

NLWJC- Kagan

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Takings [3]

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 As originally enacted, §207 provided that no undivided fractional interest in such lands shall descend by intestacy or devise, but, instead, shall escheat to the tribe “if such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 gen-

eral 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 latter’s 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 *amicus 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 descendent [*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.<sup>1</sup>

<sup>1</sup>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.<sup>2</sup> Cf. 25 U. S. C.

<sup>2</sup>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.<sup>1</sup> 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.<sup>2</sup>

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

<sup>1</sup>S. 503, 97th Cong., 2d Sess. (1982).

<sup>2</sup>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).<sup>3</sup> 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<sup>4</sup>] by intestacy or devise but shall escheat to that tribe if such interest represents 2 per centum or less of the

<sup>3</sup>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.

<sup>4</sup>The word “descendent”—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 “descendent” in §207. The Senate Report accompanying the Act described how “descendent” 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.”<sup>6</sup>

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

<sup>6</sup> 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.<sup>6</sup>

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.<sup>7</sup> 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  $\frac{1}{3645}$  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.

<sup>6</sup>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.

<sup>7</sup>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 latter's 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.<sup>8</sup> 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.<sup>9</sup> I had thought it well settled

<sup>8</sup>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.

<sup>9</sup>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.<sup>10</sup> In order to

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

<sup>10</sup>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.<sup>11</sup> 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

<sup>11</sup> 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,<sup>12</sup>

<sup>12</sup> "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.<sup>13</sup> 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

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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.

<sup>13</sup>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.<sup>14</sup>

Critical to our decision in *Texaco* was the fact that an owner could readily avoid the risk of abandonment in a variety of ways,<sup>15</sup> 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

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<sup>14</sup>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*.

<sup>15</sup>See n. 12, *supra*.

STEVENS, J., concurring in judgment 481 U. S.

control or disposition of such property." 454 U. S., at 531-532.<sup>16</sup>

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

<sup>16</sup> 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.

704

STEVENS, J., concurring in judgment

opportunity to arrange for the consolidation of their respective fractional interests with those of other owners.<sup>17</sup> 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).<sup>18</sup>

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.<sup>19</sup>

<sup>17</sup> 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.

<sup>18</sup> 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*).

<sup>19</sup> 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.<sup>20</sup> 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.

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.

<sup>20</sup> 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.

Per Curiam

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.

\*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, PENNSYL-  
VANIA DEPARTMENT OF ENVIRON-  
MENTAL 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.<sup>1</sup> It often causes substantial dam-

<sup>1</sup>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, Moebis, 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.<sup>2</sup> 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.<sup>3</sup>

Despite what their name may suggest, neither of the “full extraction” mining methods currently used in western Pennsylvania<sup>4</sup> 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.<sup>5</sup> 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).

<sup>2</sup>“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].

<sup>3</sup>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.

<sup>4</sup>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.

<sup>5</sup>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.<sup>6</sup> Since 1966 the DER has ap-

<sup>6</sup>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.<sup>7</sup> 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.<sup>8</sup>

"(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).

<sup>7</sup>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).

<sup>8</sup>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 im-

plemented 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.<sup>9</sup> 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 Subsidence Act

<sup>9</sup>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<sup>10</sup> 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-

<sup>10</sup> "[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.<sup>11</sup> 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-

<sup>11</sup>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."<sup>12</sup> 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.<sup>13</sup>

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.

<sup>12</sup> "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.

<sup>13</sup> "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<sup>14</sup> set forth in the statute were genuine, substantial, and legitimate, and we have no reason to conclude otherwise.<sup>15</sup>

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

<sup>14</sup>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).

<sup>15</sup>"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.<sup>16</sup>

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

<sup>16</sup>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.<sup>17</sup> 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.<sup>18</sup> In *Mugler v. Kansas*, 123 U. S. 623

<sup>17</sup> 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.

<sup>18</sup> 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.

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when interference arises from some public program adjusting the benefits and burdens of economic life to promote the common good.” *Penn Central Transportation 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.<sup>19</sup>

<sup>19</sup>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*.<sup>20</sup> 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.<sup>21</sup> 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

<sup>20</sup>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).

<sup>21</sup>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.<sup>22</sup> 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

<sup>22</sup> 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.<sup>23</sup>

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:

<sup>23</sup> 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.<sup>24</sup> 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

<sup>24</sup>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).<sup>25</sup> 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.

<sup>25</sup>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.<sup>26</sup> 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.<sup>27</sup>

<sup>26</sup> 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.

<sup>27</sup> 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.<sup>28</sup> 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*.

<sup>28</sup> 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.<sup>29</sup>

#### 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

<sup>29</sup> 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,<sup>30</sup> 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

<sup>30</sup> "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.<sup>31</sup>

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

<sup>31</sup> 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,<sup>32</sup> 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).

<sup>32</sup> 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.<sup>33</sup> 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 peti-

<sup>33</sup> 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.

tioners 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.

## 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.*<sup>1</sup> 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

<sup>1</sup> 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.<sup>2</sup> 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

<sup>2</sup>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 passage-way, 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*.<sup>3</sup>

## 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-*

<sup>3</sup>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.<sup>4</sup>

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

<sup>4</sup> *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.<sup>5</sup> 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

<sup>5</sup>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.<sup>6</sup> 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-

<sup>6</sup> 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.<sup>7</sup> 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.<sup>8</sup>

#### 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

<sup>7</sup> 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).

<sup>8</sup> 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.<sup>9</sup>

<sup>9</sup> 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.

knows if he will be charged and of what offense he will be accused.

To force persons to make this kind of choice between two fundamental rights places an intolerable burden on the exercise of those rights. "It cuts down on the privilege [of testifying in one's own defense] by making its assertion costly," *Griffin v. California, supra*, at 614, and is therefore forbidden.

## II

I have explained why I believe the use for impeachment purposes of a defendant's prearrest failure to volunteer his version of events to the authorities is constitutionally impermissible. I disagree not only with the Court's holding in this case, but as well with its emerging conception of the individual's duty to assist the State in obtaining convictions, including his own—a conception which, I believe, is fundamentally at odds with our constitutional system. See, *e. g.*, *Roberts v. United States*, 445 U. S. 552, 569–572 (1980) (MARSHALL, J., dissenting). This conception disparages not only individual freedoms, but also the social interest in preserving those liberties and in the integrity of the criminal justice system. There is no doubt an important social interest in enabling police and prosecutors to obtain convictions. But the Court does not serve the Nation well by subordinating to that interest the safeguards that the Constitution guarantees to the criminal defendant.

## AGINS ET UX. *v.* CITY OF TIBURON

### APPEAL FROM THE SUPREME COURT OF CALIFORNIA

No. 79–602. Argued April 15, 1980—Decided June 10, 1980

After appellants had acquired five acres of unimproved land in appellee city for residential development, the city was required by California law to prepare a general plan governing land use and the development of open-space land. In response, the city adopted zoning ordinances that placed appellants' property in a zone in which property may be devoted to one-family dwellings, accessory buildings, and open-space uses, with density restrictions permitting appellants to build between one and five single-family residences on their tract. Without having sought approval for development of their tract under the ordinances, appellants brought suit against the city in state court, alleging that the city had taken their property without just compensation in violation of the Fifth and Fourteenth Amendments, and seeking, *inter alia*, a declaration that the zoning ordinances were facially unconstitutional. The city's demurrer claiming that the complaint failed to state a cause of action was sustained by the trial court, and the California Supreme Court affirmed.

*Held:* The zoning ordinances on their face do not take appellants' property without just compensation. Pp. 260–263.

(a) The ordinances substantially advance the legitimate governmental goal of discouraging premature and unnecessary conversion of open-space land to urban uses and are proper exercises of the city's police power to protect its residents from the ill effects of urbanization. Pp. 261–262.

(b) Appellants will share with other owners the benefits and burdens of the city's exercise of such police power, and in assessing the fairness of the ordinances these benefits must be considered along with any diminution in market value that appellants might suffer. P. 262.

(c) Although the ordinances limit development, they neither prevent the best use of appellants' land nor extinguish a fundamental attribute of ownership. Since at this juncture appellants are free to pursue their reasonable investment expectations by submitting a development plan to the city, it cannot be said that the impact of the ordinances has denied them the "justice and fairness" guaranteed by the Fifth and Fourteenth Amendments. Pp. 262–263.

24 Cal. 3d 266, 598 P. 2d 25, affirmed.

POWELL, J., delivered the opinion for a unanimous Court.

*Gideon Kanner* argued the cause for appellants. With him on the briefs were *John P. Pollock* and *Reginald G. Hearn*.

*E. Clement Shute, Jr.*, argued the cause *pro hac vice* for appellee. With him on the brief were *Robert I. Conn* and *Gary T. Raghianti*.\*

\*Briefs of *amici curiae* urging reversal were filed by *Robert A. Ferris* for the California Forest Protective Association; by *Les J. Weinstein* and *Aaron M. Peck* for the Glendale Federal Savings and Loan Association; by *Howard N. Ellman*, *Kenneth N. Burns*, and *Michael J. Burke* for Half Moon Bay Properties, Inc.; by *Gus Bauman* for the National Association of Home Builders et al.; by *Ronald A. Zumbrun* and *Thomas E. Hookano* for the Pacific Legal Foundation; and, *pro se*, by *Burton J. Goldstein*, *M. Reed Hunter*, *Jess S. Jackson, Jr.*, *Jerrold A. Fadem*, *Michael M. Berger*, *Roger M. Sullivan*, *Richard F. Desmond*, *Stephen J. Wagner*, *Gerald B. Hansen*, and *Alfred P. Chasuk* for Mr. Goldstein et al.

Briefs of *amici curiae* urging affirmance were filed by *Solicitor General McCree*, *Assistant Attorney General Moorman*, *Deputy Solicitor General Claiborne*, *Elinor Hadley Stillman*, and *Jacques B. Gelin* for the United States; by *George Deukmejian*, *Attorney General*, *N. Gregory Taylor*, *Assistant Attorney General*, and *Richard C. Jacobs*, *Deputy Attorney General*, for the State of California; by the Attorneys General and other officials of their respective jurisdictions as follows: *J. D. MacFarlane*, *Attorney General of Colorado*; *Richard S. Gebelein*, *Attorney General of Delaware*, and *Regina M. Small*, *State Solicitor*; *Jim Smith*, *Attorney General of Florida*, and *Richard Hixson*, *Assistant Attorney General*; *Wayne Minami*, *Attorney General of Hawaii*; *William J. Scott*, *Attorney General of Illinois*, and *George Wolff*, *Assistant Attorney General*; *William J. Guste, Jr.*, *Attorney General of Louisiana*, and *Kendall Vick*, *Assistant Attorney General*; *Richard S. Cohen*, *Attorney General of Maine*, and *Cabanne Howard*, *Assistant Attorney General*; *Stephen H. Sachs*, *Attorney General of Maryland*, and *Paul F. Strain* and *Thomas A. Deming*, *Deputy Attorneys General*; *Francis X. Bellotti*, *Attorney General of Massachusetts*, and *Stephen M. Leonard*, *Assistant Attorney General*; *Robert Abrams*, *Attorney General of New York*; *William J. Brown*, *Attorney General of Ohio*, and *Colleen Nissl*, *Assistant Attorney General*; *James A. Redden*, *Attorney General of Oregon*, and *Peter S. Herman* and *Mary J. Deits*, *Deputy Attorneys General*; *M. Jerome Diamond*, *Attorney General of Vermont*, and *Bensen D. Scotch*, *Assistant Attorney General*; *Slade Gorton*, *Attorney General of Washington*, and *Charles B. Roe, Jr.*, *Senior*

MR. JUSTICE POWELL delivered the opinion of the Court.

The question in this case is whether municipal zoning ordinances took appellants' property without just compensation in violation of the Fifth and Fourteenth Amendments.

## I

After the appellants acquired five acres of unimproved land in the city of Tiburon, Cal., for residential development, the city was required by state law to prepare a general plan governing both land use and the development of open-space land. Cal. Govt. Code Ann. §§ 65302 (a) and (e) (West Supp. 1979); see § 65563. In response, the city adopted two ordinances that modified existing zoning requirements. Tiburon, Cal., Ordinances Nos. 123 N. S. and 124 N. S. (June 28, 1973). The zoning ordinances placed the appellants' property in "RPD-1," a Residential Planned Development and Open Space Zone. RPD-1 property may be devoted to one-family dwellings, accessory buildings, and open-space uses. Density restrictions permit the appellants to build between one and five single-family residences on their 5-acre tract. The appellants never have sought approval for development of their land under the zoning ordinances.<sup>1</sup>

Assistant Attorney General; and *Bronson C. La Follette*, *Attorney General of Wisconsin*, for the State of Colorado et al.; by *John H. Larson* and *Paul T. Hanson* for the County of Los Angeles; by *Robert J. Logan* and *Jeffrey P. Widman* for the City of San Jose et al.; by *Daniel Riesel*, *Nicholas A. Robinson*, *Joel H. Sachs*, *Ross Sandler*, and *Philip Weinberg* for the Committee on Environmental Law of the Association of the Bar of the City of New York; by *David Bonderman* for the Conservation Foundation et al.; and by *Elliott E. Blinderman* for the Federation of Hillside and Canyon Associations, Inc., et al.

Briefs of *amici curiae* were filed by *Timothy B. Flynn* and *A. Thomas Hunt* for the American Planning Association et al.; by *Frank Schnidman* for the National Association of Manufacturers; and by *Louis E. Goebel* and *Guenter S. Cohn* for San Diego Gas & Electric Co.

<sup>1</sup> Shortly after it enacted the ordinances, the city began eminent domain proceedings against the appellants' land. The following year, however, the

The appellants filed a two-part complaint against the city in State Superior Court. The first cause of action sought \$2 million in damages for inverse condemnation.<sup>2</sup> The second cause of action requested a declaration that the zoning ordinances were facially unconstitutional. The gravamen of both claims was the appellants' assertion that the city had taken their property without just compensation in violation of the Fifth and Fourteenth Amendments. The complaint alleged that land in Tiburon has greater value than any other suburban property in the State of California. App. 3. The ridge-lands that appellants own "possess magnificent views of San Francisco Bay and the scenic surrounding areas [and] have the highest market values of all lands" in Tiburon. *Id.*, at 4. Rezoning of the land "forever prevented [its] development for residential use. . . ." *Id.*, at 5. Therefore, the appellants contended, the city had "completely destroyed the value of [appellants'] property for any purpose or use whatsoever. . . ." *Id.*, at 7.<sup>3</sup>

The city demurred, claiming that the complaint failed to state a cause of action. The Superior Court sustained the demurrer,<sup>4</sup> and the California Supreme Court affirmed. 24 Cal. 3d 266, 598 P. 2d 25 (1979). The State Supreme Court

city abandoned those proceedings, and its complaint was dismissed. The appellants were reimbursed for costs incurred in connection with the action.

<sup>2</sup> Inverse condemnation should be distinguished from eminent domain. Eminent domain refers to a legal proceeding in which a government asserts its authority to condemn property. *United States v. Clarke*, 445 U. S. 253, 255-258 (1980). Inverse condemnation is "a shorthand description of the manner in which a landowner recovers just compensation for a taking of his property when condemnation proceedings have not been instituted." *Id.*, at 257.

<sup>3</sup> The appellants also contended that the city's aborted attempt to acquire the land through eminent domain had destroyed the use of the land during the pendency of the condemnation proceedings. App. 10.

<sup>4</sup> The State Superior Court granted the appellants leave to amend the cause of action seeking a declaratory judgment, but the appellants did not avail themselves of that opportunity.

first considered the inverse condemnation claim. It held that a landowner who challenges the constitutionality of a zoning ordinance may not "sue in inverse condemnation and thereby transmute an excessive use of the police power into a lawful taking for which compensation in eminent domain must be paid." *Id.*, at 273, 598 P. 2d, at 28. The sole remedies for such a taking, the court concluded, are mandamus and declaratory judgment. Turning therefore to the appellants' claim for declaratory relief, the California Supreme Court held that the zoning ordinances had not deprived the appellants of their property without compensation in violation of the Fifth Amendment.<sup>5</sup>

We noted probable jurisdiction. 444 U. S. 1011 (1980). We now affirm the holding that the zoning ordinances on their face do not take the appellants' property without just compensation.<sup>6</sup>

<sup>5</sup> The California Supreme Court also rejected appellants' argument that the institution and abandonment of eminent domain proceedings themselves constituted a taking. The court found that the city had acted reasonably and that general municipal planning decisions do not violate the Fifth Amendment.

<sup>6</sup> The appellants also contend that the state courts erred by sustaining the demurrer despite their uncontroverted allegations that the zoning ordinances would "forever preven[t] . . . development for residential use," *id.*, at 5, and "completely destro[y] the value of [appellant's] property for any purpose or use whatsoever . . .," *id.*, at 7. The California Supreme Court compared the express terms of the zoning ordinances with the factual allegations of the complaint. The terms of the ordinances permit construction of one to five residences on the appellants' 5-acre tract. The court therefore rejected the contention that the ordinances prevented all use of the land. Under California practice, allegations in a complaint are taken to be true unless "contrary to law or to a fact of which a court may take judicial notice." *Dale v. City of Mountain View*, 55 Cal. App. 3d 101, 105, 127 Cal. Rptr. 520, 522 (1976); see *Martinez v. Socoma Cos.*, 11 Cal. 3d 394, 399-400, 521 P. 2d 841, 844 (1974). California courts may take judicial notice of municipal ordinances. Cal. Evid. Code Ann. § 452 (b) (West 1966). In this case, the State Supreme Court merely rejected allegations inconsistent with the explicit terms of the ordinance under

## II

The Fifth Amendment guarantees that private property shall not "be taken for public use, without just compensation." The appellants' complaint framed the question as whether a zoning ordinance that prohibits all development of their land effects a taking under the Fifth and Fourteenth Amendments. The California Supreme Court rejected the appellants' characterization of the issue by holding, as a matter of state law, that the terms of the challenged ordinances allow the appellants to construct between one and five residences on their property. The court did not consider whether the zoning ordinances would be unconstitutional if applied to prevent appellants from building five homes. Because the appellants have not submitted a plan for development of their property as the ordinances permit, there is as yet no concrete controversy regarding the application of the specific zoning provisions. See *Socialist Labor Party v. Gilligan*, 406 U. S. 583, 588 (1972). See also *Goldwater v. Carter*, 444 U. S. 996, 997 (1979) (POWELL, J., concurring). Thus, the only question properly before us is whether the mere enactment of the zoning ordinances constitutes a taking.

The application of a general zoning law to particular property effects a taking if the ordinance does not substantially advance legitimate state interests, see *Nectow v. Cambridge*, 277 U. S. 183, 188 (1928), or denies an owner economically viable use of his land, see *Penn Central Transp. Co. v. New York City*, 438 U. S. 104, 138, n. 36 (1978). 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. Although no precise rule de-

review. The appellants' objection to the State Supreme Court's application of state law does not raise a federal question appropriate for review by this Court. See *Patterson v. Colorado ex rel. Attorney General*, 205 U. S. 454, 461 (1907).

termines when property has been taken, see *Kaiser Aetna v. United States*, 444 U. S. 164 (1979), the question necessarily requires a weighing of private and public interests. The seminal decision in *Euclid v. Ambler Co.*, 272 U. S. 365 (1926), is illustrative. In that case, the landowner challenged the constitutionality of a municipal ordinance that restricted commercial development of his property. Despite alleged diminution in value of the owner's land, the Court held that the zoning laws were facially constitutional. They bore a substantial relationship to the public welfare, and their enactment inflicted no irreparable injury upon the landowner. *Id.*, at 395-397.

In this case, the zoning ordinances substantially advance legitimate governmental goals. The State of California has determined that the development of local open-space plans will discourage the "premature and unnecessary conversion of open-space land to urban uses." Cal. Govt. Code Ann. § 65561 (b) (West. Supp. 1979).<sup>7</sup> The specific zoning regulations at issue are exercises of the city's police power to protect the residents of Tiburon from the ill effects of urbanization.<sup>8</sup> Such governmental purposes long have been recognized as legitimate. See *Penn Central Transp. Co. v. New York City*, *supra*, at 129; *Village of Belle Terre v.*

<sup>7</sup> The State also recognizes that the preservation of open space is necessary "for the assurance of the continued availability of land for the production of food and fiber, for the enjoyment of scenic beauty, for recreation and for the use of natural resources." Cal. Govt. Code Ann. § 65561 (a) (West. Supp. 1979); see Tiburon, Cal., Ordinance No. 124 N. S. §§ 1 (f) and (h).

<sup>8</sup> The City Council of Tiburon found that "[i]t is in the public interest to avoid unnecessary conversion of open space land to strictly urban uses, thereby protecting against the resultant adverse impacts, such as air, noise and water pollution, traffic congestion, destruction of scenic beauty, disturbance of the ecology and environment, hazards to geology, fire and flood, and other demonstrated consequences of urban sprawl." *Id.*, § 1 (c).

*Boraas*, 416 U. S. 1, 9 (1974); *Euclid v. Ambler Co.*, *supra*, at 394-395.

The ordinances place appellants' land in a zone limited to single-family dwellings, accessory buildings, and open-space uses. Construction is not permitted until the builder submits a plan compatible with "adjoining patterns of development and open space." Tiburon, Cal., Ordinance No. 123 N. S. § 2 (F). In passing upon a plan, the city also will consider how well the proposed development would preserve the surrounding environment and whether the density of new construction will be offset by adjoining open spaces. *Ibid.* The zoning ordinances benefit the appellants as well as the public by serving the city's interest in assuring careful and orderly development of residential property with provision for open-space areas. There is no indication that the appellants' 5-acre tract is the only property affected by the ordinances. Appellants therefore will share with other owners the benefits and burdens of the city's exercise of its police power. In assessing the fairness of the zoning ordinances, these benefits must be considered along with any diminution in market value that the appellants might suffer.

Although the ordinances limit development, they neither prevent the best use of appellants' land, see *United States v. Causby*, 328 U. S. 256, 262, and n. 7 (1946), nor extinguish a fundamental attribute of ownership, see *Kaiser Aetna v. United States*, *supra*, at 179-180. The appellants have alleged that they wish to develop the land for residential purposes, that the land is the most expensive suburban property in the State, and that the best possible use of the land is residential. App. 3-4. The California Supreme Court has decided, as a matter of state law, that appellants may be permitted to build as many as five houses on their five acres of prime residential property. At this juncture, the appellants are free to pursue their reasonable investment expectations by submitting a development plan to local officials. Thus, it cannot be said that the impact of general land-use regulations has denied

appellants the "justice and fairness" guaranteed by the Fifth and Fourteenth Amendments. See *Penn Central Transp. Co. v. New York City*, 438 U. S., at 124.<sup>9</sup>

### III

The State Supreme Court determined that the appellants could not recover damages for inverse condemnation even if the zoning ordinances constituted a taking. The court stated that only mandamus and declaratory judgment are remedies available to such a landowner. Because no taking has occurred, we need not consider whether a State may limit the remedies available to a person whose land has been taken without just compensation.

The judgment of the Supreme Court of California is

*Affirmed.*

<sup>9</sup> Appellants also claim that the city's precondemnation activities constitute a taking. See nn. 1, 3, and 5, *supra*. 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. See also *City of Walnut Creek v. Leadership Housing Systems, Inc.*, 73 Cal. App. 3d 611, 620-624, 140 Cal. Rptr. 690, 695-697 (1977). Even if the appellants' ability to sell their property was 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." *Danforth v. United States*, 308 U. S. 271, 285 (1939). See *Thomas W. Garland, Inc. v. City of St. Louis*, 596 F. 2d 784, 787 (CA8), cert. denied, 444 U. S. 899 (1979); *Reservation Eleven Associates v. District of Columbia*, 136 U. S. App. D. C. 311, 315-316, 420 F. 2d 153, 157-158 (1969); *Virgin Islands v. 50.05 Acres of Land*, 185 F. Supp. 495, 498 (V. I. 1960); 2 J. Sackman & P. Rohan, *Nichols' Law of Eminent Domain* § 6.13 [3] (3d ed. 1979).

PENN CENTRAL TRANSPORTATION CO. ET AL. v.  
NEW YORK CITY ET AL.

APPEAL FROM THE COURT OF APPEALS OF NEW YORK

No. 77-444. Argued April 17, 1978—Decided June 26, 1978

Under New York City's Landmarks Preservation Law (Landmarks Law), which was enacted to protect historic landmarks and neighborhoods from precipitate decisions to destroy or fundamentally alter their character, the Landmarks Preservation Commission (Commission) may designate a building to be a "landmark" on a particular "landmark site" or may designate an area to be a "historic district." The Board of Estimate may thereafter modify or disapprove the designation, and the owner may seek judicial review of the final designation decision. The owner of the designated landmark must keep the building's exterior "in good repair" and before exterior alterations are made must secure Commission approval. Under two ordinances owners of landmark sites may transfer development rights from a landmark parcel to proximate lots. Under the Landmarks Law, the Grand Central Terminal (Terminal), which is owned by the Penn Central Transportation Co. and its affiliates (Penn Central) was designated a "landmark" and the block it occupies a "landmark site." Appellant Penn Central, though opposing the designation before the Commission, did not seek judicial review of the final designation decision. Thereafter appellant Penn Central entered into a lease with appellant UGP Properties, whereby UGP was to construct a multistory office building over the Terminal. After the Commission had rejected appellants' plans for the building as destructive of the Terminal's historic and aesthetic features, with no judicial review thereafter being sought, appellants brought suit in state court claiming that the application of the Landmarks Law had "taken" their property without just compensation in violation of the Fifth and Fourteenth Amendments and arbitrarily deprived them of their property without due process of law in violation of the Fourteenth Amendment. The trial court's grant of relief was reversed on appeal, the New York Court of Appeals ultimately concluding that there was no "taking" since the Landmarks Law had not transferred control of the property to the city, but only restricted appellants' exploitation of it; and that there was no denial of due process because (1) the same use of the Terminal was permitted as before; (2) the appellants had not shown that they could not earn a reasonable return on their invest-

ment in the Terminal itself; (3) even if the Terminal proper could never operate at a reasonable profit, some of the income from Penn Central's extensive real estate holdings in the area must realistically be imputed to the Terminal; and (4) the development rights above the Terminal, which were made transferable to numerous sites in the vicinity, provided significant compensation for loss of rights above the Terminal itself. *Held*: The application of the Landmarks Law to the Terminal property does not constitute a "taking" of appellants' property within the meaning of the Fifth Amendment as made applicable to the States by the Fourteenth Amendment. Pp. 123-138.

(a) In a wide variety of contexts the government may execute laws or programs that adversely affect recognized economic values without its action constituting a "taking," and in instances such as zoning laws where a state tribunal has 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 regulations that destroyed or adversely affected real property interests. In many instances use restrictions that served a substantial public purpose have been upheld against "taking" challenges, *e. g.*, *Goldblatt v. Hempstead*, 369 U. S. 590; *Hadacheck v. Sebastian*, 239 U. S. 394, though a state statute that substantially furthers important public policies may so frustrate distinct investment-backed expectations as to constitute a "taking," *e. g.*, *Pennsylvania Coal Co. v. Mahon*, 260 U. S. 393, and government acquisitions of resources to permit uniquely public functions constitute "takings," *e. g.*, *United States v. Causby*, 328 U. S. 256. Pp. 123-128.

(b) In deciding whether particular governmental action has effected a "taking," the character of the action and nature and extent of the interference with property rights (here the city tax block designated as the "landmark site") are focused upon, rather than discrete segments thereof. Consequently, appellants cannot establish a "taking" simply by showing that they have been denied the ability to exploit the superjacent airspace, irrespective of the remainder of appellants' parcel. Pp. 130-131.

(c) Though diminution in property value alone, as may result from a zoning law, cannot establish a "taking," as appellants concede, they urge that the regulation of individual landmarks is different because it applies only to selected properties. But it does not follow that landmark laws, which embody a comprehensive plan to preserve structures of historic or aesthetic interest, are discriminatory, like "reverse spot" zoning. Nor can it be successfully contended that designation of a landmark involves only a matter of taste and therefore will inevitably

lead to arbitrary results, for judicial review is available and there is no reason to believe it will be less effective than would be so in the case of zoning or any other context. Pp. 131-133.

(d) That the Landmarks Law affects some landowners more severely than others does not itself result in "taking," for that is often the case with general welfare and zoning legislation. Nor, contrary to appellants' contention, are they solely burdened and unbenefited by the Landmarks Law, which has been extensively applied and was enacted on the basis of the legislative judgment that the preservation of landmarks benefits the citizenry both economically and by improving the overall quality of city life. Pp. 133-135.

(e) The Landmarks Law no more effects an appropriation of the airspace above the Terminal for governmental uses than would a zoning law appropriate property; it simply prohibits appellants or others from occupying certain features of that space while allowing appellants gainfully to use the remainder of the parcel. *United States v. Causby, supra*, distinguished. P. 135.

(f) The Landmarks Law, which does not interfere with the Terminal's present uses or prevent Penn Central from realizing a "reasonable return" on its investment, does not impose the drastic limitation on appellants' ability to use the air rights above the Terminal that appellants claim, for on this record there is no showing that a smaller, harmonizing structure would not be authorized. Moreover, the pre-existing air rights are made transferable to other parcels in the vicinity of the Terminal, thus mitigating whatever financial burdens appellants have incurred. Pp. 135-137.

42 N. Y. 2d 324, 366 N. E. 2d 1271, affirmed.

BRENNAN, J., delivered the opinion of the Court, in which STEWART, WHITE, MARSHALL, BLACKMUN, and POWELL, JJ., joined. REHNQUIST, J., filed a dissenting opinion, in which BURGER, C. J., and STEVENS, J., joined, *post*, p. 138.

*Daniel M. Gribbon* argued the cause for appellants. With him on the briefs were *John R. Bolton* and *Carl Helmetag, Jr.*

*Leonard Koerner* argued the cause for appellees. With him on the brief were *Allen G. Schwartz*, *L. Kevin Sheridan*, and *Dorothy Miner*.

*Assistant Attorney General Wald* argued the cause for the United States as *amicus curiae* urging affirmance. On the

brief were *Solicitor General McCree*, *Assistant Attorney General Moorman*, *Peter R. Steenland, Jr.*, and *Carl Strass*.\*

MR. JUSTICE BRENNAN delivered the opinion of the Court.

The question presented is whether a city may, as part of a comprehensive program to preserve historic landmarks and historic districts, place restrictions on the development of individual historic landmarks—in addition to those imposed by applicable zoning ordinances—without effecting a "taking" requiring the payment of "just compensation." Specifically, we must decide whether the application of New York City's Landmarks Preservation Law to the parcel of land occupied by Grand Central Terminal has "taken" its owners' property in violation of the Fifth and Fourteenth Amendments.

## I

### A

Over the past 50 years, all 50 States and over 500 municipalities have enacted laws to encourage or require the preservation of buildings and areas with historic or aesthetic importance.<sup>1</sup> These nationwide legislative efforts have been

\*Briefs of *amici curiae* urging affirmance were filed by *David Bonderman* and *Frank B. Gilbert* for the National Trust for Historic Preservation et al.; by *Paul S. Byard*, *Ralph C. Menapace, Jr.*, *Terence H. Benbow*, *William C. Chanler*, *Richard H. Pershan*, *Francis T. P. Plimpton*, *Whitney North Seymour*, and *Bethuel M. Webster* for the Committee to Save Grand Central Station et al.; and by *Louis J. Lefkowitz*, Attorney General, *Samuel A. Hirshowitz*, First Assistant Attorney General, and *Philip Weinberg*, Assistant Attorney General, for the State of New York.

Briefs of *amici curiae* were filed by *Evelle J. Younger*, Attorney General, *E. Clement Shute, Jr.*, and *Robert H. Connett*, Assistant Attorneys General, and *Richard C. Jacobs*, Deputy Attorney General, for the State of California; and by *Eugene J. Morris* for the Real Estate Board of New York, Inc.

<sup>1</sup> See National Trust for Historic Preservation, *A Guide to State Historic Preservation Programs* (1976); National Trust for Historic Preservation,

precipitated by two concerns. The first is recognition that, in recent years, large numbers of historic structures, landmarks, and areas have been destroyed<sup>2</sup> without adequate consideration of either the values represented therein or the possibility of preserving the destroyed properties for use in economically productive ways.<sup>3</sup> The second is a widely shared belief that structures with special historic, cultural, or architectural significance enhance the quality of life for all. Not only do these buildings and their workmanship represent the lessons of the past and embody precious features of our heritage, they serve as examples of quality for today. “[H]istoric conservation is but one aspect of the much larger problem, basically an environmental one, of enhancing—or perhaps developing for the first time—the quality of life for people.”<sup>4</sup>

New York City, responding to similar concerns and acting

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Directory of Landmark and Historic District Commissions (1976). In addition to these state and municipal legislative efforts, Congress has determined that “the historical and cultural foundations of the Nation should be preserved as a living part of our community life and development in order to give a sense of orientation to the American people,” National Historic Preservation Act of 1966, 80 Stat. 915, 16 U. S. C. § 470 (b) (1976 ed.), and has enacted a series of measures designed to encourage preservation of sites and structures of historic, architectural, or cultural significance. See generally Gray, *The Response of Federal Legislation to Historic Preservation*, 36 *Law & Contemp. Prob.* 314 (1971).

<sup>2</sup> Over one-half of the buildings listed in the Historic American Buildings Survey, begun by the Federal Government in 1933, have been destroyed. See Costonis, *The Chicago Plan: Incentive Zoning and the Preservation of Urban Landmarks*, 85 *Harv. L. Rev.* 574, 574 n. 1 (1972), citing Huxtable, *Bank’s Building Plan Sets Off Debate on “Progress,”* *N. Y. Times*, Jan. 17, 1971, section 8, p. 1, col. 2.

<sup>3</sup> See, e. g., *N. Y. C. Admin. Code* § 205-1.0 (a) (1976).

<sup>4</sup> Gilbert, *Introduction, Precedents for the Future*, 36 *Law & Contemp. Prob.* 311, 312 (1971), quoting address by Robert Stipe, 1971 Conference on Preservation Law, Washington, D. C., May 1, 1971 (unpublished text, pp. 6-7).

pursuant to a New York State enabling Act,<sup>5</sup> adopted its Landmarks Preservation Law in 1965. See *N. Y. C. Admin. Code*, ch. 8-A, § 205-1.0 *et seq.* (1976). The city acted from the conviction that “the standing of [New York City] as a world-wide tourist center and world capital of business, culture and government” would be threatened if legislation were not enacted to protect historic landmarks and neighborhoods from precipitate decisions to destroy or fundamentally alter their character. § 205-1.0 (a). The city believed that comprehensive measures to safeguard desirable features of the existing urban fabric would benefit its citizens in a variety of ways: e. g., fostering “civic pride in the beauty and noble accomplishments of the past”; protecting and enhancing “the city’s attractions to tourists and visitors”; “support[ing] and stimul[ating] business and industry”; “strengthen[ing] the economy of the city”; and promoting “the use of historic districts, landmarks, interior landmarks and scenic landmarks for the education, pleasure and welfare of the people of the city.” § 205-1.0 (b).

The New York City law is typical of many urban landmark laws in that its primary method of achieving its goals is not by acquisitions of historic properties,<sup>6</sup> but rather by involving public entities in land-use decisions affecting these properties

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<sup>5</sup> See *N. Y. Gen. Mun. Law* § 96-a (McKinney 1977). It declares that it is the public policy of the State of New York to preserve structures and areas with special historical or aesthetic interest or value and authorizes local governments to impose reasonable restrictions to perpetuate such structures and areas.

<sup>6</sup> The consensus is that widespread public ownership of historic properties in urban settings is neither feasible nor wise. Public ownership reduces the tax base, burdens the public budget with costs of acquisitions and maintenance, and results in the preservation of public buildings as museums and similar facilities, rather than as economically productive features of the urban scene. See Wilson & Winkler, *The Response of State Legislation to Historic Preservation*, 36 *Law & Contemp. Prob.* 329, 330-331, 339-340 (1971).

and providing services, standards, controls, and incentives that will encourage preservation by private owners and users.<sup>7</sup> While the law does place special restrictions on landmark properties as a necessary feature to the attainment of its larger objectives, the major theme of the law is to ensure the owners of any such properties both a "reasonable return" on their investments and maximum latitude to use their parcels for purposes not inconsistent with the preservation goals.

The operation of the law can be briefly summarized. The primary responsibility for administering the law is vested in the Landmarks Preservation Commission (Commission), a broad based, 11-member agency<sup>8</sup> assisted by a technical staff. The Commission first performs the function, critical to any landmark preservation effort, of identifying properties and areas that have "a special character or special historical or aesthetic interest or value as part of the development, heritage or cultural characteristics of the city, state or nation." § 207-1.0 (n); see § 207-1.0 (h). If the Commission determines, after giving all interested parties an opportunity to be heard, that a building or area satisfies the ordinance's criteria, it will designate a building to be a "landmark," § 207-1.0 (n),<sup>9</sup> situ-

<sup>7</sup> See Costonis, *supra* n. 2, at 580-581; Wilson & Winkler, *supra* n. 6; Rankin, Operation and Interpretation of the New York City Landmark Preservation Law, 36 Law & Contemp. Prob. 366 (1971).

<sup>8</sup> The ordinance creating the Commission requires that it include at least three architects, one historian qualified in the field, one city planner or landscape architect, one realtor, and at least one resident of each of the city's five boroughs. N. Y. C. Charter § 534 (1976). In addition to the ordinance's requirements concerning the composition of the Commission, there is, according to a former chairman, a "prudent tradition" that the Commission include one or two lawyers, preferably with experience in municipal government, and several laymen with no specialized qualifications other than concern for the good of the city. Goldstone, Aesthetics in Historic Districts, 36 Law & Contemp. Prob. 379, 384-385 (1971).

<sup>9</sup> "Landmark." Any improvement, any part of which is thirty years old or older, which has a special character or special historical or aesthetic interest or value as part of the development, heritage or cultural character-

ated on a particular "landmark site," § 207-1.0 (o),<sup>10</sup> or will designate an area to be a "historic district," § 207-1.0 (h).<sup>11</sup> After the Commission makes a designation, New York City's Board of Estimate, after considering the relationship of the designated property "to the master plan, the zoning resolution, projected public improvements and any plans for the renewal of the area involved," § 207-2.0 (g)(1), may modify or disapprove the designation, and the owner may seek judicial review of the final designation decision. Thus far, 31 historic districts and over 400 individual landmarks have been finally designated,<sup>12</sup> and the process is a continuing one.

Final designation as a landmark results in restrictions upon the property owner's options concerning use of the landmark site. First, the law imposes a duty upon the owner to keep the exterior features of the building "in good repair" to assure that the law's objectives not be defeated by the landmark's

istics (of the city, state or nation and which has been designated as a landmark pursuant to the provisions of this chapter." § 207-1.0 (n).

<sup>10</sup> "Landmark site." An improvement parcel or part thereof on which is situated a landmark and any abutting improvement parcel or part thereof used as and constituting part of the premises on which the landmark is situated, and which has been designated as a landmark site pursuant to the provisions of this chapter." § 207-1.0 (o).

<sup>11</sup> "Historic district." Any area which: (1) contains improvements which: (a) have a special character or special historical or aesthetic interest or value; and (b) represent one or more periods or styles of architecture typical of one or more eras in the history of the city; and (c) cause such area, by reason of such factors, to constitute a distinct section of the city; and (2) has been designated as a historic district pursuant to the provisions of this chapter." § 207-1.0 (h). The Act also provides for the designation of a "scenic landmark," see § 207-1.0 (w), and an "interior landmark." See § 207-1.0 (m).

<sup>12</sup> See Landmarks Preservation Commission of the City of New York, Landmarks and Historic Districts (1977). Although appellants are correct in noting that some of the designated landmarks are publicly owned, the vast majority are, like Grand Central Terminal, privately owned structures.

falling into a state of irremediable disrepair. See § 207-10.0 (a). Second, the Commission must approve in advance any proposal to alter the exterior architectural features of the landmark or to construct any exterior improvement on the landmark site, thus ensuring that decisions concerning construction on the landmark site are made with due consideration of both the public interest in the maintenance of the structure and the landowner's interest in use of the property. See §§ 207-4.0 to 207-9.0.

In the event an owner wishes to alter a landmark site, three separate procedures are available through which administrative approval may be obtained. First, the owner may apply to the Commission for a "certificate of no effect on protected architectural features": that is, for an order approving the improvement or alteration on the ground that it will not change or affect any architectural feature of the landmark and will be in harmony therewith. See § 207-5.0. Denial of the certificate is subject to judicial review.

Second, the owner may apply to the Commission for a certificate of "appropriateness." See § 207-6.0. Such certificates will be granted if the Commission concludes—focusing upon aesthetic, historical, and architectural values—that the proposed construction on the landmark site would not unduly hinder the protection, enhancement, perpetuation, and use of the landmark. Again, denial of the certificate is subject to judicial review. Moreover, the owner who is denied either a certificate of no exterior effect or a certificate of appropriateness may submit an alternative or modified plan for approval. The final procedure—seeking a certificate of appropriateness on the ground of "insufficient return," see § 207-8.0—provides special mechanisms, which vary depending on whether or not the landmark enjoys a tax exemption,<sup>13</sup> to ensure that designation does not cause economic hardship.

<sup>13</sup> If the owner of a non-tax-exempt parcel has been denied certificates of appropriateness for a proposed alteration and shows that he is not earning

Although the designation of a landmark and landmark site restricts the owner's control over the parcel, designation also enhances the economic position of the landmark owner in one significant respect. Under New York City's zoning laws, owners of real property who have not developed their property

a reasonable return on the property in its present state, the Commission and other city agencies must assume the burden of developing a plan that will enable the landmark owner to earn a reasonable return on the landmark site. The plan may include, but need not be limited to, partial or complete tax exemption, remission of taxes, and authorizations for alterations, construction, or reconstruction appropriate for and not inconsistent with the purposes of the law. § 207-8.0 (c). The owner is free to accept or reject a plan devised by the Commission and approved by the other city agencies. If he accepts the plan, he proceeds to operate the property pursuant to the plan. If he rejects the plan, the Commission may recommend that the city proceed by eminent domain to acquire a protective interest in the landmark, but if the city does not do so within a specified time period, the Commission must issue a notice allowing the property owner to proceed with the alteration or improvement as originally proposed in his application for a certificate of appropriateness.

Tax-exempt structures are treated somewhat differently. They become eligible for special treatment only if four preconditions are satisfied: (1) the owner previously entered into an agreement to sell the parcel that was contingent upon the issuance of a certificate of approval; (2) the property, as it exists at the time of the request, is not capable of earning a reasonable return; (3) the structure is no longer suitable to its past or present purposes; and (4) the prospective buyer intends to alter the landmark structure. In the event the owner demonstrates that the property in its present state is not earning a reasonable return, the Commission must either find another buyer for it or allow the sale and construction to proceed.

But this is not the only remedy available for owners of tax-exempt landmarks. As the case at bar illustrates, see *infra*, at 121, if an owner files suit and establishes that he is incapable of earning a "reasonable return" on the site in its present state, he can be afforded judicial relief. Similarly, where a landmark owner who enjoys a tax exemption has demonstrated that the landmark structure, as restricted, is totally inadequate for the owner's "legitimate needs," the law has been held invalid as applied to that parcel. See *Lutheran Church v. City of New York*, 35 N. Y. 2d 121, 316 N. E. 2d 305 (1974).

to the full extent permitted by the applicable zoning laws are allowed to transfer development rights to contiguous parcels on the same city block. See New York City, Zoning Resolution Art. I, ch. 2, § 12-10 (1978) (definition of "zoning lot"). A 1968 ordinance gave the owners of landmark sites additional opportunities to transfer development rights to other parcels. Subject to a restriction that the floor area of the transferee lot may not be increased by more than 20% above its authorized level, the ordinance permitted transfers from a landmark parcel to property across the street or across a street intersection. In 1969, the law governing the conditions under which transfers from landmark parcels could occur was liberalized, see New York City Zoning Resolutions 74-79 to 74-793, apparently to ensure that the Landmarks Law would not unduly restrict the development options of the owners of Grand Central Terminal. See Marcus, *Air Rights Transfers in New York City*, 36 *Law & Contemp. Prob.* 372, 375 (1971). The class of recipient lots was expanded to include lots "across a street and opposite to another lot or lots which except for the intervention of streets or street intersections f[or]m a series extending to the lot occupied by the landmark building[, provided that] all lots [are] in the same ownership." New York City Zoning Resolution 74-79 (emphasis deleted).<sup>14</sup> In addition, the 1969 amendment permits, in highly commer-

<sup>14</sup> To obtain approval for a proposed transfer, the landmark owner must follow the following procedure. First, he must obtain the permission of the Commission which will examine the plans for the development of the transferee lot to determine whether the planned construction would be compatible with the landmark. Second, he must obtain the approbation of New York City's Planning Commission which will focus on the effects of the transfer on occupants of the buildings in the vicinity of the transferee lot and whether the landmark owner will preserve the landmark. Finally, the matter goes to the Board of Estimate, which has final authority to grant or deny the application. See also Costonis, *supra* n. 2, at 585-586.

cialized areas like midtown Manhattan, the transfer of all unused development rights to a single parcel. *Ibid.*

## B

This case involves the application of New York City's Landmarks Preservation Law to Grand Central Terminal (Terminal). The Terminal, which is owned by the Penn Central Transportation Co. and its affiliates (Penn Central), is one of New York City's most famous buildings. Opened in 1913, it is regarded not only as providing an ingenious engineering solution to the problems presented by urban railroad stations, but also as a magnificent example of the French beaux-arts style.

The Terminal is located in midtown Manhattan. Its south facade faces 42d Street and that street's intersection with Park Avenue. At street level, the Terminal is bounded on the west by Vanderbilt Avenue, on the east by the Commodore Hotel, and on the north by the Pan-American Building. Although a 20-story office tower, to have been located above the Terminal, was part of the original design, the planned tower was never constructed.<sup>15</sup> The Terminal itself is an eight-story structure which Penn Central uses as a railroad station and in which it rents space not needed for railroad purposes to a variety of commercial interests. The Terminal is one of a number of properties owned by appellant Penn Central in this area of midtown Manhattan. The others include the Barclay, Biltmore, Commodore, Roosevelt, and Waldorf-Astoria Hotels, the Pan-American Building and other office buildings along Park Avenue, and the Yale Club. At least eight of these are eligible to be recipients of development rights afforded the Terminal by virtue of landmark designation.

On August 2, 1967, following a public hearing, the Commission designated the Terminal a "landmark" and designated the

<sup>15</sup> The Terminal's present foundation includes columns, which were built into it for the express purpose of supporting the proposed 20-story tower.

“city tax block” it occupies a “landmark site.”<sup>16</sup> The Board of Estimate confirmed this action on September 21, 1967. Although appellant Penn Central had opposed the designation before the Commission, it did not seek judicial review of the final designation decision.

On January 22, 1968, appellant Penn Central, to increase its income, entered into a renewable 50-year lease and sublease agreement with appellant UGP Properties, Inc. (UGP), a wholly owned subsidiary of Union General Properties, Ltd., a United Kingdom corporation. Under the terms of the agreement, UGP was to construct a multistory office building above the Terminal. UGP promised to pay Penn Central \$1 million annually during construction and at least \$3 million annually thereafter. The rentals would be offset in part by a loss of some \$700,000 to \$1 million in net rentals presently received from concessionaires displaced by the new building.

Appellants UGP and Penn Central then applied to the Commission for permission to construct an office building atop the Terminal. Two separate plans, both designed by architect Marcel Breuer and both apparently satisfying the terms of the applicable zoning ordinance, were submitted to the Commission for approval. The first, Breuer I, provided for the construction of a 55-story office building, to be cantilevered above the existing facade and to rest on the roof of the Terminal. The second, Breuer II Revised,<sup>17</sup> called for tearing

<sup>16</sup> The Commission's report stated:

“Grand Central Station, one of the great buildings of America, evokes a spirit that is unique in this City. It combines distinguished architecture with a brilliant engineering solution, wedded to one of the most fabulous railroad terminals of our time. Monumental in scale, this great building functions as well today as it did when built. In style, it represents the best of the French Beaux Arts.” Record 2240.

<sup>17</sup> Appellants also submitted a plan, denominated Breuer II, to the Commission. However, because appellants learned that Breuer II would have violated existing easements, they substituted Breuer II Revised for Breuer II, and the Commission evaluated the appropriateness only of Breuer II Revised.

down a portion of the Terminal that included the 42d Street facade, stripping off some of the remaining features of the Terminal's facade, and constructing a 53-story office building. The Commission denied a certificate of no exterior effect on September 20, 1968. Appellants then applied for a certificate of “appropriateness” as to both proposals. After four days of hearings at which over 80 witnesses testified, the Commission denied this application as to both proposals.

The Commission's reasons for rejecting certificates respecting Breuer II Revised are summarized in the following statement: “To protect a Landmark, one does not tear it down. To perpetuate its architectural features, one does not strip them off.” Record 2255. Breuer I, which would have preserved the existing vertical facades of the present structure, received more sympathetic consideration. The Commission first focused on the effect that the proposed tower would have on one desirable feature created by the present structure and its surroundings: the dramatic view of the Terminal from Park Avenue South. Although appellants had contended that the Pan-American Building had already destroyed the silhouette of the south facade and that one additional tower could do no further damage and might even provide a better background for the facade, the Commission disagreed, stating that it found the majestic approach from the south to be still unique in the city and that a 55-story tower atop the Terminal would be far more detrimental to its south facade than the Pan-American Building 375 feet away. Moreover, the Commission found that from closer vantage points the Pan-American Building and the other towers were largely cut off from view, which would not be the case of the mass on top of the Terminal planned under Breuer I. In conclusion, the Commission stated:

“[We have] no fixed rule against making additions to designated buildings—it all depends on how they are done . . . . But to balance a 55-story office tower above

a flamboyant Beaux-Arts facade seems nothing more than an aesthetic joke. Quite simply, the tower would overwhelm the Terminal by its sheer mass. The 'addition' would be four times as high as the existing structure and would reduce the Landmark itself to the status of a curiosity.

"Landmarks cannot be divorced from their settings—particularly when the setting is a dramatic and integral part of the original concept. The Terminal, in its setting, is a great example of urban design. Such examples are not so plentiful in New York City that we can afford to lose any of the few we have. And we must preserve them in a meaningful way—with alterations and additions of such character, scale, materials and mass as will protect, enhance and perpetuate the original design rather than overwhelm it." *Id.*, at 2251.<sup>18</sup>

Appellants did not seek judicial review of the denial of either certificate. Because the Terminal site enjoyed a tax exemption,<sup>19</sup> remained suitable for its present and future uses, and was not the subject of a contract of sale, there were no further administrative remedies available to appellants as to the Breuer I and Breuer II Revised plans. See n. 13, *supra*. Further, appellants did not avail themselves of the opportunity to develop

<sup>18</sup> In discussing Breuer I, the Commission also referred to a number of instances in which it had approved additions to landmarks: "The office and reception wing added to Gracie Mansion and the school and church house added to the 12th Street side of the First Presbyterian Church are examples that harmonize in scale, material and character with the structures they adjoin. The new Watch Tower Bible and Tract Society building on Brooklyn Heights, though completely modern in idiom, respects the qualities of its surroundings and will enhance the Brooklyn Heights Historic District, as Butterfield House enhances West 12th Street, and Breuer's own Whitney Museum its Madison Avenue locale." Record 2251.

<sup>19</sup> See N. Y. Real Prop. Tax Law § 489-aa *et seq.* (McKinney Supp. 1977).

and submit other plans for the Commission's consideration and approval. Instead, appellants filed suit in New York Supreme Court, Trial Term, claiming, *inter alia*, that the application of the Landmarks Preservation Law had "taken" their property without just compensation in violation of the Fifth and Fourteenth Amendments and arbitrarily deprived them of their property without due process of law in violation of the Fourteenth Amendment. Appellants sought a declaratory judgment, injunctive relief barring the city from using the Landmarks Law to impede the construction of any structure that might otherwise lawfully be constructed on the Terminal site, and damages for the "temporary taking" that occurred between August 2, 1967, the designation date, and the date when the restrictions arising from the Landmarks Law would be lifted. The trial court granted the injunctive and declaratory relief, but severed the question of damages for a "temporary taking."<sup>20</sup>

Appellees appealed, and the New York Supreme Court, Appellate Division, reversed. 50 App. Div. 2d 265, 377 N. Y. S. 2d 20 (1975). The Appellate Division held that the restrictions on the development of the Terminal site were necessary to promote the legitimate public purpose of protecting landmarks and therefore that appellants could sustain their constitutional claims only by proof that the regulation deprived them of all reasonable beneficial use of the property. The Appellate Division held that the evidence appellants

<sup>20</sup> Although that court suggested that any regulation of private property to protect landmark values was unconstitutional if "just compensation" were not afforded, it also appeared to rely upon its findings: first, that the cost to Penn Central of operating the Terminal building itself, exclusive of purely railroad operations, exceeded the revenues received from concessionaires and tenants in the Terminal; and second, that the special transferable development rights afforded Penn Central as an owner of a landmark site did not "provide compensation to plaintiffs or minimize the harm suffered by plaintiffs due to the designation of the Terminal as a landmark."

introduced at trial—"Statements of Revenues and Costs," purporting to show a net operating loss for the years 1969 and 1971, which were prepared for the instant litigation—had not satisfied their burden.<sup>21</sup> First, the court rejected the claim that these statements showed that the Terminal was operating at a loss, for in the court's view, appellants had improperly attributed some railroad operating expenses and taxes to their real estate operations, and compounded that error by failing to impute any rental value to the vast space in the Terminal devoted to railroad purposes. Further, the Appellate Division concluded that appellants had failed to establish either that they were unable to increase the Terminal's commercial income by transforming vacant or underutilized space to revenue-producing use, or that the unused development rights over the Terminal could not have been profitably transferred to one or more nearby sites.<sup>22</sup> The Appellate Division concluded that all appellants had succeeded in showing was that they had been deprived of the property's most profitable use, and that this showing did not establish that appellants had been unconstitutionally deprived of their property.

The New York Court of Appeals affirmed. 42 N. Y. 2d 324, 366 N. E. 2d 1271 (1977). That court summarily rejected any claim that the Landmarks Law had "taken"

<sup>21</sup> These statements appear to have reflected the costs of maintaining the exterior architectural features of the Terminal in "good repair" as required by the law. As would have been apparent in any case therefore, the existence of the duty to keep up the property was here—and will presumably always be—factored into the inquiry concerning the constitutionality of the landmark restrictions.

The Appellate Division also rejected the claim that an agreement of Penn Central with the Metropolitan Transit Authority and the Connecticut Transit Authority provided a basis for invalidating the application of the Landmarks Law.

<sup>22</sup> The record reflected that Penn Central had given serious consideration to transferring some of those rights to either the Biltmore Hotel or the Roosevelt Hotel.

property without "just compensation," *id.*, at 329, 366 N. E. 2d, at 1274, indicating that there could be no "taking" since the law had not transferred control of the property to the city, but only restricted appellants' exploitation of it. In that circumstance, the Court of Appeals held that appellants' attack on the law could prevail only if the law deprived appellants of their property in violation of the Due Process Clause of the Fourteenth Amendment. Whether or not there was a denial of substantive due process turned on whether the restrictions deprived Penn Central of a "reasonable return" on the "privately created and privately managed ingredient" of the Terminal. *Id.*, at 328, 366 N. E. 2d, at 1273.<sup>23</sup> The Court of Appeals concluded that the Landmarks Law had not effected a denial of due process because: (1) the landmark regulation permitted the same use as had been made of the Terminal for more than half a century; (2) the appellants had failed to show that they could not earn a reasonable return on their investment in the Terminal itself; (3) even if the Terminal proper could never operate at a reasonable profit, some of the income from Penn Central's extensive real estate holdings in the area, which include hotels and office buildings, must realistically be imputed to the Terminal; and

<sup>23</sup> The Court of Appeals suggested that in calculating the value of the property upon which appellants were entitled to earn a reasonable return, the "publicly created" components of the value of the property—*i. e.*, those elements of its value attributable to the "efforts of organized society" or to the "social complex" in which the Terminal is located—had to be excluded. However, since the record upon which the Court of Appeals decided the case did not, as that court recognized, contain a basis for segregating the privately created from the publicly created elements of the value of the Terminal site and since the judgment of the Court of Appeals in any event rests upon bases that support our affirmance, see *infra*, this page and 122, we have no occasion to address the question whether it is permissible or feasible to separate out the "social increments" of the value of property. See Costonis, *The Disparity Issue: A Context for the Grand Central Terminal Decision*, 91 Harv. L. Rev. 402, 416-417 (1977).

(4) the development rights above the Terminal, which had been made transferable to numerous sites in the vicinity of the Terminal, one or two of which were suitable for the construction of office buildings, were valuable to appellants and provided "significant, perhaps 'fair,' compensation for the loss of rights above the terminal itself." *Id.*, at 333-336, 366 N. E. 2d, at 1276-1278.

Observing that its affirmance was "[o]n the present record," and that its analysis had not been fully developed by counsel at any level of the New York judicial system, the Court of Appeals directed that counsel "should be entitled to present . . . any additional submissions which, in the light of [the court's] opinion, may usefully develop further the factors discussed." *Id.*, at 337, 366 N. E. 2d, at 1279. Appellants chose not to avail themselves of this opportunity and filed a notice of appeal in this Court. We noted probable jurisdiction. 434 U. S. 983 (1977). We affirm.

## II

The issues presented by appellants are (1) whether the restrictions imposed by New York City's law upon appellants' exploitation of the Terminal site effect a "taking" of appellants' property for a public use within the meaning of the Fifth Amendment, which of course is made applicable to the States through the Fourteenth Amendment, see *Chicago, B. & Q. R. Co. v. Chicago*, 166 U. S. 226, 239 (1897), and, (2), if so, whether the transferable development rights afforded appellants constitute "just compensation" within the meaning of the Fifth Amendment.<sup>24</sup> We need only address the question whether a "taking" has occurred.<sup>25</sup>

<sup>24</sup> Our statement of the issues is a distillation of four questions presented in the jurisdictional statement:

"Does the social and cultural desirability of preserving historical landmarks through government regulation derogate from the constitutional

[Footnote 25 is on p. 123]

## A

Before considering appellants' specific contentions, it will be useful to review the factors that have shaped the jurisprudence of the Fifth Amendment injunction "nor shall private property be taken for public use, without just compensation." The question of what constitutes a "taking" for purposes of the Fifth Amendment has proved to be a problem of considerable difficulty. While this Court has recognized that the "Fifth Amendment's guarantee . . . [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.

requirement that just compensation be paid for private property taken for public use?

"Is Penn Central entitled to no compensation for that large but unmeasurable portion of the value of its rights to construct an office building over the Grand Central Terminal that is said to have been created by the efforts of 'society as an organized entity'?"

"Does a finding that Penn Central has failed to establish that there is no possibility, without exercising its development rights, of earning a reasonable return on all of its remaining properties that benefit in any way from the operations of the Grand Central Terminal warrant the conclusion that no compensation need be paid for the taking of those rights?"

"Does the possibility accorded to Penn Central, under the landmark-preservation regulation, of realizing some value at some time by transferring the Terminal development rights to other buildings, under a procedure that is conceded to be defective, severely limited, procedurally complex and speculative, and that requires ultimate discretionary approval by governmental authorities, meet the constitutional requirements of just compensation as applied to landmarks?" Jurisdictional Statement 3-4.

The first and fourth questions assume that there has been a taking and raise the problem whether, under the circumstances of this case, the transferable development rights constitute "just compensation." The second and third questions, on the other hand, are directed to the issue whether a taking has occurred.

<sup>25</sup> As is implicit in our opinion, we do not embrace the proposition that a "taking" can never occur unless government has transferred physical control over a portion of a parcel.

40, 49 (1960), this Court, quite simply, has 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. See *Goldblatt v. Hempstead*, 369 U. S. 590, 594 (1962). Indeed, we have frequently observed that whether a particular restriction will be rendered invalid by the government's failure to pay for any losses proximately caused by it depends largely "upon the particular circumstances [in that] case." *United States v. Central Eureka Mining Co.*, 357 U. S. 155, 168 (1958); see *United States v. Caltex, Inc.*, 344 U. S. 149, 156 (1952).

In engaging in these essentially ad hoc, factual inquiries, the Court's decisions have identified several factors that have particular significance. The economic impact of the regulation on the claimant and, particularly, the extent to which the regulation has interfered with distinct investment-backed expectations are, of course, relevant considerations. See *Goldblatt v. Hempstead*, *supra*, at 594. So, too, is the character of the governmental action. 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 when interference arises from some public program adjusting the benefits and burdens of economic life to promote the common good.

"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 Co. v. Mahon*, 260 U. S. 393, 413 (1922), and this Court has accordingly recognized, in a wide variety of contexts, that government may execute laws or programs that adversely affect recognized economic values. Exercises of the taxing power are one obvious example. A second are the decisions in which this Court has dismissed "taking" challenges on the ground that, while the challenged government action caused

economic harm, it did not interfere with interests that were sufficiently bound up with the reasonable expectations of the claimant to constitute "property" for Fifth Amendment purposes. See, e. g., *United States v. Willow River Power Co.*, 324 U. S. 499 (1945) (interest in high-water level of river for runoff for tailwaters to maintain power head is not property); *United States v. Chandler-Dunbar Water Power Co.*, 229 U. S. 53 (1913) (no property interest can exist in navigable waters); see also *Demorest v. City Bank Co.*, 321 U. S. 36 (1944); *Muhlker v. Harlem R. Co.*, 197 U. S. 544 (1905); Sax, *Takings and the Police Power*, 74 Yale L. J. 36, 61-62 (1964).

More importantly for the present case, 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 regulations that destroyed or adversely affected recognized real property interests. See *Nectow v. Cambridge*, 277 U. S. 183, 188 (1928). Zoning laws are, of course, the classic example, see *Euclid v. Ambler Realty Co.*, 272 U. S. 365 (1926) (prohibition of industrial use); *Gorieb v. Fox*, 274 U. S. 603, 608 (1927) (requirement that portions of parcels be left unbuilt); *Welch v. Swasey*, 214 U. S. 91 (1909) (height restriction), which have been viewed as permissible governmental action even when prohibiting the most beneficial use of the property. See *Goldblatt v. Hempstead*, *supra*, at 592-593, and cases cited; see also *Eastlake v. Forest City Enterprises, Inc.*, 426 U. S. 668, 674 n. 8 (1976).

Zoning laws generally do not affect existing uses of real property, but "taking" challenges have also been held to be without merit in a wide variety of situations when the challenged governmental actions prohibited a beneficial use to which individual parcels had previously been devoted and thus caused substantial individualized harm. *Miller v. Schoene*, 276 U. S. 272 (1928), is illustrative. In that case, a state entomologist, acting pursuant to a state statute, ordered

the claimants to cut down a large number of ornamental red cedar trees because they produced cedar rust fatal to apple trees cultivated nearby. Although the statute provided for recovery of any expense incurred in removing the cedars, and permitted claimants to use the felled trees, it did not provide compensation for the value of the standing trees or for the resulting decrease in market value of the properties as a whole. A unanimous Court held that this latter omission did not render the statute invalid. The Court held that the State might properly make "a choice between the preservation of one class of property and that of the other" and since the apple industry was important in the State involved, concluded that the State had not exceeded "its constitutional powers by deciding upon the destruction of one class of property [without compensation] in order to save another which, in the judgment of the legislature, is of greater value to the public." *Id.*, at 279.

Again, *Hadacheck v. Sebastian*, 239 U. S. 394 (1915), upheld a law prohibiting the claimant from continuing his otherwise lawful business of operating a brickyard in a particular physical community on the ground that the legislature had reasonably concluded that the presence of the brickyard was inconsistent with neighboring uses. See also *United States v. Central Eureka Mining Co.*, *supra* (Government order closing gold mines so that skilled miners would be available for other mining work held not a taking): *Atchison, T. & S. F. R. Co. v. Public Utilities Comm'n*, 346 U. S. 346 (1953) (railroad may be required to share cost of constructing railroad grade improvement); *Walls v. Midland Carbon Co.*, 254 U. S. 300 (1920) (law prohibiting manufacture of carbon black upheld); *Reinman v. Little Rock*, 237 U. S. 171 (1915) (law prohibiting livery stable upheld); *Mugler v. Kansas*, 123 U. S. 623 (1887) (law prohibiting liquor business upheld).

*Goldblatt v. Hempstead*, *supra*, is a recent example. There, a 1958 city safety ordinance banned any excavations below

the water table and effectively prohibited the claimant from continuing a sand and gravel mining business that had been operated on the particular parcel since 1927. The Court upheld the ordinance against a "taking" challenge, although the ordinance prohibited the present and presumably most beneficial use of the property and had, like the regulations in *Miller and Hadacheck*, severely affected a particular owner. The Court assumed that the ordinance did not prevent the owner's reasonable use of the property since the owner made no showing of an adverse effect on the value of the land. Because the restriction served a substantial public purpose, the Court thus held no taking had occurred. It is, of course, implicit in *Goldblatt* that a use restriction on real property may constitute a "taking" if not reasonably necessary to the effectuation of a substantial public purpose, see *Nectow v. Cambridge*, *supra*; cf. *Moore v. East Cleveland*, 431 U. S. 494, 513-514 (1977) (STEVENS, J., concurring), or perhaps if it has an unduly harsh impact upon the owner's use of the property.

*Pennsylvania Coal Co. v. Mahon*, 260 U. S. 393 (1922), is the leading case for the proposition that a state statute that substantially furthers important public policies may so frustrate distinct investment-backed expectations as to amount to a "taking." There the claimant had sold the surface rights to particular parcels of property, but expressly reserved the right to remove the coal thereunder. A Pennsylvania statute, enacted after the transactions, forbade any mining of coal that caused the subsidence of any house, unless the house was the property of the owner of the underlying coal and was more than 150 feet from the improved property of another. Because the statute made it commercially impracticable to mine the coal, *id.*, at 414, and thus had nearly the same effect as the complete destruction of rights claimant had reserved from the owners of the surface land, see *id.*, at 414-415, the Court held that the statute was invalid as effecting a "taking"

without just compensation. See also *Armstrong v. United States*, 364 U. S. 40 (1960) (Government's complete destruction of a materialman's lien in certain property held a "taking"); *Hudson Water Co. v. McCarter*, 209 U. S. 349, 355 (1908) (if height restriction makes property wholly useless "the rights of property . . . prevail over the other public interest" and compensation is required). See generally Michelman, Property, Utility, and Fairness: Comments on the Ethical Foundations of "Just Compensation" Law, 80 Harv. L. Rev. 1165, 1229-1234 (1967).

Finally, government actions that may be characterized as acquisitions of resources to permit or facilitate uniquely public functions have often been held to constitute "takings." *United States v. Causby*, 328 U. S. 256 (1946), is illustrative. In holding that direct overflights above the claimant's land, that destroyed the present use of the land as a chicken farm, constituted a "taking," *Causby* emphasized that Government had not "merely destroyed property [but was] using a part of it for the flight of its planes." *Id.*, at 262-263, n. 7. See also *Griggs v. Allegheny County*, 369 U. S. 84 (1962) (overflights held a taking); *Portsmouth Co. v. United States*, 260 U. S. 327 (1922) (United States military installations' repeated firing of guns over claimant's land is a taking); *United States v. Cress*, 243 U. S. 316 (1917) (repeated floodings of land caused by water project is a taking); but see *YMCA v. United States*, 395 U. S. 85 (1969) (damage caused to building when federal officers who were seeking to protect building were attacked by rioters held not a taking). See generally Michelman, *supra*, at 1226-1229; Sax, Takings and the Police Power, 74 Yale L. J. 36 (1964).

## B

In contending that the New York City law has "taken" their property in violation of the Fifth and Fourteenth Amendments, appellants make a series of arguments, which, while tailored to the facts of this case, essentially urge that

any substantial restriction imposed pursuant to a landmark law must be accompanied by just compensation if it is to be constitutional. Before considering these, we emphasize what is not in dispute. Because this Court has recognized, in a number of settings, that States and cities may enact land-use restrictions or controls to enhance the quality of life by preserving the character and desirable aesthetic features of a city, see *New Orleans v. Dukes*, 427 U. S. 297 (1976); *Young v. American Mini Theatres, Inc.*, 427 U. S. 50 (1976); *Village of Belle Terre v. Boraas*, 416 U. S. 1, 9-10 (1974); *Berman v. Parker*, 348 U. S. 26, 33 (1954); *Welch v. Swasey*, 214 U. S., at 108, appellants do not contest that New York City's objective of preserving structures and areas with special historic, architectural, or cultural significance is an entirely permissible governmental goal. They also do not dispute that the restrictions imposed on its parcel are appropriate means of securing the purposes of the New York City law. Finally, appellants do not challenge any of the specific factual premises of the decision below. They accept for present purposes both that the parcel of land occupied by Grand Central Terminal must, in its present state, be regarded as capable of earning a reasonable return,<sup>26</sup> and that the transferable development rights afforded appellants by virtue of the Terminal's designation as a landmark are valuable, even if not as valuable as the rights to construct above the Terminal. In appellants' view none of these factors derogate from their claim that New York City's law has effected a "taking."

<sup>26</sup> Both the Jurisdictional Statement 7-8, n. 7, and Brief for Appellants 8 n. 7 state that appellants are not seeking review of the New York courts' determination that Penn Central could earn a "reasonable return" on its investment in the Terminal. Although appellants suggest in their reply brief that the factual conclusions of the New York courts cannot be sustained unless we accept the rationale of the New York Court of Appeals, see Reply Brief for Appellants 12 n. 15, it is apparent that the findings concerning Penn Central's ability to profit from the Terminal depend in no way on the Court of Appeals' rationale.

They first observe that the airspace above the Terminal is a valuable property interest, citing *United States v. Causby, supra*. They urge that the Landmarks Law has deprived them of any gainful use of their "air rights" above the Terminal and that, irrespective of the value of the remainder of their parcel, the city has "taken" their right to this superjacent airspace, thus entitling them to "just compensation" measured by the fair market value of these air rights.

Apart from our own disagreement with appellants' characterization of the effect of the New York City law, see *infra*, at 134-135, the submission that appellants may establish a "taking" simply by showing that they have been denied the ability to exploit a property interest that they heretofore had believed was available for development is quite simply untenable. Were this the rule, this Court would have erred not only in upholding laws restricting the development of air rights, see *Welch v. Swasey, supra*, but also in approving those prohibiting both the subjacent, see *Goldblatt v. Hempstead*, 369 U. S. 590 (1962), and the lateral, see *Gorieb v. Fox*, 274 U. S. 603 (1927), development of particular parcels.<sup>27</sup> "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

<sup>27</sup> These cases dispose of any contention that might be based on *Pennsylvania Coal Co. v. Mahon*, 260 U. S. 393 (1922), that full use of air rights is so bound up with the investment-backed expectations of appellants that governmental deprivation of these rights invariably—*i. e.*, irrespective of the impact of the restriction on the value of the parcel as a whole—constitutes a "taking." Similarly, *Welch*, *Goldblatt*, and *Gorieb* illustrate the fallacy of appellants' related contention that a "taking" must be found to have occurred whenever the land-use restriction may be characterized as imposing a "servitude" on the claimant's parcel.

parcel as a whole—here, the city tax block designated as the "landmark site."

Secondly, appellants, focusing on the character and impact of the New York City law, argue that it effects a "taking" because its operation has significantly diminished the value of the Terminal site. Appellants concede that the decisions sustaining other land-use regulations, which, like the New York City law, are reasonably related to the promotion of the general welfare, uniformly reject the proposition that diminution in property value, standing alone, can establish a "taking," see *Euclid v. Ambler Realty Co.*, 272 U. S. 365 (1926) (75% diminution in value caused by zoning law); *Hadacheck v. Sebastian*, 239 U. S. 394 (1915) (87½% diminution in value); cf. *Eastlake v. Forest City Enterprises, Inc.*, 426 U. S., at 674 n. 8, and that the "taking" issue in these contexts is resolved by focusing on the uses the regulations permit. See also *Goldblatt v. Hempstead, supra*. Appellants, moreover, also do not dispute that a showing of diminution in property value would not establish a "taking" if the restriction had been imposed as a result of historic-district legislation, see generally *Maher v. New Orleans*, 516 F. 2d 1051 (CA5 1975), but appellants argue that New York City's regulation of individual landmarks is fundamentally different from zoning or from historic-district legislation because the controls imposed by New York City's law apply only to individuals who own selected properties.

Stated baldly, appellants' position appears to be that the only means of ensuring that selected owners are not singled out to endure financial hardship for no reason is to hold that any restriction imposed on individual landmarks pursuant to the New York City scheme is a "taking" requiring the payment of "just compensation." Agreement with this argument would, of course, invalidate not just New York City's law, but all comparable landmark legislation in the Nation. We find no merit in it.

It is true, as appellants emphasize, that both historic-district legislation and zoning laws regulate all properties within given physical communities whereas landmark laws apply only to selected parcels. But, contrary to appellants' suggestions, landmark laws are not like discriminatory, or "reverse spot," zoning: that is, a land-use decision which arbitrarily singles out a particular parcel for different, less favorable treatment than the neighboring ones. See 2 A. Rathkopf, *The Law of Zoning and Planning* 26-4, and n. 6 (4th ed. 1978). In contrast to discriminatory zoning, which is the antithesis of land-use control as part of some comprehensive plan, the New York City law embodies a comprehensive plan to preserve structures of historic or aesthetic interest wherever they might be found in the city,<sup>28</sup> and as noted, over 400 landmarks and 31 historic districts have been designated pursuant to this plan.

Equally without merit is the related argument that the decision to designate a structure as a landmark "is inevitably arbitrary or at least subjective, because it is basically a matter of taste," Reply Brief for Appellants 22, thus unavoidably singling out individual landowners for disparate and unfair treatment. The argument has a particularly hollow ring in this case. For appellants not only did not seek judicial review of either the designation or of the denials of the certificates of appropriateness and of no exterior effect, but do not even now suggest that the Commission's decisions concerning the Terminal were in any sense arbitrary or unprincipled. But, in

<sup>28</sup> Although the New York Court of Appeals contrasted the New York City Landmarks Law with both zoning and historic-district legislation and stated at one point that landmark laws do not "further a general community plan," 42 N. Y. 2d 324, 330, 366 N. E. 2d 1271, 1274 (1977), it also emphasized that the implementation of the objectives of the Landmarks Law constitutes an "acceptable reason for singling out one particular parcel for different and less favorable treatment." *Ibid.*, 366 N. E. 2d, at 1275. Therefore, we do not understand the New York Court of Appeals to disagree with our characterization of the law.

any event, a landmark owner has a right to judicial review of any Commission decision, and, quite simply, there is no basis whatsoever for a conclusion that courts will have any greater difficulty identifying arbitrary or discriminatory action in the context of landmark regulation than in the context of classic zoning or indeed in any other context.<sup>29</sup>

Next, appellants observe that New York City's law differs from zoning laws and historic-district ordinances in that the Landmarks Law does not impose identical or similar restrictions on all structures located in particular physical communities. It follows, they argue, that New York City's law is inherently incapable of producing the fair and equitable distribution of benefits and burdens of governmental action which is characteristic of zoning laws and historic-district legislation and which they maintain is a constitutional requirement if "just compensation" is not to be afforded. It is, of course, true that the Landmarks Law has a more severe impact on some landowners than on others, but that in itself does not mean that the law effects a "taking." Legislation designed to promote the general welfare commonly burdens some more than others. The owners of the brickyard in *Hadacheck*, of the cedar trees in *Miller v. Schoene*, and of the gravel and sand mine in *Goldblatt v. Hempstead*, were uniquely burdened by the legislation sustained in those cases.<sup>30</sup> Similarly, zon-

<sup>29</sup> When a property owner challenges the application of a zoning ordinance to his property, the judicial inquiry focuses upon whether the challenged restriction can reasonably be deemed to promote the objectives of the community land-use plan, and will include consideration of the treatment of similar parcels. See generally *Nectow v. Cambridge*, 277 U. S. 183 (1928). When a property owner challenges a landmark designation or restriction as arbitrary or discriminatory, a similar inquiry presumably will occur.

<sup>30</sup> Appellants attempt to distinguish these cases on the ground that, in each, government was prohibiting a "noxious" use of land and that in the present case, in contrast, appellants' proposed construction above the Terminal would be beneficial. We observe that the uses in issue in

ing laws often affect some property owners more severely than others but have not been held to be invalid on that account. For example, the property owner in *Euclid* who wished to use its property for industrial purposes was affected far more severely by the ordinance than its neighbors who wished to use their land for residences.

In any event, appellants' repeated suggestions that they are solely burdened and unbenefited is factually inaccurate. This contention overlooks the fact that the New York City law applies to vast numbers of structures in the city in addition to the Terminal—all the structures contained in the 31 historic districts and over 400 individual landmarks, many of which are close to the Terminal.<sup>31</sup> Unless we are to reject the judgment of the New York City Council that the preservation of landmarks benefits all New York citizens and all structures, both economically and by improving the quality of life in the city as a whole—which we are unwilling to do—we cannot

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*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 particular 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.

Nor, correlatively, can it be asserted that the destruction or fundamental alteration of a historic landmark is not harmful. The suggestion that the beneficial quality of appellants' proposed construction is established by the fact that the construction would have been consistent with applicable zoning laws ignores the development in sensibilities and ideals reflected in landmark legislation like New York City's. Cf. *West Bros. Brick Co. v. Alexandria*, 169 Va. 271, 282-283, 192 S. E. 881, 885-886, appeal dismissed for want of a substantial federal question, 302 U. S. 658 (1937).

<sup>31</sup> There are some 53 designated landmarks and 5 historic districts or scenic landmarks in Manhattan between 14th and 59th Streets. See Landmarks Preservation Commission, *Landmarks and Historic Districts* (1977).

conclude that the owners of the Terminal have in no sense been benefited by the Landmarks Law. Doubtless appellants believe they are more burdened than benefited by the law, but that must have been true, too, of the property owners in *Miller, Hadacheck, Euclid, and Goldblatt*.<sup>32</sup>

Appellants' final broad-based attack would have us treat the law as an instance, like that in *United States v. Causby*, in which government, acting in an enterprise capacity, has appropriated part of their property for some strictly governmental purpose. Apart from the fact that *Causby* was a case of invasion of airspace that destroyed the use of the farm beneath and this New York City law has in nowise impaired the present use of the Terminal, the Landmarks Law neither exploits appellants' parcel for city purposes nor facilitates nor arises from any entrepreneurial operations of the city. The situation is not remotely like that in *Causby* where the airspace above the property was in the flight pattern for military aircraft. The Landmarks Law's effect is simply to prohibit appellants or anyone else from occupying portions of the airspace above the Terminal, while permitting appellants to use the remainder of the parcel in a gainful fashion. This is no more an appropriation of property by government for its own uses than is a zoning law prohibiting, for "aesthetic" reasons, two or more adult theaters within a specified area, see *Young v. American Mini Theatres, Inc.*, 427 U. S. 50 (1976), or a safety regulation prohibiting excavations below a certain level. See *Goldblatt v. Hempstead*.

### C

Rejection of appellants' broad arguments is not, however, the end of our inquiry, for all we thus far have established is

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<sup>32</sup> It is, of course, true that the fact the duties imposed by zoning and historic-district legislation apply throughout particular physical communities provides assurances against arbitrariness, but the applicability of the Landmarks Law to a large number of parcels in the city, in our view, provides comparable, if not identical, assurances.

that the New York City law is not rendered invalid by its failure to provide "just compensation" whenever a landmark owner is restricted in the exploitation of property interests, such as air rights, to a greater extent than provided for under applicable zoning laws. We now must consider whether the interference with appellants' property is of such a magnitude that "there must be an exercise of eminent domain and compensation to sustain [it]." *Pennsylvania Coal Co. v. Mahon*, 260 U. S., at 413. That inquiry may be narrowed to the question of the severity of the impact of the law on appellants' parcel, and its resolution in turn requires a careful assessment of the impact of the regulation on the Terminal site.

Unlike the governmental acts in *Goldblatt, Miller, Causby, Griggs*, and *Hadacheck*, the New York City law does not interfere in any way with the present uses of the Terminal. Its designation as a landmark not only permits but contemplates that appellants may continue to use the property precisely as it has been used for the past 65 years: as a railroad terminal containing office space and concessions. So the law does not interfere with what must be regarded as Penn Central's primary expectation concerning the use of the parcel. More importantly, on this record, we must regard the New York City law as permitting Penn Central not only to profit from the Terminal but also to obtain a "reasonable return" on its investment.

Appellants, moreover, exaggerate the effect of the law on their ability to make use of the air rights above the Terminal in two respects.<sup>33</sup> First, it simply cannot be maintained, on this record, that appellants have been prohibited from occupying *any* portion of the airspace above the Terminal. While the Commission's actions in denying applications to construct an

<sup>33</sup> Appellants, of course, argue at length that the transferable development rights, while valuable, do not constitute "just compensation." Brief for Appellants 36-43.

office building in excess of 50 stories above the Terminal may indicate that it will refuse to issue a certificate of appropriateness for any comparably sized structure, nothing the Commission has said or done suggests an intention to prohibit *any* construction above the Terminal. The Commission's report emphasized that whether any construction would be allowed depended upon whether the proposed addition "would harmonize in scale, material, and character with [the Terminal]." Record 2251. Since appellants have not sought approval for the construction of a smaller structure, we do not know that appellants will be denied any use of any portion of the airspace above the Terminal.<sup>34</sup>

Second, to the extent appellants have been denied the right to build above the Terminal, it is not literally accurate to say that they have been denied *all* use of even those pre-existing air rights. Their ability to use these rights has not been abrogated; they are made transferable to at least eight parcels in the vicinity of the Terminal, one or two of which have been found suitable for the construction of new office buildings. Although appellants and others have argued that New York City's transferable development-rights program is far from ideal,<sup>35</sup> the New York courts here supportably found that, at least in the case of the Terminal, the rights afforded are valuable. While these rights may well not have constituted "just compensation" if a "taking" had occurred, the rights nevertheless undoubtedly mitigate whatever financial burdens the law has imposed on appellants and, for that reason, are to be taken into account in considering the impact of regulation. Cf. *Goldblatt v. Hempstead*, 369 U. S., at 594 n. 3.

<sup>34</sup> Counsel for appellants admitted at oral argument that the Commission has not suggested that it would not, for example, approve a 20-story office tower along the lines of that which was part of the original plan for the Terminal. See Tr. of Oral Arg. 19.

<sup>35</sup> See *Costonis, supra* n. 2, at 585-589.

On this record, we conclude that the application of New York City's Landmarks Law has not effected a "taking" of appellants' property. The restrictions imposed are substantially related to the promotion of the general welfare and not only permit reasonable beneficial use of the landmark site but also afford appellants opportunities further to enhance not only the Terminal site proper but also other properties.<sup>30</sup>

*Affirmed.*

MR. JUSTICE REHNQUIST, with whom THE CHIEF JUSTICE and MR. JUSTICE STEVENS join, dissenting.

Of the over one million buildings and structures in the city of New York, appellees have singled out 400 for designation as official landmarks.<sup>1</sup> The owner of a building might initially be pleased that his property has been chosen by a distinguished committee of architects, historians, and city

<sup>30</sup> We emphasize that our holding today is on the present record, which in turn is based on Penn Central's present ability to use the Terminal for its intended purposes and in a gainful fashion. The city conceded at oral argument that if appellants can demonstrate at some point in the future that circumstances have so changed that the Terminal ceases to be "economically viable," appellants may obtain relief. See Tr. of Oral Arg. 42-43.

<sup>1</sup> A large percentage of the designated landmarks are public structures (such as the Brooklyn Bridge, City Hall, the Statue of Liberty and the Municipal Asphalt Plant) and thus do not raise Fifth Amendment taking questions. See Landmarks Preservation Commission of the City of New York, Landmarks and Historic Districts (1977 and Jan. 10, 1978, Supplement). Although the Court refers to the New York ordinance as a *comprehensive* program to preserve *historic* landmarks, *ante*, at 107, the ordinance is not limited to historic buildings and gives little guidance to the Landmarks Preservation Commission in its selection of landmark sites. Section 207-1.0 (n) of the Landmarks Preservation Law, as set forth in N. Y. C. Admin. Code, ch. 8-A (1976), requires only that the selected landmark be at least 30 years old and possess "a special character or special historical or aesthetic interest or value as part of the development, heritage or cultural characteristics of the city, state or nation."

planners for such a singular distinction. But he may well discover, as appellant Penn Central Transportation Co. did here, that the landmark designation imposes upon him a substantial cost, with little or no offsetting benefit except for the honor of the designation. The question in this case is whether the cost associated with the city of New York's desire to preserve a limited number of "landmarks" within its borders must be borne by all of its taxpayers or whether it can instead be imposed entirely on the owners of the individual properties.

Only in the most superficial sense of the word can this case be said to involve "zoning."<sup>2</sup> Typical zoning restrictions may, it is true, so limit the prospective uses of a piece of property as to diminish the value of that property in the abstract because it may not be used for the forbidden purposes. But any such abstract decrease in value will more than likely be at least partially offset by an increase in value which flows from similar restrictions as to use on neighboring

<sup>2</sup> Even the New York Court of Appeals conceded that "[t]his is not a zoning case. . . . Zoning restrictions operate to advance a comprehensive community plan for the common good. Each property owner in the zone is both benefited and restricted from exploitation, presumably without discrimination, except for permitted continuing nonconforming uses. The restrictions may be designed to maintain the general character of the area, or to assure orderly development, objectives inuring to the benefit of all, which property owners acting individually would find difficult or impossible to achieve. . . ."

"Nor does this case involve landmark regulation of a historic district. . . . [In historic districting, as in traditional zoning,] owners although burdened by the restrictions also benefit, to some extent, from the furtherance of a general community plan."

"Restrictions on alteration of individual landmarks are not designed to further a general community plan. Landmark restrictions are designed to prevent alteration or demolition of a single piece of property. To this extent, such restrictions resemble 'discriminatory' zoning restrictions, properly condemned. . . ." 42 N. Y. 2d 324, 329-330, 366 N. E. 2d 1271, 1274 (1977).

properties. All property owners in a designated area are placed under the same restrictions, not only for the benefit of the municipality as a whole but also for the common benefit of one another. In the words of Mr. Justice Holmes, speaking for the Court in *Pennsylvania Coal Co. v. Mahon*, 260 U. S. 393, 415 (1922), there is "an average reciprocity of advantage."

Where a relatively few individual buildings, all separated from one another, are singled out and treated differently from surrounding buildings, no such reciprocity exists. The cost to the property owner which results from the imposition of restrictions applicable only to his property and not that of his neighbors may be substantial—in this case, several million dollars—with no comparable reciprocal benefits. And the cost associated with landmark legislation is likely to be of a completely different order of magnitude than that which results from the imposition of normal zoning restrictions. Unlike the regime affected by the latter, the landowner is not simply prohibited from using his property for certain purposes, while allowed to use it for all other purposes. Under the historic-landmark preservation scheme adopted by New York, the property owner is under an affirmative duty to *preserve* his property as a landmark at his own expense. To suggest that because traditional zoning results in some limitation of use of the property zoned, the New York City landmark preservation scheme should likewise be upheld, represents the ultimate in treating as alike things which are different. The rubric of "zoning" has not yet sufficed to avoid the well-established proposition that the Fifth Amendment bars the "Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole." *Armstrong v. United States*, 364 U. S. 40, 49 (1960). See discussion *infra*, at 147–150.

In August 1967, Grand Central Terminal was designated a landmark over the objections of its owner Penn Central. Immediately upon this designation, Penn Central, like all

owners of a landmark site, was placed under an affirmative duty, backed by criminal fines and penalties, to keep "exterior portions" of the landmark "in good repair." Even more burdensome, however, were the strict limitations that were thereupon imposed on Penn Central's use of its property. At the time Grand Central was designated a landmark, Penn Central was in a precarious financial condition. In an effort to increase its sources of revenue, Penn Central had entered into a lease agreement with appellant UGP Properties, Inc., under which UGP would construct and operate a multistory office building cantilevered above the Terminal building. During the period of construction, UGP would pay Penn Central \$1 million per year. Upon completion, UGP would rent the building for 50 years, with an option for another 25 years, at a guaranteed *minimum* rental of \$3 million per year. The record is clear that the proposed office building was in full compliance with all New York zoning laws and height limitations. Under the Landmarks Preservation Law, however, appellants could not construct the proposed office building unless appellee Landmarks Preservation Commission issued either a "Certificate of No Exterior Effect" or a "Certificate of Appropriateness." Although appellants' architectural plan would have preserved the facade of the Terminal, the Landmarks Preservation Commission has refused to approve the construction.

### I

The Fifth Amendment provides in part: "nor shall private property be taken for public use, without just compensation."<sup>3</sup>

<sup>3</sup> The guarantee that private property shall not be taken for public use without just compensation is applicable to the States through the Fourteenth Amendment. Although the state "legislature may prescribe a form of procedure to be observed in the taking of private property for public use, . . . it is not due process of law if provision be not made for compensation." *Chicago, B. & Q. R. Co. v. Chicago*, 166 U. S. 226, 236 (1897).

In a very literal sense, the actions of appellees violated this constitutional prohibition. Before the city of New York declared Grand Central Terminal to be a landmark, Penn Central could have used its "air rights" over the Terminal to build a multistory office building, at an apparent value of several million dollars per year. Today, the Terminal cannot be modified in *any* form, including the erection of additional stories, without the permission of the Landmark Preservation Commission, a permission which appellants, despite good-faith attempts, have so far been unable to obtain. Because the Taking Clause of the Fifth Amendment has not always been read literally, however, the constitutionality of appellees' actions requires a closer scrutiny of this Court's interpretation of the three key words in the Taking Clause—"property," "taken," and "just compensation."<sup>4</sup>

#### A

Appellees do not dispute that valuable property rights have been destroyed. And the Court has frequently emphasized that the term "property" as used in the Taking Clause includes the entire "group of rights inhering in the citizen's [ownership]." *United States v. General Motors Corp.*, 323 U. S. 373 (1945). The term is not used in the

"vulgar and untechnical sense of the physical thing with respect to which the citizen exercises rights recognized by law. [Instead, it] . . . denote[s] the *group of rights* inhering in the citizen's relation to the physical thing, as

<sup>4</sup> The Court's opinion touches base with, or at least attempts to touch base with, most of the major eminent domain cases decided by this Court. Its use of them, however, is anything but meticulous. In citing to *United States v. Caltex, Inc.*, 344 U. S. 149, 156 (1952), for example, *ante*, at 124, the only language remotely applicable to eminent domain is stated in terms of "the destruction of respondents' terminals by a trained team of engineers in the face of their impending seizure by the enemy." 344 U. S., at 156.

*the right to possess, use and dispose of it. . . .* The constitutional provision is addressed to *every sort of interest* the citizen may possess." *Id.*, at 377-378 (emphasis added).

While neighboring landowners are free to use their land and "air rights" in any way consistent with the broad boundaries of New York zoning, Penn Central, absent the permission of appellees, must forever maintain its property in its present state.<sup>5</sup> The property has been thus subjected to a nonconsensual servitude not borne by any neighboring or similar properties.<sup>6</sup>

#### B

Appellees have thus destroyed—in a literal sense, "taken"—substantial property rights of Penn Central. While the term "taken" might have been narrowly interpreted to include only physical seizures of property rights, "the construction of the phrase has not been so narrow. The courts have held that the deprivation of the former owner rather than the accretion of a right or interest to the sovereign constitutes the taking." *Id.*, at 378. See also *United States v. Lynah*, 188 U. S. 445, 469

<sup>5</sup> In particular, Penn Central cannot increase the height of the Terminal. This Court has previously held that the "air rights" over an area of land are "property" for purposes of the Fifth Amendment. See *United States v. Causby*, 328 U. S. 256 (1946) ("air rights" taken by low-flying airplanes); *Griggs v. Allegheny County*, 369 U. S. 84 (1962) (same); *Portsmouth Harbor Land & Hotel Co. v. United States*, 260 U. S. 327 (1922) (firing of projectiles over summer resort can constitute taking). See also *Butler v. Frontier Telephone Co.*, 186 N. Y. 486, 79 N. E. 716 (1906) (stringing of telephone wire across property constitutes a taking).

<sup>6</sup> It is, of course, irrelevant that appellees interfered with or destroyed property rights that Penn Central had not yet physically used. The Fifth Amendment must be applied with "reference to the uses for which the property is suitable, having regard to the existing business or wants of the community, or such as may be reasonably expected in the immediate future." *Boom Co. v. Patterson*, 98 U. S. 403, 408 (1879) (emphasis added).

(1903);<sup>7</sup> *Dugan v. Rank*, 372 U. S. 609, 625 (1963). Because “not every destruction or injury to property by governmental action has been held to be a ‘taking’ in the constitutional sense,” *Armstrong v. United States*, 364 U. S., at 48, however, this does not end our inquiry. But an examination of the two exceptions where the destruction of property does *not* constitute a taking demonstrates that a compensable taking has occurred here.

## 1

As early as 1887, the Court recognized that the government can prevent a property owner from using his property to injure others without having to compensate the owner for the value of the forbidden use.

“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 for the public benefit. Such legislation 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 by any one, for certain forbidden purposes, is prejudicial to the public interests. . . . 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*

<sup>7</sup> “Such a construction would pervert the constitutional provision into a restriction upon the rights of the citizen, as those rights stood at the common law, instead of the government, and make it an authority for invasion of private right under the pretext of the public good, which had no warrant in the laws or practices of our ancestors.” 188 U. S., at 470.

*their property, to inflict injury upon the community.”* *Mugler v. Kansas*, 123 U. S. 623, 668–669.

Thus, there is no “taking” where a city prohibits the operation of a brickyard within a residential area, see *Hadacheck v. Sebastian*, 239 U. S. 394 (1915), or forbids excavation for sand and gravel below the water line, see *Goldblatt v. Hempstead*, 369 U. S. 590 (1962). Nor is it relevant, where the government is merely prohibiting a noxious use of property, that the government would seem to be singling out a particular property owner. *Hadacheck, supra*, at 413.<sup>8</sup>

The nuisance exception to the taking guarantee is not coterminous with the police power itself. The question is whether the forbidden use is dangerous to the safety, health, or welfare of others. Thus, in *Curtin v. Benson*, 222 U. S. 78 (1911), the Court held that the Government, in prohibiting the owner of property within the boundaries of Yosemite National Park from grazing cattle on his property, had taken the owner’s property. The Court assumed that the Government could constitutionally require the owner to fence his land or take other action to prevent his cattle from straying onto others’ land without compensating him.

“Such laws might be considered as strictly regulations of the use of property, of so using it that no injury could result to others. They would have the effect of making the owner of land herd his cattle on his own land and of making him responsible for a neglect of it.” *Id.*, at 86.

The prohibition in question, however, was “not a prevention of a misuse or illegal use but the prevention of a legal and essential use, an attribute of its ownership.” *Ibid.*

Appellees are not prohibiting a nuisance. The record is

<sup>8</sup> Each of the cases cited by the Court for the proposition that legislation which severely affects some landowners but not others does not effect a “taking” involved noxious uses of property. See *Hadacheck*; *Miller v. Schoene*, 276 U. S. 272 (1928); *Goldblatt*. See *ante*, at 125–127, 133.

clear that the proposed addition to the Grand Central Terminal would be in full compliance with zoning, height limitations, and other health and safety requirements. Instead, appellees are seeking to preserve what they believe to be an outstanding example of beaux arts architecture. Penn Central is prevented from further developing its property basically because *too good* a job was done in designing and building it. The city of New York, because of its unadorned admiration for the design, has decided that the owners of the building must preserve it unchanged for the benefit of sightseeing New Yorkers and tourists.

Unlike land-use regulations, appellees' actions do not merely *prohibit* Penn Central from using its property in a narrow set of noxious ways. Instead, appellees have placed an *affirmative* duty on Penn Central to maintain the Terminal in its present state and in "good repair." Appellants are not free to use their property as they see fit within broad outer boundaries but must strictly adhere to their past use except where appellees conclude that alternative uses would not detract from the landmark. While Penn Central may continue to use the Terminal as it is presently designed, appellees otherwise "exercise complete dominion and control over the surface of the land," *United States v. Causby*, 328 U. S. 256, 262 (1946), and must compensate the owner for his loss. *Ibid.* "Property is taken in the constitutional sense when inroads are made upon an owner's use of it to an extent that, as between private parties, a servitude has been acquired." *United States v. Dickinson*, 331 U. S. 745, 748 (1947). See also *Dugan v. Rank*, *supra*, at 625.<sup>9</sup>

<sup>9</sup> In *Monongahela Navigation Co. v. United States*, 148 U. S. 312 (1893), the Monongahela company had expended large sums of money in improving the Monongahela River by means of locks and dams. When the United States condemned this property for its own use, the Court held that full compensation had to be awarded. "Suppose, in the improvement of a navigable stream, it was deemed essential to construct a canal with locks, in order to pass around rapids or falls. Of the power of Congress

Even where the government prohibits a noninjurious use, the Court has ruled that a taking does not take place if the prohibition applies over a broad cross section of land and thereby "secure[s] an average reciprocity of advantage." *Pennsylvania Coal Co. v. Mahon*, 260 U. S., at 415.<sup>10</sup> It is for this reason that zoning does not constitute a "taking." While zoning at times reduces *individual* property values, the burden is shared relatively evenly and it is reasonable to conclude that on the whole an individual who is harmed by one aspect of the zoning will be benefited by another.

Here, however, a multimillion dollar loss has been imposed on appellants; it is uniquely felt and is not offset by any benefits flowing from the preservation of some 400 other "landmarks" in New York City. Appellees have imposed a substantial cost on less than one one-tenth of one percent of the buildings in New York City for the general benefit of all its people. It is exactly this imposition of general costs on a few individuals at which the "taking" protection is directed. The Fifth Amendment

"prevents the public from loading upon one individual more than his just share of the burdens of government,

to condemn whatever land may be necessary for such canal, there can be no question; and of the equal necessity of paying full compensation for all private property taken there can be as little doubt." *Id.*, at 337. Under the Court's rationale, however, where the Government wishes to preserve a pre-existing canal system for public use, it need not condemn the property but need merely order that it be preserved in its present form and be kept "in good repair."

<sup>10</sup> Appellants concede that the preservation of buildings of historical or aesthetic importance is a permissible objective of state action. Brief for Appellants 12. Cf. *Berman v. Parker*, 348 U. S. 26 (1954); *United States v. Gettysburg Electric R. Co.*, 160 U. S. 668 (1896).

For the reasons noted in the text, historic zoning, as has been undertaken by cities such as New Orleans, may well not require compensation under the Fifth Amendment.

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).

Less than 20 years ago, this Court reiterated that the

"Fifth Amendment's guarantee that private property shall not be taken for a public use without just compensation 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 v. United States*, 364 U. S., at 49.

Cf. *Nashville, C. & St. L. R. Co. v. Walters*, 294 U. S. 405, 428-430 (1935).<sup>11</sup>

As Mr. Justice Holmes pointed out in *Pennsylvania Coal Co. v. Mahon*, "the question at bottom" in an eminent domain case "is upon whom the loss of the changes desired should fall." 260 U. S., at 416. The benefits that appellees believe will flow from preservation of the Grand Central Terminal will accrue to all the citizens of New York City. There is no reason to believe that appellants will enjoy a substantially greater share of these benefits. If the cost of preserving Grand Central Terminal were spread evenly across the entire population of the city of New York, the burden per person would be in cents per year—a minor cost appellees would

<sup>11</sup> "It is true that the police power embraces regulations designed to promote public convenience or the general welfare, and not merely those in the interest of public health, safety and morals. . . . But when particular individuals are singled out to bear the cost of advancing the public convenience, that imposition must bear some reasonable relation to the evils to be eradicated or the advantages to be secured. . . . While moneys raised by general taxation may constitutionally be applied to purposes from which the individual taxed may receive no benefit, and indeed, suffer serious detriment, . . . so-called assessments for public improvements laid upon particular property owners are ordinarily constitutional only if based on benefits received by them." 294 U. S., at 429-430.

surely concede for the benefit accrued. Instead, however, appellees would impose the entire cost of several million dollars per year on Penn Central. But it is precisely this sort of discrimination that the Fifth Amendment prohibits.<sup>12</sup>

Appellees in response would argue that a taking only occurs where a property owner is denied *all* reasonable value of his property.<sup>13</sup> The Court has frequently held that, even where a destruction of property rights would not *otherwise* constitute a taking, the inability of the owner to make a reasonable return on his property requires compensation under the Fifth Amendment. See, e. g., *United States v. Lynah*, 188 U. S., at 470. But the converse is not true. A taking does not become a noncompensable exercise of police power simply because the government in its grace allows the owner to make some "reasonable" use of his property. "[I]t is the character of the invasion, not the amount of damage resulting from it,

<sup>12</sup> The fact that the Landmarks Preservation Commission may have allowed additions to a relatively few landmarks is of no comfort to appellants. *Ante*, at 118 n. 18. Nor is it of any comfort that the Commission refuses to allow appellants to construct any additional stories because of their belief that such construction would not be aesthetic. *Ante*, at 117-118.

<sup>13</sup> Difficult conceptual and legal problems are posed by a rule that a taking only occurs where the property owner is denied all reasonable return on his property. Not only must the Court define "reasonable return" for a variety of types of property (farmlands, residential properties, commercial and industrial areas), but the Court must define the particular property unit that should be examined. For example, in this case, if appellees are viewed as having restricted Penn Central's use of its "air rights," *all* return has been denied. See *Pennsylvania Coal Co. v. Mahon*, 260 U. S. 393 (1922). The Court does little to resolve these questions in its opinion. Thus, at one point, the Court implies that the question is whether the restrictions have "an unduly harsh impact upon the owner's use of the property," *ante*, at 127; at another point, the question is phrased as whether Penn Central can obtain "a 'reasonable return' on its investment," *ante*, at 136; and, at yet another point, the question becomes whether the landmark is "economically viable," *ante*, at 138 n. 36.

so long as the damage is substantial, that determines the question whether it is a taking." *United States v. Cress*, 243 U. S. 316, 328 (1917); *United States v. Causby*, 328 U. S., at 266. See also *Goldblatt v. Hempstead*, 369 U. S., at 594.

## C

Appellees, apparently recognizing that the constraints imposed on a landmark site constitute a taking for Fifth Amendment purposes, do not leave the property owner empty-handed. As the Court notes, *ante*, at 113-114, the property owner may theoretically "transfer" his previous right to develop the landmark property to adjacent properties if they are under his control. Appellees have coined this system "Transfer Development Rights," or TDR's.

Of all the terms used in the Taking Clause, "just compensation" has the strictest meaning. The Fifth Amendment does not allow simply an approximate compensation but requires "a full and perfect equivalent for the property taken." *Monongahela Navigation Co. v. United States*, 148 U. S., at 326.

"[I]f the adjective 'just' had been omitted, and the provision was simply that property should not be taken without compensation, the natural import of the language would be that the compensation should be the equivalent of the property. And this is made emphatic by the adjective 'just.' There can, in view of the combination of those two words, be no doubt that the compensation must be a full and perfect equivalent for the property taken." *Ibid.*

See also *United States v. Lynah*, *supra*, at 465; *United States v. Pewee Coal Co.*, 341 U. S. 114, 117 (1951). And the determination of whether a "full and perfect equivalent" has been awarded is a "judicial function." *United States v. New River Collieries Co.*, 262 U. S. 341, 343-344 (1923). The fact

that *appellees* may believe that TDR's provide full compensation is irrelevant.

"The legislature may determine what private property is needed for public purposes—that is a question of a political and legislative character; but when the taking has been ordered, then the question of compensation is judicial. It does not rest with the public, taking the property, through Congress or the legislature, its representative, to say what compensation shall be paid, or even what shall be the rule of compensation. The Constitution has declared that just compensation shall be paid, and the ascertainment of that is a judicial inquiry." *Monongahela Navigation Co. v. United States*, *supra*, at 327.

Appellees contend that, even if they have "taken" appellants' property, TDR's constitute "just compensation." Appellants, of course, argue that TDR's are highly imperfect compensation. Because the lower courts held that there was no "taking," they did not have to reach the question of whether or not just compensation has already been awarded. The New York Court of Appeals' discussion of TDR's gives some support to appellants:

"The many defects in New York City's program for development rights transfers have been detailed elsewhere . . . . The area to which transfer is permitted is severely limited [and] complex procedures are required to obtain a transfer permit." 42 N. Y. 2d 324, 334-335, 366 N. E. 2d 1271, 1277 (1977).

And in other cases the Court of Appeals has noted that TDR's have an "uncertain and contingent market value" and do "not adequately preserve" the value lost when a building is declared to be a landmark. *French Investing Co. v. City of New York*, 39 N. Y. 2d 587, 591, 350 N. E. 2d 381, 383, appeal dismissed, 429 U. S. 990 (1976). On the other hand, there is evidence in the record that Penn Central has been

offered substantial amounts for its TDR's. Because the record on appeal is relatively slim, I would remand to the Court of Appeals for a determination of whether TDR's constitute a "full and perfect equivalent for the property taken."<sup>14</sup>

## II

Over 50 years ago, Mr. Justice Holmes, speaking for the Court, warned that the courts were "in danger of forgetting that 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. The Court's opinion in this case demonstrates that the danger thus foreseen has not abated. The city of New York is in a precarious financial state, and some may believe that the costs of landmark preservation will be more easily borne by corporations such as Penn Central than the overburdened individual tax-

<sup>14</sup>The Court suggests, *ante*, at 131, that if appellees are held to have "taken" property rights of landmark owners, not only the New York City Landmarks Preservation Law, but "all comparable landmark legislation in the Nation," must fall. This assumes, of course, that TDR's are not "just compensation" for the property rights destroyed. It also ignores the fact that many States and cities in the Nation have chosen to preserve landmarks by purchasing or condemning restrictive easements over the facades of the landmarks and are apparently quite satisfied with the results. See, *e. g.*, Ore. Rev. Stat. §§ 271.710, 271.720 (1977); Md. Ann. Code, Art 41, § 181A (1978); Va. Code §§ 10-145.1 and 10-138 (e) (1978); Richmond, Va., City Code § 17-23 *et seq.* (1975). The British National Trust has effectively used restrictive easements to preserve landmarks since 1937. See National Trust Act, 1937, 1 Edw. 8 and 1 Geo. 6 ch. lvii, §§ 4 and 8. Other States and cities have found that tax incentives are also an effective means of encouraging the private preservation of landmark sites. See, *e. g.*, Conn. Gen. Stat. § 12-127a (1977); Ill. Rev. Stat., ch. 24, § 11-48.2-6 (1976); Va. Code § 10-139 (1978). The New York City Landmarks Preservation Law departs drastically from these traditional, and constitutional, means of preserving landmarks.

payers of New York. But these concerns do not allow us to ignore past precedents construing the Eminent Domain Clause to the end that the desire to improve the public condition is, indeed, achieved by a shorter cut than the constitutional way of paying for the change.

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ADMINISTRATIVE MATERIALS

Attorney General's Guidelines for the Evaluation of Risk and  
Avoidance of Unanticipated Takings  
Authority: Executive Order No. 12630

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53 Fed. Reg. 8859

March 18, 1988

TEXT:

I. Explanatory Note

A. Policy, Purpose, and Mandate

The Fifth Amendment to the United States Constitution provides that private property shall not be taken for public use without payment of just compensation. Over the course of our nation's history, this constitutional requirement has had important legal and fiscal consequences in the development and implementation of government policies and actions at the local, state, and national levels.

During the past year, the Supreme Court of the United States again examined the protection of private property under the Fifth Amendment. In *First English Evangelical Lutheran Church of Glendale v. County of Los Angeles*, 107 S. Ct. 2378 [17 ELR 20787] (1987) and *Nollan v. California Coastal Commission*, 107 S. Ct. 3141 [17 ELR 20918] (1987), the Supreme Court addressed the fundamental protections afforded by the Fifth Amendment whenever a government policy or action is determined to result in a taking of private property for public use.

The President issued Executive Order No. 12630, "Governmental Actions and Interference with Constitutionally Protected Property Rights," on March 15, 1988, pursuant to his authority as president and in service of his constitutional obligations to manage the executive branch and to ensure constitutionality of governmental actions. This Executive Order directs Executive Branch departments and agencies, as a part of their internal management process, to assess the takings implications of proposed policies and actions on private property interests protected by the Fifth Amendment. In this way, federal agency decisionmakers will be better informed about the potential effects of proposed agency activities and to the extent permitted by law, consistent with their statutory obligations, can minimize the impacts of such activities on constitutionally protected private property rights.

In Section 1(c) of Executive Order No. 12630, the President directed the Attorney General to promulgate, in consultation with the Executive Branch departments and agencies, Guidelines for the Evaluation of Risk and Avoidance of Unanticipated Takings. In accordance with the direction provided in the Executive Order, these Guidelines establish a basic, uniform framework for federal agencies to use in their internal evaluations of the takings implications of administrative, regulatory, and legislative policies and actions. Neither the Executive Order nor these Guidelines prevents an agency

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from making an independent decision about proceeding with a specific policy or action which the decisionmaker determines is statutorily required. Rather, their purpose is to assure that governmental decisionmakers are fully informed of any potential takings implications of proposed policies and actions, thereby enhancing the cost-efficient administration of agency programs. In those instances in which a range of alternatives are available, each of which would meet the statutorily required objective, prudent management requires selection of the least risk alternative. In instances in which alternatives are not available, the takings implications are noted.

As detailed in Section VIII of the Guidelines, the evaluations conducted under the Executive Order, the Guidelines, and the accompanying Appendix to the Guidelines for the Evaluation of Risk and Avoidance of Unanticipated Takings (incorporated by reference herein) are intended solely as internal and predecisional management aids for agency decisionmakers. Neither any part of the evaluation process nor any conclusions reached under that process are admissions of the existence -- possible, probable, or otherwise -- of takings or are otherwise subject to judicial review. Further, terms utilized in the process established in these Guidelines (for example, "takings implication" and "significant takings implications") are terms of art and their meanings are limited to the context of this evaluation process.

#### B. Overview of the Guidelines

The Guidelines first present, in Sections II and III, information regarding the scope of policies and actions subject to evaluation under Executive Order No. 12630 and the agencies that must conduct these evaluations. Generally, an agency's administrative, regulatory, and legislative policies and actions that affect, or may affect, the use or value of private property must be evaluated. The policies and actions specifically excluded from review, for example, agency plans and studies, and policies and actions initiated prior to issuance of the Executive Order, are also set forth. Even as to excluded matters, however, agency decisionmakers must take steps to ensure that their constitutional obligations are recognized and fulfilled.

Section V of the Guidelines then explains the Fifth Amendment principles and specific assessment factors to be used in evaluating the takings implications of policies and actions. This evaluation, called the takings implication assessment (TIA), will enable the agency to determine whether, and to what extent, a proposed policy or action poses risks of a taking of private property and to estimate the potential financial exposure of the proposal. The basic elements of the TIA appear in Section VI of the Guidelines. Once completed, the TIA, which will usually be based on a specific factual setting, will serve as an evaluative tool for the agency decisionmaker. This predecisional assessment should be incorporated by the agency, in a form and manner chosen by the agency, into existing planning processes and procedures.

Section VI of the Guidelines explains specific executive branch management responsibilities with regard to the Executive Order and details special reporting requirements. For instance, Sections VI(B) and VI(C) address agency reporting requirements under Section 5(b) of the Executive Order to the Office of Management and Budget.

In addition, Section VI(D) of the Guidelines establishes a supplementation process enabling agencies to adapt these implementation procedures and

management requirements to their specific program responsibilities. Through supplementation, an agency has flexibility, with the approval of the Attorney General, to exempt specific policies and actions from analysis under the Executive Order whenever such policies and actions, as a class, have no takings implications. For example, under current case law, no takings implication arises solely because an otherwise lawful permit system is established with respect to subsequent uses of property. In addition, through supplementation, an agency may make specific modifications, as necessary, to the management process. Supplementation may be initiated by an agency at any time, subject to review and approval by the Attorney General.

Section VII sets forth the general responsibilities of the Attorney General and the Director of the Office of Management and Budget in implementation of the Executive Order. The Attorney General is responsible for taking action, to the extent permitted by law, to ensure that the policies of the agencies are consistent with the principles, criteria, and administrative requirements established in the Executive Order and these Guidelines, and for revising and reissuing these Guidelines, as necessary, to reflect fundamental changes in takings law that occur as a result of United States Supreme Court decisions. Finally, in Section VIII of the Guidelines, the non-reviewability of actions taken under the Executive Order, the Guidelines, and the accompanying Appendix to the Guidelines is explained.

An Appendix to the Guidelines for the Evaluation of Risk and Avoidance of Unanticipated Takings has also been prepared and is incorporated by reference into these Guidelines. This Appendix provides further information for the use of departments and agencies regarding the case law surrounding considerations of whether a taking has occurred and the extent of any potential just compensation claim. As with the Guidelines themselves, this Appendix addresses only a general framework for the evaluation of takings implications of proposed agency policies and actions under the Executive Order and these Guidelines.

## II. Scope of the Guidelines

### A. Policies and Actions Subject to Evaluation

Except for the policies and actions specified in the exclusions in Subsections II(B) and (C) below, an agency must evaluate, for their takings implications, its administrative, regulatory, and legislative policies and actions that affect, or may affect, the use or value of private property in accordance with the framework established in these Guidelines. These will include, but are not limited to, the following.

#### 1. Administrative and Regulatory Policies and Actions

An agency must evaluate its administrative and regulatory policies and actions that affect, or may affect, the use or value of private property. These policies and actions (as discussed in Sections 2(a) and 2(c) of Executive Order No. 12630) include, but are not limited to, federal regulations that propose or implement licensing or permitting requirements, conditions or restrictions otherwise imposed by an agency on private property use, and actions relating to or causing the physical occupancy or invasion of private property.

#### 2. Legislative Policies and Actions

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An agency must evaluate its legislative policies and actions that affect, or may affect, the use or value of private property whenever such legislative policies and actions are subject to coordination and clearance by the Office of Management and Budget pursuant to Circular No. A-19, Revised, or succeeding management directives issued by the Office of Management and Budget for legislative coordination and clearance.

### 3. Recommendations to Other Federal Agencies

Written agency comments or recommendations by other than the lead agency on policies or actions within the Executive Order are subject to evaluation under these Guidelines whenever such comments or recommendations are required by law. In that circumstance, the commenting agency shall prepare a limited takings implication assessment consisting only of an assessment of the likelihood that the proposed action or policy may effect a taking for which compensation is due pursuant to Section VI(A)(2)(c)(i), *infra*.

#### B. Exclusions

The following federal policies and actions are excluded from evaluation under these Guidelines. Although these specific policies and actions are excluded from evaluation, they should be conducted or undertaken by federal agencies with due regard for the Fifth Amendment. Accordingly, even as to excluded matters, federal agency decisionmakers must take steps to ensure that their constitutional obligations are recognized and fulfilled.

Those policies and actions explicitly excluded from coverage under Executive Order No. 12630 and these Guidelines are as follows:

#### 1. Programs or Regulations Reducing Federal Restrictions on Use of Private Property

Federal policies or actions involving amendments to regulations, deregulation, or discontinuance of federal programs in a manner that lessens interference with the use of private property are excluded from coverage under the Executive Order and these Guidelines.

#### 2. Trust Property and Treaty Negotiations

Those policies or actions involving the property of person(s) or identified groups (for example, a federally recognized Indian tribe) for which the United States is serving as trustee and those actions taken while the United States is preparing to enter into or undertaking treaty negotiations with a foreign nation are excluded from coverage under the Executive Order and these Guidelines. For purposes of this exclusion, properties held in trust do not include trust territories of the United States (such as the Trust Territories of the Pacific) or other properties over which the United States is acting as a government, rather than serving in the capacity of a statutory trustee.

#### 3. Seizures of Property

All policies or actions involving seizures of property, which will be used by federal civil or military law enforcement officers either as evidence in a criminal proceeding or for criminal or civil statutory forfeiture proceedings, are excluded from coverage under the Executive Order and these Guidelines.

Property attached pursuant to law by court or administrative order in any proceeding initiated by the United States is also excluded.

#### 4. Agency Plans and Studies

Preliminary data gathering and evaluation activities, which occur prior to the agency's decision to implement a policy or action and which neither (1) physically occupy or invade private property nor (2) purport to regulate or otherwise restrict the use of private property, are excluded from coverage under the Executive Order and these Guidelines. Such activities are preliminary aids in the decisionmaking process and are excluded even though disclosure of their mere existence may, in certain instances, result in a drop in property values.

Once a proposed policy or action has advanced beyond this preliminary stage, the agency's policy or action is subject to evaluation under the Executive Order.

#### 5. Consultations Regarding Regulation of Private Property by State and Local Governments

Communications between federal agencies and state or local land-use planning agencies regarding planned or proposed state or local policies or actions regulating private property are excluded from coverage under the Executive Order and these Guidelines. This exclusion applies regardless of whether such communications are initiated by a federal agency or are undertaken by a federal agency in response to an invitation from the state or local authority. This exclusion does not apply to any policy or action for which a federal agency has decisionmaking authority, including authority to require or otherwise direct the state or local government to undertake or refrain from undertaking the activity in question.

#### 6. Military Property

Policies or actions involving placement of military facilities, in the exercise of the power of eminent domain, are excluded from coverage under the Executive Order and these Guidelines. Military activities that are undertaken solely on federal property, for example, artillery practice and military maneuvers and exercises, are also excluded.

#### 7. Exercise of the Power of Eminent Domain

The formal exercise of the power of eminent domain by federal agencies is excluded from coverage under the Executive Order and these Guidelines.

#### 8. Military and Foreign Affairs Activities

Policies and actions involving military and foreign affairs functions of the United States, such as foreign sanctions programs, military exercises, procurement activities, and regulation of personnel, are excluded from coverage under the Executive Order and these Guidelines. This exemption does not apply to regulation by the military of the use by citizens of private property, including the United States Army Corps of Engineers' civil works program. Thus, for purposes of this subsection, military functions do not include those activities in which the military component or personnel are substituting for, or performing as, a civilian regulatory body or agency.

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## 9. Pending or Imminent Litigation; Enforcement Actions Seeking Statutorily Authorized Penalties, Debt Collection, or the Like

Policies and actions taken in furtherance of pending or imminent litigation, whether judicial or administrative, are excluded from coverage under these Guidelines. In addition, judicial and administrative adjudicatory actions brought pursuant to federal law seeking penalties, the collection of debts authorized by statute, or the like, are excluded from coverage under these Guidelines. Policies and actions of offices of the Inspector General under the Inspector General Act of 1978, as amended, are also excluded from coverage under these Guidelines.

## C. Special Exclusion for Agency Policies and Actions Initiated Prior to Issuance of Executive Order No. 12630

Administrative, regulatory, or legislative policies and actions that were finally developed and implemented by an agency at the time of issuance of Executive Order No. 12630 are excluded from coverage under the Executive Order. Agency policies and actions proposed, but not initiated, prior to issuance of the Executive Order or these Guidelines are likewise excluded from coverage under the Executive Order. However, these categories of policies and actions should be evaluated in accordance with the Executive Order and these Guidelines to the maximum extent practicable in order to ensure that constitutional and managerial obligations are met.

## III. Agency Applicability

Executive Order No. 12630 and these Guidelines apply, except as provided in Section 2 of the Executive Order and Section II(B) herein, to any executive department, agency, or military department of the United States Government, and to any United States Government corporation, United States Government controlled corporation, or other establishment in the Executive Branch of the United States Government other than those entities defined as "independent regulatory agencies" in 44 U.S.C. § 3502(10).

The term "agency," when used in these Guidelines, shall refer to any of the departments, corporations, or other establishments identified in this section.

## IV. Definitions

## A. "Private Property"

"Private property" includes all property protected by the Fifth Amendment to the United States Constitution, including, but not limited to, real and personal property and tangible and intangible property.

## B. "Takings Implication"

Any policy or action to which the Executive Order applies that, upon examination by the decisionmaker under Section V(D)(3), *infra*, appears to have an effect on private property sufficiently severe as to effectively deny economically viable use of any distinct legally protected property interest to its owner, or to have the effect of, or result in, a permanent or temporary physical occupation, invasion, or deprivation, shall be deemed to have a takings implication for purposes of the Executive Order and these Guidelines.

### C. "Significant Takings Implications"

For purposes of the Executive Order and these Guidelines, a "significant takings implication" exists when, on the basis of available information, the decisionmaker concludes as to any policy or action with a takings implication that:

1. The proposed policy or action poses a substantial risk that a taking of private property may result, or
2. Insufficient information as to facts or law exists to enable an accurate assessment of whether significant takings consequences may result from the proposed policy or action.

### D. "Legislation"

For purposes of an agency's evaluation and reporting responsibilities under the executive order and these guidelines, "legislation" is limited to those agency legislative policies and actions that are subject to coordination and clearance by the Office of Management and Budget pursuant to Circular No. A-19, Revised, or succeeding management directives issued by the Office of Management and Budget on legislative coordination and clearance. Examples of the types of legislative submissions subject to review include an agency's proposed legislation and agency comments or testimony concerning pending legislation.

### E. "Lead Agency"

This is the federal agency designated to supervise the preparation of the reviews and assessments directed by the Executive Order and these Guidelines.

1. Designation of a lead agency is necessary whenever more than one department or agency is involved in a group of policies or actions directly related to each other because of their functional interdependence or geographic proximity.
2. For purposes of all policies and actions subject to evaluation under the Executive Order and these Guidelines, the lead agency is the one which will have primary responsibility for implementing the proposed policy or action or whose program would otherwise be primarily affected by the proposed policy or action. Any other agency having interagency consultation and review responsibilities for the policy or action in question shall, to the maximum extent possible, work with the lead agency to identify any takings implications.
3. Potential lead agencies have the responsibility to coordinate and determine, in a timely manner, which agency will be lead agency and which will be cooperating agencies. If there is disagreement among the agencies, the following factors should be considered in resolving the lead agency question:
  - a. Magnitude of the agency's involvement in the policy or action;
  - b. The agency's approval/disapproval authority over the policy or action;
  - c. Duration of the agency's involvement in the policy or action; and

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d. Sequence of the agencies' involvement in the policy or action.

4. When agencies are unable to resolve the choice of the lead agency, an official, to be designated by the Office of the President, shall be responsible for selecting the lead agency.

#### V. General Principles and Assessment Factors

Section V of these Guidelines provides a discussion of the general principles and assessment factors which inform considerations of whether a takings implication (Section V(D)(3)) exists. Section V(A) surveys takings factors generally; Section V(B) addresses current takings law more specifically; and Section V(C) points to specific takings risks discussed in Executive Order No. 12630. The accompanying Attorney General's Appendix to these Guidelines further details case law considerations on the risk of a taking. Section V(D) describes the current legal criteria through which the factors identified in Section V are analyzed. And, Section V(D)(3) specifies the term of art risk assessment criteria -- "takings implication" used to assess risk. Section VI of the Guidelines, especially Section VI(A)(2), sets forth the general process for documentation of the agency's application of these factors and criteria.

#### A. Underlying Premises of the Fifth Amendment

1. The Fifth Amendment provides that "private property [shall not] be taken for public use, without just compensation." Ownership, use, and transfer of private property of all types are rights. They are not benefits or privileges bestowed by government. At the same time, government also has the obligation to lawfully govern. Thus, the rights of property owners are not absolute and government may, within limits, regulate the use of property. Where those regulations amount to a taking of private property, government must pay the owner just compensation for the property rights abridged. The fact that the government's actions are otherwise constitutionally authorized does not mean that those actions cannot effect a taking. On the other hand, government may not take property except for a public purpose within its constitutional authority, and only then, on the payment of just compensation.

2. Government has historically used the formal exercise of the power of eminent domain, which provides orderly processes for paying just compensation, to acquire private property for public use. However, government may become liable for the payment of just compensation to private property owners whose property permanently or temporarily has been either physically occupied or invaded by government or others with the assistance or approval of government, or so affected by governmental regulation as to have been effectively taken despite the fact that the government has neither physically invaded, confiscated, or occupied the property nor taken legal title to the property.

3. So long as an action having consequences sufficiently severe as to constitute a taking is within the constitutional authority of the government, and the action taken is expressly or impliedly authorized by Congress or other constitutional source of authority (for example, an action directed by the President that the President may constitutionally authorize), the just compensation obligation will attach regardless of whether government contemplated or intended the taking to result. In contrast to the formal exercise of eminent domain, the private property owner can obtain compensation by filing what is called an "inverse condemnation" suit.

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4. The Fifth Amendment's protection extends to all forms of property -- real and personal, tangible and intangible. Property is not defined by the Constitution, but by independent sources such as state, local, and federal law.

5. In planning and carrying out federal program policies and actions undertaken by statute and otherwise, government officials have the obligation to be fiscally responsible. In addition, they must respect the constitutional rights of individuals who are affected by those program policies and actions. Accordingly, officials must be aware of and avoid, to the extent possible and consistent with the obligations imposed by law, actions that may inadvertently result in takings. Where such taking risk cannot be wholly avoided, responsible government officials should, to the extent possible and consistent with the obligations imposed by law, minimize the potential financial impact of takings by appropriate planning and implementation. To do this, officials must make decisions informed by the general and specific principles of takings case law.

### B. The Nature of a Taking

Takings may occur when permanent or temporary government actions result in the physical occupancy of property, the physical invasion of property, or the regulation of property.

#### 1. Physical Occupancies

Permanent or temporary physical occupancy is the most traditional type of taking and is therefore the most familiar and most easily recognized as a taking. As a general rule, where a physical occupancy exists no balancing of the economic impact on the owner and the public benefit will occur in the taking analysis. Examples of physical occupancy takings include not only formal condemnation exercises, such as the taking of land to build a highway, but also utility easements and access easements. [See Appendix to Guidelines, Section III(E)(1).]

#### 2. Physical Invasions

As a general rule, physical invasions of property, as distinguished from physical occupancies, may also give rise to a taking where the invasions are of a recurring and substantial nature. Examples of physical invasion takings include, among others, flooding and water related intrusions and overflight or aviation easement intrusions. [See Appendix to Guidelines, Section III(E)(2).]

#### 3. Regulatory Takings

a. Like physical occupations or invasions, regulation which affects the value, use, or transfer of property may constitute a taking if it goes too far. *Pennsylvania Coal Company v. Mahon*, 260 U.S. 393 (1922); *Hodel v. Irving*, 107 S. Ct. 2076 (1987); *Nollan v. California Coastal Commission*, 107 S. Ct. 3141 [17 ELR 20918] (1987). Regulation has gone too far and may result in takings liability if:

i. The regulation in question does not substantially advance a legitimate governmental purpose; it is not enough that the regulation or action might rationally advance the purpose purported to be served; or

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ii. In assessing the character of the government action, the economic impact of the action on the property interest involved, the extent to which the regulation interferes with the reasonable, investment-backed expectations of the owner of the property interest, and other relevant factors, justice and fairness require that the public, and not the private property owner, pay for the public use. *Pennsylvania Coal v. Mahon*, 260 U.S. 393 (1922); *Penn Central Transportation Company v. New York City*, 438 U.S. 104 [8 ELR 20528] (1978); *Agins v. City of Tiburon*, 447 U.S. 255 [10 ELR 20361] (1980); *First English Evangelical Lutheran Church of Glendale v. Los Angeles County*, 107 S. Ct. 2378, 2389, n.10 [17 ELR 20787] (1987).

b. Regulatory actions that closely resemble, or have the effect of, a physical invasion or occupation of property are more likely to be found to be takings. See *Nollan v. California Coastal Commission*, 107 S. Ct. 2076 [17 ELR 20918] (1987). The greater the deprivation of use, the greater the likelihood that a taking will be found.

c. Regulation of an individual's property must not be disproportionate, within the limits of existing information or technology, to the degree to which the individual's property use is contributing to the overall problem. Thus, regulatory actions designed to compel public benefits, rather than prevent privately imposed harms, are also more likely to be takings.

[See Appendix to Guidelines, Section III(F).]

### C. Special Situations

When implementing a regulatory policy or action and evaluating the takings implications of that policy or action, agencies should consider the following special factors:

#### 1. Permitting Programs

[Executive Order No. 12630, Section 4(a); Appendix to Guidelines, Section III(F)(2).]

The programs of many agencies require private parties to obtain permits before making specific uses of, or acting with respect to, private property, without necessarily effecting a taking for which compensation is due. Those agencies may place conditions on the granting of such permits. However, a condition on the granting of a permit risks a takings implication unless:

a. The condition serves the same purpose that would be served by a prohibition of the use or action; and

b. The condition imposed substantially advances that purpose.

#### 2. Public Health and Safety

[Executive Order No. 12630, Section 4(d); Appendix to Guidelines, Section III(F)(5).]

Policies or actions undertaken to protect public health and safety are ordinarily given greater latitude by courts before being held to give rise to takings. For purposes of that deference, however, the Supreme Court has ruled

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that "public health and safety" is not coextensive with the government's power to act. Public health and safety represents a component of that broader power. Again, that governmental power exists does not mean that its exercise is free of takings concerns. The deference discussed here extends only to public health and safety interests.

a. Where public health and safety is the asserted regulatory purpose, then the health and safety risk posed by the property use to be regulated must be identified with as much specificity as possible and should be "real and substantial." That is, it must be more than speculative. It must present a genuine risk of harm to public health and safety and the claim of risk of harm must be supported by meaningful evidence, in light of available technology and information, that such harm may result from the use to be regulated.

b. Any action taken to regulate property use for public health and safety purposes must address the health and safety risk; that is, it must be designed to counter the identified risk and must substantially advance the public health and safety purpose. The action should also, within the limits of available technology and information, be no more restrictive than necessary to alleviate the health and safety risk created by the use to be regulated.

c. In assessing these issues, an agency should examine the following factors:

i. The certainty that the property use to be regulated poses a health and safety risk in the absence of government action; and

ii. The severity of the injury to public health and safety should the identified risk materialize, based on the best available information in the field involved.

From the perspective of a takings implication analysis, the greater the certainty or the greater the severity, the more stringent measures are justified.

d. Although the ideal is that the response taken to counter the risk be "no greater than" the risk posed, reasonable proportionality presupposes available technology and information.

### 3. Delay

[Executive Order No. 12630, Section 3(d); Appendix to Guidelines, Section IV.]

Undue delay in decisionmaking processes, whether intentional or unintentional, may give rise to takings liability, or increase the amount of compensation due if the decisionmaking process interferes with the use of property pending the decision. Hence, decisionmaking processes should be kept to the minimum time necessary to allow the agency to meet its obligations.

### D. Policy and Action Evaluation Criteria

[Executive Order No. 12630, Section 4; Appendix to Guidelines, Sections II, III, and V.]

When evaluating policies or actions for takings implications, the following criteria (informed by the guidance of Executive Order No. 12630, Sections V(A-C) of these Guidelines, the Appendix to these Guidelines, and applicable case law) will apply. These criteria will form the basis for the assessment of takings implications as outlined in Section VI(A)(2), *infra*.

#### 1. Takings Implication Considerations: Physical Intrusion

Physical intrusion takings analysis is appropriate where the action or policy involves physical presence by the government, or by others pursuant to government authorizations, on private property. Where that presence amounts to occupancy of the property, takings exposure is measured by the physical limits of the occupation. Where the intrusion is less than occupancy, takings exposure turns on both the character of the invasion (for example, overflight, flooding) and a physical presence that is the natural and probable consequence of authorized government action.

#### 2. Takings Implication Considerations: Regulatory Takings

As discussed in Section V(B)(3), regulation may result in a taking of property.

##### a. Character of the Government Action

In assessing the character of the government action, an agency should examine:

i. The purpose intended to be served by the enabling statute, where the policy or action is taken pursuant to statute. Agencies should examine both the legislative history and the operative terms of the statute to determine that a legitimate purpose identified in the statute is being served;

ii. Whether the policy or action will substantially advance a legitimate public purpose of the enabling statute, where the policy or action is in furtherance of obligations imposed or authorized by statute. The proposed policy or action both must have the purpose of furthering, and must substantially further, the purpose embodied in the statute. It is not enough that the policy or action or regulation might rationally advance the purpose purported to be served;

iii. The degree to which the property-related activity or use that is the subject of the proposed policy or action contributes to a harm that the proposed policy or action is designed to address. The less direct, immediate, and demonstrable the contribution of the property-related activity to the harm to be addressed, the greater the risk that a taking will have occurred; and

iv. The extent to which the intended policy or action totally abrogates a property interest which has been historically viewed as an essential stick in the bundle of property rights.

##### b. Economic Impact of the Proposed Policy or Action

In assessing the economic impact of the proposed policy or action, an agency should examine:

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i. To the extent reasonably possible, what economic and property interests will be, or are likely to be, affected by the proposed policy or action. In that context, economic impact should be considered as to each property interest recognized by the applicable law;

ii. The likely degree of economic impact on identified property and economic interests;

iii. To the extent reasonably possible, among other relevant factors, the character and present use of the property, the anticipated duration of the proposed or intended action, and variations in state law;

iv. Whether the proposed policy or action carries benefits to the private property owner that offset or otherwise mitigate the adverse economic impact of the proposed policy or action; and

v. Whether alternative actions are available that would achieve the underlying lawful governmental objective and would have a lesser economic impact.

c. Interference with Reasonable Investment-Backed Expectations

To the extent reasonably possible, an agency should examine the degree to which the proposed policy or action will interfere with reasonable, investment-backed expectations of those private property owners affected by the proposed action, even if such expectations are not formally recognized as property interests under the generally applicable law.

3. Determination of Policies or Actions Having Takings Implications or Significant Taking Implications

a. When an agency decisionmaker, in applying the Section V(D) criteria, determines that a policy or action appears to have an effect on private property sufficiently severe as to effectively deny economically viable use of any distinct legally protected property interest to its owner, or to have the effect of, or result in, a permanent or temporary physical occupation, invasion, or deprivation, that appearance shall be deemed to give rise to a takings implication for purposes of the Executive Order and these Guidelines. See Section IV(B), supra (definition of "takings implication").

b. Similarly, a significant takings implication shall be deemed to exist for purposes of the Executive Order and these Guidelines when, on the basis of available information, the decisionmaker concludes as to any policy or action with a takings implication that:

i. The proposed policy or action poses a substantial risk that a taking private property may result; or

ii. Insufficient information as to facts or law exists to enable an accurate assessment of whether significant takings consequences may result from the proposed policy or action.

See Section IV(B), supra (definition of "significant takings implication").

#### 4. Evaluation of Alternatives for Policies and Actions Having Takings Implications

Agencies should strive to the extent permitted by law, consistent with their statutory obligations, to undertake policies or actions in a way which minimizes their takings implications. Where such implications cannot be wholly avoided, the agencies should take appropriate actions to minimize the potential financial impact of takings.

### VI. Implementation, Management, and Special Reporting Requirements

#### A. Implementation and Management Requirements

In order to apply the general principles contained in the Executive Order, Sections V(A)-(C) of these Guidelines, and the Appendix to these Guidelines, through the criteria detailed in Section V(D) of the Guidelines, Executive Order No. 12630 imposes the following obligations on agencies subject to its provisions.

##### 1. Federal Agency Contact

The head of each agency required to review its policies and actions under Executive Order No. 12630 shall designate an agency official to be responsible for ensuring that agency's compliance with the Executive Order and these Guidelines. The designation of this official is solely within the discretion of the agency head. The designated federal agency contact shall serve as the agency's liaison on questions of compliance with the Executive Order and shall make information available to the Office of Management and Budget and/or the Attorney General, upon request, regarding the agency's compliance procedures and activities.

The identity of the designated official shall be communicated, by no later than July 15, 1988, to the Assistant Attorney General, Land and Natural Resources Division, Department of Justice, and the Director, Office of Management and Budget. Notification of any change in this designation shall also be forwarded within ten (10) working days of the effective date of the change.

##### 2. Takings Implication Assessment (TIA)

Before undertaking any proposed action or implementing any policy or action subject to evaluation, each agency shall perform a Takings Implication Assessment (TIA). The TIA shall be made available to the agency decisionmaker responsible for determining whether and how to implement a policy or to undertake an action, in such form and in such manner as is calculated to ensure that the decisionmaker may make meaningful use of the TIA in formulating his or her decision.

a. The TIA is to be integrated, in a form and manner in the agency's discretion, into normal agency decisionmaking processes.

b. The TIA will serve as a tool for assessing the taking implications and related fiscal impact of policies and actions within the Executive Order. It is to provide candid, predecisional advice as a part of the continuing process of developing government policies and actions.

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c. For administrative and regulatory policies and actions subject to evaluation under the Executive Order and these Guidelines, a TIA must include:

i. An assessment of the likelihood that the proposed action or policy may effect a taking for which compensation is due, in light of the principles referenced in the Executive Order and these Guidelines (see Section V, supra) and under applicable case law;

ii. Identification and consideration of alternatives, if any, to the proposed policy or action which also achieve the government's obligations under law but would reduce intrusions on the use or value of private property; and

iii. An estimate of the potential financial exposure to the government should a court find the proposed policy or action to be a taking. It is important to emphasize, in this respect, that this estimate is to be that -- an estimate. Agencies are encouraged to employ available data to the extent possible.

d. For legislative policies and actions subject to evaluation under the Executive Order and these Guidelines, a TIA must include:

i. An assessment of the likelihood that the proposed policy or action may effect a taking for which compensation is due, in light of the principles referenced in the Executive Order and these Guidelines (see Section V, supra) and under applicable case law;

ii. An assessment of whether there are alternatives to the proposed policy that could accomplish the legislative objective, but would present a lesser intrusion on the use or value of private property; and

iii. An estimate of the potential financial exposure to the government should a court find the proposed policy or action to be a taking. This estimate may be presented, in summary, in one of the following alternative forms, or in similar language in the agency's discretion:

a. If enacted as proposed, this legislation would pose a substantial risk of significant financial exposure for the United States.

b. If enacted as proposed, this legislation would pose a likelihood of some degree of financial exposure for the United States.

c. If enacted as proposed, this legislation would pose a limited risk of financial exposure for the United States.

e. In instances in which there is an immediate threat to health and safety that constitutes an emergency requiring immediate response, the TIA may be done upon completion of the emergency action in a form and manner in the agency's discretion.

## B. Special Reporting Requirements

### 1. Required Submissions to the Office of Management and Budget

For regulations submitted for Office of Management and Budget review under Executive Order No. 12291, each agency should include a discussion summarizing

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any identified takings implications, consistent with Section VI(A)(2)(c), and addressing the merits of the regulations in light of those implications, if the regulation is:

- a. A "major" rule as defined or designated under Executive Order No. 12291;
- b. Any rule that has "significant takings implications," regardless of whether it is properly classified as a "major rule"; or
- c. Any rule otherwise designated by the Office of Management and Budget.

The agency should retain the Takings Implication Assessment and make it available, upon request, to the Office of Management and Budget.

## 2. Notices of Proposed Rulemaking

"Significant taking implications" shall be identified and discussed, in form and manner chosen by the agency, in notices of proposed rulemaking.

## 3. Legislative Proposals

For legislative policies and actions subject to coordination and clearance by the Office of Management and Budget (OMB) under Circular No. A19, Revised, or any successor directive or circular, each agency shall, consistent with Section VI(A)(2)(d), identify the takings implications of the legislation, if any, in such form and manner as the agency deems appropriate. When the agency then elects not to address an identified takings implication in the document submitted for legislative coordination and clearance, the agency shall notify OMB of the existence of such implication. Where an agency determines that a legislative policy or action has significant takings implications, it shall include an evaluation of such implications in its submission to OMB under Circular No. A-19, Revised.

In every instance, agencies should retain the Takings Implication Assessment and make it available, upon request, to the Office of Management and Budget.

## C. Agency Budget Submissions

Separate guidance will be provided by the Office of Management and Budget regarding documentation requirements (e.g., OMB Circular No. A-11).

## D. Agency Supplementation

### 1. Purpose

Section 5(e)(2) of Executive Order No. 12630 directs that the Attorney General shall, in consultation with each agency, promulgate such supplemental guidelines as may be appropriate to the specific obligations of that agency. Supplemental guidelines may be issued for one specific agency or for a group of related agencies, as appropriate. The supplemental guidelines shall set forth implementing procedures that will aid an agency in administering its specific program responsibilities in accordance with the analytical and procedural framework presented in the Executive Order and these Guidelines. The supplemental guidelines should not be used to restate the terms of the Executive Order or these Guidelines.

## 2. Initiation of Supplementation Process

The Guidelines supplementation process may be initiated either by an affected agency or by the Attorney General, as set forth below. However, in either event, the Attorney General is responsible for final approval and issuance of the supplemental guidelines.

### a. Federal Agency Review

Each agency to which Executive Order No. 12630 applies is responsible, on a continuing basis, for reviewing its internal policies and procedures to ensure full compliance with the Executive Order. In conjunction with this review, each agency shall assess whether procedures to supplement these Guidelines (including, for example, exclusions supported by a Takings Implication Assessment, or special processes for certain categories of policies or actions) are necessary and appropriate in light of its specific statutory obligations. Whenever an agency determines that issuance of supplemental guidelines is warranted, the Secretary or head of the agency shall inform the Attorney General and submit proposed supplemental guidelines for review, approval, and issuance by the Attorney General.

### b. Department of Justice Review

In conjunction with his responsibilities for oversight of agency implementation of Executive Order No. 12630, the Attorney General may initiate the preparation and issuance of supplemental guidelines for an individual agency or group of agencies. Initiation and development of such guidelines by the Attorney General may be appropriate, for example, to ensure that similar types of government program activities, conducted by several agencies, are evaluated in a comparable manner under the Executive Order. The Attorney General shall consult with the Secretary or head of the individual agency or agencies involved regarding the need for, and advisability of, issuance of such supplemental guidelines.

## 3. Issuance of the Supplemental Guidelines

The Attorney General has the responsibility under Section 5(e)(2) of the Executive Order to promulgate any such agency supplemental guidelines. Accordingly, the Attorney General shall review an agency's proposed supplemental guidelines, submitted in accordance with Section VI(D) (2)(a) above, for conformance with the Executive Order and these Guidelines. At the completion of this review, including consultation with the agency involved, the Attorney General may, in his discretion, issue agency supplemental guidelines. In the event the Attorney General has initiated preparation and development of agency supplemental guidelines, he shall consult with, and fully consider the recommendations of, the agency involved prior to issuance of Executive Order No. 12630 supplemental guidelines. Any policy or action for which a categorical exclusion has been created by supplemental guidelines will automatically lose that exclusion from the Executive Order No. 12630 process where such conduct is held by a court of competent jurisdiction to have the potential of a taking.

## 4. National Security Exemption

Executive Order No. 12630 supplemental guidelines may include specific criteria for providing limited exceptions to the provisions of these

guidelines for classified activities and actions. Such activities and actions are those specifically authorized under criteria established by an executive order or statute to be kept secret in the interest of national defense or foreign policy and are in fact properly classified pursuant to such executive order or statute.

VII. Responsibilities of the Attorney General and the Director of the Office of Management and Budget

A. Attorney General

In addition to the specific responsibilities for implementation of Executive Order No. 12630 set forth above, the Attorney General shall, to the extent permitted by law, take action to ensure that the policies of the agencies are consistent with the principles, criteria, and administrative requirements established in the Executive Order and these Guidelines. The Attorney General shall also revise and reissue these Guidelines, as necessary, to reflect fundamental changes in takings law that occur as a result of United States Supreme Court decisions.

B. Director, Office of Management and Budget

The Director, Office of Management and Budget, shall, to the extent permitted by law, take action to ensure that the policies of the agencies are consistent with the principles, criteria, and requirements stated in Executive Order No. 12630 and that all takings awards levied against agencies are properly accounted for in agency budget submissions.

VIII. Judicial Review and Enforcement

Consistent with Section 6 of Executive Order No. 12630, these Guidelines and the Appendix to the Guidelines are intended only to improve the internal management of Executive Branch agencies and are therefore enforceable only by and within the Executive Branch. Accordingly, like the Executive Order itself, these Guidelines and the Appendix to the Guidelines shall not be deemed to create any right or benefit, substantive or procedural, enforceable by anyone in any court against the United States, its agencies, its officers, or any person. For these reasons, neither these Guidelines, the Appendix, nor the deliberative processes or products resulting from their implementation by agencies shall be treated as establishing criteria or standards that constitute any basis for judicial review of agency actions. Thus, the extent or quality of an agency's compliance with the Executive Order or these Guidelines shall not be justiciable in any proceeding for judicial review of agency action.

Issued in Washington, D.C. the 30th day of June, 1988.

EDWIN MEESE III

Attorney General

INDEX

Term	Section
Agency Plans and Studies	II(B) (4)
Alternatives	
Economic Impact	V(D) (2) (b) (v)
In General	V(A) (5)

Minimization	V(D) (4)
Special Reporting Requirements	VI (B)
Takings Implication Assessment	VI (A) (2) (c) (ii)
Attached Property	II (B) (3)
Attorney General	
Responsibilities	VII (A)
Available Technology and Information	V (B) (3) (c)
Budget	VI (C)
Character of Government Action	V (D) (2) (a)
Purpose to be Served	V (D) (2) (a) (i)
Policy or Action Significantly Advance Purpose	V (D) (2) (a) (ii)
Proportionality as Factor	V (D) (2) (a) (iii)
Consultation with State and Local Governments	II (B) (5)
Cost	
Estimate Only	VI (A) (2) (c) (iii)
Takings Implication Assessment	VI (A) (2) (c) (iii)
Data Gathering and Evaluation	II (B) (4)
Delay	
In General	V (C) (3)
Departments and Agencies	
Comments on Policies or Actions of Other Departments and Agencies	II (A)
Lead Agency	IV (E)
Within Executive Order 12630	III
Economic Impact	
In General	V (D) (2) (b)
Degree of Impact	V (D) (2) (b) (ii)
Number Affected	V (D) (2) (b) (i)
Reciprocal Benefits	V (D) (2) (b) (iv)
Relevant Factors	V (D) (2) (b) (iii)
Eminent Domain	
Power	II (B) (7)
Traditional use	V (A) (2)
Exemption	
Policies and Action Prior to Executive Order 12630	II (C)
Exclusions	
Agency Plans and Studies	II (B) (4)
Consultation with State and Local Governments	II (B) (5)
Eminent Domain Power	II (B) (7)
Military and Foreign Affairs Activities	II (B) (8)
Military Property	II (B) (6)
Reduction of Regulations	II (B) (1)
Seizures of Property	II (B) (3)
Trust Property and Treaty Negotiations	II (B) (2)
Executive Order	
History	I
Sections 2(a) and 2(c)	II (A)
Fifth Amendment	
Authority to Act	V (A) (3)

In General	I, II(B)
Just Compensation Obligation	V(A) (1-3)
General Principles and Assessment Factors	
Guidelines	
Exclusions	II(B)
Overview	I
Policies and Actions Subject to Evaluation	II(A)
Purpose	I, V(B) (3) (c)
Implementation, Management, and Special Reporting Requirements	
Designation of Responsible Official	VI(A)
Takings Implication Assessment	VI(A) (1)
Insufficient Information	VI(A) (2)
Inverse Condemnation	IV(C) (2)
Generally Defined	V(A) (2)
Judicial Review	V(A) (3)
Land Use Planning Agencies	VIII
Legislation	II(B) (4)
Pending	IV(D)
Proposed	IV(D)
Special Reporting Requirements	VI(B) (3)
Major Rule	VI(B) (1)
Military and Foreign Affairs Activities	II(B) (8)
Military Property	II(B) (6)
Minimization of Intrusion	V(A) (5), V(D) (4)
Office of Management and Budget Responsibilities	VII(B)
Physical Intrusion	
Physical Invasion	II(B) (4), V(A) (2), V(D) (1)
Physical Occupancy	II(B) (4), V(A) (2), V(D) (1)
Police Power	V(C) (2)
Policies and Actions Prior to Executive Order 12630	II(C)
Policies and Actions Subject to Evaluation	II(A)
Private Property	IV(A)
Forms	V(A) (4)
Ownership and Use Not Privilege	V(A) (1)
Proportionality	
Character of Government Action	V(D) (2) (a) (iii)
In General	V(B) (3) (c)
Public Health and Safety	V(C) (2) (d)
Public Health and Safety	
Certainty and Severity Analysis	V(C) (2) (c)
Component of Broader Police Power	V(C) (2)
Deference	V(C) (2)
Health and Safety Risk	V(C) (2) (b)
Proportionality	V(C) (2) (d)
Purpose Analysis	V(C) (2) (a)
Substantially Advance Health and Safety Purpose	V(C) (2) (b)

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Public Purpose	
In General	V(A) (1)
Reasonable Investment Backed Expectations	V(D) (2) (c)
Reciprocal Benefits	
Economic Impact	V(D) (2) (b) (iv)
Reduction of Regulations	II(B) (1)
Regulations	
Lawful Exercise Not Precluding	
Taking	V(A) (1)
Permitting	V(C) (1)
Public Health and Safety	V(C) (2)
Similarity to Physical Occupancy	
or Invasion	V(B) (3) (b)
Takings Implications	V(D) (2)
Responsible Official	VI(A) (1)
Rulemaking	VI(B) (1)
Major Rule	VI(B) (1) (a)
Rule Otherwise Designated	VI(B) (1) (c)
Rule with Significant Takings	
Implications	VI(B) (1) (b)
Significant Takings Implications	
Defined	IV(B)
Identify and Discuss	VI(B) (1) (b)
Special Reporting Requirements	
Budget	VI(B) (2)
In General	VI(B)
Legislative Proposals	VI(B) (3)
Rulemaking	VI(B) (1)
Special Situations	V(C)
Permitting Programs	V(C) (1)
Public Health and Safety	V(C) (2)
Supplementation	
Department of Justice Review	VI(D) (1) (b)
Federal Agency Review	VI(D) (2) (a)
Initiation	VI(D) (2)
Issuance	VI(D) (3)
National Security Exemption	VI(D) (4)
Purpose	VI(D) (1)
Takings	
Nature of Takings	V(B)
Physical Invasions	V(B) (2)
Physical Occupancies	V(B) (1)
Regulatory	V(B) (3)
Takings Implication Assessment	
Alternatives Assessment	VI(A) (2) (c) (ii)
Budget Use	VI(C)
Financial Exposure Estimate	VI(A) (2) (c) (iii)
Evaluative Device	VI(A) (2) (b)
Form and Manner, Agency	
Discretion	VI(A) (2) (a)
In General	VI(A) (2)
Likelihood of Taking	VI(A) (2) (c) (i)
Predecisional Device	VI(A) (2) (b)
Rulemaking Use	VI(B) (1)
Takings Implications	

Evaluation Criteria In General	V(D)
Identify and Discuss Significant Takings Implications	VI(B) (1) (b)
Identify Takings Implications of Regulatory Actions	VI(B) (1)
Minimizing Risk	V(D) (4)
Physical Intrusion	V(D) (1)
Regulatory Takings In General	V(D) (2)
Character of Government Action	V(D) (2) (a)
Economic Impact	V(D) (2) (b)
Reasonable Investment Backed Expectations	V(D) (2) (c)
Test	V(D) (3)
Treaty Negotiations	II(B) (2)
Trust Property	II(B) (2)

## Appendix to Guidelines for the Evaluation of Risk and Avoidance of Unanticipated Takings

### I. Introduction

This Appendix is a part of, and incorporated by reference into, the Guidelines promulgated by the Attorney General pursuant to Executive Order No. 12630. It provides further detail for the case law parameters surrounding the consideration of the risk that a taking may have occurred. See Guidelines, Section V(A) (5). This discussion is not meant to be exhaustive. In that respect, the takings implication consideration and the evaluation of applicable case law will normally be one requiring close consultation between agency program personnel and agency counsel.

As with the Guidelines themselves, this Appendix speaks only to a general framework for the takings implication analysis under Executive Order No. 12630. Similarly, it is important to reiterate that Executive Order No. 12630 contemplates agency-specific supplemental guidelines. See Executive Order No. 12630, @ 5(e) (2); Guidelines, @ VI(D).

### II. General Considerations

#### A. The Framework

Executive Order No. 12630, as further explained in the Guidelines, provides for: (a) completion of a Takings Implication Assessment (TIA) before undertaking any proposed action or implementing any policy as defined by Section 2(b) and 2(c) of the Executive Order (see Guidelines, @ VI(A)(2)) and (b) certain Special Reporting Requirements, including the identification of takings implications of proposed regulatory actions in certain specific submissions to the Office of Management and Budget (OMB), and the identification and discussion of significant takings implications (as defined in the Guidelines) in notices of proposed rulemaking and, subject to the normal OMB legislative coordination and clearance process, messages transmitting legislative proposals to Congress. These obligations will be integrated, in ways to be determined by the agency in light of the particular program, into its normal decisionmaking processes.

The Guidelines contemplate that agency decisionmakers will continue to meet the obligations imposed upon them by statute. They do not, and should not be read to, preclude actions or policies which the decisionmaker determines necessary to meet those obligations. In those circumstances, the TIA process will identify the takings implications, if any, of the necessary governmental conduct while permitting that conduct to go forward.

#### B. The Takings Implication Assessment

The TIA serves as an evaluative tool for the takings implications of policies and actions within the Executive Order and provides candid advice on those implications. As a part of the continuing process of developing government policies and actions, the TIA focuses attention on the fiscal and policy concerns arising from takings risk. Intended as a predecisional document, the TIA will be available for meaningful use by the decisionmaker prior to the decision. See Guidelines, @ VI(A)(2).

#### C. Significance of Factual Information to Takings Implication Analysis

Questions as to the existence of takings require the sifting of numerous facts for the isolation of significant and insignificant factors. This focus on facts also lies at the heart of the advice contemplated by the TIA. Thus, a separate TIA will normally be prepared for each policy or action within the Executive Order. Similarly, because the TIA's do evaluate specific factual settings, a TIA prepared for one policy or action will normally have no precedential value for another policy or action.

### III. Takings Implications Analysis: General Principles and Framework

[See Executive Order No. 12630, @@ 1(b), 3(a); Guidelines, @ V(D).]

#### A. Introduction

The Executive Order requires identification of takings implications. See Executive Order 12630, @ 5(b). This Appendix now turns to a general discussion of the case law framework which provides the current background for assessing takings implications.

#### B. Fairness and Justice Under the Fifth Amendment

Ratified in 1791, the Fifth Amendment provides, for pertinent purposes:

nor shall private property be taken for public use without just compensation.

Its terms do not prohibit the taking of private property for lawful purposes. Rather, they operate "to secure compensation in the event of otherwise proper interference amounting to a taking." *First English Evangelical Lutheran Church of Glendale v. County of Los Angeles*, 107 S. Ct. 2378, 2386 [17 ELR 20787] (1987). The constitutional guarantee of the Amendment precludes 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. 40, 49 (1959).

#### 1. Focus on Impact of Actions and Self-Executing Character

The assessment of governmental interference under the Amendment turns ultimately not on what the government may say, or what it may intend, but on the impact of its actions. *Hughes v. Washington*, 389 U.S. 290, 298 (1967); *Armstrong v. United States*, 364 U.S. at 48-49. Moreover, where the interference effects a taking, that governmental action implicates a "constitutional obligation to pay just compensation." *First English Evangelical Lutheran Church of Glendale v. County of Los Angeles*, 107 S. Ct. at 2386. The Amendment has a "self-executing character . . . with respect to compensation." *United States v. Clarke*, 445 U.S. 253, 257 (1980) (citations omitted), quoted in *First English Evangelical Lutheran Church of Glendale v. County of Los Angeles*, *id.*

In the face of this self-executing obligation, it is not enough that an agency discontinue its intrusion when a court finds that a taking has occurred. *First English Evangelical Lutheran Church of Glendale v. County of Los Angeles*, 107 S. Ct. at 2387-2389. In those circumstances, just compensation would still be due for the period between the point at which the government action created compensable interference (see Sections III(E-G), *infra*) and the termination of that intrusion. *Id.* at 2388-2389.

Nor is it necessary that just compensation be paid in advance of a taking, provided that a process is available for meeting the obligation. *Williamson Co. Regional Planning v. Hamilton Bank*, 105 S. Ct. 3108, 3121 (1985).

## 2. Fact Sensitive Analysis

The takings analysis proceeds in the particular factual circumstances of the governmental impact on property. This leads to what have been described as "ad hoc" analyses in the context of particular facts. See *Hodel v. Irving*, 107 S. Ct. 2076, 2082 (1987); *Kaiser Aetna v. United States*, 444 U.S. 164, 175 [10 ELR 20042] (1979); *Penn Central Transportation Co. v. New York City*, 438 U.S. 104, 124 [8 ELR 20528] (1978). See Section II(C), *supra*.

## 3. Public Use Requirement

The Amendment reaches the taking of private property for public use. In that respect, the "public use" requirement is "coterminous with the scope of the sovereign's police powers." *Hawaii Housing Authority v. Midkiff*, 104 S. Ct. 2321, 2329 [14 ELR 20549] (1984) (Hawaii Land Reform Act created condemnation process for transfer of title from lessors in land oligopoly to lessees in order to reduce concentration of land ownership). The Court will not "substitute its judgment for a legislature's judgment as to what constitutes a public use 'unless the use be palpably without reasonable foundation.'" See also *Berman v. Parker*, 348 U.S. 26, 33 (1954) (comprehensive use of eminent domain power for slum redevelopment). Although analysis of the legislative public purpose may include the legislative statement of purpose and the legislative history, the operative terms and provisions of the statute will control any inconsistency between the former and the latter. See *Keystone Bituminous Coal Association v. De Benedictis*, 107 S. Ct. 1232, 1243 n.16 [17 ELR 20440] (1987) ("examine the operative provisions of a statute, not just its stated purpose, in assessing its true nature"). That the Legislature has found a public use does not necessarily, however, answer the more critical question -- for Fifth Amendment purposes -- of whether the lawful exercise of governmental power effects a compensable taking. See Sections III(C-F), *infra*; Guidelines, @ V.

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## C. Property Interests Within the Fifth Amendment

[See Executive Order No. 12630, @ 2(b).]

"Property interests . . . are not created by the Constitution." Webb's Fabulous Pharmacies, Inc. v. Beckwith, 449 U.S. 155, 161 (1980). Instead, "they are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law." Id. See also Ruckelshaus v. Monsanto Company, 467 U.S. 986, 1001 [14 ELR 20539] (1983) (trade secret property right). Federal statutes may, however, provide a basis for the perfection of property interests by individuals. For instance, subject to the federal law limitations for establishing that necessary predicates for the vesting of interests have occurred, federal mining claims are private property within the Fifth Amendment. Freese v. United States, 639 F.2d 754 (Ct. Cl. 1982). In a later opinion, Freese v. United States, 6 Cl. Ct. 1, aff'd, 770 F.2d 177 (Fed. Cir. 1984), the court found that plaintiffs had not perfected their claim. Cf. Cape Fox Corporation v. United States, 4 Cl. Ct. 223 (1983) (ANCSA "selections" contingent and speculative).

The Amendment reaches property interests of whatever specie -- realty, personalty, or intellectual. In the context of the Fifth Amendment, the word "property" is used in the sense of "the group of rights inhering in the citizen's relation to the physical thing, as the right to possess, to use and dispose of it." The provision addresses every sort of interest the citizen may possess. United States v. General Motors Corp., 323 U.S. 373, 378 (1945). See also United States v. Willow River Power Co., 324 U.S. 499, 502 (1945); but cf. Reichelderfer v. Quinn, 287 U.S. 315 (1932) (sovereign-created values may not be private property interests under the Fifth Amendment); Acton v. United States, 401 F.2d 896 (9th Cir. 1968), cert. denied, 395 U.S. 945 (1969) (no property rights accrued to licensee upon revocation which are compensable in condemnation). Nor are all economic interests property interests. United States v. Willow River Power Co., 324 U.S. 499, 502 (1945). Where a property interest exists, however, the authority of the government to limit the interest by legal redefinition is constrained by the Fifth Amendment. Ruckelshaus v. Monsanto Co., 467 U.S. 986, 1012 [14 ELR 20539] (1984).

And, even though the right to build on private property can be the subject of legitimate permitting regulation, that right "cannot remotely be described as 'governmental benefit'." Nollan v. California Coastal Commission, 107 S. Ct. 3141, 3146 [17 ELR 20918] (1987).

Further, compensation due under the Amendment when a taking does occur accrues to the owner of the property interest at the time of the taking, not to the owner at an earlier or later date. United States v. Dow, 357 U.S. 17 (1958). For special statutory limitations with respect to the assignment of taking claims, see 31 U.S.C. @ 3727 (1986).

## D. Congressional Authorization to Act

[See Executive Order no. 12630, @ 3(e).]

Congressional authorization to undertake the government action at issue is an essential element of a taking. See generally, Section 3(e), supra. The test is not whether Congress authorized or even contemplated a taking effect from action pursuant to its purpose. Rather, the test is whether the government conduct

said to give rise to the taking was authorized. See *Florida Rock Industries v. United States*, 791 F.2d 893, 898 [16 ELR 20671] (Fed. Cir. 1986), citing *Portsmouth Harbor Land and Hotel Company v. United States*, 260 U.S. 327 (1922); *NBH Land Company v. United States*, 576 F.2d 317, 319 (Ct. Cl. 1978); *Barnes v. United States*, 538 F.2d 865, 871 (Ct. Cl. 1976). Where Congress has acted so as to preclude implication of authority for takings purposes, however, a taking cannot lie. *NBH Land Company v. United States*, 576 F.2d at 319; *Southern California Financial Corporation v. United States*, 634 F.2d 521, 524 (Ct. Cl. 1980).

#### E. Physical Intrusion Taking: Physical Occupancy and Physical Invasion

[See Executive Order No. 12630, @ 3(b); Guidelines, @ V(B)(1) & (2).]

##### 1. Physical Occupancy [Guidelines, @ V(B)(1)]

In general, governmental actions resulting in physical intrusions constitute property restrictions long viewed by the Supreme Court as having "an unusually serious character for purposes of the Takings Clause." *Loretto v. Teleprompter Manhattan CATV Corporation*, 458 U.S. 419, 426 (1982). Moreover, "when the physical intrusion reaches the extreme form of a permanent physical occupation, a taking has occurred." *Id.*

In the circumstances of a physical occupation, the taking reaches 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 425-426. Thus, the presence of CATV cables and related boxes (occupying approximately 1 1/2 cubic feet) pursuant to New York law requiring landlords to permit the facilities on their rental property was a taking. *Id.* at 441.

##### 2. Physical Invasions

[Guidelines, @ V(B) (2)]

The Supreme Court recognizes a distinction between instances of permanent physical occupation and those of physical invasions falling short of occupation. *Id.* at 430. Classic examples of the latter in federal law include, but are not limited to, aviation easement, or so-called overflight, and flooding taking cases.

Thus, where flights of government aircraft are so low and frequent over private property as to constitute a direct and immediate interference with the use and enjoyment of the subjacent land, compensable takings may arise. *United States v. Causby*, 328 U.S. 256 (1946). See also *Aaron v. United States*, 311 F.2d 798 (Ct. Cl. 1963) (finding overflight taking in navigable airspace); *Branning v. United States*, 654 F.2d 88 (Ct. Cl. 1981) (liability from flights over 500 feet AGL not precluded merely by that fact); *Stephens v. United States*, 11 Cl. Ct. 352 (1986) (vast majority of flights in navigable airspace and no peculiar circumstances warranting liability there). Where flights occurring below the navigable airspace are involved, those intruding flights must interfere "substantially with the use or enjoyment of the property" in order to risk taking liability. *Hero Lands Company v. United States*, 1 Cl. Ct. 102, 105 (flights in conjunction with operations of NAS-New Orleans), *aff'd*, 727 F.2d 1118 (Fed. Cir.), *cert. denied*, 466 U.S. 972 (1983).

Where flooding occurs as the natural and probable consequence of authorized government action and, although intermittent, is inevitably recurring, a taking also may be found. *United States v. Cress*, 243 U.S. 316, 330 (1917). See also *Bartz v. United States*, 633 F.2d 571 (Ct. Cl. 1980); *Barnes v. United States*, 538 F.2d 865 (Ct. Cl. 1976) (alteration of sedimentation patterns resulting in above high water flooding causing taking). The flooding must be productive of substantial interference in order to risk taking liability. *Barnes v. United States*, 538 F.2d at 870 (citing *United States v. Cress*, 243 U.S. at 328).

#### F. Regulatory Takings

[See Executive Order No. 12630, §§ 3(b), 3(c), 4(a), 4(d), 5(b); Guidelines, § V(B)(3).]

##### 1. In General

Governmental regulatory conduct may go "too far," thus requiring just compensation. *Pennsylvania Coal v. Mahon*, 260 U.S. 393, 415 (1922) (statute prohibited the mining of anthracite coal in a manner causing surface subsidence and damage to overlying structures). Where the Mahon line is crossed and the vehicle for payment of just compensation provided by 28 U.S.C. § 1491 (1986) is unavailable, for instance, the Court has invalidated federal regulatory action. Specifically, in *Hodel v. Irving*, 107 S. Ct. 2076, 2084 (1987), the Supreme Court invalidated congressional legislation providing that certain property could not descend by intestacy or devise to successors in interest but, instead, would escheat to Indian tribes. Stressing the extraordinary character of the government regulation and the virtual "abrogation of the right to pass on a certain type of property," the Court concluded that the statute went "too far."

The Court has indicated, in land use regulation contexts, that the line will be crossed when a regulation 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 [10 ELR 20361] (1980) (zoning density restrictions neither prevented best use of property nor extinguished a "fundamental" attribute of ownership), cited in *Nollan v. California Coastal Commission*, 107 S. Ct. 3141, 3146 [17 ELR 20918] (1987) and *United States v. Riverside Bayview Homes Inc.*, 106 S. Ct. 455, 459 [16 ELR 20086] (1985). The existence of a permit system, for instance, and the requirement that an individual resort to the system before engaging in a property use does not effect a taking per se. *Id.* "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." *Id.*

##### 2. Permitting Programs and Conditions Substantially Advancing Legitimate Government Purposes

[See Executive Order No. 12630, § 4; Guidelines, § V(C)(1).]

##### a. In General

The programs of many agencies require private parties to obtain permits in order to undertake a specific use of, or action with respect to, private property. Takings precedent requires that permitting programs give special thought with respect to any conditions imposed on the granting of a permit. Specifically, in *Nollan v. California Coastal Commission*, 107 S. Ct. 3141,

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3144 [17 ELR 20918] (1987), the Court addressed a situation where the California Coastal Commission granted property owners a permit to replace a small beachfront bungalow with a larger house on the condition that the owners provide, by easement, additional lateral access for the public to public beaches on the water side of the house.

Analyzing the case under the Takings Clause, the Court first reiterated the proposition that the right to exclude others from property was one of the most essential sticks in the property owners' bundle of rights. *Id.* at 3145. That the burden on this right resulted from a condition on a permit as contrasted to acquisition of an easement for access was insignificant. *Id.* Pointing to the permanent and continuous right given to individuals to traverse the lateral beachfront, the Court found a physical occupation. *Id.* Accord *Loretto v. Teleprompter Manhattan CATV Corporation*, 458 U.S. 419, 426 (1982).

Analyzing the question of whether exaction of this concession by permit condition effected a taking, Nollan cited *Agins* language and began with the proposition that "land use regulation would not effect a taking if it 'substantially advance[d] legitimate state interests' and [did] not 'den[y] an owner economically viable use of his land.'" *Id.* at 3146 (citing *Agins v. City of Tiburon*, 447 U.S. at 260). Significantly, the Court held that the regulatory requirement must "substantially advance" the legitimate interest and not merely be a requirement which might rationally achieve the governmental objective. *Nollan v. California Coastal Commission*, 107 S. Ct. at 3147, n.3.

The Court assumed, *arguendo*, the legitimacy of the government interest -- protecting the public's ability to see the beach -- in the first instance. *Id.* at 3147. Given that legitimacy, a "condition that would have protected the public's ability to see the beach notwithstanding construction of the new house," for example, would have been constitutional. *Id.* at 3148. Such a condition would have served the same governmental purpose as the building restriction in the first instance.

Where the condition imposed failed to advance the governmental interest which anchored the restriction in the first instance, but instead sought to achieve a different purpose without just compensation, "the building restriction [was] not a valid regulation of land use but 'an out and out plan of extortion.'" *Id.* (citations omitted.) In the Court's view, this nexus failure resulted, for Takings Clause purposes, in something beyond the "outer limits of 'legitimate state interests.'" *Id.*

#### b. Executive Order and Guidelines Requirements

Accordingly, in the interest of minimizing unanticipated takings, Section 4(a) of the Executive Order and Section V(C)(1) of the Guidelines provide that a permitting requirement imposing a condition on the granting of the permit should: (1) serve the same purpose that would have been served by a prohibition of the use or action; and, (2) substantially advance that purpose.

### 3. Proportionality of Burden to Risk Created

[See Executive Order No. 12630, @ 4(b); Guidelines, @ V(B)(3)(c).]

#### a. In General

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It is also important to the justice and fairness analysis compelled by the Fifth Amendment to demonstrate, to the extent possible, that the restriction imposed is proportional to the contribution to that risk occasioned by the restricted use. *Nollan v. California Coastal Commission*, 107 S. Ct. 3141, 3143 n.4 (1987) ("if . . . singled out to bear the burden . . . although they had not contributed to it more than other . . . landowners . . . [the action] might violate either the . . . Takings Clause or the Equal Protection Clause.").

## b. Executive Order and Guidelines Requirements

Accordingly, Section 4(b) of Executive Order No. 12630 provides:

When a proposed action would place a restriction on a use of private property, the restriction imposed on the use shall not be disproportionate to the extent to which the use contributes to the overall problem that the restriction is imposed to redress.

See also Guidelines, @ V(B)(3)(c).

## 4. Three-Part Regulatory Taking Analysis

[Guidelines, @ V(D)(2)]

## a. In General

In addition to the specific requirements with respect to permitting conditions (Section III(F)(2), *supra*), the location of the Mahon "line" requires careful consideration of what has come to be viewed as a three-part regulatory taking test: (1) the character of the governmental action; (2) the economic impact of the action; and (3) the extent of interference with reasonable investment-backed expectations. *Penn Central Transportation Company v. New York City*, 438 U.S. 104, 124 [8 ELR 20528] (1978) (New York Landmark Law prohibited appellants from occupying airspace, i.e., developing, above Grand Central Station but permitted use of the remainder of the parcel as well as sanctioned the transfer of this precluded right to develop to other property; no taking found). This three-part test is applied in Section V(D) of the Guidelines when evaluating regulatory actions for their takings implications.

## b. Examples of Application of Three-Part Analysis

The following are examples of the application of the three-tiered test: *Hodel v. Irving*, 107 S. Ct. at 2082 (act effected uncompensated taking; character of action, analogized significance of right to devise property to the right to exclude others; economic impact could be substantial and right to devise property "a valuable right"; taking found even though interference with investment backed expectations was not substantial; *Connolly v. Pension Benefit Guaranty Corporation*, 106 S. Ct. 1018, 1026 (1986) (withdrawal liability provisions of Multi-Employer Pension Plan Amendments of 1980 not takings; character of action, economic reallocation; economic impact, in proportion to experience with pension plan; interference with investment backed expectations, not substantial because of early notice to participants); *Kaiser Aetna v. United States*, 444 U.S. 164, 178 [10 ELR 20042] (1979) (action unlawful taking where petitioners, in presence of government consent and acquiescence, committed substantial investment of resources to link private body of water to navigable water; loss of right to exclude characterized as a fundamental right of

property; assertion of navigation servitude here would result in physical invasion; impact not insubstantial; expectancies evidenced by substantial investment of funds entitled to protection).

The ad hoc three-part test is not fully predictable, and therefore, proposed actions and policies should be sensitive to takings implications even if the case precedents finding a taking were decided on somewhat different facts. For example, even on the same subject matter, application of the tests can result in different takings conclusions. For instance, in *Keystone Bituminous Coal Association v. De Benedictis*, 107 S. Ct. 1232, 1242 [17 ELR 20440] (1987), the Court considered recent Pennsylvania legislation which -- like the Kohler Act analyzed in *Mahon* -- addressed concerns of subsidence damage associated with coal mining activities. The opinion finds the *Mahon* line unviolated for two reasons.

First, the 1966 Subsidence Act contained specific legislative findings that important public interest warranted the regulation, unlike the Kohler Act which involved "a balancing of the private economic interest of coal companies against the private interests of surface owners." 107 S. Ct. at 1242. Thus, the 1966 legislation brought to bear the "substantial" public interest in "preventing activities similar to public nuisances." 107 S. Ct. at 1246. See @ III(F)(5)(a), *infra*. In determining the purposes, the Court emphasized that, although legislative declarations were important, the analysis required judicial consideration of the operative terms of the statute. 107 S. Ct. at 1243, n. 16.

Second, *Keystone* petitioners demonstrated no material interference with reasonable investment backed expectations on the part of the coal industry. Specifically, the cases presented a facial challenge to the 1966 Act -- essentially, an allegation that the mere enactment of the legislation constituted a taking. 107 S. Ct. at 1242. Petitioners made no claim that the 1966 Act made continued mining of bituminous coal commercially impracticable. Nor did the Court have before it any evidence that the Act's requirement to leave certain coal in place had made mining unprofitable in those locations. These factors stood in contrast to *Mahon's* finding that the Kohler Act rendered mining commercially impracticable. Petitioners' "support estates" (which under Pennsylvania law included the right to remove coal underlying the surface or to leave those layers intact and which could be owned by either the surface or mineral estate owner), in the Court's view, had value only in that they protected or enhanced the mineral estates also owned by petitioners -- that is, the support estate was simply one strand in the bundle of rights owned by the coal owner. The Court stressed that petitioners "retain[ed] the right to mine virtually all of the coal in their mineral estates." Thus, the burden imposed on the surface estate did not constitute a taking.

### c. Economic Impact Factors

[Guidelines, @ V(D)(2)(b)]

Among the factors which may be relevant in assessing the economic impact of governmental action are the character of the property, the volatility of property values, variations in state property laws affecting the utility of the property, market, regional and demographic information, the existence of irretrievable economic opportunities, the anticipated duration of the proposed action, and the extent to which the property owner may have enhanced the existing use of the property. This list of factors is illustrative only and

is neither exhaustive nor obligatory.

5. Regulation in the Service of Public Health and Safety

[See Executive Order No. 12630, @ 4(d); Guidelines, @ V(C)(2).]

a. In General: Deference in Matters of Public Health and Safety

In evaluating government regulatory conduct under the Takings Clause, courts have evidenced a "hesitance" to find takings where the public purpose of the underlying legislation is to "restrain[] uses of property that are tantamount to public nuisances . . ." *Keystone Bituminous Coal Association v. De Benedictis*, 107 S. Ct. at 1245. Important to claiming the deference shown in such public nuisance regulation is recognition of the concept of "reciprocity of advantage" that, in demonstrable ways, each who is regulated benefits from the similar regulation of others. *Id.* Cf. *Mugler v. Kansas*, 123 U.S. 623 (1887) (prohibition of liquor sale in interest of health, safety, or morals of public); *Euclid v. Ambler*, 272 U.S. 365 (1926) (in a facial challenge, conclusion that noise and traffic might be very nearly a public nuisance in an area; thus, regulations bore substantial relationship to public welfare); *Miller v. Schoene*, 276 U.S. 272 (1928) (nuisance rationale sustains state's destruction of cedar rust trees); *Goldblatt v. Hempstead*, 369 U.S. 590, 595-596 (1961) (safety based regulation prohibiting further excavation of sand and gravel mine below water table not unreasonable; plaintiffs failed to meet burden of showing that prohibition would further reduce value of property or that regulation unreasonable).

b. Deference Not Coextensive with "Public Use"

Although "public use" for purposes of the Fifth Amendment is coterminous with the governmental police power (Section III(B)(3), *supra*) the deferential "nuisance exception" discussed here is not coextensive with the police power. *Keystone Bituminous Coal Association v. De Benedictis*, 107 S. Ct. at 1245, n.20. In other words, even when governmental action is designed to protect health and safety, some consideration of that action's economic impact may nevertheless be appropriate. Thus, *Florida Rock v. United States*, 791 F.2d 893, 902 [16 ELR 20671] (Fed. Cir. 1986) has cautioned that a "regulation under the Clean Water Act can be a taking if its effect on a landowner's ability to put his property to productive use is sufficiently severe."

c. Executive Order and Guidelines Requirements

[See Executive Order 12630, @ 5(d); Guidelines, @ VI(A).]

With respect to public health and safety directed actions, then, management must, in any internal deliberative documents and any submissions to the Director, Office of Management and Budget, that are required:

i. Identify clearly, with as much specificity as possible, the public health or safety risk created by the private property use that is the subject of the proposed action;

ii. Establish that such proposed action substantially advances the purpose of protecting public health and safety against the specifically identified risk;

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iii. Establish to the extent possible, that the restrictions imposed on the private property are not disproportionate to the extent to which the use contributes to the overall risk; and

iv. Estimate, to the extent possible, the potential cost to the government in the event that a court later determines that the action constituted a taking. See @ V, *infra*.

Under the Guidelines procedure, this reporting is accomplished by completion of the TIA process and consideration of the factors identified in Section V(C)(2) of the Guidelines for public health and safety actions. The "required submissions" are defined in Section VI(B) of the Guidelines.

#### 6. Examples of Regulatory Takings Litigation

Although clearly not exhaustive, federal regulatory takings litigation include the following examples: Kirby Forest Industries v. United States, 467 U.S. 1, 4-6 (1984) (mere initiation of condemnation action does not result in taking even if accompanied by *lis pendens*); Yuba Goldfields v. United States, 723 F.2d 884 (Fed. Cir. 1983) (taking: government assertion of mineral rights title, was later found inaccurate by court ruling, and related "prohibition" of dredging activity); Deltona Corporation v. United States, 657 F.2d 1184 [11 ELR 20905] (Ct. Cl. 1981) (no taking: multi-stage development; permits as to early stages granted, but two permits under Section 10 of the Rivers and Harbors Act and Section 404 of the Clean Water Act denied as to latter stages; where many "economically viable uses" remain, denial of highest and best use not a taking); Jentgen v. United States, 657 F.2d 1210 [11 ELR 20910] (Ct. Cl. 1981) (no taking: Corps of Engineers denied section 404 permits, but offered modification; plaintiffs declined offer); Benenson v. United States, 548 F.2d 939 [7 ELR 20371] (Ct. Cl. 1977) (taking: statutory requirements for development of Pennsylvania Avenue property, in combination with congressionally imposed moratorium, in interest of preserving building facade deprived owner of any reasonable use); Hendler v. United States, 11 Cl. Ct. 91 [17 ELR 20678] (1986) (no taking: issuance of emergency access order under CERCLA alone not a taking; left open question of physical intrusion); Snowbank Enterprises v. United States, 6 Cl. Ct. 476 (1984) (no taking: regulatory constraints imposed by Boundary Waters Canoe Wilderness Act on access not so pervasive as to amount to a taking); Mesa Ranch Partnership v. United States, 2 Cl. Ct. 700 (1983) (no taking: threat of condemnation not a taking; interested party persuasion of local zoning body to down-zone property not a taking).

#### G. Examples of Non-Categorical Takings Litigation

Government action may not fall clearly into either a physical intrusion or regulatory burden category. In these instances, courts have proceeded to analyze the justice and fairness, in the context of *Armstrong, supra*, of the burden placed on the property owner. Examples include *Eyherabide v. United States*, 345 F.2d 565 (Ct. Cl. 1965) (taking: gunnery range around property; evidence of physical intrusion combined with other factors, such as signs indicating that area within ranch was a gunnery range); *Drakes Bay Land Company v. United States*, 424 F.2d 574 (Ct. Cl. 1970) (taking: government officials found to have ignored means, placed in their hands, to prevent economic harm from congressional taking; instead, found to have taken positive steps to prevent exploitation of land).

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#### IV. Temporary Takings Resulting from Government Activity

[See Executive Order No. 12630, §§ 3(b), 3(d), 4(c); Guidelines, § V(C)(3).]

##### A. In General

"'[T]emporary' takings which . . . deny a landowner all use of his property, are not different in kind from permanent takings, for which the Constitution clearly requires compensation." *First English Evangelical Lutheran Church of Glendale v. County of Los Angeles*, 107 S. Ct. at 2388 (finding that the Constitution's Takings Clause, as applicable to the states through the Fourteenth Amendment, compelled a cause of action for the government's payment for the value of the use of land during a temporary period). Where government action is found to occasion a temporary taking, "the government may elect to abandon its intrusion or discontinue regulations." *Id.* at 2387 (citations omitted). Time consumed by administrative processes in good faith which may be viewed as "normal delay" will likely raise no takings implication. *Id.* at 2389. However, government-imposed moratoria on use raise colorable takings considerations. See, e.g., *Benenson v. United States*, *supra*.

##### B. Executive Order and Guidelines Requirements

[See Executive Order No. 12630, §§ 3(d) & 4(c); Guidelines, § V(C)(3).]

Conversely, as the Executive Order highlights, "undue delays in decision-making during which private property use is interfered with carry a risk of being held to be takings." Executive Order No. 12630, § 3(d). In the interest of fiscal responsibility and minimizing the just compensation that might eventually be found due for any temporary taking, the Executive Order provides that:

When a proposed action involves a permitting process or any other decision-making process that will interfere with, or otherwise prohibit, the use of private property pending the completion of the process, the duration of the process shall be kept to the minimum necessary.

Executive Order No. 12630, § 4(c). Types of delay requiring especially careful attention would include moratoria on the development or use or conduct which might be viewed as acquisitory in character.

#### V. Estimation of Potential Financial Exposure

[See Executive Order, § 4(d)(4); Guidelines, § VI(A)(2)(c)(3).]

##### A. In General

By way of overview, the United States may be held liable for the taking of a fee or lesser interest in property. See *Benenson v. United States*, 548 F.2d at 948 (fee interest); *United States v. Causby*, 328 U.S. at 267 (easement). Importantly, when the government takes, it acquires a property interest. With respect to the compensation due for the taking, the goal is to provide the monetary equivalent necessary to place the property owner in the same position he or she would have been had the taking not occurred. *United States v. Reynolds*, 397 U.S. 14, 15-16 (1970); *Foster v. United States*, 2 Cl. Ct. 426, 445 (1983). Where the taking is for less than a fee interest, the just

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compensation measure is frequently described as the difference between the value of the property before the taking and the value after the taking. *Aaron v. United States*, 311 F.2d at 802. Damages resulting from the loss or destruction of business incidental to the taking are not recoverable as part of the just compensation due. *Mitchell v. United States*, 267 U.S. 341, 346 (1925). But see *Prudential Insurance Company of America v. United States*, 801 F.2d 1295, 1300, n.13 (Fed. Cir. 1985).

The award of just compensation also entitles the successful plaintiff to interest from the date of the taking to the date of payment. See *Jacobs v. United States*, 290 U.S. 13, 16-17 (1933); *Henry v. United States*, 8 Cl. Ct. 389, 393-94 (1985); *Foster v. United States*, 3 Cl. Ct. 738, 745 (1983). Litigation expenses, including the reimbursement of reasonable attorney and appraisal fees, will also be available pursuant to the Uniform Relocation Assistance and Real Property Acquisition Policies Act, 42 U.S.C. § 4654(c) (1986).

#### B. Financial Exposure

The Guidelines require an estimation of potential financial exposure. First, it is critical to recognize that this is an estimation only. These estimates are not intended to be close approximations of ultimate takings liability, if any, in a given case. Second, the estimates will vary with the nature and scope of the government policy or action proposed. For instance, in the context of a proposed major rule under Executive Order No. 12291 for which a regulatory impact analysis has been prepared, that analysis may provide an appropriate vehicle for exposure estimation. See Sections 3(b) and (d), Executive Order No. 12291. In the context of other proposed rules, an economic assessment of the rule's impact on society will likely be prepared. See Sections 2(b)-(e), Executive Order No. 12291. Treatment of the economic impact of the rule on the use or value of private property within that economic assessment may provide an appropriate vehicle for exposure estimation. In the context of legislation, economic assessments of the impact of such policies and action on the use or value of private property may provide an appropriate vehicle for exposure estimation. In the context of other policies and actions -- for example, permit applications -- applicants may be requested to supply the acquisition cost they paid for the property, adjusted for time to the date of the application.