coastal Zone Management Act of its own. See S.C.Code § 48–39–10 *et seq.* (1987). In its original form, the South Carolina Act required owners of coastal zone land that qualified as a "critical area" (defined in the legislation to include beaches and immediately adjacent sand dunes, § 48–39–10(J)) to obtain a permit from the newly created South Carolina Coastal Council (respondent here) prior to committing the land to a "use other than the use the critical area was devoted to on [September 28, 1977]." § 48–39–130(A).

In the late 1970's, Lucas and others began extensive residential development of the Isle of Palms, a barrier island situated eastward of the City of Charleston. Toward the close of the development cycle for one residential subdivision known as "Beachwood East," Lucas in 1986 purchased the two lots at issue in this litigation for his own account. No portion of the lots, which were located approximately 300 feet from the beach, qualified as a "critical area" under the 1977 Act; accordingly, at the time Lucas acquired these parcels, he was not legally obliged to obtain a permit from the Council in advance of any development activity. His intention with respect to the lots was to do what the owners of the immediately adjacent parcels had already done: erect single-family residences. He commissioned architectural drawings for this purpose.

The Beachfront Management Act brought Lucas's plans to an abrupt end. Under that 1988 legislation, the Council was directed to establish a "baseline" connecting the landward-most "point[s] of erosion . . . during the past forty years" in the region of the Isle of Palms that includes Lucas's lots. § 48–39–280(A)(2) (Supp. 1988).[1] In action not challenged here, the Council fixed this baseline landward of Lucas's parcels. That was significant, for under the Act construction of occupiable improvements[2] was flatly prohibited sea-

1. This specialized historical method of determining the baseline applied because the Beachwood East subdivision is located adjacent to a so-called "inlet erosion zone" (defined in the Act to mean "a segment of shoreline along or adjacent to tidal inlets which is influenced directly by the inlet and its associated shoals," S.C. Code § 48–39–270(7) (Supp.1988)) that is "not stabilized by jetties, terminal groins, or other structures," § 48–39–280(A)(2). For areas other than these unstabilized inlet erosion zones, the statute directs that the baseline be established "along the crest of the primary oceanfront sand dune." § 48–39–280(A)(1).

2. The Act did allow the construction of certain nonhabitable improvements, *e.g.*, "wooden walkways no larger in width than six feet," and "small wooden decks no larger than one hun-

ward of a line drawn 20 feet landward of, and parallel to, the baseline, § 48-39-290(A) (Supp.1988). The Act provided no exceptions.

B

Lucas promptly filed suit in the South Carolina Court of Common Pleas, contending that the Beachfront Management Act's construction bar effected a taking of his property without just compensation. Lucas did not take issue with the validity of the Act as a lawful exercise of South Carolina's police power, but contended that the Act's complete extinguishment of his property's value entitled him to compensation regardless of whether the legislature had acted in furtherance of legitimate police power objectives. Following a bench trial, the court agreed. Among its factual determinations was the finding that "at the time Lucas purchased the two lots, both were zoned for single-family residential construction and ... there were no restrictions imposed upon such use of the property by either the State of South Carolina, the County of Charleston, or the Town of the Isle of Palms." App. to Pet. for Cert. 36. The trial court further found that the Beachfront Management Act decreed a permanent ban on construction insofar as Lucas's lots were concerned, and that this prohibition "deprive[d] Lucas of any reasonable economic use of the lots, ... eliminated the unrestricted right of use, and render[ed] them valueless." *Id.*, at 37. The court thus concluded that Lucas's properties had been "taken" by operation of the Act, and it ordered respondent to pay "just compensation" in the amount of $1,232,387.50. *Id.*, at 40.

The Supreme Court of South Carolina reversed. It found dispositive what it described as Lucas's concession "that the Beachfront Management Act [was] properly and validly designed to preserve ... South Carolina's beaches." 304 S.C. 376, 379, 404 S.E.2d 895, 896 (1991). Failing an attack on the validity of the statute as such, the court believed itself bound to accept the "uncontested ... findings" of the South Carolina legislature that new construction in the coastal zone—such as petitioner intended—threatened this public resource. *Id.*, at 383, 404 S.E.2d, at 898. The Court ruled that when a regulation respecting the use of property is designed "to prevent serious public harm," *id.*, at 383, 404 S.E.2d, at 899 (citing, *inter alia*, *Mugler v. Kansas*, 123 U.S. 623, 8 S.Ct. 273, 31 L.Ed. 205 (1887)), no compensation is owing under the Takings Clause regardless of the regulation's effect on the property's value.

Two justices dissented. They acknowledged that our *Mugler* line of cases recognizes governmental power to prohibit "noxious" uses of property—*i.e.*, uses of property akin to "public nuisances"—without having to pay compensation. But they would not have characterized the Beachfront Management Act's "*primary* purpose [as] the prevention of a nuisance." 304 S.C., at 395, 404 S.E.2d, at 906 (Harwell, J., dissenting). To the dissenters, the chief purposes of the legislation, among them the promotion of tourism and the creation of a "habitat for indigenous flora and fauna," could not fairly be compared to nuisance abatement. *Id.*, at 396, 404 S.E.2d, at 906. As a consequence, they would have affirmed the trial court's conclusion that the Act's obliteration of the value of petitioner's lots accomplished a taking.

We granted certiorari. 502 U.S. ——, 112 S.Ct. 436, 116 L.Ed.2d 455 (1991).

II

[1] As a threshold matter, we must briefly address the Council's suggestion that this case is inappropriate for plenary review. After briefing and argument before the South Carolina Supreme Court, but prior to issuance of that court's opinion, the Beachfront Management Act was amended to authorize the Council, in cer-

dred forty-four square feet." §§ 48-39-290(A)(1) and (2) (Supp.1988).

tain circumstances, to issue "special permits" for the construction or reconstruction of habitable structures seaward of the baseline. See S.C.Code § 48-39-290(D)(1) (Supp.1991). According to the Council, this amendment renders Lucas's claim of a permanent deprivation unripe, as Lucas may yet be able to secure permission to build on his property. "[The Court's] cases," we are reminded, "uniformly reflect an insistence on knowing the nature and extent of permitted development before adjudicating the constitutionality of the regulations that purport to limit it." *MacDonald, Sommer & Frates v. County of Yolo*, 477 U.S. 340, 351, 106 S.Ct. 2561, 2567, 91 L.Ed.2d 285 (1986). See also *Agins v. Tiburon*, 447 U.S. 255, 260, 100 S.Ct. 2138, 2141, 65 L.Ed.2d 106 (1980). Because petitioner "has not yet obtained a final decision regarding how [he] will be allowed to develop [his] property," *Williamson County Regional Planning Comm'n of Johnson City v. Hamilton Bank*, 473 U.S. 172, 190, 105 S.Ct. 3108, 3118, 87 L.Ed.2d 126 (1985), the Council argues that he is not yet entitled to definitive adjudication of his takings claim in this Court.

We think these considerations would preclude review had the South Carolina Supreme Court rested its judgment on ripeness grounds, as it was (essentially) invited to do by the Council, see Brief for Respondent 9, n. 3. The South Carolina Supreme Court shrugged off the possibility of further administrative and trial proceedings, however, preferring to dispose of Lucas's takings claim on the merits. Compare, *e.g.*, *San Diego Gas & Electric Co. v. City of San Diego*, 450 U.S. 621, 631-632, 101 S.Ct. 1287, 1293-1294, 67 L.Ed.2d 551 (1981). This unusual disposition does not preclude Lucas from applying for a permit under the 1990 amendment for *future* construction, and challenging, on takings grounds, any denial. But it does preclude, both practically and legally, any takings claim with respect to Lucas's *past* deprivation, *i.e.*, for his having been denied construction rights during the period before the 1990 amendment. See generally *First English Evangelical Lutheran Church of Glendale v. County of Los Angeles*, 482 U.S. 304, 107 S.Ct. 2378, 96 L.Ed.2d 250 (1987) (holding that temporary deprivations of use are compensable under the Takings Clause). Without even so much as commenting upon the consequences of the South Carolina Supreme Court's judgment in this respect, the Council insists that permitting Lucas to press his claim of a past deprivation on this appeal would be improper, since "the issues of whether and to what extent [Lucas] has incurred a temporary taking ... have simply never been addressed." Brief for Respondent 11. Yet Lucas had no reason to proceed on a "temporary taking" theory at trial, or even to seek remand for that purpose prior to submission of the case to the South Carolina Supreme Court, since as the Act then read, the taking was unconditional and permanent. Moreover, given the breadth of the South Carolina Supreme Court's holding and judgment, Lucas would plainly be unable (absent our intervention now) to obtain further state-court adjudication with respect to the 1988-1990 period.

In these circumstances, we think it would not accord with sound process to insist that Lucas pursue the late-created "special permit" procedure before his takings claim can be considered ripe. Lucas has properly alleged Article III injury-in-fact in this case, with respect to both the pre-1990 and post-1990 constraints placed on the use of his parcels by the Beachfront Management Act.[3] That there is a discretionary "special

3. Justice BLACKMUN insists that this aspect of Lucas's claim is "not justiciable," *post*, at 2907, because Lucas never fulfilled his obligation under *Williamson County Regional Planning Comm'n v. Hamilton Bank of Johnson City*, 473 U.S. 172, 105 S.Ct. 3108, 87 L.Ed.2d 126 (1985), to "submi[t] a plan for development of [his] property" to the proper state authorities. *Id.*, at 187, 105 S.Ct., at 3117. See *post*, at 2908. But such a submission would have been pointless, as the Council stipulated below that no building permit would have been issued under the 1988 Act, application or no application. Record 14 (stipulations). Nor does the peculiar posture of

permit" procedure by which he may regain—for the future, at least—beneficial use of his land goes only to the prudential "ripeness" of Lucas's challenge, and for the reasons discussed we do not think it prudent to apply that prudential requirement here. See *Esposito v. South Carolina Coastal Council*, 939 F.2d 165, 168 (CA4 1991), cert. pending, No. 91-941.[4] We leave for decision on remand, of course, the questions left unaddressed by the South Carolina Supreme Court as a consequence of its categorical disposition.[5]

III

A

Prior to Justice Holmes' exposition in *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 43 S.Ct. 158, 67 L.Ed. 322 (1922), it was generally thought that the Takings Clause reached only a "direct appropriation" of property, *Legal Tender Cases*, 12 Wall. 457, 551, 20 L.Ed. 287 (1871), or the functional equivalent of a "practical ouster of [the owner's] possession." *Transportation Co. v. Chicago*, 99 U.S. 635, 642, 25 L.Ed. 336 (1879). See also *Gibson v. United States*, 166 U.S. 269, 275-276, 17 S.Ct. 578, 580, 41 L.Ed. 996 (1897). Justice Holmes recognized in *Mahon*, however, that if the protection against physical appropriations of private property was to be meaningfully enforced, the government's power to redefine the range of interests included in the ownership of property was necessarily constrained by constitutional limits. 260 U.S., at 414-415, 43 S.Ct., at 160. If, instead, the uses of private proper-

this case mean that we are without Article III jurisdiction, as Justice BLACKMUN apparently believes, see *post*, at 2907, and n. 5. Given the South Carolina Supreme Court's dismissive foreclosure of further pleading and adjudication with respect to the pre-1990 component of Lucas's taking claim, it is appropriate for us to address that component as if the case were here on the pleadings alone. Lucas properly alleged injury-in-fact in his complaint, see App. to Pet. for Cert. 154 (complaint); *id.*, at 156 (asking "damages for the temporary taking of his property" from the date of the 1988 Act's passage to "such time as this matter is finally resolved"). No more can reasonably be demanded. Cf. *First English Evangelical Lutheran Church of Glendale v. County of Los Angeles*, 482 U.S. 304, 312-313, 107 S.Ct. 2378, 2384, 96 L.Ed.2d 250 (1987). Justice BLACKMUN finds it "baffling," *post*, at 2908, n. 5, that we grant standing here, whereas "just a few days ago, in *Lujan v. Defenders of Wildlife*, 504 U.S. ——, 112 S.Ct. 2130, — L.Ed.2d —— (1992)," we denied standing. He sees in that strong evidence to support his repeated imputations that the Court "presses" to take this case, *post*, at 2904, is "eager to decide" it, *post*, at 2909, and is unwilling to "be denied," *post*, at 2907. He has a point: The decisions are indeed very close in time, yet one grants standing and the other denies it. The distinction, however, rests in law rather than chronology. *Lujan*, since it involved the establishment of injury-in-fact at the *summary judgment stage*, required specific facts to be adduced by sworn testimony; had the same challenge to a generalized allegation of injury-in-fact been made at the pleading stage, it would have been unsuccessful.

4. In that case, the Court of Appeals for the Fourth Circuit reached the merits of a takings challenge to the 1988 Beachfront Management Act identical to the one Lucas brings here even though the Act was amended, and the special permit procedure established, while the case was under submission. The court observed: "The enactment of the 1990 Act during the pendency of this appeal, with its provisions for special permits and other changes that may affect the plaintiffs, does not relieve us of the need to address the plaintiffs' claims under the provisions of the 1988 Act. Even if the amended Act cured all of the plaintiffs' concerns, the amendments would not foreclose the possibility that a taking had occurred during the years when the 1988 Act was in effect." *Esposito v. South Carolina Coastal Council*, 939 F.2d 165, 168 (CA4 1991).

5. Justice BLACKMUN states that our "intense interest in Lucas' plight ... would have been more prudently expressed by vacating the judgment below and remanding for further consideration in light of the 1990 amendments" to the Beachfront Management Act. *Post*, at 2909, n. 7. That is a strange suggestion, given that the South Carolina Supreme Court rendered its categorical disposition in this case *after* the Act had been amended, and *after* it had been invited to consider the effect of those amendments on Lucas's case. We have no reason to believe that the justices of the South Carolina Supreme Court are any more desirous of using a narrower ground now than they were then; and neither "prudence" nor any other principle of judicial restraint requires that we remand to find out whether they have changed their mind.

ty were subject to unbridled, uncompensated qualification under the police power, "the natural tendency of human nature [would be] to extend the qualification more and more until at last private property disappear[ed]." *Id.*, at 415, 43 S.Ct., at 160. These considerations gave birth in that case to the oft-cited maxim that, "while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking." *Ibid.*

[2] Nevertheless, our decision in *Mahon* offered little insight into when, and under what circumstances, a given regulation would be seen as going "too far" for purposes of the Fifth Amendment. In 70-odd years of succeeding "regulatory takings" jurisprudence, we have generally eschewed any " 'set formula' " for determining how far is too far, preferring to "engag[e] in ... essentially ad hoc, factual inquiries," *Penn Central Transportation Co. v. New York City*, 438 U.S. 104, 124, 98 S.Ct. 2646, 2659, 57 L.Ed.2d 631 (1978) (quoting *Goldblatt v. Hempstead*, 369 U.S. 590, 594, 82 S.Ct. 987, 990, 8 L.Ed.2d 130 (1962)). See Epstein, Takings: Descent and Resurrection, 1987 Sup.Ct. Rev. 1, 4. We have, however, described at least two discrete categories of regulatory action as compensable without case-specific inquiry into the public interest advanced in support of the restraint. The first encompasses regulations that compel the property owner to suffer a physical "invasion" of his property. In general (at least with regard to permanent invasions), no matter how minute the intrusion, and no matter how weighty the public purpose behind it, we have required compensation. For example, in *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 102 S.Ct. 3164, 73 L.Ed.2d 868 (1982), we determined that New York's law requiring landlords to allow television cable companies to emplace cable facilities in their apartment buildings constituted a taking, *id.*, at 435–440, 102 S.Ct., at 3175–3178, even though the facilities occupied at most only 1½ cubic feet of the landlords' property, see *id.*, at 438, n. 16, 102 S.Ct., at 3177. See also *United States v. Causby*, 328 U.S. 256, 265, and n. 10, 66 S.Ct. 1062, 1067, and n. 10, 90 L.Ed. 1206 (1946) (physical invasions of airspace); cf. *Kaiser Aetna v. United States*, 444 U.S. 164, 100 S.Ct. 383, 62 L.Ed.2d 332 (1979) (imposition of navigational servitude upon private marina).

The second situation in which we have found categorical treatment appropriate is where regulation denies all economically beneficial or productive use of land. See *Agins*, 447 U.S., at 260, 100 S.Ct., at 2141; see also *Nollan v. California Coastal Comm'n*, 483 U.S. 825, 834, 107 S.Ct. 3141, 3147, 97 L.Ed.2d 677 (1987); *Keystone Bituminous Coal Assn. v. DeBenedictis*, 480 U.S. 470, 495, 107 S.Ct. 1232, 1247, 94 L.Ed.2d 472 (1987); *Hodel v. Virginia Surface Mining & Reclamation Assn., Inc.*, 452 U.S. 264, 295–296, 101 S.Ct. 2352, 2370, 69 L.Ed.2d 1 (1981).[6] As we have said on

6. We will not attempt to respond to all of Justice BLACKMUN's mistaken citation of case precedent. Characteristic of its nature is his assertion that the cases we discuss here stand merely for the proposition "that proof that a regulation does *not* deny an owner economic use of his property is sufficient to defeat a facial taking challenge" and not for the point that "*denial* of such use is sufficient to establish a taking claim regardless of any other consideration." *Post*, at 2911, n. 11. The cases say, repeatedly and unmistakably, that " '[t]he test to be applied in considering [a] facial [takings] challenge is fairly straightforward. A statute regulating the uses that can be made of property *effects a taking if it "denies an owner economically viable use of his land."* ' " *Keystone*, 480 U.S., at 495, 107 S.Ct., at 1247 (quoting *Hodel*, 452 U.S., at 295–296, 101 S.Ct., at 2370 (quoting *Agins*, 447 U.S., at 260, 100 S.Ct., at 2141)) (emphasis added).

Justice BLACKMUN describes that rule (which we do not invent but merely apply today) as "alter[ing] the long-settled rules of review" by foisting on the State "the burden of showing [its] regulation is not a taking." *Post*, at 2909. This is of course wrong. Lucas had to do more than simply file a lawsuit to establish his constitutional entitlement; he had to show that the Beachfront Management Act denied him economically beneficial use of his land. Our analysis presumes the unconstitutionality of state land-use regulation only in the sense that *any* rule-with-exceptions presumes the in-

numerous occasions, the Fifth Amendment is violated when land-use regulation "does not substantially advance legitimate state interests *or denies an owner economically viable use of his land.*" *Agins, supra,* 447 U.S., at 260, 100 S.Ct., at 2141 (citations omitted) (emphasis added).[7]

We have never set forth the justification for this rule. Perhaps it is simply, as Justice Brennan suggested, that total deprivation of beneficial use is, from the landowner's point of view, the equivalent of a physical appropriation. See *San Diego Gas & Electric Co. v. San Diego,* 450 U.S., at 652, 101 S.Ct., at 1304 (Brennan, J., dissenting). "[F]or what is the land but the profits thereof[?]" 1 E. Coke, Institutes ch. 1, § 1 (1st Am. ed. 1812). Surely, at least, in the extraordinary circumstance when *no* productive or economically beneficial use of land is permitted, it is less realistic to indulge our usual assumption that the legislature is simply "adjusting the benefits and burdens of economic life," *Penn Central Transportation Co.,* 438 U.S., at 124, 98 S.Ct., at 2659, in a manner that secures an "average reciprocity of advantage" to everyone concerned. *Pennsylvania Coal Co. v. Mahon,* 260 U.S., at 415, 43 S.Ct., at 160. And the *functional* basis for permitting the government, by regulation, to affect property values without compensation—that "Government hardly could go on if to some extent values incident to property could not be diminished without paying for every such change in the general law," *id.,* at 413, 43 S.Ct., at 159—does not apply to the relatively rare situations where the government has deprived a landowner of all economically beneficial uses.

On the other side of the balance, affirmatively supporting a compensation requirement, is the fact that regulations that leave the owner of land without economically beneficial or productive options for its

validity of a law that violates it—for example, the rule generally prohibiting content-based restrictions on speech. See, *e.g., Simon & Schuster, Inc. v. New York Crime Victims Board,* 502 U.S. ——, ——, 112 S.Ct. 501, 508, 116 L.Ed.2d 476 (1991) ("A statute is presumptively inconsistent with the First Amendment if it imposes a financial burden on speakers because of the content of their speech"). Justice BLACKMUN's real quarrel is with the substantive standard of liability we apply in this case, a long-established standard we see no need to repudiate.

7. Regrettably, the rhetorical force of our "deprivation of all economically feasible use" rule is greater than its precision, since the rule does not make clear the "property interest" against which the loss of value is to be measured. When, for example, a regulation requires a developer to leave 90% of a rural tract in its natural state, it is unclear whether we would analyze the situation as one in which the owner has been deprived of all economically beneficial use of the burdened portion of the tract, or as one in which the owner has suffered a mere diminution in value of the tract as a whole. (For an extreme—and, we think, unsupportable—view of the relevant calculus, see *Penn Central Transportation Co. v. New York City,* 42 N.Y.2d 324, 333–334, 397 N.Y.S.2d 914, 920, 366 N.E.2d 1271, 1276–1277 (1977), aff'd, 438 U.S. 104, 98 S.Ct. 2646, 57 L.Ed.2d 631 (1978), where the state court examined the diminution in a particular parcel's value produced by a municipal ordinance in light of total value of the taking claimant's other holdings in the vicinity.) Unsurprisingly, this uncertainty regarding the composition of the denominator in our "deprivation" fraction has produced inconsistent pronouncements by the Court. Compare *Pennsylvania Coal Co. v. Mahon,* 260 U.S. 393, 414, 43 S.Ct. 158, 160, 67 L.Ed. 322 (1922) (law restricting subsurface extraction of coal held to effect a taking), with *Keystone Bituminous Coal Assn. v. DeBenedictis,* 480 U.S. 470, 497–502, 107 S.Ct. 1232, 1248–1251, 94 L.Ed.2d 472 (1987) (nearly identical law held not to effect a taking); see also *id.,* at 515–520, 107 S.Ct., at 1257–1260 (REHNQUIST, C.J., dissenting); Rose, *Mahon* Reconstructed: Why the Takings Issue is Still a Muddle, 57 S.Cal.L.Rev. 561, 566–569 (1984). The answer to this difficult question may lie in how the owner's reasonable expectations have been shaped by the State's law of property—*i.e.,* whether and to what degree the State's law has accorded legal recognition and protection to the particular interest in land with respect to which the takings claimant alleges a diminution in (or elimination of) value. In any event, we avoid this difficulty in the present case, since the "interest in land" that Lucas has pleaded (a fee simple interest) is an estate with a rich tradition of protection at common law, and since the South Carolina Court of Common Pleas found that the Beachfront Management Act left each of Lucas's beachfront lots without economic value.

use—typically, as here, by requiring land to be left substantially in its natural state—carry with them a heightened risk that private property is being pressed into some form of public service under the guise of mitigating serious public harm. See, *e.g.*, *Annicelli v. South Kingstown*, 463 A.2d 133, 140–141 (R.I.1983) (prohibition on construction adjacent to beach justified on twin grounds of safety and "conservation of open space"); *Morris County Land Improvement Co. v. Parsippany-Troy Hills Township*, 40 N.J. 539, 552–553, 193 A.2d 232, 240 (1963) (prohibition on filling marshlands imposed in order to preserve region as water detention basin and create wildlife refuge). As Justice Brennan explained: "From the government's point of view, the benefits flowing to the public from preservation of open space through regulation may be equally great as from creating a wildlife refuge through formal condemnation or increasing electricity production through a dam project that floods private property." *San Diego Gas & Elec. Co., supra*, 450 U.S., at 652, 101 S.Ct., at 1304 (Brennan, J., dissenting). The many statutes on the books, both state and federal, that provide for the use of eminent domain to impose servitudes on private scenic lands preventing developmental uses, or to acquire such lands altogether, suggest the practical equivalence in this setting of negative regulation and appropriation. See, *e.g.*, 16 U.S.C. § 410ff-1(a) (authorizing acquisition of "lands, waters, or interests [within Channel Islands National Park] (including but not limited to scenic easements)"); § 460aa-2(a) (authorizing acquisition of "any lands, or lesser interests therein, including mineral interests and scenic easements" within Sawtooth National Recreation Area); §§ 3921–3923 (authorizing acquisition of wetlands); N.C. Gen.Stat. § 113A-38 (1990) (authorizing acquisition of, *inter alia*, " 'scenic easements' " within the North Carolina natural and scenic rivers system); Tenn.Code Ann. §§ 11-15-101—11-15-108 (1987) (authorizing acquisition of "protective easements" and other rights in real property adjacent to State's historic, architectural, archaeological, or cultural resources).

[3, 4] We think, in short, that there are good reasons for our frequently expressed belief that when the owner of real property has been called upon to sacrifice *all* economically beneficial uses in the name of the common good, that is, to leave his property economically idle, he has suffered a taking.[8]

8. Justice STEVENS criticizes the "deprivation of all economically beneficial use" rule as "wholly arbitrary", in that "[the] landowner whose property is diminished in value 95% recovers nothing," while the landowner who suffers a complete elimination of value "recovers the land's full value." *Post*, at 2919. This analysis errs in its assumption that the landowner whose deprivation is one step short of complete is not entitled to compensation. Such an owner might not be able to claim the benefit of our categorical formulation, but, as we have acknowledged time and again, "[t]he economic impact of the regulation on the claimant and ... the extent to which the regulation has interfered with distinct investment-backed expectations" are keenly relevant to takings analysis generally. *Penn Central Transportation Co. v. New York City*, 438 U.S. 104, 124, 98 S.Ct. 2646, 2659, 57 L.Ed.2d 631 (1978). It is true that in at least *some* cases the landowner with 95% loss will get nothing, while the landowner with total loss will recover in full. But that occasional result is no more strange than the gross disparity between the landowner whose premises are taken for a highway (who recovers in full) and the landowner whose property is reduced to 5% of its former value by the highway (who recovers nothing). Takings law is full of these "all-or-nothing" situations.

Justice STEVENS similarly misinterprets our focus on "developmental" uses of property (the uses proscribed by the Beachfront Management Act) as betraying an "assumption that the only uses of property cognizable under the Constitution are *developmental* uses." *Post*, at 2919, n. 3. We make no such assumption. Though our prior takings cases evince an abiding concern for the productive use of, and economic investment in, land, there are plainly a number of noneconomic interests in land whose impairment will invite exceedingly close scrutiny under the Takings Clause. See, *e.g.*, *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 436, 102 S.Ct. 3164, 3176, 73 L.Ed.2d 868 (1982) (interest in excluding strangers from one's land).

B

[5, 6] The trial court found Lucas's two beachfront lots to have been rendered valueless by respondent's enforcement of the coastal-zone construction ban.[9] Under Lucas's theory of the case, which rested upon our "no economically viable use" statements, that finding entitled him to compensation. Lucas believed it unnecessary to take issue with either the purposes behind the Beachfront Management Act, or the means chosen by the South Carolina Legislature to effectuate those purposes. The South Carolina Supreme Court, however, thought otherwise. In its view, the Beachfront Management Act was no ordinary enactment, but involved an exercise of South Carolina's "police powers" to mitigate the harm to the public interest that petitioner's use of his land might occasion. 304 S.C., at 384, 404 S.E.2d, at 899. By neglecting to dispute the findings enumerated in the Act[10] or otherwise to challenge the legislature's purposes, petitioner "concede[d] that the beach/dune area of South Carolina's shores is an extremely valuable public resource; that the erection of new construction, *inter alia*, contributes to the erosion and destruction of this public resource; and that discouraging new construction in close proximity to the beach/dune area is necessary to prevent a great public harm." *Id.*, at 382–383, 404 S.E.2d, at 898. In the court's view, these concessions brought petitioner's challenge within

9. This finding was the premise of the Petition for Certiorari, and since it was not challenged in the Brief in Opposition we decline to entertain the argument in respondent's brief on the merits, see Brief for Respondent 45–50, that the finding was erroneous. Instead, we decide the question presented under the same factual assumptions as did the Supreme Court of South Carolina. See *Oklahoma City v. Tuttle*, 471 U.S. 808, 816, 105 S.Ct. 2427, 2432, 85 L.Ed.2d 791 (1985).

10. The legislature's express findings include the following:

"The General Assembly finds that:

"(1) The beach/dune system along the coast of South Carolina is extremely important to the people of this State and serves the following functions:

"(a) protects life and property by serving as a storm barrier which dissipates wave energy and contributes to shoreline stability in an economical and effective manner;

"(b) provides the basis for a tourism industry that generates approximately two-thirds of South Carolina's annual tourism industry revenue which constitutes a significant portion of the state's economy. The tourists who come to the South Carolina coast to enjoy the ocean and dry sand beach contribute significantly to state and local tax revenues;

"(c) provides habitat for numerous species of plants and animals, several of which are threatened or endangered. Waters adjacent to the beach/dune system also provide habitat for many other marine species;

"(d) provides a natural health environment for the citizens of South Carolina to spend leisure time which serves their physical and mental well-being.

"(2) Beach/dune system vegetation is unique and extremely important to the vitality and preservation of the system.

"(3) Many miles of South Carolina's beaches have been identified as critically eroding.

"(4) ... [D]evelopment unwisely has been sited too close to the [beach/dune] system. This type of development has jeopardized the stability of the beach/dune system, accelerated erosion, and endangered adjacent property. It is in both the public and private interests to protect the system from this unwise development.

"(5) The use of armoring in the form of hard erosion control devices such as seawalls, bulkheads, and rip-rap to protect erosion-threatened structures adjacent to the beach has not proven effective. These armoring devices have given a false sense of security to beachfront property owners. In reality, these hard structures, in many instances, have increased the vulnerability of beachfront property to damage from wind and waves while contributing to the deterioration and loss of the dry sand beach which is so important to the tourism industry.

"(6) Erosion is a natural process which becomes a significant problem for man only when structures are erected in close proximity to the beach/dune system. It is in both the public and private interests to afford the beach/dune system space to accrete and erode in its natural cycle. This space can be provided only by discouraging new construction in close proximity to the beach/dune system and encouraging those who have erected structures too close to the system to retreat from it.

"(8) It is in the state's best interest to protect and to promote increased public access to South Carolina's beaches for out-of-state tourists and South Carolina residents alike." S.C. Code § 48–39–250 (Supp.1991).

a long line of this Court's cases sustaining against Due Process and Takings Clause challenges the State's use of its "police powers" to enjoin a property owner from activities akin to public nuisances. See *Mugler v. Kansas*, 123 U.S. 623, 8 S.Ct. 273, 31 L.Ed. 205 (1887) (law prohibiting manufacture of alcoholic beverages); *Hadacheck v. Sebastian*, 239 U.S. 394, 36 S.Ct. 143, 60 L.Ed. 348 (1915) (law barring operation of brick mill in residential area); *Miller v. Schoene*, 276 U.S. 272, 48 S.Ct. 246, 72 L.Ed. 568 (1928) (order to destroy diseased cedar trees to prevent infection of nearby orchards); *Goldblatt v. Hempstead*, 369 U.S. 590, 82 S.Ct. 987, 8 L.Ed.2d 130 (1962) (law effectively preventing continued operation of quarry in residential area).

It is correct that many of our prior opinions have suggested that "harmful or noxious uses" of property may be proscribed by government regulation without the requirement of compensation. For a number of reasons, however, we think the South Carolina Supreme Court was too quick to conclude that that principle decides the present case. The "harmful or noxious uses" principle was the Court's early attempt to describe in theoretical terms why government may, consistent with the Takings Clause, affect property values by regulation without incurring an obligation to compensate—a reality we nowadays acknowledge explicitly with respect to the full scope of the State's police power. See, *e.g.*, *Penn Central Transportation Co.*, 438 U.S., at 125, 98 S.Ct., at 2659 (where State "reasonably conclude[s] that 'the health, safety, morals, or general welfare' would be promoted by prohibiting particular contemplated uses of land," compensation need not accompany prohibition); see also *Nollan v. California Coastal Commission*, 483 U.S., at 834–835, 107 S.Ct., at 3147 ("Our cases have not elaborated on the standards for determining what constitutes a 'legitimate state interest[,]' [but] [t]hey have made clear ... that a broad range of governmental purposes and regulations satisfy these requirements"). We made this very point in *Penn Central Transportation Co.*, where, in the course of sustaining New York City's landmarks preservation program against a takings challenge, we rejected the petitioner's suggestion that *Mugler* and the cases following it were premised on, and thus limited by, some objective conception of "noxiousness":

> "[T]he uses in issue in *Hadacheck*, *Miller*, and *Goldblatt* were perfectly lawful in themselves. They involved no 'blameworthiness, ... moral wrongdoing or conscious act of dangerous risk-taking which induce[d society] to shift the cost to a pa[rt]icular individual.' Sax, Takings and the Police Power, 74 Yale L.J. 36, 50 (1964). These cases are better understood as resting not on any supposed 'noxious' quality of the prohibited uses but rather on the ground that the restrictions were reasonably related to the implementation of a policy—not unlike historic preservation—expected to produce a widespread public benefit and applicable to all similarly situated property." 438 U.S., at 133–134, n. 30, 98 S.Ct., at 2664, n. 30.

"Harmful or noxious use" analysis was, in other words, simply the progenitor of our more contemporary statements that "land-use regulation does not effect a taking if it 'substantially advance[s] legitimate state interests'...." *Nollan*, *supra*, 483 U.S., at 834, 107 S.Ct., at 3147 (quoting *Agins v. Tiburon*, 447 U.S., at 260, 100 S.Ct., at 2141); see also *Penn Central Transportation Co.*, *supra*, 438 U.S., at 127, 98 S.Ct., at 2660; *Euclid v. Ambler Realty Co.*, 272 U.S. 365, 387–388, 47 S.Ct. 114, 118, 71 L.Ed. 303 (1926).

The transition from our early focus on control of "noxious" uses to our contemporary understanding of the broad realm within which government may regulate without compensation was an easy one, since the distinction between "harm-preventing" and "benefit-conferring" regulation is often in the eye of the beholder. It

is quite possible, for example, to describe in *either* fashion the ecological, economic, and aesthetic concerns that inspired the South Carolina legislature in the present case. One could say that imposing a servitude on Lucas's land is necessary in order to prevent his use of it from "harming" South Carolina's ecological resources; or, instead, in order to achieve the "benefits" of an ecological preserve.[11] Compare, *e.g.*, *Claridge v. New Hampshire Wetlands Board*, 125 N.H. 745, 752, 485 A.2d 287, 292 (1984) (owner may, without compensation, be barred from filling wetlands because landfilling would deprive adjacent coastal habitats and marine fisheries of ecological support), with, *e.g.*, *Bartlett v. Zoning Comm'n of Old Lyme*, 161 Conn. 24, 30, 282 A.2d 907, 910 (1971) (owner barred from filling tidal marshland must be compensated, despite municipality's "laudable" goal of "preserv[ing] marshlands from encroachment or destruction"). Whether one or the other of the competing characterizations will come to one's lips in a particular case depends primarily upon one's evaluation of the worth of competing uses of real estate. See Restatement (Second) of Torts § 822, Comment *g*, p. 112 (1979) ("[p]ractically all human activities unless carried on in a wilderness interfere to some extent with others or involve some risk of interference"). A given restraint will be seen as mitigating "harm" to the adjacent parcels or securing a "benefit" for them, depending upon the observer's evaluation of the relative importance of the use that the restraint favors. See Sax, Takings and the Police Power, 74 Yale L.J. 36, 49 (1964) ("[T]he problem [in this area] is not one of noxiousness or harm-creating activity at all; rather it is a problem of inconsistency between perfectly innocent and independently desirable uses"). Whether Lucas's construction of single-family residences on his parcels should be described as bringing "harm" to South Carolina's adjacent ecological resources thus depends principally upon whether the describer believes that the State's use interest in nurturing those resources is so important that *any* competing adjacent use must yield.[12]

When it is understood that "prevention of harmful use" was merely our early formulation of the police power justification necessary to sustain (without compensa-

11. In the present case, in fact, some of the "[South Carolina] legislature's 'findings'" to which the South Carolina Supreme Court purported to defer in characterizing the purpose of the Act as "harm-preventing," 304 S.C. 376, 385, 404 S.E.2d 895, 900 (1991), seem to us phrased in "benefit-conferring" language instead. For example, they describe the importance of a construction ban in enhancing "South Carolina's annual tourism industry revenue," S.C. Code § 48-39-250(1)(b) (Supp.1991), in "provid[ing] habitat for numerous species of plants and animals, several of which are threatened or endangered," § 48-39-250(1)(c), and in "provid[ing] a natural healthy environment for the citizens of South Carolina to spend leisure time which serves their physical and mental well-being." § 48-39-250(1)(d). It would be pointless to make the outcome of this case hang upon this terminology, since the same interests could readily be described in "harm-preventing" fashion.

Justice BLACKMUN, however, apparently insists that we *must* make the outcome hinge (exclusively) upon the South Carolina Legislature's other, "harm-preventing" characterizations, focusing on the declaration that "prohibitions on building in front of the setback line are necessary to protect people and property from storms, high tides, and beach erosion." *Post*, at 2906. He says "[n]othing in the record undermines [this] assessment," *ibid.*, apparently seeing no significance in the fact that the statute permits owners of *existing* structures to remain (and even to rebuild if their structures are not "destroyed beyond repair," S.C. Code Ann. § 48-39-290(B)), and in the fact that the 1990 amendment authorizes the Council to issue permits for new construction in violation of the uniform prohibition, see S.C. Code § 48-39-290(D)(1) (Supp.1991).

12. In Justice BLACKMUN's view, even with respect to regulations that deprive an owner of all developmental or economically beneficial land uses, the test for required compensation is whether the legislature has recited a harm-preventing justification for its action. See *post*, at 2906, 2910-2912. Since such a justification can be formulated in practically every case, this amounts to a test of whether the legislature has a stupid staff. We think the Takings Clause requires courts to do more than insist upon artful harm-preventing characterizations.

tion) *any* regulatory diminution in value; and that the distinction between regulation that "prevents harmful use" and that which "confers benefits" is difficult, if not impossible, to discern on an objective, value-free basis; it becomes self-evident that noxious-use logic cannot serve as a touchstone to distinguish regulatory "takings"—which require compensation—from regulatory deprivations that do not require compensation. *A fortiori* the legislature's recitation of a noxious-use justification cannot be the basis for departing from our categorical rule that total regulatory takings must be compensated. If it were, departure would virtually always be allowed. The South Carolina Supreme Court's approach would essentially nullify *Mahon*'s affirmation of limits to the noncompensable exercise of the police power. Our cases provide no support for this: None of them that employed the logic of "harmful use" prevention to sustain a regulation involved an allegation that the regulation wholly eliminated the value of the claimant's land. See *Keystone Bituminous Coal Assn.*, 480 U.S., at 513–514, 107 S.Ct., at 1257 (REHNQUIST, C.J., dissenting).[13]

[7] Where the State seeks to sustain regulation that deprives land of all economically beneficial use, we think it may resist compensation only if the logically antecedent inquiry into the nature of the owner's estate shows that the proscribed use interests were not part of his title to begin with.[14] This accords, we think, with our "takings" jurisprudence, which has traditionally been guided by the understandings of our citizens regarding the content of, and the State's power over, the "bundle of rights" that they acquire when they obtain title to property. It seems to us that the property owner necessarily expects the uses of his property to be restricted, from time to time, by various measures newly enacted by the State in legitimate exercise of its police powers; "[a]s long recognized, some values are enjoyed under an implied limitation and must yield to the police power." *Pennsylvania Coal Co. v. Mahon*, 260 U.S., at 413, 43 S.Ct., at 159. And in the case of personal property, by reason of the State's traditionally high degree of control over commercial dealings, he ought to be aware of the possibility that new regulation might even render his property economically worthless (at least if the property's only economically productive use is sale or manufacture for sale), see *Andrus*

13. *E.g., Mugler v. Kansas*, 123 U.S. 623, 8 S.Ct. 273, 31 L.Ed. 205 (1887) (prohibition upon use of a building as a brewery; other uses permitted); *Plymouth Coal Co. v. Pennsylvania*, 232 U.S. 531, 34 S.Ct. 359, 58 L.Ed. 713 (1914) (requirement that "pillar" of coal be left in ground to safeguard mine workers; mineral rights could otherwise be exploited); *Reinman v. Little Rock*, 237 U.S. 171, 35 S.Ct. 511, 59 L.Ed. 900 (1915) (declaration that livery stable constituted a public nuisance; other uses of the property permitted); *Hadacheck v. Sebastian*, 239 U.S. 394, 36 S.Ct. 143, 60 L.Ed. 348 (1915) (prohibition of brick manufacturing in residential area; other uses permitted); *Goldblatt v. Hempstead*, 369 U.S. 590, 82 S.Ct. 987, 8 L.Ed.2d 130 (1962) (prohibition on excavation; other uses permitted).

14. Drawing on our First Amendment jurisprudence, see, *e.g., Employment Division, Department of Human Resources of Oregon v. Smith*, 494 U.S. 872, 878–879, 110 S.Ct. 1595, 1600, 108 L.Ed.2d 876 (1990), Justice STEVENS would "loo[k] to the *generality* of a regulation of property" to determine whether compensation is owing. *Post*, at 2923. The Beachfront Management Act is general, in his view, because it "regulates the use of the coastline of the entire state." *Post*, at 2924. There may be some validity to the principle Justice STEVENS proposes, but it does not properly apply to the present case. The equivalent of a law of general application that inhibits the practice of religion without being aimed at religion, see *Oregon v. Smith, supra*, is a law that destroys the value of land without being aimed at land. Perhaps such a law—the generally applicable criminal prohibition on the manufacturing of alcoholic beverages challenged in *Mugler* comes to mind—cannot constitute a compensable taking. See 123 U.S., at 655–656, 8 S.Ct., at 293–294. But a regulation *specifically directed to land use* no more acquires immunity by plundering landowners generally than does a law specifically directed at religious practice acquire immunity by prohibiting all religions. Justice STEVENS' approach renders the Takings Clause little more than a particularized restatement of the Equal Protection Clause.

v. Allard, 444 U.S. 51, 66–67, 100 S.Ct. 318, 327, 62 L.Ed.2d 210 (1979) (prohibition on sale of eagle feathers). In the case of land, however, we think the notion pressed by the Council that title is somehow held subject to the "implied limitation" that the State may subsequently eliminate all economically valuable use is inconsistent with the historical compact recorded in the Takings Clause that has become part of our constitutional culture.[15]

[8] Where "permanent physical occupation" of land is concerned, we have refused to allow the government to decree it anew (without compensation), no matter how weighty the asserted "public interests" involved, *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S., at 426, 102 S.Ct., at 3171—though we assuredly *would* permit the government to assert a permanent easement that was a pre-existing limitation upon the landowner's title. Compare *Scranton v. Wheeler*, 179 U.S. 141, 163, 21 S.Ct. 48, 57, 45 L.Ed. 126 (1900) (interests of "riparian owner in the submerged lands ... bordering on a public navigable water" held subject to Government's navigational servitude), with *Kaiser Aetna v. United States*, 444 U.S., at 178–180, 100 S.Ct., at 392–393 (imposition of navigational servitude on marina created and rendered navigable at private expense held to constitute a taking). We believe similar treatment must be accorded confiscatory regulations, *i.e.*, regulations that prohibit all economically beneficial use of land: Any limitation so severe cannot be newly legislated or decreed (without compensation), but must inhere in the title itself, in the restrictions that background principles of the State's law of property and nuisance already place upon land ownership. A law or decree with such an effect must, in other words, do no more than duplicate the result that could have been achieved in the courts—by adjacent landowners (or other uniquely affected persons) under the State's law of private nuisance, or by the State under its complementary power to abate nuisances that affect the public generally, or otherwise.[16]

[9] On this analysis, the owner of a lake bed, for example, would not be entitled to compensation when he is denied the requisite permit to engage in a landfilling operation that would have the effect of flooding others' land. Nor the corporate owner of a nuclear generating plant, when it is directed to remove all improvements from its land upon discovery that the plant sits astride an earthquake fault. Such regulatory action may well have the effect of eliminating the land's only economically productive

15. After accusing us of "launch[ing] a missile to kill a mouse," *post*, at 2904, Justice BLACKMUN expends a good deal of throw-weight of his own upon a noncombatant, arguing that our description of the "understanding" of land ownership that informs the Takings Clause is not supported by early American experience. That is largely true, but entirely irrelevant. The practices of the States *prior* to incorporation of the Takings and Just Compensation Clauses, see *Chicago, B. & Q.R. Co. v. Chicago*, 166 U.S. 226, 17 S.Ct. 581, 41 L.Ed. 979 (1897)—which, as Justice BLACKMUN acknowledges, occasionally included *outright physical appropriation* of land without compensation, see *post*, at 2915—were out of accord with *any* plausible interpretation of those provisions. Justice BLACKMUN is correct that early constitutional theorists did not believe the Takings Clause embraced regulations of property at all, see *post*, at 2915, and n. 23, but even he does not suggest (explicitly, at least) that we renounce the Court's contrary conclusion in *Mahon*. Since the text of the Clause can be read to encompass regulatory as well as physical deprivations (in contrast to the text originally proposed by Madison, see Speech Proposing Bill of Rights (June 8, 1789), in 12 J. Madison, The Papers of James Madison 201 (C. Hobson, R. Rutland, W. Rachal, & J. Sisson ed. 1979) ("No person shall be ... obliged to relinquish his property, where it may be necessary for public use, without a just compensation"), we decline to do so as well.

16. The principal "otherwise" that we have in mind is litigation absolving the State (or private parties) of liability for the destruction of "real and personal property, in cases of actual necessity, to prevent the spreading of a fire" or to forestall other grave threats to the lives and property of others. *Bowditch v. Boston*, 101 U.S. 16, 18–19, 25 L.Ed. 980 (1880); see *United States v. Pacific Railroad*, 120 U.S. 227, 238–239, 7 S.Ct. 490, 495–496, 30 L.Ed. 634 (1887).

use, but it does not proscribe a productive use that was previously permissible under relevant property and nuisance principles. The use of these properties for what are now expressly prohibited purposes was *always* unlawful, and (subject to other constitutional limitations) it was open to the State at any point to make the implication of those background principles of nuisance and property law explicit. See Michelman, Property, Utility, and Fairness, Comments on the Ethical Foundations of "Just Compensation" Law, 80 Harv.L.Rev. 1165, 1239–1241 (1967). In light of our traditional resort to "existing rules or understandings that stem from an independent source such as state law" to define the range of interests that qualify for protection as "property" under the Fifth (and Fourteenth) amendments, *Board of Regents of State Colleges v. Roth*, 408 U.S. 564, 577, 92 S.Ct. 2701, 2709, 33 L.Ed.2d 548 (1972); see, *e.g.*, *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 1011–1012, 104 S.Ct. 2862, 2877, 81 L.Ed.2d 815 (1984); *Hughes v. Washington*, 389 U.S. 290, 295, 88 S.Ct. 438, 441, 19 L.Ed.2d 530 (1967) (Stewart, J., concurring), this recognition that the Takings Clause does not require compensation when an owner is barred from putting land to a use that is proscribed by those "existing rules or understandings" is surely unexceptional. When, however, a regulation that declares "off-limits" all economically productive or beneficial uses of land goes beyond what the relevant background principles would dictate, compensation must be paid to sustain it.[17]

The "total taking" inquiry we require today will ordinarily entail (as the application of state nuisance law ordinarily entails) analysis of, among other things, the degree of harm to public lands and resources, or adjacent private property, posed by the claimant's proposed activities, see, *e.g.*, Restatement (Second) of Torts §§ 826, 827, the social value of the claimant's activities and their suitability to the locality in question, see, *e.g.*, *id.*, §§ 828(a) and (b), 831, and the relative ease with which the alleged harm can be avoided through measures taken by the claimant and the government (or adjacent private landowners) alike, see, *e.g.*, *id.*, §§ 827(e), 828(c), 830. The fact that a particular use has long been engaged in by similarly situated owners ordinarily imports a lack of any common-law prohibition (though changed circumstances or new knowledge may make what was previously permissible no longer so, see Restatement (Second) of Torts, *supra*, § 827, comment *g*. So also does the fact that other landowners, similarly situated, are permitted to continue the use denied to the claimant.

It seems unlikely that common-law principles would have prevented the erection of any habitable or productive improvements on petitioner's land; they rarely support prohibition of the "essential use" of land, *Curtin v. Benson*, 222 U.S. 78, 86, 32 S.Ct. 31, 33, 56 L.Ed. 102 (1911). The question, however, is one of state law to be dealt with on remand. We emphasize that to win its case South Carolina must do more than proffer the legislature's declaration that the uses Lucas desires are inconsistent with the public interest, or the conclusory assertion that they violate a common-law maxim such as *sic utere tuo ut alienum non laedas*. As we have said, a "State, by *ipse dixit*, may not transform private property into public property without compensation . . . ." *Webb's Fabulous Pharmacies, Inc. v. Beckwith*, 449 U.S. 155, 164, 101 S.Ct. 446, 452, 66 L.Ed.2d 358 (1980). Instead, as it would be required to do if it sought to restrain Lucas in a common-law action for public nuisance, South Carolina must identify background principles of nui-

17. Of course, the State may elect to rescind its regulation and thereby avoid having to pay compensation for a permanent deprivation. See *First English Evangelical Lutheran Church*, 482 U.S., at 321, 107 S.Ct., at 2389. But "where the [regulation has] 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." *Ibid.*

sance and property law that prohibit the uses he now intends in the circumstances in which the property is presently found. Only on this showing can the State fairly claim that, in proscribing all such beneficial uses, the Beachfront Management Act is taking nothing.[18]

* * *

The judgment is reversed and the cause remanded for proceedings not inconsistent with this opinion.

So ordered.

Justice KENNEDY, concurring in the judgment.

The case comes to the Court in an unusual posture, as all my colleagues observe. *Ante*, at 2890; *post*, at 2906 (BLACKMUN, J., dissenting); *post*, at 2918 (STEVENS, J., dissenting); *post*, at 2925 (Statement of SOUTER, J.). After the suit was initiated but before it reached us, South Carolina amended its Beachfront Management Act to authorize the issuance of special permits at variance with the Act's general limitations. See S.C.Code § 48-39-290(D)(1) (Supp.1991). Petitioner has not applied for a special permit but may still do so. The availability of this alternative, if it can be invoked, may dispose of petitioner's claim of a permanent taking. As I read the Court's opinion, it does not decide the permanent taking claim, but neither does it foreclose the Supreme Court of South Carolina from considering the claim or requiring petitioner to pursue an administrative alternative not previously available.

The potential for future relief does not control our disposition, because whatever may occur in the future cannot undo what has occurred in the past. The Beachfront Management Act was enacted in 1988. S.C.Code § 48-39-250 *et seq.* (Supp.1990). It may have deprived petitioner of the use of his land in an interim period. § 48-39-290(A). If this deprivation amounts to a taking, its limited duration will not bar constitutional relief. It is well established that temporary takings are as protected by the Constitution as are permanent ones. *First English Evangelical Lutheran Church of Glendale v. County of Los Angeles*, 482 U.S. 304, 318, 107 S.Ct. 2378, 2387, 96 L.Ed.2d 250 (1987).

The issues presented in the case are ready for our decision. The Supreme Court of South Carolina decided the case on constitutional grounds, and its rulings are now before us. There exists no jurisdictional bar to our disposition, and prudential considerations ought not to militate against it. The State cannot complain of the manner in which the issues arose. Any uncertainty in this regard is attributable to the State, as a consequence of its amendment to the Beachfront Management Act. If the Takings Clause is to protect against temporary deprivations as well as permanent ones, its enforcement must not be frustrated by a shifting background of state law.

Although we establish a framework for remand, moreover, we do not decide the ultimate question of whether a temporary taking has occurred in this case. The facts necessary to the determination have not been developed in the record. Among the matters to be considered on remand must be whether petitioner had the intent and capacity to develop the property and failed to do so in the interim period because the State prevented him. Any failure by petitioner to comply with relevant administra-

18. Justice BLACKMUN decries our reliance on background nuisance principles at least in part because he believes those principles to be as manipulable as we find the "harm prevention"/"benefit conferral" dichotomy, see *post*, at 2914. There is no doubt some leeway in a court's interpretation of what existing state law permits—but not remotely as much, we think, as in a legislative crafting of the reasons for its confiscatory regulation. We stress that an affirmative decree eliminating all economically beneficial uses may be defended only if an *objectively reasonable application* of relevant precedents would exclude those beneficial uses in the circumstances in which the land is presently found.

tive requirements will be part of that analysis.

The South Carolina Court of Common Pleas found that petitioner's real property has been rendered valueless by the State's regulation. App. to Pet. for Cert. 37. The finding appears to presume that the property has no significant market value or resale potential. This is a curious finding, and I share the reservations of some of my colleagues about a finding that a beach front lot loses all value because of a development restriction. *Post*, at 2908 (BLACKMUN, J., dissenting); *post*, at 2919, n. 3 (STEVENS, J., dissenting); *post*, at 2925 (Statement of SOUTER, J.). While the Supreme Court of South Carolina on remand need not consider the case subject to this constraint, we must accept the finding as entered below. See *Oklahoma City v. Tuttle*, 471 U.S. 808, 816, 105 S.Ct. 2427, 2432, 85 L.Ed.2d 791 (1985). Accepting the finding as entered, it follows that petitioner is entitled to invoke the line of cases discussing regulations that deprive real property of all economic value. See *Agins v. Tiburon*, 447 U.S. 255, 260, 100 S.Ct. 2138, 2141, 65 L.Ed.2d 106 (1980).

The finding of no value must be considered under the Takings Clause by reference to the owner's reasonable, investment-backed expectations. *Kaiser Aetna v. United States*, 444 U.S. 164, 175, 100 S.Ct. 383, 390, 62 L.Ed.2d 332 (1979); *Penn Central Transportation Co. v. New York City*, 438 U.S. 104, 124, 98 S.Ct. 2646, 2659, 57 L.Ed.2d 631 (1978); see also *W.B. Worthen Co. v. Kavanaugh*, 295 U.S. 56, 55 S.Ct. 555, 79 L.Ed. ,1298 (1935). The Takings Clause, while conferring substantial protection on property owners, does not eliminate the police power of the State to enact limitations on the use of their property. *Mugler v. Kansas*, 123 U.S. 623, 669, 8 S.Ct. 273, 301, 31 L.Ed. 205 (1887). The rights conferred by the Takings Clause and the police power of the State may coexist without conflict. Property is bought and sold, investments are made, subject to the State's power to regulate. Where a taking is alleged from regulations which deprive the property of all value, the test must be whether the deprivation is contrary to reasonable, investment-backed expectations.

There is an inherent tendency towards circularity in this synthesis, of course; for if the owner's reasonable expectations are shaped by what courts allow as a proper exercise of governmental authority, property tends to become what courts say it is. Some circularity must be tolerated in these matters, however, as it is in other spheres. *E.g., Katz v. United States*, 389 U.S. 347, 88 S.Ct. 507, 19 L.Ed.2d 576 (1967) (Fourth Amendment protections defined by reasonable expectations of privacy). The definition, moreover, is not circular in its entirety. The expectations protected by the Constitution are based on objective rules and customs that can be understood as reasonable by all parties involved.

In my view, reasonable expectations must be understood in light of the whole of our legal tradition. The common law of nuisance is too narrow a confine for the exercise of regulatory power in a complex and interdependent society. *Goldblatt v. Hempstead*, 369 U.S. 590, 593, 82 S.Ct. 987, 989, 8 L.Ed.2d 130 (1962). The State should not be prevented from enacting new regulatory initiatives in response to changing conditions, and courts must consider all reasonable expectations whatever their source. The Takings Clause does not require a static body of state property law; it protects private expectations to ensure private investment. I agree with the Court that nuisance prevention accords with the most common expectations of property owners who face regulation, but I do not believe this can be the sole source of state authority to impose severe restrictions. Coastal property may present such unique concerns for a fragile land system that the State can go further in regulating its development and use than the common law of nuisance might otherwise permit.

The Supreme Court of South Carolina erred, in my view, by reciting the general purposes for which the state regulations

were enacted without a determination that they were in accord with the owner's reasonable expectations and therefore sufficient to support a severe restriction on specific parcels of property. See 304 S.C. 376, 383, 404 S.E.2d 895, 899 (1991). The promotion of tourism, for instance, ought not to suffice to deprive specific property of all value without a corresponding duty to compensate. Furthermore, the means as well as the ends of regulation must accord with the owner's reasonable expectations. Here, the State did not act until after the property had been zoned for individual lot development and most other parcels had been improved, throwing the whole burden of the regulation on the remaining lots. This too must be measured in the balance. See *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 416, 43 S.Ct. 158, 160, 67 L.Ed. 322 (1922).

With these observations, I concur in the judgment of the Court.

Justice BLACKMUN, dissenting.

Today the Court launches a missile to kill a mouse.

The State of South Carolina prohibited petitioner Lucas from building a permanent structure on his property from 1988 to 1990. Relying on an unreviewed (and implausible) state trial court finding that this restriction left Lucas' property valueless, this Court granted review to determine whether compensation must be paid in cases where the State prohibits all economic use of real estate. According to the Court, such an occasion never has arisen in any of our prior cases, and the Court imagines that it will arise "relatively rarely" or only in "extraordinary circumstances." Almost certainly it did not happen in this case.

Nonetheless, the Court presses on to decide the issue, and as it does, it ignores its jurisdictional limits, remakes its traditional rules of review, and creates simultaneously a new categorical rule and an exception (neither of which is rooted in our prior case law, common law, or common sense). I protest not only the Court's decision, but each step taken to reach it. More fundamentally, I question the Court's wisdom in issuing sweeping new rules to decide such a narrow case. Surely, as Justice KENNEDY demonstrates, the Court could have reached the result it wanted without inflicting this damage upon our Takings Clause jurisprudence.

My fear is that the Court's new policies will spread beyond the narrow confines of the present case. For that reason, I, like the Court, will give far greater attention to this case than its narrow scope suggests—not because I can intercept the Court's missile, or save the targeted mouse, but because I hope perhaps to limit the collateral damage.

I

A

In 1972 Congress passed the Coastal Zone Management Act. 16 U.S.C. § 1451 *et seq.* The Act was designed to provide States with money and incentives to carry out Congress' goal of protecting the public from shoreline erosion and coastal hazards. In the 1980 Amendments to the Act, Congress directed States to enhance their coastal programs by "[p]reventing or significantly reducing threats to life and the destruction of property by eliminating development and redevelopment in high-hazard areas." [1] 16 U.S.C. § 1456b(a)(2) (1988 ed., Supp. II).

1. The country has come to recognize that uncontrolled beachfront development can cause serious damage to life and property. See Brief for Sierra Club, et al. as *Amici Curiae* 2–5. Hurricane Hugo's September 1989 attack upon South Carolina's coastline, for example, caused 29 deaths and approximately $6 billion in property damage, much of it the result of uncontrolled beachfront development. See Zalkin, Shifting Sands and Shifting Doctrines: The Supreme Court's Changing Takings Doctrine and South Carolina's Coastal Zone Statute, 79 Cal. L.Rev. 205, 212–213 (1991). The beachfront buildings are not only themselves destroyed in

South Carolina began implementing the congressional directive by enacting the South Carolina Coastal Zone Management Act of 1977. Under the 1977 Act, any construction activity in what was designated the "critical area" required a permit from the Council, and the construction of any habitable structure was prohibited. The 1977 critical area was relatively narrow.

This effort did not stop the loss of shoreline. In October 1986, the Council appointed a "Blue Ribbon Committee on Beachfront Management" to investigate beach erosion and propose possible solutions. In March 1987, the Committee found that South Carolina's beaches were "critically eroding," and proposed land-use restrictions. Report of the South Carolina Blue Ribbon Committee on Beachfront Management i, 6–10 (March 1987). In response, South Carolina enacted the Beachfront Management Act on July 1, 1988. S.C.Code § 48–39–250 *et seq.* (Supp.1990). The 1988 Act did not change the uses permitted within the designated critical areas. Rather, it enlarged those areas to encompass the distance from the mean high watermark to a setback line established on the basis of "the best scientific and historical data" available.[2] S.C.Code § 48–39–280 (Supp.1991).

B

Petitioner Lucas is a contractor, manager, and part owner of the Wild Dune development on the Isle of Palms. He has lived there since 1978. In December 1986, he purchased two of the last four pieces of vacant property in the development.[3] The area is notoriously unstable. In roughly half of the last 40 years, all or part of petitioner's property was part of the beach or flooded twice daily by the ebb and flow of the tide. Tr. 84. Between 1957 and 1963, petitioner's property was under water. *Id.*, at 79, 81–82. Between 1963 and 1973 the shoreline was 100 to 150 feet onto petitioner's property. *Ibid.* In 1973 the first line of stable vegetation was about halfway through the property. *Id.*, at 80. Between 1981 and 1983, the Isle of Palms issued 12 emergency orders for sandbagging to protect property in the Wild Dune development. *Id.*, at 99. Determining that local habitable structures were in imminent danger of collapse, the Council issued permits for two rock revetments to protect condominium developments near petitioner's property from erosion; one of the revetments extends more than halfway onto one of his lots. *Id.*, at 102.

C

The South Carolina Supreme Court found that the Beachfront Management Act did not take petitioner's property without compensation. The decision rested on two premises that until today were unassailable—that the State has the power to prevent any use of property it finds to be harmful to its citizens, and that a state statute is entitled to a presumption of constitutionality.

The Beachfront Management Act includes a finding by the South Carolina General Assembly that the beach/dune system serves the purpose of "protect[ing] life and property by serving as a storm barrier which dissipates wave energy and contrib-

such a storm, "but they are often driven, like battering rams, into adjacent inland homes." *Ibid.* Moreover, the development often destroys the natural sand dune barriers that provide storm breaks. *Ibid.*

2. The setback line was determined by calculating the distance landward from the crest of an ideal oceanfront sand dune which is forty times the annual erosion rate. S.C.Code § 48–39–280 (Supp.1991).

3. The properties were sold frequently at rapidly escalating prices before Lucas purchased them. Lot 22 was first sold in 1979 for $96,660, sold in 1984 for $187,500, then in 1985 for $260,000, and, finally, to Lucas in 1986 for $475,000. He estimated its worth in 1991 at $650,000. Lot 24 had a similar past. The record does not indicate who purchased the properties prior to Lucas, or why none of the purchasers held on to the lots and built on them. Tr. 44–46.

utes to shoreline stability in an economical and effective manner." § 48–39–250(1)(a). The General Assembly also found that "development unwisely has been sited too close to the [beach/dune] system. This type of development has jeopardized the stability of the beach/dune system, accelerated erosion, and endangered adjacent property." § 48–39–250(4); see also § 48–39–250(6) (discussing the need to "afford the beach/dune system space to accrete and erode").

If the state legislature is correct that the prohibition on building in front of the setback line prevents serious harm, then, under this Court's prior cases, the Act is constitutional. "Long ago it was recognized that all property in this country is held under the implied obligation that the owner's use of it shall not be injurious to the community, and the Takings Clause did not transform that principle to one that requires compensation whenever the State asserts its power to enforce it." *Keystone Bituminous Coal Assn. v. DeBenedictis*, 480 U.S. 470, 491–492, 107 S.Ct. 1232, 1245, 94 L.Ed.2d 472 (1987) (internal quotations omitted); see also *id.*, at 488–489, and n. 18, 107 S.Ct., at 1244, n. 18. The Court consistently has upheld regulations imposed to arrest a significant threat to the common welfare, whatever their economic effect on the owner. See *e.g.*, *Goldblatt v. Hempstead*, 369 U.S. 590, 592–593, 82 S.Ct. 987, 989, 8 L.Ed.2d 130 (1962); *Euclid v. Ambler Realty Co.*, 272 U.S. 365, 47 S.Ct. 114, 71 L.Ed. 303 (1926); *Gorieb v. Fox*, 274 U.S. 603, 608, 47 S.Ct. 675, 677, 71 L.Ed. 1228 (1927); *Mugler v. Kansas*, 123 U.S. 623, 8 S.Ct. 273, 31 L.Ed. 205 (1887).

Petitioner never challenged the legislature's findings that a building ban was necessary to protect property and life. Nor did he contend that the threatened harm was not sufficiently serious to make building a house in a particular location a "harmful" use, that the legislature had not made sufficient findings, or that the legislature was motivated by anything other than a desire to minimize damage to coastal areas. Indeed, petitioner objected at trial that evidence as to the purposes of the setback requirement was irrelevant. Tr. 68. The South Carolina Supreme Court accordingly understood petitioner not to contest the State's position that "discouraging new construction in close proximity to the beach/dune area is necessary to prevent a great public harm," 304 S.C. 376, ——, 404 S.E.2d 895, 898 (1991), and "to prevent serious injury to the community." *Id.*, at ——, 404 S.E.2d, at 901. The court considered itself "bound by these uncontested legislative findings ... [in the absence of] any attack whatsoever on the statutory scheme." *Id.*, at ——, 404 S.E.2d, at 898.

Nothing in the record undermines the General Assembly's assessment that prohibitions on building in front of the setback line are necessary to protect people and property from storms, high tides, and beach erosion. Because that legislative determination cannot be disregarded in the absence of such evidence, see, *e.g.*, *Euclid*, 272 U.S., at 388, 47 S.Ct., at 118; *O'Gorman & Young v. Hartford Fire Ins. Co.*, 282 U.S. 251, 257–258, 51 S.Ct. 130, 132, 75 L.Ed. 324 (1931) (Brandeis, J.), and because its determination of harm to life and property from building is sufficient to prohibit that use under this Court's cases, the South Carolina Supreme Court correctly found no taking.

II

My disagreement with the Court begins with its decision to review this case. This Court has held consistently that a land-use challenge is not ripe for review until there is a final decision about what uses of the property will be permitted. The ripeness requirement is not simply a gesture of good-will to land-use planners. In the absence of "a final and authoritative determination of the type and intensity of development legally permitted on the subject property," *MacDonald, Sommer & Frates v. Yolo County*, 477 U.S. 340, 348, 106 S.Ct. 2561, 2566, 91 L.Ed.2d 285 (1986), and the

utilization of state procedures for just compensation, there is no final judgment, and in the absence of a final judgment there is no jurisdiction. See *San Diego Gas & Electric Co. v. San Diego*, 450 U.S. 621, 633, 101 S.Ct. 1287, 1294, 67 L.Ed.2d 551 (1981); *Agins v. Tiburon*, 447 U.S. 255, 260, 100 S.Ct. 2138, 2141, 65 L.Ed.2d 106 (1980).

This rule is "compelled by the very nature of the inquiry required by the Just Compensation Clause," because the factors applied in deciding a takings claim "simply cannot be evaluated until the administrative agency has arrived at a final, definitive position regarding how it will apply the regulations at issue to the particular land in question." *Williamson County Regional Planning Comm'n v. Hamilton Bank of Johnson City*, 473 U.S. 172, 190, 191, 105 S.Ct. 3108, 3118, 3119, 87 L.Ed.2d 126 (1985). See also *MacDonald, Sommer & Frates*, 477 U.S., at 348, 106 S.Ct., at 2566 ("A court cannot determine whether a regulation has gone 'too far' unless it knows how far the regulation goes") (citation omitted).

The Court admits that the 1990 amendments to the Beachfront Management Act allowing special permits preclude Lucas from asserting that his property has been permanently taken. See *ante*, at 2890–2891. The Court agrees that such a claim would not be ripe because there has been no final decision by respondent on what uses will be permitted. The Court, however, will not be denied: it determines that petitioner's "temporary takings" claim for the period from July 1, 1988, to June 25, 1990, is ripe. But this claim also is not justiciable.[4]

From the very beginning of this litigation, respondent has argued that the courts:

> "lac[k] jurisdiction in this matter because the Plaintiff has sought no authorization from Council for use of his property, has not challenged the location of the baseline or setback line as alleged in the Complaint and because no final agency decision has been rendered concerning use of his property or location of said baseline or setback line."

Tr. 10 (answer, as amended). Although the Council's plea has been ignored by every court, it is undoubtedly correct.

Under the Beachfront Management Act, petitioner was entitled to challenge the setback line or the baseline or erosion rate applied to his property in formal administrative, followed by judicial, proceedings. S.C.Code § 48–39–280(E) (Supp.1991). Because Lucas failed to pursue this administrative remedy, the Council never finally decided whether Lucas' particular piece of property was correctly categorized as a critical area in which building would not be permitted. This is all the more crucial because Lucas argued strenuously in the trial court that his land was perfectly safe to build on, and that his company had studies to prove it. Tr. 20, 25, 36. If he was correct, the Council's final decision would have been to alter the setback line, eliminating the construction ban on Lucas' property.

That petitioner's property fell within the critical area as initially interpreted by the Council does not excuse petitioner's failure to challenge the Act's application to his property in the administrative process. The claim is not ripe until petitioner seeks a variance from that status. "[W]e have made it quite clear that the mere assertion of regulatory jurisdiction by a governmental body does not constitute a regulatory taking." *United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121, 126, 106 S.Ct. 455, 459, 88 L.Ed.2d 419 (1985). See

4. The Court's reliance, *ante*, at 2892, on *Esposito v. South Carolina Coastal Council*, 939 F.2d 165, 168 (CA4 1991), cert. pending, No. 91–941, in support of its decision to consider Lucas' temporary taking claim ripe is misplaced. In *Esposito* the plaintiffs brought a facial challenge to the mere enactment of the Act. Here, of course, Lucas has brought an as-applied challenge. See Brief for Petitioner 16. Facial challenges are ripe when the Act is passed; applied challenges require a final decision on the Act's application to the property in question.

also *Williamson County*, 473 U.S., at 188, 105 S.Ct., at 3117 (claim not ripe because respondent did not seek variances that would have allowed it to develop the property, notwithstanding the Commission's finding that the plan did not comply with the zoning ordinance and subdivision regulations).[5]

Even if I agreed with the Court that there were no jurisdictional barriers to deciding this case, I still would not try to decide it. The Court creates its new taking jurisprudence based on the trial court's finding that the property had lost all economic value.[6] This finding is almost certainly erroneous. Petitioner still can enjoy other attributes of ownership, such as the right to exclude others, "one of the most essential sticks in the bundle of rights that are commonly characterized as property." *Kaiser Aetna v. United States*, 444 U.S. 164, 176, 100 S.Ct. 383, 391, 62 L.Ed.2d 332 (1979). Petitioner can picnic, swim, camp in a tent, or live on the property in a movable trailer. State courts frequently have recognized that land has economic value where the only residual economic uses are recreation or camping. See, *e.g.*, *Turnpike Realty Co. v. Dedham*, 362 Mass. 221, 284 N.E.2d 891 (1972) cert. denied, 409 U.S. 1108, 93 S.Ct. 908, 34 L.Ed.2d 689 (1973); *Turner v. County of Del Norte*, 24 Cal.App.3d 311, 101 Cal.Rptr. 93 (1972); *Hall v. Board of Environmental Protection*, 528 A.2d 453 (Me.1987). Petitioner also retains the right to alienate the land, which would have value for neighbors and for those prepared to enjoy proximity to the ocean without a house.

Yet the trial court, apparently believing that "less value" and "valueless" could be used interchangeably, found the property "valueless." The court accepted no evidence from the State on the property's value without a home, and petitioner's appraiser testified that he never had considered what the value would be absent a residence. Tr. 54–55. The appraiser's value was based on the fact that the "highest and best use of these lots .... [is] luxury single family detached dwellings." *Id.*, at 48. The trial court appeared to believe that the property could be considered "valueless" if it was not available for its most profitable use. Absent that erroneous assumption, see *Goldblatt*, 369 U.S., at 592, 82 S.Ct., at 989, I find no evidence in the record supporting the trial court's conclusion that the damage to the lots by virtue of the restrictions was "total." Record 128 (findings of fact). I agree with the Court, *ante*, at 2896, n. 9, that it has the power to decide a case that turns on an erroneous finding, but I question the wisdom of deciding an issue based on a factual premise that does not exist in this case, and in the judgment of the Court will exist in the future only in "extraordinary circumstance[s]." *Ante*, at 2894.

5. Even more baffling, given its decision, just a few days ago, in *Lujan v. Defenders of Wildlife*, — U.S. —, 112 S.Ct. 2130, — L.Ed. — (1992), the Court decides petitioner has demonstrated injury in fact. In his complaint, petitioner made no allegations that he had any definite plans for using his property. App. to Pet. for Cert. 153–156. At trial, Lucas testified that he had house plans drawn up, but that he was "in no hurry" to build "because the lot was appreciating in value." Tr. 28–29. The trial court made no findings of fact that Lucas had any plans to use the property from 1988 to 1990. "'[S]ome day' intentions—without any description of concrete plans, or indeed even any specification of *when* the some day will be—do not support a finding of the 'actual or imminent' injury that our cases require." — U.S., at —, 112 S.Ct., at 2138. The Court circumvents *Defenders of Wildlife* by deciding to resolve this case as if it arrived on the pleadings alone. But it did not. Lucas had a full trial on his claim for "damages for the temporary taking of his property from the date of the 1988 Act's passage to such time as this matter is finally resolved," *ante*, at 2892, n. 3, quoting the Complaint, and failed to demonstrate any immediate concrete plans to build or sell.

6. Respondent contested the findings of fact of the trial court in the South Carolina Supreme Court, but that court did not resolve the issue. This Court's decision to assume for its purposes that petitioner had been denied all economic use of his land does not, of course, dispose of the issue on remand.

Clearly, the Court was eager to decide this case.[7] But eagerness, in the absence of proper jurisdiction, must—and in this case should have been—met with restraint.

III

The Court's willingness to dispense with precedent in its haste to reach a result is not limited to its initial jurisdictional decision. The Court also alters the long-settled rules of review.

The South Carolina Supreme Court's decision to defer to legislative judgments in the absence of a challenge from petitioner comports with one of this Court's oldest maxims: "the existence of facts supporting the legislative judgment is to be presumed." *United States v. Carolene Products Co.*, 304 U.S. 144, 152, 58 S.Ct. 778, 783, 82 L.Ed. 1234 (1938). Indeed, we have said the legislature's judgment is "well-nigh conclusive." *Berman v. Parker*, 348 U.S. 26, 32, 75 S.Ct. 98, 102, 99 L.Ed. 27 (1954). See also *Sweet v. Rechel*, 159 U.S. 380, 392, 16 S.Ct. 43, 45–46, 40 L.Ed. 188 (1895); *Euclid*, 272 U.S., at 388, 47 S.Ct., at 118 ("If the validity of the legislative classification for zoning purposes be fairly debatable, the legislative judgment must be allowed to control").

Accordingly, this Court always has required plaintiffs challenging the constitutionality of an ordinance to provide "some factual foundation of record" that contravenes the legislative findings. *O'Gorman & Young*, 282 U.S., at 258, 51 S.Ct., at 132. In the absence of such proof, "the presumption of constitutionality must prevail." *Id.*, at 257, 51 S.Ct., at 132. We only recently have reaffirmed that claimants have the burden of showing a state law constitutes a taking. See *Keystone Bituminous Coal*, 480 U.S., at 485, 107 S.Ct., at 1242. See also *Goldblatt*, 369 U.S., at 594, 82 S.Ct., at 990 (citing "the usual presumption of constitutionality" that applies to statutes attacked as takings).

Rather than invoking these traditional rules, the Court decides the State has the burden to convince the courts that its legislative judgments are correct. Despite Lucas' complete failure to contest the legislature's findings of serious harm to life and property if a permanent structure is built, the Court decides that the legislative findings are not sufficient to justify the use prohibition. Instead, the Court "emphasize[s]" the State must do more than merely proffer its legislative judgments to avoid invalidating its law. *Ante*, at 2901. In this case, apparently, the State now has the burden of showing the regulation is not a taking. The Court offers no justification for its sudden hostility toward state legislators, and I doubt that it could.

IV

The Court does not reject the South Carolina Supreme Court's decision simply on the basis of its disbelief and distrust of the legislature's findings. It also takes the opportunity to create a new scheme for regulations that eliminate all economic value. From now on, there is a categorical rule finding these regulations to be a taking unless the use they prohibit is a background common-law nuisance or property principle. See *ante*, at 2900–2902.

7. The Court overlooks the lack of a ripe and justiciable claim apparently out of concern that in the absence of its intervention Lucas will be unable to obtain further adjudication of his temporary-taking claim. The Court chastises respondent for arguing that Lucas's temporary-taking claim is premature because it failed "so much as [to] commen[t]" upon the effect of the South Carolina Supreme Court's decision on petitioner's ability to obtain relief for the 2-year period, and it frets that Lucas would "be unable (absent our intervention now) to obtain further state-court adjudication with respect to the 1988–1990 period." *Ante*, at 2891. Whatever the explanation for the Court's intense interest in Lucas' plight when ordinarily we are more cautious in granting discretionary review, the concern would have been more prudently expressed by vacating the judgment below and remanding for further consideration in light of the 1990 amendments. At that point, petitioner could have brought a temporary-taking claim in the state courts.

A

I first question the Court's rationale in creating a category that obviates a "case-specific inquiry into the public interest advanced," *ante*, at 2893, if all economic value has been lost. If one fact about the Court's taking jurisprudence can be stated without contradiction, it is that "the particular circumstances of each case" determine whether a specific restriction will be rendered invalid by the government's failure to pay compensation. *United States v. Central Eureka Mining Co.*, 357 U.S. 155, 168, 78 S.Ct. 1097, 1104, 2 L.Ed.2d 1228 (1958). This is so because although we have articulated certain factors to be considered, including the economic impact on the property owner, the ultimate conclusion "necessarily requires a weighing of private and public interests." *Agins*, 447 U.S., at 261, 100 S.Ct., at 2141. When the government regulation prevents the owner from any economically valuable use of his property, the private interest is unquestionably substantial, but we have never before held that no public interest can outweigh it. Instead the Court's prior decisions "uniformly reject the proposition that diminution in property value, standing alone, can establish a 'taking.'" *Penn Central Transp. Co. v. New York City*, 438 U.S. 104, 131, 98 S.Ct. 2646, 2663, 57 L.Ed.2d 631 (1978).

This Court repeatedly has recognized the ability of government, in certain circumstances, to regulate property without compensation no matter how adverse the financial effect on the owner may be. More than a century ago, the Court explicitly upheld the right of States to prohibit uses of property injurious to public health, safety, or welfare without paying compensation: "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 just sense, be deemed a taking or an appropriation of property." *Mugler v. Kansas*, 123 U.S. 623, 668–669, 8 S.Ct. 273, 301, 31 L.Ed. 205 (1887). On this basis, the Court upheld an ordinance effectively prohibiting operation of a previously lawful brewery, although the "establishments will become of no value as property." *Id.*, at 664, 8 S.Ct., at 298; see also *id.*, at 668, 8 S.Ct., at 300.

Mugler was only the beginning in a long line of cases.[8] In *Powell v. Pennsylvania*, 127 U.S. 678, 8 S.Ct. 992, 32 L.Ed. 253 (1888), the Court upheld legislation prohibiting the manufacture of oleomargarine, despite the owner's allegation that "if prevented from continuing it, the value of his property employed therein would be entirely lost and he be deprived of the means of livelihood." *Id.*, at 682, 8 S.Ct., at 994. In *Hadacheck v. Sebastian*, 239 U.S. 394, 36 S.Ct. 143, 60 L.Ed. 348 (1915), the Court upheld an ordinance prohibiting a brickyard, although the owner had made excavations on the land that prevented it from being utilized for any purpose but a brickyard. *Id.*, at 405, 36 S.Ct., at 143. In *Miller v. Schoene*, 276 U.S. 272, 48 S.Ct. 246, 72 L.Ed. 568 (1928), the Court held that the Fifth Amendment did not require Virginia to pay compensation to the owner of cedar trees ordered destroyed to prevent a disease from spreading to nearby apple orchards. The "preferment of [the public 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." *Id.*, at 280, 48 S.Ct., at 247. Again, in *Omnia Commercial Co. v. United States*, 261 U.S. 502, 43 S.Ct. 437, 67 L.Ed. 773 (1923), the Court stated that "destruction of, or injury to, property is frequently accomplished with-

8. Prior to *Mugler*, the Court had held that owners whose real property is wholly destroyed to prevent the spread of a fire are not entitled to compensation. *Bowditch v. Boston*, 101 U.S. 16, 18–19, 25 L.Ed. 980 (1879). And the Court recognized in *The License Cases*, 5 How. 504, 589, 12 L.Ed. 256 (1847) (opinion of McLean, J.), that "[t]he acknowledged police power of a State extends often to the destruction of property."

out a 'taking' in the constitutional sense." *Id.*, at 508, 43 S.Ct., at 437.

More recently, in *Goldblatt*, the Court upheld a town regulation that barred continued operation of an existing sand and gravel operation in order to protect public safety. 369 U.S., at 596, 82 S.Ct., at 991. "Although a comparison of values before and after is relevant," the Court stated, "it is by no means conclusive."[9] *Id.*, at 594, 82 S.Ct., at 990. In 1978, the Court declared that "in instances in which a state tribunal reasonably concluded that 'the health, safety, morals, or general welfare' would be promoted by prohibiting particular contemplated uses of land, this Court has upheld land-use regulation that destroyed ... recognized real property interests." *Penn Central Transp. Co.*, 438 U.S., at 125, 98 S.Ct., at 2659. In *First Lutheran Church v. Los Angeles County*, 482 U.S. 304, 107 S.Ct. 2378, 96 L.Ed.2d 250 (1987), the owner alleged that a floodplain ordinance had deprived it of "all use" of the property. *Id.*, at 312, 107 S.Ct., at 2384. The Court remanded the case for consideration whether, even if the ordinance denied the owner all use, it could be justified as a safety measure.[10] *Id.*, at 313, 107 S.Ct., at 2385. And in *Keystone Bituminous Coal*, the Court summarized over 100 years of precedent: "the Court has repeatedly upheld regulations that destroy or adversely affect real property interests."[11] 480 U.S., at 489, n. 18, 107 S.Ct., at 1244, n. 18.

The Court recognizes that "our prior opinions have suggested that 'harmful or noxious uses' of property may be proscribed by government regulation without the requirement of compensation," *ante*, at 2897, but seeks to reconcile them with its categorical rule by claiming that the Court never has upheld a regulation when the owner alleged the loss of all economic value. Even if the Court's factual premise were correct, its understanding of the Court's cases is distorted. In none of the cases did the Court suggest that the right of a State to prohibit certain activities with-

9. That same year, an appeal came to the Court asking "[w]hether zoning ordinances which altogether destroy the worth of valuable land by prohibiting the only economic use of which it is capable effect a taking of real property without compensation." Juris. Statement, O.T.1962, No. 307, p. 5. The Court dismissed the appeal for lack of a substantial federal question. *Consolidated Rock Products Co. v. Los Angeles*, 57 Cal.2d 515, 20 Cal.Rptr. 638, 370 P.2d 342, appeal dism'd, 371 U.S. 36, 83 S.Ct. 145, 9 L.Ed.2d 112 (1962).

10. On remand, the California court found no taking in part because the zoning regulation "involves this highest of public interests—the prevention of death and injury." *First Lutheran Church v. Los Angeles*, 210 Cal.App.3d 1353, 1370, 258 Cal.Rptr. 893, 904 (1989), cert. denied, 493 U.S. 1056, 110 S.Ct. 866, 107 L.Ed.2d 950 (1990).

11. The Court's suggestion that *Agins v. Tiburon*, 447 U.S. 255, 100 S.Ct. 2138, 65 L.Ed.2d 106 (1980), a unanimous opinion, created a new *per se* rule, only now discovered, is unpersuasive. In *Agins*, the Court stated that "no precise rule determines when property has been taken" but instead that "the question necessarily requires a weighing of public and private interest." *Id.*, at 260–262, 100 S.Ct., at 2141–2142. The other cases cited by the Court, *ante*, at 2893, repeat the *Agins* sentence, but in no way suggest that the public interest is irrelevant if total value has been taken. The Court has indicated that proof that a regulation does *not* deny an owner economic use of his property is sufficient to defeat a facial taking challenge. See *Hodel v. Virginia Surface Mining & Reclamation Assn., Inc.*, 452 U.S. 264, 295–297, 101 S.Ct. 2352, 2370–2371, 69 L.Ed.2d 1 (1981). But the conclusion that a regulation is not on its face a taking because it allows the landowner some economic use of property is a far cry from the proposition that *denial* of such use is sufficient to establish a taking claim regardless of any other consideration. The Court never has accepted the latter proposition.

The Court relies today on dicta in *Agins*, *Hodel*, *Nollan v. California Coastal Comm'n*, 483 U.S. 825, 107 S.Ct. 3141, 97 L.Ed.2d 677 (1987), and *Keystone Bituminous Coal v. DeBenedictis*, 480 U.S. 470, 107 S.Ct. 1232, 94 L.Ed.2d 472 (1987), for its new categorical rule. *Ante*, at 2893. I prefer to rely on the directly contrary holdings in cases such as *Mugler* and *Hadacheck*, not to mention contrary statements in the very cases on which the Court relies. See *Agins*, 447 U.S., at 260–262, 100 S.Ct., at 2141–2142; *Keystone Bituminous Coal*, 480 U.S., at 489 n. 18, 491–492, 107 S.Ct., at 1243–1244 n. 18, 1245–1246.

out paying compensation turned on the availability of some residual valuable use.[12] Instead, the cases depended on whether the government interest was sufficient to prohibit the activity, given the significant private cost.[13]

These cases rest on the principle that the State has full power to prohibit an owner's use of property if it is harmful to the public. "[S]ince no individual has a right to use his property so as to create a nuisance or otherwise harm others, the State has not 'taken' anything when it asserts its power to enjoin the nuisance-like activity." *Keystone Bituminous Coal*, 480 U.S., at 491, n. 20, 107 S.Ct., at 1245, n. 20. It would make no sense under this theory to suggest that an owner has a constitutionally protected right to harm others, if only he makes the proper showing of economic loss.[14] See *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 418, 43 S.Ct. 158, 161, 67 L.Ed. 322 (1922) (Brandeis, J., dissenting) ("Restriction upon [harmful] use does not become inappropriate as a means, merely because it deprives the owner of the only use to which the property can then be profitably put").

B

Ultimately even the Court cannot embrace the full implications of its *per se* rule: it eventually agrees that there cannot be a categorical rule for a taking based on economic value that wholly disregards the public need asserted. Instead, the Court decides that it will permit a State to regulate all economic value only if the State prohibits uses that would not be permitted under "background principles of nuisance and property law."[15] *Ante*, at 2901.

Until today, the Court explicitly had rejected the contention that the government's power to act without paying compensation

12. *Miller v. Schoene*, 276 U.S. 272, 48 S.Ct. 246, 72 L.Ed. 568 (1928), is an example. In the course of demonstrating that apple trees are more valuable than red cedar trees, the Court noted that red cedar has "occasional use and value as lumber." *Id.*, at 279, 48 S.Ct., at 247. But the Court did not discuss whether the timber owned by the petitioner in that case was commercially saleable, and nothing in the opinion suggests that the State's right to require uncompensated felling of the trees depended on any such salvage value. To the contrary, it is clear from its unanimous opinion that the *Schoene* Court would have sustained a law requiring the burning of cedar trees if that had been necessary to protect apple trees in which there was a public interest: the Court spoke of preferment of the public interest over the property interest of the individual, "to the extent even of its destruction." *Id.*, at 280, 48 S.Ct., at 247.

13. The Court seeks to disavow the holdings and reasoning of *Mugler* and subsequent cases by explaining that they were the Court's early efforts to define the scope of the police power. There is language in the earliest taking cases suggesting that the police power was considered to be the power simply to prevent harms. Subsequently, the Court expanded its understanding of what were government's legitimate interests. But it does not follow that the holding of those early cases—that harmful and noxious uses of property can be forbidden whatever the harm to the property owner and without the payment of compensation—was repudiated. To the contrary, as the Court consciously expanded the scope of the police power beyond preventing harm, it clarified that there was a core of public interests that overrode any private interest. See *Keystone Bituminous Coal*, 480 U.S., at 491, n. 20, 107 S.Ct., at 1245, n. 20.

14. "Indeed, it would be extraordinary to construe the Constitution to require a government to compensate private landowners because it denied them 'the right' to use property which cannot be used without risking injury and death." *First Lutheran Church*, 210 Cal.App.3d, at 1366, 258 Cal.Rptr., at 901–902.

15. Although it refers to state nuisance and property law, the Court apparently does not mean just any state nuisance and property law. Public nuisance was first a common-law creation, see Newark, The Boundaries of Nuisance, 65 L.Q.Rev. 480, 482 (1949) (attributing development of nuisance to 1535), but by the 1800s in both the United States and England, legislatures had the power to define what is a public nuisance, and particular uses often have been selectively targeted. See Prosser, Private Action for Public Nuisance, 52 Va.L.Rev. 997, 999–1000 (1966); J.F. Stephen, A General View of the Criminal Law of England 105–107 (2d ed. 1890). The Court's references to "common-law" background principles, however, indicate that legislative determinations do not constitute "state nuisance and property law" for the Court.

turns on whether the prohibited activity is a common-law nuisance.[16] The brewery closed in *Mugler* itself was not a common-law nuisance, and the Court specifically stated that it was the role of the legislature to determine what measures would be appropriate for the protection of public health and safety. See 123 U.S., at 661, 8 S.Ct., at 297. In upholding the state action in *Miller*, the Court found it unnecessary to "weigh with nicety the question whether the infected cedars constitute a nuisance according to common law; or whether they may be so declared by statute." 276 U.S., at 280, 48 S.Ct., at 248. See also *Goldblatt*, 369 U.S., at 593, 82 S.Ct., at 989; *Hadacheck*, 239 U.S., at 411, 36 S.Ct., at 146. Instead the Court has relied in the past, as the South Carolina Court has done here, on legislative judgments of what constitutes a harm.[17]

The Court rejects the notion that the State always can prohibit uses it deems a harm to the public without granting compensation because "the distinction between 'harm-preventing' and 'benefit-conferring' regulation is often in the eye of the beholder." *Ante*, at 2897. Since the characterization will depend "primarily upon one's evaluation of the worth of competing uses of real estate," *ante*, at 2898, the Court decides a legislative judgment of this kind no longer can provide the desired "objective, value-free basis" for upholding a regulation. *Ante*, at 2899. The Court, however, fails to explain how its proposed common law alternative escapes the same trap.

The threshold inquiry for imposition of the Court's new rule, "deprivation of all economically valuable use," itself cannot be determined objectively. As the Court admits, whether the owner has been deprived of all economic value of his property will depend on how "property" is defined. The "composition of the denominator in our 'deprivation' fraction," *ante*, at 2894, n. 7, is the dispositive inquiry. Yet there is no "objective" way to define what that denominator should be. "We have long understood that any land-use regulation can be characterized as the 'total' deprivation of an aptly defined entitlement.... Alternatively, the same regulation can always be characterized as a mere 'partial' withdrawal from full, unencumbered ownership of the landholding affected by the regulation...."[18] Michelman, Takings, 1987, 88 Colum.L.Rev. 1600, 1614 (1988).

The Court's decision in *Keystone Bituminous Coal* illustrates this principle per-

16. Also, until today the fact that the regulation prohibited uses that were lawful at the time the owner purchased did not determine the constitutional question. The brewery, the brickyard, the cedar trees, and the gravel pit were all perfectly legitimate uses prior to the passage of the regulation. See *Mugler v. Kansas*, 123 U.S. 623, 654, 8 S.Ct. 273, 293, 31 L.Ed. 205 (1887); *Hadacheck v. Los Angeles*, 239 U.S. 394, 36 S.Ct. 143, 60 L.Ed. 348 (1915); *Miller*, 276 U.S., at 272, 48 S.Ct., at 246; *Goldblatt v. Hempstead*, 369 U.S. 590, 82 S.Ct. 987, 8 L.Ed.2d 130 (1962). This Court explicitly acknowledged in *Hadacheck* that "[a] vested interest cannot be asserted against [the police power] because of conditions once obtaining. To so hold would preclude development and fix a city forever in its primitive conditions." 239 U.S., at 410, 36 S.Ct., at 145 (citation omitted).

17. The Court argues that finding no taking when the legislature prohibits a harmful use, such as the Court did in *Mugler* and the South Carolina Supreme Court did in the instant case, would nullify *Pennsylvania Coal*. See *ante*, at 2897. Justice Holmes, the author of *Pennsylvania Coal*, joined *Miller v. Schoene*, 276 U.S. 272, 48 S.Ct. 246, 72 L.Ed. 568 (1928), six years later. In *Miller*, the Court adopted the exact approach of the South Carolina Court: It found the cedar trees harmful, and their destruction not a taking, whether or not they were a nuisance. Justice Holmes apparently believed that such an approach did not repudiate his earlier opinion. Moreover, this Court already has been over this ground five years ago, and at that point rejected the assertion that *Pennsylvania Coal* was inconsistent with *Mugler*, *Hadacheck*, *Miller*, or the others in the string of "noxious use" cases, recognizing instead that the nature of the State's action is critical in takings analysis. *Keystone Bituminous Coal*, 480 U.S., at 490, 107 S.Ct., at 1244.

18. See also Michelman, Property, Utility, and Fairness, Comments on the Ethical Foundations of "Just Compensation" Law, 80 Harv.L.Rev. 1165, 1192–1193 (1967); Sax, Takings and the Police Power, 74 Yale L.J. 36, 60 (1964).

fectly. In *Keystone*, the Court determined that the "support estate" was "merely a part of the entire bundle of rights possessed by the owner." 480 U.S., at 501, 107 S.Ct., at 1250. Thus, the Court concluded that the support estate's destruction merely eliminated one segment of the total property. *Ibid.* The dissent, however, characterized the support estate as a distinct property interest that was wholly destroyed. *Id.*, at 519, 107 S.Ct., at 1260. The Court could agree on no "value-free basis" to resolve this dispute.

Even more perplexing, however, is the Court's reliance on common-law principles of nuisance in its quest for a value-free taking jurisprudence. In determining what is a nuisance at common law, state courts make exactly the decision that the Court finds so troubling when made by the South Carolina General Assembly today: they determine whether the use is harmful. Common-law public and private nuisance law is simply a determination whether a particular use causes harm. See Prosser, Private Action for Public Nuisance, 52 Va.L.Rev. 997, 997 (1966) ("*Nuisance* is a French word which means nothing more than harm"). There is nothing magical in the reasoning of judges long dead. They determined a harm in the same way as state judges and legislatures do today. If judges in the 18th and 19th centuries can distinguish a harm from a benefit, why not judges in the 20th century, and if judges can, why not legislators? There simply is no reason to believe that new interpretations of the hoary common law nuisance doctrine will be particularly "objective" or "value-free." [19] Once one abandons the level of generality of *sic utere tuo ut alienum non laedas*, *ante*, at 2901, one searches in vain, I think, for anything resembling a principle in the common law of nuisance.

C

Finally, the Court justifies its new rule that the legislature may not deprive a property owner of the only economically valuable use of his land, even if the legislature finds it to be a harmful use, because such action is not part of the "long recognized" "understandings of our citizens." *Ante*, at 2899. These "understandings" permit such regulation only if the use is a nuisance under the common law. Any other course is "inconsistent with the historical compact recorded in the Takings Clause." *Ante*, at 2900. It is not clear from the Court's opinion where our "historical compact" or "citizens' understanding" comes from, but it does not appear to be history.

The principle that the State should compensate individuals for property taken for public use was not widely established in America at the time of the Revolution.

> "The colonists ... inherited ... a concept of property which permitted extensive regulation of the use of that property for the public benefit—regulation that could even go so far as to deny all productive use of the property to the owner if, as Coke himself stated, the regulation 'extends to the public benefit ... for this is for the public, and every one hath benefit by it.' "

F. Bosselman, D. Callies & J. Banta, The Taking Issue 80–81 (1973), quoting *The Case of the King's Prerogative in Saltpetre*, 12 Co.Rep. 12–13 (1606) (hereinafter Bosselman). See also Treanor, The Origins

19. "There is perhaps no more impenetrable jungle in the entire law than that which surrounds the word 'nuisance.' It has meant all things to all people, and has been applied indiscriminately to everything from an alarming advertisement to a cockroach baked in a pie." W. Keeton, D. Dobbs, R. Keeton, D. Owen, Prosser and Keeton on The Law of Torts 616 (5th ed. 1984) (footnotes omitted). It is an area of law that "straddles the legal universe, virtually defies synthesis, and generates case law to suit every taste." W. Rodgers, Environmental Law § 2.4, at 48 (1986) (footnotes omitted). The Court itself has noted that "nuisance concepts" are "often vague and indeterminate." *Milwaukee v. Illinois*, 451 U.S. 304, 317, 101 S.Ct. 1784, 1792, 68 L.Ed.2d 114 (1981).

and Original Significance of the Just Compensation Clause of the Fifth Amendment, 94 Yale L.J. 694, 697, n. 9 (1985).[20]

Even into the 19th century, state governments often felt free to take property for roads and other public projects without paying compensation to the owners.[21] See M. Horwitz, The Transformation of American Law, 1780–1860, pp. 63–64 (1977) (hereinafter Horwitz); Treanor, 94 Yale L.J., at 695. As one court declared in 1802, citizens "were bound to contribute as much of [land], as by the laws of the country, were deemed necessary for the public convenience." *M'Clenachan v. Curwin*, 3 Yeates 362, 373 (Pa.1802). There was an obvious movement toward establishing the just compensation principle during the 19th century, but "there continued to be a strong current in American legal thought that regarded compensation simply as a 'bounty given ... by the State' out of 'kindness' and not out of justice." Horwitz 65 (quoting *Commonwealth v. Fisher*, 1 Pen. & W. 462, 465 (Pa.1830)). See also *State v. Dawson*, 3 Hill 100, 103 (S.C.1836)).[22]

Although, prior to the adoption of the Bill of Rights, America was replete with land use regulations describing which activities were considered noxious and forbidden, see Bender, The Takings Clause: Principles or Politics?, 34 Buffalo L.Rev. 735, 751 (1985); L. Friedman, A History of American Law 66–68 (1973), the Fifth Amendment's Takings Clause originally did not extend to regulations of property, whatever the effect.[23] See *ante*, at 2892. Most state courts agreed with this narrow interpretation of a taking. "Until the end of the nineteenth century ... jurists held that the constitution protected possession only, and not value." Siegel, Understanding the Nineteenth Century Contract Clause: The Role of the Property–Privilege Distinction and "Takings" Clause Jurisprudence, 60 S.Cal.L.Rev. 1, 76 (1986); Bosselman 106. Even indirect and consequential injuries to property resulting from regulations were excluded from the definition of a taking. See Bosselman 106; *Callender v. Marsh*, 1 Pick. 418, 430 (Mass.1823).

Even when courts began to consider that regulation in some situations could constitute a taking, they continued to uphold bans on particular uses without paying compensation, notwithstanding the economic impact, under the rationale that no one can obtain a vested right to injure or en-

20. See generally Sax, 74 Yale L.J., at 56–59. "The evidence certainly seems to indicate that the mere fact that government activity destroyed existing economic advantages and power did not disturb [the English theorists who formulated the compensation notion] at all." *Id.*, at 56. Professor Sax contends that even Blackstone, "remembered champion of the language of private property," did not believe that the compensation clause was meant to preserve economic value. *Id.*, at 58–59.

21. In 1796, the Attorney General of South Carolina responded to property holders' demand for compensation when the State took their land to build a road by arguing that "there is not one instance on record, and certainly none within the memory of the oldest man now living, of any demand being made for compensation for the soil or freehold of the lands." *Lindsay v. Commissioners*, 2 S.C.L. 38, 49 (1796).

22. Only the constitutions of Vermont and Massachusetts required that compensation be paid when private property was taken for public use; and although eminent domain was mentioned in the Pennsylvania constitution, its sole requirement was that property not be taken without the consent of the legislature. See Grant, The "Higher Law" Background of the Law of Eminent Domain, in 2 Selected Essays on Constitutional Law 912, 915–916 (1938). By 1868, five of the original States still had no just compensation clauses in their constitutions. *Ibid.*

23. James Madison, author of the Takings Clause, apparently intended it to apply only to direct, physical takings of property by the Federal Government. See Treanor, The Origins and Original Significance of the Just Compensation Clause of the Fifth Amendment, 94 Yale L.J., 694, 711 (1985). Professor Sax argues that although "contemporaneous commentary upon the meaning of the compensation clause is in very short supply," 74 Yale L.J., at 58, the "few authorities that are available" indicate that the clause was "designed to prevent arbitrary government action," not to protect economic value. *Id.*, at 58–60.

danger the public.[24] In the *Coates* cases, for example, the Supreme Court of New York found no taking in New York's ban on the interment of the dead within the city, although "no other use can be made of these lands." *Coates v. City of New York*, 7 Cow. 585, 592 (N.Y.1827). See also *Brick Presbyterian Church v. City of New York*, 5 Cow. 538 (N.Y.1826); *Commonwealth v. Alger*, 7 Cush. 53, 59, 104 (Mass.1851); *St. Louis Gunning Advertisement Co. v. St. Louis*, 235 Mo. 99, 145–146, 137 S.W. 929, 942 (1911), appeal dism'd, 231 U.S. 761, 34 S.Ct. 325, 58 L.Ed. 470 (1913). More recent cases reach the same result. See *Consolidated Rock Products Co. v. Los Angeles*, 57 Cal.2d 515, 20 Cal.Rptr. 638, 370 P.2d 342, appeal dism'd, 371 U.S. 36, 83 S.Ct. 145, 9 L.Ed.2d 112 (1962); *Nassr v. Commonwealth*, 394 Mass. 767, 477 N.E.2d 987 (1985); *Eno v. Burlington*, 125 Vt. 8, 209 A.2d 499 (1965); *Turner v. County of Del Norte*, 24 Cal.App.3d 311, 101 Cal.Rptr. 93 (1972).

In addition, state courts historically have been less likely to find that a government action constitutes a taking when the affected land is undeveloped. According to the South Carolina court, the power of the legislature to take unimproved land without providing compensation was sanctioned by "ancient rights and principles." *Lindsay v. Commissioners*, 2 S.C.L. 38, 57 (1796). "Except for Massachusetts, no colony appears to have paid compensation when it built a state-owned road across unimproved land. Legislatures provided compensation only for enclosed or improved land." Treanor, 94 Yale L.J., at 695 (footnotes omitted). This rule was followed by some States into the 1800s. See Horwitz 63–65.

With similar result, the common agrarian conception of property limited owners to "natural" uses of their land prior to and during much of the 18th century. See *id.*, at 32. Thus, for example, the owner could build nothing on his land that would alter the natural flow of water. See *id.*, at 44; see also, *e.g.*, *Merritt v. Parker*, 1 Coxe 460, 463 (N.J.1795). Some more recent state courts still follow this reasoning. See, *e.g.*, *Just v. Marinette County*, 56 Wis.2d 7, 201 N.W.2d 761, 768 (1972).

Nor does history indicate any common-law limit on the State's power to regulate harmful uses even to the point of destroying all economic value. Nothing in the discussions in Congress concerning the Takings Clause indicates that the Clause was limited by the common-law nuisance doctrine. Common law courts themselves rejected such an understanding. They regularly recognized that it is "for the legislature to interpose, and by positive enactment to prohibit a use of property which would be injurious to the public." *Tewksbury*, 11 Metc., at 57.[25] Chief Justice Shaw explained in upholding a regulation prohibiting construction of wharves, the existence of a taking did not depend on "whether a certain erection in tide water is a nuisance at common law or not." *Alger*, 7 Cush., at 104; see also *State v. Paul*, 5 R.I. 185, 193 (1858); *Commonwealth v. Parks*, 155 Mass. 531, 532, 30 N.E. 174 (1892) (Holmes, J.) ("[T]he legislature may change the common law as to nuisances, and may move the line either way, so as to make things nui-

24. For this reason, the retroactive application of the regulation to formerly lawful uses was not a controlling distinction in the past. "Nor can it make any difference that the right is purchased previous to the passage of the by-law," for "[e]very right, from an absolute ownership in property, down to a mere easement, is purchased and holden subject to the restriction, that it shall be so exercised as not to injure others. Though, at the time, it be remote and inoffensive, the purchaser is bound to know, at his peril, that it may become otherwise." *Coates v. City of New York*, 7 Cow. 585, 605 (N.Y.1827). See also *Brick Presbyterian Church v. City of New York*, 5 Cow. 538, 542 (N.Y.1826); *Commonwealth v. Tewksbury*, 11 Metc. 55 (Mass. 1846); *State v. Paul*, 5 R.I. 185 (1858).

25. More recent state court decisions agree. See, *e.g.*, *Lane v. Mt. Vernon*, 38 N.Y.2d 344, 379 N.Y.S.2d 798, 800, 342 N.E.2d 571, 573 (1976); *Commonwealth v. Baker*, 160 Pa.Super. 640, 53 A.2d 829, 830 (1947).

sances which were not so, or to make things lawful which were nuisances").

In short, I find no clear and accepted "historical compact" or "understanding of our citizens" justifying the Court's new taking doctrine. Instead, the Court seems to treat history as a grab-bag of principles, to be adopted where they support the Court's theory, and ignored where they do not. If the Court decided that the early common law provides the background principles for interpreting the Taking Clause, then regulation, as opposed to physical confiscation, would not be compensable. If the Court decided that the law of a later period provides the background principles, then regulation might be compensable, but the Court would have to confront the fact that legislatures regularly determined which uses were prohibited, independent of the common law, and independent of whether the uses were lawful when the owner purchased. What makes the Court's analysis unworkable is its attempt to package the law of two incompatible eras and peddle it as historical fact.[26]

V

The Court makes sweeping and, in my view, misguided and unsupported changes in our taking doctrine. While it limits these changes to the most narrow subset of government regulation—those that eliminate all economic value from land—these changes go far beyond what is necessary to secure petitioner Lucas' private benefit. One hopes they do not go beyond the narrow confines the Court assigns them to today.

I dissent.

26. The Court asserts that all early American experience, prior to and after passage of the Bill of Rights, and any case law prior to 1897 are "entirely irrelevant" in determining what is "the historical compact recorded in the Takings Clause." *Ante*, at 2900, n. 15. Nor apparently are we to find this compact in the early federal taking cases, which clearly permitted prohibition of harmful uses despite the alleged loss of all value, whether or not the prohibition was a common-law nuisance, and whether or not the prohibition occurred subsequent to the purchase. See *supra*, pp. 2910, 2912–2913, and n. 16. I cannot imagine where the Court finds its "historical compact," if not in history.

Justice STEVENS, dissenting.

Today the Court restricts one judge-made rule and expands another. In my opinion it errs on both counts. Proper application of the doctrine of judicial restraint would avoid the premature adjudication of an important constitutional question. Proper respect for our precedents would avoid an illogical expansion of the concept of "regulatory takings."

I

As the Court notes, *ante*, at 2890–2891, South Carolina's Beachfront Management Act has been amended to permit some construction of residences seaward of the line that frustrated petitioner's proposed use of his property. Until he exhausts his right to apply for a special permit under that amendment, petitioner is not entitled to an adjudication by this Court of the merits of his permanent takings claim. *MacDonald, Sommer & Frates v. County of Yolo*, 477 U.S. 340, 351, 106 S.Ct. 2561, 2567, 91 L.Ed.2d 285 (1986).

It is also not clear that he has a viable "temporary takings" claim. If we assume that petitioner is now able to build on the lot, the only injury that he may have suffered is the delay caused by the temporary existence of the absolute statutory ban on construction. We cannot be sure, however, that that delay caused petitioner any harm because the record does not tell us whether his building plans were even temporarily frustrated by the enactment of the statute.[1] Thus, on the present record it is entirely possible that petitioner has suffered no injury-in-fact even if the state

1. In this regard, it is noteworthy that petitioner acquired the lot about 18 months before the statute was passed; there is no evidence that he ever sought a building permit from the local authorities.

statute was unconstitutional when he filed this lawsuit.

It is true, as the Court notes, that the argument against deciding the constitutional issue in this case rests on prudential considerations rather than a want of jurisdiction. I think it equally clear, however, that a Court less eager to decide the merits would follow the wise counsel of Justice Brandeis in his deservedly famous concurring opinion in *Ashwander v. Tennessee Valley Authority*, 297 U.S. 288, 341, 56 S.Ct. 466, 480, 80 L.Ed. 688 (1936). As he explained, the Court has developed "for its own governance in the cases confessedly within its jurisdiction, a series of rules under which it has avoided passing upon a large part of all the constitutional questions pressed upon it for decision." *Id.* at 346, 56 S.Ct., at 482. The second of those rules applies directly to this case.

> "2. The Court will not 'anticipate a question of constitutional law in advance of the necessity of deciding it.' *Liverpool, N.Y. & P.S.S. Co. v. Emigration Commissioners*, 113 U.S. 33, 39 [5 S.Ct. 352, 355, 28 L.Ed. 899]; [citing five additional cases]. 'It is not the habit of the Court to decide questions of a constitutional nature unless absolutely necessary to a decision of the case.' *Burton v. United States*, 196 U.S. 283, 295 [25 S.Ct. 243, 245, 49 L.Ed. 482]." *Id.*, at 346–347, 56 S.Ct., at 483.

Cavalierly dismissing the doctrine of judicial restraint, the Court today tersely announces that "we do not think it prudent to apply that prudential requirement here." *Ante*, at 2892. I respectfully disagree and would save consideration of the merits for another day. Since, however, the Court has reached the merits, I shall do so as well.

II

In its analysis of the merits, the Court starts from the premise that this Court has adopted a "categorical rule that total regulatory takings must be compensated," *ante*, at 2899, and then sets itself to the task of identifying the exceptional cases in which a State may be relieved of this categorical obligation. *Ante*, at 2899. The test the Court announces is that the regulation must do no more than duplicate the result that could have been achieved under a State's nuisance law. *Ante*, at 2900. Under this test the categorical rule will apply unless the regulation merely makes explicit what was otherwise an implicit limitation on the owner's property rights.

In my opinion, the Court is doubly in error. The categorical rule the Court establishes is an unsound and unwise addition to the law and the Court's formulation of the exception to that rule is too rigid and too narrow.

The Categorical Rule

As the Court recognizes, *ante*, at 2892–2893, *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 43 S.Ct. 158, 67 L.Ed. 322 (1922), provides no support for its—or, indeed, any—categorical rule. To the contrary, Justice Holmes recognized that such absolute rules ill fit the inquiry into "regulatory takings." Thus, in the paragraph that contains his famous observation that a regulation may go "too far" and thereby constitute a taking, the Justice wrote: "As we already have said, this is a question of degree—and therefore cannot be disposed of by general propositions." *Id.* at 416, 43 S.Ct., at 160. What he had "already ... said" made perfectly clear that Justice Holmes regarded economic injury to be merely one factor to be weighed: "One fact for consideration in determining such limits is the extent of the diminution [of value.] So the question depends upon the particular facts." *Id.* at 413, 43 S.Ct., at 159.

Nor does the Court's new categorical rule find support in decisions following *Mahon*. Although in dicta we have sometimes recited that a law "effects a taking if [it] ... denies an owner economically viable use of his land," *Agins v. Tiburon*, 447 U.S. 255, 260, 100 S.Ct. 2138, 2141, 65 L.Ed.2d 106 (1980), our *rulings* have reject-

ed such an absolute position. We have frequently—and recently—held that, in some circumstances, a law that renders property valueless may nonetheless not constitute a taking. See, *e.g.*, *First English Evangelical Lutheran Church of Glendale v. County of Los Angeles*, 482 U.S. 304, 313, 107 S.Ct. 2378, 2385, 96 L.Ed.2d 250 (1987); *Goldblatt v. Hempstead*, 369 U.S. 590, 596, 82 S.Ct. 987, 991, 8 L.Ed.2d 130 (1962); *United States v. Caltex*, 344 U.S. 149, 155, 73 S.Ct. 200, 203, 97 L.Ed. 157 (1952); *Miller v. Schoene*, 276 U.S. 272, 48 S.Ct. 246, 72 L.Ed. 568 (1928); *Hadacheck v. Sebastian*, 239 U.S. 394, 405, 36 S.Ct. 143, 143, 60 L.Ed. 348 (1915); *Mugler v. Kansas*, 123 U.S. 623, 657, 8 S.Ct. 273, 294, 31 L.Ed. 205 (1887); cf. *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 1011, 104 S.Ct. 2862, 2877, 81 L.Ed.2d 815 (1984); *Connolly v. Pension Benefit Guaranty Corporation*, 475 U.S. 211, 225, 106 S.Ct. 1018, 1026, 89 L.Ed.2d 166 (1986). In short, as we stated in *Keystone Bituminous Coal Assn. v. DeBenedictis*, 480 U.S. 470, 490, 107 S.Ct. 1232, 1244, 94 L.Ed.2d 472 (1987), "'Although a comparison of values before and after' a regulatory action 'is relevant, ... it is by no means conclusive.'"

In addition to lacking support in past decisions, the Court's new rule is wholly arbitrary. A landowner whose property is diminished in value 95% recovers nothing, while an owner whose property is diminished 100% recovers the land's full value. The case at hand illustrates this arbitrariness well. The Beachfront Management Act not only prohibited the building of new dwellings in certain areas, it also prohibited the rebuilding of houses that were "destroyed beyond repair by natural causes or by fire." 1988 S.C. Acts 634, § 3; see also *Esposito v. South Carolina Coastal Council*, 939 F.2d 165, 167 (CA4 1991).[2] Thus, if the homes adjacent to Lucas' lot were destroyed by a hurricane one day after the Act took effect, the owners would not be able to rebuild, nor would they be assured recovery. Under the Court's categorical approach, Lucas (who has lost the opportunity to build) recovers, while his neighbors (who have lost *both* the opportunity to build *and* their homes) do not recover. The arbitrariness of such a rule is palpable.

Moreover, because of the elastic nature of property rights, the Court's new rule will also prove unsound in practice. In response to the rule, courts may define "property" broadly and only rarely find regulations to effect total takings. This is the approach the Court itself adopts in its revisionist reading of venerable precedents. We are told that—notwithstanding the Court's findings to the contrary in each case—the brewery in *Mugler*, the brickyard in *Hadacheck*, and the gravel pit in *Goldblatt* all could be put to "other uses" and that, therefore, those cases did not involve total regulatory takings.[3] *Ante*, at 2899, n. 13.

On the other hand, developers and investors may market specialized estates to take advantage of the Court's new rule. The smaller the estate, the more likely that a regulatory change will effect a total taking. Thus, an investor may, for example, purchase the right to build a multi-family home on a specific lot, with the result that a zoning regulation that allows only single-

2. This aspect of the Act was amended in 1990. See S.C. Code § 48-39-290(B) (Supp.1990).

3. Of course, the same could easily be said in this case: Lucas may put his land to "other uses"—fishing or camping, for example—or may sell his land to his neighbors as a buffer. In either event, his land is far from "valueless."

This highlights a fundamental weakness in the Court's analysis: its failure to explain why only the impairment of "*economically* beneficial or productive use," *ante*, at 2893 (emphasis added), of property is relevant in takings analysis. I should think that a regulation arbitrarily prohibiting an owner from continuing to use her property for bird-watching or sunbathing might constitute a taking under some circumstances; and, conversely, that such uses are of value to the owner. Yet the Court offers no basis for its assumption that the only uses of property cognizable under the Constitution are *developmental* uses.

family homes would render the investor's property interest "valueless."[4] In short, the categorical rule will likely have one of two effects: Either courts will alter the definition of the "denominator" in the takings "fraction," rendering the Court's categorical rule meaningless, or investors will manipulate the relevant property interests, giving the Court's rule sweeping effect. To my mind, neither of these results is desirable or appropriate, and both are distortions of our takings jurisprudence.

Finally, the Court's justification for its new categorical rule is remarkably thin. The Court mentions in passing three arguments in support of its rule; none is convincing. First, the Court suggests that "total deprivation of feasible use is, from the landowner's point of view, the equivalent of a physical appropriation." *Ante*, at 2894–2895. This argument proves too much. From the "landowner's point of view," a regulation that diminishes a lot's value by 50% is as well "the equivalent" of the condemnation of half of the lot. Yet, it is well established that a 50% diminution in value does not by itself constitute a taking. See *Euclid v. Ambler Realty Co.*, 272 U.S. 365, 384, 47 S.Ct. 114, 117, 71 L.Ed. 303 (1926) (75% diminution in value). Thus, the landowner's perception of the regulation cannot justify the Court's new rule.

Second, the Court emphasizes that because total takings are "relatively rare" its new rule will not adversely affect the government's ability to "go on." *Ante*, at 2894. This argument proves too little. Certainly it is true that defining a small class of regulations that are *per se* takings will not greatly hinder important governmental functions—but this is true of *any* small class of regulations. The Court's suggestion only begs the question of why regulations of *this* particular class should always be found to effect takings.

Finally, the Court suggests that "regulations that leave the owner ... without economically beneficial ... use ... carry with them a heightened risk that private property is being pressed into some form of public service." *Ibid.* As discussed more fully below, see *infra*, Part III, I agree that the risks of such singling out are of central concern in takings law. However, such risks do not justify a *per se* rule for total regulatory takings. There is no necessary correlation between "singling out" and total takings: a regulation may single out a property owner without depriving him of all of his property, see *e.g.*, *Nollan v. California Coastal Comm'n*, 483 U.S. 825, 837, 107 S.Ct. 3141, 3149, 97 L.Ed.2d 677 (1987); *J.E.D. Associates, Inc. v. Atkinson*, 121 N.H. 581, 432 A.2d 12 (1981); and it may deprive him of all of his property without singling him out, see *e.g.*, *Mugler v. Kansas*, 123 U.S. 623, 8 S.Ct. 273, 31 L.Ed. 205 (1887); *Hadacheck v. Sebastian*, 239 U.S. 394, 36 S.Ct. 143, 60 L.Ed. 348 (1915). What matters in such cases is not the degree of diminution of value, but rather the specificity of the expropriating act. For this reason, the Court's third justification for its new rule also fails.

In short, the Court's new rule is unsupported by prior decisions, arbitrary and unsound in practice, and theoretically unjustified. In my opinion, a categorical rule as important as the one established by the Court today should be supported by more history or more reason than has yet been provided.

The Nuisance Exception

Like many bright-line rules, the categorical rule established in this case is only "categorical" for a page or two in the U.S. Reports. No sooner does the Court state that "total regulatory takings must be

4. This unfortunate possibility is created by the Court's subtle revision of the "total regulatory takings" dicta. In past decisions, we have stated that a regulation effects a taking if it "denies an owner economically viable use of his *land*," *Agins v. Tiburon*, 447 U.S. 255, 260, 100 S.Ct. 2138, 2141, 65 L.Ed.2d 106 (1980) (emphasis added), indicating that this "total takings" test did not apply to other estates. Today, however, the Court suggests that a regulation may effect a total taking of *any* real property interest. See *ante*, at 2894, n. 7.

compensated," *ante*, at 2899, than it quickly establishes an exception to that rule.

The exception provides that a regulation that renders property valueless is not a taking if it prohibits uses of property that were not "previously permissible under relevant property and nuisance principles." *Ante*, at 2901. The Court thus rejects the basic holding in *Mugler v. Kansas*, 123 U.S. 623, 8 S.Ct. 273, 31 L.Ed. 205 (1887). There we held that a state-wide statute that prohibited the owner of a brewery from making alcoholic beverages did not effect a taking, even though the use of the property had been perfectly lawful and caused no public harm before the statute was enacted. We squarely rejected the rule the Court adopts today:

> "It is true, that, when the defendants ... erected their breweries, the laws of the State did not forbid the manufacture of intoxicating liquors. But the State did not thereby give any assurance, or come under an obligation, that its legislation upon that subject would remain unchanged. [T]he supervision of the public health and the public morals is a governmental power, 'continuing in its nature,' and 'to be dealt with as the special exigencies of the moment may require;' ... 'for this purpose, the largest legislative discretion is allowed, and the discretion cannot be parted with any more than the power itself.'" *Id.*, at 669, 8 S.Ct., at 301.

Under our reasoning in *Mugler*, a state's decision to prohibit or to regulate certain uses of property is not a compensable taking just because the particular uses were previously lawful. Under the Court's opinion today, however, if a state should decide to prohibit the manufacture of asbestos, cigarettes, or concealable firearms, for example, it must be prepared to pay for the adverse economic consequences of its decision. One must wonder if Government will be able to "go on" effectively if it must risk compensation "for every such change in the general law." *Mahon*, 260 U.S., at 413, 43 S.Ct., at 159.

The Court's holding today effectively freezes the State's common law, denying the legislature much of its traditional power to revise the law governing the rights and uses of property. Until today, I had thought that we had long abandoned this approach to constitutional law. More than a century ago we recognized that "the great office of statutes is to remedy defects in the common law as they are developed, and to adapt it to the changes of time and circumstances." *Munn v. Illinois*, 94 U.S. 113, 134, 24 L.Ed. 77 (1877). As Justice Marshall observed about a position similar to that adopted by the Court today:

> "If accepted, that claim would represent a return to the era of *Lochner v. New York*, 198 U.S. 45 [25 S.Ct. 539, 49 L.Ed. 937] (1905), when common-law rights were also found immune from revision by State or Federal Government. Such an approach would freeze the common law as it has been constructed by the courts, perhaps at its 19th-century state of development. It would allow no room for change in response to changes in circumstance. The Due Process Clause does not require such a result." *PruneYard Shopping Center v. Robins*, 447 U.S. 74, 93, 100 S.Ct. 2035, 2047, 64 L.Ed.2d 741 (1980) (concurring opinion).

Arresting the development of the common law is not only a departure from our prior decisions; it is also profoundly unwise. The human condition is one of constant learning and evolution—both moral and practical. Legislatures implement that new learning; in doing so they must often revise the definition of property and the rights of property owners. Thus, when the Nation came to understand that slavery was morally wrong and mandated the emancipation of all slaves, it, in effect, redefined "property." On a lesser scale, our ongoing self-education produces similar changes in the rights of property owners: New appreciation of the significance of endangered species, see, *e.g.*, *Andrus v. Allard*, 444 U.S. 51, 100 S.Ct. 318, 62 L.Ed.2d 210 (1979); the importance of wetlands,

see, *e.g.*, 16 U.S.C. § 3801 *et seq.*; and the vulnerability of coastal lands, see, *e.g.*, 16 U.S.C. § 1451 *et seq.*, shapes our evolving understandings of property rights.

Of course, some legislative redefinitions of property will effect a taking and must be compensated—but it certainly cannot be the case that every movement away from common law does so. There is no reason, and less sense, in such an absolute rule. We live in a world in which changes in the economy and the environment occur with increasing frequency and importance. If it was wise a century ago to allow Government "'the largest legislative discretion'" to deal with "'the special exigencies of the moment,'" *Mugler*, 123 U.S., at 669, 8 S.Ct., at 301, it is imperative to do so today. The rule that should govern a decision in a case of this kind should focus on the future, not the past.[5]

* * * * * *

The Court's categorical approach rule will, I fear, greatly hamper the efforts of local officials and planners who must deal with increasingly complex problems in land-use and environmental regulation. As this case—in which the claims of an *individual* property owner exceed $1 million—well demonstrates, these officials face both substantial uncertainty because of the ad hoc nature of takings law and unacceptable penalties if they guess incorrectly about that law.[6]

Viewed more broadly, the Court's new rule and exception conflict with the very character of our takings jurisprudence. We have frequently and consistently recognized that the definition of a taking cannot be reduced to a "set formula" and that determining whether a regulation is a taking is "essentially [an] ad hoc, factual inquir[y]." *Penn Central Transportation Co. v. New York City*, 438 U.S. 104, 124, 98 S.Ct. 2646, 2659, 57 L.Ed.2d 631 (1978) (quoting *Goldblatt v. Hempstead*, 369 U.S. 590, 594, 82 S.Ct. 987, 990, 8 L.Ed.2d 130 (1962)). This is unavoidable, for the determination whether a law effects a taking is ultimately a matter of "fairness and justice," *Armstrong v. United States*, 364 U.S. 40, 49, 80 S.Ct. 1563, 1569, 4 L.Ed.2d 1554 (1960), and "necessarily requires a weighing of private and public interests." *Agins*, 447 U.S., at 261, 100 S.Ct., at 2141. The rigid rules fixed by the Court today clash with this enterprise: "fairness and justice" are often disserved by categorical rules.

III

It is well established that a takings case "entails inquiry into [several factors:] the character of the governmental action, its economic impact, and its interference with reasonable investment-backed expectations." *PruneYard*, 447 U.S., at 83, 100 S.Ct., at 2042. The Court's analysis today focuses on the last two of these three factors: the categorical rule addresses a regulation's "economic impact," while the nuisance exception recognizes that ownership brings with it only certain "expectations." Neglected by the Court today is the first, and in some ways, the most im-

5. Even measured in terms of efficiency, the Court's rule is unsound. The Court today effectively establishes a form of insurance against certain changes in land-use regulations. Like other forms of insurance, the Court's rule creates a "moral hazard" and inefficiencies: In the face of uncertainty about changes in the law, developers will overinvest, safe in the knowledge that if the law changes adversely, they will be entitled to compensation. See generally Farber, Economic Analysis and Just Compensation, 12 Int'l Rev. of Law & Econ. 125 (1992).

6. As the Court correctly notes, in regulatory takings, unlike physical takings, courts have a choice of remedies. See *ante*, at 2901, n. 17. They may "invalidat[e the] excessive regulation," or they may "allo[w] the regulation to stand and orde[r] the government to afford compensation for the permanent taking." *First English Evangelical Lutheran Church v. County of Los Angeles*, 482 U.S. 304, 335, 107 S.Ct. 2378, 2396, 96 L.Ed.2d 250 (1987) (STEVENS, J., dissenting); see also *id.*, at 319–21, 107 S.Ct., at 2388–2389. In either event, however, the costs to the government are likely to be substantial and are therefore likely to impede the development of sound land-use policy.

portant factor in takings analysis: the character of the regulatory action.

The Just Compensation Clause "was designed to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole." *Armstrong*, 364 U.S., at 49, 80 S.Ct., at 1569. Accordingly, one of the central concerns of our takings jurisprudence is "prevent[ing] the public from loading upon one individual more than his just share of the burdens of government." *Monongahela Navigation Co. v. United States*, 148 U.S. 312, 325, 13 S.Ct. 622, 626, 37 L.Ed. 463 (1893). We have, therefore, in our takings law frequently looked to the *generality* of a regulation of property.[7]

For example, in the case of so-called "developmental exactions," we have paid special attention to the risk that particular landowners might "b[e] singled out to bear the burden" of a broader problem not of his own making. *Nollan*, 483 U.S., at 835, n. 4, 107 S.Ct., at 3148, n. 4; see also *Pennell v. San Jose*, 485 U.S. 1, 23, 108 S.Ct. 849, 863, 99 L.Ed.2d 1 (1988). Similarly, in distinguishing between the Kohler Act (at issue in *Mahon*) and the Subsidence Act (at issue in *Keystone*), we found significant that the regulatory function of the latter was substantially broader. Unlike the Kohler Act, which simply transferred back to the surface owners certain rights that they had earlier sold to the coal companies, the Subsidence Act affected all surface owners—including the coal companies—equally. See *Keystone*, 480 U.S., at 486, 107 S.Ct., at 1242. Perhaps the most familiar application of this principle of generality arises in zoning cases. A diminution in value caused by a zoning regulation is far less likely to constitute a taking if it is part of a general and comprehensive land-use plan, see *Euclid v. Ambler Realty Co.*, 272 U.S. 365, 47 S.Ct. 114, 71 L.Ed. 303 (1926); conversely, "spot zoning" is far more likely to constitute a taking, see *Penn Central*, 438 U.S., at 132, and n. 28, 98 S.Ct., at 2663, and n. 28.

The presumption that a permanent physical occupation, no matter how slight, effects a taking is wholly consistent with this principle. A physical taking entails a certain amount of "singling out."[8] Consistent with this principle, physical occupations by third parties are more likely to effect takings than other physical occupations.

7. This principle of generality is well-rooted in our broader understandings of the Constitution as designed in part to control the "mischiefs of faction." See The Federalist No. 10, p. 43 (G. Wills ed. 1982) (J. Madison).

An analogous concern arises in First Amendment law. There we have recognized that an individual's rights are not violated when his religious practices are prohibited under a neutral law of general applicability. For example, in *Employment Division, Department of Human Resources of Oregon v. Smith*, 494 U.S. 872, 879–880, 110 S.Ct. 1595, 1600, 108 L.Ed.2d 876 (1990), we observed:

"[Our] decisions have consistently held that the right of free exercise does not relieve an individual of the obligation to comply with a 'valid and neutral law of general applicability on the ground that the law proscribes (or prescribes) conduct that his religion prescribes (or proscribes).' *United States v. Lee*, 455 U.S. 252, 263, n. 3, 102 S.Ct. 1051, 1054, n. 3, 71 L.Ed.2d 127 (1982) (STEVENS, J., concurring in judgment).... In *Prince v. Massachusetts*, 321 U.S. 158, 64 S.Ct. 438, 88 L.Ed. 645 (1944), we held that a mother could be prosecuted under the child labor laws for using her children to dispense literature in the streets, her religious motivation notwithstanding. We found no constitutional infirmity in 'excluding [these children] from doing there what no other children may do.' *Id.*, at 171, 64 S.Ct., at 444. In *Braunfeld v. Brown*, 366 U.S. 599, 81 S.Ct. 1144, 6 L.Ed.2d 563 (1961) (plurality opinion), we upheld Sunday-closing laws against the claim that they burdened the religious practices of persons whose religions compelled them to refrain from work on other days. In *Gillette v. United States*, 401 U.S. 437, 461, 91 S.Ct. 828, 842, 28 L.Ed.2d 168 (1971), we sustained the military Selective Service System against the claim that it violated free exercise by conscripting persons who opposed a particular war on religious grounds."

If such a neutral law of general applicability may severely burden constitutionally protected interests in liberty, a comparable burden on property owners should not be considered unreasonably onerous.

8. See Levmore, Takings, Torts, and Special Interests, 77 Va.L.Rev. 1333, 1352–1354 (1991).

Thus, a regulation requiring the installation of a junction box owned by a third party, *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 102 S.Ct. 3164, 73 L.Ed.2d 868 (1982), is more troubling than a regulation requiring the installation of sprinklers or smoke detectors; just as an order granting third parties access to a marina, *Kaiser Aetna v. United States*, 444 U.S. 164, 100 S.Ct. 383, 62 L.Ed.2d 332 (1979), is more troubling than an order requiring the placement of safety buoys in the marina.

In analyzing takings claims, courts have long recognized the difference between a regulation that targets one or two parcels of land and a regulation that enforces a state-wide policy. See, *e.g.*, *A.A. Profiles, Inc. v. Ft. Lauderdale*, 850 F.2d 1483, 1488 (CA11 1988); *Wheeler v. Pleasant Grove*, 664 F.2d 99, 100 (CA5 1981); *Trustees Under Will of Pomeroy v. Westlake*, 357 So.2d 1299, 1304 (La.App.1978); see also *Burrows v. Keene*, 121 N.H. 590, 432 A.2d 15, 21 (1981); *Herman Glick Realty Co. v. St. Louis County*, 545 S.W.2d 320, 324–325 (Mo.App.1976); *Huttig v. Richmond Heights*, 372 S.W.2d 833, 842–843 (Mo. 1963). As one early court stated with regard to a waterfront regulation, "If such restraint were in fact imposed upon the estate of one proprietor only, out of several estates on the same line of shore, the objection would be much more formidable." *Commonwealth v. Alger*, 61 Mass. 53, 102 (1851).

In considering Lucas' claim, the generality of the Beachfront Management Act is significant. The Act does not target particular landowners, but rather regulates the use of the coastline of the entire State. See S.C. Code § 48–39–10 (Supp.1990). Indeed, South Carolina's Act is best understood as part of a national effort to protect the coastline, one initiated by the Federal Coastal Zone Management Act of 1972. Pub.L. 92–583, 86 Stat. 1280, codified as amended at 16 U.S.C. § 1451 *et seq.* Pursuant to the Federal Act, every coastal State has implemented coastline regulations.[9] Moreover, the Act did not single out owners of undeveloped land. The Act also prohibited owners of developed land from rebuilding if their structures were destroyed, see 1988 S.C. Acts 634 § 3,[10] and what is equally significant, from repairing erosion control devices, such as seawalls, see S.C. Code § 48–39–290(B)(2) (Supp. 1990). In addition, in some situations, owners of developed land were required to "renouris[h] the beach ... on a yearly basis with an amount ... of sand ... not ... less than one and one-half times the yearly volume of sand lost due to erosion." 1988 S.C. Acts 634 § 3, p. 5140.[11] In short, the South Carolina Act imposed substantial burdens on owners of developed and undeveloped land alike.[12] This generality indicates that the Act is not an effort to expropriate owners of undeveloped land.

Admittedly, the economic impact of this regulation is dramatic and petitioner's investment-backed expectations are substantial. Yet, if anything, the costs to and expectations of the owners of developed land are even greater: I doubt, however, that the cost to owners of developed land of renourishing the beach and allowing their seawalls to deteriorate effects a tak-

9. See Zalkin, Shifting Sands and Shifting Doctrines: The Supreme Court's Changing Takings Doctrine and South Carolina's Coastal Zone Statute, 79 Cal.L.Rev. 205, 216–217, nn. 46–47 (1991) (collecting statutes).

10. This provision was amended in 1990. See S.C. Code § 48–39–290(B) (Supp.1990).

11. This provision was amended in 1990; authority for renourishment was shifted to local governments. See S.C. Code § 48–39–350(A) (Supp.1990).

12. In this regard, the Act more closely resembles the Subsidence Act in *Keystone* than the Kohler Act in *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 43 S.Ct. 158, 67 L.Ed. 322 (1922), and more closely resembles the general zoning scheme in *Euclid v. Ambler Realty Co.*, 272 U.S. 365, 47 S.Ct. 114, 71 L.Ed. 303 (1926) than the specific landmark designation in *Penn Central Transportation Co. v. New York City*, 438 U.S. 104, 98 S.Ct. 2646, 57 L.Ed.2d 631 (1978).

ing. The costs imposed on the owners of undeveloped land, such as petitioner, differ from these costs only in degree, not in kind.

The impact of the ban on developmental uses must also be viewed in light of the purposes of the Act. The legislature stated the purposes of the Act as "protect[ing], preserv[ing], restor[ing] and enhanc[ing] the beach/dune system" of the State not only for recreational and ecological purposes, but also to "protec[t] life and property." S.C. Code § 48-39-260(1)(a) (Supp. 1990). The State, with much science on its side, believes that the "beach/dune system [acts] as a buffer from high tides, storm surge, [and] hurricanes." *Ibid.* This is a traditional and important exercise of the State's police power, as demonstrated by Hurricane Hugo, which in 1989, caused 29 deaths and more than $6 billion in property damage in South Carolina alone.[13]

In view of all of these factors, even assuming that petitioner's property was rendered valueless, the risk inherent in investments of the sort made by petitioner, the generality of the Act, and the compelling purpose motivating the South Carolina Legislature persuade me that the Act did not effect a taking of petitioner's property.

Accordingly, I respectfully dissent.

Statement of Justice SOUTER.

I would dismiss the writ of certiorari in this case as having been granted improvidently. After briefing and argument it is abundantly clear that an unreviewable assumption on which this case comes to us is both questionable as a conclusion of Fifth Amendment law and sufficient to frustrate the Court's ability to render certain the legal premises on which its holding rests.

The petition for review was granted on the assumption that the state by regulation had deprived the owner of his entire economic interest in the subject property. Such was the state trial court's conclusion, which the state supreme court did not review. It is apparent now that in light of our prior cases, see, *e.g.*, *Keystone Bituminous Coal Assn. v. DeBenedictis*, 480 U.S. 470, 493-502, 107 S.Ct. 1232, 1246-1251, 94 L.Ed.2d 472 (1987); *Andrus v. Allard*, 444 U.S. 51, 65-66, 100 S.Ct. 318, 326-327, 62 L.Ed.2d 210 (1979); *Penn Central Transportation Corp. v. New York City*, 438 U.S. 104, 130-131, 98 S.Ct. 2646, 2662, 57 L.Ed.2d 631 (1978), the trial court's conclusion is highly questionable. While the respondent now wishes to contest the point, see Brief for Respondent 45-50, the Court is certainly right to refuse to take up the issue, which is not fairly included within the question presented, and has received only the most superficial and one-sided treatment before us.

Because the questionable conclusion of total deprivation cannot be reviewed, the Court is precluded from attempting to clarify the concept of total (and, in the Court's view, categorically compensable) taking on which it rests, a concept which the Court describes, see *ante*, at 2893 n. 6, as so uncertain under existing law as to have fostered inconsistent pronouncements by the Court itself. Because that concept is left uncertain, so is the significance of the exceptions to the compensation requirement that the Court proceeds to recognize. This alone is enough to show that there is little utility in attempting to deal with this case on the merits.

The imprudence of proceeding to the merits in spite of these unpromising circumstances is underscored by the fact that, in doing so, the Court cannot help but assume something about the scope of the uncertain concept of total deprivation, even when it is barred from explicating total deprivation directly. Thus, when the Court concludes that the application of nuisance law provides an exception to the general rule that complete denial of economically beneficial use of property amounts to a compensable taking, the Court will be understood to suggest (if it does not assume)

13. Zalkin, 79 Cal.L.Rev., at 212-213.

that there are in fact circumstances in which state-law nuisance abatement may amount to a denial of all beneficial land use as that concept is to be employed in our takings jurisprudence under the Fifth and Fourteenth Amendments. The nature of nuisance law, however, indicates that application of a regulation defensible on grounds of nuisance prevention or abatement will quite probably not amount to a complete deprivation in fact. The nuisance enquiry focuses on conduct, not on the character of the property on which that conduct is performed, see 4 Restatement (Second) of Torts § 821B (1979) (public nuisance); *id.*, § 822 (private nuisance), and the remedies for such conduct usually leave the property owner with other reasonable uses of his property, see W. Keeton, D. Dobbs, R. Keeton, & D. Owen, Prosser and Keeton on Law of Torts § 90 (5th ed. 1984) (public nuisances usually remedied by criminal prosecution or abatement), *id.*, § 89 (private nuisances usually remedied by damages, injunction or abatement); see also, *e.g.*, *Mugler v. Kansas*, 123 U.S. 623, 668–669, 8 S.Ct. 273, 301, 31 L.Ed. 205 (1887) (prohibition on use of property to manufacture intoxicating beverages "does not disturb the owner in the control or use of his property for lawful purposes, nor restrict his right to dispose of it, but is only a declaration by the State that its use ... for certain forbidden purposes, is prejudicial to the public interests"); *Hadacheck v. Sebastian*, 239 U.S. 394, 412, 36 S.Ct. 143, 146, 60 L.Ed. 348 (1915) (prohibition on operation of brickyard did not prohibit extraction of clay from which bricks were produced). Indeed, it is difficult to imagine property that can be used only to create a nuisance, such that its sole economic value must presuppose the right to occupy it for such seriously noxious activity.

The upshot is that the issue of what constitutes a total deprivation is being addressed by indirection, and with uncertain results, in the Court's treatment of defenses to compensation claims. While the issue of what constitutes total deprivation deserves the Court's attention, as does the relationship between nuisance abatement and such total deprivation, the Court should confront these matters directly. Because it can neither do so in this case, nor skip over those preliminary issues and deal independently with defenses to the Court's categorical compensation rule, the Court should dismiss the instant writ and await an opportunity to face the total deprivation question squarely. Under these circumstances, I believe it proper for me to vote to dismiss the writ, despite the Court's contrary preference. See, *e.g.*, *Welsh v. Wisconsin*, 466 U.S. 740, 755, 104 S.Ct. 2091, 2100, 80 L.Ed.2d 732 (1984) (Burger, C.J.); *United States v. Shannon*, 342 U.S. 288, 294, 72 S.Ct. 281, 285, 96 L.Ed. 321 (1952) (Frankfurter, J.).

Henry Jose ESPINOSA, Petitioner,

v.

FLORIDA.

No. 91-7390.

June 29, 1992.

Defendant was convicted in the Circuit Court, Dade County, Arthur I. Snyder, J., of first-degree murder, second-degree murder, attempted murder, grand theft, and burglary, and was sentenced to death. Defendant appealed. The Florida Supreme Court, 589 So.2d 887, affirmed, and defendant petitioned for certiorari. The Supreme Court held that, if weighing state decides to place capital-sentencing authority in two actors rather than one, neither actor must be permitted to weigh invalid aggravating circumstances.

Reversed and remanded.

HODEL, SECRETARY OF THE INTERIOR *v.* IRVING ET AL.

APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

No. 85-637. Argued October 6, 1986—Decided May 18, 1987

As a means of ameliorating the problem of extreme fractionation of Indian lands that, pursuant to federal statutes dating back to the end of the 19th century, were allotted to individual Indians and held in trust by the United States, and that, through successive generations, had been splintered into multiple undivided interests by descent or devise, Congress enacted § 207 (later amended) of the Indian Land Consolidation Act of 1983. As originally enacted, § 207 provided that no undivided fractional interest in such lands shall descend by intestacy or devise, but, instead, shall escheat to the tribe "if such interest represents 2 per centum or less of the total acreage in such tract and has earned to its owner less than $100 in the preceding year before it is due to escheat." No provision for the payment of compensation to the owners of the interests covered by § 207 was made. Appellees are members of the Oglala Sioux Tribe and either are, or represent, heirs or devisees of Tribe members who died while the original terms of § 207 were in effect and who owned fractional interests subject to § 207. Appellees filed suit in Federal District Court, claiming that § 207 resulted in a taking of property without just compensation in violation of the Fifth Amendment. The District Court held that the statute was constitutional, but the Court of Appeals reversed, concluding that appellees' decedents had a right, derived from the original Sioux allotment statute, to control disposition of their property at death, that appellees had standing to invoke such right, and that the taking of the right without compensation to decedents' estates violated the Fifth Amendment.

Held:

1. Appellees have standing to challenge § 207, which has deprived them of the fractional interests they otherwise would have inherited. This is sufficient injury-in-fact to satisfy the case-or-controversy requirement of Article III of the Constitution. Moreover, the concerns of the prudential standing doctrine are also satisfied, even though appellees do not assert that their own property rights have been taken unconstitutionally, but rather that their decedents' right to pass the property at death has been taken. For decedent Indians with trust property, federal statutes require the Secretary of the Interior to assume the general role of the executor or administrator of the estate in asserting the decedent's surviving claims. Here, however, the Secretary's responsibilities in that capacity include the administration of the statute that appellees claim is unconstitutional, so that he cannot be expected to assert decedents' rights to the extent that they turn on the statute's constitutionality. Under these circumstances, appellees can appropriately serve as their decedents' representatives for purposes of asserting the latters' Fifth Amendment rights. Pp. 711–712.

2. The original version of § 207 effected a "taking" of appellees' decedents' property without just compensation. Determination of the question whether a governmental property regulation amounts to a "taking" requires ad hoc factual inquiries as to such factors as the impact of the regulation, its interference with reasonable investment-backed expectations, and the character of the governmental action. Here, the relative impact of § 207 upon appellees' decedents can be substantial. Even assuming, *arguendo*, that the income generated by the parcels in question may be properly thought of as *de minimis*, their value may not be. Although appellees' decedents retain full beneficial use of the property during their lifetimes as well as the right to convey it *inter vivos*, the right to pass on valuable property to one's heirs is itself a valuable right. However, the extent to which any of appellees' decedents had investment-backed expectations in passing on the property is dubious. Also weighing weakly in favor of the statute is the fact that there is something of an "average reciprocity of advantage," *Pennsylvania Coal Co.* v. *Mahon*, 260 U. S. 393, 415, to the extent that owners of escheatable interests maintain a nexus to the Tribe, and consolidation of lands in the Tribe benefits Tribe members since consolidated lands are more productive than fractionated lands. But the character of the Government regulation here is extraordinary since it amounts to virtually the abrogation of the right to pass on property to one's heirs, which right has been part of the Anglo-American legal system since feudal times. Moreover, § 207 effectively abolishes both descent and devise of the property interest even when the passing of the property to the heir might result in consolidation of property—as, for instance, when the heir already owns another undivided interest in the property—which is the governmental purpose sought to be advanced. Pp. 712–718.

758 F. 2d 1260, affirmed.

O'CONNOR, J., delivered the opinion of the Court, in which REHNQUIST, C. J., and BRENNAN, MARSHALL, BLACKMUN, POWELL, and SCALIA, JJ., joined. BRENNAN, J., filed a concurring opinion, in which MARSHALL and BLACKMUN, JJ., joined, *post*, p. 718. SCALIA, J., filed a concurring opinion, in which REHNQUIST, C. J., and POWELL, J., joined, *post*, p. 719.

STEVENS, J., filed an opinion concurring in the judgment, in which WHITE, J., joined, *post*, p. 719.

Edwin S. Kneedler argued the cause for appellant. With him on the briefs were *Solicitor General Fried, Assistant Attorney General Habicht, Deputy Solicitor General Wallace, Anne S. Almy*, and *Blake A. Watson.*

Yvette Hall War Bonnet argued the cause for appellees. With her on the brief was *Nora K. Kelley.**

JUSTICE O'CONNOR delivered the opinion of the Court.

The question presented is whether the original version of the "escheat" provision of the Indian Land Consolidation Act of 1983, Pub. L. 97–459, Tit. II, 96 Stat. 2519, effected a "taking" of appellees' decedents' property without just compensation.

I

Towards the end of the 19th century, Congress enacted a series of land Acts which divided the communal reservations of Indian tribes into individual allotments for Indians and unallotted lands for non-Indian settlement. This legislation seems to have been in part animated by a desire to force Indians to abandon their nomadic ways in order to "speed the Indians' assimilation into American society," *Solem* v. *Bartlett*, 465 U. S. 463, 466 (1984), and in part a result of pressure to free new lands for further white settlement. *Ibid.* Two years after the enactment of the General Allotment Act of 1887, ch. 119, 24 Stat. 388, Congress adopted a specific statute authorizing the division of the Great Reservation of the Sioux Nation into separate reservations and the allotment of specific tracts of reservation land to individual Indians, con-

Bertram E. Hirsch filed a brief for the Sisseton-Wahpeton Sioux Tribe as *amicus curiae* urging reversal.

Briefs of *amici curiae* urging affirmance were filed for Pacific Legal Foundation by *Ronald A. Zumbrun* and *Robert K. Best;* and for the Yakima Indian Nation by *James B. Hovis.*

ditioned on the consent of three-fourths of the adult male Sioux. Act of Mar. 2, 1889, ch. 405, 25 Stat. 888. Under the Act, each male Sioux head of household took 320 acres of land and most other individuals 160 acres. 25 Stat. 890. In order to protect the allottees from the improvident disposition of their lands to white settlers, the Sioux allotment statute provided that the allotted lands were to be held in trust by the United States. *Id.*, at 891. Until 1910, the lands of deceased allottees passed to their heirs "according to the laws of the State or Territory" where the land was located, *ibid.*, and after 1910, allottees were permitted to dispose of their interests by will in accordance with regulations promulgated by the Secretary of the Interior. 36 Stat. 856, 25 U. S. C. § 373. Those regulations generally served to protect Indian ownership of the allotted lands.

The policy of allotment of Indian lands quickly proved disastrous for the Indians. Cash generated by land sales to whites was quickly dissipated, and the Indians, rather than farming the land themselves, evolved into petty landlords, leasing their allotted lands to white ranchers and farmers and living off the meager rentals. Lawson, Heirship: The Indian Amoeba, reprinted in Hearing on S. 2480 and S. 2663 before the Senate Select Committee on Indian Affairs, 98th Cong., 2d Sess., 82–83 (1984). The failure of the allotment program became even clearer as successive generations came to hold the allotted lands. Thus 40-, 80-, and 160-acre parcels became splintered into multiple undivided interests in land, with some parcels having hundreds, and many parcels having dozens, of owners. Because the land was held in trust and often could not be alienated or partitioned, the fractionation problem grew and grew over time.

A 1928 report commissioned by the Congress found the situation administratively unworkable and economically wasteful. L. Meriam, Institute for Government Research, The

Problem of Indian Administration 40–41. Good, potentially productive, land was allowed to lie fallow, amidst great poverty, because of the difficulties of managing property held in this manner. Hearings on H. R. 11113 before the Subcommittee on Indian Affairs of the House Committee on Interior and Insular Affairs, 89th Cong., 2d Sess., 10 (1966) (remarks of Rep. Aspinall). In discussing the Indian Reorganization Act of 1934, Representative Howard said:

> "It is in the case of the inherited allotments, however, that the administrative costs become incredible. . . . On allotted reservations, numerous cases exist where the shares of each individual heir from lease money may be 1 cent a month. Or one heir may own minute fractional shares in 30 or 40 different allotments. The cost of leasing, bookkeeping, and distributing the proceeds in many cases far exceeds the total income. The Indians and the Indian Service personnel are thus trapped in a meaningless system of minute partition in which all thought of the possible use of land to satisfy human needs is lost in a mathematical haze of bookkeeping." 78 Cong. Rec. 11728 (1934).

In 1934, in response to arguments such as these, the Congress acknowledged the failure of its policy and ended further allotment of Indian lands. Indian Reorganization Act of 1934, ch. 576, 48 Stat. 984, 25 U. S. C. § 461 *et seq.*

But the end of future allotment by itself could not prevent the further compounding of the existing problem caused by the passage of time. Ownership continued to fragment as succeeding generations came to hold the property, since, in the order of things, each property owner was apt to have more than one heir. In 1960, both the House and the Senate undertook comprehensive studies of the problem. See House Committee on Interior and Insular Affairs, Indian Heirship Land Study, 86th Cong., 2d Sess. (Comm. Print

1961); Senate Committee on Interior and Insular Affairs, Indian Heirship Land Survey, 86th Cong., 2d Sess. (Comm. Print 1960–1961). These studies indicated that one-half of the approximately 12 million acres of allotted trust lands were held in fractionated ownership, with over 3 million acres held by more than six heirs to a parcel. *Id.*, at pt. 2, p. x. Further hearings were held in 1966, Hearings on H. R. 11113, *supra*, but not until the Indian Land Consolidation Act of 1983 did the Congress take action to ameliorate the problem of fractionated ownership of Indian lands.

Section 207 of the Indian Land Consolidation Act—the escheat provision at issue in this case—provided:

> "No undivided fractional interest in any tract of trust or restricted land within a tribe's reservation or otherwise subjected to a tribe's jurisdiction shall descedent *[sic]* by intestacy or devise but shall escheat to that tribe if such interest represents 2 per centum or less of the total acreage in such tract and has earned to its owner less than $100 in the preceding year before it is due to escheat." 96 Stat. 2519.

Congress made no provision for the payment of compensation to the owners of the interests covered by § 207. The statute was signed into law on January 12, 1983, and became effective immediately.

The three appellees—Mary Irving, Patrick Pumpkin Seed, and Eileen Bissonette—are enrolled members of the Oglala Sioux Tribe. They are, or represent, heirs or devisees of members of the Tribe who died in March, April, and June 1983. Eileen Bissonette's decedent, Mary Poor Bear-Little Hoop Cross, purported to will all her property, including property subject to § 207, to her five minor children in whose name Bissonette claims the property. Chester Irving, Charles Leroy Pumpkin Seed, and Edgar Pumpkin Seed all died intestate. At the time of their deaths, the four dece-

dents owned 41 fractional interests subject to the provisions of § 207. App. 20, 22–28, 32–33, 37–39. The Irving estate lost two interests whose value together was approximately $100; the Bureau of Indian Affairs placed total values of approximately $2,700 on the 26 escheatable interests in the Cross estate and $1,816 on the 13 escheatable interests in the Pumpkin Seed estates. But for § 207, this property would have passed, in the ordinary course, to appellees or those they represent.

Appellees filed suit in the United States District Court for the District of South Dakota, claiming that § 207 resulted in a taking of property without just compensation in violation of the Fifth Amendment. The District Court concluded that the statute was constitutional. It held that appellees had no vested interest in the property of the decedents prior to their deaths and that Congress had plenary authority to abolish the power of testamentary disposition of Indian property and to alter the rules of intestate succession. App. to Juris. Statement 21a–26a.

The Court of Appeals for the Eighth Circuit reversed. *Irving* v. *Clark*, 758 F. 2d 1260 (1985). Although it agreed that appellees had no vested rights in the decedents' property, it concluded that their decedents had a right, derived from the original Sioux allotment statute, to control disposition of their property at death. The Court of Appeals held that appellees had standing to invoke that right and that the taking of that right without compensation to decedents' estates violated the Fifth Amendment.[1]

[1]The Court of Appeals, without explanation, went on to "declare" that not only the original version of § 207, but also the amended version not before it, 25 U. S. C. § 2206 (1982 ed., Supp. III), unconstitutionally took property without compensation. Since none of the property which escheated in this case did so pursuant to the amended version of the statute, this "declaration" is, at best, dicta. We express no opinion on the constitutionality of § 207 as amended.

II

The Court of Appeals concluded that appellees have standing to challenge § 207. 758 F. 2d, at 1267–1268. The Government does not contest this ruling. As the Court of Appeals recognized, however, the existence of a case or controversy is a jurisdictional prerequisite to a federal court's deliberations. *Id.*, at 1267, n. 12. We are satisfied that the necessary case or controversy exists in this case. Section 207 has deprived appellees of the fractional interests they otherwise would have inherited. This is sufficient injury-in-fact to satisfy Article III of the Constitution. See *Singleton* v. *Wulff*, 428 U. S. 106, 112 (1976).

In addition to the constitutional standing requirements, we have recognized prudential standing limitations. As the court below recognized, one of these prudential principles is that the plaintiff generally must assert his own legal rights and interests. 758 F. 2d, at 1267–1268. That general principle, however, is subject to exceptions. Appellees here do not assert that their own property rights have been taken unconstitutionally, but rather that their decedents' right to pass the property at death has been taken. Nevertheless, we have no difficulty in finding the concerns of the prudential standing doctrine met here.

For obvious reasons, it has long been recognized that the surviving claims of a decedent must be pursued by a third party. At common law, a decedent's surviving claims were prosecuted by the executor or administrator of the estate. For Indians with trust property, statutes require the Secretary of the Interior to assume that general role. 25 U. S. C. §§ 371–380. The Secretary's responsibilities in that capacity, however, include the administration of the statute that the appellees claim is unconstitutional, see 25 U. S. C. §§ 2202, 2209, so that he can hardly be expected to assert appellees' decedents' rights to the extent that they turn on that point. Under these circumstances, appellees can appropriately serve as their decedents' representatives for purposes of asserting

the latters' Fifth Amendment rights. They are situated to pursue the claims vigorously, since their interest in receiving the property is indissolubly linked to the decedents' right to dispose of it by will or intestacy. A vindication of decedents' rights would ensure that the fractional interests pass to appellees; pressing these rights unsuccessfully would equally guarantee that appellees take nothing. In short, permitting appellees to raise their decedents' claims is merely an extension of the common law's provision for appointment of a decedent's representative. It is therefore a "settled practice of the courts" not open to objection on the ground that it permits a litigant to raise third parties' rights. *Tyler* v. *Judges of Court of Registration*, 179 U. S. 405, 406 (1900).

III

The Congress, acting pursuant to its broad authority to regulate the descent and devise of Indian trust lands, *Jefferson* v. *Fink*, 247 U. S. 288, 294 (1918), enacted § 207 as a means of ameliorating, over time, the problem of extreme fractionation of certain Indian lands. By forbidding the passing on at death of small, undivided interests in Indian lands, Congress hoped that future generations of Indians would be able to make more productive use of the Indians' ancestral lands. We agree with the Government that encouraging the consolidation of Indian lands is a public purpose of high order. The fractionation problem on Indian reservations is extraordinary and may call for dramatic action to encourage consolidation. The Sisseton-Wahpeton Sioux Tribe, appearing as *amicus curiae* in support of the Secretary of the Interior, is a quintessential victim of fractionation. Forty-acre tracts on the Sisseton-Wahpeton Lake Traverse Reservation, leasing for about $1,000 annually, are commonly subdivided into hundreds of undivided interests, many of which generate only pennies a year in rent. The average tract has 196 owners and the average owner undivided interests in 14 tracts. The administrative headache this rep-

resents can be fathomed by examining Tract 1305, dubbed "one of the most fractionated parcels of land in the world." Lawson, Heirship: The Indian Amoeba, reprinted in Hearing on S. 2480 and S. 2663 before the Senate Select Committee on Indian Affairs, 98th Cong., 2d Sess., 85 (1984). Tract 1305 is 40 acres and produces $1,080 in income annually. It is valued at $8,000. It has 439 owners, one-third of whom receive less than $.05 in annual rent and two-thirds of whom receive less than $1. The largest interest holder receives $82.85 annually. The common denominator used to compute fractional interests in the property is 3,394,923,840,000. The smallest heir receives $.01 every 177 years. If the tract were sold (assuming the 439 owners could agree) for its estimated $8,000 value, he would be entitled to $.000418. The administrative costs of handling this tract are estimated by the Bureau of Indian Affairs at $17,560 annually. *Id.*, at 86, 87. See also Comment, Too Little Land, Too Many Heirs—The Indian Heirship Land Problem, 46 Wash. L. Rev. 709, 711–713 (1971).

This Court has held that the Government has considerable latitude in regulating property rights in ways that may adversely affect the owners. See *Keystone Bituminous Coal Assn.* v. *DeBenedictis*, 480 U. S. 470, 491–492 (1987); *Penn Central Transportation Co.* v. *New York City*, 438 U. S. 104, 125–127 (1978); *Goldblatt* v. *Hempstead*, 369 U. S. 590, 592–593 (1962). The framework for examining the question whether a regulation of property amounts to a taking requiring just compensation is firmly established and has been regularly and recently reaffirmed. See, *e. g.*, *Keystone Bituminous Coal Assn.* v. *DeBenedictis*, *supra*, at 485; *Ruckelshaus* v. *Monsanto Co.*, 467 U. S. 986, 1004–1005 (1984); *Hodel* v. *Virginia Surface Mining and Reclamation Assn., Inc.*, 452 U. S. 264, 295 (1981); *Agins* v. *Tiburon*, 447 U. S. 255, 260–261 (1980); *Kaiser Aetna* v. *United States*, 444 U. S. 164, 174–175 (1979); *Penn Central Transportation Co.*

v. *New York City*, *supra*, at 124. As THE CHIEF JUSTICE has written:

> "[T]his Court has generally 'been unable to develop any "set formula" for determining when "justice and fairness" require that economic injuries caused by public action be compensated by the government, rather than remain disproportionately concentrated on a few persons.' [*Penn Central Transportation Co.* v. *New York City*, 438 U. S.], at 124. Rather, it has examined the 'taking' question by engaging in essentially ad hoc, factual inquiries that have identified several factors—such as the economic impact of the regulation, its interference with reasonable investment backed expectations, and the character of the governmental action—that have particular significance. *Ibid.*" *Kaiser Aetna* v. *United States*, *supra*, at 175.

There is no question that the relative economic impact of § 207 upon the owners of these property rights can be substantial. Section 207 provides for the escheat of small undivided property interests that are unproductive during the year preceding the owner's death. Even if we accept the Government's assertion that the income generated by such parcels may be properly thought of as *de minimis*, their value may not be. While the Irving estate lost two interests whose value together was only approximately $100, the Bureau of Indian Affairs placed total values of approximately $2,700 and $1,816 on the escheatable interests in the Cross and Pumpkin Seed estates. See App. 20, 21–28, 29–39. These are not trivial sums. There are suggestions in the legislative history regarding the 1984 amendments to § 207 that the failure to "look back" more than one year at the income generated by the property had caused the escheat of potentially valuable timber and mineral interests. S. Rep. No. 98–632, p. 12 (1984); Hearing on H. J. Res. 158 before the Senate Select Committee on Indian Affairs, 98th Cong., 2d Sess., 20, 26, 32, 75 (1984); Amendments to the Indian

Land Consolidation Act: Hearing on H. J. Res. 158 before the Senate Select Committee on Indian Affairs, 98th Cong., 1st Sess., 8, 29 (1983). Of course, the whole of appellees' decedents' property interests were not taken by § 207. Appellees' decedents retained full beneficial use of the property during their lifetimes as well as the right to convey it *inter vivos*. There is no question, however, that the right to pass on valuable property to one's heirs is itself a valuable right. Depending on the age of the owner, much or most of the value of the parcel may inhere in this "remainder" interest. See 26 CFR § 20.2031-7(f) (Table A) (1986) (value of remainder interest when life tenant is age 65 is approximately 32% of the whole).

The extent to which any of appellees' decedents had "investment-backed expectations" in passing on the property is dubious. Though it is conceivable that some of these interests were purchased with the expectation that the owners might pass on the remainder to their heirs at death, the property has been held in trust for the Indians for 100 years and is overwhelmingly acquired by gift, descent, or devise. Because of the highly fractionated ownership, the property is generally held for lease rather than improved and used by the owners. None of the appellees here can point to any specific investment-backed expectations beyond the fact that their ancestors agreed to accept allotment only after ceding to the United States large parts of the original Great Sioux Reservation.

Also weighing weakly in favor of the statute is the fact that there is something of an "average reciprocity of advantage," *Pennsylvania Coal Co.* v. *Mahon*, 260 U. S. 393, 415 (1922), to the extent that owners of escheatable interests maintain a nexus to the Tribe. Consolidation of Indian lands in the Tribe benefits the members of the Tribe. All members do not own escheatable interests, nor do all owners belong to the Tribe. Nevertheless, there is substantial overlap between the two groups. The owners of escheatable inter-

ests often benefit from the escheat of others' fractional interests. Moreover, the whole benefit gained is greater than the sum of the burdens imposed since consolidated lands are more productive than fractionated lands.

If we were to stop our analysis at this point, we might well find § 207 constitutional. But the character of the Government regulation here is extraordinary. In *Kaiser Aetna* v. *United States*, 444 U. S., at 176, we emphasized that the regulation destroyed "one of the most essential sticks in the bundle of rights that are commonly characterized as property—the right to exclude others." Similarly, the regulation here amounts to virtually the abrogation of the right to pass on a certain type of property—the small undivided interest—to one's heirs. In one form or another, the right to pass on property—to one's family in particular—has been part of the Anglo-American legal system since feudal times. See *United States* v. *Perkins*, 163 U. S. 625, 627–628 (1896). The fact that it may be possible for the owners of these interests to effectively control disposition upon death through complex *inter vivos* transactions such as revocable trusts is simply not an adequate substitute for the rights taken, given the nature of the property. Even the United States concedes that total abrogation of the right to pass property is unprecedented and likely unconstitutional. Tr. of Oral Arg. 12–14. Moreover, this statute effectively abolishes both descent and devise of these property interests even when the passing of the property to the heir might result in consolidation of property—as for instance when the heir already owns another undivided interest in the property.[2] Cf. 25 U. S. C.

[2] JUSTICE STEVENS argues that weighing in the balance the fact that § 207 takes the right to pass property even when descent or devise results in consolidation of Indian lands amounts to an unprecedented importation of overbreadth analysis into our Fifth Amendment jurisprudence. *Post*, at 724–726. The basis for this argument is his assertion that none of appellees' decedents actually attempted to pass the property in a way that might have resulted in consolidation. But the fact of the matter remains that before § 207 was enacted appellees' decedents had the power to pass on

§ 2206(b) (1982 ed., Supp. III). Since the escheatable interests are not, as the United States argues, necessarily *de minimis*, nor, as it also argues, does the availability of *inter vivos* transfer obviate the need for descent and devise, a *total* abrogation of these rights cannot be upheld. But cf. *Andrus* v. *Allard*, 444 U. S. 51 (1979) (upholding abrogation of the right to sell endangered eagles' parts as necessary to environmental protection regulatory scheme).

In holding that complete abolition of both the descent and devise of a particular class of property may be a taking, we reaffirm the continuing vitality of the long line of cases recognizing the States', and where appropriate, the United States', broad authority to adjust the rules governing the descent and devise of property without implicating the guarantees of the Just Compensation Clause. See, *e. g.*, *Irving Trust Co.* v. *Day*, 314 U. S. 556, 562 (1942); *Jefferson* v. *Fink*, 247 U. S., at 294. The difference in this case is the fact that both descent and devise are completely abolished;

their property at death to those who already owned an interest in the subject property. This right too was abrogated by § 207; each of the appellees' decedents lost this stick in their bundles of property rights upon the enactment of § 207. It is entirely proper to note the extent of the rights taken from appellees' decedents in assessing whether the statute passes constitutional muster under the *Penn Central* balancing test. This is neither overbreadth analysis nor novel. See, *e. g.*, *Keystone Bituminous Coal Assn.* v. *DeBenedictis*, 480 U. S. 470, 493–502 (1987) (discussing, in general terms, the extent of the abrogation of coal extraction rights caused by the Subsidence Act); *Penn Central Transportation Co.* v. *New York City*, 438 U. S. 104, 136–137 (1978) (discussing extent to which air rights abrogated by the designation of Grand Central Station as a landmark, noting that not all new construction prohibited, and noting the availability of transferable development rights).

JUSTICE STEVENS' objections are perhaps better directed at the question whether there is third-party standing to challenge this statute under the Fifth Amendment's Just Compensation Clause. But as we have shown, there is certainly no Article III bar to permitting appellees to raise their decedents' claims, *supra*, at 711, and JUSTICE STEVENS himself concedes that prudential considerations do not bar consideration of the Fifth Amendment claim. *Post*, at 724.

indeed they are abolished even in circumstances when the governmental purpose sought to be advanced, consolidation of ownership of Indian lands, does not conflict with the further descent of the property.

There is little doubt that the extreme fractionation of Indian lands is a serious public problem. It may well be appropriate for the United States to ameliorate fractionation by means of regulating the descent and devise of Indian lands. Surely it is permissible for the United States to prevent the owners of such interests from further subdividing them among future heirs on pain of escheat. See *Texaco, Inc.* v. *Short*, 454 U. S. 516, 542 (1982) (BRENNAN, J., dissenting). It may be appropriate to minimize further compounding of the problem by abolishing the descent of such interests by rules of intestacy, thereby forcing the owners to formally designate an heir to prevent escheat to the Tribe. What is certainly not appropriate is to take the extraordinary step of abolishing both descent and devise of these property interests even when the passing of the property to the heir might result in consolidation of property. Accordingly, we find that this regulation, in the words of Justice Holmes, "goes too far." *Pennsylvania Coal Co.* v. *Mahon*, 260 U. S., at 415. The judgment of the Court of Appeals is

Affirmed.

JUSTICE BRENNAN, with whom JUSTICE MARSHALL and JUSTICE BLACKMUN join, concurring.

I find nothing in today's opinion that would limit *Andrus* v. *Allard*, 444 U. S. 51 (1979), to its facts. Indeed, largely for reasons discussed by the Court of Appeals, I am of the view that the unique negotiations giving rise to the property rights and expectations at issue here make this case the unusual one. See *Irving* v. *Clark*, 758 F. 2d 1260, 1266–1269, and n. 10 (CA8 1985). Accordingly, I join the opinion of the Court.

JUSTICE SCALIA, with whom THE CHIEF JUSTICE and JUSTICE POWELL join, concurring.

I join the opinion of the Court. I write separately to note that in my view the present statute, insofar as concerns the balance between rights taken and rights left untouched, is indistinguishable from the statute that was at issue in *Andrus* v. *Allard*, 444 U. S. 51 (1979). Because that comparison is determinative of whether there has been a taking, see *Penn Central Transportation Co.* v. *New York City*, 438 U. S. 104, 136 (1978); *Pennsylvania Coal Co.* v. *Mahon*, 260 U. S. 393, 413 (1922), in finding a taking today our decision effectively limits *Allard* to its facts.

JUSTICE STEVENS, with whom JUSTICE WHITE joins, concurring in the judgment.

The Government has a legitimate interest in eliminating Indians' fractional holdings of real property. Legislating in pursuit of this interest, the Government might constitutionally have consolidated the fractional land interests affected by § 207 of the Indian Land Consolidation Act of 1983, 96 Stat. 2519, 25 U. S. C. § 2206 (1982 ed., Supp. III), in three ways: It might have purchased them; it might have condemned them for a public purpose and paid just compensation to their owners; or it might have left them untouched while conditioning their descent by intestacy or devise upon their consolidation by voluntary conveyances within a reasonable period of time.

Since Congress plainly did not authorize either purchase or condemnation and the payment of just compensation, the statute is valid only if Congress, in § 207, authorized the third alternative. In my opinion, therefore, the principal question in this case is whether § 207 represents a lawful exercise of the sovereign's prerogative to condition the retention of fee simple or other ownership interests upon the performance of a modest statutory duty within a reasonable period of time.

I

The Court's opinion persuasively demonstrates that the Government has a strong interest in solving the problem of fractionated land holdings among Indians. It also indicates that the specific escheat provision at issue in this case was one of a long series of congressional efforts to address this problem. The Court's examination of the legislative history, however, is incomplete. An examination of the circumstances surrounding Congress' enactment of § 207 discloses the abruptness and lack of explanation with which Congress added the escheat section to the other provisions of the Indian Land Consolidation Act that it enacted in 1983. See *ante*, at 708–709.

In 1982, the Senate passed a special bill for the purpose of authorizing the Devils Lake Sioux Tribe of North Dakota to adopt a land consolidation program with the approval of the Secretary of the Interior.[1] That bill provided that the Tribe would compensate individual owners for any fractional interest that might be acquired; the bill did not contain any provision for escheat.[2]

When the Senate bill was considered by the House Committee on Indian Affairs, the Committee expanded the coverage of the legislation to authorize any Indian tribe to adopt a land consolidation program with the approval of the Secretary, and it also added § 207—the escheat provision at issue in this case—to the bill. H. R. Rep. No. 97-908, pp. 5, 9

[1] S. 503, 97th Cong., 2d Sess. (1982).

[2] The Report of the Senate Select Committee on Indian Affairs described the purpose of the bill as follows:

"The purpose of S. 503 is to authorize the purchase, sale, and exchange of lands by the Devils Lake Sioux Tribe of the Devils Lake Sioux Reservation, North Dakota. The bill is designed to allow the Tribe to consolidate land ownership with the reservation in order to maximize utilization of the reservation land base. The bill also would restrict inheritance of trust property to members of the Tribe provided that the Tribe paid fair market value to the Secretary of the Interior on behalf of the decedent's estate." S. Rep. No. 97-507, p. 3 (1982).

(1982).[3] The Report on the House Amendments does not specifically discuss § 207. In its general explanation of how Indian trust or restricted lands pass out of Indian ownership, resulting in a need for statutory authorization to tribes to enact laws to prevent the erosion of Indian land ownership, the Report unqualifiedly stated that, "if an Indian allottee dies intestate, his heirs will inherit his property, whether they are Indian or non-Indian." *Id.*, at 11.

The House returned the amended bill to the Senate, which accepted the House addition without hearings and without any floor discussion of § 207. 128 Cong. Rec. 32466–32468 (1982). Section 207 provided:

> "No undivided fractional interest in any tract of trust or restricted land within a tribe's reservation or otherwise subjected to a tribe's jurisdiction shall [descend[4]] by intestacy or devise but shall escheat to that tribe if such interest represents 2 per centum or less of the

[3] The House additions were themselves an amended version of H. R. 5856, the Indian Land Consolidation Act. H. R. Rep. No. 97-908, p. 9 (1982). The House Committee on Interior and Insular Affairs had held hearings on H. R. 5856, but these hearings were not published. H. R. Legislative Calendar, 97th Cong., 2d Sess., 72 (1982).

The purposes of the legislation were summarized by the House Committee on Interior and Insular Affairs as (1) to provide mechanisms for the tribes to consolidate their tribal landholdings; (2) to allow Indian tribes or allottees to buy all of the fractionated interests in the tracts without having to obtain the consent of all the owners; and (3) to keep trust lands in Indian ownership by allowing tribes to restrict inheritance of Indian lands to Indians. H. R. Rep. No. 97-908, *supra*, at 9–11.

[4] The word "descedent"—an obvious error—appears in the original text. The Act of Oct. 30, 1984, 98 Stat. 3171—which is not relevant to our consideration of this case—corrected the error by substituting the word "descend" for "descedent" in § 207. The Senate Report accompanying the Act described how "descedent" made its way into the 1983 statute: "[T]he bill actually voted on by the House and Senate was garbled in the printing. It was this garbled version of Title II that was signed by the President." S. Rep. No. 98-632, p. 2 (1984).

total acreage in such tract and has earned to its owner less than $100 in the preceding year before it is due to escheat."

In the text of the Act, Congress took pains to specify that fractional interests acquired by a tribe pursuant to an approved plan must be purchased at a fair price. See §§ 204, 205, and 206. There is no comparable provision in § 207. The text of the Act also does not explain why Congress omitted a grace period for consolidation of the fractional interests that were to escheat to the tribe pursuant to that section.

The statute was signed into law on January 12, 1983, and became effective immediately. On March 2, the Bureau of Indian Affairs of the Department of the Interior issued a memorandum to all its area directors to advise them of the enactment of § 207 and to provide them with interim instructions pending the promulgation of formal regulations. The memorandum explained:

> "Section 207 effects a major change in testate and intestate heirship succession for certain undivided fractional interests in trust and restricted Indian land. Under this section, certain interests in land, as explained below, will no longer be capable of descending by intestate succession or being devised by will. Such property interests will, upon the death of the current owner, escheat to the tribe. . . .
>
> . . . . .
>
> "Because Section 207 of P. L. 97-459 constitutes a major change in Indian heirship succession, Area Offices and Agencies are urged to provide all Indian landowners under their jurisdiction with notice of its effects."[5]

The memorandum then explained how Indian landowners who wanted their heirs or devisees, rather than the tribe, to

[5] App. to Juris. Statement 38a-39a.

acquire their fractional interests could avoid the impact of § 207. It outlined three ways by which the owner of a fractional interest of less than two percent of a tract could enlarge that interest to more than two percent.[6]

The three appellees—Mary Irving, Patrick Pumpkin Seed, and Eileen Bissonette—are enrolled members of the Oglala Sioux Tribe. They represent heirs or devisees of members of the Tribe who died in March, April, and June 1983.[7] At the time of their deaths, the decedents owned 41 fractional interests subject to the provisions of § 207. App. 20, 22-28, 32-33, 37-39. The size and value of those interests varied widely—the smallest was a $1/3645$ interest in a 320-acre tract, having an estimated value of only $12.30, whereas the largest was the equivalent of $3\frac{1}{2}$ acres valued at $284.44. *Id.*, at 22 and 23. If § 207 is valid, all of those interests escheated to the Tribe; if § 207 had not been enacted—or if it is invalid—the interests would have passed to appellees.

[6] The memorandum stated:

"To assure the effectiveness of a will or heirship succession under state law, any Indian owner within the above category (if he or she is concerned that the tribe rather than his or her heirs or devisees will take these interests) may purchase additional interests from coowners pursuant to 25 CFR 151.7 and thereby increase his/her ownership interest to more than two percent. Another alternative is for such an owner to convey his/her interest to coowners or relatives pursuant to 25 CFR 152.25 and reserve a life estate, thus retaining the benefits of the interest while assuring its continued individual, rather than tribal, ownership. A third alternative, if feasible, is to partition the tract in such a way as to enlarge the owner's interest in a portion of said tract.

"Indians falling within the above category and who are presently occupying, or in any other way using, the tract in question should especially be advised of the aforementioned alternatives." *Id.*, at 39a-40a.

[7] Mary Irving is the daughter of Chester Irving who died on March 18, 1983, see App. 18; Eileen Bissonette is the guardian for the five minor children of Geraldine Mary Poor Bear-Little Hoop Cross who died on March 23, 1983, see *id.*, at 21; and Patrick Pumpkin Seed is the son of Charles Leroy Pumpkin Seed who died on April 2, 1983, see *id.*, at 34, and the nephew of Edgar Pumpkin Seed who died on June 23, 1983.

II

I agree with the Court's explanation of why these appellees "can appropriately serve as their decedents' representatives for purposes of asserting the latters' Fifth Amendment rights." *Ante*, at 711–712. But the reason the Court asserts for finding that § 207 effects a taking is not one that appellees press, or could press, on behalf of *their* decedents. A substantial gap separates the claims that the Court allows these appellees to advance from the rationale that the Court ultimately finds persuasive.

The Court's grant of relief to appellees based on the rights of hypothetical decedents therefore necessarily rests on the implicit adoption of an overbreadth analysis that has heretofore been restricted to the First Amendment area. The Court uses the language of takings jurisprudence to express its conclusion that § 207 violates the Fifth Amendment, but the stated reason is that § 207 "goes too far," see *ante*, at 718, because it might interfere with testamentary dispositions, or inheritances, that result in the consolidation of property interests rather than their increased fractionation.[8] That reasoning may apply to some decedents, but it does not apply to these litigants' decedents. In one case, the property of Mary Poor Bear-Little Hoop Cross was divided among her five children. In two other cases, the fractional interests passed to the next generation.[9] I had thought it well settled

[8] The crux of the Court's holding is stated as follows:

"What is certainly not appropriate is to take the extraordinary step of abolishing both descent and devise of these property interests even when the passing of the property to the heir might result in consolidation of property. Accordingly, we find that this regulation, in the words of Justice Holmes, 'goes too far.'" *Ante*, at 718.

[9] Patrick Pumpkin Seed was a potential heir to four pieces of property in which both his father and his uncle had interests. However, because both his father and his uncle had other potential heirs, the net effect of the distribution of the uncle's and the father's estates would have been to increase the fractionalization of their property interests. Furthermore, even if the statute were considered invalid as applied to Patrick Pumpkin Seed, the

by our precedents that "one to whom application of a statute is constitutional will not be heard to attack the statute on the ground that impliedly it might also be taken as applying to other persons or other situations in which its application might be unconstitutional." *United States* v. *Raines*, 362 U. S. 17, 21 (1960) (citing cases). This rule rests on the wisdom that the "delicate power of pronouncing an Act of Congress unconstitutional is not to be exercised with reference to hypothetical cases thus imagined." *Id.*, at 22.[10] In order to

Court does not explain why it would also be considered invalid as applied to Mary Irving and Eileen Bissonette.

[10] We have made a limited exception to this rule when a "statute's very existence may cause others not before the court to refrain from constitutionally protected speech or expression." *Broadrick* v. *Oklahoma*, 413 U. S. 601, 612 (1973). This exception does not apply to § 207. Even if overbreadth analysis were appropriate in a case outside of the First Amendment area, the Court's use of it on these facts departs from precedent. The Court generally does not grant relief unless there has been a showing that the invalid applications of the statute represent a substantial portion of its entire coverage. "[W]e believe that the overbreadth of a statute must not only be real, but substantial as well, judged in relation to the statute's plainly legitimate sweep." *Id.*, at 615. See also *City Council of Los Angeles* v. *Taxpayers for Vincent*, 466 U. S. 789, 799 (1984) (requirement of substantiality prevents overbreadth doctrine from abolishing ordinary standing requirements); *New York* v. *Ferber*, 458 U. S. 747, 767–771 (1982) (a law should not be invalidated as overbroad unless it is substantially so). As I wrote in *New York* v. *Ferber:*

"My reasons for avoiding overbreadth analysis in this case are more qualitative than quantitative. When we follow our traditional practice of adjudicating difficult and novel constitutional questions only in concrete factual situations, the adjudications tend to be crafted with greater wisdom. Hypothetical rulings are inherently treacherous and prone to lead us into unforeseen errors; they are qualitatively less reliable than the products of case-by-case adjudication." *Id.*, at 780–781 (opinion concurring in judgment).

Section 207 is obviously not "substantially overbroad." The notion that a regulatory statute unrelated to freedom of expression is invalid simply because the conditions prompting its enactment are not present in every situation to which it applies is a startling doctrine for which the Court cites no authority.

review the judgment of the Court of Appeals granting relief to these litigants, an analysis different from the Court's novel overbreadth approach is required.

III

The Secretary argues that special features of this legislation make it a reasonable exercise of Congress' power to regulate Indian property interests. The Secretary does not suggest that it is generally permissible to modify the individual's presently recognized right to dispose of his property at death without giving him a reasonable opportunity to make *inter vivos* dispositions that will avoid the consequences of a newly enacted change in the laws of intestacy and testamentary disposition. The Secretary does not even contend that this power is unlimited as applied to the property of Indians. Rather, the Secretary contends that § 207 falls within the permissible boundaries of legislation that may operate to limit or extinguish property rights. The Secretary places great emphasis on the minimal value of the property interests affected by § 207, the legitimacy of the governmental purpose in consolidating such interests, and the fact that the tribe, rather than the United States, is the beneficiary of the so-called "escheat." These points, considered in turn and as a whole, provide absolutely no basis for reversing the judgment of the Court of Appeals.

The value of a property interest does not provide a yardstick for measuring "the scope of the dual constitutional guarantees that there be no taking of property without just compensation, and no deprivation of property without the due process of law." *Texaco, Inc.* v. *Short*, 454 U. S. 516, 540–541 (1982) (BRENNAN, J., dissenting). The sovereign has no license to take private property without paying for it and without providing its owner with any opportunity to avoid or mitigate the consequences of the deprivation simply because the property is relatively inexpensive. *Loretto* v. *Teleprompter Manhattan CATV Corp.*, 458 U. S. 419, 436–

437, and 438, n. 16 (1982). The Fifth Amendment draws no distinction between grand larceny and petty larceny.

The legitimacy of the governmental purposes served by § 207 demonstrates that the statute is not arbitrary, see *Delaware Tribal Business Committee* v. *Weeks*, 430 U. S. 73 (1977), and that the alleged "taking" is for a valid "public use" within the meaning of the Fifth Amendment. Those facts, however, do not excuse or mitigate whatever obligation to pay just compensation arises when an otherwise constitutional enactment effects a taking of property. Nor does it lessen the importance of giving a property owner fair notice of a major change in the rules governing the disposition of his property.

The fact that § 207 provides for an "escheat" to the tribe rather than to the United States does not change the unwarned impact of the statute on an individual Indian who wants to leave his property to his children. The statute takes the disposition of decedent's fractional land interests out of the control of the decedent's will or the laws of intestate succession; whether the United States or the tribe retains the property, the landowner's loss is the same. The designation of the tribe as beneficiary is an essential feature, however, in two respects. Since the tribe is the beneficiary, its own interests conflict with its duty to bring the workings of the statute to the attention of the property owner. In addition, the designation of the tribe as beneficiary highlights the inappropriateness of the majority's takings analysis. The use of the term "escheat" in § 207 differs in a substantial way from the more familiar uses of that term. At common law the property of a person who died intestate and without lawful heirs would escheat to the sovereign; thus the doctrine provided a mechanism for determining ownership of what otherwise would have remained abandoned property. In contrast, under § 207 the statutory escheat supersedes the rights of claimants who would otherwise inherit the property; it allocates property between two contending parties.

Section 207 differs from more conventional escheats in another important way. It contains no provisions assuring that the property owner was given a fair opportunity to make suitable arrangements to avoid the operation of the statute. Legislation authorizing the escheat of unclaimed property, such as real estate, bank accounts, and other earmarked funds, typically provides as a condition precedent to the escheat an appropriate lapse of time and the provision of adequate notice to make sure that the property may fairly be treated as abandoned.[11] Similarly, interpleader proceedings in District Court provide procedural safeguards, including an opportunity to appear, for those whose rights will be affected by the judgment. See 28 U. S. C. § 1335; Fed. Rule Civ. Proc. 22. The statute before us, in contrast, contained no such mechanism, apparently relying on the possibility that appellees' decedents would simply learn about the statute's consequences one way or another.

While § 207 therefore does not qualify as an escheat of the kind recognized at common law, it might be regarded as a statute imposing a duty on the owner of highly fractionated interests in allotted lands to consolidate his interests with

[11] For example, the Government both provides a grace period and bears an affirmative responsibility to prevent escheat in the distribution of funds to which enrolled members of the Peoria Tribe are statutorily entitled under 84 Stat. 688, 25 U. S. C. § 1222. See 25 U. S. C. § 1226 ("Any per capita share, whether payable to a living enrollee or to the heirs or legatees of a deceased enrollee, which the Secretary of the Interior is unable to deliver within two years after the date the check is issued . . . shall revert to the Peoria Tribe").

State statutes governing abandoned property typically provide for a grace period and notice. See, *e. g.*, N. Y. Aband. Prop. Law §§ 300–302 (McKinney 1944 and Supp. 1987) (property held by banking organizations); Ill. Rev. Stat., ch. 141, ¶¶ 102, 112 (1985) (property held by banking or financial organizations). Statutes governing the escheat of property of decedents intestate and without heirs also provide for notice and an opportunity for interested parties to assert their claims. See, *e. g.*, Cal. Civ. Proc. Code Ann. §§ 1420, 1423 (West 1982); Tex. Prop. Code Ann. §§ 71.101–71.106 (1984 and Supp. 1987).

those of other owners of similar interests. The method of enforcing such a duty is to treat its nonperformance during the owner's lifetime as an abandonment of the fractional interests. This release of dominion over the property might justify its escheat to the use of the sovereign.

Long ago our cases made it clear that a State may treat real property as having been abandoned if the owner fails to take certain affirmative steps to protect his ownership interest. We relied on these cases in upholding Indiana's Mineral Lapse Act, a statute that extinguished an interest in coal, oil, or other minerals that had not been used for 20 years:

> "These decisions clearly establish that the State of Indiana has the power to enact the kind of legislation at issue. In each case, the Court upheld the power of the State to condition the retention of a property right upon the performance of an act within a limited period of time. In each instance, as a result of the failure of the property owner to perform the statutory condition, an interest in fee was deemed as a matter of law to be abandoned and to lapse." *Texaco, Inc.* v. *Short*, 454 U. S., at 529.

It is clear, however, that a statute providing for the lapse, escheat, or abandonment of private property cannot impose conditions on continued ownership that are unreasonable, either because they cost too much or because the statute does not allow property owners a reasonable opportunity to perform them and thereby to avoid the loss of their property. In the *Texaco* case, both conditions were satisfied: The conditions imposed by the Indiana Legislature were easily met,[12]

[12] "It is also clear that the State has not exercised this power in an arbitrary manner. The Indiana statute provides that a severed mineral interest shall not terminate if its owner takes any one of three steps to establish his continuing interest in the property. If the owner engages in actual production, or collects rents or royalties from another person who does or proposes to do so, his interest is protected. If the owner pays taxes, no matter how small, the interest is secure. If the owner files a written statement of claim in the county recorder's office, the interest remains via-

and the 2-year grace period included in the statute foreclosed any argument that mineral owners did not have an adequate opportunity to familiarize themselves with the terms of the legislation and to comply with its provisions before their mineral interests were extinguished. As the Court recognized in *United States* v. *Locke*, 471 U. S. 84, 106, n. 15 (1985), "[l]egislatures can enact substantive rules of law that treat property as forfeited under conditions that the common law would not consider sufficient to indicate abandonment." These rules, however, are only reasonable if they afford sufficient notice to the property owners and a reasonable opportunity to comply. *Ibid.*

The Due Process Clause of the Fifth Amendment thus applies to § 207's determination of which acts and omissions may validly constitute an abandonment, just as the Takings Clause applies to whether the statutory escheat of property must be accompanied by the payment of just compensation.[13] It follows, I believe, that § 207 deprived decedents of due process of law by failing to provide an adequate "grace period" in which they could arrange for the consolidation of fractional interests in order to avoid abandonment. Because the statutory presumption of abandonment is invalid under the precise facts of this case, I do not reach the ground relied upon by the Court of Appeals—that the resulting escheat of

ble. Only if none of these actions is taken for a period of 20 years does a mineral interest lapse and revert to the surface owner." 454 U. S., at 529.

It would appear easier for the owner of a mineral interest to meet these conditions than for appellees' decedents to meet the implicit conditions imposed by § 207. Paying taxes or filing a written statement of claim are simple and unilateral acts, but an Indian owner of a fractional interest cannot consolidate interests or collect $100 per annum from it without the willing participation of other parties.

[13] The Fifth Amendment to the Constitution provides that no person shall "be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

abandoned property would effect a taking of private property for public use without just compensation.[14]

Critical to our decision in *Texaco* was the fact that an owner could readily avoid the risk of abandonment in a variety of ways,[15] and the further fact that the statute afforded the affected property owners a reasonable opportunity to familiarize themselves with its terms and to comply with its provisions. We explained:

> "The first question raised is simply how a legislature must go about advising its citizens of actions that must be taken to avoid a valid rule of law that a mineral interest that has not been used for 20 years will be deemed to be abandoned. The answer to this question is no different from that posed for any legislative enactment affecting substantial rights. Generally, a legislature need do nothing more than enact and publish the law, and afford the citizenry a reasonable opportunity to familiarize itself with its terms and to comply. In this case, the 2-year grace period included in the Indiana statute forecloses any argument that the statute is invalid because mineral owners may not have had an opportunity to become familiar with its terms. It is well established that persons owning property within a State are charged with knowledge of relevant statutory provisions affecting the

[14] I am unable to join the Court's largely inapposite Fifth Amendment takings analysis. As I have demonstrated, the statute, analogous to those authorizing the escheat of abandoned property, is rooted in the sovereign's authority to oversee and supervise the transfer of property ownership. Instead of analyzing § 207 in relation to our precedents recognizing and limiting the exercise of such authority, however, the Court ignores this line of cases, implicitly questions their validity, and appears to invite widespread challenges under the Fifth Amendment Takings Clause to a variety of statutes of the kind that we upheld in *Texaco* v. *Short*.

[15] See n. 12, *supra*.

control or disposition of such property." 454 U. S., at 531–532.[16]

Assuredly Congress has ample power to require the owners of fractional interests in allotted lands to consolidate their holdings during their lifetimes or to face the risk that their interests will be deemed to have been abandoned. But no such abandonment may occur unless the owners have a fair opportunity to avoid that consequence. In this case, it is palpably clear that they were denied such an opportunity.

This statute became effective the day it was signed into law. It took almost two months for the Bureau of Indian Affairs to distribute an interim memorandum advising its area directors of the major change in Indian heirship succession effected by § 207. Although that memorandum identified three ways in which Indian landowners could avoid the consequences of § 207, it is not reasonable to assume that appellees' decedents—who died on March 18, March 23, April 2, and June 23, 1983—had anything approaching a reasonable

[16] Earlier in the opinion we noted that in *Wilson* v. *Iseminger*, 185 U. S. 55 (1902), the Court had upheld a Pennsylvania statute that provided for the extinguishment of certain interests in realty "since the statute contained a reasonable grace period in which owners could protect their rights." 454 U. S., at 527, n. 21. We quoted the following passage from the *Wilson* case:

"It may be properly conceded that all statutes of limitation must proceed on the idea that the party has full opportunity afforded him to try his right in the courts. A statute could not bar the existing rights of claimants without affording this opportunity; if it should attempt to do so, it would not be a statute of limitations, but an unlawful attempt to extinguish rights arbitrarily, whatever might be the purport of its provisions. It is essential that such statutes allow a reasonable time after they take effect for the commencement of suits upon existing causes of action; though what shall be considered a reasonable time must be settled by the judgment of the legislature, and the courts will not inquire into the wisdom of its decision in establishing the period of legal bar, unless the time allowed is manifestly so insufficient that the statute becomes a denial of justice." 185 U. S., at 62–63.

opportunity to arrange for the consolidation of their respective fractional interests with those of other owners.[17] With respect to these appellees' decedents, "the time allowed is manifestly so insufficient that the statute becomes a denial of justice." *Wilson* v. *Iseminger*, 185 U. S. 55, 63 (1902).[18]

While citizens "are presumptively charged with knowledge of the law," *Atkins* v. *Parker*, 472 U. S. 115, 130 (1985), that presumption may not apply when "the statute does not allow a sufficient 'grace period' to provide the persons affected by a change in the law with an adequate opportunity to become familiar with their obligations under it." *Ibid.* (citing *Texaco, Inc.*, 454 U. S., at 532). Unlike the food stamp recipients in *Parker*, who received a grace period of over 90 days and individual notice of the substance of the new law, 472 U. S., at 130–131, the Indians affected by § 207 did not receive a reasonable grace period. Nothing in the record suggests that appellees' decedents received an adequate opportunity to put their affairs in order.[19]

[17] The legislative history of the Indian Land Consolidation Act of 1983 is mute with respect to § 207. See n. 4, *supra*. This silence is illuminating; it suggests that Indian landowners cannot reasonably be expected to have received notice about the statute before it took effect and to have arranged their affairs accordingly. The lack of legislative history concerning § 207 also demonstrates that Congress paid scant or no attention to whether, in light of its longstanding fiduciary obligation to Indians, it was constitutionally required to afford a reasonable postenactment "grace period" for compliance.

[18] A statute which denies the affected party a reasonable opportunity to avoid the consequences of noncompliance may work an injustice similar to that of invalid retroactive legislation. In both instances, the party who "could have anticipated the potential liability attaching to his chosen course of conduct would have avoided the liability by altering his conduct." *Usery* v. *Turner Elkhorn Mining Co.*, 428 U. S. 1, 17, n. 16 (1976) (citing *Welch* v. *Henry*, 305 U. S. 134, 147 (1938)). See also *United States* v. *Hemme*, 476 U. S. 558, 568–569 (1986) (following *Welch* v. *Henry*, *supra*).

[19] Nothing in the record contradicts the possibility that appellees themselves only became aware of the statute upon receiving notices that hearings had been scheduled for the week of October 24, 1983, to determine if their Tribe had a right through escheat to any lands that might other-

The conclusion that Congress has failed to provide appellees' decedents with a reasonable opportunity for compliance implies no rejection of Congress' plenary authority over the affairs and the property of Indians. The Constitution vests Congress with plenary power "to deal with the special problems of Indians." *Morton* v. *Mancari*, 417 U. S. 535, 551 (1974). As the Secretary acknowledges, however, the Government's plenary power over the property of Indians "is subject to constitutional limitations." Brief for Appellant 24–25. The Due Process Clause of the Fifth Amendment required Congress to afford reasonable notice and opportunity for compliance to Indians that § 207 would prevent fractional interests in land from descending by intestate or testate succession.[20] In omitting any opportunity at all for owners of fractional interests to order their affairs in light of § 207, Congress has failed to afford the affected Indians the due process of law required by the Fifth Amendment.

Accordingly, I concur in the judgment.

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wise have passed to appellees. *Irving* v. *Clark*, 758 F. 2d 1260, 1262 (CA8 1985). The notices were issued on October 4, 1983, after the death of appellees' decedents, and therefore afforded no opportunity for decedents to comply with § 207 or for appellees to advise their decedents of the possibility of escheat.

[20] I need express no view on the constitutionality of § 207 as amended by the Act of Oct. 30, 1984, 98 Stat. 3171. All of the interests of appellees' decedents at issue in this case are governed by the original version of § 207. The decedents all died between January 12, 1983, and October 30, 1984, the period in which the original version of § 207 was in effect. The parties in this case present no case or controversy with respect to the application of the *amended* version of § 207.

PENSION BENEFIT GUARANTY CORPORATION *v.* YAHN & McDONNELL, INC., ET AL.

APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

No. 86–231. Argued April 27, 1987—Decided May 18, 1987*

787 F. 2d 128, affirmed by an equally divided Court.

Gary M. Ford argued the cause for appellants in both cases. With him on the briefs for appellant in No. 86–231 were *Peter H. Gould, David F. Power, Kenneth S. Geller, Kathryn A. Oberly*, and *Mitchell L. Strickler*. *Richard H. Markowitz* and *Paula R. Markowitz* filed briefs for appellants in No. 86–253.

Carl L. Taylor argued the cause for appellees in both cases. With him on the brief were *Glenn Summers* and *William H. Ewing*.†

PER CURIAM.

The judgment is affirmed by an equally divided Court.

JUSTICE WHITE took no part in the consideration or decision of these cases.

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*Together with No. 86–253, *United Retail & Wholesale Employees Teamsters Union Local No. 115 Pension Plan et al.* v. *Yahn & McDonnell, Inc., et al.*, also on appeal from the same court.

†Briefs of *amici curiae* urging reversal in No. 86–231 were filed for the National Coordinating Committee for Multiemployer Plans by *Gerald M. Feder, David R. Levin*, and *Nik B. Edes;* and for the Trustees of the United Mine Workers of America 1950 and 1974 Pension Plans by *Israel Goldowitz*.

Briefs of *amici curiae* urging affirmance in both cases were filed for the Chamber of Commerce of the United States by *Stephen A. Bokat* and *Robin S. Conrad;* and for Flying Tiger Line Inc., et al. by *Douglas D. Broadwater, R. Franklin Balotti, Jesse A. Finkelstein, William W. Bowser*, and *Lawrence M. Nagin*.

KEYSTONE BITUMINOUS COAL ASSN. ET AL. *v.* DEBENEDICTIS, SECRETARY, PENNSYLVANIA DEPARTMENT OF ENVIRONMENTAL RESOURCES, ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

No. 85-1092. Argued November 10, 1986—Decided March 9, 1987

Section 4 of Pennsylvania's Bituminous Mine Subsidence and Land Conservation Act (Act) prohibits coal mining that causes subsidence damage to pre-existing public buildings, dwellings, and cemeteries. Implementing regulations issued by Pennsylvania's Department of Environmental Resources (DER) require 50% of the coal beneath § 4-protected structures to be kept in place to provide surface support, and extend § 4's protection to water courses. Section 6 of the Act authorizes the DER to revoke a mining permit if the removal of coal causes damage to a § 4-protected structure or area and the operator has not within six months repaired the damage, satisfied any claim arising therefrom, or deposited the sum that repairs will reasonably cost as security. Petitioners, who own or control substantial coal reserves under Act-protected property, filed suit in Federal District Court seeking to enjoin the DER from enforcing the Act and regulations. The complaint alleged, *inter alia*, that Pennsylvania recognizes a separate "support estate" in addition to the surface and mineral estates in land; that approximately 90% of the coal petitioners will mine was severed from surface estates between 1890 and 1920; that petitioners typically acquired waivers of any damages claims that might result from coal removal; that § 4, as implemented by the 50% rule, and § 6 violate the Fifth Amendment's Takings Clause; and that § 6 violates Article I's Contracts Clause. Because petitioners had not yet alleged or proved any specific injury caused by the enforcement of §§ 4 and 6 or the regulations, the only question before the District Court was whether the mere enactment of §§ 4 and 6 and the regulations constituted a taking. The District Court granted DER's motion for summary judgment on this facial challenge. The Court of Appeals affirmed, holding that *Pennsylvania Coal Co.* v. *Mahon*, 260 U. S. 393, does not control; that the Act does not effect a taking; and that the impairment of private contracts effectuated by the Act was justified by the public interests protected by the Act.

Held:

1. Petitioners have not satisfied their burden of showing that §§ 4 and 6 and the regulations' 50% rule constitute a taking of private property without compensation in violation of the Fifth and Fourteenth Amendments. *Pennsylvania Coal* does not control this case because the two factors there considered relevant—the Commonwealth's interest in enacting the law and the extent of the alleged taking—here support the Act's constitutionality. Pp. 481–502.

(a) Unlike the statute considered in *Pennsylvania Coal*, the Act is intended to serve genuine, substantial, and legitimate public interests in health, the environment, and the fiscal integrity of the area by minimizing damage to surface areas. None of the indicia of a statute enacted solely for the benefit of private parties identified in *Pennsylvania Coal* are present here. Petitioners' argument that § 6's remedies are unnecessary to satisfy the Act's public purposes because of the Commonwealth's insurance program that reimburses repair costs is not persuasive, since the public purpose is served by deterring mine operators from causing damage in the first place by making them assume financial responsibility. Thus, the Commonwealth has merely exercised its police power to prevent activities that are tantamount to public nuisances. The character of this governmental action leans heavily against finding a taking. Pp. 485–493.

(b) The record in this case does not support a finding similar to the one in *Pennsylvania Coal* that the Act makes it impossible for petitioners to profitably engage in their business, or that there has been undue interference with their investment-backed expectations. Because this case involves only a facial constitutional challenge, such a finding is necessary to establish a taking. However, petitioners have never claimed that their mining operations, or even specific mines, have been unprofitable since the Act was passed; nor is there evidence that mining in any specific location affected by the 50% rule has been unprofitable. In fact, the only relevant evidence is testimony indicating that § 4 requires petitioners to leave 27 million tons (less than 2%) of their coal in place. Petitioners' argument that the Commonwealth has effectively appropriated this coal since it has no other useful purpose if not mined fails because the 27 million tons do not constitute a separate segment of property for taking law purposes. The record indicates that only 75% of petitioners' underground coal can be profitably mined in any event, and there is no showing that their reasonable "investment-backed expectations" have been materially affected by the § 4-imposed duty. Petitioners' argument that the Act constitutes a taking because it entirely destroys the value of their unique support estate also fails. As a practical matter, the support estate has value only insofar as it is used to exploit another

estate. Thus, the support estate is not a separate segment of property for takings law purposes since it constitutes just one part of the mine operators' bundle of property rights. Because petitioners retain the right to mine virtually all the coal in their mineral estates, the burden the Act places on the support estate does not constitute a taking. Moreover, since there is no evidence as to what percentage of petitioners' support estates, either in the aggregate or with respect to any individual estate, has been affected by the Act, their Takings Clause facial challenge fails. Pp. 493–502.

2. Section 6 does not impair petitioners' contractual agreements in violation of Article I, § 10, of the Constitution by denying petitioners their right to hold surface owners to their contractual waivers of liability for surface damage. The Contracts Clause has not been read literally to obliterate valid exercises of the States' police power to protect the public health and welfare. Here, the Commonwealth has a significant and legitimate public interest in preventing subsidence damage to the § 4-protected buildings, cemeteries, and water courses, and has determined that the imposition of liability on coal companies is necessary to protect that interest. This determination is entitled to deference because the Commonwealth is not a party to the contracts in question. Thus, the impairment of petitioners' right to enforce the generations-old damages waivers is amply justified by the public purposes served by the Act. Pp. 502–506.

771 F. 2d 707, affirmed.

STEVENS, J., delivered the opinion of the Court, in which BRENNAN, WHITE, MARSHALL, and BLACKMUN, JJ., joined. REHNQUIST, C. J., filed a dissenting opinion, in which POWELL, O'CONNOR, and SCALIA, JJ., joined, *post*, p. 506.

Rex E. Lee argued the cause for petitioners. With him on the briefs were *Benjamin W. Heineman, Jr.*, *Michael A. Nemeroff*, *Carter G. Phillips*, *Henry McC. Ingram*, and *Thomas C. Reed*.

Andrew S. Gordon, Chief Deputy Attorney General of Pennsylvania, argued the cause for respondent. With him on the brief was *LeRoy S. Zimmerman*, Attorney General.*

*Briefs of *amici curiae* urging reversal were filed for the Mid-Atlantic Legal Foundation et al. by *Richard B. McGlynn;* for the National Coal Association et al. by *Harold P. Quinn, Jr.;* and for the Pacific Legal Foundation by *Ronald A. Zumbrun*, *Robert K. Best*, and *Lucinda Low Swartz*.

JUSTICE STEVENS, delivered the opinion of the Court.

In *Pennsylvania Coal Co.* v. *Mahon*, 260 U. S. 393 (1922), the Court reviewed the constitutionality of a Pennsylvania statute that admittedly destroyed "previously existing rights of property and contract." *Id.*, at 413. Writing for the Court, Justice Holmes explained:

> "Government hardly could go on if to some extent values incident to property could not be diminished without paying for every such change in the general law. As long recognized, some values are enjoyed under an implied limitation and must yield to the police power. But obviously the implied limitation must have its limits, or the contract and due process clauses are gone. One fact for consideration in determining such limits is the extent of the diminution. When it reaches a certain magnitude, in most if not in all cases there must be an exercise of eminent domain and compensation to sustain the act.

Briefs of *amici curiae* urging affirmance were filed for the State of California *ex rel.* John K. Van de Kamp et al. by *Mr. Van de Kamp*, Attorney General of California, *pro se*, *Richard C. Jacobs*, *N. Gregory Taylor*, and *Theodora Berger*, Assistant Attorneys General, *Richard M. Frank*, and *Craig C. Thompson*, and by the Attorneys General for their respective States as follows: *John Steven Clark* of Arkansas, *Jim Smith* of Florida, *Corinne K. A. Watanabe* of Hawaii, *Linley E. Pearson*, of Indiana, *Robert T. Stephan* of Kansas, *William J. Guste, Jr.*, of Louisiana, *Stephen H. Sachs* of Maryland, *Francis X. Bellotti* of Massachusetts, *James E. Tierney* of Maine, *Frank J. Kelley* of Michigan, *Hubert H. Humphrey III* of Minnesota, *Edwin L. Pittman* of Mississippi, *William L. Webster* of Missouri, *Robert M. Spire* of Nebraska, *Stephen E. Merrill* of New Hampshire, *W. Cary Edwards* of New Jersey, *Robert Abrams* of New York, *Lacy H. Thornburg* of North Carolina, *Michael Turpin* of Oklahoma, *Dave Frohnmayer* of Oregon, *Mark V. Meierhenry* of South Dakota, *W. J. Michael Cody* of Tennessee, *Jeffrey L. Amestoy* of Vermont, *Kenneth O. Eikenberry* of Washington, and *Bronson C. La Follette* of Wisconsin; for the National Conference of State Legislatures et al. by *Benna Ruth Solomon*, *Joyce Holmes Benjamin*, *Beate Bloch*, and *Robert H. Freilich;* and for the Pennsylvania State Grange et al. by *K. W. James Rochow*.

So the question depends upon the particular facts." *Ibid.*

In that case the "particular facts" led the Court to hold that the Pennsylvania Legislature had gone beyond its constitutional powers when it enacted a statute prohibiting the mining of anthracite coal in a manner that would cause the subsidence of land on which certain structures were located.

Now, 65 years later, we address a different set of "particular facts," involving the Pennsylvania Legislature's 1966 conclusion that the Commonwealth's existing mine subsidence legislation had failed to protect the public interest in safety, land conservation, preservation of affected municipalities' tax bases, and land development in the Commonwealth. Based on detailed findings, the legislature enacted the Bituminous Mine Subsidence and Land Conservation Act (Subsidence Act or Act), Pa. Stat. Ann., Tit. 52, § 1406.1 *et seq.* (Purdon Supp. 1986). Petitioners contend, relying heavily on our decision in *Pennsylvania Coal*, that §§ 4 and 6 of the Subsidence Act and certain implementing regulations violate the Takings Clause, and that § 6 of the Act violates the Contracts Clause of the Federal Constitution. The District Court and the Court of Appeals concluded that *Pennsylvania Coal* does not control for several reasons and that our subsequent cases make it clear that neither § 4 nor § 6 is unconstitutional on its face. We agree.

I

Coal mine subsidence is the lowering of strata overlying a coal mine, including the land surface, caused by the extraction of underground coal. This lowering of the strata can have devastating effects.[1] It often causes substantial dam-

[1] See generally Department of the Interior, Lee & Abel, Subsidence from Underground Mining: Environmental Analysis and Planning Considerations, Geological Survey Circular 2-12, p. 876 (1983); P. Mavrolas & M. Schechtman, Coal Mine Subsidence 6-8 (1981); Blazey & Strain, Deep Mine Subsidence—State Law and the Federal Response, 1 Eastern Mineral Law Foundation § 1.01, pp. 1-5 (1980); Department of the Interior, Bureau of Mines, Moebs, Subsidence Over Four Room-and-Pillar Sections in South-

age to foundations, walls, other structural members, and the integrity of houses and buildings. Subsidence frequently causes sinkholes or troughs in land which make the land difficult or impossible to develop. Its effect on farming has been well documented—many subsided areas cannot be plowed or properly prepared. Subsidence can also cause the loss of groundwater and surface ponds.[2] In short, it presents the type of environmental concern that has been the focus of so much federal, state, and local regulation in recent decades.[3]

Despite what their name may suggest, neither of the "full extraction" mining methods currently used in western Pennsylvania[4] enables miners to extract all subsurface coal; considerable amounts need to be left in the ground to provide access, support, and ventilation to the mines. Additionally, mining companies have long been required by various Pennsylvania laws and regulations, the legitimacy of which is not challenged here, to leave coal in certain areas for public safety reasons.[5] Since 1966, Pennsylvania has placed an additional set of restrictions on the amount of coal that may be

western Pennsylvania, R18645 (1982); H. R. Rep. No. 95-218, p. 126 (1977).

[2] "Wherever [subsidence effects] extend, damage can occur to buildings, roads, pipelines, cables, streams, water impoundments, wells, and aquifers. Buildings can be cracked or tilted; roads can be lowered or cracked; streams, water impoundments, and aquifers can all be drained into the underground excavations. Oil and gas wells can be severed, causing their contents to migrate into underground mines, into aquifers, and even into residential basements. Sewage lines, gas lines, and water lines can all be severed, as can telephone and electric cables." Blazey & Strain, *supra*, § 1.01 [2].

[3] Indeed, in 1977, Congress passed the Federal Surface Mining Control and Reclamation Act, 91 Stat. 445, 30 U. S. C. § 1201 *et seq.*, which includes regulation of subsidence caused by underground coal mining. See 30 U. S. C. § 1266.

[4] The two "full extraction" coal mining methods in use in western Pennsylvania are the room and pillar method, and the longwall method. App. 90-91.

[5] For example, Pennsylvania law requires that coal beneath and adjacent to certain large surface bodies of water be left in place. Pa. Stat. Ann., Tit. 52, § 3101 *et seq.* (Purdon 1966).

extracted; these restrictions are designed to diminish subsidence and subsidence damage in the vicinity of certain structures and areas.

Pennsylvania's Subsidence Act authorizes the Pennsylvania Department of Environmental Resources (DER) to implement and enforce a comprehensive program to prevent or minimize subsidence and to regulate its consequences. Section 4 of the Subsidence Act, Pa. Stat. Ann., Tit. 52, § 1406.4 (Purdon Supp. 1986), prohibits mining that causes subsidence damage to three categories of structures that were in place on April 17, 1966: public buildings and noncommercial buildings generally used by the public; dwellings used for human habitation; and cemeteries.[6] Since 1966 the DER has ap-

[6] Section 4 provides:

"Protection of surface structures against damage from cave-in, collapse, or subsidence

"In order to guard the health, safety and general welfare of the public, no owner, operator, lessor, lessee, or general manager, superintendent or other person in charge of or having supervision over any bituminous coal mine shall mine bituminous coal so as to cause damage as a result of the caving-in, collapse or subsidence of the following surface structures in place on April 27, 1966, overlying or in the proximity of the mine:

"(1) Any public building or any noncommercial structure customarily used by the public, including but not being limited to churches, schools, hospitals, and municipal utilities or municipal public service operations.

"(2) Any dwelling used for human habitation; and

"(3) Any cemetery or public burial ground; unless the current owner of the structure consents and the resulting damage is fully repaired or compensated."

In response to the enactment in 1977 of the Federal Surface Mining Control and Reclamation Act, 91 Stat. 445, 30 U. S. C. § 1201 *et seq.*, and regulations promulgated by the Secretary of the Interior in 1979, 44 Fed. Reg. 14902, the Pennsylvania DER adopted new regulations extending the statutory protection to additional classes of buildings and surface features. Particularly:

"(a)(1) public buildings and non-commercial buildings customarily used by the public [after April 27, 1966], including churches, schools, hospitals, courthouses, and government offices;

. . . . .

plied a formula that generally requires 50% of the coal beneath structures protected by § 4 to be kept in place as a means of providing surface support.[7] Section 6 of the Subsidence Act, Pa. Stat. Ann., Tit. 52, § 1406.6 (Purdon Supp. 1986), authorizes the DER to revoke a mining permit if the removal of coal causes damage to a structure or area protected by § 4 and the operator has not within six months either repaired the damage, satisfied any claim arising therefrom, or deposited a sum equal to the reasonable cost of repair with the DER as security.[8]

"(4) perennial streams and impoundments of water with the storage volume of 20 acre feet;

"(5) aquifers which serve as a significant source of water supply to any public water system; and

"(6) coal refuse disposa[l]" areas. 25 Pa. Code §§ 89.145(a) and 89.146 (b) (1983).

[7] The regulations define the zone for which the 50% rule applies:

"(2) The support area shall be rectangular in shape and determined by projecting a 15 degree angle of draw from the surface to the coal seam, beginning 15 feet from each side of the structure. For a structure on a surface slope of 5.0% or greater, the support area on the downslope side of the structure shall be extended an additional distance, determined by multiplying the depth of the overburden by the percentage of the surface slope." § 89.146(b)(2).

However, this 50% requirement is neither an absolute floor nor ceiling. It may be waived by the Department upon a showing that alternative measures will prevent subsidence damage. § 89.146(b)(5). Alternatively, more stringent measures may be imposed, or mining may be prohibited, if it appears that leaving 50% of the coal in place will not provide adequate support. § 89.146(b)(4).

[8] Although some subsidence eventually occurs over every underground mine, the extent and timing of the subsidence depends upon a number of factors, including the depth of the mining, the geology of the overlying strata, the topography of the surface, and the method of coal removal. The DER believes that the support provided by its 50% rule will last in almost all cases for the life of the structure being protected. Since 1966, petitioners have mined under approximately 14,000 structures or areas protected by § 4; there have been subsidence damage claims with respect to only 300. Stipulations of Counsel 41 and 42, App. 90.

II

In 1982, petitioners filed a civil rights action in the United States District Court for the Western District of Pennsylvania seeking to enjoin officials of the DER from enforcing the Subsidence Act and its implementing regulations. Petitioners are an association of coal mine operators, and four corporations that are engaged, either directly or through affiliates, in underground mining of bituminous coal in western Pennsylvania. The members of the association and the corporate petitioners own, lease, or otherwise control substantial coal reserves beneath the surface of property affected by the Subsidence Act. The defendants in the action, respondents here, are the Secretary of the DER, the Chief of the DER's Division of Mine Subsidence, and the Chief of the DER's Section on Mine Subsidence Regulation.

The complaint alleges that Pennsylvania recognizes three separate estates in land: The mineral estate; the surface estate; and the "support estate." Beginning well over 100 years ago, landowners began severing title to underground coal and the right of surface support while retaining or conveying away ownership of the surface estate. It is stipulated that approximately 90% of the coal that is or will be mined by petitioners in western Pennsylvania was severed from the surface in the period between 1890 and 1920. When acquiring or retaining the mineral estate, petitioners or their predecessors typically acquired or retained certain additional rights that would enable them to extract and remove the coal. Thus, they acquired the right to deposit wastes, to provide for drainage and ventilation, and to erect facilities such as tipples, roads, or railroads, on the surface. Additionally, they typically acquired a waiver of any claims for damages that might result from the removal of the coal.

In the portions of the complaint that are relevant to us, petitioners alleged that both § 4 of the Subsidence Act, as implemented by the 50% rule, and § 6 of the Subsidence Act, constitute a taking of their private property without compensation in violation of the Fifth and Fourteenth Amendments. They also alleged that § 6 impairs their contractual agreements in violation of Article I, § 10, of the Constitution.[9] The parties entered into a stipulation of facts pertaining to petitioners' facial challenge, and filed cross-motions for summary judgment on the facial challenge. The District Court granted respondents' motion.

In rejecting petitioners' Takings Clause claim, the District Court first distinguished *Pennsylvania Coal*, primarily on the ground that the Subsidence Act served valid public purposes that the Court had found lacking in the earlier case. 581 F. Supp. 511, 516 (1984). The District Court found that the restriction on the use of petitioners' property was an exercise of the Commonwealth's police power, justified by Pennsylvania's interest in the health, safety, and general welfare of the public. In answer to petitioners' argument that the Subsidence Act effectuated a taking because a separate, recognized interest in realty—the support estate—had been entirely destroyed, the District Court concluded that under Pennsylvania law the support estate consists of a bundle of rights, including some that were not affected by the Act. That the right to cause damage to the surface may constitute the most valuable "strand" in the bundle of rights possessed by the owner of a support estate was not considered controlling under our decision in *Andrus* v. *Allard*, 444 U. S. 51 (1979).

In rejecting petitioners' Contracts Clause claim, the District Court noted that there was no contention that the Subsi-

[9] Petitioners also challenged various other portions of the Subsidence Act below, see 771 F. 2d 707, 718–719 (1985); 581 F. Supp. 511, 513, 519–520 (1984), but have not pursued these claims in this Court.

dence Act or the DER regulations had impaired any contract to which the Commonwealth was a party. Since only private contractual obligations had been impaired, the court considered it appropriate to defer to the legislature's determinations concerning the public purposes served by the legislation. The court found that the adjustment of the rights of the contracting parties was tailored to those "significant and legitimate" public purposes. 581 F. Supp., at 514. At the parties' request, the District Court certified the facial challenge for appeal.

The Court of Appeals affirmed, agreeing that *Pennsylvania Coal* does not control because the Subsidence Act is a legitimate means of "protect[ing] the environment of the Commonwealth, its economic future, and its well-being." 771 F. 2d 707, 715 (1985). The Court of Appeals' analysis of the Subsidence Act's effect on petitioners' property differed somewhat from the District Court's, however. In rejecting the argument that the support estate had been entirely destroyed, the Court of Appeals did not rely on the fact that the support estate itself constitutes a bundle of many rights, but rather considered the support estate as just one segment of a larger bundle of rights that invariably includes either the surface estate or the mineral estate. As Judge Adams explained:

> "To focus upon the support estate separately when assessing the diminution of the value of plaintiffs' property caused by the Subsidence Act therefore would serve little purpose. The support estate is more properly viewed as only one 'strand' in the plaintiff's 'bundle' of property rights, which also includes the mineral estate. As the Court stated in *Andrus*, '[t]he destruction of one "strand" of the bundle is not a taking because the aggregate must be viewed in its entirety.' 444 U. S. at 65. . . . The use to which the mine operators wish to put the support estate is forbidden. However, because the plaintiffs still possess valuable mineral rights that enable them profitably to mine coal, subject only to the Subsidence Act's requirement that they prevent subsidence, their entire 'bundle' of property rights has not been destroyed." *Id.*, at 716.

With respect to the Contracts Clause claim, the Court of Appeals agreed with the District Court that a higher degree of deference should be afforded to legislative determinations respecting economic and social legislation affecting wholly private contracts than when the State impairs its own agreements. The court held that the impairment of private agreements effectuated by the Subsidence Act was justified by the legislative finding "that subsidence damage devastated many surface structures and thus endangered the health, safety, and economic welfare of the Commonwealth and its people." *Id.*, at 718. We granted certiorari, 475 U. S. 1080 (1986), and now affirm.

III

Petitioners assert that disposition of their takings claim[10] calls for no more than a straightforward application of the Court's decision in *Pennsylvania Coal Co.* v. *Mahon.* Although there are some obvious similarities between the cases, we agree with the Court of Appeals and the District Court that the similarities are far less significant than the differences, and that *Pennsylvania Coal* does not control this case.

In *Pennsylvania Coal*, the Pennsylvania Coal Company had served notice on Mr. and Mrs. Mahon that the company's mining operations beneath their premises would soon reach a point that would cause subsidence to the surface. The Mahons filed a bill in equity seeking to enjoin the coal company from removing any coal that would cause "the caving in, col-

[10] "[N]or shall private property be taken for public use, without just compensation." U. S. Const., Amdt. 5. This restriction is applied to the States through the Fourteenth Amendment. See *Chicago B. & Q. R. Co.* v. *Chicago*, 166 U. S. 226 (1897).

lapse or subsidence" of their dwelling. The bill acknowledged that the Mahons owned only "the surface or right of soil" in the lot, and that the coal company had reserved the right to remove the coal without any liability to the owner of the surface estate. Nonetheless, the Mahons asserted that Pennsylvania's then recently enacted Kohler Act of 1921, P. L. 1198, Pa. Stat. Ann., Tit. 52, § 661 *et seq.* (Purdon 1966), which prohibited mining that caused subsidence under certain structures, entitled them to an injunction.

After initially having entered a preliminary injunction pending a hearing on the merits, the Chancellor soon dissolved it, observing:

> "[T]he plaintiffs' bill contains no averment on which to base by implication or otherwise any finding of fact that any interest public or private is involved in the defendant's proposal to mine the coal except the private interest of the plaintiffs in the prevention of private injury." Tr. of Record in *Pennsylvania Coal* v. *Mahon*, O. T. 1922, No. 549, p. 23.

The Pennsylvania Supreme Court reversed, concluding that the Kohler Act was a proper exercise of the police power. 274 Pa. 489, 118 A. 491 (1922). One Justice dissented. He concluded that the Kohler Act was not actually intended to protect lives and safety, but rather was special legislation enacted for the sole benefit of the surface owners who had released their right to support. *Id.*, at 512–518, 118 A., at 499–501.

The company promptly appealed to this Court, asserting that the impact of the statute was so severe that "a serious shortage of domestic fuel is threatened." Motion to Advance for Argument in *Pennsylvania Coal* v. *Mahon*, O. T. 1922, No. 549, p. 3. The company explained that until the Court ruled, "no anthracite coal which is likely to cause surface subsidence can be mined," and that strikes were threatened

throughout the anthracite coal fields.[11] In its argument in this Court, the company contended that the Kohler Act was not a bona fide exercise of the police power, but in reality was nothing more than "'robbery under the forms of law'" because its purpose was "not to protect the lives or safety of the public generally but merely to augment the property rights of a favored few." See 260 U. S., at 396–398, quoting *Loan Assn.* v. *Topeka*, 20 Wall. 655, 664 (1875).

Over Justice Brandeis' dissent, this Court accepted the company's argument. In his opinion for the Court, Justice Holmes first characteristically decided the specific case at hand in a single, terse paragraph:

> "This is the case of a single private house. No doubt there is a public interest even in this, as there is in every purchase and sale and in all that happens within the commonwealth. Some existing rights may be modified even in such a case. *Rideout* v. *Knox*, 148 Mass. 368. But usually in ordinary private affairs the public interest does not warrant much of this kind of interference. A source of damage to such a house is not a public nuisance even if similar damage is inflicted on others in different places. The damage is not common or public. *Wesson* v. *Washburn Iron Co.*, 13 Allen, 95, 103. The extent of the public interest is shown by the statute to be limited, since the statute ordinarily does not apply to land when the surface is owned by the owner of the coal. Furthermore, it is not justified as a protection of personal safety. That could be provided for by notice. Indeed the very foundation of this bill is that the defendant gave timely notice of its intent to mine under the house. On the other hand the extent of the taking is great. It purports to abolish what is recognized in Pennsylvania as an es-

[11] The urgency with which the case was treated is evidenced by the fact that the Court issued its decision less than a month after oral argument; a little over a year after the test case had been commenced.

tate in land—a very valuable estate—and what is declared by the Court below to be a contract hitherto binding the plaintiffs. If we were called upon to deal with the plaintiffs' position alone, we should think it clear that the statute does not disclose a public interest sufficient to warrant so extensive a destruction of the defendant's constitutionally protected rights." 260 U. S., at 413–414.

Then—uncharacteristically—Justice Holmes provided the parties with an advisory opinion discussing "the general validity of the Act."[12] In the advisory portion of the Court's opinion, Justice Holmes rested on two propositions, both critical to the Court's decision. First, because it served only private interests, not health or safety, the Kohler Act could not be "sustained as an exercise of the police power." *Id.*, at 414. Second, the statute made it "commercially impracticable" to mine "certain coal" in the areas affected by the Kohler Act.[13]

The holdings and assumptions of the Court in *Pennsylvania Coal* provide obvious and necessary reasons for distinguishing *Pennsylvania Coal* from the case before us today.

[12] "But the case has been treated as one in which the general validity of the act should be discussed. The Attorney General of the State, the City of Scranton, and the representatives of other extensive interests were allowed to take part in the argument below and have submitted their contentions here. It seems, therefore, to be our duty to go farther in the statement of our opinion, in order that it may be known at once, and that further suits should not be brought in vain." 260 U. S., at 414.

[13] "What makes the right to mine coal valuable is that it can be exercised with profit. To make it commercially impracticable to mine certain coal has very nearly the same effect for constitutional purposes as appropriating or destroying it. This we think that we are warranted in assuming that the statute does." *Id.*, at 414–415.

This assumption was not unreasonable in view of the fact that 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. See n. 8, *supra*.

The two factors that the Court considered relevant, have become integral parts of our takings analysis. 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." *Agins* v. *Tiburon*, 447 U. S. 255, 260 (1980) (citations omitted); see also *Penn Central Transportation Co.* v. *New York City*, 438 U. S. 104, 124 (1978). Application of these tests to petitioners' challenge demonstrates that they have not satisfied their burden of showing that the Subsidence Act constitutes a taking. First, unlike the Kohler Act, the character of the governmental action involved here leans heavily against finding a taking; the Commonwealth of Pennsylvania has acted to arrest what it perceives to be a significant threat to the common welfare. Second, there is no record in this case to support a finding, similar to the one the Court made in *Pennsylvania Coal*, that the Subsidence Act makes it impossible for petitioners to profitably engage in their business, or that there has been undue interference with their investment-backed expectations.

The Public Purpose

Unlike the Kohler Act, which was passed upon in *Pennsylvania Coal*, the Subsidence Act does not merely involve a balancing of the private economic interests of coal companies against the private interests of the surface owners. The Pennsylvania Legislature specifically found that important public interests are served by enforcing a policy that is designed to minimize subsidence in certain areas. Section 2 of the Subsidence Act provides:

> "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 of the Commonwealth, by providing for the conservation of surface land areas which may be affected in the mining of bituminous coal by methods other than 'open pit' or

'strip' mining, to aid in the protection of the safety of the public, to enhance the value of such lands for taxation, to aid in the preservation of surface water drainage and public water supplies and generally to improve the use and enjoyment of such lands and to maintain primary jurisdiction over surface coal mining in Pennsylvania." Pa. Stat. Ann., Tit. 52, § 1406.2 (Purdon Supp. 1986).

The District Court and the Court of Appeals were both convinced that the legislative purposes[14] set forth in the statute were genuine, substantial, and legitimate, and we have no reason to conclude otherwise.[15]

None of the indicia of a statute enacted solely for the benefit of private parties identified in Justice Holmes' opinion are present here. First, Justice Holmes explained that the Kohler Act was a "private benefit" statute since it "ordinarily does not apply to land when the surface is owned by the owner of the coal." 260 U. S., at 414. The Subsidence Act, by contrast, has no such exception. The current surface owner may only waive the protection of the Act if the DER consents. See 25 Pa. Code § 89.145(b) (1983). Moreover, the Court was forced to reject the Commonwealth's safety justification for the Kohler Act because it found that the Commonwealth's interest in safety could as easily have been accomplished through a notice requirement to landowners. The Subsidence Act, by contrast, is designed to accomplish a number of widely varying interests, with reference to which petitioners have not suggested alternative methods through which the Commonwealth could proceed.

Petitioners argue that at least § 6, which requires coal companies to repair subsidence damage or pay damages to those

[14] The legislature also set forth rather detailed findings about the dangers of subsidence and the need for legislation. See Pa. Stat. Ann., Tit. 52, § 1406.3 (Purdon Supp. 1986).

[15] "We are not disposed to displace the considered judgment of the Court of Appeals on an issue whose resolution is so contingent upon an analysis of state law." *Runyon* v. *McCrary*, 427 U. S. 160, 181 (1976).

who suffer subsidence damage, is unnecessary because the Commonwealth administers an insurance program that adequately reimburses surface owners for the cost of repairing their property. But this argument rests on the mistaken premise that the statute was motivated by a desire to protect private parties. In fact, however, the public purpose that motivated the enactment of the legislation is served by preventing the damage from occurring in the first place—in the words of the statute—"by providing for the conservation of surface land areas." Pa. Stat. Ann., Tit. 52, § 1406.2 (Purdon Supp. 1986). The requirement that the mine operator assume the financial responsibility for the repair of damaged structures deters the operator from causing the damage at all—the Commonwealth's main goal—whereas an insurance program would merely reimburse the surface owner after the damage occurs.[16]

Thus, the Subsidence Act differs from the Kohler Act in critical and dispositive respects. With regard to the Kohler Act, the Court believed that the Commonwealth had acted only to ensure against damage to some private landowners' homes. Justice Holmes stated that if the private individuals needed support for their structures, they should not have

[16] We do not suggest that courts have "a license to judge the effectiveness of legislation," *post*, at 511, n. 3, or that courts are to undertake "least restrictive alternative" analysis in deciding whether a state regulatory scheme is designed to remedy a public harm or is instead intended to provide private benefits. That a land use regulation may be somewhat overinclusive or underinclusive is, of course, no justification for rejecting it. See *Euclid* v. *Ambler Realty Co.*, 272 U. S. 365, 388–389 (1926). But, on the other hand, *Pennsylvania Coal* instructs courts to examine the operative provisions of a statute, not just its stated purpose, in assessing its true nature. In *Pennsylvania Coal*, that inquiry led the Court to reject the Pennsylvania Legislature's stated purpose for the statute, because the "extent of the public interest is shown by the statute to be limited." 260 U. S., at 413–414. In this case, we, the Court of Appeals, and the District Court, have conducted the same type of inquiry the Court in *Pennsylvania Coal* conducted, and have determined that the details of the statute do not call the stated public purposes into question.

"take[n] the risk of acquiring only surface rights." 260 U. S., at 416. Here, by contrast, the Commonwealth is acting to protect the public interest in health, the environment, and the fiscal integrity of the area. That private individuals erred in taking a risk cannot estop the Commonwealth from exercising its police power to abate activity akin to a public nuisance. The Subsidence Act is a prime example that "circumstances may so change in time . . . as to clothe with such a [public] interest what at other times . . . would be a matter of purely private concern." *Block* v. *Hirsh*, 256 U. S. 135, 155 (1921).

In *Pennsylvania Coal* the Court recognized that the nature of the State's interest in the regulation is a critical factor in determining whether a taking has occurred, and thus whether compensation is required.[17] The Court distinguished the case before it from a case it had decided eight years earlier, *Plymouth Coal Co.* v. *Pennsylvania*, 232 U. S. 531 (1914). There, "it was held competent for the legislature to require a pillar of coal to be left along the line of adjoining property." *Pennsylvania Coal*, 260 U. S., at 415. Justice Holmes explained that unlike the Kohler Act, the statute challenged in *Plymouth Coal* dealt with "a requirement for the safety of employees invited into the mine, and secured an average reciprocity of advantage that has been recognized as a justification of various laws." 260 U. S., at 415.

Many cases before and since *Pennsylvania Coal* have recognized that the nature of the State's action is critical in takings analysis.[18] In *Mugler* v. *Kansas*, 123 U. S. 623

[17] In his dissent, Justice Brandeis argued that the State has an absolute right to prohibit land use that amounts to a public nuisance. *Id.*, at 417. Justice Holmes' opinion for the Court did not contest that proposition, but instead took issue with Justice Brandeis' conclusion that the Kohler Act represented such a prohibition. *Id.*, at 413–414.

[18] Of course, the type of taking alleged is also an often critical factor. It is well settled that a "'taking' may more readily be found when the interference with property can be characterized as a physical invasion by government, see, *e. g.*, *United States* v. *Causby*, 328 U. S. 256 (1946), than

(1887), for example, a Kansas distiller who had built a brewery while it was legal to do so challenged a Kansas constitutional amendment which prohibited the manufacture and sale of intoxicating liquors. Although the Court recognized that the "buildings and machinery constituting these breweries are of little value" because of the Amendment, *id.*, at 657, Justice Harlan explained that 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 just sense, be deemed a taking or 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 upon the community." *Id.*, at 668–669.

when interference arises from some public program adjusting the benefits and burdens of economic life to promote the common good." *Penn Central Tranportation Co.* v. *New York City*, 438 U. S. 104, 124 (1978). While the Court has almost invariably found that the permanent physical occupation of property constitutes a taking, see *Loretto* v. *Teleprompter Manhattan CATV Corp.*, 458 U. S. 419, 435–438 (1982), the Court has repeatedly upheld regulations that destroy or adversely affect real property interests. See, *e. g.*, *Connolly* v. *Pension Benefit Guaranty Corporation*, 475 U. S. 211 (1986); *Penn Central Transportation Co.* v. *New York City*, 438 U. S., at 125; *Eastlake* v. *Forest City Enterprises, Inc.*, 426 U. S. 668, 674, n. 8 (1976); *Goldblatt* v. *Hempstead*, 369 U. S. 590, 592–593 (1962); *Euclid* v. *Ambler Realty Co.*, 272 U. S. 365 (1926); *Gorieb* v. *Fox*, 274 U. S. 603, 608 (1927); *Welch* v. *Swasey*, 214 U. S. 91 (1909). This case, of course, involves land use regulation, not a physical appropriation of petitioners' property.

See also *Plymouth Coal Co., supra; Hadacheck* v. *Sebastian*, 239 U. S. 394 (1915); *Reinman* v. *Little Rock*, 237 U. S. 171 (1915); *Powell* v. *Pennsylvania*, 127 U. S. 678 (1888).

We reject petitioners' implicit assertion that *Pennsylvania Coal* overruled these cases which focused so heavily on the nature of the State's interest in the regulation. Just five years after the *Pennsylvania Coal* decision, Justice Holmes joined the Court's unanimous decision in *Miller* v. *Schoene*, 276 U. S. 272 (1928), holding that the Takings Clause did not require the State of Virginia to compensate the owners of cedar trees for the value of the trees that the State had ordered destroyed. The trees needed to be destroyed to prevent a disease from spreading to nearby apple orchards, which represented a far more valuable resource. In upholding the state action, the Court did not consider it necessary to "weigh with nicety the question whether the infected cedars constitute a nuisance according to common law; or whether they may be so declared by statute." *Id.*, at 280. Rather, it was clear that the State's exercise of its police power to prevent the impending danger was justified, and did not require compensation. See also *Euclid* v. *Ambler Realty Co.*, 272 U. S. 365 (1926); *Omnia Commercial Co.* v. *United States*, 261 U. S. 502, 509 (1923). Other subsequent cases reaffirm the important role that the nature of the state action plays in our takings analysis. See *Goldblatt* v. *Hempstead*, 369 U. S. 590 (1962); *Consolidated Rock Products Co.* v. *Los Angeles*, 57 Cal. 2d 515, 370 P. 2d 342, appeal dism'd, 371 U. S. 36 (1962). As the Court explained in *Goldblatt:* "Although a comparison of values before and after" a regulatory action "is relevant, . . . it is by no means conclusive . . . ." 369 U. S., at 594.[19]

[19] See also *Agins* v. *Tiburon*, 447 U. S. 255, 261 (1980) (the question whether a taking has occurred "necessarily requires a weighing of private and public interests"); *Webb's Fabulous Pharmacies, Inc.* v. *Beckwith*, 449 U. S. 155, 163 (1980) ("No police power justification is offered for the deprivation").

The Court's hesitance to find a taking when the State merely restrains uses of property that are tantamount to public nuisances is consistent with the notion of "reciprocity of advantage" that Justice Holmes referred to in *Pennsylvania Coal.*[20] 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.[21] See *Penn Central Transportation Co.* v. *New York City*, 438 U. S., at 144–150 (REHNQUIST, J., dissenting); cf. *California Reduction Co.* v. *Sanitary Reduction Works*, 199 U. S. 306, 322 (1905). These restrictions are "properly treated as part of the burden of common citizenship." *Kimball Laundry Co.* v. *United States*, 338 U. S. 1, 5 (1949). Long ago it was recognized that "all property in

[20] The special status of this type of state action can also be understood on the simple theory that since no individual has a right to use his property so as to create a nuisance or otherwise harm others, the State has not "taken" anything when it asserts its power to enjoin the nuisance-like activity. Cf. Sax, Takings, Private Property and Public Rights, 81 Yale L. J. 149, 155–161 (1971); Michelman, Property, Utility, and Fairness: Comments on the Ethical Foundations of "Just Compensation" Law, 80 Harv. L. Rev. 1165, 1235–1237 (1967).

However, as the current CHIEF JUSTICE has explained: "The nuisance exception to the taking guarantee is not coterminous with the police power itself." *Penn Central Transportation Co.*, 438 U. S., at 145 (REHNQUIST, J., dissenting). This is certainly the case in light of our recent decisions holding that the "scope of the 'public use' requirement of the Takings Clause is 'coterminous with the scope of a sovereign's police powers.'" See *Ruckelshaus* v. *Monsanto Co.*, 467 U. S. 986, 1014 (1984) (quoting *Hawaii Housing Authority* v. *Midkiff*, 467 U. S. 229, 240 (1984)). See generally R. Epstein, Takings 108–112 (1985).

[21] The Takings Clause has never been read to require the States or the courts to calculate whether a specific individual has suffered burdens under this generic rule in excess of the benefits received. Not every individual gets a full dollar return in benefits for the taxes he or she pays; yet, no one suggests that an individual has a right to compensation for the difference between taxes paid and the dollar value of benefits received.

this country is held under the implied obligation that the owner's use of it shall not be injurious to the community," *Mugler* v. *Kansas*, 123 U. S., at 665; see also *Beer Co.* v. *Massachusetts*, 97 U. S. 25, 32 (1878), and the Takings Clause did not transform that principle to one that requires compensation whenever the State asserts its power to enforce it.[22] See *Mugler*, 123 U. S., at 664.

In *Agins* v. *Tiburon*, we explained that the "determination that governmental action constitutes a taking, is, in essence, a determination that the public at large, rather than a single owner, must bear the burden of an exercise of state power in the public interest," and we recognized that this question "necessarily requires a weighing of private and public interests." 447 U. S., at 260–261. As the cases discussed above demonstrate, the public interest in preventing activities similar to public nuisances is a substantial one, which in many instances has not required compensation. The Subsidence Act, unlike the Kohler Act, plainly seeks to further such an interest. Nonetheless, we need not rest our decision on this factor alone, because petitioners have also failed to make a

[22] Courts have consistently held that a State need not provide compensation when it diminishes or destroys the value of property by stopping illegal activity or abating a public nuisance. See *Nassr* v. *Commonwealth*, 394 Mass. 767, 477 N. E. 2d 987 (1985) (hazardous waste operation); *Kuban* v. *McGimsey*, 96 Nev. 105, 605 P. 2d 623 (1980) (brothel); *MacLeod* v. *Takoma Park*, 257 Md. 477, 263 A. 2d 581 (1970) (unsafe building); *Eno* v. *Burlington*, 125 Vt. 8, 209 A. 2d 499 (1965) (fire and health hazard); *Pompano Horse Club, Inc.* v. *State ex rel. Bryan*, 93 Fla. 415, 111 So. 801 (1927) (gambling facility); *People ex rel. Thrasher* v. *Smith*, 275 Ill. 256, 114 N. E. 31 (1916) ("bawdyhouse"). It is hard to imagine a different rule that would be consistent with the maxim "*sic utere tuo ut alienum non laedas*" (use your own property in such manner as not to injure that of another). See generally *Empire State Insurance Co.* v. *Chafetz*, 278 F. 2d 41 (CA5 1960). As Professor Epstein has recently commented: "The issue of compensation cannot arise until the question of justification has been disposed of. In the typical nuisance prevention case, this question is resolved against the claimant." Epstein, *supra*, at 199.

showing of diminution of value sufficient to satisfy the test set forth in *Pennsylvania Coal* and our other regulatory takings cases.

Diminution of Value and Investment-Backed Expectations

The second factor that distinguishes this case from *Pennsylvania Coal* is the finding in that case that the Kohler Act made mining of "certain coal" commercially impracticable. In this case, by contrast, petitioners have not shown any deprivation significant enough to satisfy the heavy burden placed upon one alleging a regulatory taking. For this reason, their takings claim must fail.

In addressing petitioners' claim we must not disregard the posture in which this case comes before us. The District Court granted summary judgment to respondents only on the facial challenge to the Subsidence Act. The court explained that "[b]ecause plaintiffs have not alleged any injury due to the enforcement of the statute, there is as yet no concrete controversy regarding the application of the specific provisions and regulations. Thus, *the only question before this court is whether the mere enactment of the statutes and regulations constitutes a taking*." 581 F. Supp., at 513 (emphasis added). The next phase of the case was to be petitioners' presentation of evidence about the actual effects the Subsidence Act had and would have on them. Instead of proceeding in this manner, however, the parties filed a joint motion asking the court to certify the facial challenge for appeal. The parties explained that an assessment of the actual impact that the Act has on petitioners' operations "will involve complex and voluminous proofs," which neither party was currently in a position to present, App. 15–17, and stressed that if an appellate court were to reverse the District Court on the facial challenge, then all of their expenditures in adjudicating the as-applied challenge would be wasted. Based

on these considerations, the District Court certified three questions relating to the facial challenge.[23]

The posture of the case is critical because we have recognized an important distinction between a claim that the mere enactment of a statute constitutes a taking and a claim that the particular impact of government action on a specific piece of property requires the payment of just compensation. This point is illustrated by our decision in *Hodel* v. *Virginia Surface Mining & Reclamation Assn., Inc.*, 452 U. S. 264 (1981), in which we rejected a preenforcement challenge to the constitutionality of the Surface Mining Control and Reclamation Act of 1977. We concluded that the District Court had been mistaken in its reliance on *Pennsylvania Coal* as support for a holding that two statutory provisions were unconstitutional because they deprived coal mine operators of the use of their land. The Court explained:

> "[T]he court below ignored this Court's oft-repeated admonition that the constitutionality of statutes ought not be decided except in an actual factual setting that makes such a decision necessary. See *Socialist Labor Party* v. *Gilligan*, 406 U. S. 583, 588 (1972); *Rescue Army* v. *Municipal Court*, 331 U. S. 549, 568–575, 584 (1947); *Alabama State Federation of Labor* v. *McAdory*, 325 U. S. 450, 461 (1945). Adherence to this rule is particularly important in cases raising allegations of an unconstitutional taking of private property. Just last Term, we reaffirmed:

[23] The certified questions asked whether §§ 4, 5, or 6 of the Subsidence Act, and various regulations:

"1. Violate the Rule of the *Mahon* Decision[,]
"2. Constitute *Per Se* Takings,
"3. Violate Article I, § 10 of the Constitution of the United States." App. 12.

The Court of Appeals recognized the limited nature of its inquiry, pointing out that it was passing only on the facial challenge, and that the "as-applied challenge remains for disposition in the district court." 771 F. 2d, at 710, n. 3.

> "'[T]his Court has generally "been unable to develop any 'set formula' for determining when 'justice and fairness' require that economic injuries caused by public action be compensated by the government, rather than remain disproportionately concentrated on a few persons." Rather, it has examined the "taking" question by engaging in essentially ad hoc, factual inquiries that have identified several factors—such as the economic impact of the regulation, its interference with reasonable investment backed expectations, and the character of the government action—that have particular significance.' *Kaiser Aetna* v. *United States*, 444 U. S. 164, 175 (1979) (citations omitted).
>
> "These 'ad hoc, factual inquiries' must be conducted with respect to specific property, and the particular estimates of economic impact and ultimate valuation relevant in the unique circumstances.
>
> "Because appellees' taking claim arose in the context of a facial challenge, it presented no concrete controversy concerning either application of the Act to particular surface mining operations or its effect on specific parcels of land. Thus, the only issue properly before the District Court and, in turn, this Court, is whether the 'mere enactment' of the Surface Mining Act constitutes a taking. See *Agins* v. *Tiburon*, 447 U. S. 255, 260 (1980). The test to be applied in considering this facial challenge is fairly straightforward. A statute regulating the uses that can be made of property effects a taking if it 'denies an owner economically viable use of his land . . . .' *Agins* v. *Tiburon*, *supra*, at 260; see also *Penn Central Transp. Co.* v. *New York City*, 438 U. S. 104 (1978)." 452 U. S., at 295–296.

Petitioners thus face an uphill battle in making a facial attack on the Act as a taking.

The hill is made especially steep because petitioners have not claimed, at this stage, that the Act makes it commercially

impracticable for them to continue mining their bituminous coal interests in western Pennsylvania. Indeed, petitioners have not even pointed to a single mine that can no longer be mined for profit. The only evidence available on the effect that the Subsidence Act has had on petitioners' mining operations comes from petitioners' answers to respondents' interrogatories. Petitioners described the effect that the Subsidence Act had from 1966–1982 on 13 mines that the various companies operate, and claimed that they have been required to leave a bit less than 27 million tons of coal in place to support § 4 areas. The total coal in those 13 mines amounts to over 1.46 billion tons. See App. 284. Thus § 4 requires them to leave less than 2% of their coal in place.[24] But, as we have indicated, nowhere near all of the underground coal is extractable even aside from the Subsidence Act. The categories of coal that must be left for § 4 purposes and other purposes are not necessarily distinct sets, and there is no information in the record as to how much coal is actually left in the ground *solely* because of § 4. We do know, however, that petitioners have never claimed that their mining operations, or even any specific mines, have been unprofitable since the Subsidence Act was passed. Nor is there evidence that mining in any specific location affected by the 50% rule has been unprofitable.

Instead, petitioners have sought to narrowly define certain segments of their property and assert that, when so defined, the Subsidence Act denies them economically viable use. They advance two alternative ways of carving their property in order to reach this conclusion. First, they focus on the specific tons of coal that they must leave in the ground under

[24] The percentage of the total that must be left in place under § 4 is not the same for every mine because of the wide variation in the extent of surface development in different areas. For 7 of the 13 mines identified in the record, 1% or less of the coal must remain in place; for 3 others, less than 3% must be left in place; for the other 3, the percentages are 4%, 7.8%, and 9.4%. See App. 284.

the Subsidence Act, and argue that the Commonwealth has effectively appropriated this coal since it has no other useful purpose if not mined. Second, they contend that the Commonwealth has taken their separate legal interest in property—the "support estate."

Because our test for regulatory taking requires us to compare the value that has been taken from the property with the value that remains in the property, one of the critical questions is determining how to define the unit of property "whose value is to furnish the denominator of the fraction." Michelman, Property, Utility, and Fairness: Comments on the Ethical Foundations of "Just Compensation" Law, 80 Harv. L. Rev. 1165, 1192 (1967).[25] In *Penn Central* the Court explained:

> "'Taking' jurisprudence does not divide a single parcel into discrete segments and attempt to determine whether rights in a particular segment have been entirely abrogated. In deciding whether a particular governmental action has effected a taking, this Court focuses rather both on the character of the action and on the nature of the interference with rights *in the parcel as a whole*—here the city tax block designated as the 'landmark site.'" 438 U. S., at 130–131.

Similarly, in *Andrus* v. *Allard*, 444 U. S. 51 (1979), we held that "where an owner possesses a full 'bundle' of property rights, the destruction of one 'strand' of the bundle is not a taking because the aggregate must be viewed in its entirety." *Id.*, at 65–66. Although these verbal formulizations do not solve all of the definitional issues that may arise in defining the relevant mass of property, they do provide sufficient guidance to compel us to reject petitioners' arguments.

[25] See also Sax, Takings and the Police Power, 74 Yale L. J. 36, 60 (1964); Rose, *Mahon* Reconstructed: Why the Takings Issue is Still a Muddle, 57 S. Cal. L. Rev. 561, 566–567 (1984).

The Coal in Place

The parties have stipulated that enforcement of the DER's 50% rule will require petitioners to leave approximately 27 million tons of coal in place. Because they own that coal but cannot mine it, they contend that Pennsylvania has appropriated it for the public purposes described in the Subsidence Act.

This argument fails for the reason explained in *Penn Central* and *Andrus*. The 27 million tons of coal do not constitute a separate segment of property for takings law purposes. Many zoning ordinances place limits on the property owner's right to make profitable use of some segments of his property. A requirement that a building occupy no more than a specified percentage of the lot on which it is located could be characterized as a taking of the vacant area as readily as the requirement that coal pillars be left in place. Similarly, under petitioners' theory one could always argue that a setback ordinance requiring that no structure be built within a certain distance from the property line constitutes a taking because the footage represents a distinct segment of property for takings law purposes. Cf. *Gorieb* v. *Fox*, 274 U. S. 603 (1927) (upholding validity of setback ordinance) (Sutherland, J.). There is no basis for treating the less than 2% of petitioners' coal as a separate parcel of property.

We do not consider Justice Holmes' statement that the Kohler Act made mining of "certain coal" commercially impracticable as requiring us to focus on the individual pillars of coal that must be left in place. That statement is best understood as referring to the Pennsylvania Coal Company's assertion that it could not undertake profitable anthracite coal mining in light of the Kohler Act. There were strong assertions in the record to support that conclusion. For example, the coal company claimed that one company was "unable to operate six large collieries in the city of Scranton, employing more than five thousand men." Motion to Advance for Ar-

gument in *Pennsylvania Coal Co.* v. *Mahon*, O. T. 1922, No. 549, p. 2.[26] As Judge Adams explained:

> "At first blush, this language seems to suggest that the Court would have found a taking no matter how little of the defendants' coal was rendered unmineable—that because 'certain' coal was no longer accessible, there had been a taking of that coal. However, when one reads the sentence in context, it becomes clear that the Court's concern was with whether the defendants' 'right to mine coal . . . [could] be exercised *with profit*.' 260 U. S. at 414 (emphasis added). . . . Thus, the Court's holding in *Mahon* must be assumed to have been based on its understanding that the Kohler Act rendered the business of mining coal unprofitable." 771 F. 2d, at 716, n. 6.

When the coal that must remain beneath the ground is viewed in the context of any reasonable unit of petitioners' coal mining operations and financial-backed expectations, it is plain that petitioners have not come close to satisfying their burden of proving that they have been denied the economically viable use of that property. The record indicates that only about 75% of petitioners' underground coal can be profitably mined in any event, and there is no showing that petitioners' reasonable "investment-backed expectations" have been materially affected by the additional duty to retain the small percentage that must be used to support the structures protected by § 4.[27]

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[26] Of course, the company also argued that the Subsidence Act made it commercially impracticable to mine the very coal that had to be left in place. Although they could have constructed pillars for support in place of the coal, the cost of the artificial pillars would have far exceeded the value of the coal. See Brief for Plaintiff in Error in *Pennsylvania Coal* v. *Mahon*, O. T. 1922, No. 549, pp. 7–9.

[27] We do not suggest that the State may physically appropriate relatively small amounts of private property for its own use without paying just compensation. The question here is whether there has been any taking at all when no coal has been physically appropriated, and the regulatory pro-

The Support Estate

Pennsylvania property law is apparently unique in regarding the support estate as a separate interest in land that can be conveyed apart from either the mineral estate or the surface estate.[28] Petitioners therefore argue that even if comparable legislation in another State would not constitute a taking, the Subsidence Act has that consequence because it entirely destroys the value of their unique support estate. It is clear, however, that our takings jurisprudence forecloses reliance on such legalistic distinctions within a bundle of property rights. For example, in *Penn Central*, the Court rejected the argument that the "air rights" above the terminal constituted a separate segment of property for Takings Clause purposes. 438 U. S., at 130. Likewise, in *Andrus* v. *Allard*, we viewed the right to sell property as just one element of the owner's property interest. 444 U. S., at 65–66. In neither case did the result turn on whether state law allowed the separate sale of the segment of property.

The Court of Appeals, which is more familiar with Pennsylvania law than we are, concluded that as a practical matter the support estate is always owned by either the owner of the surface or the owner of the minerals. It stated:

> "The support estate consists of the right to remove the strata of coal and earth that undergird the surface or to leave those layers intact to support the surface and prevent subsidence. These two uses cannot co-exist and, depending upon the purposes of the owner of the support

gram places a burden on the use of only a small fraction of the property that is subjected to regulation. See generally n. 18, *supra*.

[28] See *Charnetski* v. *Miners Mills Coal Mining Co.*, 270 Pa. 459, 113 A. 683 (1921); *Penman* v. *Jones*, 256 Pa. 416 (1917); *Captline* v. *County of Allegheny*, 74 Pa. Commw. 85, 459 A. 2d 1298 (1983), cert. denied, 466 U. S. 904 (1984); see generally Montgomery, The Development of the Right of Subjacent Support and the "Third Estate" in Pennsylvania, 25 Temple L. Q. 1 (1951).

> estate, one use or the other must be chosen. If the owner is a mine operator, the support estate is used to exploit the mineral estate. When the right of support is held by the surface owner, its use is to support that surface and prevent subsidence. Thus, although Pennsylvania law does recognize the support estate as a 'separate' property interest, *id.*, it cannot be used profitably by one who does not also possess either the mineral estate or the surface estate. *See* Montgomery, *The Development of the Right of Subjacent Support and the 'Third Estate in Pennsylvania,'* 25 Temple L. Q. 1, 21 (1951)." 771 F. 2d, at 715–716.

Thus, in practical terms, the support estate has value only insofar as it protects or enhances the value of the estate with which it is associated. Its value is merely a part of the entire bundle of rights possessed by the owner of either the coal or the surface. Because petitioners retain the right to mine virtually all of the coal in their mineral estates, the burden the Act places on the support estate does not constitute a taking. Petitioners may continue to mine coal profitably even if they may not destroy or damage surface structures at will in the process.

But even if we were to accept petitioners' invitation to view the support estate as a distinct segment of property for "takings" purposes, they have not satisfied their heavy burden of sustaining a facial challenge to the Act. Petitioners have acquired or retained the support estate for a great deal of land, only part of which is protected under the Subsidence Act, which, of course, deals with subsidence in the immediate vicinity of certain structures, bodies of water, and cemeteries. See n. 6, *supra*. The record is devoid of any evidence on what percentage of the purchased support estates, either in the aggregate or with respect to any individual estate, has been affected by the Act. Under these circumstances, peti-

tioners' facial attack under the Takings Clause must surely fail.[29]

IV

In addition to their challenge under the Takings Clause, petitioners assert that § 6 of the Subsidence Act violates the Contracts Clause by not allowing them to hold the surface owners to their contractual waiver of liability for surface damage. Here too, we agree with the Court of Appeals and the District Court that the Commonwealth's strong public interests in the legislation are more than adequate to justify the impact of the statute on petitioners' contractual agreements.

Prior to the ratification of the Fourteenth Amendment, it was Article I, § 10, that provided the primary constitutional check on state legislative power. The first sentence of that section provides:

> "No State shall enter into any Treaty, Alliance, or Confederation; grant Letters of Marque and Reprisal; coin Money; emit Bills of Credit; make any Thing but gold or silver Coin a Tender in Payment of Debts; pass any Bill of Attainder, ex post facto Law, or Law impairing the Obligation of Contracts, or grant any Title of Nobility." U. S. Const., Art. I, § 10.

Unlike other provisions in the section, it is well settled that the prohibition against impairing the obligation of contracts is not to be read literally. *W. B. Worthen Co.* v. *Thomas*, 292 U. S. 426, 433 (1934). The context in which the Contracts Clause is found, the historical setting in which it was

[29] Another unanswered question about the level of diminution involves the District Court's observation that the support estate carries with it far more than the right to cause subsidence damage without liability. See 581 F. Supp., at 519. There is no record as to what value these other rights have and it is thus impossible to say whether the regulation of subsidence damage under certain structures, and the imposition of liability for damage to certain structures, denies petitioners the economically viable use of the support estate, even if viewed as a distinct segment of property.

adopted,[30] and our cases construing the Clause, indicate that its primary focus was upon legislation that was designed to repudiate or adjust pre-existing debtor-creditor relationships that obligors were unable to satisfy. See *e. g.*, *ibid.*; *Home Building & Loan Assn.* v. *Blaisdell*, 290 U. S. 398 (1934). Even in such cases, the Court has refused to give the Clause a literal reading. Thus, in the landmark case of *Home Building & Loan Assn.* v. *Blaisdell*, the Court upheld Minnesota's statutory moratorium against home foreclosures, in part, because the legislation was addressed to the "legitimate end" of protecting "a basic interest of society," and not just for the advantage of some favored group. *Id.*, at 445.

As Justice Stewart explained:

> "[I]t is to be accepted as a commonplace that the Contract Clause does not operate to obliterate the police power of the States. 'It is the settled law of this court that the interdiction of statutes impairing the obligation of contracts does not prevent the State from exercising such powers as are vested in it for the promotion of the common weal, or are necessary for the general good of the public, though contracts previously entered into between individuals may thereby be affected. This power, which in its various ramifications is known as the police power, is an exercise of the sovereign right of the Government to protect the lives, health, morals, comfort and general welfare of the people, and is paramount to any rights under contracts between individuals.' *Manigault* v. *Springs*, 199 U. S. 473, 480. As Mr. Justice

[30] "It was made part of the Constitution to remedy a particular social evil—the state legislative practice of enacting laws to relieve individuals of their obligations under certain contracts—and thus was intended to prohibit States from adopting 'as [their] policy the repudiation of debts or the destruction of contracts or the denial of means to enforce them,' *Home Building & Loan Assn.* v. *Blaisdell*, 290 U. S. 398, 439 (1934)." *Allied Structural Steel Co.* v. *Spannaus*, 438 U. S. 234, 256 (1978) (BRENNAN, J., dissenting).

Holmes succinctly put the matter in his opinion for the Court in *Hudson Water Co.* v. *McCarter*, 209 U. S. 349, 357: 'One whose rights, such as they are, are subject to state restriction, cannot remove them from the power of the State by making a contract about them. The contract will carry with it the infirmity of the subject matter.'" *Allied Structural Steel Co.* v. *Spannaus*, 438 U. S. 234, 241–242 (1978).

In assessing the validity of petitioners' Contracts Clause claim in this case, we begin by identifying the precise contractual right that has been impaired and the nature of the statutory impairment. Petitioners claim that they obtained damages waivers for a large percentage of the land surface protected by the Subsidence Act, but that the Act removes the surface owners' contractual obligations to waive damages. We agree that the statute operates as "a substantial impairment of a contractual relationship," *id.*, at 244, and therefore proceed to the asserted justifications for the impairment.[31]

The record indicates that since 1966 petitioners have conducted mining operations under approximately 14,000 structures protected by the Subsidence Act. It is not clear whether that number includes the cemeteries and water courses under which mining has been conducted. In any event, it is petitioners' position that, because they contracted

[31] As we have mentioned above, we do not know what percentage of petitioners' acquired support estate is in fact restricted under the Subsidence Act. See *supra*, at 501–502. Moreover, we have no basis on which to conclude just how substantial a part of the support estate the waiver of liability is. See *id.*, at n. 29. These inquiries are both essential to determine the "severity of the impairment," which in turn affects "the level of scrutiny to which the legislation will be affected." *Energy Reserves Group, Inc.* v. *Kansas Power & Light Co.*, 459 U. S. 400, 411 (1983). While these dearths in the record might be critical in some cases, they are not essential to our discussion here because the Subsidence Act withstands scrutiny even if it is assumed that it constitutes a total impairment.

with some previous owners of property generations ago,[32] they have a constitutionally protected legal right to conduct their mining operations in a way that would make a shambles of all those buildings and cemeteries. As we have discussed, the Commonwealth has a strong public interest in preventing this type of harm, the environmental effect of which transcends any private agreement between contracting parties.

Of course, the finding of a significant and legitimate public purpose is not, by itself, enough to justify the impairment of contractual obligations. A court must also satisfy itself that the legislature's "adjustment of 'the rights and responsibilities of contracting parties [is based] upon reasonable conditions and [is] of a character appropriate to the public purpose justifying [the legislation's] adoption.'" *Energy Reserves Group, Inc.* v. *Kansas Power & Light Co.*, 459 U. S. 400, 412 (1983) (quoting *United States Trust Co.* v. *New Jersey*, 431 U. S. 1, 22 (1977)). But, we have repeatedly held that unless the State is itself a contracting party, courts should "'properly defer to legislative judgment as to the necessity and reasonableness of a particular measure.'" *Energy Reserves Group, Inc.*, 459 U. S., at 413 (quoting *United States Trust Co.*, 431 U. S., at 23).

[32] Most of these waivers were obtained over 70 years ago as part of the support estate which was itself obtained or retained as an incident to the acquisition or retention of the right to mine large quantities of underground coal. No question of enforcement of such a waiver against the original covenantor is presented; rather, petitioners claim a right to enforce the waivers against subsequent owners of the surface. This claim is apparently supported by Pennsylvania precedent holding that these waivers run with the land. See *Kormuth* v. *United States Steel Co.*, 379 Pa. 365, 108 A. 2d 907 (1954); *Scranton* v. *Phillips*, 94 Pa. 15, 22 (1880). That the Pennsylvania courts might have had, or may in the future have, a valid basis for refusing to enforce these perpetual covenants against subsequent owners of the surface rights is not necessarily a sufficient reason for concluding that the legislative impairment of the contracts is permissible. See *Tidal Oil Co.* v. *Flanagan*, 263 U. S. 444 (1924); *Central Land Co.* v. *Laidley*, 159 U. S. 103 (1895) (distinguishing legislative and judicial action).

As we explained more fully above, the Subsidence Act plainly survives scrutiny under our standards for evaluating impairments of private contracts.[33] The Commonwealth has determined that in order to deter mining practices that could have severe effects on the surface, it is not enough to set out guidelines and impose restrictions, but that imposition of liability is necessary. By requiring the coal companies either to repair the damage or to give the surface owner funds to repair the damage, the Commonwealth accomplishes both deterrence and restoration of the environment to its previous condition. We refuse to second-guess the Commonwealth's determinations that these are the most appropriate ways of dealing with the problem. We conclude, therefore, that the impairment of petitioners' right to enforce the damages waivers is amply justified by the public purposes served by the Subsidence Act.

The judgment of the Court of Appeals is

Affirmed.

CHIEF JUSTICE REHNQUIST, with whom JUSTICE POWELL, JUSTICE O'CONNOR, and JUSTICE SCALIA join, dissenting.

More than 50 years ago, this Court determined the constitutionality of Pennsylvania's Kohler Act as it affected the property interests of coal mine operators. *Pennsylvania Coal Co.* v. *Mahon*, 260 U. S. 393 (1922). The Bituminous Mine Subsidence and Land Conservation Act approved today effects an interference with such interests in a strikingly similar manner. The Court finds at least two reasons why this case is different. First, we are told, "the character of the governmental action involved here leans heavily against finding a taking." *Ante*, at 485. Second, the Court concludes that the Subsidence Act neither "makes it impossible for petitioners to profitably engage in their business," nor involves "undue interference with [petitioners'] investment-backed expectations." *Ibid.* Neither of these conclusions persuades me that this case is different, and I believe that the Subsidence Act works a taking of petitioners' property interests. I therefore dissent.

[33] Because petitioners did not raise the issue before the District Court, the Court of Appeals rejected their attempt to argue on appeal that the Subsidence Act also affects contracts to which the Commonwealth is a party. See 771 F. 2d, at 718, n. 8.

I

In apparent recognition of the obstacles presented by *Pennsylvania Coal* to the decision it reaches, the Court attempts to undermine the authority of Justice Holmes' opinion as to the validity of the Kohler Act, labeling it "uncharacteristically . . . advisory." *Ante*, at 484. I would not so readily dismiss the precedential value of this opinion. There is, to be sure, some language in the case suggesting that it could have been decided simply by addressing the particular application of the Kohler Act at issue in the case. See, *e. g.*, *Pennsylvania Coal*, *supra*, at 414 ("If we were called upon to deal with the plaintiffs' position alone, we should think it clear that the statute does not disclose a public interest sufficient to warrant so extensive a destruction of the defendant's constitutionally protected rights"). The Court, however, found that the validity of the Act itself was properly drawn into question: "[T]he case has been treated as one in which the general validity of the [Kohler] act should be discussed." *Ibid.*[1] The coal company clearly had an interest in obtaining a determination that the Kohler Act was unenforceable if it worked a taking without providing for compensation. For

[1] The Pennsylvania Supreme Court, in the decision under review, had also determined that the case called for "consideration . . . of the constitutionality of the act itself." *Mahon* v. *Pennsylvania Coal Co.*, 274 Pa. 489, 494, 118 A. 491, 492 (1922). Before this Court, the coal company persisted in its claim that the Pennsylvania statute took its property without just compensation. See Brief for Plaintiff in Error in *Pennsylvania Coal Co.* v. *Mahon*, O. T. 1922, No. 549, pp. 7–8, 16, 19–21, 28–33; Brief for Defendants in Error in *Pennsylvania Coal Co.* v. *Mahon*, O. T. 1922, No. 549, p. 73.

these reasons, I would not find the opinion of the Court in *Pennsylvania Coal* advisory in any respect.

The Court's implication to the contrary is particularly disturbing in this context, because the holding in *Pennsylvania Coal* today discounted by the Court has for 65 years been the foundation of our "regulatory takings" jurisprudence. See *Penn Central Transportation Co.* v. *New York City*, 438 U. S. 104, 127 (1978); D. Hagman & J. Juergensmeyer, Urban Planning and Land Development Control Law 319 (2d ed. 1986) ("Pennsylvania Coal was a monumental decision which remains a vital element in contemporary taking law"). We have, for example, frequently relied on the admonition that "if regulation goes too far it will be recognized as a taking." *Pennsylvania Coal, supra*, at 415. See, *e. g.*, *MacDonald, Sommer & Frates* v. *Yolo County*, 477 U. S. 340, 348 (1986); *Ruckelshaus* v. *Monsanto Co.*, 467 U. S. 986, 1003 (1984); *PruneYard Shopping Center* v. *Robins*, 447 U. S. 74, 83 (1980); *Goldblatt* v. *Hempstead*, 369 U. S. 590, 594 (1962); *United States* v. *Central Eureka Mining Co.*, 357 U. S. 155, 168 (1958). Thus, even were I willing to assume that the opinion in *Pennsylvania Coal* standing alone is reasonably subject to an interpretation that renders more than half the discussion "advisory," I would have no doubt that our repeated reliance on that opinion establishes it as a cornerstone of the jurisprudence of the Fifth Amendment's Just Compensation Clause.

I accordingly approach this case with greater deference to the language as well as the holding of *Pennsylvania Coal* than does the Court. Admittedly, questions arising under the Just Compensation Clause rest on ad hoc factual inquiries, and must be decided on the facts and circumstances in each case. See *Penn Central Transportation Co.* v. *New York City, supra*, at 124; *United States* v. *Central Eureka Mining Co., supra*, at 168. Examination of the relevant factors presented here convinces me that the differences be-

tween them and those in *Pennsylvania Coal* verge on the trivial.

II

The Court first determines that this case is different from *Pennsylvania Coal* because "the Commonwealth of Pennsylvania has acted to arrest what it perceives to be a significant threat to the common welfare." *Ante*, at 485. In my view, reliance on this factor represents both a misreading of *Pennsylvania Coal* and a misunderstanding of our precedents.

A

The Court opines that the decision in *Pennsylvania Coal* rested on the fact that the Kohler Act was "enacted solely for the benefit of private parties," *ante*, at 486, and "served only private interests." *Ante*, at 484. A review of the Kohler Act shows that these statements are incorrect. The Pennsylvania Legislature passed the statute "as remedial legislation, designed to cure existing evils and abuses." *Mahon* v. *Pennsylvania Coal Co.*, 274 Pa. 489, 495, 118 A. 491, 492 (1922) (quoting the Act). These were *public* "evils and abuses," identified in the preamble as "wrecked and dangerous streets and highways, collapsed public buildings, churches, schools, factories, streets, and private dwellings, broken gas, water and sewer systems, the loss of human life . . . ." *Id.*, at 496, 118 A., at 493.[2] The Pennsylvania Supreme Court recognized that these concerns were "such as to create an emergency, properly warranting the exercise of the police power . . . ." *Id.*, at 497, 118 A., at 493. There can be

[2] That these were public "evils and abuses" is further illustrated by the coverage of the Kohler Act, which regulated mining under "any public building or any structure customarily used by the public," including churches, schools, hospitals, theaters, hotels, and railroad stations. *Mahon* v. *Pennsylvania Coal, supra*, at 495, 118 A., at 492. Protected areas also included streets, roads, bridges, or "any other public passageway, dedicated to public use or habitually used by the public," as well as public utility structures, private homes, workplaces, and cemeteries. *Ibid.*

no doubt that the Kohler Act was intended to serve public interests.

Though several aspects of the Kohler Act limited its protection of these interests, see *Pennsylvania Coal*, 260 U. S., at 414, this Court did not ignore the public interests served by the Act. When considering the protection of the "single private house" owned by the Mahons, the Court noted that "[n]o doubt there is a *public* interest even in this." *Id.*, at 413 (emphasis added). It recognized that the Act "affects the mining of coal under streets or cities in places where the right to mine such coal has been reserved." *Id.*, at 414. See also *id.*, at 416 ("We assume . . . that the statute was passed upon the conviction that an exigency existed that would warrant it, and we assume that an exigency exists that would warrant the exercise of eminent domain"). The strong public interest in the stability of streets and cities, however, was insufficient "to warrant achieving the desire by a shorter cut than the constitutional way of paying for the change." *Ibid.* Thus, the Court made clear that the mere existence of a public purpose was insufficient to release the government from the compensation requirement: "The protection of private property in the Fifth Amendment presupposes that it is wanted for public use, but provides that it shall not be taken for such use without compensation." *Id.*, at 415.

The Subsidence Act rests on similar public purposes. These purposes were clearly stated by the legislature: "[T]o aid in the protection of the safety of the public, to enhance the value of [surface area] lands for taxation, to aid in the preservation of surface water drainage and public water supplies and generally to improve the use and enjoyment of such lands . . . ." Pa. Stat. Ann., Title 52, § 1406.2 (Purdon Supp. 1986). The Act's declaration of policy states that mine subsidence "has seriously impeded land development . . . has caused a very clear and present danger to the health, safety and welfare of the people of Pennsylvania [and] erodes the

tax base of the affected municipalities." §§ 1406.3(2), (3), (4). The legislature determined that the prevention of subsidence would protect surface structures, advance the economic future and well-being of Pennsylvania, and ensure the safety and welfare of the Commonwealth's residents. *Ibid.* Thus, it is clear that the Court has severely understated the similarity of purpose between the Subsidence Act and the Kohler Act. The public purposes in this case are not sufficient to distinguish it from *Pennsylvania Coal.*[8]

B

The similarity of the public purpose of the present Act to that in *Pennsylvania Coal* does not resolve the question whether a taking has occurred; the existence of such a public purpose is merely a necessary prerequisite to the government's exercise of its taking power. See *Hawaii Housing Authority* v. *Midkiff*, 467 U. S. 229, 239–243, 245 (1984); *Berman* v. *Parker*, 348 U. S. 26, 32–33 (1954). The *nature* of these purposes may be relevant, for we have recognized that a taking does not occur where the government exercises its unquestioned authority to prevent a property owner from using his property to injure others without having to compensate the value of the forbidden use. See *Goldblatt* v. *Hemp-*

[8] The Court notes that the particulars of the Subsidence Act better serve these public purposes than did the Kohler Act. *Ante*, at 486. This may well be true, but our inquiry into legislative purpose is not intended as a license to judge the effectiveness of legislation. When considering the Fifth Amendment issues presented by Hawaii's Land Reform Act, we noted that the Act, "like any other, may not be successful in achieving its intended goals. But 'whether *in fact* the provisions will accomplish the objectives is not the question: the [constitutional requirement] is satisfied if . . . the . . . [State] Legislature *rationally could have believed* that the [Act] would promote its objective.'" *Hawaii Housing Authority* v. *Midkiff*, 467 U. S. 229, 242 (1984), quoting *Western & Southern Life Insurance Co.* v. *State Bd. of Equalization*, 451 U. S. 648, 671–672 (1981). Conversely, our cases have never found it sufficient that legislation efficiently achieves its desired objectives to hold that the compensation required by the Fifth Amendment is unavailable.

stead, 369 U. S. 590 (1962); *Hadacheck* v. *Sebastian*, 239 U. S. 394 (1915); *Mugler* v. *Kansas*, 123 U. S. 623 (1887). See generally *Penn Central Transportation Co.* v. *New York City*, 438 U. S., at 144–146 (REHNQUIST, J., dissenting). The Court today indicates that this "nuisance exception" alone might support its conclusion that no taking has occurred. Despite the Court's implication to the contrary, see *ante*, at 485–486, and n. 15, the legitimacy of this purpose is a question of federal, rather than state, law, subject to independent scrutiny by this Court. This statute is not the type of regulation that our precedents have held to be within the "nuisance exception" to takings analysis.

The ease with which the Court moves from the recognition of public interests to the assertion that the activity here regulated is "akin to a public nuisance" suggests an exception far wider than recognized in our previous cases. "The nuisance exception to the taking guarantee," however, "is not coterminous with the police power itself," *Penn Central Transportation*, *supra*, at 145 (REHNQUIST, J., dissenting), but is a narrow exception allowing the government to prevent "a misuse or illegal use." *Curtin* v. *Benson*, 222 U. S. 78, 86 (1911). It is not intended to allow "the prevention of a legal and essential use, an attribute of its ownership." *Ibid.*

The narrow nature of this exception is compelled by the concerns underlying the Fifth Amendment. Though, as the Court recognizes, *ante*, at 491–492, the Fifth Amendment does not prevent actions that secure a "reciprocity of advantage," *Pennsylvania Coal*, *supra*, at 415, it is designed to prevent "the public from loading upon one individual more than his just share of the burdens of government, and says that when he surrenders to the public something more and different from that which is exacted from other members of the public, a full and just equivalent shall be returned to him." *Monongahela Navigation Co.* v. *United States*, 148 U. S. 312, 325 (1893). See also *Penn Central Transportation Co.* v. *New York City*, *supra*, at 123–125; *Armstrong* v.

United States, 364 U. S. 40, 49 (1960). A broad exception to the operation of the Just Compensation Clause based on the exercise of multifaceted health, welfare, and safety regulations would surely allow government much greater authority than we have recognized to impose societal burdens on individual landowners, for nearly every action the government takes is intended to secure for the public an extra measure of "health, safety, and welfare."

Thus, our cases applying the "nuisance" rationale have involved at least two narrowing principles. First, nuisance regulations exempted from the Fifth Amendment have rested on discrete and narrow purposes. See *Goldblatt* v. *Hempstead*, *supra*; *Hadacheck* v. *Sebastian*, *supra*; *Mugler* v. *Kansas*, *supra*. The Subsidence Act, however, is much more than a nuisance statute. The central purposes of the Act, though including public safety, reflect a concern for preservation of buildings, economic development, and maintenance of property values to sustain the Commonwealth's tax base. We should hesitate to allow a regulation based on essentially economic concerns to be insulated from the dictates of the Fifth Amendment by labeling it nuisance regulation.

Second, and more significantly, our cases have never applied the nuisance exception to allow complete extinction of the value of a parcel of property. Though nuisance regulations have been sustained despite a substantial reduction in value, we have not accepted the proposition that the State may completely extinguish a property interest or prohibit all use without providing compensation. Thus, in *Mugler* v. *Kansas*, *supra*, the prohibition on manufacture and sale of intoxicating liquors made the distiller's brewery "of little value" but did not completely extinguish the value of the building. Similarly, in *Miller* v. *Schoene*, 276 U. S. 272 (1928), the individual forced to cut down his cedar trees nevertheless was able "to use the felled trees." *Penn Central Transportation Co.* v. *New York City*, *supra*, at 126. The

restriction on surface mining upheld in *Goldblatt* v. *Hempstead, supra,* may have prohibited "a beneficial use" of the property, but did not reduce the value of the lot in question. 369 U. S., at 593, 594. In none of these cases did the regulation "destroy essential uses of private property." *Curtin* v. *Benson, supra,* at 86.

Here, petitioners' interests in particular coal deposits have been completely destroyed. By requiring that defined seams of coal remain in the ground, see *ante,* at 476–477, and n. 7, § 4 of the Subsidence Act has extinguished any interest one might want to acquire in this property, for "'the right to coal consists in the right to mine it.'" *Pennsylvania Coal,* 260 U. S., at 414, quoting *Commonwealth ex rel. Keator* v. *Clearview Coal Co.,* 256 Pa. 328, 331, 100 A. 820 (1917). Application of the nuisance exception in these circumstances would allow the State not merely to forbid one "particular use" of property with many uses but to extinguish *all* beneficial use of petitioners' property.[4]

Though suggesting that the purposes alone are sufficient to uphold the Act, the Court avoids reliance on the nuisance exception by finding that the Subsidence Act does not impair petitioners' investment-backed expectations or ability to profitably operate their businesses. This conclusion follows mainly from the Court's broad definition of the "relevant mass of property," *ante,* at 497, which allows it to ascribe to the Subsidence Act a less pernicious effect on the interests of the property owner. The need to consider the effect of regulation on some identifiable segment of property makes all important the admittedly difficult task of defining the relevant

[4] *Plymouth Coal Co.* v. *Pennsylvania,* 232 U. S. 531 (1914), did not go this far. Though the Court in that case upheld a statute requiring mine operators to leave certain amounts of coal in their mines, examination of the opinion in *Plymouth Coal* reveals that the statute was not challenged as a taking for which compensation was due. Instead, the coal company complained that the statutory provisions for defining the width of required pillars of coal were constitutionally deficient as a matter of procedural due process.

parcel. See *Penn Central Transportation Co.* v. *New York City,* 438 U. S., at 149, n. 13 (REHNQUIST, J., dissenting). For the reasons explained below, I do not believe that the Court's opinion adequately performs this task.

III

The *Pennsylvania Coal* Court found it sufficient that the Kohler Act rendered it "commercially impracticable to mine certain coal." 260 U. S., at 414. The Court, *ante,* at 498, observes that this language is best understood as a conclusion that certain coal mines could not be operated at a profit. Petitioners have not at this stage of the litigation rested their claim on similar proof; they have not "claimed that their mining operations, or even any specific mines, have been unprofitable since the Subsidence Act was passed." *Ante,* at 496. The parties have, however, stipulated for purposes of this facial challenge that the Subsidence Act requires petitioners to leave in the ground 27 million tons of coal, without compensation therefor. Petitioners also claim that the Act extinguishes their purchased interests in support estates which allow them to mine the coal without liability for subsidence. We are thus asked to consider whether these restrictions are such as to constitute a taking.

A

The Court's conclusion that the restriction on particular coal does not work a taking is primarily the result of its view that the 27 million tons of coal in the ground "do not constitute a separate segment of property for takings law purposes." *Ante,* at 498. This conclusion cannot be based on the view that the interests are too insignificant to warrant protection by the Fifth Amendment, for it is beyond cavil that government appropriation of "relatively small amounts of private property for its own use" requires just compensation. *Ante,* at 499, n. 27. Instead, the Court's refusal to recognize the coal in the ground as a separate segment of property for takings purposes is based on the fact that the

alleged taking is "regulatory," rather than a physical intrusion. See *ante*, at 488–489, n. 18. On the facts of this case, I cannot see how the label placed on the government's action is relevant to consideration of its impact on property rights.

Our decisions establish that governmental action short of physical invasion may constitute a taking because such regulatory action might result in "as complete [a loss] as if the [government] had entered upon the surface of the land and taken exclusive possession of it." *United States* v. *Causby*, 328 U. S. 256, 261 (1946). Though the government's direct benefit may vary depending upon the nature of its action, the question is evaluated from the perspective of the property holder's loss rather than the government's gain. See *ibid.*; *United States* v. *General Motors Corp.*, 323 U. S. 373, 378 (1945); *Boston Chamber of Commerce* v. *Boston*, 217 U. S. 189, 195 (1910). Our observation that "[a] 'taking' may more readily be found when the interference with property can be characterized as a physical invasion by government," *Penn Central Transportation Co.* v. *New York City*, *supra*, at 124, was not intended to alter this perspective merely because the claimed taking is by regulation. Instead, we have recognized that regulations—unlike physical invasions—do not typically extinguish the "full bundle" of rights in a particular piece of property. In *Andrus* v. *Allard*, 444 U. S. 51, 66 (1979), for example, we found it crucial that a prohibition on the sale of avian artifacts destroyed only "one 'strand' of the bundle" of property rights, "because the aggregate must be viewed in its entirety." This characteristic of regulations frequently makes unclear the breadth of their impact on identifiable segments of property, and has required that we evaluate the effects in light of the "several factors" enumerated in *Penn Central Transportation Co.*: "The economic impact of the regulation on the claimant, . . . the extent to which the regulation has interfered with investment-backed expectations, [and] the character of the governmental action." 438 U. S., at 124.

No one, however, would find any need to employ these analytical tools where the government has physically taken an identifiable segment of property. Physical appropriation by the government leaves no doubt that it has in fact deprived the owner of all uses of the land. Similarly, there is no need for further analysis where the government by regulation extinguishes the whole bundle of rights in an identifiable segment of property, for the effect of this action on the holder of the property is indistinguishable from the effect of a physical taking.[5] Thus, it is clear our decision in *Andrus* v. *Allard*, *supra*, would have been different if the Government had confiscated the avian artifacts. In my view, a different result would also follow if the Government simply prohibited every use of that property, for the owner would still have been "deprive[d] of all or most of his interest in the subject matter." *United States* v. *General Motors Corp. supra*, at 378.

In this case, enforcement of the Subsidence Act and its regulations will require petitioners to leave approximately 27 million tons of coal in place. There is no question that this coal is an identifiable and separable property interest. Unlike many property interests, the "bundle" of rights in this coal is sparse. "'For practical purposes, the right to coal consists in the right to mine it.'" *Pennsylvania Coal*, 260

[5] There is admittedly some language in *Penn Central Transportation Co.* v. *New York City*, 438 U. S. 104, 130–131 (1978), that suggests a contrary analysis: "'Taking' jurisprudence does not divide a single parcel into discrete segments and attempt to determine whether rights in a particular segment have been entirely abrogated. In deciding whether a particular governmental action has effected a taking, this Court focuses rather both on the character of the action and on the nature and extent of the interference with rights in the parcel as a whole." The Court gave no guidance on how one is to distinguish a "discrete segment" from a "single parcel." It was not clear, moreover, that the air rights at issue in *Penn Central* were entirely eliminated by the operation of New York City's Landmark Preservation Law, for, as the Court noted, "it simply cannot be maintained, on this record, that appellants have been prohibited from occupying *any* portion of the airspace above the Terminal." *Id.*, at 136.

U. S., at 414, quoting *Commonwealth ex rel. Keater* v. *Clearview Coal Co.*, 256 Pa. at 331, 100 A. at 820. From the relevant perspective—that of the property owners—this interest has been destroyed every bit as much as if the government had proceeded to mine the coal for its own use. The regulation, then, does not merely inhibit one strand in the bundle, cf. *Andrus* v. *Allard*, *supra*, but instead destroys completely any interest in a segment of property. In these circumstances, I think it unnecessary to consider whether petitioners may operate individual mines or their overall mining operations profitably, for they have been denied all use of 27 million tons of coal. I would hold that § 4 of the Subsidence Act works a taking of these property interests.

B

Petitioners also claim that the Subsidence Act effects a taking of their support estate. Under Pennsylvania law, the support estate, the surface estate, and the mineral estate are "three distinct estates in land which can be held in fee simple separate and distinct from each other . . . ." *Captline* v. *County of Allegheny*, 74 Pa. Commw. 85, 91, 459 A. 2d 1298, 1301(1983), cert. denied, 466 U. S. 904 (1984). In refusing to consider the effect of the Subsidence Act on this property interest alone, the Court dismisses this feature of Pennsylvania property law as simply a "legalistic distinctio[n] within a bundle of property rights." *Ante*, at 500. "Its value," the Court informs us, "is merely a part of the entire bundle of rights possessed by the owner of either the coal or the surface." *Ante*, at 501. See also 771 F. 2d 707, 716 (1985) ("To focus upon the support estate separately . . . would serve little purpose"). This view of the support estate allows the Court to conclude that its destruction is merely the destruction of one "strand" in petitioners' bundle of property rights, not significant enough in the overall bundle to work a taking.

Contrary to the Court's approach today, we have evaluated takings claims by reference to the units of property defined

by state law. In *Ruckleshaus* v. *Monsanto Co.*, for example, we determined that certain "health, safety, and environmental data" was "cognizable as a trade-secret property right under Missouri law," 467 U. S., at 1003, and proceeded to evaluate the effects of governmental action on this state-defined property right.[6] Reliance on state law is necessitated by the fact that "'[p]roperty interests . . . are not created by the Constitution. Rather, they are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law.'" *Webb's Fabulous Pharmacies, Inc.* v. *Beckwith*, 449 U. S. 155, 161 (1980), quoting *Board of Regents* v. *Roth*, 408 U. S. 564, 577 (1972). In reality, the Court's decision today cannot reject this necessary reliance on state law. Rather, it simply rejects the support estate as the relevant segment of property and evaluates the impact of the Subsidence Act by reference to some broader, yet undefined, segment of property presumably recognized by state law.

I see no reason for refusing to evaluate the impact of the Subsidence Act on the support estate alone, for Pennsylvania has clearly defined it as a separate estate in property. The Court suggests that the practical significance of this estate is limited, because its value "is merely part of the bundle of rights possessed by the owner of either the coal or the surface." *Ante*, at 501. Though this may accurately describe the usual state of affairs, I do not understand the Court to mean that one holding the support estate alone would find it worthless, for surely the owners of the mineral or surface es-

[6] Indeed, we rejected the claim that the Supremacy Clause allowed Congress to dictate that the effect of its regulation "not vary depending on the property law of the State in which the submitter [of trade-secret information] is located. . . . If Congress can 'pre-empt' state property law in the manner advocated . . . , then the Taking Clause has lost all vitality." *Ruckleshaus* v. *Monsanto Co.*, 467 U. S., at 1012.

tates would be willing buyers of this interest.[7] Nor does the Court suggest that the owner of both the mineral and support estates finds his separate interest in support to be without value. In these circumstances, where the estate defined by state law is both severable and of value in its own right, it is appropriate to consider the effect of regulation on that particular property interest.

When held by owners of the mineral estate, the support estate "consists of the right to remove the strata of coal and earth that undergird the surface . . . ." 771 F. 2d, at 715. Purchase of this right, therefore, shifts the risk of subsidence to the surface owner. Section 6 of the Subsidence Act, by making the coal mine operator strictly liable for any damage to surface structures caused by subsidence, purports to place this risk on the holder of the mineral estate regardless of whether the holder also owns the support estate. Operation of this provision extinguishes petitioners' interests in their support estates, making worthless what they purchased as a separate right under Pennsylvania law. Like the restriction on mining particular coal, this complete interference with a property right extinguishes its value, and must be accompanied by just compensation.[8]

IV

In sum, I would hold that Pennsylvania's Bituminous Mine Subsidence and Land Conservation Act effects a taking of petitioners' property without providing just compensation. Specifically, the Act works to extinguish petitioners' interest

[7] It is clear that under Pennsylvania law, "one person may own the coal, another the surface, and the third the right of support." *Smith* v. *Glen Alden Coal Co.*, 347 Pa. 290, 304, 32 A. 2d 227, 234–235 (1943).

[8] It is therefore irrelevant that petitioners have not presented evidence of "what percentage of the purchased support estates, either in the aggregate or with respect to any individual estate, has been affected by the Act." *Ante*, at 501. There is no doubt that the Act extinguishes support estates. Because it fails to provide compensation for this taking, the Act violates the dictates of the Fifth Amendment.

in at least 27 million tons of coal by requiring that coal to be left in the ground, and destroys their purchased support estates by returning to them financial liability for subsidence. I respectfully dissent from the Court's decision to the contrary.[9]

[9] Because I would find § 6 of the Subsidence Act unconstitutional under the Fifth Amendment, I would not reach the Contracts Clause issue addressed by the Court, *ante*, at 502–506.

least, where a State permits the execution of a minor, great care must be taken to ensure that the minor truly deserves to be treated as an adult. A specific inquiry including "age, actual maturity, family environment, education, emotional and mental stability, and . . . prior record" is particularly relevant when a minor's criminal culpability is at issue. See *Fare* v. *Michael C.*, 442 U. S. 707, 734, n. 4 (1979) (POWELL, J., dissenting). No such inquiry occurred in this case. In every realistic sense Burger not only was a minor according to law, but clearly his mental capacity was subnormal to the point where a jury reasonably could have believed that death was not an appropriate punishment. Because there is a reasonable probability that the evidence not presented to the sentencing jury in this case would have affected its outcome, Burger has demonstrated prejudice due to counsel's deficient performance.

III

As I conclude that counsel's performance in this case was deficient, and the deficiency may well have influenced the sentence that Burger received, I would vacate Burger's death sentence and remand for resentencing.

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offense. Streib, *supra*, at 389 (citing Amnesty International, The Death Penalty (1979)).

NOLLAN ET UX. v. CALIFORNIA COASTAL COMMISSION

APPEAL FROM THE COURT OF APPEAL OF CALIFORNIA, SECOND APPELLATE DISTRICT

No. 86-133. Argued March 30, 1987—Decided June 26, 1987

The California Coastal Commission granted a permit to appellants to replace a small bungalow on their beachfront lot with a larger house upon the condition that they allow the public an easement to pass across their beach, which was located between two public beaches. The County Superior Court granted appellants a writ of administrative mandamus and directed that the permit condition be struck. However, the State Court of Appeal reversed, ruling that imposition of the condition did not violate the Takings Clause of the Fifth Amendment, as incorporated against the States by the Fourteenth Amendment.

Held:

1. Although the outright taking of an uncompensated, permanent, public-access easement would violate the Takings Clause, conditioning appellants' rebuilding permit on their granting such an easement would be lawful land-use regulation if it substantially furthered governmental purposes that would justify denial of the permit. The government's power to forbid particular land uses in order to advance some legitimate police-power purpose includes the power to condition such use upon some concession by the owner, even a concession of property rights, so long as the condition furthers the same governmental purpose advanced as justification for prohibiting the use. Pp. 831–837.

2. Here the Commission's imposition of the access-easement condition cannot be treated as an exercise of land-use regulation power since the condition does not serve public purposes related to the permit requirement. Of those put forth to justify it—protecting the public's ability to see the beach, assisting the public in overcoming a perceived "psychological" barrier to using the beach, and preventing beach congestion—none is plausible. Moreover, the Commission's justification for the access requirement unrelated to land-use regulation—that it is part of a comprehensive program to provide beach access arising from prior coastal permit decisions—is simply an expression of the belief that the public interest will be served by a continuous strip of publicly accessible beach. Although the State is free to advance its "comprehensive program" by exercising its eminent domain power and paying for access easements, it

cannot compel coastal residents alone to contribute to the realization of that goal. Pp. 838–842.

177 Cal. App. 3d 719, 223 Cal. Rptr. 28, reversed.

SCALIA, J., delivered the opinion of the Court, in which REHNQUIST, C. J., and WHITE, POWELL, and O'CONNOR, JJ., joined. BRENNAN, J., filed a dissenting opinion, in which MARSHALL, J., joined, *post*, p. 842. BLACKMUN, J., filed a dissenting opinion, *post*, p. 865. STEVENS, J., filed a dissenting opinion, in which BLACKMUN, J., joined, *post*, p. 866.

Robert K. Best argued the cause for appellants. With him on the briefs were *Ronald A. Zumbrun* and *Timothy A. Bittle*.

Andrea Sheridan Ordin, Chief Assistant Attorney General of California, argued the cause for appellee. With her on the brief were *John K. Van de Kamp*, Attorney General, *N. Gregory Taylor*, Assistant Attorney General, *Anthony M. Summers*, Supervising Deputy Attorney General, and *Jamee Jordan Patterson*.*

*Briefs of *amici curiae* urging reversal were filed for the United States by *Solicitor General Fried, Assistant Attorney General Habicht, Deputy Solicitor General Ayer, Deputy Assistant Attorneys General Marzulla, Hookano*, and *Kmiec, Richard J. Lazarus*, and *Peter R. Steenland, Jr.*; and for the Breezy Point Cooperative by *Walter Pozen*.

Briefs of *amici curiae* urging affirmance were filed for the Commonwealth of Massachusetts et al. by *James M. Shannon*, Attorney General of Massachusetts, and *Lee P. Breckenridge* and *Nathaniel S. W. Lawrence*, Assistant Attorneys General, and by the Attorneys General for their respective States as follows: *Don Siegelman* of Alabama, *John Steven Clark* of Arkansas, *Joseph Lieberman* of Connecticut, *Charles M. Oberly* of Delaware, *Robert Butterworth* of Florida, *Warren Price III* of Hawaii, *Neil F. Hartigan* of Illinois, *Thomas J. Miller* of Iowa, *Robert T. Stephan* of Kansas, *William J. Guste, Jr.*, of Louisiana, *James E. Tierney* of Maine, *J. Joseph Curran, Jr.*, of Maryland, *Hubert H. Humphrey III* of Minnesota, *William L. Webster* of Missouri, *Robert M. Spire* of Nebraska, *Stephen E. Merrill* of New Hampshire, *W. Cary Edwards* of New Jersey, *Robert Abrams* of New York, *Lacy H. Thornburg* of North Carolina, *Nicholas Spaeth* of North Dakota, *Dave Frohnmayer* of Oregon, *James E. O'Neil* of Rhode Island, *W. J. Michael Cody* of Tennessee, *Jim Mattox* of Texas, *Jeffrey Amestoy* of Vermont, *Kenneth O. Eikenberry* of Washington, *Charles G. Brown* of West Virginia, and *Donald J. Hanaway* of Wisconsin; for the Council of State Governments et al. by *Benna Ruth Solomon* and *Joyce Holmes Benjamin*; for Designated California Cities and Counties by *E. Clement Shute, Jr.*; and for the Natural Resources Defense Council et al. by *Fredric D. Woocher*.

Briefs of *amici curiae* were filed for the California Association of Realtors by *William M. Pfeiffer*; and for the National Association of Home Builders et al. by *Jerrold A. Fadem, Michael M. Berger*, and *Gus Bauman*.

JUSTICE SCALIA delivered the opinion of the Court.

James and Marilyn Nollan appeal from a decision of the California Court of Appeal ruling that the California Coastal Commission could condition its grant of permission to rebuild their house on their transfer to the public of an easement across their beachfront property. 177 Cal. App. 3d 719, 223 Cal. Rptr. 28 (1986). The California court rejected their claim that imposition of that condition violates the Takings Clause of the Fifth Amendment, as incorporated against the States by the Fourteenth Amendment. *Ibid.* We noted probable jurisdiction. 479 U. S. 913 (1986).

I

The Nollans own a beachfront lot in Ventura County, California. A quarter-mile north of their property is Faria County Park, an oceanside public park with a public beach and recreation area. Another public beach area, known locally as "the Cove," lies 1,800 feet south of their lot. A concrete seawall approximately eight feet high separates the beach portion of the Nollans' property from the rest of the lot. The historic mean high tide line determines the lot's oceanside boundary.

The Nollans originally leased their property with an option to buy. The building on the lot was a small bungalow, totaling 504 square feet, which for a time they rented to summer vacationers. After years of rental use, however, the building had fallen into disrepair, and could no longer be rented out.

The Nollans' option to purchase was conditioned on their promise to demolish the bungalow and replace it. In order to do so, under Cal. Pub. Res. Code Ann. §§ 30106, 30212, and 30600 (West 1986), they were required to obtain a coastal development permit from the California Coastal Commission. On February 25, 1982, they submitted a permit application to the Commission in which they proposed to demolish the existing structure and replace it with a three-bedroom house in keeping with the rest of the neighborhood.

The Nollans were informed that their application had been placed on the administrative calendar, and that the Commission staff had recommended that the permit be granted subject to the condition that they allow the public an easement to pass across a portion of their property bounded by the mean high tide line on one side, and their seawall on the other side. This would make it easier for the public to get to Faria County Park and the Cove. The Nollans protested imposition of the condition, but the Commission overruled their objections and granted the permit subject to their recordation of a deed restriction granting the easement. App. 31, 34.

On June 3, 1982, the Nollans filed a petition for writ of administrative mandamus asking the Ventura County Superior Court to invalidate the access condition. They argued that the condition could not be imposed absent evidence that their proposed development would have a direct adverse impact on public access to the beach. The court agreed, and remanded the case to the Commission for a full evidentiary hearing on that issue. *Id.*, at 36.

On remand, the Commission held a public hearing, after which it made further factual findings and reaffirmed its imposition of the condition. It found that the new house would increase blockage of the view of the ocean, thus contributing to the development of "a 'wall' of residential structures" that would prevent the public "psychologically . . . from realizing a stretch of coastline exists nearby that they have every right

to visit." *Id.*, at 58. The new house would also increase private use of the shorefront. *Id.*, at 59. These effects of construction of the house, along with other area development, would cumulatively "burden the public's ability to traverse to and along the shorefront." *Id.*, at 65–66. Therefore the Commission could properly require the Nollans to offset that burden by providing additional lateral access to the public beaches in the form of an easement across their property. The Commission also noted that it had similarly conditioned 43 out of 60 coastal development permits along the same tract of land, and that of the 17 not so conditioned, 14 had been approved when the Commission did not have administrative regulations in place allowing imposition of the condition, and the remaining 3 had not involved shorefront property. *Id.*, at 47–48.

The Nollans filed a supplemental petition for a writ of administrative mandamus with the Superior Court, in which they argued that imposition of the access condition violated the Takings Clause of the Fifth Amendment, as incorporated against the States by the Fourteenth Amendment. The Superior Court ruled in their favor on statutory grounds, finding, in part to avoid "issues of constitutionality," that the California Coastal Act of 1976, Cal. Pub. Res. Code Ann. § 30000 *et seq.* (West 1986), authorized the Commission to impose public access conditions on coastal development permits for the replacement of an existing single-family home with a new one only where the proposed development would have an adverse impact on public access to the sea. App. 419. In the court's view, the administrative record did not provide an adequate factual basis for concluding that replacement of the bungalow with the house would create a direct or cumulative burden on public access to the sea. *Id.*, at 416–417. Accordingly, the Superior Court granted the writ of mandamus and directed that the permit condition be struck.

The Commission appealed to the California Court of Appeal. While that appeal was pending, the Nollans satisfied

the condition on their option to purchase by tearing down the bungalow and building the new house, and bought the property. They did not notify the Commission that they were taking that action.

The Court of Appeal reversed the Superior Court. 177 Cal. App. 3d 719, 223 Cal. Rptr. 28 (1986). It disagreed with the Superior Court's interpretation of the Coastal Act, finding that it required that a coastal permit for the construction of a new house whose floor area, height or bulk was more than 10% larger than that of the house it was replacing be conditioned on a grant of access. *Id.*, at 723–724, 223 Cal. Rptr., at 31; see Cal. Pub. Res. Code Ann. § 30212. It also ruled that that requirement did not violate the Constitution under the reasoning of an earlier case of the Court of Appeal, *Grupe* v. *California Coastal Comm'n*, 166 Cal. App. 3d 148, 212 Cal. Rptr. 578 (1985). In that case, the court had found that so long as a project contributed to the need for public access, even if the project standing alone had not created the need for access, and even if there was only an indirect relationship between the access exacted and the need to which the project contributed, imposition of an access condition on a development permit was sufficiently related to burdens created by the project to be constitutional. 177 Cal. App. 3d, at 723, 223 Cal. Rptr., at 30–31; see *Grupe, supra*, at 165–168, 212 Cal. Rptr., at 587–590; see also *Remmenga* v. *California Coastal Comm'n*, 163 Cal. App. 3d 623, 628, 209 Cal. Rptr. 628, 631, appeal dism'd, 474 U. S. 915 (1985). The Court of Appeal ruled that the record established that that was the situation with respect to the Nollans' house. 177 Cal. App. 3d, at 722–723, 223 Cal. Rptr., at 30–31. It ruled that the Nollans' taking claim also failed because, although the condition diminished the value of the Nollans' lot, it did not deprive them of all reasonable use of their property. *Id.*, at 723, 223 Cal. Rptr., at 30; see *Grupe, supra*, at 175–176, 212 Cal. Rptr., at 595–596. Since, in the Court of Appeal's view, there was no statutory or constitutional obstacle to imposi-

tion of the access condition, the Superior Court erred in granting the writ of mandamus. The Nollans appealed to this Court, raising only the constitutional question.

II

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 to the beach, rather than conditioning their permit to rebuild their house on their agreeing to do so, we have no doubt there would have been a taking. To say that the appropriation of a public easement across a landowner's premises does not constitute the taking of a property interest but rather (as JUSTICE BRENNAN contends) "a mere restriction on its use," *post*, at 848–849, n. 3, is to use words in a manner that deprives them of all their ordinary meaning. Indeed, one of the principal uses of the eminent domain power is to assure that the government be able to require conveyance of just such interests, so long as it pays for them. J. Sackman, 1 Nichols on Eminent Domain § 2.1[1] (Rev. 3d ed. 1985), 2 *id.*, § 5.01[5]; see 1 *id.*, § 1.42[9], 2 *id.*, § 6.14. Perhaps because the point is so obvious, we have never been confronted with a controversy that required us to rule upon it, but our cases' analysis of the effect of other governmental action leads to the same conclusion. We have repeatedly held that, as to property reserved by its owner for private use, "the right to exclude [others is] 'one of the most essential sticks in the bundle of rights that are commonly characterized as property.'" *Loretto* v. *Teleprompter Manhattan CATV Corp.*, 458 U. S. 419, 433 (1982), quoting *Kaiser Aetna* v. *United States*, 444 U. S. 164, 176 (1979). In *Loretto* we observed that where governmental action results in "[a] permanent physical occupation" of the property, by the government itself or by others, see 458 U. S., at 432–433, n. 9, "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.*, at 434–435. We think a "permanent physical occupation" has occurred, for purposes of that rule, where individuals are given a permanent and continuous right to pass to and fro, so that the real property may continuously be traversed, even though no particular individual is permitted to station himself permanently upon the premises.[1]

JUSTICE BRENNAN argues that while this might ordinarily be the case, the California Constitution's prohibition on any individual's "exclu[ding] the right of way to [any navigable] water whenever it is required for any public purpose," Art. X, § 4, produces a different result here. *Post*, at 847–848, see also *post*, at 855, 857. There are a number of difficulties with that argument. Most obviously, the right of way sought here is not naturally described as one *to* navigable water (from the street to the sea) but *along* it; it is at least highly questionable whether the text of the California Constitution has any prima facie application to the situation before us. Even if it does, however, several California cases suggest that JUSTICE BRENNAN's interpretation of the effect of the clause is erroneous, and that to obtain easements of access across private property the State must proceed through its eminent domain power. See *Bolsa Land Co.* v. *Burdick*, 151 Cal. 254, 260, 90 P. 532, 534–535 (1907); *Oakland* v. *Oakland Water Front Co.*, 118 Cal. 160, 185, 50 P. 277, 286 (1897); *Heist* v. *County of Colusa*, 163 Cal. App. 3d 841, 851, 213 Cal. Rptr. 278, 285 (1984); *Aptos Seascape Corp.* v. *Santa Cruz*, 138 Cal. App. 3d 484, 505–506, 188 Cal. Rptr. 191, 204–205 (1982). (None of these cases specifically ad-

[1] The holding of *PruneYard Shopping Center* v. *Robins*, 447 U. S. 74 (1980), is not inconsistent with this analysis, since there the owner had already opened his property to the general public, and in addition permanent access was not required. The analysis of *Kaiser Aetna* v. *United States*, 444 U. S. 164 (1979), is not inconsistent because it was affected by traditional doctrines regarding navigational servitudes. Of course neither of those cases involved, as this one does, a classic right-of-way easement.

dressed the argument that Art. X, § 4, allowed the public to cross private property to get to navigable water, but if that provision meant what JUSTICE BRENNAN believes, it is hard to see why it was not invoked.) See also 41 Op. Cal. Atty. Gen. 39, 41 (1963) ("In spite of the sweeping provisions of [Art. X, § 4], and the injunction therein to the Legislature to give its provisions the most liberal interpretation, the few reported cases in California have adopted the general rule that one may not trespass on private land to get to navigable tidewaters for the purpose of commerce, navigation or fishing"). In light of these uncertainties, and given the fact that, as JUSTICE BLACKMUN notes, the Court of Appeal did not rest its decision on Art. X, § 4, *post*, at 865, we should assuredly not take it upon ourselves to resolve this question of California constitutional law in the first instance. See, *e. g.*, *Jenkins* v. *Anderson*, 447 U. S. 231, 234, n. 1 (1980). That would be doubly inappropriate since the Commission did not advance this argument in the Court of Appeal, and the Nollans argued in the Superior Court that any claim that there was a pre-existing public right of access had to be asserted through a quiet title action, see Points and Authorities in Support of Motion for Writ of Administrative Mandamus, No. SP50805 (Super. Ct. Cal.), p. 20, which the Commission, possessing no claim to the easement itself, probably would not have had standing under California law to bring. See Cal. Code Civ. Proc. Ann. § 738 (West 1980).[2]

[2] JUSTICE BRENNAN also suggests that the Commission's public announcement of its intention to condition the rebuilding of houses on the transfer of easements of access caused the Nollans to have "no reasonable claim to any expectation of being able to exclude members of the public" from walking across their beach. *Post*, at 857–860. He cites our opinion in *Ruckelshaus* v. *Monsanto Co.*, 467 U. S. 986 (1984), as support for the peculiar proposition that a unilateral claim of entitlement by the government can alter property rights. In *Monsanto*, however, we found merely that the Takings Clause was not violated by giving effect to the Government's announcement that application for "*the right to [the] valuable Government benefit*," *id.*, at 1007 (emphasis added), of obtaining registration

Given, then, that requiring uncompensated conveyance of the easement outright would violate the Fourteenth Amendment, the question becomes whether requiring it to be conveyed as a condition for issuing a land-use permit alters the outcome. We have long recognized that land-use regulation does not effect a taking if it "substantially advance[s] legitimate state interests" and does not "den[y] an owner economically viable use of his land," *Agins* v. *Tiburon*, 447 U. S. 255, 260 (1980). See also *Penn Central Transportation Co.* v. *New York City*, 438 U. S. 104, 127 (1978) ("[A] use restriction may constitute a 'taking' if not reasonably necessary to the effectuation of a substantial government purpose"). 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.[3] They have made clear, however, that a

of an insecticide would confer upon the Government a license to use and disclose the trade secrets contained in the application. *Id.*, at 1007–1008. See also *Bowen* v. *Gilliard*, *ante*, at 605. But the right to build on one's own property—even though its exercise can be subjected to legitimate permitting requirements—cannot remotely be described as a "governmental benefit." And thus the announcement that the application for (or granting of) the permit will entail the yielding of a property interest cannot be regarded as establishing the voluntary "exchange," 467 U. S., at 1007, that we found to have occurred in *Monsanto*. Nor are the Nollans' rights altered because they acquired the land well after the Commission had begun to implement its policy. So long as the Commission could not have deprived the prior owners of the easement without compensating them, the prior owners must be understood to have transferred their full property rights in conveying the lot.

[3] Contrary to JUSTICE BRENNAN's claim, *post*, at 843, our opinions do not establish that these standards are the same as those applied to due process or equal protection claims. To the contrary, our verbal formulations in the takings field have generally been quite different. We have required that the regulation "substantially advance" the "legitimate state interest" sought to be achieved, *Agins* v. *Tiburon*, 447 U. S. 255, 260 (1980), not that "the State '*could rationally have decided*' that the measure adopted might achieve the State's objective." *Post*, at 843, quoting *Minnesota* v.

broad range of governmental purposes and regulations satisfies these requirements. See *Agins* v. *Tiburon*, *supra*, at 260–262 (scenic zoning); *Penn Central Transportation Co.* v. *New York City*, *supra* (landmark preservation); *Euclid* v. *Ambler Realty Co.*, 272 U. S. 365 (1926) (residential zoning); Laitos & Westfall, Government Interference with Private Interests in Public Resources, 11 Harv. Envtl. L. Rev. 1, 66 (1987). The Commission argues that among these permissible purposes are protecting the public's ability to see the beach, assisting the public in overcoming the "psychological barrier" to using the beach created by a developed shorefront, and preventing congestion on the public beaches. We assume, without deciding, that this is so—in which case the Commission unquestionably would be able to deny the Nollans their permit outright if their new house (alone, or by reason of the cumulative impact produced in conjunction with other construction)[4] would substantially impede these pur-

Clover Leaf Creamery Co., 449 U. S. 456, 466 (1981). JUSTICE BRENNAN relies principally on an equal protection case, *Minnesota* v. *Clover Leaf Creamery Co.*, *supra*, and two substantive due process cases, *Williamson* v. *Lee Optical of Oklahoma, Inc.*, 348 U. S. 483, 487–488 (1955), and *Day-Brite Lighting, Inc.* v. *Missouri*, 342 U. S. 421, 423 (1952), in support of the standards he would adopt. But there is no reason to believe (and the language of our cases gives some reason to disbelieve) that so long as the regulation of property is at issue the standards for takings challenges, due process challenges, and equal protection challenges are identical; any more than there is any reason to believe that so long as the regulation of speech is at issue the standards for due process challenges, equal protection challenges, and First Amendment challenges are identical. *Goldblatt* v. *Hempstead*, 369 U. S. 590 (1962), does appear to assume that the inquiries are the same, but that assumption is inconsistent with the formulations of our later cases.

[4] If the Nollans were being singled out to bear the burden of California's attempt to remedy these problems, although they had not contributed to it more than other coastal landowners, the State's action, even if otherwise valid, might violate either the incorporated Takings Clause or the Equal Protection Clause. One of the principal purposes of the Takings Clause is "to bar Government from forcing some people alone to bear public burdens

poses, unless the denial would interfere so drastically with the Nollans' use of their property as to constitute a taking. See *Penn Central Transportation Co.* v. *New York City*, *supra*.

The Commission argues that a permit condition that serves the same legitimate police-power purpose as a refusal to issue the permit should not be found to be a taking if the refusal to issue the permit would not constitute a taking. We agree. Thus, if the Commission attached to the permit some condition that would have protected the public's ability to see the beach notwithstanding construction of the new house—for example, a height limitation, a width restriction, or a ban on fences—so long as the Commission could have exercised its police power (as we have assumed it could) to forbid construction of the house altogether, imposition of the condition would also be constitutional. Moreover (and here we come closer to the facts of the present case), the condition would be constitutional even if it consisted of the requirement that the Nollans provide a viewing spot on their property for passersby with whose sighting of the ocean their new house would interfere. Although such a requirement, constituting a permanent grant of continuous access to the property, would have to be considered a taking if it were not attached to a development permit, the Commission's assumed power to forbid construction of the house in order to protect the public's view of the beach must surely include the power to condition construction upon some concession by the owner, even a concession of property rights, that serves the same end. If a prohibition designed to accomplish that purpose would be a legitimate exercise of the police power rather than a taking, it would be strange to conclude that providing the

which, in all fairness and justice, should be borne by the public as a whole." *Armstrong* v. *United States*, 364 U. S. 40, 49 (1960); see also *San Diego Gas & Electric Co.* v. *San Diego*, 450 U. S. 621, 656 (1981) (BRENNAN, J., dissenting); *Penn Central Transportation Co.* v. *New York City*, 438 U. S. 104, 123 (1978). But that is not the basis of the Nollans' challenge here.

owner an alternative to that prohibition which accomplishes the same purpose is not.

The evident constitutional propriety disappears, however, if the condition substituted for the prohibition utterly fails to further the end advanced as the justification for the prohibition. When that essential nexus is eliminated, the situation becomes the same as if California law forbade shouting fire in a crowded theater, but granted dispensations to those willing to contribute $100 to the state treasury. While a ban on shouting fire can be a core exercise of the State's police power to protect the public safety, and can thus meet even our stringent standards for regulation of speech, adding the unrelated condition alters the purpose to one which, while it may be legitimate, is inadequate to sustain the ban. Therefore, even though, in a sense, requiring a $100 tax contribution in order to shout fire is a lesser restriction on speech than an outright ban, it would not pass constitutional muster. Similarly here, the lack of nexus between the condition and the original purpose of the building restriction converts that purpose to something other than what it was. The purpose then becomes, quite simply, the obtaining of an easement to serve some valid governmental purpose, but without payment of compensation. Whatever may be the outer limits of "legitimate state interests" in the takings and land-use context, this is not one of them. In short, unless the permit condition serves the same governmental purpose as the development ban, the building restriction is not a valid regulation of land use but "an out-and-out plan of extortion." *J. E. D. Associates, Inc.* v. *Atkinson*, 121 N. H. 581, 584, 432 A. 2d 12, 14–15 (1981); see Brief for United States as *Amicus Curiae* 22, and n. 20. See also *Loretto* v. *Teleprompter Manhattan CATV Corp.*, 458 U. S., at 439, n. 17.[5]

[5] One would expect that a regime in which this kind of leveraging of the police power is allowed would produce stringent land-use regulation which the State then waives to accomplish other purposes, leading to lesser realization of the land-use goals purportedly sought to be served than would

III

The Commission claims that it concedes as much, and that we may sustain the condition at issue here by finding that it is reasonably related to the public need or burden that the Nollans' new house creates or to which it contributes. We can accept, for purposes of discussion, the Commission's proposed test as to how close a "fit" between the condition and the burden is required, because we find that this case does not meet even the most untailored standards. The Commission's principal contention to the contrary essentially turns on a play on the word "access." The Nollans' new house, the Commission found, will interfere with "visual access" to the beach. That in turn (along with other shorefront development) will interfere with the desire of people who drive past the Nollans' house to use the beach, thus creating a "psychological barrier" to "access." The Nollans' new house will also, by a process not altogether clear from the Commission's opinion but presumably potent enough to more than offset the effects of the psychological barrier, increase the use of the public beaches, thus creating the need for more "access." These burdens on "access" would be alleviated by a requirement that the Nollans provide "lateral access" to the beach.

Rewriting the argument to eliminate the play on words makes clear that there is nothing to it. It is quite impossible to understand how a requirement that people already on the public beaches be able to walk across the Nollans' property reduces any obstacles to viewing the beach created by the new house. It is also impossible to understand how it lowers any "psychological barrier" to using the public beaches, or how it helps to remedy any additional congestion on them

result from more lenient (but nontradeable) development restrictions. Thus, the importance of the purpose underlying the prohibition not only does not *justify* the imposition of unrelated conditions for eliminating the prohibition, but positively militates against the practice.

caused by construction of the Nollans' new house. We therefore find that the Commission's imposition of the permit condition cannot be treated as an exercise of its land-use power for any of these purposes.[6] Our conclusion on this point is consistent with the approach taken by every other court that has considered the question, with the exception of the California state courts. See *Parks* v. *Watson*, 716 F. 2d 646, 651–653 (CA9 1983); *Bethlehem Evangelical Lutheran Church* v. *Lakewood*, 626 P. 2d 668, 671–674 (Colo. 1981); *Aunt Hack Ridge Estates, Inc.* v. *Planning Comm'n*, 160 Conn. 109, 117–120, 273 A. 2d 880, 885 (1970); *Longboat Key* v. *Lands End, Ltd.*, 433 So. 2d 574 (Fla. App. 1983); *Pioneer Trust & Savings Bank* v. *Mount Prospect*, 22 Ill. 2d 375, 380, 176 N. E. 2d 799, 802 (1961); *Lampton* v. *Pinaire*, 610 S. W. 2d 915, 918–919 (Ky. App. 1980); *Schwing* v. *Baton Rouge*, 249 So. 2d 304 (La. App.), application denied, 259 La. 770, 252 So. 2d 667 (1971); *Howard County* v. *JJM, Inc.*, 301 Md. 256, 280–282, 482 A. 2d 908, 920–921 (1984); *Collis* v. *Bloomington*, 310 Minn. 5, 246 N. W. 2d 19 (1976); *State ex rel. Noland* v. *St. Louis County*, 478 S. W. 2d 363 (Mo. 1972);

[6] As JUSTICE BRENNAN notes, the Commission also argued that the construction of the new house would "'increase private use immediately adjacent to public tidelands,'" which in turn might result in more disputes between the Nollans and the public as to the location of the boundary. *Post*, 851, quoting App. 62. That risk of boundary disputes, however, is inherent in the right to exclude others from one's property, and the construction here can no more justify mandatory dedication of a sort of "buffer zone" in order to avoid boundary disputes than can the construction of an addition to a single-family house near a public street. Moreover, a buffer zone has a boundary as well, and unless that zone is a "no-man's land" that is off limits for both neighbors (which is of course not the case here) its creation achieves nothing except to shift the location of the boundary dispute further on to the private owner's land. It is true that in the distinctive situation of the Nollans' property the seawall could be established as a clear demarcation of the public easement. But since not all of the lands to which this land-use condition applies have such a convenient reference point, the avoidance of boundary disputes is, even more obviously than the others, a made-up purpose of the regulation.

Billings Properties, Inc. v. *Yellowstone County*, 144 Mont. 25, 33–36, 394 P. 2d 182, 187–188 (1964); *Simpson* v. *North Platte*, 206 Neb. 240, 292 N. W. 2d 297 (1980); *Briar West, Inc.* v. *Lincoln*, 206 Neb. 172, 291 N. W. 2d 730 (1980); *J. E. D. Associates* v. *Atkinson*, 121 N. H. 581, 432 A. 2d 12 (1981); *Longridge Builders, Inc.* v. *Planning Bd. of Princeton*, 52 N. J. 348, 350–351, 245 A. 2d 336, 337–338 (1968); *Jenad, Inc.* v. *Scarsdale*, 18 N. Y. 2d 78, 218 N. E. 2d 673 (1966); *MacKall* v. *White*, 85 App. Div. 2d 696, 445 N. Y. S. 2d 486 (1981), appeal denied, 56 N. Y. 2d 503, 435 N. E. 2d 1100 (1982); *Frank Ansuini, Inc.* v. *Cranston*, 107 R. I. 63, 68–69, 71, 264 A. 2d 910, 913, 914 (1970); *College Station* v. *Turtle Rock Corp.*, 680 S. W. 2d 802, 807 (Tex. 1984); *Call* v. *West Jordan*, 614 P. 2d 1257, 1258–1259 (Utah 1980); *Board of Supervisors of James City County* v. *Rowe*, 216 Va. 128, 136–139, 216 S. E. 2d 199, 207–209 (1975); *Jordan* v. *Menomonee Falls*, 28 Wis. 2d 608, 617–618, 137 N. W. 2d 442, 447–449 (1965), appeal dism'd, 385 U. S. 4 (1966). See also *Littlefield* v. *Afton*, 785 F. 2d 596, 607 (CA8 1986); Brief for National Association of Home Builders et al. as *Amici Curiae* 9–16.

JUSTICE BRENNAN argues that imposition of the access requirement is not irrational. In his version of the Commission's argument, the reason for the requirement is that in its absence, a person looking toward the beach from the road will see a street of residential structures including the Nollans' new home and conclude that there is no public beach nearby. If, however, that person sees people passing and repassing along the dry sand behind the Nollans' home, he will realize that there is a public beach somewhere in the vicinity. *Post*, at 849–850. The Commission's action, however, was based on the opposite factual finding that the wall of houses completely blocked the view of the beach and that a person looking from the road would not be able to see it at all. App. 57–59.

Even if the Commission had made the finding that JUSTICE BRENNAN proposes, however, it is not certain that it would

suffice. We do not share JUSTICE BRENNAN's confidence that the Commission "should have little difficulty in the future in utilizing its expertise to demonstrate a specific connection between provisions for access and burdens on access," *post*, at 862, that will avoid the effect of today's decision. 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. As indicated earlier, our cases describe the condition for abridgment of property rights through the police power as a "*substantial* advanc[ing]" of a legitimate state interest. We are inclined to be particularly careful about the adjective where the actual conveyance of property is made a condition to the lifting of a land-use restriction, since in that context there is heightened risk that the purpose is avoidance of the compensation requirement, rather than the stated police-power objective.

We are left, then, with the Commission's justification for the access requirement unrelated to land-use regulation:

> "Finally, the Commission notes that there are several existing provisions of pass and repass lateral access benefits already given by past Faria Beach Tract applicants as a result of prior coastal permit decisions. The access required as a condition of this permit is part of a comprehensive program to provide continuous public access along Faria Beach as the lots undergo development or redevelopment." App. 68.

That is simply an expression of the Commission's belief that the public interest will be served by a continuous strip of publicly accessible beach along the coast. The Commission may well be right that it is a good idea, but that does not establish that the Nollans (and other coastal residents) alone can be compelled to contribute to its realization. Rather, California is free to advance its "comprehensive program," if it wishes, by using its power of eminent domain for this "public pur-

pose," see U. S. Const., Amdt. 5; but if it wants an easement across the Nollans' property, it must pay for it.

Reversed.

JUSTICE BRENNAN, with whom JUSTICE MARSHALL joins, dissenting.

Appellants in this case sought to construct a new dwelling on their beach lot that would both diminish visual access to the beach and move private development closer to the public tidelands. The Commission reasonably concluded that such "buildout," both individually and cumulatively, threatens public access to the shore. It sought to offset this encroachment by obtaining assurance that the public may walk along the shoreline in order to gain access to the ocean. The Court finds this an illegitimate exercise of the police power, because it maintains that there is no reasonable relationship between the effect of the development and the condition imposed.

The first problem with this conclusion is that the Court imposes a standard of precision for the exercise of a State's police power that has been discredited for the better part of this century. Furthermore, even under the Court's cramped standard, the permit condition imposed in this case directly responds to the specific type of burden on access created by appellants' development. Finally, a review of those factors deemed most significant in takings analysis makes clear that the Commission's action implicates none of the concerns underlying the Takings Clause. The Court has thus struck down the Commission's reasonable effort to respond to intensified development along the California coast, on behalf of landowners who can make no claim that their reasonable expectations have been disrupted. The Court has, in short, given appellants a windfall at the expense of the public.

I

The Court's conclusion that the permit condition imposed on appellants is unreasonable cannot withstand analysis. First, the Court demands a degree of exactitude that is in-

consistent with our standard for reviewing the rationality of a State's exercise of its police power for the welfare of its citizens. Second, even if the nature of the public-access condition imposed must be identical to the precise burden on access created by appellants, this requirement is plainly satisfied.

A

There can be no dispute that the police power of the States encompasses the authority to impose conditions on private development. See, *e. g.*, *Agins* v. *Tiburon*, 447 U. S. 255 (1980); *Penn Central Transportation Co.* v. *New York City*, 438 U. S. 104 (1978); *Gorieb* v. *Fox*, 274 U. S. 603 (1927). It is also by now commonplace that this Court's review of the rationality of a State's exercise of its police power demands only that the State *"could rationally have decided"* that the measure adopted might achieve the State's objective. *Minnesota* v. *Clover Leaf Creamery Co.*, 449 U. S. 456, 466 (1981) (emphasis in original).[1] In this case, California has

[1] See also *Williamson* v. *Lee Optical of Oklahoma, Inc.*, 348 U. S. 483, 487–488 (1955) ("[T]he law need not be in every respect logically consistent with its aims to be constitutional. It is enough that there is an evil at hand for correction, and that it might be thought that the particular legislative measure was a rational way to correct it"); *Day-Brite Lighting, Inc.* v. *Missouri*, 342 U. S. 421, 423 (1952) ("Our recent decisions make it plain that we do not sit as a super-legislature to weigh the wisdom of legislation nor to decide whether the policy which it expresses offends the public welfare. . . . [S]tate legislatures have constitutional authority to experiment with new techniques; they are entitled to their own standard of the public welfare").

Nothwithstanding the suggestion otherwise, *ante*, at 834–835, n. 3, our standard for reviewing the threshold question whether an exercise of the police power is legitimate is a uniform one. As we stated over 25 years ago in addressing a takings challenge to government regulation:

"The term 'police power' connotes the time-tested conceptional limit of public encroachment upon private interests. Except for the substitution of the familiar standard of 'reasonableness,' this Court has generally refrained from announcing any specific criteria. The classic statement of the rule in *Lawton* v. *Steele*, 152 U. S. 133, 137 (1894), is still valid today: . . . '[I]t must appear, first, that the interests of the public . . . require [govern-

employed its police power in order to condition development upon preservation of public access to the ocean and tidelands. The Coastal Commission, if it had so chosen, could have de-

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ment] interference; and, second, that the means are reasonably necessary for the accomplishment of the purpose, and not unduly oppressive upon individuals.' Even this rule is not applied with strict precision, for this Court has often said that 'debatable questions as to reasonableness are not for the courts but for the legislature . . . .' *E. g., Sproles* v. *Binford*, 286 U. S. 374, 388 (1932)." *Goldblatt* v. *Hempstead*, 369 U. S. 590, 594–595 (1962).

See also *id.*, at 596 (upholding regulation from takings challenge with citation to, *inter alia*, *United States* v. *Carolene Products Co.*, 304 U. S. 144, 154 (1938), for proposition that exercise of police power will be upheld if "any state of facts either known or which could be reasonably assumed affords support for it"). In *Connolly* v. *Pension Benefit Guaranty Corporation*, 475 U. S. 211 (1986), for instance, we reviewed a takings challenge to statutory provisions that had been held to be a legitimate exercise of the police power under due process analysis in *Pension Benefit Guaranty Corporation* v. *R. A. Gray & Co.*, 467 U. S. 717 (1984). *Gray*, in turn, had relied on *Usery* v. *Turner Elkhorn Mining Co.*, 428 U. S. 1 (1976). In rejecting the takings argument that the provisions were not within Congress' regulatory power, the Court in *Connolly* stated: "Although both *Gray* and *Turner Elkhorn* were due process cases, it would be surprising indeed to discover now that in both cases Congress unconstitutionally had taken the assets of the employers there involved." 475 U. S., at 223. Our phraseology may differ slightly from case to case—*e. g.*, regulation must "substantially advance," *Agins* v. *Tiburon*, 447 U. S. 255, 260 (1980), or be "reasonably necessary to," *Penn Central Transportation Co.* v. *New York City*, 438 U. S. 104, 127 (1978), the government's end. These minor differences cannot, however, obscure the fact that the inquiry in each case is the same.

Of course, government action may be a valid exercise of the police power and still violate specific provisions of the Constitution. JUSTICE SCALIA is certainly correct in observing that challenges founded upon these provisions are reviewed under different standards. *Ante*, at 834–835, n. 3. Our consideration of factors such as those identified in *Penn Central*, *supra*, for instance, provides an analytical framework for protecting the values underlying the Takings Clause, and other distinctive approaches are utilized to give effect to other constitutional provisions. This is far different, however, from the use of different standards of review to address the threshold issue of the rationality of government action.

nied the Nollans' request for a development permit, since the property would have remained economically viable without the requested new development.[2] Instead, the State sought to accommodate the Nollans' desire for new development, on the condition that the development not diminish the overall amount of public access to the coastline. Appellants' proposed development would reduce public access by restricting visual access to the beach, by contributing to an increased need for community facilities, and by moving private development closer to public beach property. The Commission sought to offset this diminution in access, and thereby preserve the overall balance of access, by requesting a deed restriction that would ensure "lateral" access: the right of the public to pass and repass along the dry sand parallel to the shoreline in order to reach the tidelands and the ocean. In the expert opinion of the Coastal Commission, development conditioned on such a restriction would fairly attend to both public and private interests.

The Court finds fault with this measure because it regards the condition as insufficiently tailored to address the precise

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[2] As this Court declared in *United States* v. *Riverside Bayview Homes, Inc.*, 474 U. S. 121, 127 (1985):

"A requirement that a person obtain a permit before engaging in a certain use of his or her property does not itself 'take' the property in any sense: after all, the very existence of a permit system implies that permission may be granted, leaving the landowner free to use the property as desired. Moreover, even if the permit is denied, there may be other viable uses available to the owner. Only when a permit is denied and the effect of the denial is to prevent 'economically viable' use of the land in question can it be said that a taking has occurred."

We also stated in *Kaiser Aetna* v. *United States*, 444 U. S. 164, 179 (1979), with respect to dredging to create a private marina:

"We have not the slightest doubt that the Government could have refused to allow such dredging on the ground that it would have impaired navigation in the bay, or could have conditioned its approval of the dredging on petitioners' agreement to comply with various measures that it deemed appropriate for the promotion of navigation."

type of reduction in access produced by the new development. The Nollans' development blocks visual access, the Court tells us, while the Commission seeks to preserve lateral access along the coastline. Thus, it concludes, the State acted irrationally. Such a narrow conception of rationality, however, has long since been discredited as a judicial arrogation of legislative authority. "To make scientific precision a criterion of constitutional power would be to subject the State to an intolerable supervision hostile to the basic principles of our Government." *Sproles* v. *Binford*, 286 U. S. 374, 388 (1932). Cf. *Keystone Bituminous Coal Assn.* v. *DeBenedictis*, 480 U. S. 470, 491, n. 21 (1987) ("The Takings Clause has never been read to require the States or the courts to calculate whether a specific individual has suffered burdens . . . in excess of the benefits received"). As this Court long ago declared with regard to various forms of restriction on the use of property:

> "Each interferes in the same way, if not to the same extent, with the owner's general right of dominion over his property. All rest for their justification upon the same reasons which have arisen in recent times as a result of the great increase and concentration of population in urban communities and the vast changes in the extent and complexity of the problems of modern city life. State legislatures and city councils, who deal with the situation from a practical standpoint, are better qualified than the courts to determine the necessity, character, and degree of regulation which these new and perplexing conditions require; and their conclusions should not be disturbed by the courts unless clearly arbitrary and unreasonable." *Gorieb*, 274 U. S., at 608 (citations omitted).

The Commission is charged by both the State Constitution and legislature to preserve overall public access to the California coastline. Furthermore, by virtue of its participation in the Coastal Zone Management Act (CZMA) program, the

State must "exercise effectively [its] responsibilities in the coastal zone through the development and implementation of management programs to achieve wise use of the land and water resources of the coastal zone," 16 U. S. C. § 1452(2), so as to provide for, *inter alia*, "public access to the coas[t] for recreation purposes." § 1452(2)(D). The Commission has sought to discharge its responsibilities in a flexible manner. It has sought to balance private and public interests and to accept tradeoffs: to permit development that reduces access in some ways as long as other means of access are enhanced. In this case, it has determined that the Nollans' burden on access would be offset by a deed restriction that formalizes the public's right to pass along the shore. In its informed judgment, such a tradeoff would preserve the net amount of public access to the coastline. The Court's insistence on a precise fit between the forms of burden and condition on each individual parcel along the California coast would penalize the Commission for its flexibility, hampering the ability to fulfill its public trust mandate.

The Court's demand for this precise fit is based on the assumption that private landowners in this case possess a reasonable expectation regarding the use of their land that the public has attempted to disrupt. In fact, the situation is precisely the reverse: it is private landowners who are the interlopers. The public's expectation of access considerably antedates any private development on the coast. Article X, § 4, of the California Constitution, adopted in 1879, declares:

> "No individual, partnership, or corporation, claiming or possessing the frontage or tidal lands of a harbor, bay, inlet, estuary, or other navigable water in this State, shall be permitted to exclude the right of way to such water whenever it is required for any public purpose, nor to destroy or obstruct the free navigation of such water; and the Legislature shall enact such laws as will give the most liberal construction to this provision, so

that access to the navigable waters of this State shall always be attainable for the people thereof."

It is therefore private landowners who threaten the disruption of settled public expectations. Where a private landowner has had a reasonable expectation that his or her property will be used for exclusively private purposes, the disruption of this expectation dictates that the government pay if it wishes the property to be used for a public purpose. In this case, however, the State has sought to protect *public* expectations of access from disruption by private land use. The State's exercise of its police power for this purpose deserves no less deference than any other measure designed to further the welfare of state citizens.

Congress expressly stated in passing the CZMA that "[i]n light of competing demands and the urgent need to protect and to give high priority to natural systems in the coastal zone, present state and local institutional arrangements for planning and regulating land and water uses in such areas are inadequate." 16 U. S. C. § 1451(h). It is thus puzzling that the Court characterizes as a "non-land-use justification," *ante*, at 841, the exercise of the police power to "'provide continuous public access along Faria Beach as the lots undergo development or redevelopment.'" *Ibid.* (quoting App. 68). The Commission's determination that certain types of development jeopardize public access to the ocean, and that such development should be conditioned on preservation of access, is the essence of responsible land-use planning. The Court's use of an unreasonably demanding standard for determining the rationality of state regulation in this area thus could hamper innovative efforts to preserve an increasingly fragile national resource.[8]

[8] The list of cases cited by the Court as support for its approach, *ante*, at 839–840, includes no instance in which the State sought to vindicate preexisting rights of access to navigable water, and consists principally of cases involving a requirement of the dedication of land as a condition of subdivision approval. Dedication, of course, requires the surrender of ownership of property rather than, as in this case, a mere restriction on its use. The only case pertaining to beach access among those cited by the Court is *MacKall* v. *White*, 85 App. Div. 2d 696, 445 N. Y. S. 2d 486 (1981). In that case, the court found that a subdivision application could not be conditioned upon a declaration that the landowner would not hinder the public from using a trail that had been used to gain access to a bay. The trail had been used despite posted warnings prohibiting passage, and despite the owner's resistance to such use. In that case, unlike this one, neither the State Constitution, state statute, administrative practice, nor the conduct of the landowner operated to create any reasonable expectation of a right of public access.

B

Even if we accept the Court's unusual demand for a precise match between the condition imposed and the specific type of burden on access created by the appellants, the State's action easily satisfies this requirement. First, the lateral access condition serves to dissipate the impression that the beach that lies behind the wall of homes along the shore is for private use only. It requires no exceptional imaginative powers to find plausible the Commission's point that the average person passing along the road in front of a phalanx of imposing permanent residences, including the appellants' new home, is likely to conclude that this particular portion of the shore is not open to the public. If, however, that person can see that numerous people are passing and repassing along the dry sand, this conveys the message that the beach is in fact open for use by the public. Furthermore, those persons who go down to the public beach a quarter-mile away will be able to look down the coastline and see that persons have continuous access to the tidelands, and will observe signs that proclaim the public's right of access over the dry sand. The burden produced by the diminution in visual access—the impression that the beach is not open to the public—is thus directly alleviated by the provision for public access over the dry sand. The Court therefore has an

unrealistically limited conception of what measures could reasonably be chosen to mitigate the burden produced by a diminution of visual access.

The second flaw in the Court's analysis of the fit between burden and exaction is more fundamental. The Court assumes that the only burden with which the Coastal Commission was concerned was blockage of visual access to the beach. This is incorrect.[4] The Commission specifically stated in its report in support of the permit condition that "[t]he Commission finds that the applicants' proposed development would present an increase in view blockage, *an increase in private use of the shorefront*, and that this impact would burden the public's ability to traverse to and along the shorefront." App. 65–66 (emphasis added). It declared that the possibility that "the public may get the impression that the beachfront is no longer available for public use" would be "due to *the encroaching nature of private use immediately adjacent to the public use, as well as* the visual 'block' of increased residential build-out impacting the visual quality of the beachfront." *Id.*, at 59 (emphasis added).

The record prepared by the Commission is replete with references to the threat to public access along the coastline resulting from the seaward encroachment of private development along a beach whose mean high-tide line is constantly shifting. As the Commission observed in its report: "The Faria Beach shoreline fluctuates during the year depending on the seasons and accompanying storms, and the public is not always able to traverse the shoreline below the mean

[4] This may be because the State in its briefs and at argument contended merely that the permit condition would serve to preserve overall public access, by offsetting the diminution in access resulting from the project, such as, *inter alia*, blocking the public's view of the beach. The State's position no doubt reflected the reasonable assumption that the Court would evaluate the rationality of its exercise of the police power in accordance with the traditional standard of review, and that the Court would not attempt to substitute its judgment about the best way to preserve overall public access to the ocean at the Faria Family Beach Tract.

high tide line." *Id.*, at 67. As a result, the boundary between publicly owned tidelands and privately owned beach is not a stable one, and "[t]he existing seawall is located very near to the mean high water line." *Id.*, at 61. When the beach is at its largest, the seawall is about 10 feet from the mean high-tide mark; "[d]uring the period of the year when the beach suffers erosion, the mean high water line appears to be located either on or beyond the existing seawall." *Ibid.* Expansion of private development on appellants' lot toward the seawall would thus "increase private use immediately adjacent to public tidelands, which has the potential of causing adverse impacts on the public's ability to traverse the shoreline." *Id.*, at 62. As the Commission explained:

> "The placement of more private use adjacent to public tidelands has the potential of creating use conflicts between the applicants and the public. The results of new private use encroachment into boundary/buffer areas between private and public property can create situations in which landowners intimidate the public and seek to prevent them from using public tidelands because of disputes between the two parties over where the exact boundary between private and public ownership is located. If the applicants' project would result in further seaward encroachment of private use into an area of clouded title, new private use in the subject encroachment area could result in use conflict between private and public entities on the subject shorefront." *Id.*, at 61–62.

The deed restriction on which permit approval was conditioned would directly address this threat to the public's access to the tidelands. It would provide a formal declaration of the public's right of access, thereby ensuring that the shifting character of the tidelands, and the presence of private development immediately adjacent to it, would not jeop-

ardize enjoyment of that right.[5] The imposition of the permit condition was therefore directly related to the fact that appellants' development would be "located along a unique stretch of coast where lateral public access is inadequate due to the construction of private residential structures and shoreline protective devices along a fluctuating shoreline." *Id.*, at 68. The deed restriction was crafted to deal with the particular character of the beach along which appellants sought to build, and with the specific problems created by expansion of development toward the public tidelands. In imposing the restriction, the State sought to ensure that such development would not disrupt the historical expectation of the public regarding access to the sea.[6]

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[5] As the Commission's Public Access (Shoreline) Interpretative Guidelines state:

"[T]he provision of lateral access recognizes the potential for conflicts between public and private use and creates a type of access that allows the public to move freely along all the tidelands in an area that can be clearly delineated and distinguished from private use areas. . . . Thus the 'need' determination set forth in P[ublic] R[esources] C[ode] 30212(a)(2) should be measured in terms of providing access that buffers public access to the tidelands from the burdens generated on access by private development." App. 358–359.

[6] The Court suggests that the risk of boundary disputes "is inherent in the right to exclude others from one's property," and thus cannot serve as a purpose to support the permit condition. *Ante*, at 839, n. 6. The Commission sought the deed restriction, however, not to address a generalized problem inherent in any system of property, but to address the *particular* problem created by the shifting high-tide line along Faria Beach. Unlike the typical area in which a boundary is delineated reasonably clearly, the very problem on Faria Beach is that the boundary is *not* constant. The area open to public use therefore is frequently in question, and, as the discussion, *supra*, demonstrates, the Commission clearly tailored its permit condition precisely to address this specific problem.

The Court acknowledges that the Nollans' seawall could provide "a clear demarcation of the public easement," and thus avoid merely shifting "the location of the boundary dispute further on to the private owner's land." *Ibid.* It nonetheless faults the Commission because every property subject to regulation may not have this feature. This case, however, is a chal-

The Court is therefore simply wrong that there is no reasonable relationship between the permit condition and the specific type of burden on public access created by the appellants' proposed development. Even were the Court desirous of assuming the added responsibility of closely monitoring the regulation of development along the California coast, this record reveals rational public action by any conceivable standard.

II

The fact that the Commission's action is a legitimate exercise of the police power does not, of course, insulate it from a takings challenge, for when "regulation goes too far it will be recognized as a taking." *Pennsylvania Coal Co.* v. *Mahon*, 260 U. S. 393, 415 (1922). Conventional takings analysis underscores the implausibility of the Court's holding, for it demonstrates that this exercise of California's police power implicates none of the concerns that underlie our takings jurisprudence.

In reviewing a Takings Clause claim, we have regarded as particularly significant the nature of the governmental action and the economic impact of regulation, especially the extent to which regulation interferes with investment-backed expectations. *Penn Central*, 438 U. S., at 124. The character of the government action in this case is the imposition of a condition on permit approval, which allows the public to continue to have access to the coast. The physical intrusion permitted by the deed restriction is minimal. The public is permitted the right to pass and repass along the coast in an area from the seawall to the mean high-tide mark. App. 46. This area is at its *widest* 10 feet, *id.*, at 61, which means that *even without the permit condition*, the public's right of access permits it to pass on average within a few feet of the seawall. Passage closer to the 8-foot-high rocky seawall will make the

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lenge to the permit condition *as applied to the Nollans' property*, so the presence or absence of seawalls on other property is irrelevant.

appellants even less visible to the public than passage along the high-tide area farther out on the beach. The intrusiveness of such passage is even less than the intrusion resulting from the required dedication of a sidewalk in front of private residences, exactions which are commonplace conditions on approval of development.[7] Furthermore, the high-tide line shifts throughout the year, moving up to and beyond the seawall, so that public passage for a portion of the year would either be impossible or would not occur on appellant's property. Finally, although the Commission had the authority to provide for either passive or active recreational use of the property, it chose the least intrusive alternative: a mere right to pass and repass. *Id.*, at 370.[8] As this Court made

[7] See, *e. g.*, *Bellefontaine Neighbors* v. *J. J. Kelley Realty & Bldg. Co.*, 460 S. W. 2d 298 (Mo. Ct. App. 1970); *Allen* v. *Stockwell*, 210 Mich. 488, 178 N. W. 27 (1920). See generally Shultz & Kelley, Subdivision Improvement Requirements and Guarantees: A Primer, 28 Wash. U. J. Urban and Contemp. L. 3 (1985).

[8] The Commission acted in accordance with its Guidelines both in determining the width of the area of passage, and in prohibiting any recreational use of the property. The Guidelines state that it may be necessary on occasion to provide for less than the normal 25-foot-wide accessway along the dry sand when this may be necessary to "protect the privacy rights of adjacent property owners." App. 363. They also provide this advice in selecting the type of public use that may be permitted:

"*Pass and Repass.* Where topographic constraints of the site make use of the beach dangerous, where habitat values of the shoreline would be adversely impacted by public use of the shoreline or where the accessway may encroach closer than 20 feet to a residential structure, the accessway may be limited to the right of the public to pass and repass along the access area. For the purposes of these guidelines, pass and repass is defined as the right to walk and run along the shoreline. This would provide for public access along the shoreline but would not allow for any additional use of the accessway. Because this severely limits the public's ability to enjoy the adjacent state owned tidelands by restricting the potential use of the access areas, this form of access dedication should be used only where necessary to protect the habitat values of the site, where topographic constraints warrant the restriction, or where it is necessary to protect the privacy of the landowner." *Id.*, at 370.

clear in *PruneYard Shopping Center* v. *Robins*, 447 U. S. 74, 83 (1980), physical access to private property in itself creates no takings problem if it does not "unreasonably impair the value or use of [the] property." Appellants can make no tenable claim that either their enjoyment of their property or its value is diminished by the public's ability merely to pass and repass a few feet closer to the seawall beyond which appellants' house is located.

PruneYard is also relevant in that we acknowledged in that case that public access rested upon a "state constitutional . . . provision that had been construed to create rights to the use of private property by strangers." *Id.*, at 81. In this case, of course, the State is also acting to protect a state constitutional right. See *supra*, at 847–848 (quoting Art. X, § 4, of California Constitution). The constitutional provision guaranteeing public access to the ocean states that "the Legislature shall enact such laws as will give *the most liberal construction to this provision* so that access to the navigable waters of this State shall be always attainable for the people thereof." Cal. Const., Art. X, § 4 (emphasis added). This provision is the explicit basis for the statutory directive to provide for public access along the coast in new development projects, Cal. Pub. Res. Code Ann. § 30212 (West 1986), and has been construed by the state judiciary to permit passage over private land where necessary to gain access to the tidelands. *Grupe* v. *California Coastal Comm'n*, 166 Cal. App. 3d 148, 171–172, 212 Cal. Rptr. 578, 592–593 (1985). The physical access to the perimeter of appellants' property at issue in this case thus results directly from the State's enforcement of the State Constitution.

Finally, the character of the regulation in this case is not unilateral government action, but a condition on approval of a development request submitted by appellants. The State has not sought to interfere with any pre-existing property interest, but has responded to appellants' proposal to intensify development on the coast. Appellants themselves chose to

submit a new development application, and could claim no property interest in its approval. They were aware that approval of such development would be conditioned on preservation of adequate public access to the ocean. The State has initiated no action against appellants' property; had the Nollans' not proposed more intensive development in the coastal zone, they would never have been subject to the provision that they challenge.

Examination of the economic impact of the Commission's action reinforces the conclusion that no taking has occurred. Allowing appellants to intensify development along the coast in exchange for ensuring public access to the ocean is a classic instance of government action that produces a "reciprocity of advantage." *Pennsylvania Coal*, 260 U. S., at 415. Appellants have been allowed to replace a one-story, 521-square-foot beach home with a two-story, 1,674-square-foot residence and an attached two-car garage, resulting in development covering 2,464 square feet of the lot. Such development obviously significantly increases the value of appellants' property; appellants make no contention that this increase is offset by any diminution in value resulting from the deed restriction, much less that the restriction made the property less valuable than it would have been without the new construction. Furthermore, appellants gain an additional benefit from the Commission's permit condition program. They are able to walk along the beach beyond the confines of their own property only because the Commission has required deed restrictions as a condition of approving other new beach developments.[9] Thus, appellants benefit both as private landowners and as members of the public from the fact that new development permit requests are conditioned on preservation of public access.

[9] At the time of the Nollans' permit application, 43 of the permit requests for development along the Faria Beach had been conditioned on deed restrictions ensuring lateral public access along the shoreline. App. 48.

Ultimately, appellants' claim of economic injury is flawed because it rests on the assumption of entitlement to the full value of their new development. Appellants submitted a proposal for more intensive development of the coast, which the Commission was under no obligation to approve, and now argue that a regulation designed to ameliorate the impact of that development deprives them of the full value of their improvements. Even if this novel claim were somehow cognizable, it is not significant. "[T]he interest in anticipated gains has traditionally been viewed as less compelling than other property-related interests." *Andrus* v. *Allard*, 444 U. S. 51, 66 (1979).

With respect to appellants' investment-backed expectations, appellants can make no reasonable claim to any expectation of being able to exclude members of the public from crossing the edge of their property to gain access to the ocean. It is axiomatic, of course, that state law is the source of those strands that constitute a property owner's bundle of property rights. "[A]s a general proposition[,] the law of real property is, under our Constitution, left to the individual States to develop and administer." *Hughes* v. *Washington*, 389 U. S. 290, 295 (1967) (Stewart, J., concurring). See also *Borax Consolidated, Ltd.* v. *Los Angeles*, 296 U. S. 10, 22 (1935) ("Rights and interests in the tideland, which is subject to the sovereignty of the State, are matters of local law"). In this case, the State Constitution explicitly states that no one possessing the "frontage" of any "navigable water in this State, shall be permitted to exclude the right of way to such water whenever it is required for any public purpose." Cal. Const., Art. X, § 4. The state Code expressly provides that, save for exceptions not relevant here, "[p]ublic access from the nearest public roadway to the shoreline and along the coast shall be provided in new development projects." Cal. Pub. Res. Code Ann. § 30212 (West 1986). The Coastal Commission Interpretative Guidelines make clear that fulfillment of the Commission's constitutional and statutory duty

requires that approval of new coastline development be conditioned upon provisions ensuring lateral public access to the ocean. App. 362. At the time of appellants' permit request, the Commission had conditioned all 43 of the proposals for coastal new development in the Faria Family Beach Tract on the provision of deed restrictions ensuring lateral access along the shore. *Id.*, at 48. Finally, the Faria family had leased the beach property since the early part of this century, and "the Faria family and their lessees [including the Nollans] had not interfered with public use of the beachfront within the Tract, so long as public use was limited to pass and repass lateral access along the shore." *Ibid.* California therefore has clearly established that the power of exclusion for which appellants seek compensation simply is not a strand in the bundle of appellants' property rights, and appellants have never acted as if it were. Given this state of affairs, appellants cannot claim that the deed restriction has deprived them of a reasonable expectation to exclude from their property persons desiring to gain access to the sea.

Even were we somehow to concede a pre-existing expectation of a right to exclude, appellants were clearly on notice when requesting a new development permit that a condition of approval would be a provision ensuring public lateral access to the shore. Thus, they surely could have had no expectation that they could obtain approval of their new development and exercise any right of exclusion afterward. In this respect, this case is quite similar to *Ruckelshaus* v. *Monsanto Co.*, 467 U. S. 986 (1984). In *Monsanto*, the respondent had submitted trade data to the Environmental Protection Agency (EPA) for the purpose of obtaining registration of certain pesticides. The company claimed that the agency's disclosure of certain data in accordance with the relevant regulatory statute constituted a taking. The Court conceded that the data in question constituted property under state law. It also found, however, that certain of the data had been submitted to the agency after Congress had

made clear that only limited confidentiality would be given data submitted for registration purposes. The Court observed that the statute served to inform Monsanto of the various conditions under which data might be released, and stated:

> "If, despite the data-consideration and data-disclosure provisions in the statute, Monsanto chose to submit the requisite data in order to receive a registration, it can hardly argue that its reasonable investment-backed expectations are disturbed when EPA acts to use or disclose the data in a manner that was authorized by law at the time of the submission." *Id.*, at 1006–1007.

The Court rejected respondent's argument that the requirement that it relinquish some confidentiality imposed an unconstitutional condition on receipt of a Government benefit:

> "[A]s long as Monsanto is aware of the conditions under which the data are submitted, and the conditions are rationally related to a legitimate Government interest, a voluntary submission of data by an applicant in exchange for the economic advantages of a registration can hardly be called a taking." *Id.*, at 1007.

The similarity of this case to *Monsanto* is obvious. Appellants were aware that stringent regulation of development along the California coast had been in place at least since 1976. The specific deed restriction to which the Commission sought to subject them had been imposed since 1979 on all 43 shoreline new development projects in the Faria Family Beach Tract. App. 48. Such regulation to ensure public access to the ocean had been directly authorized by California citizens in 1972, and reflected their judgment that restrictions on coastal development represented "'the advantage of living and doing business in a civilized community.'" *Andrus* v. *Allard*, *supra*, at 67, quoting *Pennsylvania Coal Co.* v. *Mahon*, 260 U. S., at 422 (Brandeis, J., dissenting). The deed restriction was "authorized by law at the

time of [appellants' permit] submission," *Monsanto, supra,* at 1007, and, as earlier analysis demonstrates, *supra,* at 849–853, was reasonably related to the objective of ensuring public access. Appellants thus were on notice that new developments would be approved only if provisions were made for lateral beach access. In requesting a new development permit from the Commission, they could have no reasonable expectation of, and had no entitlement to, approval of their permit application without any deed restriction ensuring public access to the ocean. As a result, analysis of appellants' investment-backed expectations reveals that "the force of this factor is so overwhelming . . . that it disposes of the taking question." *Monsanto, supra,* at 1005.[10]

Standard Takings Clause analysis thus indicates that the Court employs its unduly restrictive standard of police power rationality to find a taking where neither the character of governmental action nor the nature of the private interest affected raise any takings concern. The result is that the Court invalidates regulation that represents a reasonable ad-

[10] The Court suggests that *Ruckelshaus* v. *Monsanto* is distinguishable, because government regulation of property in that case was a condition on receipt of a "government benefit," while here regulation takes the form of a restriction on "the right to build on one's own property," which "cannot remotely be described as a 'government benefit.'" *Ante,* at 834, n. 2. This proffered distinction is not persuasive. Both Monsanto and the Nollans hold property whose use is subject to regulation; Monsanto may not sell its property without obtaining government approval and the Nollans may not build new development on their property without government approval. Obtaining such approval is as much a "government benefit" for the Nollans as it is for Monsanto. If the Court is somehow suggesting that "the right to build on one's own property" has some privileged natural rights status, the argument is a curious one. By any traditional labor theory of value justification for property rights, for instance, see, *e. g.,* J. Locke, The Second Treatise of Civil Government 15–26 (E. Gough, ed. 1947), Monsanto would have a superior claim, for the chemical formulae which constitute its property only came into being by virtue of Monsanto's efforts.

justment of the burdens and benefits of development along the California coast.

III

The foregoing analysis makes clear that the State has taken no property from appellants. Imposition of the permit condition in this case represents the State's reasonable exercise of its police power. The Coastal Commission has drawn on its expertise to preserve the balance between private development and public access, by requiring that any project that intensifies development on the increasingly crowded California coast must be offset by gains in public access. Under the normal standard for review of the police power, this provision is eminently reasonable. Even accepting the Court's novel insistence on a precise *quid pro quo* of burdens and benefits, there is a reasonable relationship between the public benefit and the burden created by appellants' development. The movement of development closer to the ocean creates the prospect of encroachment on public tidelands, because of fluctuation in the mean high-tide line. The deed restriction ensures that disputes about the boundary between private and public property will not deter the public from exercising its right to have access to the sea.

Furthermore, consideration of the Commission's action under traditional takings analysis underscores the absence of any viable takings claim. The deed restriction permits the public only to pass and repass along a narrow strip of beach, a few feet closer to a seawall at the periphery of appellants' property. Appellants almost surely have enjoyed an increase in the value of their property even with the restriction, because they have been allowed to build a significantly larger new home with garage on their lot. Finally, appellants can claim the disruption of no expectation interest, both because they have no right to exclude the public under state law, and because, even if they did, they had full advance notice that new development along the coast is conditioned on provisions for continued public access to the ocean.

Fortunately, the Court's decision regarding this application of the Commission's permit program will probably have little ultimate impact either on this parcel in particular or the Commission program in general. A preliminary study by a Senior Lands Agent in the State Attorney General's Office indicates that the portion of the beach at issue in this case likely belongs to the public. App. 85.[11] Since a full study had not been completed at the time of appellants' permit application, the deed restriction was requested "without regard to the possibility that the applicant is proposing development on public land." *Id.*, at 45. Furthermore, analysis by the same Lands Agent also indicated that the public had obtained a prescriptive right to the use of Faria Beach from the seawall to the ocean. *Id.*, at 86.[12] The Superior Court explicitly stated in its ruling against the Commission on the permit condition issue that "no part of this opinion is intended to foreclose the public's opportunity to adjudicate the possibility that public rights in [appellants'] beach have been acquired through prescriptive use." *Id.*, at 420.

With respect to the permit condition program in general, the Commission should have little difficulty in the future in utilizing its expertise to demonstrate a specific connection between provisions for access and burdens on access produced by new development. Neither the Commission in its report nor the State in its briefs and at argument highlighted the particular threat to lateral access created by appellants'

[11] The Senior Lands Agent's report to the Commission states that "based on my observations, presently, most, if not all of Faria Beach waterward of the existing seawalls [lies] *below* the Mean High Tide Level, and would fall in public domain or sovereign category of ownership." App. 85 (emphasis added).

[12] The Senior Lands Agent's report stated:

"Based on my past experience and my investigation to date of this property it is my opinion that the area seaward of the revetment at 3822 Pacific Coast Highway, Faria Beach, as well as all the area seaward of the revetments built to protect the Faria Beach community, if not public owned, has been impliedly dedicated to the public for passive recreational use." *Id.*, at 86.

development project. In defending its action, the State emphasized the general point that *overall* access to the beach had been preserved, since the diminution of access created by the project had been offset by the gain in lateral access. This approach is understandable, given that the State relied on the reasonable assumption that its action was justified under the normal standard of review for determining legitimate exercises of a State's police power. In the future, alerted to the Court's apparently more demanding requirement, it need only make clear that a provision for public access directly responds to a particular type of burden on access created by a new development. Even if I did not believe that the record in this case satisfies this requirement, I would have to acknowledge that the record's documentation of the impact of coastal development indicates that the Commission should have little problem presenting its findings in a way that avoids a takings problem.

Nonetheless it is important to point out that the Court's insistence on a precise accounting system in this case is insensitive to the fact that increasing intensity of development in many areas calls for farsighted, comprehensive planning that takes into account both the interdependence of land uses and the cumulative impact of development.[13] As one scholar has noted:

> "Property does not exist in isolation. Particular parcels are tied to one another in complex ways, and property is

[13] As the California Court of Appeal noted in 1985: "Since 1972, permission has been granted to construct more than 42,000 building units within the land jurisdiction of the Coastal Commission. In addition, pressure for development along the coast is expected to increase since approximately 85% of California's population lives within 30 miles of the coast." *Grupe* v. *California Coastal Comm'n*, 166 Cal. App. 3d 148, 167, n. 12, 212 Cal. Rptr. 578, 589, n. 12. See also Coastal Zone Management Act, 16 U. S. C. § 1451(c) (increasing demands on coastal zones "have resulted in the loss of living marine resources, wildlife, nutrient-rich areas, permanent and adverse changes to ecological systems, decreasing open space for public use, and shoreline erosion").

more accurately described as being inextricably part of a network of relationships that is neither limited to, nor usefully defined by, the property boundaries with which the legal system is accustomed to dealing. Frequently, use of any given parcel of property is at the same time effectively a use of, or a demand upon, property beyond the border of the user." Sax, Takings, Private Property, and Public Rights, 81 Yale L. J. 149, 152 (1971) (footnote omitted).

As Congress has declared: "The key to more effective protection and use of the land and water resources of the coastal zone [is for the states to] develo[p] land and water use programs for the coastal zone, including unified policies, criteria, standards, methods, and processes for dealing with land and water use decisions of more than local significance." 16 U. S. C. § 1451(i). This is clearly a call for a focus on the overall impact of development on coastal areas. State agencies therefore require considerable flexibility in responding to private desires for development in a way that guarantees the preservation of public access to the coast. They should be encouraged to regulate development in the context of the overall balance of competing uses of the shoreline. The Court today does precisely the opposite, overruling an eminently reasonable exercise of an expert state agency's judgment, substituting its own narrow view of how this balance should be struck. Its reasoning is hardly suited to the complex reality of natural resource protection in the 20th century. I can only hope that today's decision is an aberration, and that a broader vision ultimately prevails.[14]

I dissent.

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[14] I believe that States should be afforded considerable latitude in regulating private development, without fear that their regulatory efforts will often be found to constitute a taking. "*If*. . . regulation denies the private property owner the use and enjoyment of his land and is found to effect a 'taking,'" however, I believe that compensation is the appropriate remedy for this constitutional violation. *San Diego Gas & Electric Co.* v. *San Diego*, 450 U. S. 621, 656 (1981) (BRENNAN, J., dissenting) (emphasis added). I therefore see my dissent here as completely consistent with my position in *First English Evangelical Lutheran Church of Glendale* v. *Los Angeles County*, 482 U. S. 304 (1987).

JUSTICE BLACKMUN, dissenting.

I do not understand the Court's opinion in this case to implicate in any way the public-trust doctrine. The Court certainly had no reason to address the issue, for the Court of Appeal of California did not rest its decision on Art. X, § 4, of the California Constitution. Nor did the parties base their arguments before this Court on the doctrine.

I disagree with the Court's rigid interpretation of the necessary correlation between a burden created by development and a condition imposed pursuant to the State's police power to mitigate that burden. The land-use problems this country faces require creative solutions. These are not advanced by an "eye for an eye" mentality. The close nexus between benefits and burdens that the Court now imposes on permit conditions creates an anomaly in the ordinary requirement that a State's exercise of its police power need be no more than rationally based. See, *e. g.*, *Minnesota* v. *Clover Leaf Creamery Co.*, 449 U. S. 456, 466 (1981). In my view, the easement exacted from appellants and the problems their development created are adequately related to the governmental interest in providing public access to the beach. Coastal development by its very nature makes public access to the shore generally more difficult. Appellants' structure is part of that general development and, in particular, it diminishes the public's visual access to the ocean and decreases the public's sense that it may have physical access to the beach. These losses in access can be counteracted, at least in part, by the condition on appellants' construction permitting public passage that ensures access along the beach.

Traditional takings analysis compels the conclusion that there is no taking here. The governmental action is a valid exercise of the police power, and, so far as the record reveals,

has a nonexistent economic effect on the value of appellants' property. No investment-backed expectations were diminished. It is significant that the Nollans had notice of the easement before they purchased the property and that public use of the beach had been permitted for decades.

For these reasons, I respectfully dissent.

JUSTICE STEVENS, with whom JUSTICE BLACKMUN joins, dissenting.

The debate between the Court and JUSTICE BRENNAN illustrates an extremely important point concerning government regulation of the use of privately owned real estate. Intelligent, well-informed public officials may in good faith disagree about the validity of specific types of land-use regulation. Even the wisest lawyers would have to acknowledge great uncertainty about the scope of this Court's takings jurisprudence. Yet, because of the Court's remarkable ruling in *First English Evangelical Lutheran Church of Glendale* v. *Los Angeles County*, 482 U. S. 304 (1987), local governments and officials must pay the price for the necessarily vague standards in this area of the law.

In his dissent in *San Diego Gas & Electric Co.* v. *San Diego*, 450 U. S. 621 (1981), JUSTICE BRENNAN proposed a brand new constitutional rule.* He argued that a mistake such as the one that a majority of the Court believes that the California Coastal Commission made in this case should automatically give rise to pecuniary liability for a "temporary taking." *Id.*, at 653–661. Notwithstanding the unprecedented chilling effect that such a rule will obviously have on public officials charged with the responsibility for drafting and implementing regulations designed to protect the environment and the public welfare, six Members of the Court recently endorsed JUSTICE BRENNAN's novel proposal. See *First English Evangelical Lutheran Church, supra.*

*"The constitutional rule I propose requires that, once a court finds that a police power regulation has effected a 'taking,' the government entity must pay just compensation for the period commencing on the date the regulation first effected the 'taking,' and ending on the date the government entity chooses to rescind or otherwise amend the regulation." 450 U. S., at 658.

I write today to identify the severe tension between that dramatic development in the law and the view expressed by JUSTICE BRENNAN's dissent in this case that the public interest is served by encouraging state agencies to exercise considerable flexibility in responding to private desires for development in a way that threatens the preservation of public resources. See *ante*, at 846–848. I like the hat that JUSTICE BRENNAN has donned today better than the one he wore in *San Diego*, and I am persuaded that he has the better of the legal arguments here. Even if his position prevailed in this case, however, it would be of little solace to land-use planners who would still be left guessing about how the Court will react to the next case, and the one after that. As this case demonstrates, the rule of liability created by the Court in *First English* is a shortsighted one. Like JUSTICE BRENNAN, I hope that "a broader vision ultimately prevails." *Ante*, at 864.

I respectfully dissent.

FIRST ENGLISH EVANGELICAL LUTHERAN CHURCH OF GLENDALE *v.* COUNTY OF LOS ANGELES, CALIFORNIA

APPEAL FROM THE COURT OF APPEAL OF CALIFORNIA, SECOND APPELLATE DISTRICT

No. 85-1199. Argued January 14, 1987—Decided June 9, 1987

In 1957, appellant church purchased land on which it operated a campground, known as "Lutherglen," as a retreat center and a recreational area for handicapped children. The land is located in a canyon along the banks of a creek that is the natural drainage channel for a watershed area. In 1978, a flood destroyed Lutherglen's buildings. In response to the flood, appellee Los Angeles County, in 1979, adopted an interim ordinance prohibiting the construction or reconstruction of any building or structure in an interim flood protection area that included the land on which Lutherglen had stood. Shortly after the ordinance was adopted, appellant filed suit in a California court, alleging, *inter alia*, that the ordinance denied appellant all use of Lutherglen, and seeking to recover damages in inverse condemnation for such loss of use. The court granted a motion to strike the allegation, basing its ruling on *Agins* v. *Tiburon*, 24 Cal. 3d 266, 598 P. 2d 25, aff'd on other grounds, 447 U. S. 255, in which the California Supreme Court held that a landowner may not maintain an inverse condemnation suit based upon a "regulatory" taking, and that 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. Because appellant alleged a regulatory taking and sought only damages, the trial court deemed the allegation that the ordinance denied all use of Lutherglen to be irrelevant. The California Court of Appeal affirmed.

Held:

1. The claim that the *Agins* case improperly held that the Just Compensation Clause of the Fifth Amendment does not require compensation as a remedy for "temporary" regulatory takings—those regulatory takings which are ultimately invalidated by the courts—is properly presented in this case. In earlier cases, this Court was unable to reach the question because either the regulations considered to be in issue by the state courts did not effect a taking, or the factual disputes yet to be resolved by state authorities might still lead to the conclusion that no taking had occurred. Here, the California Court of Appeal assumed

that the complaint sought damages for the uncompensated "taking" of all use of Lutherglen by the ordinance, and relied on the California Supreme Court's *Agins* decision for the conclusion that the remedy for the taking was limited to nonmonetary relief, thus isolating the remedial question for this Court's consideration. *MacDonald, Sommer & Frates* v. *Yolo County*, 477 U. S. 340; *Williamson County Regional Planning Comm'n* v. *Hamilton Bank*, 473 U. S. 172; *San Diego Gas & Electric Co.* v. *San Diego*, 450 U. S. 621; and *Agins*, all distinguished. Pp. 311-313.

2. Under the Just Compensation Clause, where the government has "taken" property by a land-use regulation, the landowner may recover damages for the time before it is finally determined that the regulation constitutes a "taking" of his property. The Clause is designed not to limit the governmental interference with property rights *per se*, but rather to secure *compensation* in the event of otherwise proper interference amounting to a taking. A landowner is entitled to bring an action in inverse condemnation as a result of the self-executing character of the constitutional provision with respect to compensation. While the typical taking occurs when the government acts to condemn property in the exercise of its power of eminent domain, the doctrine of inverse condemnation is predicated on the proposition that a taking may occur without such formal proceedings. "Temporary" regulatory takings which, as here, deny a landowner all use of his property, are not different in kind from permanent takings for which the Constitution clearly requires compensation. Once a court determines that a taking has occurred, the government retains the whole range of options already available—amendment of the regulation, withdrawal of the invalidated regulation, or exercise of eminent domain. But 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. Invalidation of the ordinance without payment of fair value for the use of the property during such period would be a constitutionally insufficient remedy. Pp. 314-322.

Reversed and remanded.

REHNQUIST, C. J., delivered the opinion of the Court, in which BRENNAN, WHITE, MARSHALL, POWELL, and SCALIA, JJ., joined. STEVENS, J., filed a dissenting opinion, in Parts I and III of which BLACKMUN and O'CONNOR, JJ., joined, *post*, p. 322.

Michael M. Berger argued the cause for appellant. With him on the briefs was *Jerrold A. Fadem.*

Jack R. White argued the cause for appellee. With him on the brief were *DeWitt W. Clinton, Charles J. Moore,* and *Darlene B. Fischer.**

CHIEF JUSTICE REHNQUIST delivered the opinion of the Court.

In this case the California Court of Appeal held that a landowner who claims that his property has been "taken" by a land-use regulation may not recover damages for the time be-

*Briefs of *amici curiae* urging reversal were filed for the American College of Real Estate Lawyers by *Robert O. Hetlage, David A. Richards, Eugene J. Morris,* and *John P. Trevaskis, Jr.;* for the California Association of Realtors by *William M. Pfeiffer;* for the California Building Industry Association by *Gideon Kanner;* for the National Association of Home Builders by *Kenneth B. Bley* and *Gus Bauman;* for the National Association of Realtors by *William D. North;* and for the Pacific Legal Foundation et al. by *Ronald A. Zumbrun* and *Robert K. Best.*

Briefs of *amici curiae* urging affirmance were filed for the United States by *Solicitor General Fried, Assistant Attorney General Habicht, Deputy Solicitor General Ayer, Deputy Assistant Attorneys General Marzulla, Hookano,* and *Kmiec,* and *Edwin S. Kneedler* and *Peter R. Steenland, Jr.;* for the State of California et al. by *John K. Van de Kamp,* Attorney General of California, *Andrea Sheridan Ordin,* Chief Assistant Attorney General, *Richard C. Jacobs, N. Gregory Taylor,* and *Theodora Berger,* Assistant Attorneys General, and *Craig C. Thompson* and *Richard M. Frank,* Deputy Attorneys General, joined by the Attorneys General for their respective States as follows: *Harold M. Brown* of Alaska, *John Steven Clark* of Arkansas, *Jim Smith* of Florida, *Corinne K. A. Watanabe* of Hawaii, *Neil F. Hartigan* of Illinois, *James E. Tierney* of Maine, *Francis X. Bellotti* of Massachusetts, *Hubert H. Humphrey III* of Minnesota, *Edwin L. Pittman* of Mississippi, *William L. Webster* of Missouri, *Stephen E. Merrill* of New Hampshire, *Robert Abrams* of New York, *Nicholas J. Spaeth* of North Dakota, *Michael Turpin* of Oklahoma, *T. Travis Medlock* of South Carolina, *Mark V. Meierhenry* of South Dakota, *Jim Maddox* of Texas, *David L. Wilkinson* of Utah, *Jeffrey L. Amestoy* of Vermont, *Mary Sue Terry* of Virginia, *Kenneth O. Eikenberry* of Washington, *Archie G. McClintock* of Wyoming, and *Hector Rivera Cruz* of Puerto Rico; for the city of Los Angeles et al. by *Gary R. Netzer, Claudia McGee Henry,* and *Anthony Saul Alperin;* for the National Association of Counties et al. by *Benna Ruth Solomon, Joyce Holmes Benjamin,* and *Beate Bloch;* and for the Conservation Foundation et al. by *Fred P. Bosselman* and *Elizabeth S. Merritt.*

fore it is finally determined that the regulation constitutes a "taking" of his property. We disagree, and conclude that in these circumstances the Fifth and Fourteenth Amendments to the United States Constitution would require compensation for that period.

In 1957, appellant First English Evangelical Lutheran Church purchased a 21-acre parcel of land in a canyon along the banks of the Middle Fork of Mill Creek in the Angeles National Forest. The Middle Fork is the natural drainage channel for a watershed area owned by the National Forest Service. Twelve of the acres owned by the church are flat land, and contained a dining hall, two bunkhouses, a caretaker's lodge, an outdoor chapel, and a footbridge across the creek. The church operated on the site a campground, known as "Lutherglen," as a retreat center and a recreational area for handicapped children.

In July 1977, a forest fire denuded the hills upstream from Lutherglen, destroying approximately 3,860 acres of the watershed area and creating a serious flood hazard. Such flooding occurred on February 9 and 10, 1978, when a storm dropped 11 inches of rain in the watershed. The runoff from the storm overflowed the banks of the Mill Creek, flooding Lutherglen and destroying its buildings.

In response to the flooding of the canyon, appellee County of Los Angeles adopted Interim Ordinance No. 11,855 in January 1979. The ordinance provided that "[a] person shall not construct, reconstruct, place or enlarge any building or structure, any portion of which is, or will be, located within the outer boundary lines of the interim flood protection area located in Mill Creek Canyon . . . ." App. to Juris. Statement A31. The ordinance was effective immediately because the county determined that it was "required for the immediate preservation of the public health and safety . . . ." *Id.*, at A32. The interim flood protection area described by the ordinance included the flat areas on either side of Mill Creek on which Lutherglen had stood.

The church filed a complaint in the Superior Court of California a little more than a month after the ordinance was adopted. As subsequently amended, the complaint alleged two claims against the county and the Los Angeles County Flood Control District. The first alleged that the defendants were liable under Cal. Govt. Code Ann. § 835 (West 1980)[1] for dangerous conditions on their upstream properties that contributed to the flooding of Lutherglen. As a part of this claim, appellant also alleged that "Ordinance No. 11,855 denies [appellant] all use of Lutherglen." App. 12, 49. The second claim sought to recover from the Flood Control District in inverse condemnation and in tort for engaging in cloud seeding during the storm that flooded Lutherglen. Appellant sought damages under each count for loss of use of Lutherglen. The defendants moved to strike the portions of the complaint alleging that the county's ordinance denied all use of Lutherglen, on the view that the California Supreme Court's decision in *Agins* v. *Tiburon*, 24 Cal. 3d 266, 598 P. 2d 25 (1979), aff'd on other grounds, 447 U. S. 255 (1980), rendered the allegation "entirely immaterial and irrelevant[, with] no bearing upon any conceivable cause of action herein." App. 22. See Cal. Civ. Proc. Code Ann. § 436(a) (West Supp. 1987) ("The court may . . . [s]trike out any irrelevant, false, or improper matter inserted in any pleading").

In *Agins* v. *Tiburon*, *supra*, the California Supreme Court decided that a landowner may not maintain an inverse condemnation suit in the courts of that State based upon a "regulatory" taking. 24 Cal. 3d, at 275–277, 598 P. 2d, at 29–31. In the court's view, maintenance of such a suit would allow a landowner to force the legislature to exercise its power of eminent domain. Under this decision, then, compensation is not required until the challenged regulation or ordinance has been held excessive in an action for declaratory

[1] Section 835 of the California Government Code establishes conditions under which a public entity may be liable "for injury caused by a dangerous condition of its property. . . ."

relief or a writ of mandamus and the government has nevertheless decided to continue the regulation in effect. Based on this decision, the trial court in the present case granted the motion to strike the allegation that the church had been denied all use of Lutherglen. It explained that "a careful rereading of the *Agins* case persuades the Court that when an ordinance, even a non-zoning ordinance, deprives a person of the total use of his lands, his challenge to the ordinance is by way of declaratory relief or possibly mandamus." App. 26. Because the appellant alleged a regulatory taking and sought only damages, the allegation that the ordinance denied all use of Lutherglen was deemed irrelevant.[2]

On appeal, the California Court of Appeal read the complaint as one seeking "damages for the uncompensated taking of all use of Lutherglen by County Ordinance No. 11,855 . . . ." App. to Juris. Statement A13–A14. It too relied on the California Supreme Court's decision in *Agins* in rejecting the cause of action, declining appellant's invitation to reevaluate *Agins* in light of this Court's opinions in *San Diego Gas & Electric Co.* v. *San Diego*, 450 U. S. 621 (1981). The court found itself obligated to follow *Agins* "because the United States Supreme Court has not yet ruled on the question of whether a state may constitutionally limit the remedy for a taking to nonmonetary relief . . . ." App. to Juris. Statement A16. It accordingly affirmed the trial court's decision to strike the allegations concerning appellee's ordinance.[3] The California Supreme Court denied review.

[2] The trial court also granted defendants' motion for judgment on the pleadings on the second cause of action, based on cloud seeding. It limited trial on the first cause of action for damages under Cal. Govt. Code Ann. § 835 (West 1980), rejecting the inverse condemnation claim. At the close of plaintiff's evidence, the trial court granted a nonsuit on behalf of defendants, dismissing the entire complaint.

[3] The California Court of Appeal also affirmed the lower court's orders limiting the issues for trial on the first cause of action, granting a nonsuit on the issues that proceeded to trial, and dismissing the second cause of action—based on cloud seeding—to the extent it was founded on a theory

This appeal followed, and we noted probable jurisdiction. 478 U. S. 1003 (1986). Appellant asks us to hold that the California Supreme Court erred in *Agins* v. *Tiburon* in determining that the Fifth Amendment, as made applicable to the States through the Fourteenth Amendment, does not require compensation as a remedy for "temporary" regulatory takings—those regulatory takings which are ultimately invalidated by the courts.[4] Four times this decade, we have considered similar claims and have found ourselves for one reason or another unable to consider the merits of the *Agins* rule. See *MacDonald, Sommer & Frates* v. *Yolo County*, 477 U. S. 340 (1986); *Williamson County Regional Planning Comm'n* v. *Hamilton Bank*, 473 U. S. 172 (1985); *San Diego Gas & Electric Co., supra; Agins* v. *Tiburon, supra.* For the reasons explained below, however, we find the constitutional claim properly presented in this case, and hold that

of strict liability in tort. The court reversed the trial court's ruling that the second cause of action could not be maintained against the Flood Control District under the theory of inverse condemnation. The case was remanded for further proceedings on this claim.

These circumstances alone, apart from the more particular issues presented in takings cases and discussed in the text, require us to consider whether the pending resolution of further liability questions deprives us of jurisdiction because we are not presented with a "final judgmen[t] or decre[e]" within the meaning of 28 U. S. C. § 1257. We think that this case is fairly characterized as one "in which the federal issue, finally decided by the highest court in the State [in which a decision could be had], will survive and require decision regardless of the outcome of future state-court proceedings." *Cox Broadcasting Corp.* v. *Cohn*, 420 U. S. 469, 480 (1975). As we explain *infra*, at 311–313, the California Court of Appeal rejected appellant's federal claim that it was entitled to just compensation from the county for the taking of its property; this distinct issue of federal law will survive and require decision no matter how further proceedings resolve the issues concerning the liability of the Flood Control District for its cloud seeding operation.

[4] The Fifth Amendment provides "nor shall private property be taken for public use, without just compensation," and applies to the States through the Fourteenth Amendment. See *Chicago, B. & Q. R. Co.* v. *Chicago*, 166 U. S. 226 (1897).

on these facts the California courts have decided the compensation question inconsistently with the requirements of the Fifth Amendment.

I

Concerns with finality left us unable to reach the remedial question in the earlier cases where we have been asked to consider the rule of *Agins*. See *MacDonald, Sommer & Frates, supra*, at 351 (summarizing cases). In each of these cases, we concluded either that regulations considered to be in issue by the state court did not effect a taking, *Agins* v. *Tiburon*, 447 U. S., at 263, or that the factual disputes yet to be resolved by state authorities might still lead to the conclusion that no taking had occurred. *MacDonald, Sommer & Frates, supra*, at 351–353; *Williamson County, supra*, at 188–194; *San Diego Gas & Electric Co., supra*, at 631–632. Consideration of the remedial question in those circumstances, we concluded, would be premature.

The posture of the present case is quite different. Appellant's complaint alleged that "Ordinance No. 11,855 denies [it] all use of Lutherglen," and sought damages for this deprivation. App. 12, 49. In affirming the decision to strike this allegation, the Court of Appeal assumed that the complaint sought "damages for the uncompensated *taking* of all use of Lutherglen by County Ordinance No. 11,855." App. to Juris. Statement A13–A14 (emphasis added). It relied on the California Supreme Court's *Agins* decision for the conclusion that "the remedy for a *taking* [is limited] to nonmonetary relief . . . ." App. to Juris. Statement A16 (emphasis added). The disposition of the case on these grounds isolates the remedial question for our consideration. The rejection of appellant's allegations did not rest on the view that they were false. Cf. *MacDonald, Sommer & Frates, supra*, at 352–353, n. 8 (California court rejected allegation in the complaint that appellant was deprived of all beneficial use of its property); *Agins* v. *Tiburon, supra*, at 259, n. 6 (same). Nor did the court rely on the theory that regulatory measures such as

Ordinance No. 11,855 may never constitute a taking in the constitutional sense. Instead, the claims were deemed irrelevant solely because of the California Supreme Court's decision in *Agins* that damages are unavailable to redress a "temporary" regulatory taking.[5] The California Court of Appeal has thus held that, regardless of the correctness of appellant's claim that the challenged ordinance denies it "all use of Lutherglen," appellant may not recover damages until the ordinance is finally declared unconstitutional, and then only for any period after that declaration for which the county seeks to enforce it. The constitutional question pretermitted in our earlier cases is therefore squarely presented here.[6]

We reject appellee's suggestion that, regardless of the state court's treatment of the question, we must independently evaluate the adequacy of the complaint and resolve the

[5] It has been urged that the California Supreme Court's discussion of the compensation question in *Agins* v. *Tiburon* was dictum, because the court had already decided that the regulations could not work a taking. See *Martino* v. *Santa Clara Valley Water District*, 703 F. 2d 1141, 1147 (CA9 1983) ("extended dictum"). The Court of Appeal in this case considered and rejected the possibility that the compensation discussion in *Agins* was dictum. See App. to Juris. Statement A14–A15, quoting *Aptos Seascape Corp.* v. *County of Santa Cruz*, 138 Cal. App. 3d 484, 493, 188 Cal. Rptr. 191, 195 (1982) ("[I]t is apparent that the Supreme Court itself did not intend its discussion [of inverse condemnation as a remedy for a taking] to be considered dictum . . . and it has not been treated as such in subsequent Court of Appeal cases"). Whether treating the claim as a takings claim is inconsistent with the first holding of *Agins* is not a matter for our concern. It is enough that the court did so for us to reach the remedial question.

[6] Our cases have also required that one seeking compensation must "seek compensation through the procedures the State has provided for doing so" before the claim is ripe for review. *Williamson County Regional Planning Comm'n* v. *Hamilton Bank*, 473 U. S. 172, 194 (1985). It is clear that appellant met this requirement. Having assumed that a taking occurred, the California court's dismissal of the action establishes that "the inverse condemnation procedure is unavailable . . . ." *Id.*, at 197. The compensation claim is accordingly ripe for our consideration.

takings claim on the merits before we can reach the remedial question. However "cryptic"—to use appellee's description—the allegations with respect to the taking were, the California courts deemed them sufficient to present the issue. We accordingly have no occasion to decide whether the ordinance at issue actually denied appellant all use of its property[7] 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. See, *e. g.*, *Goldblatt* v. *Hempstead*, 369 U. S. 590 (1962); *Hadacheck* v. *Sebastian*, 239 U. S. 394 (1915); *Mugler* v. *Kansas*, 123 U. S. 623 (1887). These questions, of course, remain open for decision on the remand we direct today. We now turn to the question whether the Just Compensation Clause requires the government to pay for "temporary" regulatory takings.[8]

[7] Because the issue was not raised in the complaint or considered relevant by the California courts in their assumption that a taking had occurred, we also do not consider the effect of the county's permanent ordinance on the conclusions of the courts below. That ordinance, adopted in 1981 and reproduced at App. to Juris. Statement A32–A33, provides that "[a] person shall not use, erect, construct, move onto, or . . . alter, modify, enlarge or reconstruct any building or structure within the boundaries of a flood protection district except . . . [a]ccessory buildings and structures that will not substantially impede the flow of water, including sewer, gas, electrical, and water systems, approved by the county engineer . . . ; [a]utomobile parking facilities incidental to a lawfully established use; [and] [f]lood-control structures approved by the chief engineer of the Los Angeles County Flood Control District." County Code § 22.44.220.

[8] In addition to challenging the finality of the takings decision below, appellee raises two other challenges to our jurisdiction. First, going to both the appellate and certiorari jurisdiction of this Court under 28 U. S. C. § 1257, appellee alleges that appellant has failed to preserve for review any claim under federal law. Though the complaint in this case invoked only the California Constitution, appellant argued in the Court of Appeal that "recent Federal decisions . . . show the Federal Constitutional error in . . . *Agins*[v. *Tiburon*, 24 Cal. 3d 266, 598 P. 2d 25 (1979)]." App. to Appellant's Opposition to Appellee's Second Motion to Dismiss A13. The Court of Appeal, by applying the state rule of *Agins* to dismiss appel-

II

Consideration of the compensation question must begin with direct reference to the language of the Fifth Amendment, which provides in relevant part that "private property [shall not] be taken for public use, without just compensation." As its language indicates, and as the Court has frequently noted, this provision does not prohibit the taking of private property, but instead places a condition on the exercise of that power. See *Williamson County*, 473 U. S., at 194; *Hodel* v. *Virginia Surface Mining & Reclamation Assn., Inc.*, 452 U. S. 264, 297, n. 40 (1981); *Hurley* v.

lant's action, rejected on the merits the claim that the rule violated the United States Constitution. This disposition makes irrelevant for our purposes any deficiencies in the complaint as to federal issues. Where the state court has considered and decided the constitutional claim, we need not consider how or when the question was raised. *Manhattan Life Ins. Co.* v. *Cohen*, 234 U. S. 123, 134 (1914). Having succeeded in bringing the federal issue into the case, appellant preserved this question on appeal to the California Supreme Court, see App. to Appellant's Opposition to Appellee's Second Motion to Dismiss A14–A22, which declined to review its *Agins* decision. Accordingly, we find that the issue urged here was both raised and passed upon below.

Second, appellee challenges our appellate jurisdiction on the grounds that the case below did not draw "in question the validity of a statute of any state . . . ." 28 U. S. C. § 1257(2). There is, of course, no doubt that the ordinance at issue in this case is "a statute of [a] state" for purposes of § 1257. See *Erznoznik* v. *City of Jacksonville*, 422 U. S. 205, 207, n. 3 (1975). As construed by the state courts, the complaint in this case alleged that the ordinance, by denying all use of the property, worked a taking without providing for just compensation. We have frequently treated such challenges to zoning ordinances as challenges to their validity under the Federal Constitution, and see no reason to revise that approach here. See, *e. g.*, *MacDonald, Sommer & Frates* v. *Yolo County*, 477 U. S. 340 (1986); *Loretto* v. *Teleprompter Manhattan CATV Corp.*, 458 U. S. 419 (1982); *Agins* v. *Tiburon*, 447 U. S. 255 (1980); *Penn Central Transportation Co.* v. *New York City*, 438 U. S. 104 (1978). By holding that the failure to provide compensation was not unconstitutional, moreover, the California courts upheld the validity of the ordinance against the particular federal constitutional question at issue here—just compensation—and the case is therefore within the terms of § 1257(2).

Kincaid, 285 U. S. 95, 104 (1932); *Monongahela Navigation Co.* v. *United States*, 148 U. S. 312, 336 (1893); *United States* v. *Jones*, 109 U. S. 513, 518 (1883). This basic understanding of the Amendment makes clear that it is designed not to limit the governmental interference with property rights *per se*, but rather to secure *compensation* in the event of otherwise proper interference amounting to a taking. Thus, government action that works a taking of property rights necessarily implicates the "constitutional obligation to pay just compensation." *Armstrong* v. *United States*, 364 U. S. 40, 49 (1960).

We have recognized that a landowner is entitled to bring an action in inverse condemnation as a result of "'the self-executing character of the constitutional provision with respect to compensation . . . .'" *United States* v. *Clarke*, 445 U. S. 253, 257 (1980), quoting 6 P. Nichols, Eminent Domain § 25.41 (3d rev. ed. 1972). As noted in JUSTICE BRENNAN'S dissent in *San Diego Gas & Electric Co.*, 450 U. S., at 654–655, it has been established at least since *Jacobs* v. *United States*, 290 U. S. 13 (1933), that claims for just compensation are grounded in the Constitution itself:

> "The suits were based on the right to recover just compensation for property taken by the United States for public use in the exercise of its power of eminent domain. *That right was guaranteed by the Constitution.* The fact that condemnation proceedings were not instituted and that the right was asserted in suits by the owners did not change the essential nature of the claim. The form of the remedy did not qualify the right. It rested upon the Fifth Amendment. Statutory recognition was not necessary. A promise to pay was not necessary. Such a promise was implied because of the duty to pay imposed by the Amendment. *The suits were thus founded upon the Constitution of the United States.*" *Id.*, at 16. (Emphasis added.)

Jacobs, moreover, does not stand alone, for the Court has frequently repeated the view that, in the event of a taking, the compensation remedy is required by the Constitution. See, *e. g.*, *Kirby Forest Industries, Inc.* v. *United States*, 467 U. S. 1, 5 (1984); *United States* v. *Causby*, 328 U. S. 256, 267 (1946); *Seaboard Air Line R. Co.* v. *United States*, 261 U. S. 299, 304–306 (1923); *Monongahela Navigation, supra*, at 327.[9]

It has also been established doctrine at least since Justice Holmes' opinion for the Court in *Pennsylvania Coal Co.* v. *Mahon*, 260 U. S. 393 (1922), that "[t]he 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." *Id.*, at 415. While the typical taking occurs when the government acts to condemn property in the exercise of its power of eminent domain, the entire doctrine of inverse condemnation is predicated on the proposition that a taking may occur without such formal proceedings. In *Pumpelly* v. *Green Bay Co.*, 13 Wall. 166, 177–178 (1872), construing a provision in the Wisconsin Constitution identical to the Just Compensation Clause, this Court said:

> "It would be a very curious and unsatisfactory result, if . . . it shall be held that if the government refrains from the absolute conversion of real property to the uses of

[9]The Solicitor General urges that the prohibitory nature of the Fifth Amendment, see *supra*, at 314, combined with principles of sovereign immunity, establishes that the Amendment itself is only a limitation on the power of the Government to act, not a remedial provision. The cases cited in the text, we think, refute the argument of the United States that "the Constitution does not, of its own force, furnish a basis for a court to award money damages against the government." Brief for United States as *Amicus Curiae* 14. Though arising in various factual and jurisdictional settings, these cases make clear that it is the Constitution that dictates the remedy for interference with property rights amounting to a taking. See *San Diego Gas & Electric Co.* v. *San Diego*, 450 U. S. 621, 655, n. 21 (1981) (BRENNAN, J., dissenting), quoting *United States* v. *Dickinson*, 331 U. S. 745, 748 (1947).

> the public it can destroy its value entirely, can inflict irreparable and permanent injury to any extent, can, in effect, subject it to total destruction without making any compensation, because, in the narrowest sense of that word, it is not *taken* for the public use."

Later cases have unhesitatingly applied this principle. See, *e. g.*, *Kaiser Aetna* v. *United States*, 444 U. S. 164 (1979); *United States* v. *Dickinson*, 331 U. S. 745, 750 (1947); *United States* v. *Causby*, *supra*.

While the California Supreme Court may not have actually disavowed this general rule in *Agins*, we believe that it has truncated the rule by disallowing damages that occurred prior to the ultimate invalidation of the challenged regulation. The California Supreme Court justified its conclusion at length in the *Agins* opinion, concluding that:

> "In combination, the need for preserving a degree of freedom in the land-use planning function, and the inhibiting financial force which inheres in the inverse condemnation remedy, persuade us that on balance mandamus or declaratory relief rather than inverse condemnation is the appropriate relief under the circumstances." 24 Cal. 3d, at 276–277, 598 P. 2d, at 31.

We, of course, are not unmindful of these considerations, but they must be evaluated in the light of the command of the Just Compensation Clause of the Fifth Amendment. The Court has recognized in more than one case that the government may elect to abandon its intrusion or discontinue regulations. See, *e. g.*, *Kirby Forest Industries, Inc.* v. *United States*, *supra*; *United States* v. *Dow*, 357 U. S. 17, 26 (1958). Similarly, a governmental body may acquiesce in a judicial declaration that one of its ordinances has effected an unconstitutional taking of property; the landowner has no right under the Just Compensation Clause to insist that a "temporary" taking be deemed a permanent taking. But we have

not resolved whether abandonment by the government requires payment of compensation for the period of time during which regulations deny a landowner all use of his land.

In considering this question, we find substantial guidance in cases where the government has only temporarily exercised its right to use private property. In *United States* v. *Dow*, *supra*, at 26, though rejecting a claim that the Government may not abandon condemnation proceedings, the Court observed that abandonment "results in an alteration in the property interest taken—from [one of] full ownership to one of temporary use and occupation. . . . In such cases compensation would be measured by the principles normally governing the taking of a right to use property temporarily. See *Kimball Laundry Co.* v. *United States*, 338 U. S. 1 [1949]; *United States* v. *Petty Motor Co.*, 327 U. S. 372 [1946]; *United States* v. *General Motors Corp.*, 323 U. S. 373 [1945]." Each of the cases cited by the *Dow* Court involved appropriation of private property by the United States for use during World War II. Though the takings were in fact "temporary," see *United States* v. *Petty Motor Co.*, 327 U. S. 372, 375 (1946), there was no question that compensation would be required for the Government's interference with the use of the property; the Court was concerned in each case with determining the proper measure of the monetary relief to which the property holders were entitled. See *Kimball Laundry Co.* v. *United States*, 338 U. S. 1, 4–21 (1949); *Petty Motor Co.*, *supra*, at 377–381; *United States* v. *General Motors Corp.*, 323 U. S. 373, 379–384 (1945).

These cases reflect the fact that "temporary" takings which, as here, deny a landowner all use of his property, are not different in kind from permanent takings, for which the Constitution clearly requires compensation. Cf. *San Diego Gas & Electric Co.*, 450 U. S., at 657 (BRENNAN, J., dissenting) ("Nothing in the Just Compensation Clause suggests that 'takings' must be permanent and irrevocable"). It is axiomatic that the Fifth Amendment's just compensation provision is "designed to bar Government from forcing some

people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole." *Armstrong* v. *United States*, 364 U. S., at 49. See also *Penn Central Transportation Co.* v. *New York City*, 438 U. S. 104, 123–125 (1978); *Monongahela Navigation Co.* v. *United States*, 148 U. S., at 325. In the present case the interim ordinance was adopted by the County of Los Angeles in January 1979, and became effective immediately. Appellant filed suit within a month after the effective date of the ordinance and yet when the California Supreme Court denied a hearing in the case on October 17, 1985, the merits of appellant's claim had yet to be determined. The United States has been required to pay compensation for leasehold interests of shorter duration than this. The value of a leasehold interest in property for a period of years may be substantial, and the burden on the property owner in extinguishing such an interest for a period of years may be great indeed. See, *e. g.*, *United States* v. *General Motors*, *supra*. Where this burden results from governmental action that amounted to a taking, the Just Compensation Clause of the Fifth Amendment requires that the government pay the landowner for the value of the use of the land during this period. Cf. *United States* v. *Causby*, 328 U. S., at 261 ("It is the owner's loss, not the taker's gain, which is the measure of the value of the property taken"). Invalidation of the ordinance or its successor ordinance after this period of time, though converting the taking into a "temporary" one, is not a sufficient remedy to meet the demands of the Just Compensation Clause.

Appellee argues that requiring compensation for denial of all use of land prior to invalidation is inconsistent with this Court's decisions in *Danforth* v. *United States*, 308 U. S. 271 (1939), and *Agins* v. *Tiburon*, 447 U. S. 255 (1980). In *Danforth*, the landowner contended that the "taking" of his property had occurred prior to the institution of condemnation proceedings, by reason of the enactment of the Flood Control Act itself. He claimed that the passage of that Act had di-

minished the value of his property because the plan embodied in the Act required condemnation of a flowage easement across his property. The Court held that in the context of condemnation proceedings a taking does not occur until compensation is determined and paid, and went on to say that "[a] reduction or increase in the value of property may occur by reason of legislation for or the beginning or completion of a project," but "[s]uch changes in value are incidents of ownership. They cannot be considered as a 'taking' in the constitutional sense." *Danforth, supra,* at 285. *Agins* likewise rejected a claim that the city's preliminary activities constituted a taking, saying that "[m]ere fluctuations in value during the process of governmental decisionmaking, absent extraordinary delay, are 'incidents of ownership.'" See 447 U. S., at 263, n. 9.

But these cases merely stand for the unexceptional proposition that the valuation of property which has been taken must be calculated as of the time of the taking, and that depreciation in value of the property by reason of preliminary activity is not chargeable to the government. Thus, in *Agins,* we concluded that the preliminary activity did not work a taking. It would require a considerable extension of these decisions to say that no compensable regulatory taking may occur until a challenged ordinance has ultimately been held invalid.[10]

[10] *Williamson County Regional Planning Comm'n,* is not to the contrary. There, we noted that "no constitutional violation occurs until just compensation has been denied." 473 U. S., at 194, n. 13. This statement, however, was addressed to the issue whether the constitutional claim was ripe for review and did not establish that compensation is unavailable for government activity occurring before compensation is actually denied. Though, as a matter of law, an illegitimate taking might not occur until the government refuses to pay, the interference that effects a taking might begin much earlier, and compensation is measured from that time. See *Kirby Forest Industries, Inc.* v. *United States,* 467 U. S. 1, 5 (1984) (Where Government physically occupies land without condemnation proceedings, "the owner has a right to bring an 'inverse condemnation' suit to recover the value of the land *on the date of the intrusion by the Government*"). (Emphasis added.)

Nothing we say today is intended to abrogate the principle that the decision to exercise the power of eminent domain is a legislative function "'for Congress and Congress alone to determine.'" *Hawaii Housing Authority* v. *Midkiff,* 467 U. S. 229, 240 (1984), quoting *Berman* v. *Parker,* 348 U. S. 26, 33 (1954). Once a court determines that a taking has occurred, the government retains the whole range of options already available—amendment of the regulation, withdrawal of the invalidated regulation, or exercise of eminent domain. Thus we do not, as the Solicitor General suggests, "permit a court, at the behest of a private person, to require the . . . Government to exercise the power of eminent domain . . . ." Brief for United States as *Amicus Curiae* 22. We merely hold 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.

We also point out that the allegation of the complaint which we treat as true for purposes of our decision was that the ordinance in question denied appellant all use of its property. We limit our holding to the facts presented, and of course do not deal with the quite different questions that would arise in the case of normal delays in obtaining building permits, changes in zoning ordinances, variances, and the like which are not before us. We realize that even our present holding will undoubtedly lessen to some extent the freedom and flexibility of land-use planners and governing bodies of municipal corporations when enacting land-use regulations. But such consequences necessarily flow from any decision upholding a claim of constitutional right; many of the provisions of the Constitution are designed to limit the flexibility and freedom of governmental authorities, and the Just Compensation Clause of the Fifth Amendment is one of them. As Justice Holmes aptly noted more than 50 years ago, "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." *Pennsylvania Coal Co.* v. *Mahon,* 260 U. S., at 416.

Here we must assume that the Los Angeles County ordinance has denied appellant all use of its property for a considerable period of years, and we hold that invalidation of the ordinance without payment of fair value for the use of the property during this period of time would be a constitutionally insufficient remedy. The judgment of the California Court of Appeal is therefore reversed, and the case is remanded for further proceedings not inconsistent with this opinion.

It is so ordered.

JUSTICE STEVENS, with whom JUSTICE BLACKMUN and JUSTICE O'CONNOR join as to Parts I and III, dissenting.

One thing is certain. The Court's decision today will generate a great deal of litigation. Most of it, I believe, will be unproductive. But the mere duty to defend the actions that today's decision will spawn will undoubtedly have a significant adverse impact on the land-use regulatory process. The Court has reached out to address an issue not actually presented in this case, and has then answered that self-imposed question in a superficial and, I believe, dangerous way.

Four flaws in the Court's analysis merit special comment. First, the Court unnecessarily and imprudently assumes that appellant's complaint alleges an unconstitutional taking of Lutherglen. Second, the Court distorts our precedents in the area of regulatory takings when it concludes that all ordinances which would constitute takings if allowed to remain in effect permanently, necessarily also constitute takings if they are in effect for only a limited period of time. Third, the Court incorrectly assumes that the California Supreme Court has already decided that it will never allow a state court to grant monetary relief for a temporary regulatory taking, and

then uses that conclusion to reverse a judgment which is correct under the Court's own theories. Finally, the Court errs in concluding that it is the Takings Clause, rather than the Due Process Clause, which is the primary constraint on the use of unfair and dilatory procedures in the land-use area.

I

In the relevant portion of its complaint for inverse condemnation, appellant alleged:

"16

"On January 11, 1979, the County adopted Ordinance No. 11,855, which provides:

"'Section 1. A person shall not construct, reconstruct, place or enlarge any building or structure, any portion of which is, or will be, located within the outer boundary lines of the interim flood protection area located in Mill Creek Canyon, vicinity of Hidden Springs, as shown on Map No. 63 ML 52, attached hereto and incorporated herein by reference as though fully set forth.'

"17

"Lutherglen is within the flood protection area created by Ordinance No. 11,855.

"18

"Ordinance No. 11,855 denies First Church all use of Lutherglen." App. 49.

Because the Church sought only compensation, and did not request invalidation of the ordinance, the Superior Court granted a motion to strike those three paragraphs, and consequently never decided whether they alleged a "taking."[1]

[1] The Superior Court's entire explanation for its decision to grant the motion to strike reads as follows:

"However a careful rereading of the *Agins* case persuades the Court that when an ordinance, even a non-zoning ordinance, deprives a person of the total use of his lands, his challenge to the ordinance is by way of declaratory relief or possibly mandamus." App. 26.

The Superior Court granted the motion to strike on the basis of the rule announced in *Agins* v. *Tiburon*, 24 Cal. 3d 266, 598 P. 2d 25 (1979). Under the rule of that case, a property owner who claims that a land-use restriction has taken property for public use without compensation must file an action seeking invalidation of the regulation, and may not simply demand compensation. The Court of Appeal affirmed on the authority of *Agins* alone,[2] also without holding that the complaint had alleged a violation of either the California Constitution or the Federal Constitution. At most, it assumed, *arguendo*, that a constitutional violation had been alleged.

This Court clearly has the authority to decide this case by ruling that the complaint did not allege a taking under the Federal Constitution,[3] and therefore to avoid the novel con-

[2] The Court of Appeal described the *Agins* case in this way:

"In *Agins* v. *City of Tiburon* (1979) 24 Cal. 3d 266, the plaintiffs filed an action for damages in inverse condemnation and for declaratory relief against the City of Tiburon, which had passed a zoning ordinance in part for 'open space' that would have permitted a maximum of five or a minimum of one dwelling units on the plaintiffs' five acres. A demurrer to both causes of action was sustained, and a judgment of dismissal was entered. The California Supreme Court affirmed the dismissal, finding that the ordinance did not on its face 'deprive the landowner of substantially all reasonable use of his property,' (*Agins, supra*, 24 Cal. 3d, at p. 277), and did not 'unconstitutionally interfere with plaintiff's entire use of the land or impermissibly decrease its value' *(ibid.)*. The Supreme Court further said that 'mandamus or declaratory relief rather than inverse condemnation [was] the appropriate relief under the circumstances.' *(Ibid.)*." App. to Juris. Statement A14.

[3] "The familiar rule of appellate court procedure in federal courts [is] that, without a cross-petition or appeal, a respondent or appellee may support the judgment in his favor upon grounds different from those upon which the court below rested its decision." *McGoldrick* v. *Compagnie Generale*, 309 U. S. 430, 434 (1940), citing *United States* v. *American Railway Express Co.*, 265 U. S. 425, 435 (1924); see also *Dandridge* v. *Williams*, 397 U. S. 471, 475–476, n. 6 (1970). It is also well settled that this Court is not bound by a state court's determination (much less an assumption) that a complaint states a federal claim. See *Staub* v. *City of Baxley*, 355 U. S. 313, 318 (1958); *First National Bank of Guthrie Center* v. *Anderson*,

stitutional issue that it addresses. Even though I believe the Court's lack of self-restraint is imprudent, it 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. No matter whether the regulation is treated as one that deprives appellant of its property on a permanent or temporary basis, this Court's precedents demonstrate that the type of regulatory program at issue here cannot constitute a taking.

"Long ago it was recognized that 'all property in this country is held under the implied obligation that the owner's use of it shall not be injurious to the community.'" *Keystone Bituminous Coal Assn.* v. *DeBenedictis*, 480 U. S. 470, 491–492 (1987), quoting *Mugler* v. *Kansas*, 123 U. S. 623, 665 (1887). Thus, in order to protect the health and safety of the community,[4] government may condemn unsafe structures,

269 U. S. 341, 346 (1926). Especially in the takings context, where the details of the deprivation are so significant, the economic drain of litigation on public resources is "too great to permit cases to go forward without a more substantial indication that a constitutional violation may have occurred." *Pace Resources, Inc.* v. *Shrewsbury Township*, 808 F. 2d 1023, 1026 (CA3), cert. denied, *post*, p. 906.

[4] See *Keystone Bituminous Coal Assn.* v. *DeBenedictis*, 480 U. S. 470, 485–493 (1987) (coal mine subsidence); *Goldblatt* v. *Hempstead*, 369 U. S. 590 (1962) (rock quarry excavation); *Miller* v. *Schoene*, 276 U. S. 272 (1928) (infectious tree disease); *Hadacheck* v. *Sebastian*, 239 U. S. 394 (1915) (emissions from factory); *Mugler* v. *Kansas*, 123 U. S. 623 (1887) (intoxicating liquors); see also *Penn Central Transportation Co.* v. *New York City*, 438 U. S. 104, 145 (1978) (REHNQUIST, J., dissenting) ("The question is whether the forbidden use is dangerous to the safety, health, or welfare of others"). Many state courts have reached the identical conclusion. See *Keystone Bituminous*, *supra*, at 492, n. 22 (citing cases).

In *Keystone Bituminous* we explained that one of the justifications for the rule that health and safety regulation cannot constitute a taking is that individuals hold their property subject to the limitation that they not use it in dangerous or noxious ways. 480 U. S., at 491, n. 20. The Court's recent decision in *United States* v. *Cherokee Nation of Oklahoma*, 480 U. S. 700 (1987), adds support to this thesis. There, the Court reaffirmed the traditional rule that when the United States exercises its power to assert a

may close unlawful business operations, may destroy infected trees, and surely may restrict access to hazardous areas—for example, land on which radioactive materials have been discharged, land in the path of a lava flow from an erupting volcano, or land in the path of a potentially life-threatening flood.[5] When a governmental entity imposes these types of health and safety regulations, it may not be "burdened with the condition that [it] 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 upon the community." *Mugler*, *supra*, at 668–669; see generally *Keystone Bituminous*, *supra*, at 485–493.

In this case, the legitimacy of the county's interest in the enactment of Ordinance No. 11,855 is apparent from the face of the ordinance and has never been challenged.[6] It was en-

navigational servitude it does not "take" property because the damage sustained results "from the lawful exercise of a power to which the interests of riparian owners have always been subject." *Id.*, at 704.

[5] See generally Plater, The Takings Issue in a Natural Setting: Floodlines and the Police Power, 52 Tex. L. Rev. 201 (1974); F. Bosselman, D. Callies, & J. Banta, The Taking Issue 147–155 (1973).

[6] It is proper to take judicial notice of the ordinance. It provides, in relevant part:

"ORDINANCE NO. 11,855.

"An interim ordinance temporarily prohibiting the construction, reconstruction, placement or enlargement of any building or structure within any portion of the interim flood protection area delineated within Mill Creek, vicinity of Hidden Springs, declaring the urgency thereof and that this ordinance shall take immediate effect.

"The Board of Supervisors of the County of Los Angeles does ordain as follows:

. . . . .

"Section 4. Studies are now under way by the Department of Regional Planning in connection with the County Engineer and the Los Angeles County Flood Control District, to develop permanent flood protection areas for Mill Creek and other specific areas as part of a comprehensive flood plain management project. Mapping and evaluation of flood data has progressed to the point where an interim flood protection area in Mill

acted as an "interim" measure "temporarily prohibiting" certain construction in a specified area because the County Board believed the prohibition was "urgently required for the immediate preservation of the public health and safety." Even if that were not true, the strong presumption of constitutionality that applies to legislative enactments certainly requires one challenging the constitutionality of an ordinance of this kind to allege some sort of improper purpose or insufficient justification in order to state a colorable federal claim for relief. A presumption of validity is particularly appropriate in this case because the complaint did not even allege that the ordinance is invalid, or pray for a declaration of invalidity or an injunction against its enforcement.[7] Nor did it allege any facts indicating how the ordinance interfered with any future use of the property contemplated or planned by appellant. In light of the tragic flood and the loss of life that pre-

Creek can be designated. Development is now occurring which will encroach within the limits of the permanent flood protection area and which will be incompatible with the anticipated uses to be permitted within the permanent flood protection area. If this ordinance does not take immediate effect, said uses will be established prior to the contemplated ordinance amendment, and once established may continue after such amendment has been made because of the provisions of Article 9 of Chapter 5 of Ordinance No. 1494.

"By reason of the foregoing facts this ordinance is urgently required for the immediate preservation of the public health and safety, and the same shall take effect immediately upon passage thereof." App. to Juris. Statement 31–32.

[7] Because the complaint did not pray for an injunction against enforcement of the ordinance, or a declaration that it is invalid, but merely sought monetary relief, it is doubtful that we have appellate jurisdiction under 28 U. S. C. § 1257(2). Section 1257(2) provides:

"(2) By appeal, where is drawn in question the validity of a statute of any state on the ground of its being repugnant to the Constitution, treaties or laws of the United States, and the decision is in favor of its validity."

Even if we do not have appellate jurisdiction, however, presumably the Court would exercise its certiorari jurisdiction pursuant to 28 U. S. C. § 1257(3).

inquiry has long been used in identifying that line. As Justice Holmes put it: "Government hardly could go on if to some extent values incident to property could not be diminished without paying for every such change in the general law." *Pennsylvania Coal, supra,* at 413. It is this basic distinction between regulatory and physical takings that the Court ignores today.

Regulations are three dimensional; they have depth, width, and length. As for depth, regulations define the extent to which the owner may not use the property in question. With respect to width, regulations define the amount of property encompassed by the restrictions. Finally, and for purposes of this case, essentially, regulations set forth the duration of the restrictions. It is obvious that no one of these elements can be analyzed alone to evaluate the impact of a regulation, and hence to determine whether a taking has occurred. For example, in *Keystone Bituminous* we declined to focus in on any discrete segment of the coal in the petitioners' mines, but rather looked to the effect that the restriction had on their entire mining project. See 480 U. S., at 493–502; see also *Penn Central Transportation Co.* v. *New York City,* 438 U. S. 104, 137 (1978) (looking at owner's other buildings). Similarly, in *Penn Central,* the Court concluded that it was error to focus on the nature of the uses which were prohibited without also examining the many profitable uses to which the property could still be put. *Id.,* at 130–131; see also *Agins, supra,* at 262–263; *Andrus* v. *Allard,* 444 U. S. 51, 64–67 (1979). Both of these factors are essential to a meaningful analysis of the economic effect that regulations have on the value of property and on an owner's reasonable investment-based expectations with respect to the property.

Just as it would be senseless to ignore these first two factors in assessing the economic effect of a regulation, one cannot conduct the inquiry without considering the duration of the restriction. See generally Williams, Smith, Siemon,

Mandelker, & Babcock, The White River Junction Manifesto, 9 Vt. L. Rev. 193, 215–218 (1984). For example, while I agreed with the Chief Justice's view that the permanent restriction on building involved in *Penn Central* constituted a taking, I assume that no one would have suggested that a temporary freeze on building would have also constituted a taking. Similarly, I am confident that even the dissenters in *Keystone Bituminous* would not have concluded that the restriction on bituminous coal mining would have constituted a taking had it simply required the mining companies to delay their operations until an appropriate safety inspection could be made.

On the other hand, I am willing to assume that some cases may arise in which a property owner can show that prospective invalidation of the regulation cannot cure the taking—that the temporary operation of a regulation has caused such a significant diminution in the property's value that compensation must be afforded for the taking that has already occurred. For this ever to happen, the restriction on the use of the property would not only have to be a substantial one, but it would also have to remain in effect for a significant percentage of the property's useful life. In such a case an application of our test for regulatory takings would obviously require an inquiry into the duration of the restriction, as well as its scope and severity. See *Williamson County Regional Planning Comm'n* v. *Hamilton Bank,* 473 U. S. 172, 190–191 (1985) (refusing to evaluate taking claim when the long-term economic effects were uncertain because it was not clear that restrictions would remain in effect permanently).

The cases that the Court relies upon for the proposition that there is no distinction between temporary and permanent takings, see *ante,* at 318, are inapposite, for they all deal with physical takings—where the diminution of value test is inapplicable.[8] None of those cases is controversial; the state

[8] In *United States* v. *Dow,* 357 U. S. 17 (1958), the United States had "entered into physical possession and began laying the pipe line through

certainly may not occupy an individual's home for a month and then escape compensation by leaving and declaring the occupation "temporary." But what does that have to do with the proper inquiry for regulatory takings? Why should there be a constitutional distinction between a permanent restriction that only reduces the economic value of the property by a fraction—perhaps one-third—and a restriction that merely postpones the development of a property for a fraction of its useful life—presumably far less than a third? In the former instance, no taking has occurred; in the latter case, the Court now proclaims that compensation for a taking must be provided. The Court makes no effort to explain these irreconcilable results. Instead, without any attempt to fit its proclamation into our regulatory takings cases, the Court boldly announces that once a property owner makes out a claim that a regulation would constitute a taking if allowed to stand, then he or she is entitled to damages for the period of time between its enactment and its invalidation.

Until today, we have repeatedly rejected the notion that all temporary diminutions in the value of property automatically activate the compensation requirement of the Takings Clause. In *Agins*, we held:

> "The State Supreme Court correctly rejected the contention that the municipality's good-faith planning activities, which did not result in successful prosecution of an eminent domain claim, so burdened the appellants' enjoyment of their property as to constitute a taking. . . . Even if the appellants' ability to sell their property was

the tract." *Id.*, at 19. In *Kimball Laundry Co.* v. *United States*, 338 U. S. 1 (1949), the United States Army had taken possession of the laundry plant including all "the facilities of the company, except delivery equipment." *Id.*, at 3. In *United States* v. *Petty Motor Co.*, 327 U. S. 372 (1946), the United States acquired by condemnation a building occupied by tenants and ordered the tenants to vacate. In *United States* v. *General Motors Corp.*, 323 U. S. 373 (1945), the Government occupied a portion of a leased building.

> limited during the pendency of the condemnation proceeding, the appellants were free to sell or develop their property when the proceedings ended. Mere fluctuations in value during the process of governmental decisionmaking, absent extraordinary delay, are 'incidents of ownership. They cannot be considered as a "taking" in the constitutional sense.'" 447 U. S., at 263, n. 9, quoting *Danforth* v. *United States*, 308 U. S. 271, 285 (1939).[9]

Our more recent takings cases also cut against the approach the Court now takes. In *Williamson*, *supra*, and *MacDonald, Sommer & Frates* v. *Yolo County*, 477 U. S. 340 (1986), we held that we could not review a taking claim as long as the property owner had an opportunity to obtain a variance or some other form of relief from the zoning authorities that would permit the development of the property to go forward. See *Williamson*, *supra*, at 190–191; *Yolo County*, *supra*, at 348–353. Implicit in those holdings was the assumption that the temporary deprivation of all use of the property would not constitute a taking if it would be adequately remedied by a belated grant of approval of the developer's plans. See Sallet, Regulatory "Takings" and Just Compensation: The Supreme Court's Search for a Solution Continues, 18 Urb. Law. 635, 653 (1986).

[9] The Court makes only a feeble attempt to explain why the holdings in *Agins* and *Danforth* are not controlling here. It is tautological to claim that the cases stand for the "unexceptional proposition that the valuation of property which has been taken must be calculated *as of the time of the taking*." *Ante*, at 320 (emphasis added). The question in *Danforth* was when the taking occurred. The question addressed in the relevant portion of *Agins* was whether the temporary fluctuations in value themselves constituted a taking. In rejecting the claims in those cases, the Court necessarily held that the temporary effects did not constitute takings of their own right. The cases are therefore directly on point here. If even the temporary effects of a decision to condemn, the ultimate taking, do not ordinarily constitute a taking in and of themselves, then, *a fortiori*, the temporary effects of a regulation should not.

The Court's reasoning also suffers from severe internal inconsistency. Although it purports to put to one side "normal delays in obtaining building permits, changes in zoning ordinances, variances and the like," *ante*, at 321, the Court does not explain why there is a constitutional distinction between a total denial of all use of property during such "normal delays" and an equally total denial for the same length of time in order to determine whether a regulation has "gone too far" to be sustained unless the government is prepared to condemn the property. Precisely the same interference with a real estate developer's plans may be occasioned by protracted proceedings which terminate with a zoning board's decision that the public interest would be served by modification of its regulation and equally protracted litigation which ends with a judicial determination that the existing zoning restraint has "gone too far," and that the board must therefore grant the developer a variance. The Court's analysis takes no cognizance of these realities. Instead, it appears to erect an artificial distinction between "normal delays" and the delays involved in obtaining a court declaration that the regulation constitutes a taking.[10]

In my opinion, the question whether a "temporary taking" has occurred should not be answered by simply looking at the reason a temporary interference with an owner's use of his property is terminated.[11] Litigation challenging the validity of a land-use restriction gives rise to a delay that is just as "normal" as an administrative procedure seeking a variance

[10] Whether delays associated with a judicial proceeding that terminates with a holding that a regulation was not authorized by state law would be a "normal delay" or a temporary taking depends, I suppose, on the unexplained rationale for the Court's artificial distinction.

[11] "[T]he Constitution measures a taking of property not by what a State says, or what it intends, but by what it *does*." *Hughes* v. *Washington*, 389 U. S. 290, 298 (1967) (Stewart, J., concurring). The fact that the effects of the regulation are stopped by judicial, as opposed to administrative decree, should not affect the question whether compensation is required.

or an approval of a controversial plan.[12] Just because a plaintiff can prove that a land-use restriction would constitute a taking if allowed to remain in effect permanently does not mean that he or she can also prove that its temporary application rose to the level of a constitutional taking.

III

The Court recognizes that the California courts have the right to adopt invalidation of an excessive regulation as the appropriate remedy for the permanent effects of overburdensome regulations, rather than allowing the regulation to stand and ordering the government to afford compensation for the permanent taking. See *ante*, at 319; see also *Yolo County*, *supra*, at 362–363, and n. 4 (WHITE, J., dissenting); *San Diego Gas & Electric Co.* v. *San Diego*, 450 U. S. 621, 657 (1981) (BRENNAN, J., dissenting). The difference between these two remedies is less substantial than one might assume. When a court invalidates a regulation, the Legislative or Executive Branch must then decide whether to condemn the property in order to proceed with the regulatory scheme. On the other hand, if the court requires compensation for a permanent taking, the Executive or Legislative Branch may still repeal the regulation and thus prevent the permanent taking. The difference, therefore, is only in what will happen in the case of Legislative or Executive inertia. Many scholars have debated the respective merits of the alternative approaches in light of separation-of-powers concerns,[13] but our only concern is with a *state court's* decision on

[12] States may surely provide a forum in their courts for review of general challenges to zoning ordinances and other regulations. Such a procedure then becomes part of the "normal" process. Indeed, when States have set up such procedures in their courts, we have required resort to those processes before considering takings claims. See *Williamson County Regional Planning Comm'n* v. *Hamilton Bank*, 473 U. S. 172 (1985).

[13] See, *e. g.*, Mandelker, Land Use Takings: The Compensation Issue, 8 Hastings Const. L. Q. 491 (1981); Williams, Smith, Siemon, Mandelker, & Babcock, The White River Junction Manifesto, 9 Vt. L. Rev. 193, 233–234

which procedure it considers more appropriate. California is fully competent to decide how it wishes to deal with the separation-of-powers implications of the remedy it routinely uses.[14]

Once it is recognized that California may deal with the permanent taking problem by invalidating objectionable regulations, it becomes clear that the California Court of Appeal's decision in this case should be affirmed. Even if this Court is correct in stating that one who makes out a claim for a permanent taking is automatically entitled to some compensation for the temporary aspect of the taking as well, the States still have the right to deal with the permanent aspect of a taking by invalidating the regulation. That is all that the California courts have done in this case. They have refused to proceed upon a complaint which sought only damages, and which did not contain a request for a declaratory invalidation of the regulation, as clearly required by California precedent.

The Court seriously errs, therefore, when it claims that the California court held that "a landowner who claims that his property has been 'taken' by a land-use regulation may not recover damages for the time before it is finally determined that the regulation constitutes a 'taking' of his property." *Ante*, at 306–307. Perhaps the Court discerns such a practice from some of the California Supreme Court's earlier decisions, but that is surely no reason for reversing a procedural judgment in a case in which the dismissal of the complaint was entirely consistent with an approach that the

(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 Loyola (LA) L. Rev. 685, 704–712 (1986); Comment, Just Compensation or Just Invalidation: The Availability of a Damages Remedy in Challenging Land Use Regulations, 29 UCLA L. Rev. 711, 725–726 (1982).

[14] For this same reason, the parties' and *amici*'s conflicting claims about whether this Court's cases, such as *Hurley* v. *Kincaid*, 285 U. S. 95 (1932), provide that compensation is a less intrusive remedy than invalidation, are not relevant here.

Court endorses. Indeed, I am not all that sure how the California courts would deal with a landowner who seeks both invalidation of the regulation and damages for the temporary taking that occurred prior to the requested invalidation.

As a matter of regulating the procedure in its own state courts, the California Supreme Court has decided that mandamus or declaratory relief rather than inverse condemnation provides "the appropriate relief" for one who challenges a regulation as a taking. *Agins* v. *Tiburon*, 24 Cal. 3d, at 277, 598 P. 2d, at 31. This statement in *Agins* can be interpreted in two quite different ways. First, it may merely require the property owner to exhaust his equitable remedies before asserting any claim for damages. Under that reading, a postponement of any consideration of monetary relief, or even a requirement that a "temporary regulatory taking" claim be asserted in a separate proceeding after the temporary interference has ended, would not violate the Federal Constitution. Second, the *Agins* opinion may be read to indicate that California courts will never award damages for a temporary regulatory taking.[15] Even if we assume that such a rigid rule would bar recovery in the California courts in a few meritorious cases, we should not allow a litigant to challenge the rule unless his complaint contains allegations explaining why declaratory relief would not provide him with an adequate remedy, and unless his complaint at least complies with the California rule of procedure to the extent that the rule is clearly legitimate. Since the First Amendment is not implicated, the fact that California's rule may be somewhat "overbroad" is no reason for permitting a party to complain about the impact of the rule on other property owners

[15] The California Supreme Court's discussion of the policy implications in *Agins* is entirely consistent with the view that the court was choosing between remedies (invalidation or compensation) with respect to the permanent effect of a regulation, and was not dealing with the temporary taking question at all. Subsequent California Supreme Court cases applying the *Agins* rule do not shed light on this question.

who actually file complaints that call California's rule into question.

In any event, the Court has no business speculating on how the California courts will deal with this problem when it is presented to them. Despite the many cases in which the California courts have applied the *Agins* rule, the Court can point to no case in which application of the rule has deprived a property owner of his rightful compensation.

In criminal litigation we have steadfastly adhered to the practice of requiring the defendant to exhaust his or her state remedies before collaterally attacking a conviction based on a claimed violation of the Federal Constitution. That requirement is supported by our respect for the sovereignty of the several States and by our interest in having federal judges decide federal constitutional issues only on the basis of fully developed records. See generally *Rose* v. *Lundy*, 455 U. S. 509 (1982). The States' interest in controlling land-use development and in exploring all the ramifications of a challenge to a zoning restriction should command the same deference from the federal judiciary. See *Williamson*, 473 U. S., at 194–197. And our interest in avoiding the decision of federal constitutional questions on anything less than a fully informed basis counsels against trying to decide whether equitable relief has forestalled a temporary taking until after we know what the relief is. In short, even if the California courts adhere to a rule of never granting monetary relief for a temporary regulatory taking, I believe we should require the property owner to exhaust his state remedies before confronting the question whether the net result of the state proceedings has amounted to a temporary taking of property without just compensation. In this case, the Church should be required to pursue an action demanding invalidation of the ordinance prior to seeking this Court's review of California's procedures.[16]

[16] In the habeas corpus context, we have held that a prisoner has not exhausted his state remedies when the state court refuses to consider his claim because he has not sought the appropriate state remedy. See *Woods* v. *Nierstheimer*, 328 U. S. 211, 216 (1946); *Ex parte Hawk*, 321 U. S. 114, 116–117 (1944). This rule should be applied with equal force here.

The appellant should not be permitted to circumvent that requirement by omitting any prayer for equitable relief from its complaint. I believe the California Supreme Court is justified in insisting that the owner recover as much of its property as possible before foisting any of it on an unwilling governmental purchaser. The Court apparently agrees with this proposition. Thus, even on the Court's own radical view of temporary regulatory takings announced today, the California courts had the right to strike this complaint.

IV

There is, of course, a possibility that land-use planning, like other forms of regulation, will unfairly deprive a citizen of the right to develop his property at the time and in the manner that will best serve his economic interests. The "regulatory taking" doctrine announced in *Pennsylvania Coal* places a limit on the permissible scope of land-use restrictions. In my opinion, however, it is the Due Process Clause rather than that doctrine that protects the property owner from improperly motivated, unfairly conducted, or unnecessarily protracted governmental decisionmaking. Violation of the procedural safeguards mandated by the Due Process Clause will give rise to actions for damages under 42 U. S. C. § 1983, but I am not persuaded that delays in the development of property that are occasioned by fairly conducted administrative or judicial proceedings are compensable, except perhaps in the most unusual circumstances. On the contrary, I am convinced that the public interest in having important governmental decisions made in an orderly, fully informed way amply justifies the temporary burden on the citizen that is the inevitable by-product of democratic government.

As I recently wrote:

> "The Due Process Clause of the Fourteenth Amendment requires a State to employ fair procedures in the administration and enforcement of all kinds of regulations. It does not, however, impose the utopian requirement that enforcement action may not impose any cost upon the citizen unless the government's position is completely vindicated. We must presume that regulatory bodies such as zoning boards, school boards, and health boards, generally make a good-faith effort to advance the public interest when they are performing their official duties, but we must also recognize that they will often become involved in controversies that they will ultimately lose. Even though these controversies are costly and temporarily harmful to the private citizen, as long as fair procedures are followed, I do not believe there is any basis in the Constitution for characterizing the inevitable by-product of every such dispute as a 'taking' of private property." *Williamson, supra*, at 205 (opinion concurring in judgment).

The policy implications of today's decision are obvious and, I fear, far reaching. Cautious local officials and land-use planners may avoid taking any action that might later be challenged and thus give rise to a damages action. Much important regulation will never be enacted,[17] even perhaps in

[17] It is no answer to say that "[a]fter all, if a policeman must know the Constitution, then why not a planner?" *San Diego Gas & Electric Co.* v. *San Diego*, 450 U. S. 621, 661, n. 26 (1981) (BRENNAN, J., dissenting). To begin with, the Court has repeatedly recognized that it itself cannot establish any objective rules to assess when a regulation becomes a taking. See *Hodel* v. *Irving*, 481 U. S. 704, 713–714 (1987); *Andrus* v. *Allard*, 444 U. S. 51, 65 (1979); *Penn Central*, 438 U. S., at 123–124. How then can it demand that land planners do any better? However confusing some of our criminal procedure cases may be, I do not believe they have been as open-ended and standardless as our regulatory takings cases are. As one commentator concluded: "The chaotic state of taking law makes it especially likely that availability of the damages remedy will induce land-use planning officials to stay well back of the invisible line that they dare not cross." Johnson, Compensation for Invalid Land-Use Regulations, 15 Ga. L. Rev. 559, 594 (1981); see also Sallet, The Problem of Municipal Liability for Zoning and Land-Use Regulation, 31 Cath. U. L. Rev. 465, 478 (1982); *Charles* v. *Diamond*, 41 N. Y. 2d 318, 331–332, 360 N. E. 2d 1295, 1305 (1977); *Allen* v. *City and County of Honolulu*, 58 Haw. 432, 439, 571 P. 2d 328, 331 (1977).

Another critical distinction between police activity and land-use planning is that not every missed call by a policeman gives rise to civil liability; police officers enjoy individual immunity for actions taken in good faith. See *Harlow* v. *Fitzgerald*, 457 U. S. 800 (1982); *Davis* v. *Scherer*, 468 U. S. 183 (1984). Moreover, municipalities are not subject to civil liability for police officers' routine judgment errors. See *Monell* v. *New York City Dept. of Social Services*, 436 U. S. 658 (1978). In the land regulation context, however, I am afraid that any decision by a competent regulatory body may establish a "policy or custom" and give rise to liability after today.

the health and safety area. Were this result mandated by the Constitution, these serious implications would have to be ignored. But the loose cannon the Court fires today is not only unattached to the Constitution, but it also takes aim at a long line of precedents in the regulatory takings area. It would be the better part of valor simply to decide the case at hand instead of igniting the kind of litigation explosion that this decision will undoubtedly touch off.

I respectfully dissent.